February, 2008

B&K LABOR UPDATE

What You Need to Know About Pre-Erisa Pension Credit As Boomers Reach Retirement

As many of your members get ready to retire they will face the issue of how their work in the early 70s gets credited toward their pension benefit. This issue has come to be called the pre-ERISA service issue. While ERISA has specific rules regarding breaks-in-service, accrual, and vesting, these rules do not necessarily apply to work done before 1975 -- the effective date of ERISA. But due to recent court decisions, your members who worked before 1975 are entitled to be credited for this service.

Recent court decisions have ruled that all years of service, including those pre-ERISA years, must be taken into account in determining a participant's retirement benefit. Thus, those participants with pre-ERISA years of service must have that service factored by the retirement plan into their benefit. This has created a complicated service analysis where the Plan, if any, in effect at the time of the pre-ERISA service, ERISA rules, and other equivalencies, must be factored to ascertain the benefit owed. Indeed, when it comes to pre-ERISA service, ERISA permits plans to choose an equivalency to be used to approximate hours of service to be credited. Accordingly, it is important to analyze exactly what your member is entitled to pursuant to the Plan, ERISA, and the equivalency.

If you have members who fit into this category, we would be happy to analyze their work history and the plan in effect to ensure that they receive their full retirement benefit.

Inside this Issue

Blitman & King LLP

Annual Labor & Employment Law Seminar

March 10, 2008
The Empire Room at The NY State Fairgrounds

www.bklawyers.com

The "September Massacre": Bush NLRB Presents New Challenges for Unions and Workers.

The Bush NLRB, at least for now, is history. Chairman Battista's and Member Kirsanow's terms have expired, along with Democrat Dennis Walsh's. Kirsanow has returned to private law practice as a management lawyer. Battista is looking for re-appointment to the Board, but the word is that the Democrats are not willing to do so, even as part of a "package deal" that would include Dennis Walsh.

Before the end of their majority status, though, the Republican appointees did a lot of damage to the rights of workers and unions. Sixty-one decisions were issued at the end of September by the Board, and these and decisions issued throughout the year overwhelmingly favored employers against the interests of labor. We'll be discussing many of these cases, and what we think you should do in response to them, at our March 10, 2008, 18th Annual Labor & Employment Law Seminar.

These cases include:

- Back pay: Board decisions shifted the burden of proof away from employers on critical standards that will result in less back pay, and harder to get back pay, for workers whose rights have been violated. These decisions included salting, and non-salting, cases.
- Strikers' rights to reinstatement: the Board now allows "at-will" replacements to trump the right of strikers to return to work.
- The Board expanded the definition of "supervisor" to deny NLRA protection to even more workers.
- The Board tightened up the right of unions to obtain information from an employer in situations like subcontracting where the union must now demonstrate "objective evidence" that the information was relevant to its need in proving a grievance.
- The Board approved an employer's going directly to locked-out employees to get their agreement to not strike if they were reinstated, when the union had refused to agree to such a commitment.
- The Board approved employers' prohibiting the use of office e-mail systems for union activities, even where the employer permits the use of such systems for other non-work related communication.
- The Board changed the rules on how much disclosure a union must make to dues ("Beck") objectors, now requiring a union to provide detailed information to objectors who have not even filed an objection in response to union provided categories of expenditures.
- The Board made it more difficult for unions to obtain and enforce "additional stores" clauses that require employers to grant recognition based on a simple card majority at a newly acquired facility.

These cases and others will be discussed at our 18th Annual Labor & Employment Law Seminar. We'll also cover the few cases that favor workers and unions, including:

- In successor employer cases, the Board will no longer require proof that the employees of the predecessor had the necessary experience and training to work in their same jobs for the successor employer.
- The Board ruled that in union merger or change in affiliation situations, it will not require a vote by union members approving the merger or change in affiliation.
- The Board reaffirmed long-standing case law that a union does not waive its bargaining rights by contract language or by its inaction, unless "clear and unmistakable" conduct establishes the waiver.
- In Section 8(f) construction industry cases, an employer can be held bound to a multi-employer association contract by virtue of its complying with that contract, even though it had pulled out of multi-employer bargaining and seeks to bargain its own new contract.

Dana: The NLRB's Latest Attack on Voluntary Recognition

Perhaps the most controversial of the 43 decisions issued in the last four days of September 2007 was the National Labor Relations Board's new restrictions on an employer's voluntary recognition of a bargaining representative imposed in Dana Corp., 351 NLRB No. 28 (2007). While the bargaining parties may continue to use "card-check" or "neutrality" agreements in organizing, the Dana decision curtails voluntary recognition by increasing the likelihood of a decertification election after such recognition.

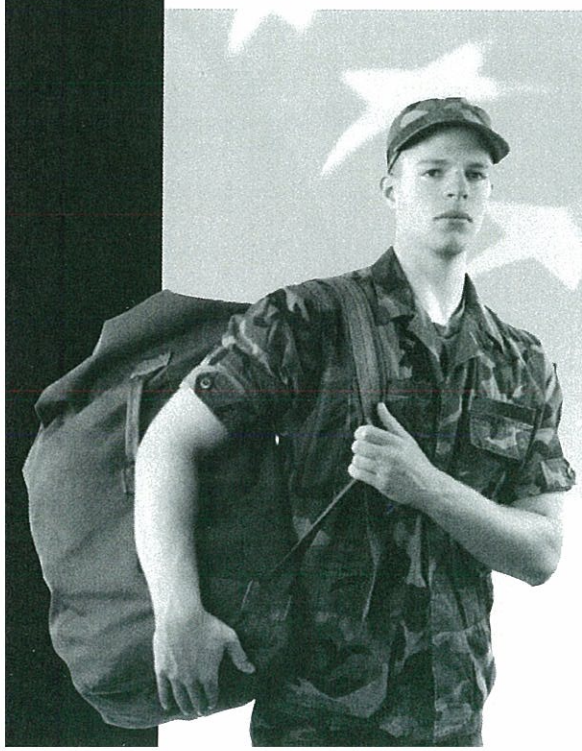
Since 1966, the Board will not conduct elections (or process unfair labor practice challenges) for a reasonable period of time – typically 6 to 12 months - after an employer voluntarily recognizes a union. Because of the labor movement's frustration with the Board's election procedures, unions have increasingly sought voluntary recognition instead of using the Board's methods. The Dana decision makes such voluntary recognition harder to achieve.

The Dana decision hampers voluntary recognition by: (1) requiring notice to employees of their right, within 45 days of the notice, to file a petition for a Board election; (2) conducting elections despite voluntary recognition if the notice is not posted or there is a valid petition for an election within 45 days after posting this notice; and (3) permitting the 30 percent showing of interest for the decertification election to include employee signatures obtained before as well as after the voluntary recognition.

As dissenting Members Liebman and Walsh explained, these new restrictions will allow "a minority of employees to hijack the bargaining process just as it is getting started." Furthermore, the majority's reasoning is flawed. The Board's unfair labor practice procedures cannot possibly be insufficient to protect against union coercion in obtaining voluntary recognition, on the one hand, but sufficient to protect employees from employer coercion throughout the Board's certification election process, on the other.

Beside chilling organizing drives, the Dana decision will surely refocus attention on the Employee Free Choice Act ("EFCA"). Essentially, the EFCA would (a) provide "card-check" instead of certification elections where a majority of employees sign authorization materials; (b) require mandatory arbitration if the parties cannot agree on the first contract; and (c) increase penalties for unfair labor practice violations.

The EFCA passed the House of Representatives on March 1, 2007, and sixteen (16) governors endorsed it. On June 26, 2007, the Senate voted 51-48 on a procedural motion to close debate on the new law. In other words, although EFCA will not obtain approval in the 2007-2008 session of Congress, the bill could become law depending on the election outcomes in November 2008, including who wins the Presidential election and the Senate elections. With the Board placing obstacles in the path of voluntary recognition through the Dana decision, we can expect greater pressure for labor law reform similar to the EFCA.



10th Mountain Division Contributions

As we have done for the last several years, late last year Blitman & King LLP made a contribution to the 10th Mountain Division Association. This contribution, which we have made in lieu of distributing holiday gifts to our clients, goes towards the many programs designed to assist soldiers in meeting financial needs not covered by the military, to provide wounded soldiers with services and support not financed by the government, and to help provide social support systems through various service organizations. This is a fine charity, one that is worthy of everyone's support. Contributions can be made to 10th Mountain Division Association, c/o Watertown Veterans Center, 210 Court Street, Suite 20, Watertown NY 13601.

Supreme Court's Ledbetter Decision Tightens Up Statute of Limitations Restrictions in Pay Discrimination Cases.

Overruling prior cases, the U.S. Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., __ U.S. __ (2007) ruled that in "disparate treatment" pay discrimination cases (which focus on the discriminatory intent of the employer), an employee must file a discrimination claim within 180 days of each discriminatory pay determination that is communicated to the employee, e.g., each annual raise. Prior cases had allowed filing over pay discrimination claims within 180 days of the most recent paycheck. The new ruling barred Lilly Ledbetter from pursuing her claim against Goodyear Tire & Rubber Co. that she was paid lower wages than men who were doing the same job. The impact of Ledbetter on all kinds of discrimination claims will be discussed at our 18th Annual Labor & Employment Law Seminar.

"ruled that in 'disparate treatment' pay discrimination cases (which focus on the discriminatory intent of the employer), an employee must file a discrimination claim within 180 days of each discriminatory pay determination that is communicated to the employee, e.g., each annual raise."

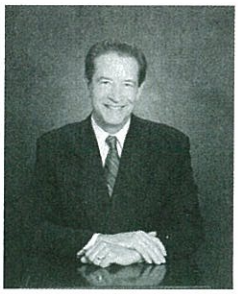
News in the Firm

We're staying active and visible in national, state and local bar associations and similar groups where we can continue to interact with decision-makers responsible for many areas affecting labor unions and workers. And we continue our involvement in local community groups.

Tim Bauman

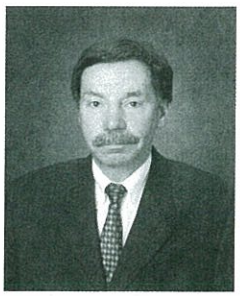
The Firm has named **Tim Bauman** Chair of the employee benefits department. Tim is also now on the Board of Directors of the Rochester Hearing and Speech Center.

Nat Lambright recently gave a presentation at the New York State Bar Association Fall meeting on decisions issued or to be issued by the National Labor Relations Board.



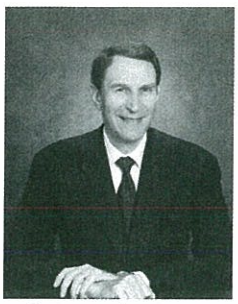
Jim LaVaute

Jim LaVaute is in the middle of his term as Chair of the American Bar Associations Labor and Employment Law Section. The Section is coming off its groundbreaking, highly successful Annual CLE Conference held in Philadelphia last November. Over 1200 attendees were presented with two and a half days of programming (over seventy different sessions) covering all areas of labor and employment law for all levels of experience. The Conference included judges, top government agency officials (NLRB, EEOC and DOL), arbitrators and law professors, in addition to lawyer practitioners who represent labor, management and individual employees. At the conference, Jules Smith led a three-day mock trial in a workplace sexual harassment discrimination case. The trial was presided over by a U.S. District Court judge and was decided by an actual jury. A mock appeal was presided over by a sitting U.S. Court of Appeals judge.



Don Oliver

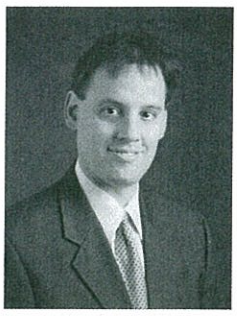
Don Oliver is serving as President of the Northern District of New York Federal Court Bar Association. This includes all the federal judges in the federal district covering upstate New York, Albany to Rochester.



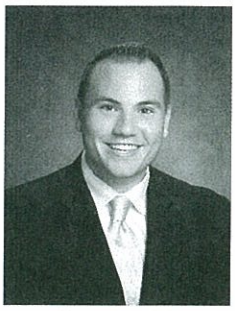
Jules Smith

Jules Smith and **Ken Wagner** are putting together this Spring's NLRB Region 3 program to be held in Rochester, sponsored by the American Bar Association Labor and Employment Law Section and the NLRB.

Jules Smith has also been asked to speak at the AFL-CIO Union Lawyers Conference in May, in Seattle, Washington. He will provide union lawyers from around the country with an update on antidiscrimination laws. Jules will also participate in a panel before the National Academy of Arbitrators meeting in Ottawa, Canada, entitled "Tough Calls in Arbitration." And in the fall, Jules will lead another mock trial of a discrimination case at the American Bar Association Labor and Employment Section's Second Annual CLE Conference, this year to be held in Denver, Colorado.



Ken L. Wagner

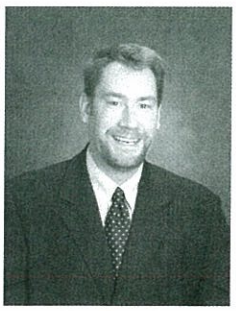


Jonathan Cerrito

Jonathan Cerrito, who specializes in employee benefits and tax law, published an article on the Taxation of Stock-Based Compensation in the New York State Bar Association Young Lawyers Division "Perspective". Jonathan is also presenting at a seminar this Spring in Albany on Health Reimbursement Accounts.

Monica Heath

In October, **Monica Heath** presented an overview of the recent comprehensive workers' compensation reform package to local members of the United Steelworkers at a day-long session in Syracuse. Monica's work with the Central New York Labor-Religion Coalition was featured in an article in last fall's Onondaga County Bar Reporter. She holds the office of Secretary of the Central New York Labor-Religion Coalition and also is a Board Member of the New York State Labor-Religion Coalition.



Nat Lambright

Nat Lambright is now Vice President of the Central New York Chapter of the Labor and Employment Relations Association.

Bernie King

Several partners in the Firm – **Bernie King**, **Jules Smith**, **Jim LaVaute** and **Don Oliver** - have received statewide and national recognition in Best Lawyers rating services. This recognition is limited to a small percentage of lawyers in practice who are considered by other lawyers to be at the top of the profession.

Blitman & King Case Notes

We hope you've been following our **Comar, Inc.** NLRB case (349 NLRB No. 33 (2007)), because in the current climate, successful outcomes like this can be hard to come by. This plant relocation case took a long time, but just this month, final back pay checks were issued to employees as ordered by the most recent NLRB decision in the case, issued in 2007. With the help of the NLRB's Washington D.C. Division of Enforcement Litigation, we were able to obtain the employer's agreement to a consent judgment in the U.S. Court of Appeals, District of Columbia Circuit, enforcing the Board's Order. Back pay in this case totaled over $5,000,000 for some 40 employees, and the union (formerly the American Flint Glass Workers Union, now the United Steelworkers), as directed by the NLRB, is now recognized at the relocated workplace. We're presently negotiating the new contract.

In another case, we arbitrated a contract dispute for the **Binghamton GCIU/IBT** Local, and obtained an arbitrator's award in the union's favor. The employer refused to comply and challenged the decision in U.S. District Court. We obtained a decision from the court enforcing the arbitrator's award, and also directing the employer to pay the union's attorneys fees incurred in the court case. An award of attorneys fees is very unusual in such a case, but if the employer has no reasonable argument to challenge the award, the union can move to recover its attorneys fees for the litigation.

SYRACUSE
Franklin Center
Suite 300
443 North Franklin Street
Syracuse NY 13204
Phone: 315.422.7111
Fax: 315.471.2623

ROCHESTER
The Powers Building
Suite 207
16 West Main Street
Rochester, NY 14614
Phone: 585.232.5600
Fax: 585.232.7738

ALBANY
800 Troy-Schenectady Road
2nd Floor
Latham, NY 12110
Phone: 518.785.4387
Fax: 518.785.9264

Postmaster@bklawyers.com

Blitman & King LLP
Franklin Center, Suite 300
443 North Franklin Street
Syracuse, NY 13204