Newsletter of Labor & Employment Law Section • State Bar of Michigan

LABOR AND EMPLOYMENT LAWNOTES

Volume 5, No. 3 Summer 1995

ANNUAL MEETING PROGRAM ANNOUNCED; NEW EDITOR NAMED FOR NEWSLETTER

The Council of the Labor and Employment Law Section has announced the program for this year's Annual Meeting, to be held in Lansing on Wednesday afternoon, September 20. As usual, it will begin with a business meeting at which new Council members and officers will be nominated and elected. Then a continuing education seminar will feature panel presentations on three topics; arbitration in non-union settings, NLRB affidavit practice, and affirmative action. The last topic, which gained added significance with a recent decision by the U.S. Supreme Court summarized in the adjoining article, also will be the subject of an after-dinner address by Joann Watson, Detroit NAACP Executive Director. See back page of this newsletter for details.

This newsletter has a new editor, Council member Stuart M. Israel of the firm of Miller, Cohen, Martens, Ice and Geary. Your old editor, current Section Chair Paul Glendon, will continue to work with him for a transition period spanning the next few issues and welcomes him to his new responsibilities.

GOTTFRIED SEMINAR SET FOR OCTOBER 19

National Labor Relations Board Regional Director Bill Schaub has announced that the Third Annual Bernard Gottfried Memorial Labor Law Seminar will be held at Wayne State University on Thursday, October 19, 1995. The featured speaker for this year's Gottfried Seminar will be Fred Feinstein, General Counsel of the National Labor Relations Board.

The Gottfried Seminar has become an important event for the Michigan labor-management community. The Labor and Employment Law Section is one of the sponsors of this worthwhile endeavor. In addition, the Section will sponsor the attendance at the Seminar of students from Michigan's five law schools. Excess proceeds from the Seminar also go to a good cause, the establishment of a scholarship at Wayne State University Law School in the name and memory of the late Bernard Gottfried.

All Section members are encouraged to support and attend the Gottfried Seminar. Detailed information about the Seminar is available from the Wayne State University Law School or Bill Schaub at the Board, (313) 226-3210.

U.S. SUPREME COURT REVIEW

By Lauren A. Rousseau
Office of General Counsel
Ford Motor Company

Court Restricts Permissible Scope of Affirmative Action Plans

On June 12, 1995, the Supreme Court decided one of the most closely watched civil rights cases of the term, *Adarand Constructors Inc. v Pena*, 115 S.Ct. 2097, 132 L.Ed.2d 158. The case involved a federal statute that gave preference to minority-owned highway construction subcontractors. Adarand Constructors Inc., a majority-owned construction company, challenged the statute, claiming that the minority preference provision violated the equal protection of the Fifth Amendment's Due Process clause. Adarand asserted that it had lost a construction project to a minority-owned construction company despite the fact that Adarand had been the lowest bidder. The lower court dismissed Adarand's claim and upheld the statute.

In a 5-4 decision, the Supreme Court vacated the lower court's ruling and reinstated Adarand's lawsuit, holding that federal affirmative action programs are, like state and local affirmative action programs, subject to a "strict scrutiny" standard of review. This means that in order for such programs to be lawful, they must serve a compelling government interest and must be narrowly tailored to serve that interest. Writing for the court, Justice Sandra Day O'Connor noted that race rarely provides a relevant ground for disparate treatment. Because racial classifications can be so harmful, the reasons for such classifications must be clearly identified and unequivocally legitimate. Justice O'Connor stated that application of the strict scrutiny standard will require courts to closely examine racial classifications to ensure that they meet those criteria.

Joining Justice O'Connor in the majority were Chief Justice William Rehnquist and Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas. Justice Thomas, in a separate statement, noted that remedial racial preferences are nothing more than "racial paternalism" and " can be as poisonous and pernicious as any other form of discrimination."

The Court's decision overruled most of the Supreme Court's 1990 decision in *Metro Broadcasting Inc. v Federal Communications Commission*, 497 U.S. 1050, 111 S. Ct. 15, 111 L.Ed.2d 829, which had applied the less rigid "intermediate scrutiny" standard to federal racial preference programs. Justice O'Connor wrote that *Metro Broadcasting*

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STATEMENT OF EDITORIAL POLICY

Labor and Employment Lawnotes is a quarterly newsletter published under the auspices of the Council of the Labor and Employment Law Section of the State Bar of Michigan as a service to Section members. Views expressed in the articles and case commentaries appearing herein are those of the authors, not the Council, the Section or the State Bar at large. We encourage Section members and others interested in labor and employment law to submit articles and letters to the editor for possible publication.

Stuart M. Israel, Editor
Paul E. Glendon, Editor Emeritus

COUNCIL DIRECTORY

U.S. SUPREME COURT REVIEW —

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was contrary to basic principles that had been established by the Court's earlier equal protection cases: congruity of standards applicable to federal and state racial classifications, skepticism about racial classifications and consistency of treatment regardless of race. Justice John Paul Stevens, dissenting in *Adarand*, is the only justice remaining on the Court who approved the affirmative action program at issue in *Metro Broadcasting*. Rehnquist, Scalia, O'Connor, and Kennedy dissented in *Metro Broadcasting*, finding no reasonable rationale for treating federal affirmative action programs differently than state and local affirmative action programs.

Justice Ruth Bader Ginsberg joined Justices Stevens, Breyer and Souter in dissent. She also authored a separate opinion, stating, "The divisions in this difficult case should not obscure the court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects."

The Justice Department issued a detailed memorandum on June 28, 1995 to provide federal government agencies with guidance for reviewing affirmative action programs in light of *Adarand*. The memo predicts that the impact of Adarand is likely to be broad, affecting affirmative action programs with the remedial objective of addressing past discrimination as well as those with non-remedial goals, such as promoting diversity. Significantly, while the *Adarand* Court specifically addressed remedial programs, indicating that race-based measures might be justified as a remedy for past discrimination, it did not address the lawfulness of non-remedial programs. Assistant Attorney General Walter Dellinger stated in the Justice Department memorandum that "(t)o the extent that affirmative action is used to foster racial and ethnic diversity, the government must seek some further objective beyond the achievement of diversity itself."

Recovery Under ADEA Held Taxable

In a 6-3 opinion delivered on June 14, 1995, the Supreme Court held that damages recovered under the federal Age Discrimination in Employment Act ("ADEA") are not excludable from gross income, and are therefore subject to tax (*Commissioner of Internal Revenue v Schleier*, 115 S.Ct. 2159, 132 L.Ed.2d 294). The case arose as a result of Erich Schleier's treatment of a settlement he had received under the ADEA on his 1986 income tax return. Mr. Schleier included as gross income the backpay portion of the settlement, but not the liquidated damages portion. The Commissioner of the Internal Revenue issued a deficiency notice asserting that the liquidated damages should have been included as income, and Mr. Schleier initiated proceedings in the Tax Court contesting the Commissioner's asserted deficiency and seeking a refund for the tax he had paid on the backpay. The Tax Court agreed with Mr. Schleier that the entire settlement

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was excludable from gross income under 26 U.S.C. Section 104(a) as "damages received . . . on account of personal injuries or sickness", and thus was not subject to tax. The Court of Appeals affirmed.

The Supreme Court reversed, holding that back wages recovered under the Act are not "on account of" any personal injury, and further, that no personal injury affects the amount of back wages recovered. Moreover, the Court noted that Congress intended liquidated damages under the ADEA to be punitive in nature. Thus, they serve no compensatory function and cannot be described as being "on account of personal injuries."

The ruling in *Schleier* is consistent with the Supreme Court's 1992 decision in *United States v Burke*, 112 S.Ct. 1867, 119 L.Ed.2d 34, 504 U.S. 229, which held that damages recovered under the pre-1991 version of Title VII of the Civil Rights Act of 1964 are not excludable from gross income. Significantly, both the pre-1991 version of Title VII and the ADEA do not provide for compensatory damages for emotional distress. Once the Civil Rights Act was amended in 1991 to allow for such damages, the Internal Revenue Service ruled that all recoveries under that law, including backpay awards, were excludable from gross income.

Retroactivity of 1991 Civil Rights Act Still In Doubt

On June 12, 1995, the Supreme Court denied review of a case involving the applicability of the jury trial and compensatory damages provisions of the 1991 Civil Rights Act in suits against the federal government (*Ventre v Johnson*, 132 L.Ed.2d 808). In so doing, the Court upheld the Fourth Circuit's determination that the Act does not apply to lawsuits filed after the effective date of the Act relating to conduct which occurred prior to that date.

The case arose as a result of the government employer's failure to promote the plaintiff in 1988 and 1989. The plaintiff filed a sex discrimination complaint in 1989. She filed suit in 1992, within the 90-day period permitted under the 1991 Civil Rights Act, which went into effect November 21, 1991. The trial court ruled in the defendant's favor on all claims and the Fourth Circuit affirmed, noting that the plaintiff could not appropriately seek compensatory damages or a jury trial because the provisions of the 1991 Civil Rights Act do not apply to cases arising before its enactment.

FEDERAL COURTS UPDATE

By E. Sharon Clark

UNITED STATES DISTRICT COURT – EASTERN DISTRICT OF MICHIGAN

Premium Pay Allowed as Offset to Overtime Owed

In *Abbey, et al. v City of Jackson*, No. 94-70552 (April 10, 1995), the court decided that the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 *et seq.* ("FLSA"), permitted an employer to offset premium payments made pursuant to a collective bargaining agreement against overtime owed to employees. Plaintiff fire fighters sued to recover overtime compensation for the "minimum manning shifts" during work periods in which they worked over 212 hours (the FLSA requires overtime compensation for fire fighters when they accrue 212 "hours worked" in a 28-day period). The CBA provided for a rate of pay for the minimum manning shifts greater than the regular rate of pay but less than the overtime rate. Defendant City of Jackson conceded that the fire fighters were entitled to overtime pay, but argued that it should receive credit for overtime compensation paid pursuant to the CBA in excess of the time and one-half required by the FLSA and for payments made for minimum manning shifts in a work period when the fire fighters worked less than 212 hours. The court agreed that the overtime payments provided by the CBA met the definition of premium pay in 29 U.S.C. §207(e)(5) and could be used to offset the employer's overtime obligations. The court further found that the employer could use the accumulated credit to offset all deficiencies rather than using the credit only in the same work period the deficiency was incurred. The court observed that forcing an employer to pay additional overtime when it has already paid premium pay punishes the employer without regard to whether it was attempting to avoid its obligations under FLSA.

The court also found that the fire captains were not executives exempt from the FLSA's overtime requirements, agreeing with plaintiff's argument that although the FLSA permits an employer to reduce compensation for violation of safety rules of major significance without affecting an employee's exempt status, suspending the captains for minor safety violations made them subject to reductions in pay that related to the quantity or quality of their work and was thus inconsistent with the FLSA's definition of being paid on a salaried basis.

UNITED STATES DISTRICT COURT – WESTERN DISTRICT OF MICHIGAN

Western District Considers FMLA Notice Requirements

Factual issues regarding the adequacy of plaintiff's notice of intent to take leave under the Family and Medical Leave Act, 28 U.S.C. §§2601 *et seq.* ("FMLA"), were sufficient to withstand defendant's motion for summary judgment, but at trial the court concluded that plaintiff failed to provide adequate notice of her need to take FMLA-qualifying leave, or, alternatively, that she failed to report periodically concerning her status at the employer's reasonable request, and that therefore the termination of her employment did not violate the FMLA. *Reich v Midwest Plastic Engineering, Inc. and Dennis E. Baker*, No. 1:94-CV-525 (July 26, 1995). Midwest Plastic Engineering terminated the employment of Lori Van Dosen following absences to care for her children who had chicken pox and for her own bout with the disease. When Van Dosen became ill on November 14, 1993, she notified her employer by phone; she then went to her doctor on November 15, who confirmed she had chicken pox and

prescribed medication. On November 16, she again called in; however, her condition worsened and she was hospitalized overnight. She did not call in to work thereafter, but obtained a doctor's slip for her absences and intended to return to work December 1. On November 19, a friend, Mr. Mitchelsen, went to Midwest's facility to pick up her paycheck and spoke with Van Dosen's supervisor. Van Dosen received a message on her answering machine on Monday, November 29 from her supervisor informing her that her employment had been terminated that morning. The Department of Labor's suit alleged Midwest violated the FMLA by failing to restore Van Dosen to her former position or an equivalent position following her FMLA-qualifying leave.

As part of its ruling on the parties' motions for summary judgment, the court previously found that the "serious health condition" requirement was met: Van Dosen was treated for chicken pox by a health care provider on three separate occasions, and she was admitted into the hospital and retained overnight as a direct result of chicken pox. The trial court, however, found that Van Dosen did not communicate her condition to Midwest in sufficient detail to make it evident that the requested leave was protected as FMLA-qualifying leave as required by the regulations at 29 C.F.R. §825.302 and §825.303 by failing to communicate that she was under the continuing treatment of a health care provider and that she had received inpatient care as the result of her chicken pox. In addition, the court concluded that the employer did not violate the FMLA because Van Dosen failed to provide notice "as soon as practicable," 29 C.F.R. §825-303(a), reasoning that if Van Dosen was able to go to the bank on the afternoon of November 19, she was able to notify Midwest of her condition by that date. Finally, the court found that Van Dosen failed to update Midwest as to her status and intent to return to work as her supervisor had demanded and as Midwest's policies required, providing additional ground to terminate Van Dosen's employment.

After-Acquired Evidence Not a Complete Bar to Recovery

In *Pion v Liberty Dairy Company*, No. 1:93-CV-429 (June 5, 1995), the Western District rejected defendant's argument that *McKennon v Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995), bars all relief where after-acquired evidence of employee misconduct would have resulted in discharge of the employee. The court found this argument was misguided, reading *McKennon* instead to hold that while reinstatement and front pay will generally not be available, back pay generally will be where discrimination is shown and where appropriate. Plaintiff alleged she was discharged for gender-based reasons in violation of Title VII and the Elliott-Larsen Civil Rights Act; she also asserted a common law claim of intentional infliction of emotional distress. She admitted that during her probationary employment period she developed a rash and broke a rib, but failed to report the injuries to Liberty in violation of written company policy. The court declined to rule on Liberty's alternative argument that *McKennon* requires the court to limit damages to back pay for the period from the date of Pion's discharge to the date that Liberty learned of her prior misconduct, reasoning that the liability issue had not been adequately explored and there was no indication such a ruling would encourage settlement or substantially reduce discovery time and expense. The court also found that *McKennon* should apply to Pion's Elliott-Larsen claim in the same manner as her federal claim and rejected Liberty's argument as unsupported that *McKennon* should have no bearing on the emotional distress claim.

UNITED STATES COURT OF APPEALS – SIXTH CIRCUIT

Hospital's Termination of Scrub Uniform Supply an Unfair Labor Practice; Termination of Staffing Procedure Was Not

In *Gratiot Community Hospital v NLRB*, Nos. 93-6533 and 94-5023 (April 21, 1995), the Sixth Circuit decided that a hospital's decision to cease supplying surgical scrub uniforms to all registered nurses without bargaining violated the National Labor Relations Act, 29 U.S.C. §158 (the "Act"), but that its termination of a staffing procedure called the "7/70" program without bargaining did not. The court reasoned that the Hospital's practice of providing laundered scrub uniforms became a condition or benefit of employment through long standing past practice and was thus a mandatory subject of bargaining. The court found that the Hospital's notification to its employees in writing on two occasions that the practice was being terminated satisfied the duty to notify the Union; however, the Union could not have waived its bargaining rights as the Hospital alleged because, based on the language of the communications, the decision was a *fait accompli*. The elimination of the special shift program was clearly within the Hospital's authority, however; the language of the collective bargaining agreement clearly and unambiguously allowed the Hospital to determine the number of shifts, including zero, in the 7/70 program. Judge Batchelder dissented on the issue of the surgical scrubs, noting that the Hospital's communications, when read in their entirety, clearly stated that the change in policy was a proposal only; it was thus unreasonable to infer that the Hospital was not willing to negotiate. The dissent also observed that the transcript did not contain a union request to negotiate; rather, the union representatives expressly told Hospital management that they were not meeting to negotiate but to listen.

Subcontracting Work without Bargaining Was an Unfair Labor Practice, but Injunctive Relief Was Denied

In *Calatrello v "Automatic" Sprinkler Corporation of America and Figgie International, Inc.*, No. 94-4213 (May 22, 1995), the court affirmed the district court's denial of injunctive relief but found that Automatic Sprinkler committed an unfair labor practice in violation of section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), (3) and (5) by failing to bargain in good faith with the local unions prior to subcontracting all unit work and laying off all bargaining unit employees. The standard for granting injunctive relief in unfair labor practice charges is comprised of two steps: first, the court must find there is "reasonable cause" to

believe that the alleged unfair labor practice has occurred and second, if such reasonable cause exists, the court must then determine whether injunctive relief is "just and proper." Applying a "clearly erroneous" standard, the court found direct evidence of the Company's discriminatory motive in an internal document that stated the purposes of adopting the subcontracting plan as to "avoid being a signatory to any union contract, pay its demands and work rules," to "eliminate labor negotiations," to "eliminate costs associated with union grievances," and to reduce "administration costs associated with union labor." In addition, the Company's subcontracting decision was a mandatory subject of bargaining because the Company in effect substituted the subcontractors' employees for its own, the Company continued its primary business of installing and maintaining sprinklers, and the Local Unions had substantial control or authority over the basis for the Company's subcontracting decision, *i.e.*, labor costs. Further, the Company did not bargain in good faith over this mandatory subject of bargaining because it presented the union with a *fait accompli*. In proceeding to the second step of the analysis for injunctive relief, however, the court found that an injunction would not be just and proper because the injunction sought by the NLRB was too broad, would result in undue financial hardship to the Company and was not necessary to preserve the ultimate remedial authority of the Board.

Pervasive Misrepresentation and Artful Deception Regardless of Forgery Is the Correct Standard for Setting Aside a Union Election

In *NLRB v Hub Plastics*, No. 94-5040 (May 8, 1995), the Sixth Circuit found that the NLRB applied the incorrect standard for evaluating election misrepresentations and remanded the case for further findings. Two days before the election a union representative falsely told a large group of employees that the NLRB had determined that the company was guilty of unfair labor practices; when asked for proof, the representative pointed to language in the unfair labor practice charge the union had filed. In deciding to certify the union, the NLRB applied the *Midland* standard which provides regardless of the truth or falsity of the parties' campaign statements, only forgeries affect the employees' free and fair choice sufficiently to justify setting aside an election. *Midland National Life Insurance Co.*, 264 NLRB 127 (1982). The Sixth Circuit has not endorsed the *Midland* standard but adheres to the *Van Dorn* standard which recognizes that even if forgery cannot be proved, a misrepresentation may be so pervasive and the deception so artful that employees will be unable to discern the truth, thereby affecting their right to a free and fair choice, *Van Dorn Plastic Machinery Co. v NLRB*, 736 F.2d 343 (6th Cir. 1984). The court further found that the NLRB did not err in concluding that anonymously placed "X's" in the union "Yes" box did not affect the employees' free and fair choice; the ballots did not have a tendency to mislead employees because the handwritten "X's" were sufficiently distinct from the Board's typewritten and printed notice so as to preclude any suggestion they were placed there by the Board or that it supported the company in the election.

Age-Related Comment by Supervisor, Replacement by Younger Employees Support Jury Verdict

In *Wells v The New Cherokee Corporation*, Nos. 93-6563; 94-5030 (June 23, 1995), the Sixth Circuit found that sufficient evidence of age discrimination existed to support a jury verdict in plaintiff's favor. Plaintiff Eurena J. Wells began working for New Cherokee in 1965. In 1990 she was directed to train a 28-year old employee to do her job, and at the end of the training Wells was told that her position had been eliminated. After she complained of age discrimination to the company's president, she was transferred to a position as a switchboard operator, but was fired for poor performance a year and a half later. The parties disputed the extent of Wells' performance difficulties in the switchboard operator position, but the court agreed that a jury could find that New Cherokee discriminated against Wells in 1990 when it gave her duties to a much younger employee and transferred her to the switchboard, that while younger operators shared Wells' difficulties on the switchboard they were treated differently, that the company filled positions for which Wells was qualified with young employees then lied about having tried to find a position for Wells, that Wells' supervisor Sharp displayed discriminatory bias against Wells because of her age when he told her that she was "too old to do the job" and that a "younger person could do more than" she could. The court rejected New Cherokee's argument that Sharp's age-related comment did not constitute evidence of age discrimination by the company because Sharp did not have the authority to fire Wells; rather, Sharp contributed significantly to the decision and was meaningfully involved in the decision to terminate regardless of the formal hierarchy of the company. The court also found that the district court committed harmless error in letting the jury decide the propriety of a front pay award and found that the district court did not abuse its discretion in awarding attorneys' fees at the attorneys' stated rates.

NLRB: SUMMER UPDATE

by George M. Mesrey
National Labor Relations Board

The Board has issued a number of decisions during the last three months of which practitioners should be aware. This article shall serve to highlight some of the most important substantive and procedural developments during this period. It should be noted, however, that the views expressed in this article are those of the author and not necessarily those of the National Labor Relations Board.

FAILURE TO MAKE CONTRIBUTIONS TO BENEFIT FUNDS

In GC Memorandum 95-8 (June 6, 1995), NLRB General Counsel Fred Feinstein announced a significant change in Board policy concerning cases which allege that an

employer violated Section 8(a)(5) of the NLRA by failing to make contractually required benefit fund contributions. For purposes of background, the Supreme Court held in *Laborers Health and Welfare Trust Fund v Advantage Lightweight Concrete Co.*, 484 U.S. 539 (1988), that the NLRB has exclusive jurisdiction over claims that an employer has unlawfully failed to make contributions into a benefit fund *after* expiration of a collective bargaining agreement. On the other hand, alleged delinquencies occurring *during the life of the agreement* may either be raised under Section 8(a)(5) or be subject to a lawsuit in federal court pursuant to the Employee Retirement Income Security Act (ERISA) or Section 301 of the Labor Management Relations Act. The NLRB has followed a policy since that time of deferring charges concerning delinquent benefit contributions (which arose during the life of an agreement) where a lawsuit was pending at the time of filing. In circumstances where no lawsuit was pending, the Board processed the charge.

Under GC Memorandum 95-8, the NLRB will now defer charges alleging failure to make benefit contributions which involve delinquencies which arise during the life of the agreement, regardless of whether a lawsuit is pending. Failure to file a lawsuit after deferral will result in dismissal of the charge. It appears that this action is in direct response to increasingly limited Agency budgets and staffing. Practitioners should consult this publicly distributed document when facing "collection" cases because there are some caveats to this new policy which are beyond the scope of this article.

CONTRACT BAR DOCTRINE

In *Seton Medical Center*, 317 NLRB No. 8 (April 28, 1995), the Board reaffirmed its long standing policy that there must be a signed writing specifying the overall terms of a contract in order for it to bar an election petition. In the instant case, the parties initialed each tentative agreement as bargaining proceeded. After the parties reached agreement on all outstanding issues, an unsigned document summarizing all the agreements was prepared and ratified by the union membership. Before a formal contract document was compiled and executed, however, a rival union filed a petition seeking to represent the unit employees. The Board found that the petition was not barred because there existed no *signed* document which identified the totality of the parties' agreement and that contract negotiations were concluded. In reaching this conclusion, the Board emphasized the simplicity of requiring a signed document and the danger of allowing parol evidence in contract bar cases.

REMEDY

In *East Coast Steel, Inc.*, 317 NLRB No. 122 (June 13, 1995), the Employer admitted that it failed to bargain over the decision to lay off employees and the effects of such decision. The Employer contended that the limited back-pay remedy set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), was the appropriate remedy. The Board disagreed and concluded that a traditional make whole remedy was appropriate because temporary business conditions out of the Employer's control were the primary reason for the layoffs instead of a permanent managerial decision that was entrepreneurial in nature.

PROFESSIONAL EMPLOYEES/MEDICAL TECHNOLOGISTS

The Board has considered the status of medical technologists on numerous occasions and reached different results. Depending on the case, they are deemed "professional employees" or "technical employees." The status of health care employees is particularly important in light of the Board's bargaining unit rules for acute-care hospitals. In *Group Health Association*, 317 NLRB No. 37 (April 28, 1995), the Board attempted to clear up this ambiguity by adopting a rebuttable presumption that medical technologists are "professional employees" within the meaning of Section 2(12) of the NLRA.

INFORMATION REQUESTS

In a recent case, the Board found that an employer did not violate the NLRA when it refused to supply a union with copies of its customer contracts. *F. A. Bartlett Tree Expert Co.*, 316 NLRB No. 199 (April 26, 1995). In *F. A. Bartlett*, the Union claimed that it needed the contracts in order to make a reasonable wage proposal. The Board concluded that, since the Employer was not claiming an inability to pay or making an issue of the contracts in negotiations, the customer contracts were not relevant for purposes of collective bargaining. In reaching this decision, the Board emphasized that the Union wanted this information in order to "bargain intelligently" and that such reasoning is simply insufficient to establish relevance.

BALLOT BOXES

In *Sports Shinko Corp.*, 316 NLRB No. 109 (March 9, 1995), the Board overruled an exception to an election based on a Board agent's failure to seal every edge of a ballot box between polling sessions. In reaching this decision, the Board noted that there was no evidence of tampering and that the ballot box was securely taped shut. In addition, the Board found that the Board agent's conduct satisfied the requirement in Section 11318.4 of the Casehandling Manual, Part II, Representation Proceedings, that the ballot box be "closed and securely sealed." The Board made it clear, however, that the provisions of the Casehandling Manual are merely intended to provide operational guidance and are not binding procedural rules.

NLRB LOCAL PRACTICE AND PROCEDURE COMMITTEE FORMED

National Labor Relations Board Regional Director William Schaub has initiated a Region 7 local practice and procedure committee. The committee will consist of

representatives of labor and management. The committee will address issues of interest to practitioners who appear in Board proceedings and will be a vehicle for communication between practitioners and the Board.

Issues for discussion are likely to include timetables in representation cases, the increased use of fax, affidavit procedures, the quality of court reporting, and a variety of other issues of interest to those who deal with the Board.

A core committee from among regular Board practitioners has been established. Director Schaub has asked the Labor and Employment Law Section to recommend additional practitioners to serve on the committee. If you are interested in being considered for service on the committee, write to incoming Section chair Paul M. Kara, Bridgewater Place, P.O. Box 3352, Grand Rapids, MI 49501-0352 by September 1, 1995 expressing your interest and briefly describing your practice before the Board.

The core committee held an inaugural meeting with Director Schaub in July. While the standing committee likely will be limited to twelve members, participation will be open to all practitioners. Anyone interested in presenting an issue to the committee may make arrangements to do so. The standing committee's initial business meeting is planned for October.

Director Schaub has agreed to keep practitioners advised of committee work and other matters of interest regarding Board practice by writing a column for Lawnotes.

MICHIGAN SUPREME COURT UPDATE

By David A. Rhem
Varnum, Riddering, Schmidt & Howlett LLP

LABOR AND EMPLOYMENT CASE SUMMARIES

***Nummer v Treasury Dept*, 448 Mich 534 (1995).**

In a 4-3 decision, the Court held that the doctrine of collateral estoppel bars relitigation of a discrimination claim in circuit court which had previously been litigated before the Civil Service Commission. The plaintiff-employee filed a civil service grievance after being transferred out of the Tax Fraud Division. The employee alleged that he had been promised that he would remain with the Tax Fraud Division, and that his transfer constituted gender and race discrimination. The Supreme Court majority concluded that while Michigan law does contemplate *de novo* review of an *appeal* from an administrative hearing, a plaintiff does not have the right to file and litigate a new complaint in circuit court.

***Barnell v The Taubman Co*, SC:99006 (1995).**

After previously granting leave to appeal and hearing oral arguments, the Supreme Court vacated its order and denied leave to appeal in this promissory estoppel case. Thus, the Court of Appeal's decision dismissing a plaintiff-employee's promissory estoppel claim remains "controlling authority" pursuant to AO 1994-4. In *Barnell*, the plaintiff claimed that he had relied to his detriment on defendant-employer's assurances that he would be fired only for cause. Plaintiff claimed that the defendant had induced him to leave his former employment and to move from Grand Rapids to the Detroit area. The Court of Appeals concluded that the plaintiff had failed to establish the necessary elements of a promissory estoppel claim, and that plaintiff's decision to move was a "customary and necessary incident of changing jobs rather than consideration to support the claim of promissory estoppel." The Supreme Court asserted that it was "no longer persuaded the questions presented should be reviewed by this Court."

***Garcia v McCord Gasket Co*, No 97957 (1995).**

The Michigan Supreme Court upheld the dismissal of an employer's appeal to the Workers' Compensation Appellate Commission ("WCAC") because the employer had not complied with the Magistrate's award during the appeal process.

In *Garcia*, the employee won his workers' compensation claim in front of the Magistrate. The Magistrate ordered, pursuant to statute, that all "reasonable and necessary" medical care related to plaintiff's work-related back condition be paid by the employer. The employer appealed the Magistrate's decision to the WCAC. The employer later filed a notice of dispute claiming that plaintiff had recovered and that *no* further medical treatment was "reasonable and necessary." Thus, the employer refused to pay for *any* further medical treatment.

The WCAC dismissed the employer's appeal on the basis that the employer was not complying with a previous order of the Bureau. The Court of Appeals and the Supreme Court affirmed. The Supreme Court noted that this was not a case where the employer was objecting to a *specific* medical treatment, but was instead a case where the employer was objecting to *any and all* further treatment.

***Weems v Chrysler Corp*, No 97725 (1995).**

The Supreme Court established the formula for calculating dependent benefits in this case where an employee died because of work-related injuries. The issue was whether the employee's spouse was partially or totally dependent. At the time of her husband's death, the surviving spouse received $850 per month in pension benefits. This represented 19 percent of the total household income. The Court concluded that the $850 per month was both "regular and substantial" and, consequently, the spouse was only a partial dependent.

The dependency formula is as follows: multiply the after-tax average weekly wage by 80 percent (to get the initial workers' compensation rate), then multiply this figure by the percentage of the deceased employee's after-tax contribution to total family income. This figure represents the actual dependency level of the surviving dependent.

MICHIGAN COURT OF APPEALS UPDATE

By Daniel Misteravich

Civil Rights Act — After Acquired Evidence — Damages

***Wright v Charters*, No. 165676, April 21, 1995**

When plaintiff was hired, he indicated in his application that he had never been convicted of a crime other than a traffic offense although in fact he had been convicted of felonious assault with a dangerous weapon. During his employment, plaintiff refused his employer's instructions to wrongfully terminate black employees because of their race. The employer discharged plaintiff. Plaintiff brought an action under the Elliott-Larsen Civil Rights Act. The trial court granted summary disposition for the employer holding that the employee's resume fraud entitled the employer to judgment as a matter of law. The court of appeals reversed and remanded.

The Court of Appeals held that after-acquired evidence of employee misconduct is not an absolute bar to relief under the Civil Rights Act. The court also held that evidence of employee wrongdoing should be considered in granting relief under the Elliot-Larsen Civil Rights Act. The court approved of the general rule stated in *McKennon v Nashville Banner Publishing Co*, 115 S.Ct. 879, (1995) that neither reinstatement nor front pay is an appropriate remedy.

Civil Rights Act — Age Discrimination — Considering Benefit Status

***Plieth v St. Raymond Church*, No. 166008 May 12, 1995**

A Roman Catholic parish which was in debt found it necessary to reduce its staff. The parish employed three maintenance workers. Plaintiff was one of those workers. He was sixty-two years old. In deciding to discharge plaintiff, the pastor partly based his decision on the fact that plaintiff would continue to receive retirement and medical benefits, whereas the other workers would not if they were discharged. The pastor also considered two other factors: how he could retain workers who worked mainly in the school and how he could retain superior workers. Plaintiff worked mainly in the church and the rectory; and, in the pastor's view, he was an inferior worker. After his discharge, Plaintiff filed a claim of age discrimination under the Elliot-Larsen Civil Rights Act. The trial court granted defendants' motion for summary disposition.

The Court of Appeals affirmed the trial court's decision holding that when an employer gives consideration of an employee's eligibility for benefits and when there is no evidence the employer made a correlation between employee's age and benefit status, the employee has not established a prima facie case of age discrimination.

Handicappers Civil Rights Act — Pre-1990 Amendment — Accommodation — Reasonable Time to Heal

***Hatfield v St. Mary's Med Cen*, No. 150429, June 2, 1995**

This is an action which arose before the 1990 amendment to the Handicappers Civil Rights Act. Before the amendment, the holding in *Carr v General Motors Corp*, 425 Mich 313; 389 NW2d 686 (1980) provided that an employer was not required to accommodate a handicapped employee.

Plaintiff was injured in an auto accident. As a result of the injury, plaintiff was unable to perform lifting which was part of her job description. After one year of attempting to return to work and taking some leave time, plaintiff returned to work before her medical leave had expired, and she returned with a weight lifting restriction from her physician which prevented her from lifting as required by her job description. There is some controversy as to whether plaintiff was discharged or she quit. Plaintiff brought claims under HCRA and obtained a judgment in her favor in the trial court. The Court of Appeals reversed and remanded.

The Court of Appeals held that under the pre-amendment HCRA, the employer had no duty to accommodate Plaintiff who was unable to perform the lifting which was part of her job description. The court also held that when an employee voluntarily cuts short her medical leave and returns to work, the trial court errs in giving the "time to heal" instruction to the jury.

Handicappers' Civil Rights Act — Accommodation

***Hall v Hackley Hospital*, 210 Mich App 48 (1995)**

Plaintiff, who suffered from asthma, worked in the defendant's psychiatric unit where patients were permitted to smoke tobacco in two rooms. By means of an affidavit, the defendant offered evidence that allowing psychiatric patients to smoke while they were in the psychiatric unit served a therapeutic purpose. Plaintiff experienced sinus and asthma problems which caused her to leave her job. Her doctor permitted her to return to work, but instructed her to avoid tobacco smoke and smoke-filled rooms. The parties agreed that Plaintiff could not return to her job. Plaintiff declined a job as a janitor because she would encounter airborne irritants. Plaintiff brought a claim under the Handicapper's Civil Rights Act alleging that the defendant failed to accommodate her as required by MCL 37.1102(2); MSA 3.550(102)(2). The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). The Court of Appeals affirmed.

The Court of Appeals held that given the specific needs of psychiatric patients there was no duty to accommodate the asthmatic plaintiff by prohibiting smoking in the working environment. The court expressly limited its holding to the facts of the case and suggested in dicta that an opposite ruling might become the general rule. The court also held that under the post-amendment Act the duty to accommodate does not include a duty to assign a handicapped person to another job.

Wrongful Discharge — Contractual Limitation Period

***Herweyer v Clark Highway Services, Inc*, No. 171720, July 11, 1995**

Plaintiff's employment contract provided that all claims be brought within six months. According to the contract's

savings provision, if any term of the contract were found to be legally unenforceable, then the provision would be limited to allow its enforcement as far as legally possible. Plaintiff was discharged. Thirty-one months later, Plaintiff brought claims of breach of contract, discrimination, and retaliatory discharge. The trial court granted summary disposition in favor of the defendant because the claims were not timely brought. The Court of Appeals affirmed.

The Court of Appeals held: when a contract had an unreasonable limitations period of six months and also had a savings clause which can be interpreted to substitute a reasonable limitation period for the unreasonable one, then the trial court did not err in determining that a period of less than thirty-one months would be a reasonable limitation period.

Wrongful Discharge — Breach of Public Policy-Federal Law

***Garavaglia v Centra Inc*, No. 148153, June 23, 1995**

Plaintiff was defendants' bargaining representative. The union pressured the defendant to terminate plaintiff to achieve "labor peace." It was a violation of the National Labor Relations Act (NLRA) for the union to influence defendants in their choice of a bargaining representative. Plaintiff won a jury verdict on claims which included one of breach of public policy. Defendants appealed the verdict for breach of public policy. The Court of Appeals affirmed.

The Court of Appeals held that a trial court does not err when it instructs a jury that a breach of public policy claim can be based upon violation of a policy arising out of federal law, specifically the NLRA prohibition against union influence over the employer's choice of representative. The court also held that defendants' issue of whether a plaintiff can recover for both breach of a just cause contract and discharge in breach of public policy had not been preserved below, that there had been sufficient evidence of union influence on the plaintiff's termination to avoid a directed verdict, and that costs were properly taxed against the defendants.

Act 78 — Police and Fire Civil Service — Time Limit for Filing Charges

***Command Officers Association of Michigan and Kenneth Dobson v City of Allen Park and Allen Park Civil Service Commission v City of Allen Park*, No. 165236, May 12, 1995**

On June 9, 1992, the Allen Park Police Department gained knowledge that one of its officers had committed violations warranting discharge. On September 1, 1992, charges were brought against the officer. The charges arose out of occurrences which took place on May 18, 1992. More than ninety days had passed from the date of the occurrences to the date the department brought charges. At a hearing before the civil service commission, the officer was found to be in violation. On appeal, the circuit court affirmed. The Court of Appeals reversed.

The Court of Appeals held that, although it would have held that the ninety-day time limit for filing charges under act 78 MCL 38.514; MSA 5.3364 does not begin to run until the discharging authority had actual knowledge of the employment violation, the court was constrained by Administrative Order 1994-4 to follow the holding in *Goodridge v Ypsilanti Twp Bd* which held that all charges brought after ninety days of the date of the violation are void.

Wage and Fringe Benefit Act — Timely Filing

***Reo v Lane Bryant, Inc*, No. 166515, June 6, 1995**

Plaintiff filed a claim with the Michigan Department of Labor more than three months after she had been fired for disclosing her wages. The Department of Labor applied the thirty-day filing limitation contained in MCL 408.483(2); MSA 17.277(13)(2) of the Wage and Fringe Benefit Act and dismissed plaintiff's claim. The circuit court likewise dismissed plaintiff's petition for review on the same ground. The Court of Appeals reversed and remanded.

The Court of Appeals held that a claim of discharge for disclosing wages is not subject to the thirty-day limitation period of the Wage and Fringe Benefit Act but is subject to the one-year limitation period contained in MCL 408.481; MSA 17.277(11).

MERC — PERA — Attorney Fees

***City of Detroit v Goolsby*, No. 164133, No. 164260, May 26, 1995**

This case arose out of dispute among sanitation workers, their union, and the City of Detroit over the terms of the parties' collective bargaining agreement and the union's representation. MERC made a number of findings and ordered the union to pay attorney fees. In its opinion the Court of Appeals reviewed the MERC findings and reversed the order to pay attorney fees.

The Court of Appeals held that under the Public Employment Relations Act (PERA) MCL 423.201 et seq.; MSA 17.455(1) et seq., there is no authority for the award of attorney fees. The court declined to follow two prior panels of the court of appeals which had held that attorney fees are available under PERA.

MERC UPDATE

By Kathleen Corkin Boyle
White, Przybylowicz, Schneider & Baird, P.C.

***Southfield Public Schools*, MERC Case No. C94 A-17 and CU94 B-9.**

In this case, MERC affirmed the decision of Administrative Law Judge James P. Kurtz, dismissing reciprocal unfair labor practice charges filed by the employer and the union. The union, Southfield Association of School Administrators (SASA), represented a unit of supervisory employees. The employer and the union had been parties to a three year collective bargaining agreement, which expired June 30,

1993. Prior to the expiration of the bargaining agreement, the parties met and reached a tentative agreement. The tentative agreement provided for a salary increase and for a structure which would cap retirement payouts for new employees. The tentative agreement was reduced to writing and was ratified by both the union membership and the Board of Education. After the ratification, the union became concerned about the availability of funding for retirement payouts and the status of the payouts for those employees who had been grandfathered under the tentative agreement. The parties exchanged proposals for contract language, but were unable to agree. Eventually, both the employer and the union filed unfair labor practice charges, with each alleging that the other had failed to ratify the collective bargaining agreement. The Administrative Law Judge held that the tentative written agreement between the parties, which had been ratified by the union and adopted by resolution of the Board of Education, constituted a final and binding collective bargaining agreement which fully and completely set forth the rights and obligations of the parties. Since the parties had ratified a collective bargaining agreement which would be effective through June 30, 1996, neither party had violated its bargaining obligations by refusing to sign additional language proposed by the other.

***Lapeer County*, MERC Case No. UC94 B-10.**

The Commission dismissed the unit clarification petition filed by the union, seeking to move a senior deputy circuit court clerk and a deputy circuit court clerk from the general county unit to a unit of Friend of the Court employees. The Commission agreed that the employees at issue work closely with the circuit court and its judges, but held that this fact alone does not make them employees of the court. The Commission noted that deputy circuit court clerks are appointed by the County Clerk, pursuant to statute. MCL 850.63; MSA 5.833. The Commission found no evidence of any control over the employees by the circuit court judges, and held that these judges are, therefore, not employers of the deputy clerks under the provisions of PERA. The deputy circuit court clerk and the senor deputy circuit court clerk are, therefore, appropriately placed in the general county unit.

***76th Judicial Court*, MERC Case No. C93 C-54.**

On exceptions, the MERC adopted the decision and recommended order of Administrative Law Judge James P. Kurtz and dismissed the unfair labor practice charge filed by the union representing employees of the 76th District Court. The charge alleged that the employer had violated its bargaining obligation under PERA by failing to implement a tentative contract agreement which had been reached following negotiations between the union and the court, acting through its district judge. The County Board of Commissioners had refused to ratify the agreement. In support of the charge, the union argued that the court was the sole employer, citing *74th Judicial District v Bay County*, 385 Mich 710, 78 LRRM 2503 (1971) and *Livingston County v Livingston Circuit Judge*, 393 Mich 265 (1975). According to the charging party, the district judge could not relinquish his authority as sole employer by conditioning a final agreement with the union upon approval of the Board of Commissioners. MERC agreed with the finding of the Administrative Law Judge that neither the *Bay County* nor the *Livingston County* case prohibit the involvement of the legislative body of the funding unit in approving the details of a contract covering court employees, where it is clear that the court has agreed that such functions will be exercised by the funding unit. The Commission stated that a cooperative arrangement between the court and its funding unit is a matter of discretion for the court. MERC also noted that the record supported the conclusion that all of the parties had discussed the process of final approval by the County Board of Commissioners during negotiations and had incorporated that process in the tentative agreement itself.

***Wayne County (Attorney Unit)*, MERC Case No. C94 B-42.**

On exceptions, MERC adopted the decision and order of Administrative Law Judge James P. Kurtz dismissing the unfair labor practice charge filed by a union representing attorneys employed by Wayne County. The union had charged that the employer violated its duty to bargain by terminating the payment of step increases to employees who were members of the bargaining unit. The step increases were terminated after the expiration of the contract and after bargaining for a new contract had commenced. The Commission noted that annual step wage increases and cost of living payments from an expired contract are existing terms or conditions of employment which cannot be unilaterally altered after the expiration of the contract, absent agreement or impasse. MERC adopted the finding of the Administrative Law Judge that impasse had been reached between the parties in this case. The parties had engaged in four collective bargaining meetings over a three month period. Throughout all of the meetings, the employer had maintained that a one year wage freeze was necessitated by its current financial situation. The employer maintained a wage freeze for all other bargaining and nonbargaining union employees for the 1993-94 fiscal year. The union had insisted that it would not be able to agree to a wage freeze. The parties maintained these positions consistently throughout three months of negotiations. Neither the financial condition of the county nor the consistent application of the wage freeze to other employees was disputed at the hearing. Based on these factors, MERC found that, while four bargaining sessions and three months is not a long time to bargain, the financial position of the employer together with the fact that the step increases would soon be due justified the employer's declaration of impasse.

***City of Portage Police Department*, MERC Case No. C94 E-119.**

MERC adopted the decision and recommended order of Administrative Law Judge James P. Kurtz dismissing the unfair labor practice charge filed by the Portage Police Officers Association (PPOA). The charge was filed after the employer installed video and audio recording equipment in the City's patrol cars and issued a work order which required

officers to record their activities during the normal work day. The charge alleged that these actions constituted a unilateral change in working conditions. The Administrative Law Judge ruled that although the employer was obligated to bargain regarding the impact from the use of the recording equipment, in this case there was no refusal to bargain because the union had never requested that the employer bargain. It was noted that the union had been aware for almost three months of the City's intention to install the equipment and to formulate an order regarding its use, yet during that time, the union took no steps to raise any issues with the employer or to demand to bargain regarding the use of the equipment.

A PRIMER ON GOOD FAITH BARGAINING

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The establishment of the collective bargaining relationship between the employer and its employees creates a duty to bargain regarding wages, hours and conditions of employment. Because the collective bargaining relationship has a history of being adversarial in nature, there have been many decisions of courts, boards, commissions, arbitrators and the like concerning specifically argued aspects of the duty to bargain. Study of these decisions and policies on a case-by-case basis sometimes distorts the big picture of what the duty to bargain encompasses and what the general relationship should look like. What follows is a very generalized view of the big picture.

Section 8(b) of the National Labor Relations Act as well as Section 15 of the Michigan Public Employment Relations Act essentially define the **duty to bargain collectively** as:

1. The performance of the mutual obligation
2. Of the employer and the representative of the employees
3. To meet at reasonable times *(and places)* and
4. Confer in good faith
5. With respect to wages, hours, and other terms and conditions of employment,
6. Or the negotiation of an agreement, or
7. Any question arising thereunder,
8. And the execution of a written contract incorporating any agreement reached if requested by either party, but
9. Such obligation **does not compel** either party to
   9a. Agree to a proposal,
   9b. Or require the making of a concession.

SUBJECTS OF COLLECTIVE BARGAINING

The parties must bargain with respect to **wages, hours and other terms and conditions of employment, or any matter substantially affecting these areas.** The word affect is defined by Webster's New Collegiate Dictionary as: "To produce a material influence upon or alteration in." The area of the subjects of bargaining may be further divided as follows.

MANDATORY SUBJECTS OF BARGAINING: The parties must bargain about any subject within the employment relationship that relates directly to wages, hours and other terms and conditions of employment. The major elements of the mandatory subjects of collective bargaining can be broken down into six basic categories:

1. The basic wage rates together with periodic improvement factors, cost of living allowances, etc.
2. Employment related fringe benefits.
3. The definition and use of seniority for purposes of creating and determining rights regarding layoffs, recalls and transfers as well as consideration of seniority in promotions, vacation scheduling and other employment related rights and privileges.
4. Conditions of employment, work rules, and job classifications.
5. Grievance and arbitration procedures to resolve disputes concerning proper interpretation and application of the terms of the collective bargaining agreement.
6. Provisions for union security as well as on-site union representation for employee representation in collective bargaining and grievance handling as well as in disputes arising under external law. Management retains prerogatives over many employment and workplace issues as well as virtually all strategic business decisions.

Some examples of mandatory subjects of collective bargaining are:

- Hourly Wages or Salaries
- Sick Leaves
- Hours
- Overtime
- Seniority
- Disciplinary Standards
- Arbitration of Grievances
- Safety and Health
- Holidays
- Union Security
- No Strike Clause
- Merit Increases
- Stock Purchase (private sector)
- Rest and lunch periods
- Types of discipline
- Layoff and Recall Procedures
- Grievance Procedure
- Transfer Rights
- Vacation
- Leaves of Absence
- General Management Rights
- Severance and Non-Competition Plans
- Pensions for the benefit of current employees
- Health and Insurance plans and the carriers for current employees

- Discounts on company products or services for current employees
- Profit Sharing or incentive programs for current employees
- Promotions (within the bargaining unit for private sector – within and outside the bargaining unit for public sector in Michigan)

PERMISSIVE SUBJECTS OF BARGAINING: A number of matters are considered to be totally within the purview of management. While it is not illegal to bargain concerning these items, there is no duty to do so. They fall within the "permissive subjects" category over which the parties may not go to impasse, the union may not legally strike and the employer may not lock out. Some examples of these are:

- Design and engineering of the product or service
- Method means and process of manufacture or provision of service
- Pricing decisions
- Determination of quality standards
- Production location decisions
- Financing and investment activity
- Expansion or ceasing of operations.

Some additional examples are:

- **Definition of the bargaining unit.** Agreements in this area are enforceable assuming they don't violate the duty of fair representation. If the parties can't agree, the NLRB or MERC (public sector) will decide the issue.
- **Pension improvements for those people who are already retired.** These people are no longer "employees", and therefore, there is no duty by the employer to recognize the union as their bargaining representative. While some unions have traditionally bargained for improvements for retirees, it is doubtful that a union could bargain for a reduction of benefits for retirees as the retirees would have the right to complain by indicating that the union is not their exclusive agent.
- **Interest arbitration.** This is arbitration designed to determine the terms of the contract, in lieu of a strike, rather than to interpret or enforce an existing contract. Police and fire employees in Michigan enjoy interest arbitration under state law. Other public employees in Michigan may proceed to fact finding after mediation has not resulted in an agreement; fact finding, however, is not binding on either party.
- **Size of union bargaining or grievance committee and/or pay while on union business.** Although this may be relevant if the employer is going to give employees time off with pay to process grievances or negotiate, without that consideration the size of the committee is no business of the employer.
- **The number of confidential employees.** This subject is negotiable, but in the event of an impasse, the NLRB or MERC (public sector) will make a determination to resolve the issue.
- **Method of ratification of the agreement.** The law does not require that there be a ratification vote, but the employer may want some input into how a ratification vote is conducted if it is to be done (such as a secret ballot or Board conducted ballot, etc.).

UNLAWFUL TOPICS FOR BARGAINING: The following are some examples of subjects that may not be discussed at the bargaining table. Even if the parties agree to discuss these matters, any agreement reached would be considered unlawful and not enforceable.

- **Requirement of lie detector tests.** Federal law (as well as Michigan law) forbids the employer to request or an employee to agree to take a lie detector test in any way affecting the employer/employee relationship except under special circumstances. Any contract provision to the contrary is unenforceable.
- **A "Union members only" contract.** The union is the exclusive collective bargaining representative of **all** the employees in the bargaining unit. Any contract must cover "all" the employees in the collective bargaining unit. One doesn't necessarily have to be a member of the union to be a member of the bargaining unit.
- **A requirement that the collective bargaining representative give up its right to represent a grievant at the first step of the grievance procedure.** The union is the exclusive collective bargaining representative of **all** the employees in the bargaining unit. The instant that an employee starts her or his employment, he or she is a bargaining unit member. The collective bargaining representative has a **duty and right** to represent them regarding all wages, hours and working conditions. Sometimes certain areas are excluded from specific coverage such as job security for probationary employees. While, here, the union may not be able to grieve regarding discipline pursuant to this agreement, the right and duty remains for all other areas of representation. This also includes the employees' right to representation under what is termed the Weingarten Rule, which will be discussed later in this outline. *It should be remembered that a bargaining representative represents unit members from the instant they are hired.*
- **Pre-Conditioning Bargaining** – a demand that something be agreed to as a pre-condition to commencement of negotiations. Some examples are:
  - That either party sign a performance bond of any kind.
  - That the union incorporate so that it could be sued. *This is an invasion into the area where the union has an exclusive right to manage its own affairs.*
  - That contract retroactivity be agreed to in advance of contract negotiations
- **Any agreement concerning "hot cargo."** Employers are forbidden to enter into agreements with unions to cease handling another employer's

products or to cease doing business with another person except under certain circumstances in the building and construction industry and in the apparel and clothing industry. See Section 8(c) of the National Labor Relations Act.

- **Any agreement allowing illegal discrimination.**
- **Closed Shop.** This is any agreement or practice by which an employee is required to be a Union member either before being hired or within the first 30 days of employment.

HOW BARGAINING MUST TAKE PLACE

The parties have the **mutual obligation** to bargain in **"good faith."** Good faith means that the parties must have an honest desire to reach an agreement, it has been discussed a number of times by the United States Supreme Court and defined in a number of decisions as follows:

- More than "sterile discussion" – each side must make a "reasonable effort" to reach an agreement by making a proposal and providing rationale, explaining why or why not.
- "An obligation to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement."
- "The employer must have an open mind and a sincere desire to reach an agreement."
- "A sincere effort must be made to reach a common ground."

Either side will be found to have violated the law if its conduct in bargaining, **viewed in its entirety** and considering all the circumstances, indicates that it did not negotiate with a good faith intention to reach an agreement. All the circumstances are considered. Motives are irrelevant.

If a party refuses to bargain regarding a mandatory subject of bargaining even though the party thought it was not mandatory, the party is still guilty of an unfair labor practice for failure to bargain in good faith.

The burden of proof in an unfair labor practice charge regarding failure to bargain in good faith falls to the charging party. Therefore, there is a presumption of good faith unless it is proven otherwise. Bad faith bargaining is usually very difficult to prove.

REFUSAL TO BARGAIN IN GOOD FAITH – EMPLOYERS: The National Labor Relations Act in Section 8(a)(5) bars an employer from refusing to bargain in good faith concerning wages, hours and other conditions of employment with the representative chosen by a majority of the employees in a group appropriate for collective bargaining. Some examples of employer conduct that violate this section:

- Making a wage increase without consulting the representative of employees when they have chosen such a representative.
- Making a wage increase larger than offered to the employees' representative in bargaining.
- Refusing to put into writing an agreement reached with the employees' representative.
- Refusing to deal with the representative of employees because the employees are out on a lawful strike. (The duty to bargain ceases for Michigan public employers for the duration of the strike when the employees engage in an unlawful strike.)
- Refusing to negotiate with the employees' agent concerning any of the mandatory subjects of bargaining, or attempting to undermine the collective bargaining representative during negotiations.

REFUSAL TO BARGAIN IN GOOD FAITH – UNIONS: Under section 8(b)(3) a labor organization commits an unfair labor practice if it refuses to bargain in good faith with an employer about wages, hours, and other employment conditions when the union is the representative of the employees in an appropriate bargaining unit. Thus the law sets the same good-faith bargaining obligation for a union as for an employer. Each must earnestly seek an agreement but neither is required to agree to a proposal or make a concession. Examples of conduct violating this section are insistence upon the inclusion of illegal provisions, such as a closed shop or a discriminatory hiring hall in a contract, and adamant refusal to make a written contract of reasonable duration.

GENERAL TESTS APPLICABLE TO BOTH PARTIES: The NLRB and MERC in deciding such cases in the past have looked to see if either party:

- Delayed unreasonably long in arranging conferences or refused to do so;
- Refused to send representatives who have the actual power to agree;
- Constantly changed positions in an inconsistent manner so as to forestall an agreement.
- Committed other Unfair Labor Practices.

If a party is guilty of one of the above described activities to a large degree, or a combination of the activities to a large or lesser degree, the Board would probably find that that party had not bargained in good faith.

REMEDIES FOR FAILURE TO BARGAIN (IN GOOD FAITH): In the event that either party has failed to bargain or has bargained in bad faith, a remedy is available to the innocent party through the filing of an unfair labor practice charge. In addition to a cease and desist order, there is not much in terms of judicial remedies that can be done to prevent a reoccurrence of the same kind of conduct except for treatment of representation elections and strikes as described below.

One Year Unfair Labor Practice (Election) Bar

Upon determination by the NLRB or MERC, a union may not be decertified for at least one year after the employer has been found guilty of an Unfair Labor Practice (date found guilty, not date of the offense).

STRIKES AND UNFAIR LABOR PRACTICES

Private Sector Employees – Job Security After a Strike Where Employer Unfair Labor Practices Have Been Committed.

Other than representational strikes (when a union is attempting to get recognition for purposes of collective bargaining by the employer), strikes are classified as either

Economic Strikes, Unfair Labor Practice Strikes or Unprotected "Wildcat" Strikes. When a strike is classified as an Economic Strike, the striking employees may be replaced permanently by the employer. But when a strike is classified as an Unfair Labor Practice Strike, the striking employees have the right to return to work (assuming no illegal behavior during the strike) even if "permanent replacements" will be displaced. There is no protected right to strike during a contract with a no strike clause or with an implied no strike provision inferred because of an arbitration clause. Employees taking part in or instigating such strikes are left unprotected and may be disciplined for these "illegal" activities.

Public Employees in Michigan – Section 2 of PERA states that no public employee shall strike.

Section 3 of PERA states that no person exercising any authority, supervision or direction over any public employee shall have the power to authorize, approve or consent to a strike by public employees. While it is generally stated that striking is "illegal" for public employees, it is not a crime. The practical effect of the law is that striking is not "protected" activity for public employees. They may be disciplined or discharged for advocating or taking part in a strike. *There remains some dispute about whether public employees under the coverage of the Michigan Public Employment Relations Act may legally strike after and because of an employer unfair labor practice.*

WHEN THE DUTY TO BARGAIN STARTS, AND HOW LONG IT LASTS

The duty to bargain over an issue exists any time the issue concerned is a mandatory subject of collective bargaining which is brought up for discussion by either party, and the issue is unresolved and is not currently covered by a collective bargaining agreement and hasn't been bargained about, or is the subject of a current dispute regarding the proper interpretation or application of the collective bargaining agreement – *a grievance*.

NO REPRESENTATIVE: When there has been no collective bargaining representative selected by the majority of the employees in an appropriate bargaining unit, the employer is free to unilaterally make any changes that it wishes regarding wages, hours and working conditions as long as they are legal under general employment related laws (e.g., minimum wage, civil rights, etc.). The employer need not confer with the employees.

DURING A UNION REPRESENTATION ELECTION PROCESS, the status quo regarding wages, hours and working conditions must be preserved or the outcome of the election may be affected. Therefore, no changes in wages, hours or working conditions are allowed during an election process. If the union is not certified, the status reverts to that of no representative. The employer, once again, may make unilateral changes in wages, hours and working conditions as long as these actions do not constitute discrimination because of union activity.

AFTER COLLECTIVE BARGAINING REPRESENTATIVE IS RECOGNIZED, voluntarily and/or certified, the duty to bargain as described earlier exists before any changes in wages, hours or working conditions may be made. This duty to bargain becomes a permanent part of the employer/employee relationship, and must be exhausted before the employer may make any changes in wages, hours or working conditions. Generally, the duty to bargain may be initiated by a request from either the employer or the union.

DURING THE TERM OF THE CONTRACT: Assuming that a contract is eventually reached, the duty to bargain ceases for the duration of the contract, but remains regarding wages, hours and working conditions not covered at negotiations or in the contract. It also remains to resolve disputes concerning the proper interpretation or application of the collective bargaining agreement (questions arising under the agreement) — grievances. For example:

Covered items: The contract says that employees get Independence Day off with pay; there is no duty to negotiate regarding the item during the term of the contract unless both parties agree to do so. However, does an employee get paid extra when Independence Day falls on a normal day off (Sunday)? The answer to this question as to the proper interpretation or application of the established language is the subject of negotiations through the grievance process. If an item is covered in the contract, there is no duty to bargain to change the writing of the agreement during the term of the agreement, but when there is a dispute as to the intention of the parties regarding contract language or its application, they are obliged to use the contract grievance procedure or interpretation process to resolve the dispute. All the rules of good faith bargaining apply to this process. The big difference here is usually that binding arbitration is substituted for a strike (or non-binding fact finding for public employees) as the impasse resolution mechanism.

New Items: If an item does not appear and is not referred to anywhere in the collective bargaining agreement either specifically or by reference, there remains a duty to bargain regarding this issue during the term of the contract.

However, if the item was discussed at the bargaining table but the demand regarding the item was somehow withdrawn or dropped, it is not a "new item," but is considered as a matter negotiated about and settled as a right not gained because it was withdrawn. The practice must remain the same. The duty to bargain over that issue is effectively waived for the duration of the contract.

Zipper Clauses and Maintenance of Standards Clauses may be negotiated into agreements to prevent the duty to bargain over new items during the term of a contract. A zipper clause limits the employer's obligation to bargain on mandatory subjects during the term of the collective bargaining agreement even if they were not specifically the subject of negotiations. It usually contains language to the effect that during the term of the contract, the employer will not have any duty to bargain with the union regardless of whether the subject matter is specifically included in the contract or not and acts as a general waiver by the union which prevents it from demanding to bargain over new items. The zipper clause, however, has been interpreted by the Board and courts to be effective for the employer only in cases where the status

quo is maintained. In cases where the employer wants to make changes to working conditions (and such matter is not covered in the collective bargaining agreement) bargaining regarding the matter will be required regardless of the zipper clause. If there is no bargaining, the status quo must be maintained until the parties confer in good faith regarding the issue to agreement or impasse. The zipper clause is often incorporated into the management rights clause of the collective bargaining agreement. The union will generally attempt to negotiate a maintenance of standards clause. This language would indicate that any fringe benefit whether specifically mentioned in the contract, or not, would not be disturbed by the employer for the life of the agreement.

AT THE EXPIRATION OF THE CONTRACT, Section 8(d) of the NLRA specifically outlines conditions as follows:

No party shall terminate or modify a contract unless the party desiring to do so:

- Gives written notice to the other party at least 60 days prior to the expiration of the contract of the proposed termination or modification.
- Offers to meet and confer to negotiate.
- Notifies the Federal Mediation and Conciliation Service as well as the appropriate state agency of the desire to terminate or modify within 30 days after such notice of the existence of a dispute has been sent if no contract has been reached by that time.
- Continues in full force and effect without a strike or lockout all the terms and conditions of the old contract for 60 days after the notice or expiration of the contract, whichever occurs later.

Even if the above mentioned conditions are met, the employer may still not change wages, hours or working conditions unless they have negotiated to conclusion about the proposed change first.

In Michigan, Section 7 of PERA authorizes the employer or union to request mediation through the MERC. In addition the MERC may intervene on its own initiative even though neither of the parties requests. While there is no official statutory 60-day notice rule, the expiring contract may have a notice requirement for reopening.

In Michigan, Section 25 of the Labor Relations and Mediation Act allows either of the parties to institute fact finding after collective bargaining and mediation have failed to result in a settlement. MERC will then appoint a fact finder who conducts a hearing regarding the unsettled and disputed issues which are mandatory subjects of collective bargaining. As a result, the fact finder issues a written fact finding report which is not binding on the parties but may be made public. The parties may decide to accept or reject the recommendations of the fact finder or use them to further negotiations.

HOW LONG DO THE PARTIES HAVE TO BARGAIN WITHOUT AGREEMENT BEFORE THE DUTY TO BARGAIN CEASES?

The oversimplified answer is: Until they are finished. They are finished when they reach an ***Agreement*** or ***Impasse***. Once the status quo regarding general and specific conditions is in place, there may be no changes in wages, hours and working conditions unless: an **agreement** is reached, in which event, wages, hours or working conditions may be changed as a result of implementation of the agreement; or ***impasse***, defined by Webster's Dictionary as a predicament affording no obvious escape or a deadlock, is reached. The Michigan Employment Relations Commission has decided that official ***impasse*** in bargaining may only occur after the parties have rejected a fact finder's recommendation, and have met to discuss it without settlement. All other conditions for ***impasse*** must also be met. When the parties have discussed all the issues of the whole package of pertinent mandatory subjects of bargaining and have reached a deadlock, they are at "impasse". (This is usually determined to be the case when there is no "movement" on any open issue by either side.)

Once the parties are at impasse, the employer can implement an offer that it has made to the union and the union has rejected, and neither side is obligated to continue to bargain until one side indicates that it is willing to modify its last position. This is true even during a strike if the strike is a legal strike. The employer can implement what it has offered to the union but not more or less. However, the employer may not implement any changes if it has committed an unfair labor practice regarding the bargaining during the period of negotiations; this is because one is not considered to have negotiated unless they have done so in good faith. The private sector employee must, however, bargain regarding new grievances during the period of impasse, but it is not required by law to proceed to arbitration on these new post-contract expiration disputes. An arbitration provision in a contract as it relates to "violations" occurring after the expiration of the contract expires when the contract expires. In reality, a contract can't be violated after it ceases to exist. Something that may have been a violation of the expired contract may now be a change in wages, hours or working conditions without completion of the negotiation process, which might constitute an Unfair Labor Practice. The employer must proceed to arbitration upon demand by the collective bargaining representative regarding alleged contract violations which occurred before the expiration of the contract which had a mandatory arbitration clause.

Exception: In the event of non-ratification of a tentative agreement, the parties are free to take any position regarding wages, hours and working conditions regardless of their last position at the time of the tentative agreement.

1995 Annual Section Meeting

Lansing – Wednesday, September 20

The Council of the Labor and Employment Law Section proudly presents the program for the 1995 Annual Meeting:

2:00 to 2:20 p.m. **Section Business Meeting**, including election of new Council members and officers.

2:20 to 3:10 p.m. **Arbitration in Non-Union Settings in light of *Heurtebise v Reliable Business Computers*:** a panel discussion moderated by Arthur R. Przybylowicz, of White, Przybylowicz, Schneider & Baird, with arbitrator **Robert A. McCormick**, MEA attorney **Mary H. Job**, **Patricia S. Bordman** of Clark, Klein & Beaumont, and **Sheldon J. Stark** of Stark & Gordon.

3:15 to 4:05 p.m. **NLRB Affidavits:** a panel discussion moderated by **Leonard D. Givens** of Miller, Canfield, Paddock & Stone, with NLRB Regional Director **William C. Schaub, Jr.** and **Thomas J. Barnes** of Varnum, Riddering, Schmidt & Howlett, and **Stuart M. Israel** of Miller, Cohen, Martens, Ice & Geary.

4:10 to 5:00 p.m. **Affirmative Action, Today and Tomorrow:** panel discussion, moderated by **John F. Brady**, of Brady & Hathaway, featuring **Janet C. Cooper**, Deputy Director of Michigan Dept. of Civil Rights, **Walter B. Connolly, Jr.** of Miller, Canfield, Paddock & Stone, **John R. Runyan, Jr.** of Sachs, Waldman, O'Hare, Helveston, Hodges & Barnes, and **Ann Harrell** of the OFCCP.

5:30 to 6:30 p.m. **Social Hour**, in Capital Ballroom 2 at Radisson Hotel.

6:30 to 8:00 p.m. **Dinner**, with remarks afterwards by **Joann Watson, Executive Director of Detroit Chapter, NAACP**, on affirmative action, in Capital Ballrooms 3/4 at Radisson.

Afternoon activities will be at Lansing Center. Use form in mailing coming soon from State Bar to register. No walk-up registration for dinner.

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