

**American Bar Association
Section of Labor and Employment Law**

2010 ABA Annual Meeting

August 5-8
San Francisco, California

Schedule of Events

Thursday, August 5

8:30 - 10:00 a.m.

Interest Arbitration – Pros, Cons and How Tos

Moscone Center West, Room 2002, 2nd Floor

The debate about the Employee Free Choice Act has focused attention on the use of interest arbitration as a mechanism for mandatory resolution of first contract disputes. Additionally, the prospect of voluntary use of interest arbitration in the private sector has seen an increase with the inclusion of interest arbitration provisions in neutrality agreements and in labor contracts as a means to resolve certain contract issues. This session will include an assessment of the pros and cons of mandatory and voluntary interest arbitration, including lessons learned from the public sector. The panel will also discuss the most common types of interest

arbitration (e.g. “baseball arbitration”), provide practical advice on negotiating and drafting a voluntary interest arbitration provision, and will provide comprehensive guidance on the strategy, preparation and presentation of a “winning” case in interest arbitration.

Moderator:

Wendy L. Nutt, MGM Mirage, Las Vegas, NV

Speakers:

Joel A. D’Alba, Asher, Gittler, Greenfield & D’Alba, Ltd., Chicago, IL

Amy Moor Gaylord, Franczek Radelet, Chicago, IL

John Kagel, Arbitrator/Mediator, Palo Alto, CA

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1:00 – 2:30 p.m.

**To Everything Turn, Turn, Turn:
The Impact of the Obama Administration
on Labor and Employment Law**

Moscone Center West, Room 2002, 2nd Floor

More than a year and a half into President Obama's first term, it is clear that his administration has been bold and controversial in its approach to labor and employment relations. It has pushed an agenda that reworks many of the underpinnings of the field. This panel, featuring Solicitor of Labor M. Patricia Smith, will examine how the Department of Labor's goals and enforcement actions -- regarding wage and hour and misclassification issues, OSHA, federal contractors, affirmative action and ERISA -- have changed since 2008, and the implications of newly enacted and pending legislation concerning whistleblowing, equal pay and other issues.

Moderator:

Jonathan Ben-Asher, Ritz Clark & Ben-Asher LLP, New York, NY

Speakers:

Hon. M. Patricia Smith, U.S. Department of Labor, Washington, DC

David S. Fortney, Fortney & Scott, LLC, Washington, DC

Nancy Schiffer, AFL-CIO, Washington, DC
Richard T. Seymour, Law Office of Richard T. Seymour P.L.L.C., Washington, DC

2:45 – 4:15 p.m.

*The Effectiveness of Corporate ADR Programs
Co-Sponsor: Dispute Resolution Section*

Moscone Center West, Room 2002, 2nd Floor

A panel of in-house counsel, outside

defense and plaintiff's counsel, and a neutral practitioner will discuss the ins and outs and effectiveness of corporate alternative dispute resolution programs and whether these programs are turning out to be what employers desire or as bad as employees thought they would be. Panelists will examine the practical aspects of constructing such programs and key legal issues of which to be aware when doing so. The panel will present several models of corporate ADR programs now in use, and will weigh the merits of these distinct approaches in various work environments. The important Supreme Court decision in *14 Penn Plaza v. Pyett* and subsequent decisions will also be discussed.

Moderator:

Jacquelin F. Drucker, Arbitrator, New York, NY

Speakers:

Samantha C. Grant, Mitchell Silberberg & Knupp LLP, Los Angeles, CA

T. Warren Jackson, The DIRECTV Group, Inc., El Segundo, CA

Cliff Palefsky, McGuinn, Hillsman & Palefsky, San Francisco, CA

4:30 – 6:00 p.m.

**Ricci, Lewis v. City of Chicago, Ledbetter,
Testing and Affirmative Action: How are
They Related**

Moscone Center West, Room 2002, 2nd Floor

In 2009, the Supreme Court issued *Ricci v. DiStefano* and the Lily Ledbetter Fair Pay Act became law. In 2010, the Supreme Court considered *Lewis v. City of Chicago*. As a result, employers are weighing the risks of discontinuing tests for hiring and promotion which, while validated, may have a disparate impact. They are



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measuring the lengths to which they may go to make employment decisions based solely on the need for diversity. They are evaluating whether and how to undertake self-audits of compensation in the wake of the Lily Ledbetter Fair Pay Act and to what extent the Ricci “strong basis in evidence test” should influence how they react to what they find. These issues will be debated by our panel of experts on the evolution of the law in the Title VII field.

Moderator:

Lori D. Ecker, Law Office of Lori Ecker,
Chicago, IL

Speakers:

Barry Goldstein, Of Counsel, Goldstein,
Demchak, Baller, Borgen & Dardarian, PC,
Oakland, CA
Barbara J. D’Aquila, Fulbright & Jaworski LLP,
Minneapolis, MN
Eve Hernandez, U.S. Equal Employment
Opportunity Commission, San Francisco, CA

seeking part-time, flex-time, and other work arrangements to allow them to meaningfully contribute at work, and provide a stable home life for their families. At the same time, the dour economy, widespread layoffs, and pressure on employees to be more productive with less resources have raised tensions to all time highs, and dropped morale to historic lows in American workplaces. Many fear that when employers are seeking to cut costs and reorganize their businesses, “microinequities” and implicit bias may come to the forefront, while employer diversity and inclusion initiatives take a back seat. “Microinequities” are those seemingly small acts of abuse, aggression and disrespect that can dissipate energy, drain resources, lower morale, decrease confidence and impede performance in the workplace. This panel will examine the causes and legal and non-legal effects of microinequities and implicit bias, offer suggestions on how to ameliorate the effects of some of these all too human behaviors, and look at alternative models of traditional legal work, all in an effort to help employers capitalize on diversity and inclusion efforts to actually help support their workforces through times of organizational change.

Moderator:

Eric A. Tate, Morrison & Foerster LLP, San
Francisco, CA

Speakers:

Maureen S. Binetti, Wilentz, Goldman &
Spitzer, PC, Woodbridge, NJ
Naomi C. Earp, Library of
Congress, Washington, DC
Ann Fromholz, ConocoPhillips, Houston, TX

Friday, August 6

8:30 – 10:00 a.m.

Taking Workplace Diversity and Inclusion Efforts to the Next Level

*Moscone Center South, Rooms 270/272/274,
Mezzanine Level, West Mezzanine*

Notwithstanding a landmark Presidential election that included an African-American candidate and a female candidate as frontrunners, EEOC statistics and other studies show that claims of discrimination are still on the rise. Likewise, increasingly more men and women appear to be

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8:30 – 10:00 a.m.

International Labor and Employment Law Committee Business Meeting and Discussion

Moscone Center South, Room 262, 2nd Floor, West Mezzanine

This session will provide an update on the Section's International Labor and Employment Law Committee programs and publications and will serve as an opportunity to learn about the Committee's plans, including a discussion of proposed topics for the 2011 Midyear Meeting in Berlin. Information on hot topics and significant developments in the international labor and employment arena will be discussed by Committee members, who are invited to propose topics and present papers. Please contact Joseph Fleming, Employer Co-Chair, for more information. Joe may be contacted at flemingj@gtlaw.com. There is no fee to attend this session.

10:30 a.m. – 12:00 p.m.

Ethical Traps in Cyberspace (Presidential Showcase Program)

Cosponsors: Law Student Division and Section of Science and Technology Law
Moscone Center West, Room 2014, 2nd Floor

With the increasing use of social networks such as Facebook and MySpace, video networks such as YouTube, and weblogs and mini-weblogs such as Twitter, employers have started to search for, monitor, and respond to Internet communications made by employees or applicants. As these responses have generated legal concerns, attorneys involved in investigating and litigating issues regarding these communications have started to face some unique ethical problems. Also, some attorneys have become directly involved

in ethical issues as a result of their own use of these forms of social media when making Internet communications given their professional obligations. This panel will explore some of the ethical concerns that arise regarding Internet communications in the workplace and when made by attorneys, including issues of misrepresentation, unprofessionalism, abuse of attorney-client privilege, and disqualification, along with other forms of misconduct.

Moderator:

Michael Z. Green, Texas Wesleyan University School of Law, Fort Worth, TX

Speakers:

Paul R. Klenck, Illinois Education Association - NEA, Chicago, IL

Carole Levitt, Internet for Lawyers, Rio Rancho, NM

Mark Risk, Mark Risk, P.C., New York, NY

Julie A. Totten, Orrick, Herrington & Sutcliffe LLP, Sacramento, CA

12:30 – 1:30 p.m.

Careers in Labor and Employment Law

Primary Sponsor: Law Student Division
Marriott Marquis

If you are considering a career in labor and employment law, meet with labor and employment lawyers who will share their diverse perspectives on labor and employment law and their real life experiences practicing on behalf of management, unions and plaintiffs, or serving as government attorneys and neutrals. Not only will you learn about the extremely varied career options open to labor and employment lawyers, you will receive concrete practical advice on how to get into the area that interests you, whether



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it is a big firm practice, a union legal staff, a boutique management or plaintiff firm or a federal regulatory agency.

Speakers:

Daniel M. Hutchinson, Lief, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA
D. Ward Kallstrom, Morgan, Lewis & Bockius LLP, San Francisco, CA
L. Julius M. Turman, Morgan, Lewis & Bockius LLP, San Francisco, CA

1:00 – 2:30 p.m.

Hot Topics in Immigration for Labor and Employment Attorneys

Moscone Center South, Rooms 270/272/274, Mezzanine Level, West Mezzanine

This panel will discuss the interplay of the various federal government agencies and the role of the labor and employment lawyer in immigration issues. The following hot topics will be examined:

- **Federal Contractors:** New Regulations went into effect September 2009 that impact federal contractors. A well informed labor and employment lawyer who works with organizations subject to the federal contractor rules must be aware of the provisions and potential for discrimination claims.
- **E-Verify:** How to select the population for E-verify, hidden pitfalls, anti-discrimination provisions, employer liabilities, and other risks.
- **I-9 Audits:** What is the role of the labor and employment lawyer in an I-9 audit? What should a labor and employment lawyer be aware of when the client calls and states that the Department of

Homeland Security, ICE or Department of Labor are at the door?

- **New Hires:** How to counsel employers hiring foreign talent during a downturn economy.

Moderator:

Nicole Walthour, International Paper, Memphis, TN

Speakers:

Frida P. Glucoft, Mitchell Silberberg & Knupp LLP, Los Angeles, CA
Conchita Lozano-Batista, Weinberg, Roger & Rosenfeld, Oakland, CA
C. Sebastian Aloom, Civil Rights Division, U.S. Department of Justice, Washington DC

2:45 – 4:15 p.m.

The Generational Effect on Juror Attitudes

Moscone Center South, Rooms 270/272/274, Mezzanine Level, West Mezzanine

This panel will address the fascinating issue of how juror attitudes tremendously vary across the generations. Speakers include a jury consultant who has done extensive empirical research in the assumptions, beliefs and prejudices about workplace conduct, discrimination, job security, and the court system, among Baby Boomers and Generations X, Y and Z. Her findings provide crucial guidance to lawyers about how they should mold their cases, openings, closings, witness exams, and the use of technology in the courtroom, depending on the generational make up of a jury. A plaintiff and defense lawyer will discuss the extent to which their experience meshes or differs with this research, and how employment litigators can craft trial strategy to account

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for generational differences in juror attitudes.

Moderator:

Robert M. Goldich, Greenberg Traurig, LLP,
Philadelphia, PA

Speakers:

Joseph Y. Ahmad, Ahmad, Zavitsanos &
Anaipakos, P.C., Houston, TX
Lynne C. Hermle, Orrick, Herrington &
Sutcliffe LLP, Menlo Park, CA
Jill Huntley Taylor, Dispute Dynamics, Inc.,
Philadelphia, PA

6:00 – 7:30 p.m.

Section Reception

*Four Seasons Hotel, Yerba Buena Room,
Lobby Level*

The Section gratefully acknowledges
Morrison & Foerster's sponsorship of the
Section Reception.

Saturday, August 7

8:30 – 10:00 a.m.

Wage and Hour Basics

Co-Sponsor: Section of Taxation
*Moscone Center South, Rooms 270/272/274,
Mezzanine Level, West Mezzanine*

This session will provide an overview of
the structure and enforcement of the
federal minimum wage and overtime
law. Particular focus will be placed on
issues related to the revised white-collar
exemptions, including the salaried basis
test, criteria for compensable work time
and the calculation of the regular rate of
pay necessary to compute overtime.

Speakers:

David Borgen, Goldstein, Demchak, Baller,
Borgen & Dardarian, PC
Jason C. Marsili, Posner & Rosen LLP, Los
Angeles, CA
Michael P. Royal, Fisher & Phillips LLP,
Dallas, TX

10:15 – 11:45 a.m.

**Keeping Up with the Competition
and Keeping the Taxman at Bay:
Employment Contracts, Severance
Agreements and Sec. 409A**

*Moscone Center South, Rooms 270/272/274,
Mezzanine Level, West Mezzanine*

The economic pressures of the last few
years have raised the stakes for employers
and employees as they negotiate
compensation terms at the beginning and
end of an employment relationship. In
addition, lawyers on both sides have to be
wary of violating Sec. 409A of the Internal
Revenue Code, which penalizes many
forms of deferred compensation with a
whopping tax penalty, and affects how
employees' legal claims can be settled.
This panel will discuss current trends in
employment contracts and severance
agreements, and teach you how you can
advocate for your clients while protecting
them from tax liabilities they never
anticipated.

Moderator:

Erin M. Sweeney, Dickstein Shapiro LLP,
Washington, DC

Speakers:

Richard Berge, Ernst & Young LLP, San
Francisco, CA
Wendi S. Lazar, Outten & Golden LLP, New
York, NY



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Joseph M. Yaffe, Skadden, Arps, Slate,
Meagher & Flom LLP, Palo Alto, CA

12:00 – 1:00 p.m.

Section Luncheon

*Moscone Center South, Room 250 – 262,
West Mezzanine*

All Section members registered for the Annual Meeting are invited to attend this informal luncheon. Please note that space is limited and advance registration is required. Visit the Section Information Desk to obtain a ticket.

1:00 – 2:30 p.m.

The Independent Contractor-Employee Dilemma and Other Issues Concerning the Alleged Misclassification of Employees

*Moscone Center South, Rooms 270/272/274,
Mezzanine Level, West Mezzanine*

This panel will discuss hot topics regarding the appropriate classification of certain workers. Included will be a discussion of the D.C. Circuit's 2009 ruling in *Fed Ex. Home Delivery v. NLRB*, in which the court adhered to an "entrepreneurial opportunity" test, rather than the common law agency test long followed by the NLRB and most courts. Also discussed will be recent federal and state cases concerning independent contractors and the alleged misclassification of white collar workers.

Moderator:

Stanley M. Gosch, Richard Rosenblatt & Associates, L.L.C., Greenwood Village, CO

Speakers:

Lynn Rossman Faris, Leonard Carder LLP,
Oakland, CA

Joseph Jaramillo, Goldstein Demchak Baller
Borgen & Dardarian, Oakland, CA
Karen J. Kubin, Morrison & Foerster LLP, San
Francisco, CA

2:00 – 3:30 p.m.

Retirement Security: Is This What's Next After Heath Care Reform?

Primary Sponsor: Joint Committee on
Employee Benefits

Moscone Center West

2:45 – 4:15 p.m.

Flexible Workplaces, Alternate Work Schedules and Furloughs

*Moscone Center South, Rooms 270/272/274,
Mezzanine Level, West Mezzanine*

Increasing unemployment has occurred as employers have tightened their belts out of fears regarding these tough economic times. Given the need to keep costs down in the hope of riding out these financial problems, employers have also sought new options other than the standard layoffs. A number of employers have decided to allow their employees to keep their jobs while pursuing flexible work schedules and accepting lower wages through mandatory time off without pay via furloughs. These flexible options, however, are fraught with many wage and hour legal minefields. In July 2009, the Department of Labor responded by establishing guidelines on furloughs to address wage and hour law concerns that may arise with these flexible responses to work schedules. This panel explores the wage and hour and other employment law problems that these flexible work schedules and furloughs create, and suggests appropriate measures for employees and employers to provide flexibility while navigating any legal concerns.

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Moderator:

George L. Washington, Jr, Equant, Oak Hill, VA

Speakers:

Hon. Victoria Lipnic, U.S. Equal
Employment Opportunity Commission,
Washington, DC

Felix De La Torre, Service Employees
International Union, Sacramento, CA
Virginia L. Hardwick, Hardwick Law Offices,
Doylestown, PA
Edward J. Reeves, Stoel Rives LLP, Portland, OR

4:30 – 5:00 p.m.

Section Business Meeting and Election

*Four Seasons Hotel, Yerba Buena Room,
Lobby Level*

Sunday, August 8

8:30 – 10:00 a.m.

**How Everything Old is New Again:
Does Age Discrimination Differ
Significantly From Other Forms of
Employment Discrimination?**

Moscone Center West, Room 3016, 3rd Floor

In 2009, the Supreme Court found in *Gross v. FBL Financial Services* that an employee must prove “but for” causation in an age disparate treatment mixed motive case. This standard differs from Title VII’s motivating factor requirement. The Court also noted that it had never approved the McDonnell Douglas framework for resolving disparate treatment age cases. As Congress considers legislation introduced in 2009 to reject *Gross* by requiring the same standard of proof in all mixed motive discrimination cases, the lower courts are starting to apply

Gross with varying results. Also, the EEOC issued a proposed regulation in February 2010 to explain an employer’s required proof that a reasonable factor other than age was the basis for its actions in defense of a disparate impact age claim.

Moderator:

Karen M. Buesing, Akerman Senterfitt,
Tampa, FL

Speakers:

Raymond Cheung, U.S. Equal Employment
Opportunity Commission, San Francisco, CA
J. Randall Coffey, Fisher & Phillips LLP,
Kansas City, MO
Jon Howard Rosen, The Rosen Law Firm,
Seattle, WA
Michael C. Subit, Frank Freed Subit &
Thomas LLP, Seattle, WA

10:30 a.m. – 12:00 p.m.

**Fair Trial, Free Press? Trying High-Profile
Cases in a 24/7 “New Media” World**

Primary Sponsor: Judicial Division
Moscone Center West

2:00 – 3:30 p.m.

**Health Care Reform: What Employers
Need to Know!**

Primary Sponsor: Joint Committee on
Employee Benefits
Moscone Center West