2009-10 U.S. Supreme Court Decisions Affecting Labor and Employment

By Seth H. Greenberg

The U.S. Supreme Court's 2009-10 term again featured numerous cases that affect labor and employment law in one way or another. Those cases centered around issues involving arbitration, privacy rights, attorneys' fees, timeliness of discrimination charges, ERISA, spending in political campaigns, and the authority of the National Labor Relations Board to issue decisions. Like with any year-end review, the purpose of this article is to again discuss the major issues that were decided and what questions the Court left unanswered. I will conclude with a short preview of some labor and employment cases that are before the 2010-11 term set to begin October 4, 2010.[1]

Arbitration

Stolt-Nielsen v. AnimalFeeds (Vote: 5-3)[2] (Decided April 27, 2010)

Arbitrators cannot decide class action claims unless there is a contractual basis for concluding that the parties agreed to do so, says the Supreme Court in the first of three arbitration cases decided during the 2009-10 term. *Stolt-Nielsen* is an anti-trust case, but the high court's decision there has broad implications on arbitration in all areas of law, labor and employment included.

In *Stolt-Nielsen*, the parties' agreement was silent on class arbitrations and it was undisputed that no agreement had been reached on class arbitrations. A panel of arbitrators concluded they had authority to hear class claims, a decision that was ultimately upheld by the Second Circuit.

The Supreme Court reversed, holding that the panel exceeded its authority when it embraced its own policy and ignored the intent of the parties. Justice Alito, writing for the Court, noted that the Federal Arbitration Act (FAA) "imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'"[3] He then explained:

> An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.[4]

In sum, unless explicitly included in an agreement to arbitrate, class arbitrations are precluded.

Rent-A-Center West v. Jackson (Vote: 5-4)[5] (Decided June 21, 2010)

Arbitration was clearly a focus of the Court this term. In *Rent-A-Center West v. Jackson*, the second of three arbitration-related cases, a divided court gave employment-based arbitration agreements more bite by limiting judicial review. The Court's majority held that it is up to an arbitrator to decide whether an agreement to arbitrate contained in a contract is enforceable. And the only time courts are to consider the validity of an arbitration clause is when a party to the contract challenges the validity of the agreement as a whole.

An employee signed an arbitration agreement which provided for arbitration of all past, present, and future disputes arising out of his employment, including "claims for discrimination" and "claims for violation of any federal…law." It also provided that "[t]he Arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to, any claim that all or any part of this Agreement is void or voidable." When the employee, Antonio Jackson, filed an employment discrimination suit against Rent-A-Center in federal court, Rent-A-Center moved to compel arbitration. Jackson argued that the arbitration agreement was unconscionable and, therefore, unenforceable. The District Court granted the employer's motion to compel arbitration. A divided Ninth Circuit reversed in part, affirmed in part, and remanded. On the question of who had the authority to decide whether the Agreement is enforceable—the court or the arbitrator—the Court of Appeals reversed, finding that the threshold question of unconscionability is for the court to decide.

But the nation's highest court thought otherwise and reversed the Ninth Circuit. Notably, the Court drew a distinction between two kinds of validity challenges under Section 2 of the Federal Arbitration Act (FAA). One type of validity challenge goes to the agreement to arbitrate and the other challenges the contract as a whole, either on a ground that directly affects the entire agreement or on the ground that the illegality of one of the agreement's provisions renders the whole agreement invalid.

Critics of this decision argue that the conservative majority denies access to the courts to those seeking to challenge arbitration agreements as unconscionable. Considered a victory for employers, this result is not all that surprising in light of the Court's decision in *14 Penn Plaza*[6] last term. Notably, the justices that make up the majority and the minority are identical in both cases, except that Justice Sotomayor replaced Justice Souter in dissenting here.

Granite Rock co. v. International Brotherhood of Teamsters (Vote: 7-2; 9-0)[7] (Decided June 24, 2010)

The final labor and employment decision issued in the 2009-10 term was *Granite Rock*. There, the Court made two conclusions of interest. First, a majority of the justices found that disputes over the effective date of a collective bargaining agreement are properly resolved by the courts as opposed to by an arbitrator. And second, the unanimous Court refused to recognize a new federal cause of action for the union's alleged tortious interference with the collective bargaining agreement.

Justice Thomas wrote the Opinion of the Court, reemphasizing that "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*."[8] Citing its days-old decision in *Rent-A-Center*, *supra*, Thomas further explained, "[t]o satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce."[9] Unlike in *Rent-A-Center*, however, the Court ruled against arbitrability and in favor of judicial decision-making.

There was an unusual set of facts and circumstances specific to *Granite Rock* that led to the Court's ruling. Failed contract negotiations led to a strike of concrete ready-mix workers in June 2004. On July 2, 2004, the union and the company reached a tentative agreement which included a no-strike provision. But union members did not return to work, in an attempt to gain a "hold-harmless" clause to protect against potential damages arising from the strike. The company claimed the union voted to ratify on July 2 while the union claims ratification did not occur until late August (thereby not being bound by the no-strike provision). Adding to the complication was the fact that the parties executed the agreement in December 2004. This executed agreement includes an arbitration clause. The union maintained that an arbitrator should determine when the contract was ratified and whether the no-strike provision applied to the July work stoppage.

Finding the question one of contract formation rather than contract validity, the Court found the matter to be one for judicial resolution. Justice Thomas explained, "[f]or purposes of determining arbitrability, *when* a contract is formed can be as critical as *whether* it was formed. That is the case where, as here, the date on which an agreement was ratified determines the date the agreement was formed, and thus determines whether the agreement's provisions were enforceable during the period relevant to the parties' dispute."[10]

The arbitration clause of the agreement provided that "[a]ll disputes *arising under this agreement* shall be resolved in accordance with the [Grievance] procedure." Most of the justices found that the ratification dispute clearly did not arise under the agreement. Justices Sotomayor and Stevens found otherwise, concluding that the July work stoppage was clearly a dispute arising out of the contract and should have gone to arbitration. In their dissent, both justices concluded that the date the contract was ratified was "entirely irrelevant" since the agreement was made retroactive to May 1, 2004 and the strike post-dated the May 1st date.

On remand, it is undisputed that the company can bring a breach of contract claim. The Court, however, rejected the company's request to recognize a new federal tort claim for alleged interference with the collective bargaining agreement. This unanimous decision upholds the conclusions reached by almost all the Courts of Appeals.[11]

Campaign Finance

Citizens United v. FEC (Vote: 5-4)[12] (Decided January 21, 2010)

Citizens United v. Federal Election Commission is the case that most defines the Court's latest term. Although not directly related to labor and employment law, it has significant effects on corporate and union spending in political campaigns, thereby impacting the political (and legal) landscape for years ahead. The decision, issued on January 21, 2010, held that the federal government may not ban political spending by corporations in candidate elections.

Citizens United centered around *Hillary: The Movie*, a documentary film that is quite critical of Hillary Clinton, portraying her as deceitful and power-hungry. During the 2008 presidential campaign, a group called Citizens United wanted to promote the movie in the days leading up to the election. The FEC, however, argues that this would violate the 2002 Bipartisan Campaign Reform Act that prohibits corporations from "electioneering" during the 30 days before a primary and 60 days before a general election.

In its 5-4 decision, the U.S. Supreme Court threw out the time limits for electioneering and further concluded that the federal government could not set limits on corporations spending to promote their own political messages during campaigns. According to the Court, the ban violates free speech protections

The Court's ruling appears to apply equally to labor unions as corporations. The Court specifically concludes that the identity of the political speaker (spending money on politics is speech, of course) cannot be the basis for restrictions on their independent political spending. The Court explicitly held "that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[13]

A broader question that largely goes unaddressed is how the Court will address differences between a political message that involves "express advocacy" and one

that involves "issue advocacy." Express advocacy is akin to traditional candidate support/opposition ads (e.g., "vote for" or "vote against" Candidate X). Issue advocacy is an ad that says write to Senator Y (a pro-choice lawmaker) and tell him that you are a pro-life voter.

The Court has time and again held that Congress has more power to curb "express advocacy" than "issue advocacy." But what the Court did in *Citizens United* is to strike down an explicit ban on the use of corporate funds to pay for "express advocacy," paving the way (it would seem) for the elimination of rules concerning "issue advocacy" as well.

It is hard to imagine that *Citizens United* will be the last word on corporate campaign finance. President Barack Obama criticized the Court's ruling in his State of the Union Address six days after the decision was announced. And it appears Congressional leaders across the political spectrum are in the process of legislatively overturning the decision.

So what are the effects of *Citizens United* on New York State's campaign finance system? The answer appears to be not much, if anything. But that answer must be qualified by a "you never know." The Court's ruling has vast implications on the federal level and may also affect certain state rules regarding political donations. However, it does not appear that New York's existing campaign finance system will be affected in any substantive way.

Notably, the day the Supreme Court's ruling in *Citizens United* was announced, the New York City Campaign Finance Board issued a press release from its Executive Director that provides:

> While today's decision may have a critical impact on the next federal elections, it addresses a specific provision of federal law that has no direct parallel in City law.
>
> The decision addresses *independent spending* by corporations supporting candidates; it does not disturb the prohibition on *direct contributions* from corporations to candidates.[14]

It is worth noting that no state's laws were specifically overturned by *Citizens United*, although some may now be more vulnerable to challenge. New York is no different. Until then, however, nothing changes.

Citizens United did uphold reporting requirements. In writing for the majority, Justice Anthony Kennedy concluded the government may regulate corporate political speech through disclaimer and/or disclosure requirements. However, the government may not, according to the Court, silence such political speech altogether. Justice Kennedy also concluded, "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking' [citations omitted]."[15]

ERISA

Conkright v. Frommert (Vote: 5-3)[16] (Decided April 21, 2010)

"People make mistakes. Even administrators of ERISA plans."[17] So began Chief Justice John Roberts, writing for the majority in *Conkright v. Frommert*, holding that an ERISA plan administrator must not be stripped of deference in a subsequent plan interpretation even if a previous interpretation was unreasonable. In *Conkright*, the Court sympathizes with employers, presumes good faith despite an illogical interpretation in the first instance, and gives employers a second chance.

Xerox Corporation's pension plan is at the center of *Conkright*. Xerox employees retired from the company in the 1980s and received lump sum distributions of retirement benefits. Some of these retirees were later re-hired. Xerox's plan administrator was left to determine how to account for the past distributions when calculating the re-hired employees' current benefits. The administrator adopted what is known as the "phantom account" method. This method calculated the hypothetical growth (and reduction) that the past distributions would have experienced if the money had remained in Xerox's investment funds. Employees challenged this method as irrational.

The District Court granted summary judgment to the employer/Plan, applying a deferential standard of review. On appeal, the Second Circuit vacated and remanded, holding that the method constituted an unreasonable interpretation and that the re-hired employees were not adequately notified that the phantom account method would be used.

The plan administrator then proposed a new approach, similar to the phantom account method except that it utilized an interest rate and was based upon information known at the time of the distribution. But the District Court refused to apply a deferential standard and did not accept the Plan's new, second interpretation. The Second Circuit affirmed, adopting a "one-strike-and-you're-out" analysis.

Although certiorari was granted on two questions, the Court decided only the question of whether the District Court owed deference to the Plan Administrator's interpretation of the Plan on remand. And the majority ruled that deference must be afforded.

Twenty-one years ago, in *Firestone Tire & Rubber Co. v. Bruch*,[18] the Court addressed the standard for reviewing decisions of ERISA plan administrators, granting great deference to administrators who are given discretionary authority to interpret a plan. And two years ago, in *Metropolitan Life Ins. Co. v. Glenn*,[19] the Court expanded upon *Firestone*, concluding that the deferential standard applies even in the face of a conflict of interest.

Conkright appears to be a re-affirmation of these prior decisions, whereby the Court rejects the Second Circuit's "ad hoc exception" and concludes that a single honest

mistake does not require a different approach. In other words, one error or mistake in the plan administrator's judgment will not usurp the administrator's authority to interpret the terms of the ERISA plan.

Authority of NLRB to Issue Decisions[20]

New Process Steel v. NLRB (Vote: 5-4)[21] (Decided June 17, 2010)

In a holding that calls into question hundreds of decisions by the National Labor Relations Board (NLRB) over the last two years, the U.S. Supreme Court ruled that a two-member NLRB cannot legally exercise the board's authority. The narrow 5-4 ruling in *New Process Steel v. NLRB* interprets a so-called quorum and delegation clause in the National Labor Relations Act "as requiring that the delegee group maintain a membership of three in order for the delegation to remain valid."

By the end of 2007, the ordinarily five-member board found itself with only four members and was expecting two more vacancies as the terms of two members were about to expire. By January 1, 2008, only two members remained, leaving three vacancies. According to Section 3(b) of the National Labor Relations Act, the "Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." That same provision also provides that "three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group" to which the board has delegated its powers.[22] The two-member board continued to issue rulings over the next 27 months under the delegated powers it believed were authorized by Section 3(b).

The nation's highest court was asked whether the two-member group was authorized to act for the board. The majority said it was not so authorized. Writing for the Court, Justice Stevens explained that the at-issue provision requires that such delegated power be vested continuously in a group of three members, concluding that this interpretation "is the only way to harmonize and give meaningful effect to all of the provisions in [Section] 3(b)."[23] Justice Stevens further reasoned that if Congress wished to allow the board to decide cases with only two members, it would have and can easily do so. According to Stevens, "Section 3(b), as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died."

What happens with the more than 500 cases decided in the last two plus years is still in doubt. Those cases were decided only where the two remaining members of the board, a Republican and a Democrat, were in agreement. Many experts argue that unless appealed on the ground that the two members lacked appropriate authority, employers and unions may have waived the opportunity for reconsideration. NLRB Chair Wilma Liebman issued a statement that defended the decision of the two-member group to issue rulings but acknowledged the board's obligation to ensure the Court's rulings are effectuated accordingly. She explained: "We believed that our position was legally correct and that it served the public interest in preventing a Board shutdown. We are of course disappointed with the outcome, but we will now do our best to rectify the situation in accordance with the Supreme Court's decision."[24]

Discrimination Charges

Lewis v. City of Chicago (Vote: 9-0)[25] (Decided May 24, 2010)

In *Lewis v. City of Chicago*, decided May 24, 2010, the high court unanimously found that a plaintiff who does not file a timely charge challenging the adoption of a practice may assert a disparate-impact claim in a timely charge alleging the employer's later application of that practice as long as he alleges each of the elements of a disparate-impact claim.

In 1995, the City of Chicago administered a civil service examination for firefighter positions. In January 1996, the City notified applicants of the test results, announcing it would draw candidates randomly from the pool of applicants scoring at least 89 out of 100 points (so called "well-qualified" candidates). Candidates scoring below 65 were notified they failed ("unqualified"). And those scoring between 65 and 88 were told that while "qualified" they were unlikely to be called but would be kept on the list as long as the list was still used. In March 1997, plaintiffs filed an EEOC charge claiming the test had a disparate impact on black applicants and was not a valid test.

The trial court found each hiring was a fresh violation of Title VII, thereby also concluding Plaintiffs' suit was timely. The Seventh Circuit reversed, holding that the suit was untimely because the earliest EEOC charge was filed more than 300 days after the only discriminatory act—the sorting of scores into categories. The Seventh Circuit reasoned that later hiring was merely a consequence of the test scores but not a new discriminatory act.

The U.S. Supreme Court reversed. In writing for the Court, Justice Scalia explained:

> Petitioners here challenge the City's practice of picking only those who had scored 89 or above on the 1995 examination when it later chose applicants to advance. Setting aside the first round of selection in May 1996, which all agree is beyond the cut-off, no one disputes that the conduct petitioners challenge [latest hiring from the list] occurred within the charging period. The real question, then, is not whether a claim predicated on that conduct is timely, but whether the

> practice thus defined can be the basis for a disparate-impact claim at all.
>
> We conclude that it can.[26]

* * * * *

Thus, a plaintiff establishes a prima facie disparate-impact claim by showing that the employer "uses a particular employment practice that causes a disparate impact" on one of the prohibited bases.[27]

Lewis is an interesting follow-up to the Court's decision last term in *Ricci v. DeStefano*.[28] Since layoffs and terminations usually result in a higher number of discrimination complaints, the Court's decision in *Lewis* becomes even more important.

Privacy Rights

City of Ontario, California v. Quon (Vote: 9-0)[29] (Decided June 17, 2010)

From the time the Court agreed to hear *Quon*, many legal experts had expected the ruling to be a blockbuster, offering guidance with regard to privacy in electronic communications. What the Court issued, however, was a narrow decision that focused on the search of text messages rather than the expectation of privacy in those messages. And the Court acknowledged the hype in its opening paragraph, wherein Justice Kennedy wrote: "Though the case touches issues of far-reaching significance, the Court concludes it can be resolved by settled principles determining when a search is reasonable."[30]

The City of Ontario, California sought to review two months' worth of text messages from a police officer's city-issued pager after it noticed that the officer had repeatedly exceeded the character limit allotted. Overage charges resulted but the officer wrote a check to the City for all overages, reimbursing it for any additional costs that were incurred. In conducting an audit of the officer's text messages, hundreds of personal messages were found, some of a sexual nature. Ultimately, the officer was disciplined.

The City had a "Computer Usage, Internet and E-Mail Policy" in which it "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." This Computer Policy did not, however, explicitly apply to text messages. However, in April 2002, City officials informed officers that text messages were to be treated the same as e-mails.

The unanimous Court refused to decide the case on privacy grounds. Justice Kennedy, writing for the Court, explained that technology is evolving so fast and that "[a]t present, it is uncertain how workplace norms, and the law's treatment of them, will evolve."[31] There was a discussion regarding the pervasiveness of cell phone and text message communications on and off-duty. When push came to shove, though, the justices rejected a "broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment."[32]

So how did the Court reach its decision? For the purposes of resolving the case in the most narrow way, the Court made three assumptions. First, it assumed that the officer had a reasonable expectation of privacy. Second, it assumed that the City's review of the messages constituted a search within the meaning of the Fourth Amendment. And finally, the Court posited that "the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere."[33] Based upon these assumptions, the Court conducted an analysis of the search and ultimately concluded that it was reasonable.

Although it left many important questions unanswered, the Court's discussion in *Quon* offers employers in the public and private sectors some good lessons. If nothing else, employers should ensure they adopt a comprehensive electronic communications policy that places employees on notice about what may be monitored. Additionally, searches of employee communications must only be for legitimate, work-related reasons and should not be excessively intrusive in scope.

One thing is certainly clear—as technology continues to evolve and expectations of privacy continue to be a source of contention, the Supreme Court will no longer be able to dodge the tougher issues. The high court must at least offer guidance as the Circuits develop their own technology jurisprudence.

Other Cases of Interest: Attorneys' Fees and More

Perdue v. Kenny[34] and *Hardt v. Reliance Standard Life Insurance Company*[35] are two cases that address the ability of winning parties to recover attorneys' fees, and may be of interest to labor and employment lawyers. In *Perdue*, the Court upheld fee enhancements as part of a federal fee-shifting statute in civil rights cases. And the Court unanimously held, in *Hardt*, that an ERISA claimant may be entitled to attorneys' fees as long as there is "some degree of success on the merits."

In my article last year, I mentioned that the Court granted certiorari in *Mohawk Industries v. Carpenter,*[36] a case involving attorney-client privilege and discovery. There, a fired employee sued for wrongful termination, alleging that the true reason he was fired was due to his reporting immigration violations. Before his firing, the employee had met with the employer's attorney on this matter. As part of discovery, the employee sought information related to that meeting. The District Court granted the request and ordered disclosure over the company's objection; however, it also permitted the company to appeal. The issue in *Mohawk* was whether an order for discovery, involving an attorney-client privilege, is

eligible for immediate appeal. On December 8, 2009, a unanimous Court found that it was not.

Looking Ahead to the 2010-11 Term

At the time this article is published, the Supreme Court will already be knee deep in its 2010-11 term, the first with new Justice Elena Kagan. Arbitration (*AT&T Mobility LLC v. Concepcion, US*) continues to be an issue of interest to the Court, including a further look at class-wide arbitration. In *Staub v. Proctor Hospital*, the Court will consider the circumstances under which an employer may face liability based on the unlawful intent of employees who caused or influenced an adverse employment decision but did not actually make the decision itself. *Thompson v. North American Stainless*, granted certiorari on the last day of the 2009-10 term, concerns whether Title VII prohibits retaliation against a person associated with someone who engaged in protected activity (e.g., spouse or other family member), sometimes referred to as "third-party retaliation." *CIGNA Corporation v. Amara* asks the Court to address ERISA claims for inconsistency between the plan's Summary Plan Description and the action Plan itself. And in *NASA v. Nelson*, the Court will continue its look at informational privacy issues, this time in connection with background investigations of federal contract employees.

Endnotes

1. This past January, NYSBA's Labor and Employment Law Section unveiled its Section blog to provide timely notice of significant events and developments affecting practitioners of labor and employment law in New York. Blog posts are intended to cover a wide range of topics from new legislation to court decisions to agency interpretations. The blog can be accessed from the Section's homepage on the NYSBA website. Some of the decisions described within this article were also discussed by the author on the blog shortly after the Court issued its opinions. Portions of those blog posts appear throughout this article.
2. No. 08-1198, 559 U.S. __ (2010). Justice Alito delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined. Justice Ginsburg filed a dissenting opinion, in which Justices Stevens and Breyer joined. Justice Sotomayor took no part in the consideration or decision of the case.
3. *Id*. at 17.
4. *Id*. at 21.
5. No. 09-497, 561 U.S. __ (2010). Justice Scalia delivered the opinion of the Court, in which Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined. Justice Stevens filed a dissenting opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined.
6. No. 07-581, 556 U.S. __ (2010). *14 Penn Plaza v. Pyett* was another narrowly decided case discussed in my article that appeared in the Fall/Winter 2009 edition of this *Journal* at p. 17.
7. No. 08-1214, 561 U.S. __ (2010). Justice Thomas delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Kennedy, Ginsburg, Breyer, and Alito joined. Justices Stevens and Sotomayor joined in part. Justice Sotomayor filed an opinion concurring in part and dissenting in part, in which Justice Stevens joined.
8. *Id*. at 7.
9. *Id*.
10. *Id*. at 13.
11. Not surprisingly, California was the exception.
12. No. 08-205, 558 U.S. __ (2010). Justice Kennedy delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Stevens filed a dissenting opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined.
13. *Id*. at 50.
14. *Statement of CFB Executive Director Amy Loprest on the U.S. Supreme Court Ruling in Citizens United v. FEC,* http://www.nyccfb.info/press/news/press_releases/2010-01-21.pdf.
15. No. 08-205, 558 U.S. __ (2010), at 51.
16. No. 08-810, 559 U.S. __ (2010). Chief Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined. Justice Breyer filed a dissenting opinion, in which Justices Stevens and Ginsburg joined. Justice Sotomayor took no part in the consideration or decision of the case.
17. *Id.* at 1.
18. 489 U.S. 101 (1989).
19. 544 U.S. __ (2008).
20. The *New Process Steel* decision is the subject of a separate article that appears in this *Journal*. Authored by Michael J. Israel, the article is entitled *The Supreme Court's New Process Steel Decision and Its Aftermath—Good Intentions Are Not Enough.* Israel's article gives a more in-depth analysis of the Court's decision and describes the NLRB's plan of action in light of the high court's ruling.
21. No. 08-1457, 560 U.S. __ (2010). Justice Stevens delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Kennedy filed a dissenting opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined.
22. 29 U.S.C. §153(b).
23. No. 08-1457, 560 U.S. ___ (2010), at 5.
24. NLRB Press Release (June 17, 2010); http://www.nlrb.gov/shared_files/Press%20Releases/2010/R-2752.pdf.
25. No. 08-974, 560 U.S. __ (2010). Justice Scalia delivered the opinion for a unanimous Court.
26. *Id*. at 4-5.
27. *Id*. at 6.
28. 557 U.S. __ (2009).
29. No. 08-1332, 560 U.S. __ (2010). Justice Kennedy delivered the opinion of what amounts to a unanimous Court, except that Justices Scalia and Stevens filed concurring opinons.
30. *Id*. at 1.
31. *Id*. at 11.
32. *Id*.
33. *Id*. at 12.
34. No. 08-970, 559 U.S. __ (2010). Decided on April 21, 2010, the case was decided by another 5-4 split along traditional ideological lines.
35. No. 09-448, 560 U.S. __ (2010). Decided on May 24, 2010, the case was decided unanimously.
36. No. 08-678, 558 U.S. __ (2010). Decided on December 8, 2009, the case was decided largely unanimously except that Justice Thomas filed an opinion concurring in part and concurring in the judgment.

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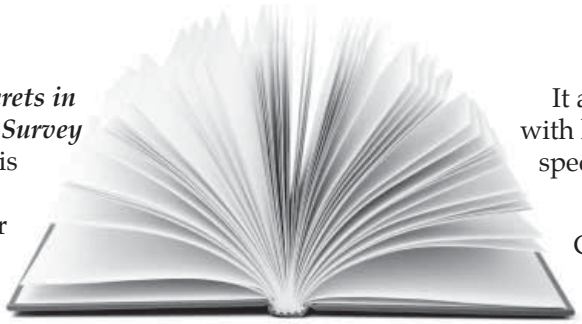
Book Reviews



Restrictive Covenants and Trade Secrets in Employment Law: An International Survey will be available from BNA Books this winter (www.bnabooks.com). It is sponsored by the International Labor and Employment Law Committee of the ABA Section of Labor and Employment Law.

Editors-in-chief are Wendi Lazar at Outten & Golden LLP and Gary Siniscalco at Orrick, Herrington & Sutcliffe LLP. The treatise includes chapters on the laws of some 50 nations written by noted practitioners in those countries, plus a chapter on global issues and chapters providing regional overviews. Also included is a chapter on "The Challenge of Cross-Border Litigation from an EU Perspective," written by Paul Goulding QC, author of *Employee Competition: Covenants, Confidentiality, and Garden Leave* (Oxford University Press).

Regional Editors are Robert Pe and Erica Chong at Orrick (Asia), Oscar de la Vega Gomez, Basham at Ringe y Correa, S.C. (Central and South America); Paul Callaghan at Taylor Wessing and Gerlind Wisskirchen at CMS Hashe Sigle (Europe); David Millstone at Squire Sanders & Dempsey L.L.P. (Middle East); Wendi Lazar and Gary Siniscalco (North America); and Danny Ong at Rajah & Tann LLP (Oceana/Asia).

This treatise explores the differences between the U.S. and foreign countries in regulating noncompetition and nonsolicitation provisions and in imposing restrictions related to confidential information and trade secrets, as well as use of garden leave and restrictions on equity compensation in this area. The survey also identifies and analyzes the privacy concerns that arise when employers try to restrict their employees' disclosures, conduct investigations concerning possible violations, or monitor compliance. And it discusses the typical procedural questions that arise, such as use of temporary restraining orders and injunctions.

It also includes regional overviews with helpful commentary on practices specific to different parts of the world.

The book is a companion to the Committee's other treatise, *International Labor and Employment Laws*, as well as serving as an international complement to the ABA/BNA U.S. State-by-State Survey series sponsored by the Employment Rights and Responsibilities Committee of the Section: *Covenants Not to Compete, Employee Duty of Loyalty, Tortious Interference in the Employment Context*, and *Trade Secrets*.

* * *

"Go to the Worker": America's Labor Apostles by Kimball Baker

A positive response to the U.S. economic crisis has been the coming together of Americans of all faith traditions to highlight the connections between the economy and our ethics and values.

Effective collective bargaining and fair treatment of workers are among U.S. economic objectives, of course, and *"Go to the Worker": America's Labor Apostles*, a recent book from Marquette University Press by Kimball Baker, shows how ecumenical efforts in the past helped American workers and their advocates to achieve these objectives. The efforts explored in the book were those of the Catholic social-action movement from the mid-1930s to the mid-1950s, which, like the Protestant "social gospel" movement of the 19th century or the Jewish labor lyceums of the early 1900s, the author notes, contributed to this nation's sense of worker justice. For a flyer with more information about the book, contact the author at kimbaker1@comcast.net.

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Thank you for your cooperation.

Phil Maier
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