

Panelists Address Future of Labor and Employment Practice

By David L. Johnson

Against the backdrop of decades of significant legislation and court battles impacting the workplace, prominent attorneys met at the Section's Annual Conference in Atlanta to debate and predict what the future holds for the practice of labor and employment law.

Given funding challenges faced by the Equal Employment Opportunity Commission and other federal agencies, panelists discussed the future roles agencies are likely to play in enforcing legislation affecting the workplace. According to Howard Radzely, a partner with Morgan, Lewis & Bockius in Washington, D.C., and former Deputy Secretary of Labor, federal agencies are "currently struggling for relevance."

Agency Guidance Needed

Radzely believes that federal agencies must do better at offering consistent guidance to the courts. He questioned whether courts are respecting the agencies' positions, particularly when those positions change from administration to administration. "If agencies are going to remain relevant, they need to find ways to get their guidance out and to ensure that the guidance is clear and the courts respect it. Right now, the jury's out as to whether that is the case."

Other panelists agreed that the hesitancy of agencies to offer clear and consistent guidance has led to uncertainty within the workplace. Craig Becker, co-general counsel of the AFL-CIO in Washington, D.C., and a former member of the National Labor Relations Board, attributes this to the nature of our "balkanized government structure." Becker believes that government agencies will try to work collaboratively to implement and enforce policy on a consistent basis, but he does not foresee an overhaul and combining of government agencies in the absence of a significant budget crisis.

Becker said the current budget

constraints merely "highlight a problem that can never be escaped." Regardless of how much money is allocated to administrative agencies, "[t]here are too many workplaces for any kind of effective agency enforcement, there are too many competitive pressures to undercut standards, and there is too much fear for employees to come forward." Because "there will always be inadequate resources," Becker suggests that the government focus on "educating and empowering workers to enforce the law, such as through class and collective action."

Barry Goldstein, a renowned plaintiff's attorney who currently is of counsel with Goldstein, Demchak, Baller, Borgen & Dardarian, in Oakland, California, applauded the significant roles government agencies play in enforcing labor and employment legislation. Noting that "the system has been remarkably effective," particularly since the Kennedy administration, Goldstein opined that "compared to other places, we've done it in a very efficient way." According to Goldstein, "we need to ask, in the long view, what is most effective for achieving the fundamental purposes of the law?"

Goldstein also anticipates that funding constraints will continue to inhibit agencies from taking a lead role in litigation. Consequently, he envisions that private sector attorneys will assume an increasingly important role in seeking remedies for aggrieved employees and deterring employers from violating the law.

Demise of Class Actions?

Goldstein and Becker are discouraged by recent Supreme Court decisions that appear to limit the ability of aggrieved employees to utilize class/collective action litigation as an effective mechanism to remedy unlawful employment practices and that enable employers to force employees to resort to arbitration. Stressing that employees have a "substantive

right to engage in concerted activity" and that "collective litigation is a form of collective bargaining," Becker lamented that employers "basically may now unilaterally preclude class actions" through contractual arrangements.

Becker said that this case law "will kill class actions" if allowed to stand.

Goldstein, however, is confident that Congress will step in to help workers if needed. Noting several recent instances in which Congress—regardless of the political party in power—has essentially "overruled" the Supreme Court's narrow interpretations of employment legislation through statutory amendments, Goldstein expects that "this is one trend that likely will continue. . . . [I]f the Supreme Court continues to become so hostile to class and collective actions, we're going to have a law by Congress that will wipe out arbitration, and that's not necessarily going to be good."

Antidiscrimination Laws

Goldstein predicts that Congress will expand nondiscrimination legislation. It could, for example, amend Title VII to prohibit discrimination on the basis of sexual orientation. He also foresees that Congress will amend nondiscrimination legislation to broaden remedies. Amending the cap on damages set forth in Title VII would be one means of doing so. In the meantime, Goldstein believes that states will continue to enact nondiscrimination legislation that is broader than federal legislation and that many large employers will voluntarily implement broad antidiscrimination policies.

NLRB Role Changing?

The panelists also discussed the future of collective bargaining and the role of the NLRB. Radzely criticized recent "controversial" NLRB decisions relating to social media, the posting of notices, and the ability to

preserve the confidentiality of workplace investigations. "I have no doubt that eventually [several NLRB decisions] will be struck down by courts," stated Radzely. He believes that certain Board members have "fundamentally changed the role of the agency."

According to Becker, the NLRB has merely been doing its job. "Unions are changing because the workplace is changing, and this is why the NLRB is changing," he stated. Noting that union membership is "holding steady" at 12 percent of the U.S. workforce, Becker is confident that unions will continue to play an "extraordinarily important part of the regulation of the workplace" in the coming years.

Wage Growth vs. Productivity

Becker said the "principal question for federal labor policy today" is how to address stagnant wages. Noting the significant growth of the U.S. economy over the last several decades, Becker asked: "Why, in the midst of this success, is there a decoupling of wage growth and productivity?" He suggested that this issue "may only be addressed by addressing the bargaining power of workers," noting that "there's been very little in new labor relations legislation" since the NLRA was enacted in 1935.

Radzely, on the other hand, fears that the consequence of additional laws and regulations impacting the workplace is the loss of U.S. jobs overseas. "If you over-regulate and raise minimum wages, workers lose their jobs," he remarked, and he suggested that "companies might pay employees more if they didn't have to allot money to defending litigation." ■

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