



# Labor & Employment Law Section Newsletter

Volume 3, Issue 1

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## Executive committee elections scheduled for general meeting in June

In June 2014 the Labor and Employment Law Section general membership voted to expand the terms of its executive committee members to two years. Time has flown by, and we are now coming to our biennial section election.

The election will be held at a general membership meeting to be held in conjunction with a CLE meeting in June.

Please watch for future newsletters and email blasts with the date and time for the general membership meeting and section election.

The election will be conducted in accordance with Articles IV and V of the section's bylaws. The bylaws can be viewed at: <http://www.nvbar.org/member-services-3895/sections/labor-and-employment-law-section/>

**Article V, Section 5 lists the Officers that comprise the Executive Committee: Section 5. Officers**  
**The Executive Committee shall consist of the following officers:**

- A. Chairperson**
- B. Vice Chairperson**
- C. Secretary**
- D. Treasurer**
- E. CLE Subcommittee Chairperson**
- F. Membership and Communications Subcommittee Chairperson**

**G. Journal Subcommittee Chairperson**

**H. Northern Nevada Representative**

**More detailed descriptions of the Officer positions are in the Bylaws at Article VI. (follow the above link)**

All of the positions are up for election except for the chairperson. The chairperson position is filled by the previously elected vice chairperson, which provides for excellent continuity in the leadership of the executive committee. Deanna Brinkerhoff is our incoming Chairperson, and her term commences on July 1.

It takes a little bit of commitment, you have to attend the meetings and help to organize the section's activities and events, but members have found the experience to be personally and professionally rewarding. Plus, an executive committee position will look good on a resume.

If you have any questions about any of the positions, the election process, or anything to do with the section for that matter, please contact Executive Board Chair J.P. Kemp at [jp@kemp-attorneys.com](mailto:jp@kemp-attorneys.com) or 702-258-1183.

We hope to have a great turnout for our CLE and General Membership Meeting and elections in June.

## Executive committee OKs establishment of legislative subcommittee

During the Labor and Employment Law Section's Executive Committee meeting on Jan. 12, a proposal, pursuant to Article V, Section 10 of the bylaws, was approved to create a legislative subcommittee to study and potentially propose legislation regarding labor and employment law issues in upcoming legislative sessions, beginning in 2017.

The State Bar of Nevada can propose legislation and the Section is authorized by our Bylaws as follows:

### **ARTICLE VIII Legislation**

**The Section may draft legislation for the Nevada State Legislature or propose to support or oppose the adoption of legislation by the Nevada State Legislature, provided the Section's proposed legislation or legislative position is consistent with its purposes and (1) relates closely and directly to the administration of justice; (2) involves matters which are not primarily political and as to which evaluation by lawyers would have**

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## Labor and Employment Law Section Executive Board



**J.P. Kemp**  
Chair

Partner at Kemp & Kemp

Employee-side employment and labor law



**Deanna Brinkerhoff**  
Vice-Chairperson/  
Chairperson-Elect

Associate at Holland and Hart

Management-side employment and labor law



**Kristina Gilmore**  
Secretary

Assistant City Attorney  
City of Henderson

Employment advice/counseling for government HR departments



**Peter Navarro**  
Treasurer

Associate at Holland & Hart LLP

Management-side employment and labor law



**Rebecca Bruch**  
Northern Nevada  
Representative

Partner at Erickson, Thorpe & Swainston

Management-side employment and labor law



**Matthew Cecil**  
CLE Subcommittee  
Chairperson

Associate at Littler Mendelson

Employer representation regarding employee disputes



**Ann McDermott**  
Membership and  
Communications Chairperson

Office of the Attorney General  
Government employer

## Legislative Subcommittee

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particular relevance if not related closely and directly to the administration of justice; or (3) comes within the Section's special expertise and jurisdiction. Any draft legislation or proposed legislative position must be approved by the Section's Executive Committee and adopted by a vote of the Section's General Membership pursuant to Article IV. If so adopted, the Section's Executive Committee, by and through the Chairperson or Vice Chairperson, must present the draft legislation or legislative position to the Board of Governors of the State Bar of Nevada for review pursuant to Section 7.10 of the State Bar of Nevada Bylaws. No committee of this Section is permitted to present draft legislation or a proposal to the Board of Governors; only the

Executive Committee may do so utilizing the procedures above.

The executive committee recognizes that there are diverse interests among our members and that reaching consensus on proposed legislation could be quite challenging. However, the executive committee also believes that there could be areas where there is consensus and opportunities to improve Nevada law in our practice area. The executive committee certainly believes that it is an endeavor worthy of a solid effort.

If you have interest in working on proposed legislation and would like to be considered for membership on the Legislative Subcommittee, or if you have questions, please contact Labor and Employment Law Section Executive Board Chairperson J.P. Kemp at [jp@kemp-attorneys.com](mailto:jp@kemp-attorneys.com).

The executive committee hopes to approve members of the subcommittee during its April meeting.

## Section will present program to help law firms navigate complex employment law issues

The Labor and Employment Section will be presenting at the State Bar of Nevada's annual meeting being held June 30 until July 2 in Waikoloa, Hawaii. The program is titled "Taking Your Own Advice: Employment Law Compliance for Law Firms."

The program description is as follows:

**Law firms routinely give advice to clients on employment law but, as a law firm, is your own legal house in order? As some recent high profile headlines demonstrate, law firms are not immune from employment-related lawsuits brought by partners, associates, contractors and other staff. To name just a few, claims against law firms have been brought under the Fair Labor Standards Act (claims by employees and**

**independent contractors for overtime violations stemming from worker misclassification), the WARN Act (for failure to provide required advance notice of layoffs), the National Labor Relations Act (for violating employee rights to engage in protected concerted activity), Title VII, the ADA, and the ADEA (for harassment, discrimination and retaliation), and under other wrongful termination, tort and breach of contract theories.**

This program will provide an overview of recent cases involving law firms, identify common employment and labor law issues faced by law firms, and provide practical advice, tips and best practices for ensuring law firm compliance.

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## Federal court rules revisions are effective Dec. 1, 2015

The Federal Rules of Civil Procedure underwent revisions that became effective on Dec. 1, 2015. The rules changes are as follows:

**FRCP 1 (scope and purpose of FRCP):** These rules should be construed, and administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding. The Committee note states that the new language is intended "to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way."

The note further states that effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.

**FRCP 4 (Summons):** Reduces time for service to be effected from 120 days to 90 days after the complaint is filed.

**FRCP 16(b)(1) (pre-trial conferences):** Encourages in-person scheduling conferences with court (rather than by phone or mail).

**FRCP 16(b)(2) (scheduling orders):** Reduces time to issue scheduling order to earlier of 90 days after any defendant is served or 60 days after any defendant appears. The court may find good cause to extend the time to issue scheduling order.

**FRCP 16(b)(3), 26(f)(3) (contents of scheduling orders):** Scheduling orders may: Provide for preservation of ESI; Include agreements

reached under Federal Rule of Evidence (FRE) 502; and Direct parties to request court conference before moving for a discovery order.

**FRCP 26(b)(1) (scope and limits of discovery):** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within this scope of discovery need not be admissible in evidence to be discoverable.

The new Committee note specifies that the changes to Rule 26(b)(1) include returning the proportionality factors from Rule 26(b)(2)(C)(iii) back to Rule 26(b)(1), where they resided before 1993. This was done to restore the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

The proposed amendments also remove the "reasonably calculated" language from the rule because the phrase has been used by some, incorrectly, to define the scope of discovery and has continued to create problems.

**FRCP 26(c)(1)(B) (protective orders):** Codifies use of protective orders to allocate discovery costs.

**FRCP 26(d)(2) (early requests for production):** Parties may deliver requests for production under FRCP 34 before FRCP 26(f) conference. The requests will be deemed served at the first FRCP 26(f) conference.

**FRCP 26(d)(3) (sequencing of discovery):** Parties may stipulate to sequencing of discovery.

**FRCP 26(f) (discovery plans):** Discovery plans: Must address issues regarding ESI preservation; and May include agreements reached under FRE 502.

**FRCP 30(a)(2)(A)(i), (d) (depositions):** Reflects emphasis on proportionality.

**FRCP 31(a)(2) (depositions by written questions):** Reflects emphasis on proportionality.

**FRCP 33(a)(1) (interrogatories):** Reflects emphasis on proportionality.

**FRCP 34(b)(2) (requests for production, responses, and objections):** Party must respond to requests for production made before FRCP 26(f) conference within 30 days after the conference. Parties must make specific objections, and state whether withholding any responsive documents on basis of objection. Reflects practice of producing copies rather than permitting inspection.

**FRCP 37(a)(3)(B)(iv) (motions to compel):** Reflects practice of producing copies rather than permitting inspection.

### Employment Law

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The panelists for this presentation are Nevada management side employment lawyers who routinely litigate labor and employment disputes, as well as counsel employers (including law firms) on human resources compliance and employment law issues.

The panelists have held various leadership positions in the State Bar's Labor and Employment Section and other legal organizations, and have previously presented on employment law topics at annual meetings of the State Bar of Nevada.

## Disclaimer

Articles and other materials published in the Labor and Employment Law Section Newsletter represent the opinions of the author(s) and should not be construed to reflect the opinions of the editor(s), the Labor and Employment Law Section or the State Bar of Nevada. Readers should seek the advice of an attorney for legal advice on any issue or question. These publications are not intended to provide legal advice.

## Recent EMRB Decisions

**Item 808; AI-046119 & AI-046121, Shannon D'Ambrosio v. Las Vegas Metropolitan Police Department.** Ms. D'Ambrosio was a probationary forensic scientist trainee in the famous CSI unit at Metro. LVMPD has a personal appearance policy for its employees in this unit as they are called upon to testify in court and LVMPD does not want an employee's appearance to detract from the employee's ability to present as a credible expert witness.

One day during her probation, Ms. D'Ambrosio came to work with pink hair, which she promptly re-dyed. Two months later she came to work with blue hair, which was covered with a wig, but which co-workers noticed under her wig. The department then made a contact report, which was not discipline. The department also denied her union representation, claiming the meeting was not disciplinary in nature. The department also extended her probation as allowed under the collective bargaining agreement.

Then in the next month the employee came to work with a "shaved" hairstyle, which resulted in her being non-confirmed. Ms. D'Ambrosio thereupon filed the instant action.

The Board ruled that the employee's Weingarten rights did not apply as there was no objective reasonable belief that the meeting could have led to discipline. The Board also held that Ms. D'Ambrosio was not discriminated against based upon personal reasons as "personal reasons" do not include reasons that are directly related to a core job function, such as compliance with the personal appearance policy.

The Board further held that LVMPD had not made a unilateral change to the bargained-for disciplinary procedures since Ms. D'Ambrosio had not been terminated (i.e., disciplined) but had only been non-confirmed.

**Item 809; AI-046113; Police Officers Association of the Clark County School District v. Clark County School District.** In this case the Board found that CCSD had committed bad faith bargaining in three ways. This case concerned an attempt by the parties to finalize a collective bargaining agreement for 2013-2014.

During negotiations, the chief negotiator for CCSD, Dr. Goldman, would not accept or reject any union proposal but would only state that he needed to consult with the school board, who would then make the decision, thus making Dr. Goldman nothing more than a messenger. Good faith bargaining requires that a bargaining team have some level of authority. Secondly, Dr. Goldman stated that the school district had a stance of never making any proposals or counterproposals. This, too, is a well-recognized indicator of bad faith bargaining.

During September 2013 through November 2013 the parties came to an agreement (even though four issues remained outstanding) and each ratified the new CBA – although as it turned out each side ratified a different version of the new CBA. When the union notified CCSD of the problem CCSD refused to meet with the union to rectify the problem and instead stated that the school board had ratified the new CBA.

This refusal to meet to rectify was a third instance of bad faith bargaining. The Board also noted that the union was not without fault in the situation and that, perhaps, it would have also found bad faith bargaining on the part of the union had a counterclaim been filed in the case.

**Item 810; 2015-011; SEIU, Local 1107 v. Clark County.** SB 241 was signed into law on June 1<sup>st</sup> of this year. The bill made significant changes to collective bargaining. Two of these changes were at issue in this case: (1) a prohibition against the use of so-called evergreen clauses, including a prohibition on increases in employee compensation following the expiration of a CBA, and (2) the denial of union leave time unless the employee organization either pays for that leave time or gives concessions for the cost of that time.

SEIU and Clark County were parties to a CBA that expired in June 2013. However, the CBA specified that the agreement would renew for another year until replaced by a successor agreement. Thus, the CBA renewed several times, including the most recent period of July 2014 through June 2015, as no successor agreement had been entered into at that time.

On June 4<sup>th</sup> the County informed the SEIU President that it was cancelling his paid union leave. On June 9<sup>th</sup> the County informed SEIU that it was suspending pay increases retroactive to June 1<sup>st</sup>. The County claimed both were done in compliance with SB 241. SEIU thereupon filed a complaint with the EMRB alleging that the County had engaged in bad faith bargaining by making unilateral changes to the CBA.

The Board first held that SB 241 was to only apply prospectively, noting that Section 5 of SB 241 disclaims retroactive application and, further, that it is to apply to a renewal or extension entered into after the effective date of June 1<sup>st</sup>. Thus SB 241 would only apply to the County and SEIU as of July 1<sup>st</sup>.

The Board then held that the County committed a unilateral change when it revoked the union leave time in early June. This was because the 2012-2013 CBA was still in effect in that it had rolled over twice. The Board also held that the "full cost" requirement includes the cost of salary and any benefits, and applies to anyone using union leave time, whether on full-time release or not. The Board further held that there is a rebuttable presumption that existing CBA's include in them concessions for any union leave time and based this in part on two statutes that presume there is good and sufficient consideration in any contract and that it is presumed that a contract has obeyed the law. The Board then noted that nothing in the record overcame this rebuttable presumption and thus the County had committed a unilateral change when it revoked the union leave.

The final issue is whether the County committed a unilateral change when it suspended the pay increases. The Board first noted that employee pay is a mandatory subject of bargaining. It then noted that SB 241 creates an exception to the

## Recent EMRB Decisions

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general obligation to maintain the status quo pending expiration of a CBA.

Under NRS 288.155(2) an employer may not increase levels of pay that exceed the amounts "in effect" as of the date of the expiration of a CBA. The Board then interpreted the words "in effect" to refer to the amounts of pay established by the terms of the CBA itself.

Thus while the County could not increase the systems of pay in effect, it was still obligated to apply those systems of pay to the employees. Thus although employees were not eligible for COLA's the employees should have been eligible for step increases or increases in longevity pay, based upon the terms in the existing CBA.

Board member Masters dissented from this part of the opinion, reasoning that the tone of the bill was to eliminate any increase in pay when a CBA expires, thus freezing all employee pay. She further noted that the Board's obligation is not to determine policy, but rather to give effect to the policy chosen by the legislature.

### **Item 811; Case A1-046120; IAFF, Local 1908 v. Clark County.**

In December 2013 the Clark County Fire Department created a second EMS Coordinator position within the fire bargaining unit and then demoted Troy Tuke, an Assistant Fire Chief, into that position.

Thereupon IAFF, Local 1908, which represents the fire bargaining unit, filed an unfair labor practice, claiming that NRS 288 forbids the County from placing non-bargaining unit employees into a bargaining unit position without negotiating the matter. The County claimed it had the right to do so under NRS 245, which allows counties to make 3% of its employees exempt from the county's merit system.

The Board held that pursuant to NRS 288.150(3) the County had a management right to decide whom to hire or appoint to any position, including one within the bargaining unit, and that promotional and appointment requirements are not a mandatory subject of bargaining. Therefore, the County was not obligated to negotiate the appointment of Tuke to the position of EMS Coordinator. The Board further stated that it

lacked the authority to decide whether the County's merit system required a competitive appointment process in this case as NRS 245 is outside its jurisdiction. However, this did not end the case. The Board heard evidence that Tuke was treated differently than the other EMS Coordinator, specifically in regards to seniority, longevity and the applicability of the grievance process. The Board noted that these do concern mandatory subjects of bargaining under NRS 288.150(2).

The County claimed that because Tuke was an exempt employee under NRS 245, that this trumped its obligations to treat Tuke as though he was subject to all the provisions in the CBA, even though he was in a bargaining unit covered by a CBA. The Board disagreed, stating that once placed into the bargaining unit, Tuke was to be treated as all other employees in that bargaining unit.

Therefore, the Board ordered Clark County to immediately cease and refrain from treating Tuke in a manner that conflicts with the applicable CBA between IAFF, Local 108 and the County.

# Shake it Up!

STATE BAR OF NEVADA  
ANNUAL MEETING

JUNE 30—JULY 2, 2016

2016 ANNUAL MEETING  
WAIKOLOA, HI