# A Labor And Employment Law Panorama

*The Editor interviews **Robert A. Boonin**, a Member in Dykema Gossett's Detroit and Ann Arbor offices who concentrates his practice on labor and employment litigation.*

**Editor: Please describe your background and practice**.

**Boonin:** I've been practicing labor and employment law for over 28 years, and my focus has been in three areas. One is traditional labor relations and union management relations; another is a focus on fair labor standards wage and hour issues; and a third area would be mostly everything else in the employment law and employment litigation realm, which includes discrimination law, unlawful termination and compliance with all the various federal and state employment-related requirements. While my practice has been based in Michigan, many of these are national issues. We routinely advise and represent clients on these matters nationwide.

**Editor: Discuss your representation of a private equity investor in a complicated effort to purchase a major OEM's glass manufacturing operation in North America.**

**Boonin:** Many of the OEMs have divested themselves of some parts of their manufacturing operations, leaving the design and the assembly of the automobiles to themselves, and the manufacture of parts to first-, second- and third-tier suppliers. When one of the OEMs was divesting itself of a plant making a particular significant car part, there were many complicated employment law issues to deal with – who would the new company (that is, the buyer) employ and at what wage rates, and which employees of the OEM or the OEM subsidiary or the OEM staffing company would be employed by the buyer, and what would the terms of their employment be? In addition, we had to determine who had to bargain over what issues with the unions involved, and then handle those negotiations. In a sense, we were phasing a major, well-established operation into what amounted to a start-up operation. Negotiating with the seller and also with the prospective buyer's union entailed a lot of moving parts in a transaction of considerable magnitude. Trying to make it a win-win for everyone was a real challenge and, personally, quite rewarding!

**Editor: I understand that you also provide legal counsel to school districts, and in one case you obtained a summary disposition and set a new precedent under the Michigan Revised School Code.**

**Boonin:** I represent a number of higher education institutions, universities and community colleges, as well as a number of school districts. These institutions deal with a number of legal issues unique to their operations: some of them are constitutional, some relate to federal discrimination laws pertaining to the students and students' rights, and some

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relate to specific rights unique to employing faculty in the public sector. The specific case that you are referring to dealt with the rights of substitute teachers who were to become employed as full-time teachers after a certain period under the Michigan school code. We were able to obtain a judgment upheld by the Michigan Court of Appeals that clarified how a school district must count the service days a substitute teacher has to work before earning a right to the next full-time position. That issue was resolved by that case, and that holding has been the law ever since.

**Editor: Describe your role in handling labor and employment matters in two plant divestitures.**

**Boonin:** That would be similar to the first case I mentioned, which dealt with a plant divestiture by one of the Detroit-based auto manufacturers. An attorney's goals in a plant-divestiture case depends on which side (the buyer or the seller) he or she is representing. The seller has certain legal obligations that need to be adhered to. Those may entail such issues as whether WARN Act notifications – where you have to give 60 days' notice if you're going to have a mass layoff – must be given and, if so, by whom. Another common – and often complicated to manage – issue is the extent to which the buyer must pick up the obligations of the seller under the union contract, or whether the buyer just becomes successor employer with an obligation to bargain with the union. In some cases, there may not be any obligation at all to negotiate with the union representing the seller's employees, but the buyer's unions may have interests needing to be addressed. All of these responses depend on the facts and the circumstances of what the labor relations situation is under the seller's union contracts, as well as the extent to which the seller's employees may be integrated into the buyer's workforce. We help clients navigate through these challenges so they transition the work in a manner that complies with all of the legal obligations on both sides of the transaction.

**Editor: You negotiated over 100 collective bargaining agreements. What strategies are particularly important in achieving successful outcomes?**

**Boonin:** There are various strategies that every negotiator needs to employ to one degree or another if he or she is going to be successful. One critical factor is your ability to listen. You have to understand the text as well as the subtext of what is said as you determine to what extent those concerns need to be addressed in the contract. To maintain credibility as a bargainer, you have to be straightforward and mean what you say while listening to concerns of the other side and seeing whether there's a way to address those concerns without compromising the interests of the client. You must always bear in mind that there may be another and better way to solve the problem, and to present it if it will help close the deal.

**Editor: Tell us about your conclusions based on successfully representing numerous employers in arbitration cases.**

**Boonin:** It is always best when a lawyer is brought in early in the grievance process so that he or she can best evaluate and structure the meaning of the contract in the context of a set of circumstances. When this is done, we are better able to provide counsel and help develop a response where we are comfortable that the client is complying with the contract or, at the very least, has a good, supportable argument that the client's actions are consistent with the contract. The rest of it is understanding the client's business and the facts of the case in the context of the contract, and being very well prepared for the hearing.

**Editor: You have successfully represented employers in wage and hour collective actions.**

**Boonin:** Most wage and hour cases involve a claim for unpaid overtime pay. We help clients, as well as the courts and opposing counsel, understand the scope of the law and applicable regulations, along with the jobs at issue. Not every job warrants overtime pay. Determining whether it does requires a deep analysis of the job. Also, if the employee is entitled to an interview, it is critical to fully understand this and the time recording and pay systems in order to determine if the company's practices are consistent with the law. Clients occasionally discover through this process that they misunderstood the law or that there was a problem with their payroll system. Other times, it's just a matter of educating the lawyer on the other side or the judge as to what the nuances of the law are, or – given the facts of the particular situation – convincing the judge that there was no violation of the law. The law is actually quite nuanced and counterintuitive, so, at times, it's very challenging for all the players to understand how the law applies to a set of facts.

Cases for unpaid overtime are brought either by one or a few plaintiffs, or on a class basis. Under federal law, the class case is brought as a "collective action," but when the claim is brought under a state law, it's usually brought as a class action. A collective action is similar in many respects to a class action, but how the class is created is quite different. In a collective action, employees have to opt into the case in order to be a part of a class. In a class action under state laws, the case is brought on behalf of an identified class, and then individuals are given an opportunity to say they don't want to be a part of the class and can opt out. In a collective action, a person files a lawsuit and then finds people to opt into it.

As a litigator, managing the process for a class action – if it is to be created, how it should be created – is very complex. It is critical to understand the options involved so that your client's interests can be best protected. For instance, we work hard to try to contain the size and scope of a class so that it will be both fair and manageable to handle in the context of litigation. How this is done often controls the outcome of the case. These cases can entail huge financial exposure for companies and can be hugely expensive to litigate. Managing the scope and size of classes is therefore sometimes more important than the merits of the case of the named plaintiffs.

**Editor: Describe your role as lead counsel in labor and employment discrimination in FMLA cases, as well as before the Department of Labor, NLRB, MESC, MDCR, EEOC and teacher tenure matters**.

**Boonin:** The lead counsel's responsibility is basically to be the quarterback for the case, to be there when significant calls are going to be made, and to be the client's point person for the litigation. I treat being lead counsel as not only being the quarterback for the team and calling the plays, but also being responsible for keeping the client aware of what's going on, what the risks are and what to expect.

Some cases may be out of your home jurisdiction, and in those cases you have to retain local counsel. In those cases, the lead counsel also becomes the quarterback of the local counsel.

In any event, the lead counsel is responsible for managing the case in a manner that best protects the client's interests in a cost-effective way without compromising the quality of the legal service.

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***Please email the interviewee at rboonin@dykema.com with questions about this interview.***

# Boonin

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**Editor: Discuss your role in counseling clients in setting up compliance programs.**

**Boonin**: Our goal or preference is to provide the kind of counseling and advice that enables clients to avoid litigation, or if they get involved in litigation, we counsel them to devise a strong position to get through it without too much pain. The lawyers in our firm speak with lawyer and senior HR-type audiences all over the country about areas of federal and state law that employers need to know about. We do a lot of policy reviews for our clients to make sure their policies are in full compliance. This work includes auditing their employment practices and helping them modify those polices to better conform with the law. Our compliance assistance comes in the form of training employers, reviewing their policies and practices, and developing policies and practices that will assure compliance or limit their exposure should a problem arise down the road. Working on compliance is that "ounce of prevention" that saves employers money and aggravation in the long run.

**Editor: You have served as lead counsel for governmental units and vendors in matters involving the privatization of services and operational divisions in the public sector. What were your responsibilities in that capacity?**

**Boonin:** I have represented both the public employers' side of a privatization transaction, as well as the vendors' side of the transaction. Serving as counsel requires that one anticipate a lot of potential consequences that are not present in the more run-of-the-mill transactions. For instance, take the situation in which a public body privatizes a certain function and all its employees doing that work become employed by the vendor, and the public body's equipment used for that work becomes the vendor's property. What happens if the public body later decides to change vendors someday down the road? What happens if the public body doesn't want to retain a private company anymore and to again perform those functions on its own? Does the new contractor or the public body get the employees back? What happens to the equipment, and if it follows the work, and under what terms? We have to anticipate these types of issues and come up with plans for how to address them if – or, as is often the case, *when* – they arise.

**Editor: You handled numerous bid protest disputes in government contract cases. What conclusions did you draw from that experience?**

**Boonin:** When you're in a bid dispute with the federal or a state or local government, you have to realize that the rules are written to favor the government. This means that the rights of a disgruntled bidder are limited. You need to structure your protest to get the government to set aside its award of the contract, or, at the very least, get the government to set aside the award and go through a rebidding process so your client gets a fair shot. To accomplish this, you must uncover some material flaw in the bidding process.

**Editor: What characteristics of your firm helped assure the successful outcomes you have described?**

**Boonin:** Our firm is fairly large and is one of the largest in the state of Michigan, with offices in major economic centers in six states across the country, as well as in Washington, DC. This provides me an extraordinary resource for finding solutions that will work for clients in multiple jurisdictions and provide them with experienced counsel wherever they are located. Being able to tap the experiences of people within the firm from across the country who may have dealt with an issue similar to the one I may be dealing with is also an added value for our clients. I am always amazed – though I really shouldn't be – that when I come across a problem that I have not seen before and send a message to my colleagues, how many times I learn that at least a few of my colleagues have dealt with something similar. It's good to compare notes and not have to reinvent the wheel each time. Having that kind of bench strength really makes it much easier for me to know that we're delivering top-tier legal services to our clients.

**Editor: Are there any particular employment law issues that you think employers need to be concerned about at this time?**

**Boonin:** While compliance is always important for employers to achieve, there are two issues that are particularly hot that employers should pay particular attention to.

One relates to what's going on at the National Labor Relations Board. Many employers believe that the NLRB is only relevant to them to the extent that their firm may be unionized. The current NLRB has made strides to protect non-unionized employees. Some of these strides were blocked by the courts due to a procedural flaw in how they've been imposed. Many of those flaws are curable, and the Board is likely going to try making those strides again – by rules and by case law. They involve limiting how employers conduct investigations, restrict the use of their email systems, and control what employees post on social media and facilitating the ability of unions to organize and shorten the time it may take to call for a union election. I expect that we will see the Board being quite aggressive in these and other areas.

The other relates to the enforcement efforts of the Department of Labor and the litigation trends with respect to the claims for unpaid overtime. Lawsuits for unpaid overtime in recent years have outpaced lawsuits for any other type of employment claim, including claims for sex, age or race discrimination. These are "claims du jour," and employers should take actions now if they are to reduce or eliminate their exposure to these types of claims. Not only are there more lawsuits, but the DOL is being particularly aggressive in its enforcement approach. In fact, the DOL's recent approach is to be less cooperative with employers who may be seeking to comply with these laws, and to instead encourage employees to make claims and sue employers. The approach has been almost not "let's see if you have a compliance problem," but "we assume that you're not complying and that your non-compliance has been willful." Bottom line, employers need to be even more vigilant in their compliance efforts than they were just a few years ago, and to involve counsel early in that process.

## *Corporate Counsel Organization Highlights*

### MCCA's CLE Expo 2014 Offers Education, Networking

The MCCA (Minority Corporate Counsel Association) will host one of its signature programs this spring – the 2014 CLE Expo – Wednesday and Thursday, March 12-13, at the Westin Bonaventure, 404 South Figueroa Street in Los Angeles.

Sessions begin at 9:30 a.m. on Wednesday and the Expo ends on Thursday at 5:00 p.m.

Wednesday's highlights include a professional development program, the MCCA Exchange networking breakfast (members only), the Thomas L. Sager Awards Luncheon, and five CLE tracks (governance and compliance, intellectual property, technology law, labor and employment law, law practice management). On Thursday, highlights include CLE sessions, the lunch plenary session titled Bringing the Multigenerational Legal Workforce Into Focus, and Closing Hot Topics in the Law. Networking sessions have been scheduled throughout the expo. At Wednesday's luncheon, Thomas L. Sager, senior vice president & general counsel, DuPont Co., will offer special remarks. Hon. Vilma Martinez, former U.S. ambassador to Argentina and the first woman to serve in that post, will offer the keynote address.

To make a reservation, visit https://www.mcca.com. For sponsorship opportunities, contact Jennifer N. Chen, vice president of External Relations, at (202) 739-5902 or jenchen@mcca.com.

### Sedona Conference® Institute Gathers eDiscovery Thought Leaders For Two-Day Conference

On Thursday and Friday, March 13 and 14, The Sedona Conference Institute will present eDiscovery in a New Era: New Technologies, New Media, New Rules.

It will run from 8:30 a.m. to 5:15 p.m. day one and 8:30 a.m. to 1 p.m. day two in Houston, Texas.

E-discovery thought leaders will gather in Houston to explore emerging challenges and trends that stem from evolving technology. An extraordinary faculty of judges, top eDiscovery practitioners, in-house counsel and experts will lead the dialogue on the following topics: case law update; pending amendments to the Federal Rules of Civil Procedure; data breach incident investigation and response; TAR and predictive coding; professional responsibility with social media, mobile devices and the cloud; and corporate counsel perspectives on new media in terms of preservation, collection and review.

The judicial faculty includes Chief Justice Nathan Hecht, Texas Supreme Court; Magistrate Judge Andrew Peck, U.S. District Court, Southern District of New York; District Judge Lee Rosenthal, U.S. District Court, Southern District of Texas; and District Judge Xavier Rodriguez, U.S. District Court, Western District of Texas. Among the other speakers are Elizabeth J. Asali, GlaxoSmithKline; Paul E. Burns, Procopio, Cory, Hargreaves & Savitch LLP; and Robert D. Owen, Sutherland Asbill & Brennan LLP.

For more information, visit our website at www.metrocorpcounsel.com/events.

To make a reservation, visit https://thesedonaconference.org/.

### DTI Announces 2014 Schedule For Certified Litigation Support And Project Management Courses

DTI, the nation's largest independent provider of e-discovery services and managed document review, and its wholly owned training company, LitWorks™, have announced details for two 2014 LitWorks course offerings.

The courses, which will be held at the company's national training center at Two Ravinia Drive, Suite 850 in Atlanta, Georgia, include a five-day Certified Litigation Support Professional Training and a three-day Certified Litigation Support Project Manager Training.

The 2014 dates are as follows: CLSP 101: Certified Litigation Support Professional Training, from March 24 to 28, and CLSP 102: Certified Litigation Support Project Manager Training, from February 4 to 6 and April 15 to 17.

The two courses build on each other, starting with the CLSP 101 course, which provides foundational best practice training that equips litigation support professionals with the skills they need to effectively review a case, assess its needs and make a comprehensive recommendation on how best to manage that case from start to finish. The CLSP 102 course focuses on sharpening litigation support project management skills and provides practical resources and tools such as checklists, job aides and templates that project managers can immediately apply to their daily work. For more information, see the events listing on our website at www.metrocorpcounsel.com/events.

Contact KimGrippe-Meyeratkmeyer@dtiglobal.com or 727-366-5050 for more information. To register for LitWorks courses, visit www.LitWorks.net.