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State Marijuana Legalization Creates Dilemma for Employers

By John M. Husband

At last count, 23 states and the District of Columbia have legalized the use and possession of marijuana for medical purposes and four states have legalized marijuana for recreational use. The initially curious anomaly of legalized marijuana in these states has now opened a complex Pandora's Box of legal issues for employers across the country.

Marijuana—its use, cultivation, transport, sale, possession, and all other related activities—remains unequivocally illegal under federal law. Legalization of marijuana at the state level does nothing to change that, creating, instead, a major dissonance for employers who must also comply with federal laws.

Setting the stage for this state–federal conflict is a handful of federal laws, most a legacy of the early drug and culture wars of the 1970s. The centerpiece of criminalization of marijuana at the federal level is the Controlled Substances Act, 21 U.S.C. §§ 801–971, enacted as part of the broader Comprehensive Drug Abuse and Prevention Act of 1970. Under the CSA, marijuana is a *Schedule I* drug—the most dangerous of narcotics under federal law.

Notwithstanding the CSA and in true "laboratory of democracy" style, in 1996, states began to approve the legal use of medical marijuana, through either popular vote or legislation. Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington have decriminalized marijuana in some form or for some purpose. Eleven additional states have pending ballot or legislative measures seeking to legalize medical use of marijuana. Additionally, between 2012 and 2014, Alaska, Colorado, Oregon, Washington, and the District of Columbia legalized recreational use of marijuana.

With state legalization of marijuana becoming more widespread, employers are facing new issues related to employees using or possessing marijuana legally under state law, including those concerning drug testing, terminations, disability discrimination, and unemployment. Courts are only now beginning to address the intersection of state and federal laws regarding marijuana and employment laws.

Most cases involving an employee's use of marijuana have been decided in the employer's favor and have relied on the fact that marijuana remains illegal under federal law. For example, an employer who terminated a quadriplegic employee who tested positive for marijuana did not violate Colorado's lawful activities statute. The Colorado Supreme court concluded that because medical marijuana is illegal under federal law, the activity could not be "lawful" for purposes of the Colorado lawful activities law. *Coats v. Dish Network, LLC* 2015 Colo. 44 (2015).

Similarly, in *Casias v. Wal-Mart Stores, Inc.* (6th Cir. 2012), an

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Commentary

"Depoliticizing" the NLRB: Some Administrative Steps

By Samuel Estreicher

The charge of NLRB "politicization" contains a kernel of truth but is nearly always an overstatement. Most cases involve relatively fact-specific applications of the National Labor Relations Act by administrative law judges, stir little controversy, are summarily affirmed without dissent, and are routinely enforced by courts of appeals. Only in a relatively small number of cases and certain agency initiatives such as the promulgation of national rules, where the law is either unclear or reversal of agency law is sought, are Board members likely to be responsive to their pre-NLRB political or ideological inclinations.

Nevertheless, the perception of a "politicized" agency is a problem that needs to be addressed. Here are some suggestions, none of which require a statutory change, that I hope the Board and its general counsel will consider.

Stabilizing Board Law

By internal agreement, the members of the Board should bind themselves to a Rule of Four: all cases coming to them contemplating or requiring a reversal of a prior NLRB decision—already identified via the Board's calls for amici briefing—would be heard by all five members and would require a vote of at least four members to take effect. This proposal does not require rulemaking. It would send a message to all affected by the Board's work that the agency's policy is to preserve the stability of Board law, that policy reversals will be more exceptional than has been the case, and that some bipartisan support will be required to overturn a prior decision.

Again, by internal agreement, the Board should require that any decision to overrule a prior decision detail the new evidence that has emerged or the changed circumstances that have occurred that justify such an overruling. A change in the composition of the Board or a judgment that the first decision was simply wrong would not be a sufficient justification.

Improving Decision-making Quality

Despite the initial success of healthcare-bargaining unit rulemaking in the 1980s and the Supreme Court's unanimous endorsement of the agency's authority to engage in legislative rulemaking in *American Hospital Association v. NLRB,* 499 U.S. 606 (1991), the Board appears to be wary of further rulemaking initiatives. Three setbacks have led to this attitude: legislative reaction to the single-location bargaining unit initiative during the Clinton administration, rejection by two courts of appeals of the agency's notice-posting rule, and the still uncertain future of its representation-case procedure rulemaking.

Rather than abandoning rulemaking, the Board should craft rules that better accommodate conflicting interests. Judicial objections should be taken into account. For example, to address the D.C. Circuit's criticism that the Board's notice-posting rule impermissibly infringed on the free speech rights of employers, the Board could re-launch a notice-posting rule omitting the fact-pattern illustrations and the remedial provisions in the rejected rule. It could then make the case that it acted within its statutory authority and that there are no serious Section 8(c) difficulties with such a stripped-down notice rule.

In other situations, the Board might use a notice-and-comment procedure where the end result is not a rule but information that helps the Board consider important regulatory questions. Under an extension of the reasoning in *Excelsior Underwear Inc.* (1966), the Board has the authority, after a representation election has been scheduled, to afford the petitioning labor organization access to certain nonworking areas of the employer's facility to discuss with employees the merits of voting for the union.

The statutory goal of an informed employee electorate would be advanced by such limited access. A notice-and-comment proceeding could be used to test reactions among practitioners and help the Board to learn in depth the practical issues that bear on the question before it. Equipped with such information, the Board's decision is likely to be sounder on the merits and more likely to receive a favorable review in the courts.

The charge of politicization is nearly always overstatement, but the perception is a problem to be addressed.

Husbanding Political Capital by Deferral/Abstention

This is a proposal for a broadening of *Collyer*-type deferral to arbitration: if the parties are in an established collective bargaining relationship and there is a good reason to believe that their dispute is capable of being resolved in the parties' agreed-upon arbitration process, the Board should abstain, reserving its jurisdiction for review of any award at the conclusion of the arbitration process.

For example, a union's ULP charge against a company considering the transfer of unit work to another location should be deferred to arbitration to determine whether the company has authority to transfer. Although this proposal is in some tension with the Board's recent ruling in *Babcock & Wilcox Construction Company* (2014), and resolution of the contractual issue via arbitration may not fully resolve the statutory question, arbitration is likely to resolve many of the underlying factual issues and, as a practical matter, encourage the parties to resolve the underlying dispute.

The basic idea here is that disputes in an established relationship are best left for the parties to tackle on their own and, at the end of the day, the Board should not, and usually cannot, change the outcome of the bargaining. The theoretical existence of a statutory question is not a good enough reason for the Board to get involved when there is reason to believe that the parties' agreed-upon arbitration process can resolve the dispute or is otherwise worth pursuing. ■

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NLRB Outlines New Arbitration Deferral Standards

By Keith D. Greenberg

At the close of 2014, the National Labor Relations Board changed its approach to deferring to arbitral determinations on unfair labor practice (ULP) charges arising in grievance arbitrations.

In *Babcock & Wilcox Construction Co., Inc.* (2014), the Board determined that it would defer to an arbitrator's award deciding a ULP charge where the arbitration procedures appear to have been fair and regular, the parties to the arbitration have agreed to be bound, and a party has urged deferral so long as 1) the arbitrator was explicitly authorized to decide the ULP issue, 2) the arbitrator was presented with and considered the statutory issue or was prevented from doing so by the party opposing deferral, and 3) Board law reasonably permits the award. The new standard is to apply prospectively only, except in pending cases where parties have explicitly authorized an arbitrator to decide ULP charges.

Grievances allege a violation of the collective bargaining agreement between a union and an employer. By contrast, a ULP charge is an allegation that an employer or a union committed a violation of the National Labor Relations Act and may be brought by an employee (prospective, current, or former), a union, or an employer. Despite fundamental differences between these contractual and statutory forms of redress, it is common for a ULP charge and a grievance to be filed over the same set of facts. Addressing a related ULP charge during the grievance procedure can be an efficient means to conserve the parties' resources and avoid relitigating the matter.

The Board first announced a post-arbitral deferral standard for ULP charges in *Spielberg Mfg. Co.* (1955). In *Spielberg*, the Board stated that it had the discretion to defer to arbitral decisions where "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act."

After a series of decisions further modifying the standard, the Board, in *Olin Corp.* (1984), again modified its deferral standard, holding an arbitrator has adequately considered the ULP if 1) the contractual issue is factually parallel to the ULP issue and 2) the arbitrator was presented generally with the facts relevant to resolving the ULP.

Olin further set forth that, as in *Spielberg*, the arbitrator's decision must not be "clearly repugnant" to the National Labor Relations Act and that it be "palpably wrong" to be so repugnant. Under *Olin*, the party opposing deferral was required to demonstrate that these standards had not been met. The *Olin* standard remained in effect from 1984 until the Board's decision in *Babcock & Wilcox* this past December.

In articulating the *Babcock & Wilcox* standard, the Board clarified that deferral to an arbitral award is appropriate where the arbitrator's decision constitutes "a reasonable application of the statutory principles that would govern the Board's decision, if the case were presented to it, to the facts of the case." The Board noted that, to meet this standard, the arbitrator need not reach the same result that the Board would have reached and clarified that it will not engage in a de novo review of the arbitrator's decision.

In a further change from the *Olin* standard, the Board shifted the burden of proving the appropriateness of deferral back upon the party urging deferral. The Board also changed its deferral standards with regard to post-arbitral grievance settlements: it will not defer unless the parties intended to settle the ULP issue, the settlement agreement addresses the ULP issue, and Board law reasonably permits the settlement agreement.

Separate from the Board's post-arbitral deferral standards are its pre-arbitral deferral standards for deferral to parties' grievance and arbitration procedures, rather than to particular decisions.

As set forth in *Collyer Insulated Wire* (1971) and *United Technologies Corp.* (1984), the Board will exercise its discretion to defer a ULP charge to the arbitration process arising under a contractual grievance procedure before an arbitration award has been issued when 1) the conduct at issue in the ULP charge is cognizable under the grievance procedure, 2) the grievance procedure culminates in final and binding arbitration, and 3) the charged party waives all timeliness defenses to the grievance. Consistent with the changed standards for post-arbitral deferral in *Babcock & Wilcox*, the Board will no longer defer cases to the arbitral process unless the arbitrator is explicitly authorized to decide the statutory issue, either by a provision in the parties' collective bargaining agreement or by agreement of the parties in a particular case.

The Board attributed its deferral standards change to, in part, its concern that the existing *Olin* deferral standard did not adequately protect employees' exercise of their Section 7 rights, since a party opposing deferral under *Olin* would be hard-pressed in most cases to prove that the arbitrator had not adequately considered a ULP issue. The Board also noted that, based upon expectations developed by application of the *Olin* standard, both the Board's general counsel and parties may have declined to oppose deferral in many cases.

Notably, many *Babcock & Wilcox* changes are consistent with the approach urged by the Board's former acting general counsel in 2011. The current general counsel published new guidance on deferral in the wake of *Babcock & Wilcox* in February 2015. ■

The Board will no longer defer cases to the arbitral process unless the arbitrator is explicitly authorized to decide the statutory issue.

Keith D. Greenberg (*keith.d.greenberg@gmail.com*), a labor and employment arbitrator and mediator in North Bethesda, Maryland, serves as neutral co-chair of the Section's National Programs Subcommittee.

By Joyce Margulies, Chair

2015–2016 Section Year: A Retrospective

In this, my last newsletter article as Section Chair, I decided to look back at a year of accomplishments by Section members. The Strategic Planning Committee, composed of the Section Chair, Chair-Elect Wayne Outten, Vice Chairs Gail Holtzman and Don Slesnick, and Immediate Past Chair Joel D'Alba, and the Section Council spent a good part of its time on an in-depth review of the Section's budget to ensure its alignment with Section priorities and its fiscal integrity. We are coming to the end of that process and plan to finalize the budget at the summer Council meeting. Highlights of other Section activities include the following.

Section Member-at-Large of the Board of Governors

Every 10 to 12 years, the Section of Labor and Employment Law has the right to submit a nomination for member-at-large to the ABA Board of Governors. We had that rare opportunity this year, and the Section by consensus selected Bernard "Bernie" King. Bernie served as Section Chair from 1987 to 1988 and has stayed active in the Section since that time. Most recently, he served as chair of the Consensus Principle Task Force. Bernie is a senior partner at Blitman and King, representing private and public employee benefit plans and labor unions.

CLE/Institutes and Meetings (CLE) Committee

The CLE Committee produces continuing education programs for the Section. It is composed of three subcommittees. The Annual Section Conference Planning Committee meets year-round to plan and implement the Annual Section Conference that takes place in early November. This year's meeting will be in Philadelphia November 4–7. It will feature 80 CLE programs, and we anticipate an attendance of 1,300–1,400. The National Programs (Webinar) Subcommittee produced 13 programs this year, including such wide-ranging and timely topics as worker misclassification, whistleblower claims, and pregnancy discrimination. We hope you have not blocked Section emails and are able to receive timely notice of these programs. The ABA Annual Meeting Subcommittee has planned three excellent programs for July 31 at the Association's annual meeting in Chicago: "The 24/7 Workplace," "Employment Law Implications of Legalized Marijuana," and "Cutting Edge Issues in Investigations."

Membership Development and Marketing Committees

The Section currently has approximately 22,000 members, including over 5,000 law student members, and has undertaken several measures to recruit and maintain members. The Membership Development Committee reached out to law firms to encourage them to send newer lawyers to the Section's meetings. The Marketing Committee established a member Spotlight Program that features a different Section member each week on the Section's website. From November through April, 22 Section members from all constituencies were featured. To get your name in lights, fill out an application on the Section's home webpage. The Committee also produces the monthly online publication, *The FLASH*. *The FLASH* welcomes articles from all Section members.

Joyce Margulies (*jmhrlaw@gmail.com*), of Margulies Employment Law Consulting in Memphis, Tennessee, advises local and neutral businesses in matters of labor and employment law and is chair of the Section.

Leadership Development Program (LDP) Committee

The Section's Leadership Development program was established seven years ago. LDP Committee membership is open to all Section members. Those who are selected participate in a training program, which is followed by work on a Section project. The LDP co-chairs held teleconferences on work-life balance, tips for attending the Los Angeles Section Conference, and involvement in the Trial Advocacy Competition. We are interested in encouraging Section members to apply for the Leadership Development Program, and we hope you will apply the next time the Section solicits applications.

Pro Bono Work Committee

Every year, the Pro Bono Work Committee encourages the Standing Committees to hold pro bono activities at their Midwinter Meetings. Events this year included a silent auction at the Employee Benefits Committee meeting, which collected over $2,500 for the San Diego Family Justice Center Foundation; a partnership between the Employment Rights & Responsibilities and the Harry Chapin Food Bank for its annual "ERR Gives Back"

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Illinois Fails to Stop Collection of Fair Share Fees

By Roy Carlson

This winter, less than a month into his term, the governor of Illinois, Republican Bruce Rauner, challenged state employee unions by attempting to curtail the collection of "fair share" fees, agency fees collected from nonmembers within the bargaining unit to cover the cost of bargaining, implementing, and enforcing the contract.

Governor Rauner took office with Democrats holding large majorities in both houses of the Illinois legislature. Rather than seek legislative support to repeal the Illinois law that allows unions to enter into collective bargaining agreements with agency fee provisions, Rauner issued an executive order directing all state agencies to withhold the fair share fees owed to various unions and to place all such fees in an escrow account.

The same day, the Governor filed a federal lawsuit against unions representing state employees seeking a declaratory judgment that his executive order was constitutional. According to Governor Rauner, ". . . [I]t is clear that the so-called 'fair share provisions' of the current collective bargaining agreements are also unconstitutional."

The constitutionality of fair share provisions in public sector collective bargaining agreements was resolved by the U.S. Supreme Court in *Abood v. Detroit Board of Education* 431 U.S. 209 (1977). The Court in *Abood* held that a collective bargaining agreement between a government entity and a union may, consistent with the First Amendment, require public employees to pay a fair share of the cost that the union incurs negotiating on their behalf. The Court upheld the requirement as permissible so long as the union was using the money for collective bargaining and contract administration, rather than for political activities.

Governor Rauner's actions were based on language criticizing *Abood* last year in *Harris v. Quinn* 573 U.S. __ (2014) in which the Court ruled that deduction of fair share fees from Illinois' home healthcare workers was not permissible, partly because they were not "full-fledged" public employees. Justice Alito remarked in the majority opinion that fair share provisions "unquestionably impose a heavy burden on the First Amendment interests of objecting employees." On June 30, the Supreme Court agreed to hear *Friedrichs v. California Teachers Association,* in which a teacher, who is not a union member, is asking the Court to overrule *Abood* on First Amendment grounds.

Although the 5–4 majority in *Harris* ruled that compelling the home healthcare workers to pay fair share fees violated the First Amendment, the justices stopped short of overturning *Abood*. Governor Rauner nevertheless sought support for his agenda with the courts and with state officials, declaring that by continuing to collect the fair share fees from nonunion members, the state was violating their First Amendment rights.

Governor Rauner's actions, however, were unsuccessful. On February 13, both the Republican State Comptroller Leslie Munger and Attorney General Lisa Madigan, a Democrat, announced that they would not follow the executive order, calling it a violation of Illinois law that permits public sector unions to bargain fair share provisions in their collective bargaining agreements within the framework of *Abood*.

Public sector unions reacted quickly by filing a legal challenge to the executive order in state court on March 5. On April 10, the Circuit Court of St. Clair County approved an agreement between the unions and Governor Rauner, shutting down the escrow collection of fair share fees and allowing all of the funds to be paid to the unions until the case is resolved.

Illinois Governor Bruce Rauner AP PHOTO

On May 20, U.S. District Judge Robert Gettleman dismissed the Governor's federal lawsuit, ruling that the Governor lacked standing to challenge fair share fees because he had no personal interest at stake.

Prior to the dismissal, however, Governor Rauner's legal team, in an attempt to deal with a possible standing problem, had amended the complaint to add three nonunion members as additional plaintiffs. Judge Gettleman allowed the case to continue as to those plaintiffs.

Governor Rauner's challenges to Illinois' unions have not been limited to battles over fair share provisions. As part of his "turnaround agenda" targeting the state's fiscal problems, he has advocated the creation of local right-to-work zones that he has termed "empowerment zones." Local governments (towns, cities, counties, etc.) located within empowerment zones would be permitted to determine which issues, if any, would be subject to collective bargaining. In addition, under the proposal, towns, cities, and counties would be permitted to enact their own right-to-work ordinances.

Illinois Attorney General Madigan drafted a memorandum for both legislative houses in which she concluded that a right-to-work law could only be implemented statewide (or territory-wide) under the National Labor Relations Act. She found that since Illinois has not adopted a statewide right-to-work law pursuant to § 14(b) of the NLRA, any such law enacted by a local government would be preempted by federal law.

Officials in some towns have ignored Ms. Madigan's opinion and supported the idea of empowerment zones, but many communities, even in traditional Republican areas of the state, have spoken out in opposition to the Governor's idea. In response, both public and private sector unions have united in opposition to his agenda. ■

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Ethical Challenges Lurk in Multi-Plaintiff Cases

By David L. Johnson

Lawyers representing multiple plaintiffs in non-class action cases often struggle with the fiduciary duty owed to each plaintiff—who retains control of his or her lawsuit?

A defendant is often interested in a global resolution of all claims for one lump sum and does not care how that sum is divided among the plaintiffs. Plaintiffs' counsel, however, is placed in the precarious position of trying to account for the best interests of each of their clients when those interests may conflict.

The recent decisions of *Johnson v. Nextel Communications, Inc.* 660 F.3d 131 (2d Cir. 2011) and *Lofton v. Wells Fargo Home Mortgage* WL 5358364 (Cal. Ct. App. 2014), illustrate the dangers that plaintiffs' attorneys face when they are perceived as acting in furtherance of their own interests rather than that of each of their clients. Ethical rules as written arguably do not take into account the practical realities presented in large multi-plaintiff cases.

Under ABA Model Rule 1.8(g), "[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the client . . . unless each client gives informed consent, in a writing signed by the client." As noted in ABA Formal Op. 06-438 (Feb. 10, 2006), this rule protects a client's right to have the "final say" in settlement after full disclosure.

Thus, a lawyer must advise each client of "the total amount or result of the settlement or agreement, the amount and nature of every client's participation in the settlement or agreement, the fees and costs to be paid to the lawyer from the proceeds or by an opposing party or parties, and the method by which the costs are to be apportioned to each client."

According to Richard Zitrin, an expert who teaches and practices in the area of legal ethics in San Francisco, "If a law firm has to truly give individual advice to each client and look out for the best interest of each client, the firm may not be able to fulfill its fiduciary duties to each client without giving conflicting advice."

The ABA's ethical rules, in Zitrin's view, "throw two major roadblocks in the way of mass-tort lawyering: the individual client's right to agree to all settlement terms and the prohibition against lawyers accepting lump sum settlements without the consent of all clients. Individual client autonomy often is displaced by 'the greater good,'" and "even full disclosure may not be enough unless the attorney also provides individualized advice to each client—a real stumbling block given the conflicts that inherently surface among clients."

Zitrin and others advocate amending the current ethical rules, which, they argue, are not realistic for even the most ethical and well-intentioned of attorneys. According to Zitrin, "we must endeavor to bridge the gulf between the rules, which are inflexible, and the reality of modern practice."

He favors "slight" revision of the current rules, "not to *broadly* permit attorneys to negotiate aggregate settlements when significant fees and conflicts issues are in play, but to *narrowly* permit clients to knowingly abrogate some degree of their individual settlement authority after they have been provided full disclosure."

The key, according to Zitrin and others, is to encourage thoughtful and comprehensive retention agreements at the inception of the attorney-client relationship so that prospective clients are advised that they would be part of a group represented by the firm, that the firm may make decisions in the interests of the majority of the clients, and that such decisions may not necessarily be in the individual client's best interest.

Others have suggested utilizing matrices or "damages averaging" to structure an objective framework for allocating an aggregate settlement. So long as the clients "are assured that, even if they choose not to accept a settlement, their attorneys will continue to represent them to the best of their abilities," Zitrin believes that arrangements such as these should be deemed compliant with ethical parameters.

Unless and until the current ethical rules are amended, plaintiffs' attorneys should tread very carefully when representing large numbers of plaintiffs in non-class action cases. At a bare minimum, it is essential for counsel to ensure that clients have the benefit of all pertinent information and for counsel to avoid the appearance that a settlement is structured in counsel's best interest rather than the client's. ■

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Alaska Native Organizations: Subject to Title VII?

By Nicole D. Franklin

Shortly after I began my job as assistant general counsel to the Association of Village Council Presidents in Bethel, Alaska, I received the following question from an administrator: "As a tribal organization, are we exempt from Title VII?" Our human resources director had resigned before I arrived, and I needed to provide the advice. Initially taken aback, I gave the standard, "Let me do some research and get back to you," and was introduced to employment law in the context of an Alaska Native organization.

When many attorneys outside of Alaska think about federal Indian law, they automatically conflate American Indians and Alaska Natives into one category. Aside from the very distinct cultural and ethnic differences, Alaska has 229 of the 566 federally recognized tribes in the United States but only one reservation. Distinguishing between jurisdictional issues and tribal sovereignty presents additional challenges that one may not find in a tribal organization located on tribal land in the "Lower 48."

In a 1993 report, the solicitor general of the U.S. Department of Interior stated that the "complexity of questions concerning the sovereign powers of Alaska Native groups arises in considerable measure from Alaska's unique circumstances and history. . . . The remote location, large size and harsh climate of Alaska further delayed the need to confront questions concerning the relationship between the Native peoples of Alaska and the United States." More than 20 years later, many of these questions still exist.

Under the Alaska Native Claims Settlement Act (ANCSA), as amended, Alaska Native tribes are separated into 12 geographic regions "having a common heritage and sharing common interests." Generally, nonprofit corporations associated with each region are governed by tribal government officials from each of the member tribes in these locations. The organizations manage several federal, state, and private grants to benefit their tribal members.

For tribal sovereignty purposes, these nonprofit entities also have the ability to negotiate and contract with the federal government under the Indian Self-Determination and Education Assistance Act (ISDEAA). ISDEAA delegated authority to tribes to administer and deliver their own programs rather than rely on the federal government to directly provide social and other services through the federal Indian trust responsibility.

In this setting, definitions matter. For instance, ISDEAA and a host of federal statutes include Alaska Native regional nonprofit corporations within the definition of "Indian tribes." However, these organizations are not listed on the U.S. Department of Interior's "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." Since Section 701(b)(1) of Title VII states tribes are not "employers" prohibited from engaging in discriminatory practices as defined in the statute, the question I received in my first weeks on the job was significant.

Finding a clear answer took more time. Tribal jurisdiction continues to be a hotly contested issue in Alaska. While addressing the Violence Against Women Act's (VAWA) exemption for Alaska Natives (which was recently repealed), Myron P. Naneng Sr., president of the Association of Village Council Presidents, stated, "Alaska Tribes get singled out for separate treatment all the time and it needs to stop." Navigating the maze of federal and state law and policy proved to be a compelling yet daunting introduction to this area of law.

Though my focus was employment law, one of the first cases I came across was the NLRB's decision in *Yukon Kuskokwim Health Corp.* (2004), which involved another Alaska Native nonprofit organization. In this case, the Board declined to assert jurisdiction after balancing its "interest in effectuating the policies of the Act [NLRA] with the need to accommodate the unique status of Indians in our society and legal culture."

This aspect of "uniqueness" regularly arises when researching or discussing federal Indian law. For instance, recognizing that Alaska Native tribes would be excluded from Native hiring preferences without a clear definition of "Indian reservation," the EEOC included Alaska regional corporations and village corporations under the provisions of the Alaska Native Claims Settlement Act. In *EEOC v. Peabody Western Coal Co.* (2014), however, the EEOC argued that tribal hiring preference—based on tribal affiliation rather than Native preference—was a classification based on national origin and violated Title VII. In a decision that strengthens tribal sovereignty, the Ninth Circuit disagreed and held that tribal hiring preference was a political classification and therefore did not violate Title VII.

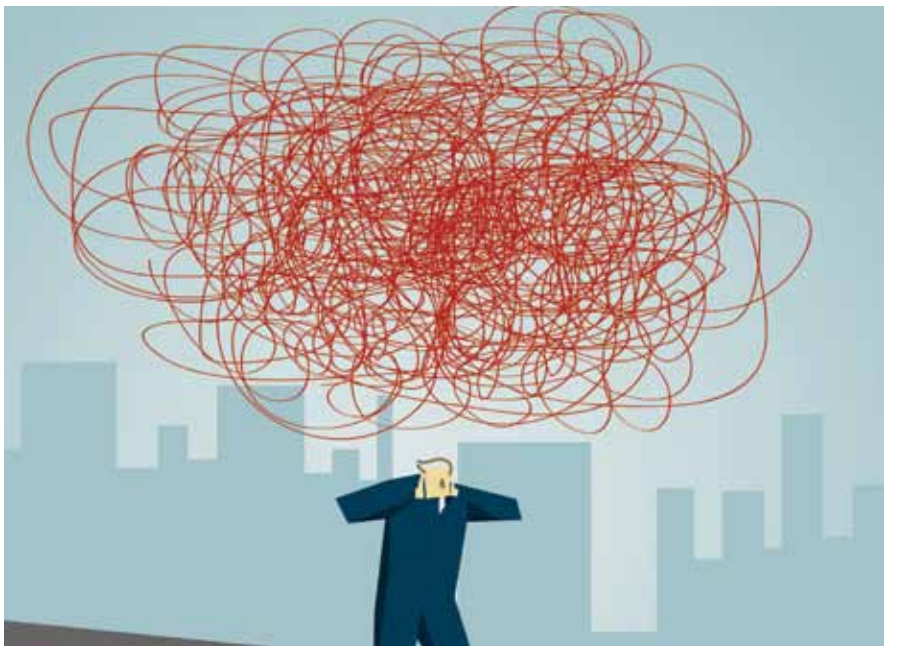
As the law evolves, understanding the differences between Native Americans and Alaska Natives in this context becomes one of the challenges of having a client whose board of directors includes 56 elected officials from independent tribes. Giving consistent and up-to-date legal advice and deference to tribal self-determination is often a balancing act with no easy answers. When tribal governments call for legal guidance or recommendations on employment matters, it is always useful to relate how our organization handles matters, with the caveat that the tribe's governing body has the authority to make its own decisions.

Thankfully, there are many highly qualified Alaska attorneys who advocate for increased recognition of tribal sovereignty and can provide guidance on these issues for those unfamiliar with or new to this area of law. As for the initial question of whether Title VII applies to an Alaska Native regional nonprofit corporation—feel free to do the research and get back to me. ■

Nicole D. Franklin (*nicole.franklin@denvergov.org*) recently became an assistant city attorney for the City of Denver, Colorado.

EEO Panel Addresses Mental Health Issues in Legal Profession

By Angie Davis



People who suffer mental illness are challenged on two levels: they struggle to confront both the disabilities that result from the disease and the public prejudices and stigmas associated with mental illness.

Lawyers are not immune from this struggle. According to the Centers for Disease Control and Prevention, the legal profession ranks fourth in the nation in suicide rates. Mental health issues regarding addictions, depression, and other emotional health conditions are prevalent among attorneys, who also contend with the stressful impact of embarrassment and humiliation when they choose to acknowledge their illness and seek treatment.

At the National Conference on Equal Employment Opportunity Law, I, along with Wynne Kelly of the Dave Nee Foundation in Washington, D.C., and Anupa Iyer of the Equal Employment Opportunity Commission in Washington, D.C., served on a panel addressing the effects of mental illness and suicide in the legal profession.

I focused on statistics. Mental health issues multiply as students progress through law school. Rates of reported illness increase geometrically with each year of school. Wynne Kelly discussed issues related to mental illness and suicide. Law students, like lawyers, are faced with challenges in dealing with mental illnesses complicated by an additional hurdle: they face an even greater potential challenge because they may have to disclose their mental illness on character and fitness questions related to state bar admissions.

Many law students are hesitant to disclose such disabilities or seek treatment out of fear of being excluded from the bar. Instead, students turn to self-medicating through the use of drugs or alcohol. The rates are alarming, as confirmed by a study led by Dean David Jaffe and Professor Jerry Organ and funded by the ABA and the Dave Nee Foundation.

The majority of states include mental health inquiries as part of their bar application process, making law students less likely to seek therapy or treatment. Kelly discussed the pressures on law students that loom as they contemplate passing the bar exam without a guarantee of admission to the bar unless they can demonstrate that they possess the requisite fitness and moral character for the practice of law.

Many bar associations ask intrusive questions such as whether law students have been diagnosed or treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder. Such questions discourage many applicants with mental disorders from seeking treatment. Kelly also discussed current litigation in various states to end such intrusive questions. Many states, as part of the law school admissions process, can ask questions of potential lawyers that most employers would not be allowed to ask under Title VII and the Americans with Disabilities Act. Kelly highlighted one state that required law students to appear before a panel of three lawyers—*not doctors*—to answer questions about their ability and competency to practice law with their mental illness.

The Dave Nee Foundation was named in honor of one of Kelly's law school classmates who committed suicide during their 3L year. Kelly discussed how Nee was one of the most engaging, personable members of the class—a leader with a bright future. His classmates wrote off his gradual withdrawal to being overcommitted, and they were stunned when he took his life. No one recognized in him the symptoms of depression. Kelly now visits schools to talk about mental illness. He encourages students to get help if they recognize these symptoms in themselves, and he speaks about ways to address colleagues who seem to need help.

The Dave Nee Foundation has partnered with Akin Gump on the Michael Starr Project, an initiative that seeks to eradicate such questions on character and fitness exams. After litigation, Louisiana changed questions on its fitness examination that allegedly violated Title II of the Americans with Disabilities Act and its implementing regulations. Many state and local bar associations have enacted lawyers assistance programs to encourage attorneys confronting mental health issues to come forward and seek treatment. The cornerstone of these programs is protection of confidential information disclosed by attorneys, law students, and judges seeking assistance.

Anupa Iyer brought the issue home to the audience as she discussed her own experience working as a lawyer while living with mental health conditions and explained what employers can do to make a work environment more inclusive for employees with such "hidden" disabilities." Iyer related her history with eating disorders and depression. She overcame this disability to complete law school but did not immediately seek to practice law out of fear that she would be disqualified when she disclosed her history during the fitness inquiry.

Only after a period of working on human rights matters overseas was Iyer able to face the issues and return to the United States to work as a lawyer. She now is on the staff of EEOC Commissioner Chai Feldblum, where she focuses on policy work.

Ms. Iyer highlighted the value to the individual of "disability pride" in addressing the stigma of mental illness and encouraged employers to be more open in their discussions with regard to mental disabilities in the workplace. Having open and forthright discussions related to seeking mental health services in our profession will encourage lawyers to seek treatment and enable them to lead healthy and productive work lives. ■

Angie Davis *(angiedavis@bakerdonelson.com)* is a shareholder in Baker Donelson's Memphis office.

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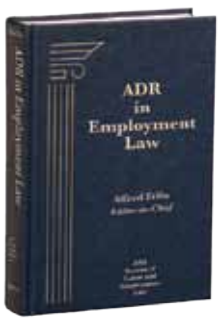

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Cannabis

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employee who used marijuana off-duty for pain associated with cancer was terminated after failing a drug test, despite having a medical marijuana registry card. The court held that Michigan's medical marijuana statute only provides a defense against criminal prosecution and other adverse action by the state but does not regulate private employment.

Employers also have successfully defended disability discrimination claims—courts have ruled that employers have no duty to accommodate medical marijuana use for an underlying disability. In *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus*. 230 P.3d 518 (2010), an employee who used marijuana outside of work for medical reasons claimed his termination violated Oregon's disability discrimination law. The court held that an employer has no obligation to accommodate an employee's use of medical marijuana because the use of marijuana is illegal under federal law. Similarly, a Colorado federal court ruled in favor of an employer on a disability discrimination claim after the employer discharged the employee for violating his employer's drug policy. *Curry v. MillerCoors, Inc.* No. 12-cv-02471 (D. Colo. Aug. 21, 2013).

Whether an employer must offer a reasonable accommodation for marijuana use for disabled employees, however, is not clear. In 2014, Nevada amended its medical marijuana law to require that employers make reasonable accommodations for an employee who holds a valid registry card and uses marijuana for medical purposes. Like the Americans with Disabilities Act (ADA), Nevada's amendment contains exceptions for reasonable accommodations imposing an undue burden on the employer or posing a threat of harm or danger to persons or property. Only time will tell if other states follow Nevada's lead or if other jurisdictions will decide a reasonable accommodation of marijuana use is warranted under state or federal disability laws.

Finally, in the unemployment context, courts have concluded that the use or possession of marijuana can constitute misconduct resulting in the denial of unemployment benefits. In *Beinor v. Industrial Claim Appeals Office* 262 P.3d 970 (Colo. App. 2011), a Denver street sweeper who used marijuana off-duty for migraine headaches tested positive during a random drug test and was discharged for violating his employer's zero-tolerance drug policy. The court upheld the denial of his unemployment benefits, finding that Colorado's medical marijuana law did not create a state constitutional right to use marijuana but instead only created limited exceptions to state criminal laws.

With increased state legalization of medical and recreational marijuana use by employees, employment issues related to marijuana use will only become more pressing and widespread. With no foreseeable change in federal law regarding marijuana's illegality, practitioners and their clients need to proceed cautiously until further clarity is achieved through judicial, legislative, or agency interpretation. ■

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The Section

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event; a "pro bono showcase" instituted by the Federal Labor Standards Legislation Committee to discuss its members' pro bono work and potential opportunities for members to participate; and the raising of more than $1,000 for Kids' Chance, Inc. by the Workers' Compensation Committee. The Pro Bono Work Committee also is in the process of soliciting nominations for the Frances Perkins Public Service Award, which is given to Section members, firms, corporate and union legal departments, government agencies, and other organizations that help meet the crucial need for pro bono labor and employment law practitioners.

Diversity in the Legal Profession (DLP) Committee

The DLP Committee has been working with a consultant to prepare a report on the Section's diversity efforts. Its members also work with the Section's Standing Committees to hold events involving diversity issues at the Midwinter Meetings. This year, these events included an excellent presentation at the Technology in the Practice and Workplace Committee meeting by lawyers who were proficient in the use of adaptive technology enabling individuals without the ability to see, hear, use fine motor skills, or talk to excel in the workplace. Several committees held discussion groups about various diversity issues, including work–life balance.

Publications Committee

The Section's 27 treatises are published by Bloomberg BNA and authored by the Section's Standing Committee members. Most notably, Tim Darby, who has been the excellent BBNA editor responsible for the Section's publications, is retiring at the end of June 2015. We welcome his successor, David Wagoner, and say a fond farewell to Tim. The Publications Committee is responsible for the administrative work involved in these publications and oversees the *ABA Journal of Labor & Employment Law*, which is edited by Professors Stephen Befort and Laura Cooper and the Law Review of the University of Minnesota Law School. The Committee is in the process of arranging for the digitization of the *Journal* so that members can receive it online.

Trial Advocacy Competition

This year the Competition hosted 101 teams in a series of mock trials presenting and defending a claim of failure to pay minimum wage. The hypothetical involved exotic dancers suing the club in which they danced for unpaid minimum wages. The regional rounds of the Competition called upon more than 475 volunteer evaluators and judges in eight regional cities who spent half a day or more at the program itself. The finals were held in New Orleans, and the successful team was from the University of California at Berkeley.

Outreach to Law Students Committee

The Committee's primary outreach activities involve Careers in Labor and Employment Law programs at law schools around the country coordinated by Section volunteers. Program activity more than doubled this year; it reached 23 law schools with over 400 law students attending. Any Section member can volunteer to coordinate a program in their area.

Human Trafficking Task Force

Our Task Force has been working with the Business Law Section to share information about corporate training modules that can be utilized by members of both Sections to provide advice and effective guidance to clients on how to eradicate human trafficking at all steps in the labor supply chain. The Task Force also will work with the Department of Labor on webinars and other outreach efforts and to share information to increase our ability to serve as a resource for our members.

I hope you have enjoyed and benefited from your involvement with the Section this past year and that you will continue to do so as we move forward under the capable leadership of my successor, Wayne Outten. I look forward to seeing many of you at the 9th Annual Labor and Employment Law Conference November 4–7 in Philadelphia. ■

Major League Soccer Reaches New Pact with Players' Union

By Gary Bailey

Major League Soccer avoided a strike at the commencement of its 2015 season by entering into a new collective bargaining agreement with its players' union. After four days of negotiations, a five-year labor deal was reached that averted what would have been the first work stoppage in the league's nineteen-year history.

The agreement was reached after marathon bargaining sessions at FMCS Washington, D.C., headquarters. League executives, team owners, and players worked nearly around the clock to conclude bargaining in time for the season to start without delay.

The deal was reached not long after representatives of the Major League Soccer Players Union (MLSPU) voted 18–1 to reject a proposed eight-year contract and authorize a strike. With three days left before start of the season, a work stoppage seemed inevitable. Fortunately for the League, the players, and the fans, an agreement was reached in time for the season opener in Los Angeles.

The term of the contract was a real sticking point for the MLSPU. MLS sought an eight-year agreement to coincide with the term of its new $720 million television broadcast deals with Fox, ESPN, and Univision. These contracts more than triple MLS revenue from its previous media deals and provide a stable base for MLS to operate into the next decade.

The MLSPU opposed an eight-year deal and instead sought a five-year term that would allow the union to return to the bargaining table sooner and seek better resolution of issues that continue to concern MLS players.

At the heart of the players' concerns was the issue of free agency. Free agency allows players who are not under contract to sign with any team. Prior to this new agreement, MLS clubs held the exclusive team rights to players regardless of whether the players were under contract or even retired from the sport. MLSPU wanted unrestricted free agency.

Analysts note that, while free agency benefits players, it has economic disadvantages for owners. In addition to leading to bidding wars for talented players, increased salaries lead to diminished owner profits. Free agency can impose a greater burden upon teams in smaller markets that historically attract fewer ticket-buyers, concessions-consumers, and merchandise-purchasers to their stadiums than their competitors in larger populated areas. MLS officials have consistently argued that its success depends upon slow but steady growth, claiming that, with limits on players' salaries, expansion and popular appeal will result in increased playing opportunity and improved salaries.

MLS has a distinctly different business operation than other professional sports where free agency exists, which has complicated the efforts by the players and their union to achieve any type of free agency rights. In comparison to other professional sports, where each team is separately owned, the MLS owns all of its 20 teams. The day-to-day operations of teams are handled by the individual clubs, but players sign with the League, not the individual teams. Free agency would result in the League bidding against itself for free agent talent.

Players and the MLSPU argue the lack of free agency results inevitably in depressed salaries. Without free agency, the factors that create a demand for talented personnel are missing. With MLS broadcast revenues soaring, demand for talent is at its highest in League history. MLSPU argued that MLS could comfortably afford an expansion of players' salaries.

Although MLS is a smaller league than other professional sports leagues, its fan base continues to expand across the United States and into Canada. The 2015 season sees the addition of two more franchises, one in Orlando and a second franchise for the New York City market. The two new teams were scheduled to meet in the first week of the season at a sold-out Citrus Bowl in Orlando in front of 62,000 fans.

In the 2015 negotiations, the players succeeded in securing a form of free agency. That will address their immediate concerns without creating the unlimited bidding war that MLS wanted to avoid.

In the new agreement, players will be eligible for free agency if they are 28 years or older or have at least eight years of experience in MLS. This system of free agency will impact about one in every eight MLS players.

Those players who exercise free agency rights will be limited in how much their salaries can increase. Players making under $100,000 can receive up to a 25 percent raise, players making $100,000 to $200,000 can receive up to a 20 percent raise, and players making over $200,000 can receive up to a 15 percent raise. In those instances where players are deemed to be "vastly outperforming their contract" (as determined by a neutral arbiter), they will not be restricted by these negotiated salary caps.

AP PHOTO

The parties also agreed to raise the minimum salary from $36,500 to $60,000 ($70,000 by the end of the contract). Salary issues were paramount for both the players and the League, as MLS continues to promote itself as an attractive option for soccer stars from Europe, Asia, and South America.

Bob Foose, executive director of the MLSPU, commented on the new provisions that "we're 12 years into this union and we've been able to introduce some free agency. None of the other major leagues has ever done it anywhere near that quickly in North America."

"This agreement will provide a platform for our players, ownership, and management to work together to help build Major League Soccer into one the great soccer leagues in the world," stated MLS Commissioner Don Garber in a written statement after the deal had been announced. ■

Gary Bailey (*gbailey@fop.org*) is a union attorney with the Illinois Fraternal Order Police Labor Council and an editor of *LEL*.

Labor AND Employment Law

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American Bar Association
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SUMMER 2015, VOL. 43, NO. 4

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9th Annual Section Conference
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Calendar of Events

July 31
ABA Annual Meeting
Chicago, IL

November 4–7
9th Annual Labor and Employment Law Conference
Philadelphia, PA

TRIAL ADVOCACY COMPETITION

October 31–November 1
New York, NY
San Francisco, CA

November 7–8
Philadelphia, PA

November 14–15
Chicago, IL
Washington, DC

November 21–22
Dallas, TX
Miami, FL
Los Angeles, CA

National Finals
January 23–24, 2016
New Orleans, LA

2016 MIDWINTER MEETINGS

January 21–23
State and Local Government Bargaining and Employment Law Committee
New Orleans, LA

February 10–13
Employee Benefits Committee
Las Vegas, NV

February 17–19
Federal Labor Standards Legislation Committee
San Juan, PR

February 21–24
Committee on Development of the Law Under the NLRA
Naples, FL

February 24–27
Committee on Practice and Procedure Under the NLRA
Naples, FL

March 8–11
Occupational Safety and Health Law Committee
Santa Barbara, CA

March 15–19
Employment Rights and Responsibilities Committee
New Orleans, LA

March 17–19
Ethics and Professional Responsibility Committee
New Orleans, LA

March 30–April 2
National Conference on Equal Employment Opportunity Law
Presented by the Equal Employment Opportunity Committee
Austin, TX

April 6–8
National Symposium on Technology in Labor and Employment Law
Presented by the Technology in the Practice and Workplace Committee
Washington, DC

For more event information, contact the Section office at 312/988-5813 or visit *www.americanbar.org/labor*.