The WorkSheet

Beins, Axelrod, Kraft, Gleason & Gibson, P.C.

3rd Quarter, 2002

BAKGG On The Job

- Regina Markey has become an Associate with the firm. She has years of experience in labor strategies as well as private and public employee pension fund issues.
- Sarah J. Starrett taught a course in Federal Sector Labor Law at the George Meany Center for Labor Studies to union activists and officials in August. Sarah also successfully forced a Federal Agency to live up to a settlement agreement concerning working conditions it had made with a union. The Agency had attempted to repudiate the agreement.
- Ed Gleason and Rich Gibson represented 10 individual whistleblower plaintiffs in a week-long Federal Court trial. The employees were fired from their shipboard jobs for contacting the United States Coast Guard concerning workplace safety issues. The case involved a little-used Coast Guard anti-retaliation statute. A decision is anticipated early next year.

Legislative Watch: Your Lawmakers At Work

Sarbanes-Oxley Act Amends ERISA Notice Requirements for Blackout Periods

In response to the wave of corporate corruption and abuse at Enron and other major U.S. corporations, the landmark Sarbanes-Oxley Act was enacted July 30, 2002. The Act contains an unprecedented range of rule changes addressing corporate governance, auditing, insider trading, and other related areas.

For participants in employee benefit plans, the Act amends ERISA to include new notice rules for individual account plans for qualified private sector pension plans. These changes reflect recent events in which corporate officers manipulated stock prices for their benefit while plan participants were temporarily suspended from trading employer securities in their own accounts.

Effective January 27, 2003, administrators of 401(k) and other defined contribution plans will be required generally to provide participants at least 30 days notice of any "blackout" period. A blackout period is any suspension, restriction, or limitation for a period of more than three consecutive business days, of the ability of participants or beneficiaries to diversify or direct the investments of, to obtain loans from, or to obtain distributions from. The notice must explain why the blackout will occur and how participant rights will be affected. Significantly, during a blackout period, corporate officers and directors are prohibited from trading in publicly-traded employer securities.

Department of Health and Human Services Issues Final HIPAA Privacy Regulation See 67 Fed. Reg. 53,182 (Aug. 14, 2002)

As expected, the Final Rules issued by the Department of Health and Human Services contained few changes. They still require health and welfare funds and health care providers to make extensive changes to their computer programs, filing systems, and staff training to ensure confidentiality of patient records.

The Final Rule clarifies that an employer has no obligation to ensure the privacy of health information that finds its way into personnel and employment records. For example, medical information in a doctor's letter to an employer to support a claim of reasonable accommodation under the ADA, or information submitted by a doctor to document an employee's sick leave request, is not "protected health information" requiring limited access or which an employer may not disclose. Similarly, if a health plan discloses health information to a plan sponsor in accordance with the rule (usually with the employee's authorization), that information, once in the hands of the plan sponsor, is no longer "protected." Note that other state or federal recordkeeping and privacy laws may affect an employer's obligation with respect to health information in a particular case.

This newsletter identifies certain Labor, ERISA, and Individual Employment cases and issues that may be of general interest to the Firm's clients and friends. The newsletter is provided as a courtesy to clients and friends and is for general informational purposes only. The newsletter does not represent the views of any of the Firm's clients. Any editorial comments are for entertainment purposes only. Likewise, this newsletter is not a substitute for specific legal advice.

In This Issue:

BAKGG: On The Job

Legislative Watch: Your Lawmakers At Work

Sarbanes-Oxley Act Amends ERISA Notice Requirements for Blackout Periods

Department of Health and Human Services Issues Final HIPAA Privacy Regulation

Paid Family Leave Becomes Law in California

And More...

Recent Cases in the Workplace: You Be The Judge

Labor:

Employer Unlawfully Solicited Employees to Appear in Anti-Union Movie During Organizing Campaign

Supervisor's Assault on Co-worker Does Not Justify Strike

Ninth Circuit Vacates $1 Million Libel Verdict

ERISA:

Supreme Court Denies Review of Ninth Circuit Case Setting Legal Standard For Cases Pertaining to Criminal Embezzlement From Employee Benefit Plan

Third Circuit Confirms Multiemployer Plan Trustees Must Disclose Proposed Changes in Benefits Only When Changes Are "Seriously Considered"

Third Circuit Calls "Janitors' Insurance" a Tax Sham

Third Circuit Allows Pension Fund to Sue Company Directors, Officers, and "Alter-Ego" of Bankrupt Employer for Withdrawal Liability

And More...

Individual Employment Rights:

New Arbitrator Disclosure Rules in California Could Become National Standard

Seventh Circuit Rejects Sexual Harassment Plaintiff's Claim of Equitable Tolling Based on Manager's Instruction that She was Not to Discuss Her Allegations With Anyone Else

Sixth Circuit Recognizes Cause of Action for Reverse Discrimination under the Age Discrimination in Employment Act

The first Monday in October signals a new term of the Supreme Court

Only two of the over 30 cases presently on the Supreme Court's docket for argument could have a significant impact on the labor community

IRS Proposes New Employer-funded Health Reimbursement Arrangement (HRA) to Be Used alongside or in place of Group Health and Cafeteria Plans See IRS Notice 2002-45 and Rev. Rul. 2002-41, published July 15, 2002

Under the proposed rule, an HRA would reimburse medical care expenses up to a maximum dollar amount in a coverage period, usually $2,000 - $4,000 per family per year. The unused portion of an HRA could be carried over year to year and be available to an employee who has retired or left the job, unlike the unused portion of employee pre-tax deferrals to a Section 125 flexible spending account. Benefits paid from an HRA are not taxable to the employee and are deductible to the employer. It is anticipated that HRAs will be paired with high-deductible group health insurance, with employees using the HRA to pay for routine physicals, dental and eye care, etc.

Paid Family Leave Becomes Law in California

On Monday September 23, 2002, California Governor Gray Davis signed into law the nation's first comprehensive legislation to provide workers with paid family leave to care for sick family members or to bond with a newly born or adopted child. The law allows workers who pay into the State's disability insurance system (most California private sector workers) to receive slightly more than half of their salary for up to six weeks. The maximum payment will be $728.00 per week and payments will not be taxed. The program will be funded by a slight increase in employee payroll deductions.

SUPREME COURT OPENS NEW TERM
2002-2003 Supreme Court Preview

As usual, the first Monday in October signals a new term of the Supreme Court. Only two of the over 30 cases presently on the Supreme Court's docket for argument could have a significant impact on the labor community.

State Regulation of Health Plans
Kentucky Assoc. of Health Plans v. Miller

After the Clinton administration failed to reform healthcare in 1993, a number of states experimented with changes to their healthcare systems. In 1994, Kentucky enacted its own Health Care Reform Act. That law prohibits health insurers from discriminating against providers who were in the geographical area of the health insurer and willing to comply with the insurer's terms and conditions for participation. Supporters of the law believe this would allow for easier patient access to providers of their choice. Opponents complained it would lead to increased costs by limiting the ability of insurers to guarantee to providers a high volume of patients in return for lower charges.

The Kentucky Association of Health Plans, Inc. filed suit against the Department of Insurance, claiming that the Kentucky law is invalid because it is preempted by the Employee Retirement Income Security Act of 1974 (ERISA). ERISA was enacted by Congress to protect employee benefit plans and expressly provides that any state laws related to such plans are preempted by ERISA unless they regulate insurance generally.

The trial court upheld the Kentucky law because the law regulates insurance and is thus saved from preemption by ERISA. The Association appealed to the Sixth Circuit Court of Appeals which affirmed the district court. The appellate court concluded that the fact that the law "…includes within its reach HMOs as well as traditional insurance companies does not take it out of the realm of insurance regulation."

FMLA and State Government Employers
Nevada Dep't. of Human Resources v. Hibbs

An employee requested leave to care for his ailing wife. His request was approved for the full 480 hours (12 weeks) of leave under the Family and Medical Leave Act of 1993 (FMLA), to be used intermittently, as needed, between May 1, 1997, and December 31, 1997. His request for additional time was denied. He later brought suit in district court against the Nevada Department of Human Resources, its director, and his supervisor for violations of the FMLA.

The district court granted the Department's motion for summary judgment, concluding the FMLA claim was barred by Nevada's Eleventh Amendment immunity. The court of appeals disagreed, concluding that the FMLA contained a sufficiently clear expression of congressional intent to avoid Eleventh Amendment immunity.

When the Supreme Court hears this case, it will decide the narrow question of whether the family medical care provision of the Family and Medical Leave Act of 1993 is a proper exercise of Congress's power under the 14th Amendment, thereby constituting a valid exercise of congressional power

to avoid the states' Eleventh Amendment immunity from suit by individuals. Stated simply, the issue is whether the FMLA can be enforced against state government employers.

Recent Cases in the Workplace: You Be The Judge

LABOR:

Employer Unlawfully Solicited Employees to Appear in Anti-Union Movie During Organizing Campaign

During a hard-fought organizing campaign, the employer produced a movie to persuade employees to oppose the union. A supervisor asked employees if they would consent to be videotaped, but not all employees were told the purpose of the film. Those who agreed were filmed. When the company later explained the purpose of the film, those who opposed were instructed to speak to company managers to arrange to be edited out of the videotape. The company thereby obtained a list of employees who did not want to appear in an anti-union movie. The union narrowly lost the election.

Enforcing the NLRB's decision that the solicitation constitutes unlawful polling, the Court of Appeals for the District of Columbia Circuit noted that polling is not a form of protected employer free speech. Its purpose is not to express the employer's views but to ascertain the views of the employees. The Court approved the NLRB's five-part test for the validity of solicitations to appear in movies: (1) The solicitation must be in the form of a general announcement which discloses the purpose of the videotape, assures that participation is voluntary, and that the employee's decision will be neither rewarded nor punished; (2) Employees cannot be pressured into making decisions in the presence of supervisors; (3) There is no other coercive conduct connected with the video; (4) There is no general atmosphere of coercion; and (5) The employer does not exceed the legitimate purpose of soliciting consent by seeking information concerning the union. *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167 (3rd Cir. August 26, 2002).

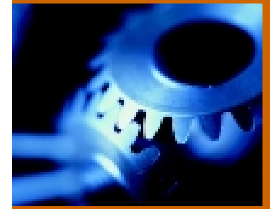
Supervisor's Assault on Co-worker Does Not Justify Strike

A district court recently held that workers who stopped work for almost four hours to protest a supervisor who had: criminally battered a union steward, denied workers water on a hot day, and removed water coolers from the loading dock, had struck unlawfully. *Airborne Freight Corp. v. Teamsters Local 705*, 2002 U.S. Dist. Lexis 15185 (N.D. Ill. August 16, 2002). Although the court refused to issue an injunction because the employer would suffer no irreparable injury from the denial of an injunction, the court held that the strike was presumptively unlawful because the disputes were grievable and arbitrable. The court further held that the Gateway Coal safety dispute exception did not apply because the employees did not face "abnormally dangerous conditions for work" and were not in "immediate danger."

Ninth Circuit Vacates $1 Million Libel Verdict

During bitter negotiations, union officials contended that the company's owner was hiding millions in profit in a related holding company while demanding steep concessions from the union. Union officials maintained this position even after the union's accountant concluded that the companies had no money. When the employees struck, the company and its owner sued for defamation, unlawful strike, and for racketeering activity. A district court dismissed the racketeering allegations and found that the strike did not breach the collective bargaining agreement. But the district court held that the allegations of hidden profits were defamatory and caused the strike. Therefore, the court awarded damages for injury to reputation, emotional injury, and damages flowing from the strike.

The Ninth Circuit reversed the defamation judgment and affirmed the district court's dismissal of the strike and racketeering claims. *Steam Press Holdings, Inc. v. Hawaii Teamsters Local 996*, 2002 U.S. App. Lexis 17649 (9th Cir. August 26, 2002). To prevail in a libel action in the context of a labor dispute, the plaintiff must show that "the defamatory statements were circulated with malice and caused him damages." "Actual malice" includes making statements concerning objective facts with reckless disregard for their falsity. The court recognized that in labor disputes both parties often "exaggerate the strength of their bargaining positions in an attempt to coerce their opponent into concession." In that context, the appellate court found the union's statements, made only in union meetings, to be a "rhetorical device employed to further the Union's bargaining strategy, not statements of objective fact."



A district court recently held that workers who stopped work for almost four hours to protest a supervisor who had: criminally battered a union steward, denied workers water on a hot day, and removed water coolers from the loading dock, had struck unlawfully

A recent court decision refused to permit parties to a lawsuit to obtain from each other copies of documents that were prepared for use in various related NLRB proceedings. The court noted that such documents constitute "work product" that is privileged from disclosure even though the underlying NLRB proceedings were over

Dues Objector Notice Must Contain Adequate Disclosure of Major Categories of Expenses and Must Include Auditor's Verification

The Tenth Circuit recently reviewed a claim that deficiencies in a Fair Share Notice sent to non-members violated their constitutional rights. In *Wessel v. City of Albuquerque*, 299 F.3d 1186 (10th Cir. August 13, 2002), the court noted that adequate disclosure includes major categories of expenses and verification by an independent auditor. The union's Notice included schedules of expenses and a statement that this was "independently audited financial information" but did not include the auditor's report and notes. The court held that the union unlawfully failed to include the auditor's report and the explanation of why the fees deducted are permissible. The court did not hold that auditor's notes must always be included in the Notice, but suggested that notes would not be necessary if the report contained sufficient explanations. The court found that the deficient Notice entitled the non-members to nominal damages, not to the recovery of all fees paid.

District Court Holds that Information Prepared in Support of NLRB Case is Confidential and Protected From Disclosure in Related Lawsuit

In *U.S. Information Systems, Inc. v. International Brotherhood of Electrical Workers Local 3*, 2002 U.S. Dist. Lexis 17532 (S.D.N.Y. September 17, 2002), the court refused to permit parties to a lawsuit to obtain from each other copies of documents that were prepared for use in various related NLRB proceedings. The court noted that such documents constitute "work product" that is privileged from disclosure even though the underlying NLRB proceedings were over.

NLRB Returns to Rebuttable Presumption of Union's Majority Status in Successorship Cases

For three years the NLRB held that when an employer takes over the operations of another employer (by merger, acquisition, etc.) the successor employer must bargain with the incumbent union for a reasonable period of time, during which the union's majority status is immune from challenge. *St. Elizabeth Manor Inc.*, 329 NLRB 341, 162 LRRM 1146 (1999).

In July 2001 MV Transportation assumed the operations of Door to Door, Inc., which had recognized the Amalgamated Transit Union as the bargaining representative for its employees. MV and the Union began bargaining in late August. While bargaining was continuing, an employee filed a decertification petition. The Regional Director dismissed the petition pursuant to *St. Elizabeth Manor*.

The Board overruled *St. Elizabeth Manor* in a 3-1 decision, with the majority consisting of Chairman Peter J. Hurtgen and Members William B. Cohen and Michael Bartlett. *MV Transportation*, 337 NLRB No. 129, 170 LRRM 1223, (July 17, 2002). The Board stated that "an incumbent union in a successor employer situation is entitled to - and only to - a rebuttable presumption of continuing status," which will not bar an otherwise valid decertification petition. The Board believes that its new rule will preserve employee freedom to select a bargaining representative because employees will not be barred from filing decertification petitions when they question whether the union is adequately representing their interests. The Board also believes that this rule will help maintain stability in bargaining because the employer still must bargain with the incumbent union unless there is a challenge.

This decision makes it more difficult for an incumbent union to negotiate with the successor employer without looking over its shoulder for a rival union or a decertification petition.

ERISA:

Department of Labor Issues Qualified Approval of Indemnification Provisions in Service Provider Agreements

The Department of Labor recently acknowledged that limitation of liability, indemnification, and hold-harmless provisions were becoming increasingly common in a plan's service provider agreements. In an advisory Opinion Letter, the Department stated as follows:

> *The Department does not believe that, in and of themselves, most limitation of liability and indemnification provisions in a service provider contract are...per se imprudent under ERISA... The Department believes, however, that provisions that purport to apply to fraud or willful misconduct by the service provider are void as against public policy and that it would not be prudent or reasonable to agree to such provisions. Other limitations of liability and indemnification provisions, applying to negligence and unintentional malpractice, may be consistent with ... ERISA when considered in connection with the reasonableness of the arrangement as a whole and the potential risks to participants and beneficiaries.*

At a minimum, compliance with these standards would require that a fiduciary assess the plan's ability to provide comparable services at comparable costs either from service providers without having to agree to such provisions, or from service providers who have provisions that provide greater protection to the plan.

Supreme Court Denies Review of Ninth Circuit Case Setting Legal Standard For Cases Pertaining to Criminal Embezzlement From Employee Benefit Plan

In *Mett v. U. S.* (June 28, 2002), the Supreme Court denied review of a Ninth Circuit decision holding that an ERISA fiduciary could violate 18 U.S.C. Section 664 without knowing that his conduct is illegal. The statute penalizes a defendant who "embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or the use of another" any assets of an ERISA plan. The Ninth Circuit had affirmed the district court's rejection of proposed jury instructions that would have required proof beyond a reasonable doubt of the defendants' knowledge of the illegality of their conduct.

Eighth Circuit Rejects the Presumption in Favor of Awarding Fees to Prevailing Plaintiffs in ERISA Cases

In *Martin v. Arkansas Blue Cross and Blue Shield*, No. 299 F.3d. 966 (8th Cir., August 16, 2002), the Eighth Circuit rejected the presumption that prevailing plaintiffs in ERISA cases are entitled to an award of attorney's fees. The Court noted that seven other circuits had also rejected the presumption. Instead, the Court ruled, district courts should award fees only in extraordinary cases and should be guided by factors including, but not limited to, the degree of culpability or bad faith, the ability of the opposing party to pay fees, whether a fee award would act as a deterrent, whether the plaintiff's action benefited all participants, and the relative merits of the parties' positions. The underlying claim in *Martin* — the unlawful denial of payment for an experimental treatment — did not warrant an award of fees, the Court held.

Third Circuit Confirms Multiemployer Plan Trustees Must Disclose Proposed Changes in Benefits Only When Changes Are "Seriously Considered"

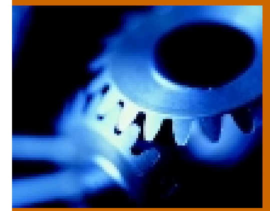
In *Mushalla v. Teamsters Local No. 863 Pension Fund*, 296 F.3d. 164 (3rd Cir. August 12, 2002), the Third Circuit rejected claims brought by several multiemployer pension plan participants alleging that plan trustees had violated their fiduciary duties by failing to disclose a proposed change in benefits prior to their retirement. The participants' was based on the settled principle that a plan fiduciary breaches its fiduciary duty under ERISA if it materially misleads an employee who inquires about possible changes in the plan.

Although it was undisputed that some of the plaintiffs had made such inquiries a few months prior to retiring, the court found that the announced change was not being "seriously considered" at that time. The court also rejected the participants' contention that ERISA imposes a higher duty on fiduciaries of multiemployer plans to disclose than on those serving a plan administered by a single employer. Thus, the plan trustees had no duty to advise the participants of the proposed change until that change was "seriously considered" by the trustees. This point was not reached until the trustees had decided to direct the fund's actuary and its legal counsel to prepare and complete the requisite studies and analyses. Such analyses would enable the trustees to consider financial feasibility of the proposed change and any legal requirements that would attach to any decision to implement the proposed change. Accordingly, the point at which the duty arises to disclose a proposed change is dependent upon when the plan fiduciaries are provided necessary information and actually decide that a change will be implemented.

Seventh Circuit Rejects Employer's Contract Formation Defenses in ERISA Collection Cases

In *Laborers' Pension Fund v. A & C Environmental, Inc.*, 301 F.3d. 768 (7th Cir. August 19, 2002), the Seventh Circuit reversed a jury verdict in favor of an employer in an action to collect delinquent contributions brought by two funds. ERISA allows funds to enforce a contract according to its terms, thus excluding any oral agreements that conflict with the written contract as irrelevant. Nevertheless, an employer may raise the affirmative defense of fraud in the execution. The court reasoned that fraud in the execution renders the contract void ab initio or a nullity and returns the parties to a state where no contract ever existed. The court sharply distinguished fraud in the execution from fraud in the inducement, a defense that cannot be raised in an ERISA collection action.

Here, the court found that, contrary to the jury's verdict, the evidence did not support the company's defense. The court pointed out that the one-page document the company's representative admittedly signed was titled in capital letters "COLLECTIVE BARGAINING AGREEMENT;" he had the authority to enter into an agreement; and the representative expressed his concern that signing the document would mean exactly what the Funds were asserting, that the company would then be obligated to contribute for all covered work, not on the particular project where a union representative had



The Supreme Court denied review of a Ninth Circuit decision holding that an ERISA fiduciary could violate 18 U.S.C. Section 664 without knowing that his conduct is illegal

The Third Circuit Court of Appeals recently found that an employer cannot deduct the cost of premiums for life insurance on employees when the employer is the beneficiary under the policies. Such insurance is known as "Janitors' Insurance"

sought the agreement. The court found that, even if true, the company representative's failure to read the document raised no defense. The court reversed and granted judgment to the Funds as a matter of law and remanded for the determination of damages.

Seventh Circuit Addresses Venue in ERISA Action for Benefits

In *Waeltz v. Delta Pilots Retirement Plan*, 301 F.3d. 804 (7th Cir. August 23, 2002), the Seventh Circuit affirmed the district court's dismissal of plan participants' action to recover benefits. The finding was that the plaintiffs had brought suit in the wrong federal district court and venue was improper. Although the plan was administered entirely in Atlanta, Georgia, the suit was filed in the Southern District of Illinois, where the retired plaintiff had once lived and the employed plaintiff still lived. However, neither plaintiff had received any benefits in the District nor had either of the men ever performed work for the employer-plan sponsor in that District.

The case required the court to consider the ERISA venue provision, which permits a suit "where a defendant may be found." The Seventh Circuit rejected the plaintiffs' contention that the plan could "be found" in any district in which it is subject to personal jurisdiction and that, because ERISA provides for nationwide service of process, there is nationwide personal jurisdiction over a covered plan. The court declared that the plaintiffs' attempt to equate venue and personal jurisdiction could not be reconciled with the statute because it made the venue provision pure surplus, a consequence it said it was "loathe to adopt." Recognizing that under ERISA's venue provision, a participant was not necessarily limited to the district where the plan was administered, the Seventh Circuit found that where the plan's only contacts with the chosen district was the mere residency of two participants out of almost 3,000, the plan was not subject to the personal jurisdiction of that court under the 'minimum contacts' test that the Constitution and ERISA requires, and could not be sued there.

Ninth Circuit Holds Plan's Action to Obtain Escrowed Tort Settlement Money From Participant Was Properly Dismissed

In *Westaff, Inc. v. Arce*, 298 F.3d. 1164 (9th Cir. August 15, 2002), the Ninth Circuit affirmed a district court's dismissal of an ERISA action seeking judgment for money paid to a participant by a third party tort feasor as damages resulting from an accident. The plan had a subrogation and reimbursement provision and sought a declaratory judgment that all the money belonged to it.

The court found that the existence of the escrow did not change the nature of the plan's action and noted the U.S. Supreme Court's decision in *Great West Life* [122 S. Ct. 708 (2002)]. The court held that the plan's action was still one for money damages, even though the settlement funds remained identifiable and that ERISA provided no cause of action to recover such damages.

The court also affirmed the district court's award of attorney fees to the participant, finding that the court had jurisdiction over the plan's claim even though it had to be dismissed for failure to state a claim. It held that the attorney fee award was proper where the lower court viewed the plan's action as an attempt to take advantage of the participant who had agreed to place the settlement monies in the escrow in order to cooperate with the plan until its claim could be resolved and the plan had now used that fact as the basis for forcing the participant to defend against its claim in federal court.

Third Circuit Calls "Janitors' Insurance" a Tax Sham

The Third Circuit Court of Appeals recently found that an employer cannot deduct the cost of premiums for life insurance on employees when the employer is the beneficiary under the policies. Such insurance is known as "Janitors' Insurance." *IRS v. CM Holdings, Inc.*, 301 F.3d. 96 (3rd Cir. August 16, 2002). "[E]ven if a transaction complies precisely with all requirements for obtaining a deduction, if it lacks economic substance it simply is not recognized for federal taxation purposes, for better or for worse," the court found. Press reports state that the Internal Revenue Service is pursuing numerous other companies among the hundreds that took out such policies covering millions of employees over the past decade, including R.R. Donnelley & Sons Co., Winn-Dixie Stores Inc. and Wal-Mart Stores Inc. Workers are typically unaware of the policies and neither they nor their families receive a benefit upon death.

Third Circuit Allows Pension Fund to Sue Company Directors, Officers, and "Alter-Ego" of Bankrupt Employer for Withdrawal Liability

In *Teamster Local 863 Pension Fund Board of Trustees v. Foodtown, Inc.*, 296 F.3d. 164 (3rd Cir. July 17, 2002), the Third Circuit held that a fund can sue the "alter ego" corporation to a former sponsoring employer of a multiemployer plan for withdrawal liability, though the former sponsoring employer itself was in bankruptcy. The appellate court held that Foodtown, Inc. was the "alter ego" of Twin

Corporation, the bankrupt company that had a collective bargaining relationship with the union, with Foodtown using Twin as a mere "instrumentality." The fund charged that Foodtown and others fraudulently diverted money to avoid $9.3 million in withdrawal liability. Because Twin continued making contributions to the plan after it had entered bankruptcy, the withdrawal liability claim was not part of the bankruptcy estate, the panel held. The Circuit also held that 17 individual officers and directors of both Twin and Foodtown are fiduciaries and can be sued with respect to employees participating in the plan. Although corporate directors generally owe a fiduciary duty only to shareholders, once a corporation becomes insolvent, directors assume a "quasi-trust" duty to the corporations' creditors and cannot favor one creditor over another, and have a special duty not to prefer themselves, the court wrote.

INDIVIDUAL EMPLOYMENT RIGHTS:

New Arbitrator Disclosure Rules in California Could Become National Standard

New comprehensive arbitrator disclosure rules adopted July 1, 2002 in California could become the national standard for identifying potential conflicts of interest in private arbitrations, including labor arbitrations. The new standards require much more detailed financial and professional relationships for all private arbitrators than had been the rule in California, as a means to promote public confidence in the private arbitration system. A key test for the new law is a suit filed by the New York Stock Exchange and the National Association of Securities Dealers, who claim the rules are burdensome and preempted by the Federal Arbitration Act.

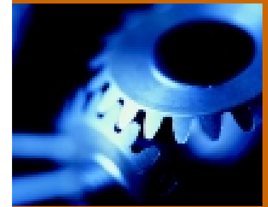
Seventh Circuit Rejects Sexual Harassment Plaintiff's Claim of Equitable Tolling Based on Manager's Instruction that She was Not to Discuss Her Allegations With Anyone Else

In *Beckel v. Wal-Mart Assoc.*, Inc, 2002 U.S. App. LEXIS 17876 (7th Cir. August 29, 2002), the Seventh Circuit considered a discharged employee's claim that her employer's threat caused her to delay filing of her harassment complaint and tolled the running of the statute of limitations. The appellate court rejected her argument that the implicit and effective threat to retaliate against her if she took any legal action regarding her allegation of sexual harassment should bar the company from relying on the statute of limitations. The court dismissed as unreasonable the employee's claim that she understood her employer's order not to talk to others to mean that talking to a lawyer and/or filing an administrative complaint would be treated as misconduct and place her job in jeopardy.

The court explained that an employer has the right to stop an employee from spreading "groundless rumors" regarding another employee's conduct. After deciding that the plaintiff's affidavit was insufficient to create an issue of fact that would bar judgment for the employer, the court also held that even if she had admissible evidence that her employer had threatened to fire her if she sued she still would not have shown a basis for equitable tolling. The court noted that such threats had been found to be unlawful as anticipatory retaliation, a claim that she had not made.

Sixth Circuit Recognizes Cause of Action for Reverse Discrimination under the Age Discrimination in Employment Act

In *Cline v. General Dynamics Land Systems, Inc.*, 296 F.3d. 466 (6th Cir., July 22, 2002), the Court allowed workers who were at least 40, and thus protected by the ADEA, to challenge a new union contract that replaced the employer's obligation to provide retiree health benefits to workers with at least 30 years of service with a new provision limiting eligibility for retiree health benefits to employees who were at least 50 years old as of the effective date of the new contract. The "younger" plaintiffs claimed that the new contract denied them benefits because of their age. A majority of the appellate panel agreed, noting that its holding that the ADEA bars discrimination against those over 40 is consistent with congressional intent to protect older workers and older persons. The dissenting judge objected that the ADEA was intended to help older workers, not younger ones, and that younger workers are not entitled to protection from workers older than they are. He also observed that the majority opinion could have a "devastating" effect on collectively bargained early retirement programs.



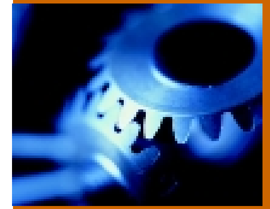
New comprehensive arbitrator disclosure rules adopted July 1, 2002 in California could become the national standard for identifying potential conflicts of interest in private arbitrations, including labor arbitrations

Community Action

- Burma Institute for Democracy and Development (BIDD):
  The charitable foundation serves to educate American citizens and others about human and civil rights abuses, to promote and defend democratic ideals, and to aid those in peril in the country of Burma and surrounding country neighbors. For more information, contact Ed Gleason at 202.328.7222 or e-mail him at gleason@bakfirm.com

We Want Your Ideas

Have an idea for a news item or topic for discussion? Send suggestions for consideration to tschum@bakfirm.com or give us a call at 202.328.7222



We're on the Web:

The WorkSheet is available in electronic format as well. To receive a printable eMail version, please contact Tatyana Schum by phone at 202.328.7222, ext. 116 or email tschum@bakfirm.com

A copy may also be viewed at our Web site: www.bakfirm.com

Know Someone Who Would Like to Receive The WorkSheet?

Let us know his/her name, mailing address and/or email address and we'll include him/her in subsequent issues. Know more than one? We'll include them all.

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