# Labor and the Supreme Court: significant issues of 1990–91

*Highlights of the High Court's new term include discrimination, arbitration, and pension cases, and a new Justice*

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The U.S. Supreme Court began its 1990–91 term without Justice William Brennan, who resigned in July after sitting on the High Court for nearly 34 years. Justice Brennan, who served longer than all but four Justices in the Court's history, was replaced by Federal Appeals Court Judge David Souter. Judge Souter was confirmed overwhelmingly by the U.S. Senate on October 9 and was sworn in as the 105th Justice of the Supreme Court.

Along with a new Justice, the 1990–91 term brought cases presenting a wide variety of labor-related issues. By the time the Court adjourns next summer, cases involving the safety, health, and civil rights of workers, the right of unions to limit the distribution of union election campaign literature, the right of employees to sue their employers for employment contract violations, and many others will have been briefed, argued, and considered. What follows are summaries of the issues in these and other important cases.[1]

## Labor-management relations

On October 10, 1990, the Court heard arguments in *Groves* v. *Ring Screw Works*,[2] a case in which the Court must interpret section 301 of the Labor Management Relations Act.[3] This Federal law permits a worker to sue his or her employer in Federal court for violating the terms of a collective bargaining agreement. One exception to this right to sue is where the collective bargaining agreement between the union and the company provides an exclusive process for resolving contract grievances. In this case, the agreed-upon process must be used.[4]

The Court in *Groves* will examine provisions in two collective bargaining agreements that provide for multiple-step grievance procedures, with the final step being binding arbitration if agreed to by both the union and management. In addition, the contracts include "no-strike" clauses, under which the union agrees to forego strikes until after all steps in the grievance procedures have been completed. The "no-strike" clauses, however, are silent on whether the parties intended that strikes be the sole remedy at that point.

In *Groves*, the Sixth Circuit Court of Appeals held that employees who were not satisfied with the outcome of the grievance procedure could not later bring suit under section 301. In that court's view, an inference can be drawn from the "no-strike" clauses that strikes, and not lawsuits, are the sole remedy for disgruntled unions and employees. But this decision conflicts with other appellate court decisions, one of which was written by Justice John Paul Stevens when he was a judge on the Court of Appeals for the Seventh Circuit.[5] These earlier decisions held that parties to a collective bargaining agreement who want to limit the ability of unions and employees to file section 301 lawsuits by making strikes the exclusive remedy must do so through express language in the collective bargaining agreement.

Dispute resolution procedures in employment contracts will also be the focus in *Gilmer* v. *Interstate/Johnson Lane Corp.*,[6] a case in which a financial services manager had agreed to submit all employment-related disputes to arbitration. Later, after being fired, the manager bypassed arbitration and filed suit against his employer under the Age Discrimination in Employment Act.[7] The

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Court of Appeals for the Fourth Circuit, though, agreed with the employer that the matter should be referred to arbitration because the arbitration agreement must be enforced under the Federal Arbitration Act.[8] Another Federal appellate court reached the opposite conclusion, holding that lawsuits filed under the Age Discrimination in Employment Act are not subject to the Federal Arbitration Act.[9] That court noted that enforcing individual arbitration agreements would undermine the Equal Employment Opportunity Commission's enforcement role under the Age Discrimination in Employment Act, a role to which an individual's right to file suit is subordinated.

Health care industry officials and labor unions will follow closely the proceedings in *American Hospital Association* v. *NLRB*.[10] At issue in this case is the validity of regulations issued by the National Labor Relations Board that define the types of collective bargaining units that may be recognized in acute care hospitals.[11] Under these regulations, eight such units may be recognized, unless extraordinary circumstances justify more.[12]

The American Hospital Association, in seeking to overturn the decision of the Seventh Circuit Court of Appeals, is expected to argue that the National Labor Relations Board, by defining which bargaining units are appropriate through generally applicable regulations, violated a statutory duty to make such decisions "in each case."[13] The hospital group also is likely to argue that the Board's regulations allow "undue proliferation" of bargaining units, which, it claims, Congress sought to prevent when it amended the National Labor Relations Act in 1974.[14] Although each of these arguments was rejected by the Seventh Circuit, that court issued an order that prohibits the regulations from taking effect until the Supreme Court issues its decision.[15]

## Employees and their unions

On the first day of its new term, the Supreme Court agreed to review *Air Line Pilots Association* v. *O'Neill*,[16] which involves a union's duty to represent workers' interests fairly during settlement negotiations. In this case, 1,400 Continental Air Lines pilots filed suit against their union, claiming that a union settlement agreement with the company resolving a lengthy strike and lawsuit had left the pilots in worse positions than if, through their union, they had simply offered to return to work.[17] As a result, the pilots sought to hold the union liable for damages, claiming that it had breached its duty of fair representation.

An airline union's duty to represent employees fairly stems from its position as their exclusive bargaining representative under the Railway Labor Act.[18] The union in *O'Neill* argued in the court of appeals that the duty could be breached only if the union engaged in intentional misconduct. In addition, the union claimed that it needs wide discretion because it represents employees with diverse individual interests. These arguments were rejected by the court, which held that the pilots can prevail in their suit simply by showing that the settlement was arbitrary or irrational. A decision by the Supreme Court articulating the proper standard for judging the propriety of the union's actions should bring some certainty to this area of labor law, thus making it easier for labor and management to negotiate certain types of disputes in the future.

In *International Organization of Masters, Mates and Pilots* v. *Brown*,[19] the Court has been asked to interpret section 401(c) of the Labor-Management Reporting and Disclosure Act.[20] This provision requires labor unions to comply with "all reasonable requests" of union officeseekers to distribute campaign literature, at the candidates' expense, to union members. Without the benefit of section 401(c), a candidate, other than an incumbent, who runs for union office would find it difficult, if not impossible, to contact union members because such a candidate, unlike a union incumbent, usually does not have access to the names and addresses of union members.

The dispute in this case began when a union denied a candidate's distribution request that was made less than 1 month before the union nominating convention. Because the candidate's request did not comport with what the union considered to be a reasonable bylaw permitting candidates to make requests only after the convention, the union refused to distribute the literature. The Fourth Circuit Court of Appeals, sitting *en banc*,[21] disagreed with the union's decision. The plain language of section 401(c), it held, refers to the reasonableness of the candidate's request, not to the reasonableness of the union rule. Because the candidate's request was reasonable on its face, the court held that the union should have granted it. The approach of the appellate court in *Brown*, by focusing solely on the reasonableness of the candidate's request, differed from the approaches of two other courts of appeals, each of which looked to the reasonableness of the union rule.[22] The Supreme Court's decision in *Brown* should resolve this divergence of opinion.

## Public employees

The Supreme Court held in 1977 that a union and a local government employer do not violate the free speech protections of the first amendment to the Constitution by entering into a collective bargaining agreement that requires

employees to pay a service fee to the union equal in amount to union dues.[23] The Court recognized, however, that "there will, of course, be difficult problems in drawing lines between [a union's] collective-bargaining activities, for which contributions may be compelled, and [a union's] ideological activities unrelated to collective bargaining, for which such compulsion is prohibited."[24]

Difficult or not, the High Court will be faced with drawing such a line in the case of *Lehnert* v. *Ferris Faculty Association*.[25] In this case, six faculty members at Ferris State College in Michigan objected to paying a service fee to the union that was to be used to fund the union's conventions, political lobbying, election campaigns, public relations, and other activities, including preparations for strikes that were illegal under State law. The faculty members claimed that their first amendment rights were violated by this arrangement because their fees were being used for more than just collective bargaining activities.

In deciding the *Lehnert* case, the Supreme Court must determine whether the court of appeals was correct in ruling that all of the activities that were subsidized by the union's fee were related to the union's role as the exclusive bargaining representative of public employees. Collective bargaining activities in the public sector, the lower appellate court held, are more wide ranging than those in the private sector because the terms and conditions of employment for public employees are affected directly by budgetary and appropriations decisions that are made in the political arena. As a result, the court ruled that a fee covering the challenged activities was proper.

## Employment discrimination

Perhaps the most controversial of the Court's 1990–91 labor cases is *UAW* v. *Johnson Controls, Inc.*[26] At issue in this case is a company's "fetal protection policy," under which women are excluded from all jobs in which they would be exposed to certain lead levels, unless they demonstrate their inability to bear children. This policy effectively precludes most women from working in a high percentage of jobs with the company, which manufactures batteries.

Under the Pregnancy Discrimination Act,[27] sex discrimination includes discrimination based on pregnancy, childbirth, or related medical conditions. Title VII of the Civil Rights Act of 1964, in turn, makes such discrimination unlawful unless an employee's sex is a "bona fide occupational qualification reasonably necessary to the normal operation of [the employer's] particular business or enterprise."[28] What makes the *Johnson Controls* case unusual is that the lower appellate court did not require the company to meet the "bona fide occupational qualification" test, even though the company's policy is based solely on a woman's ability to bear children. Instead, the court held that the interests of the employer, the employee, and the unborn child must be balanced under a "business necessity" standard, which the court said requires it to examine three issues: Whether workplace exposure to lead poses a substantial risk of harm to employees' unborn children; whether harm to fetuses occurs through women's, but not men's, exposure to lead; and whether an adequate, less discriminatory alternative to the policy exists. According to the court, the plaintiffs failed to allege facts that, if believed, met this three-part test. Therefore, the court upheld the company's policy.[29]

Although the fetal protection policy in *Johnson Controls* applies only to work situations involving lead exposure at one company, a decision by the Supreme Court affirming the lower appellate court could result in similar policies being enacted and applied to other situations in which women may encounter safety and health risks. Thus, it is not surprising that a dissenting judge in this case wrote that *Johnson Controls* "is likely the most important sex-discrimination case in any court since 1964 when Congress enacted Title VII."[30]

The Court will consider another employment discrimination case when it reviews *Boureslan* v. *Arabian American Oil Co.*,[31] which raises the issue of whether Title VII of the Civil Rights Act of 1964, with its protections against discrimination due to race, color, sex, religion, and national origin, extends to American citizens who work overseas for American companies. The Fifth Circuit Court of Appeals, sitting *en banc*, broke new ground in this case when it held that the language and legislative history of Title VII do not support the notion that Congress intended the law to apply outside the United States. This decision is contrary to the position taken by the Equal Employment Opportunity Commission, the Federal agency responsible for enforcing Title VII.[32]

## Pensions

The relationship between State law and the Employee Retirement Income Security Act[33] will be the focus of two cases before the Court. The first, *Ingersoll-Rand Co.* v. *McClendon*,[34] involves an employee who claimed that his employer fired him so that his pension would not vest. The employee might have filed suit under section 510 of the Employee Retirement Income Security Act, which makes it unlawful "to discharge . . . a [pension plan] participant . . . for the purpose of interfering with the attainment of

any right to which such participant may become entitled under the plan."[35] Instead of doing this, however, he filed suit in Texas State court, claiming that he had been wrongfully discharged in violation of Texas common law.

The employer argued that the lawsuit should be dismissed. Section 514(a) of the Federal pension law,[36] the employer contended, preempts, or supersedes, the State wrongful discharge suit because that suit involves a pension plan that is subject to the Employee Retirement Income Security Act. The Texas Supreme Court did not disagree that the Federal law played an important role in the employee's lawsuit. In fact, the court indicated that without that act's proscription against interfering with employees' pension plan rights, there would be no policy justification for overriding the Texas common law employment-at-will doctrine, which permits employers to fire employees for any reason or no reason at all. Nevertheless, without much discussion, the court held that the employee's wrongful discharge suit was not preempted by Federal law, apparently because he had sought to recover only wages and damages, and not lost pension benefits.[37] This State court decision is contrary to the decisions of several Federal appellate courts that have addressed this general issue.[38]

The second case before the Court that involves preemption of State law by the Employee Retirement Income Security Act is *FMC Corp.* v. *Holliday*.[39] At the center of the dispute in this case is a self-insured health plan that FMC operated for its employees. Under the plan, FMC agreed to pay certain health benefits to its employees but retained the right to be reimbursed for the benefits in situations in which the employee is able to recover money from the party responsible for causing his or her injury. Subrogation, as this right is known, is not prohibited under the Employee Retirement Income Security Act. However, in Pennsylvania, where FMC sought to invoke this right, subrogation is not permitted.[40] Thus, FMC's right to be reimbursed under the plan depends on whether the Federal pension law preempts the Pennsylvania antisubrogation law.

The Court of Appeals for the Third Circuit held that the Federal law does not preempt the Pennsylvania statute, because the State law regulates insurance, thus coming under an exception to the pension law's general preemption provision.[41] More important, the court held that the Employee Retirement Income Security Act's "deemer clause,"[42] which, in effect, invalidates a State insurance law insofar as it "deems" an employee benefit plan to be an insurance company, does not apply to the antisubrogation law. A State law, the court held, will not be affected by the deemer clause if it does not infringe on core concerns of the Employee Retirement Income Security Act, such as pension plan reporting, disclosure, and nonforfeitability. In reaching this conclusion, the Third Circuit acknowledged that the text of the deemer clause is ambiguous and could support a contrary interpretation, one followed by other appellate courts.[43] Nevertheless, the court held that its interpretation is correct because Congress intended to protect only core concerns of the Employee Retirement Income Security Act from State insurance regulation.

## Litigation costs

Attorneys' fees are an important consideration in almost any litigation. They are particularly important in certain types of employment discrimination cases because the losing party may be forced to pay a victorious opponent's attorneys' fees. This exception to the "American rule,"[44] under which parties must pay their own attorneys' fees, is the result of specific Federal legislation.[45] Last term, in *Missouri* v. *Jenkins*,[46] the Supreme Court held that fees for paralegal and law clerk services may be included in an award of attorneys' fees under one of these laws, 42 U.S.C. § 1988. This term, the case of *West Virginia University Hospitals* v. *Casey*[47] presents the question of the extent to which expert witness fees may be recovered under this same law.

The lower appellate court in *Casey* held that although expert witness fees can be awarded under section 1988, they cannot exceed $30 per day, because a second Federal law limits the amount of compensation that may be awarded to witnesses.[48] In reaching this conclusion, the court relied on an earlier Supreme Court decision that held that the Federal cap on witness fees may be exceeded only if Congress has provided specific statutory authority for such an action.[49] Because the *Casey* court did not construe section 1988 as providing such authority, it refused to award fees of greater than $30 per day. The Supreme Court's decision in *Casey* is expected to resolve differences of opinion on this issue among various courts of appeals.[50]

## Safety and health

The Occupational Safety and Health Act was enacted in 1970 to "assure as far as possible every working man and woman in the Nation safe and healthful working conditions."[51] This Federal law makes the Secretary of Labor responsible for, among other things, establishing policy, issuing regulations, and enforcing those regulations through a program of inspections

and litigation.[52] The Occupational Safety and Health Act also created a quasi-judicial body, the Occupational Safety and Health Review Commission, to adjudicate disputes between the Department of Labor and employers who are subject to the law's requirements.[53] The Commission hears appeals of the decisions of its administrative law judges, who perform a role similar to that of trial judges. Parties dissatisfied with a Commission decision may appeal to an appropriate United States Court of Appeals.[54]

Disputes have arisen in Federal appellate courts throughout the country over whether the Secretary's interpretation of the Department of Labor's own Occupational Safety and Health Act regulations is entitled to deference, or whether deference should be accorded to the Commission's interpretation of those regulations. This issue is important because broad regulations do not always provide clear guidance when applied to specific workplace situations. Thus, somebody must interpret the regulations to determine how, or even whether, they apply.

The Department of Labor has argued consistently that its construction of Occupational Safety and Health Act regulations should be given deference because it is the author of the regulations and is the statutory policymaking and enforcement agency. Several courts of appeals have agreed with this position.[55] Employers and the Commission, on the other hand, argue that the Commission's statutory role requires that deference be given to its interpretations. They, too, have been successful in several appellate courts.[56] The Supreme Court, in *Dole* v. *Occupational Safety and Health Review Commission*,[57] has been asked to decide which of these viewpoints will prevail.

## Seamen

The Jones Act[58] allows American and resident alien seamen who suffer work-related injuries to sue for damages in Federal district court.[59] Lawsuits filed under the Act frequently raise the issue of whether a particular worker should be considered a "seaman," a term the law leaves undefined. The Supreme Court is expected to clarify this area of the law when it considers the case of *McDermott International, Inc.* v. *Wilander*.[60]

The plaintiff in *Wilander* was a paint foreman in the Persian Gulf whose job required him to direct the sandblasting and painting of fixed platforms. Because a substantial part of his work was performed on the defendant's boat, and because his duties contributed to the ship's function as a paint boat, the foreman successfully argued to the Fifth Circuit that he was a seaman. In agreeing with him, the appellate court rejected the approach taken by the Seventh Circuit in a similar case, which denied seaman status to a worker because he neither performed significant navigational functions nor furthered the ship's transportation function.[61] □

## Footnotes

[1] As its term progresses, the Court is expected to agree to hear additional cases. Some of these cases undoubtedly will raise issues that are of interest to those who follow labor law developments. For example, shortly after this article was submitted for publication, the Court agreed to hear *Litton Financial Printing Div.* v. *NLRB*, 893 F.2d 1128 (9th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3362 (U.S. Nov. 13, 1990) (No. 90–285), which raises the issue of whether § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1988), requires an employer to abide by expired collective bargaining agreement provisions, and *Pauley* v. *Bethenergy Mines, Inc.*, 890 F.2d 1295 (3d Cir. 1989), *cert. granted*, 59 U.S.L.W. 3325 (U.S. Oct. 29, 1990) (No. 1714), which raises complex questions pertaining to the Black Lung Benefits Act, 30 U.S.C. § 901 (1988). The Court also has agreed recently to decide whether a Missouri State constitutional provision requiring appointed judges to retire at age 70 violates either the Age Discrimination in Employment Act, 29 U.S.C. § 621 (1988), or the Equal Protection Clause of the U.S. Constitution. See *Gregory* v. *Ashcroft*, 898 F.2d 598 (8th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3391 (U.S. Nov. 26, 1990) (No. 90–50).

[2] 882 F.2d 1081 (6th Cir. 1989), *cert. granted*, 110 S. Ct. 1469 (1990) (No. 89–1166). Shortly before this article went to press, the Supreme Court issued its opinion in this case, which reversed the appellate court's decision. See 59 U.S.L.W. 4043 (U.S. Dec. 10, 1990).

[3] 29 U.S.C. § 185 (1988).

[4] See *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965).

[5] See *Dickeson* v. *DAW Forest Products Co.*, 827 F.2d 627 (9th Cir. 1987); and *Associated General Contractors* v. *Illinois Conference of Teamsters*, 486 F.2d 972 (7th Cir. 1973).

[6] 895 F.2d 195 (4th Cir.), *cert. granted*, 111 S. Ct. 41 (1990) (No. 90–18).

[7] 29 U.S.C. § 621 (1988).

[8] 9 U.S.C. § 1 (1988). Section 2 of the Federal Arbitration Act provides that a "written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1988).

[9] See *Nicholson* v. *CPC Int'l Inc.*, 877 F.2d 221 (3d Cir. 1989).

[10] 899 F.2d 651 (7th Cir.), *cert. granted*, 111 S. Ct. 242 (1990) (No. 90–97).

[11] 29 CFR § 103.30 (1990).

[12] Distinct bargaining units may be recognized for registered nurses, physicians, professionals who are neither

registered nurses nor physicians, technical employees, skilled maintenance employees, business office clerical employees, guards, and all other nonprofessional employees. 29 CFR § § 103.30(a)(1)–(a)(8) (1990).

[13] 29 U.S.C. § 159(b) (1988).

[14] Act of July 26, 1974, Pub. L. No. 93–360, 88 Stat. 395 (1974). See also S. Rep. 93–766, 93d Cong., 2d Sess., reprinted in *1974 U.S. Code Cong. & Admin. News* 3946, 3950.

[15] See [1990] Daily Lab. Rep. (BNA) No. 88, at A–12 (May 7, 1990).

[16] 886 F.2d 1438 (5th Cir. 1989), *cert. granted*, 111 S. Ct. 37 (1990) (No. 89–1493).

[17] The lawsuit that was resolved by the objectionable settlement agreement had been filed by the Air Line Pilots Association to prevent the company from withdrawing recognition of the union. 886 F.2d at 1440. The union's concerns were later heightened by the company's efforts to fill more than 400 captain and first officer positions. If these efforts were successful, they would have further diluted support for the union.

[18] See 45 U.S.C. § 181 (1988); 45 U.S.C. § 152 (1988); and *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944). Other unions in the private sector are subject to a duty of fair representation under the National Labor Relations Act, 29 U.S.C. § 151 (1988). See *Vaca* v. *Sipes*, 386 U.S. 171 (1967). Federal sector unions are subject to a similar duty under Title VII of the Civil Service Reform Act, 5 U.S.C. § 7101 (1988), although Federal employees do not have the right to bring a duty-of-fair-representation suit in Federal court. See *Karahalios* v. *National Fed'n of Fed. Employees, Local 1263*, 109 S. Ct. 1282 (1989).

[19] *Sub. nom. Brown* v. *Lowen*, 889 F.2d 58 (4th Cir. 1989) (*en banc* decision adopting the panel opinion at 857 F.2d 216 (4th Cir. 1988)), *cert. granted*, 110 S. Ct. 3211 (1990) (No. 89–1330). Oral arguments were heard on November 27, 1990.

[20] 29 U.S.C. § 481(c) (1988).

[21] Although most Federal appeals court cases are reviewed and decided by three-judge panels, occasionally all regular active-service judges in a circuit may sit as a group, or "*en banc*," to decide a case. See Fed. R. App. P. 35. *En banc* consideration generally is employed in cases that are exceptionally important or when such consideration is required in order to ensure uniformity in the circuit court's decisions. In *Brown*, 10 judges heard the case, 8 of whom voted in the majority.

[22] See *Donovan* v. *Metropolitan Dist. Council of Carpenters*, 797 F.2d 140 (3d Cir. 1986); and *Marshall* v. *Provision House Workers, Local 274*, 623 F.2d 1322 (9th Cir. 1980).

[23] See *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977). The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Although the first amendment, read literally, would seem to apply only to acts of Congress, its free-speech guarantee is a liberty interest that States may not abridge under the 14th amendment. See generally *Palko* v. *Connecticut*, 302 U.S. 319, 326 (1937).

[24] *Abood* at 236. The Court has attempted to draw such lines under the Railway Labor Act, 45 U.S.C. § 151 (1988), by holding that a fee may be levied for conventions and certain social activities and publications, but not for union organizing efforts. See *Ellis* v. *Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984).

[25] 881 F.2d 1388 (6th Cir. 1989), *cert. granted*, 110 S. Ct. 2616 (1990) (No. 89–1217). Oral arguments were presented to the Court on November 5, 1990.

[26] 886 F.2d 871 (7th Cir. 1989) (*en banc*), *cert. granted*, 110 S. Ct. 1522 (1990) (No. 89–1215). Oral arguments were presented to the Court on October 10, 1990.

[27] 42 U.S.C. § 2000e(k) (1988).

[28] 42 U.S.C. § 2000e–2(e)(1) (1988).

[29] The plaintiffs found the court's use of the "business necessity" standard particularly troubling because of the Supreme Court's recent decision in *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989). In *Wards Cove*, the Court indicated that business necessity could be shown by evidence that the employment practice serves, in a significant way, the legitimate goals of the employer, rather than by evidence that the practice bears a manifest relationship to the job, as previously required under *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Just as important, the Court, for all intents and purposes, also shifted the burden of proof on the issue from the employer to the employee. 109 S. Ct. at 2126. As a result of the decision in *Wards Cove*, a plaintiff must prove that the challenged employment practice does not serve the employer's legitimate goals in any significant way. This means that in cases like *Johnson Controls*, where a court finds the evidence on the business necessity issue to be lacking, the plaintiff is likely to lose.

[30] 886 F.2d at 920 (Judge Frank Easterbrook, dissenting).

[31] 892 F.2d 1271 (5th Cir.) (*en banc*), *cert. granted*, 111 S. Ct. 40 (1990) (No. 89–1845).

[32] See *Boureslan*, 892 F.2d at 1277 n.4 (Judge Carolyn King, dissenting).

[33] 29 U.S.C. § 1001 (1988).

[34] 779 S.W.2d 69 (Tex. 1989), *cert. granted*, 110 S. Ct. 1804 (1990) (No. 89–1298). Shortly before this article went to press, the Supreme Court issued its opinion in this case, which reversed the decision of the Texas Supreme Court. See 59 U.S.L.W. 4033 (U.S. Dec. 3, 1990).

[35] 29 U.S.C. § 1140 (1988).

[36] 29 U.S.C. § 1144(a) (1988).

[37] See *McClendon* at 71 n.3.

[38] See *Fitzgerald* v. *Codex Corp.*, 882 F.2d 586 (1st Cir. 1989); *Pane* v. *RCA Corp.*, 868 F.2d 631 (3d Cir. 1989); and *Sorosky* v. *Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987).

[39] 885 F.2d 79 (3d Cir. 1989), *cert. granted*, 110 S. Ct. 1109 (1990) (No. 89–1048). Shortly before this article went to press, the Supreme Court issued its opinion in this case, which vacated and remanded the appellate court's decision. See 59 U.S.L.W. 4009 (U.S. Nov. 27, 1990).

[40] See 75 Pa. Cons. Stat. Ann. § 1720 (Purdon 1990).

[41] See 29 U.S.C. § 1144(b)(2)(A) (1988).

[42] 29 U.S.C. § 1144(b)(2)(B) (1988).

[43] See *Baxter* v. *Lynn*, 886 F.2d 182 (8th Cir. 1989); and *United Food & Commercial Workers Welfare Trust* v. *Pacyga*, 801 F.2d 1157 (9th Cir. 1986).

[44] See *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

[45] See 42 U.S.C. § 1988 (1988); and 42 U.S.C. § 2000e-5(k) (1988).

[46] 109 S. Ct. 2463 (1989).

[47] 885 F.2d 11 (3d Cir. 1989), *cert. granted*, 110 S. Ct. 1294 (1990) (No. 89–994). Oral arguments in this case were heard October 9, 1990.

[48] See 28 U.S.C. § 1821(b) (1988).

[49] *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U.S. 437 (1987).

[50] Several courts of appeals have held that the witness fee cap of 28 U.S.C. § 1821(b) (1988) does not limit fees that may be awarded under 42 U.S.C. § 1988 (1988). See *Friedrich* v. *City of Chicago*, 888 F.2d 511 (7th Cir. 1989); *Sapanajin* v. *Gunter*, 857 F.2d 463 (8th Cir. 1988); and *Hillburn* v. *Commissioner, Dep't. of Income Maintenance*, 847 F.2d 835 (2d Cir. 1988), *aff'g* 683 F.Supp. 23 (D. Conn. 1987).

[51] 29 U.S.C. § 651(b) (1988).

[52] *Id.* §§ 655–659.

[53] 29 U.S.C. § 661 (1988).

[54] *Id.* § 660.

[55] See *United Steelworkers* v. *Schuylkill Metals Corp.*, 828 F.2d 314 (5th Cir. 1987); *Brock* v. *Chicago Zoological Soc'y*, 820 F.2d 909 (7th Cir. 1987); and *Donovan* v. *A. Amorello & Sons*, 761 F.2d 61 (1st Cir. 1985).

[56] See *Brock* v. *Bechtel Power Corp.*, 803 F.2d 999 (9th Cir. 1986); *Usery* v. *Hermitage Concrete Pipe Co.*, 584 F.2d 127 (6th Cir. 1978); *Marshall* v. *Western Elec.*, 565 F.2d 240 (2d Cir. 1977); *Brennan* v. *OSHRC*, 513 F.2d 713 (8th Cir. 1975); and *Brennan* v. *Giles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974).

[57] 891 F.2d 1495 (10th Cir. 1989), *cert. granted*, 110 S. Ct. 3235 (1990) (No.89–1541). Oral arguments were heard on November 27, 1990.

[58] 46 U.S.C. App. § 688 (1988).

[59] The Jones Act also authorizes the personal representatives of American or resident alien seamen who are killed at work to sue for damages. *Id.*

[60] 887 F.2d 88 (5th Cir. 1989), *cert. granted*, 110 S. Ct. 3212 (1990) (No. 89–1474). Oral arguments were held on December 3, 1990.

[61] See *Johnson* v. *John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984).

## Shiskin award nominations

The Washington Statistical Society invites nominations for the 12th annual Julius Shiskin Award in recognition of outstanding achievement in the field of economic statistics.

The award, in memory of the former Commissioner of Labor Statistics, is designed to honor an unusually original and important contribution in the development of economic statistics or in the use of economic statistics in interpreting the economy. The contribution could be in statistical research, in the development of statistical tools, in the application of computers, in the use of economic statistical programs, or in developing public understanding of measurement issues, to all of which Mr. Shiskin contributed. Either individuals or groups can be nominated.

The award will be presented with an honorarium of $500 at the Washington Statistical Society's annual dinner in June 1991. A nomination form may be obtained by writing to the Julius Shiskin Award Committee, American Statistical Association, 1429 Duke Street, Alexandria, VA 22314-3402. Completed nomination forms must be received by March 15, 1991.