

Presenting The Lemmies

By Rich Meneghello (Portland, OR)

Some say that life is at its best when you are able to combine your work with something that you love. For those of us in the labor and employment world who love movies, what better way to celebrate movie awards season than by reviewing some of the best (and worst) films, all of which have labor and employment law themes? In light of the upcoming Academy Awards presentation this month, and with a tip of the hat to Oscar, here is our listing from the First Labor and Employment Awards. And the Lemmie goes to:

Best Picture: *On The Waterfront* (1954) – “I coulda been a contender! I coulda been somebody...” Consistently praised as one of the best movies of all time, starring Marlon Brando in an Academy Award winning performance, this is a must-see for any cinema fan. A corrupt union boss exerts control over a group of longshoremen, which also makes this a must-see for any company facing a union organizing threat.

Worst Picture: *Take This Job And Shove It* (1981) – Based on the 1978 song by Johnny Paycheck, this movie’s claim to fame is that it helped to popularize the monster truck craze. “Bigfoot” appears and tramples over the evil boss’s car, which is about the only highlight of this bomb. **Runner-up: *Hoffa* (1992)** – The subject matter is bad enough, glorifying the corrupt union boss Jimmy Hoffa (played by Jack Nicholson and several pounds of prosthetic facial features), but it’s the bad acting, the awful dialogue, and the downright boring story that makes this movie almost impossible to sit through.

Best Comedy: *Nine to Five* (1980) – Dolly Parton, Lily Tomlin and Jane Fonda star as three office workers who exact revenge on their lecherous, unethical and chauvinistic boss. After kidnapping him, they restructure the office in his absence, instituting flex schedules, job sharing programs, and an employee assistance program. While it’s not recommended that you solve morale problems by holding your boss hostage, this comedy – which holds up remarkably well after 30 years – actually offers some good HR lessons along with the laughs.

Worst Musical: *Newsies* (1992) – Want to see Christian Bale – ax murderer from *American Psycho*, violent superhero from *Batman Returns*, rebel leader from *Terminator: Salvation* – as a singing, dancing, turn-of-the-century street urchin who leads a newspaper boy labor revolution while capturing your heart along the way? I didn’t think so. Neither did I. In fact, I’ll be honest, I could only sit through the first 45 minutes of this movie before I bailed out. I know some consider this to be a cult favorite, but if you’re interested in getting your labor and employment law movie fix in the form of a musical, I’d recommend...

Best Musical: *Pajama Game* (1957) – Adapted from the hit Broadway show, this 1950’s musical tells the story of union workers at the Sleepytime Pajama Company who are looking for a seven-and-a-half cent raise. Doris Day stars as the head of the grievance committee, whose negotiations with the new factory superintendent hit a snag when the two of them fall in love. Do the workers get the raise? Will their relationship survive the workplace tension? You can probably figure it out for yourself, but this is one of the few labor and employment movies you’ll see that will leave you humming to yourself for a few days.



Worst Workplace: *North Country* (2005) – This movie was inspired by the first class-action sexual harassment lawsuit in American legal history, filed against a mining operation in Northern Minnesota. Charlize Theron and Frances McDormand, both nominated for Academy Awards for their roles in this movie, play female miners who endure harassment and retaliation after they complain about the mistreatment. The film contains several high-tension (and typically unrealistic) courtroom scenes. Employers should watch it and then do the exact opposite of everything that the company management did in the movie.

Best Actress: Sally Field in *Norma Rae* (1979) – Even hardened management executives will be rooting for plucky Sally Field to be successful in organizing a union at a textile factory in the deep South. She won the Best Actress Oscar for her work on this engaging film; even though the filmmakers hesitated casting Field, who at that time was only known as a flying nun and a perky Gidget, it’s impossible to imagine anyone else pulling off this role quite so well. **Runner up: Meryl Streep in *Silkwood* (1983)** – Streep plays Karen Silkwood, the real-life union activist and whistleblower who worked in an Oklahoma nuclear plant and complained about dangerous work practices. The movie touches on labor strikes, OSHA violations, decertification petitions, and other issues that might strike too close to home for some. As always, Streep carries every scene in which she is featured.

Best Actor: Tom Hanks in *Philadelphia* (1993) – Hanks won an Academy Award for his dramatic portrayal of an attorney battling AIDS while also fighting his own law firm over a discriminatory termination. The movie includes some of the better courtroom scenes you’ll see, with Denzel Washington outstanding as Hanks’ trial attorney. **Runner up: James Spader in *Secretary* (2002)** – Spader plays your typical sadomasochistic trial attorney who has a unique relationship with his administrative assistants, most notably Maggie Gyllenhaal. For those who haven’t seen it, be warned – it takes the concept of sexual harassment to a whole new level. Spader found his niche as a quirky attorney after this film, following it up on TV shows *The Practice* and *Boston Legal*.

Most Realistic Movie: *Matewan* (1987) – John Sayles tells the little-known story of the 1920 Matewan Massacre, a violent clash between West Virginia coal miners on strike and the Company employing them.

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Government Contracts: Look Before You Leap!

By Vasilis "Bill" Katsafanas (Orlando)

We all face uncertain economic times. As everyone knows, the federal government has passed the American Recovery & Reinvestment Act (ARRA) creating huge sources of funds to pay for various projects to "stimulate" the economy. Many companies, are now considering entering into contractual relationships with the federal government as contractors or subcontractors.

The money is good! Invariably it comes with many strings attached. Before becoming a government contractor or subcontractor you must be aware what you are agreeing to undertake. The government is ramping up enforcement efforts to catch and punish government contractors and subcontractors that fail to meet the legal requirements associated with such contracts.

Once you become a government contractor you are subject to a litany of prevailing wage requirements and affirmative action requirements which will impact how you run your business and the potential profitability of the government contract you covet. The following is a brief description of some of the various statutes and regulations you may be required to follow. Remember: these are complex laws and no short summary can cover everything.

Davis Bacon Act (DBA)

The DBA normally applies to all construction projects in excess of \$2,000.00. For projects funded under the ARRA there is no dollar limitation. Under the DBA, contractors or subcontractors are required to meet prevailing-wage standards contained in wage determinations covering the geographic area of the project. These wage determinations also include fringe benefit payments that must be made on an hourly basis as well as vacation and holiday requirements for covered employees. The hourly wage and fringe benefit payments are required for every hour worked by the employee.

The DBA also requires overtime pay for hours worked over 40 in a workweek. Moreover, the Act also requires meticulous records to be kept as the classifications in which an employee works can change from week to week and even day to day. Every time an employee works in a different classification the wage and fringe benefits required can change.

Service Contract Act (SCA)

The SCA applies to contracts or subcontracts involving the provision of services to the federal government. The SCA applies to contracts in excess of \$2,500.00. Like the DBA the SCA establishes area wage and fringe benefit determinations. The fringe benefit rate (excluding vacation and holiday) for all SCA contracts is determined annually on June 1st and as of June 1, 2009 is \$3.35/hour. Like the DBA the prevailing wages must be paid for every hour worked and overtime for hours over 40 based on the classification of the work done by the employee. Unlike the DBA the fringe benefit rate is only paid for the first 40 hours worked in a week.

Contract Work Hours & Safety Act (CWHSA)

The CWHSA applies to contracts in excess of \$100,000.00 under the DBA & SCA. It requires overtime payments at 1 ½ times the regular rate and provides for \$10/day liquidated damages if overtime wages are not properly paid.

Copeland "Anti Kickback" Act

This Act prohibits kickbacks of wages and back wages under the DBA and related acts and requires weekly "statements of compliance." It also regulates deductions an employer is permitted to make from paychecks.

Walsh-Healey Public Contracts Act (PCA)

The PCA provides labor standards (minimum wage, overtime & safety) for employees working on Federal contracts over \$10,000 for the manufacturing or furnishing of goods, supplies, articles, or equipment. It also prohibits employment of persons under 16 or convict labor.

Office of Federal Contract Compliance (OFCCP)

OFCCP requirements apply to the federal contractor or subcontractor with a contract for more than \$10,000.00 and more than 50 employees throughout its organization. OFCCP requirements are derived from various sources including Executive Order 11246, the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974. Contractors and subcontractors can be required to:

- file an EEO-1 report annually;
- comply with the "Uniform Guidelines on Employee Selection Procedures," "Sex Discrimination Guidelines," and "Guidelines on Discrimination Because of Religion or National Origin";
- maintain a written affirmative action program for qualified individuals with disabilities if the contractor has 50 or more employees and a non-exempt Government contract or subcontract of \$50,000 or more (a limited affirmative action program);
- maintain a written affirmative action program for covered veterans, if the contractor has 50 or more employees and a non-exempt Government contract or subcontract of \$100,000 (limited affirmative action program);
- file Federal Contractor Veterans' Employment Report using Form VETS-100 or VETS-100A, as appropriate; and
- comply with the Immigration Reform and Control Act (IRCA) of 1986.

Non-construction contractors or subcontractors with 50 or more employees and a contract of \$50,000 or more must develop a written Affirmative Action Program (AAP) covering minorities and women as well as veterans for each of its establishments within 120 days from the start of the Federal contract.

Executive Order 11246, also requires covered contractors and subcontractors to demonstrate good faith efforts to meet the affirmative action goals set for the employment of minorities and women in the construction industry. Construction contractors/subcontractors are not generally required to have full written affirmative action programs. The OFCCP has established goals (not quotas) based on civilian labor force participation rates, and outlined good faith steps for construction contractors to follow.

Whew!

With the enhanced enforcement emphasis of the federal government, contracting or subcontracting on government contracts raises the specter of meeting many regulatory requirements. Each of these requirements provides a trap which can be expensive and time consuming to navigate.

Look before you leap!

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Real World HR

Having It Your Way

By John McLachlan (San Francisco)

Burger King is not necessarily the only place you can get it “your way.” We believe that it’s possible to have a more productive and committed work force and no union at the same time. It definitely is not a case of “either . . . or.” And you can do it without fighting and conflict. Indeed fighting and conflict are generally counterproductive to the effort to remain union free and often cause employers to lose their focus on the only objective that really counts – employees.

Fighting . . .

Fighting and conflict have very little positive impact on an employer’s goal of remaining union free. Fighting all by itself will not work and we believe that, if you have to fight, you are at a disadvantage, simply because unions are used to fighting and want to fight with you. They are generally good at fighting. That’s what they know. Unions are good at striking and working up a crowd with the rallying cry that individuals are being treated unfairly and being taken advantage of. Where unions can act like they are fighting for your employees, they have a chance of winning.

But where unions cannot pick a fight, where they cannot find employees unhappy with their conditions, where they cannot offer a realistic prospect of improvement, unions have nothing to sell – nothing to offer. And frequently they move on to look for a workplace where they have a better chance of making a quicker sale of their product.

And what is it that unions are selling? At its essence the union’s product is protection – protection against the unknown, protection against unfair policies and supervisors, protection against poor wages and benefits. Unions tell employees that they can protect them from arbitrary mistreatment, from fear of want and unfairness, from fear of the unknown, from fear of weakness. Of course, unions can’t guarantee all the protections they promise, but that doesn’t stop them from promising, nor does it stop some employees from believing that unions can get it all for them. The union basically follows Henry Kaiser’s advice: “Find a need and fill it.”

. . . Versus Talking

There’s nothing wrong with the idea of identifying or creating needs and then satisfying those needs. Much of our free-market entrepreneurial system is built on just that premise. It is the effective employer’s job to ensure that there are no major needs in its work place that the union can use to further its own sales campaign.

The effective employer does not really defeat a union. The effective employer through its communications with its employees, through its policies and procedures, through its treatment of employees, renders the union irrelevant. The effective employer makes the union’s sales pitch immaterial. When the union says “We’ll get you more money,” employees think “I’m already paid fairly.” When the union says, “We’ll make sure you won’t be unfairly fired,” employees think “That’s not an issue for me.” When a union says “we’ll get you better benefits,” employees think, “We’re getting about as much as the business can afford in today’s environment.” When a union says, “We’ll guarantee you job security,” employees think “Sure, just like the union did for employees at GM and Chrysler.”

These hypothetical optimum responses don’t happen by accident. They happen because a company has taken pains to examine itself and its relationships with its employees. They happen where the employer has determined a course of action which puts employees first and where it has effectively communicated to employees that they are truly important to the company; and, most importantly, where it has shown employees how important they are to the company’s success.

Let’s Get Real

Right about now the realistic employer may be thinking that all of the above sounds good. But in today’s climate we’re just trying to survive. We have never had business conditions as bad as they are now. There is competition on every side, our margins are almost nil, our sales are down and there are no realistic prospects that there is going to be a major turnaround any time soon. We’re just trying to hang on and we’re asking people to do more with less. There isn’t any real job security because we’ve had to cut employees, and may have to cut more. There aren’t any ways to give employees more right now.

So what do you do? Give up and wait for the friendly union organizer to fill your employees’ heads with visions of sugar plums? There are other choices. The current conditions actually do offer employers certain “advantages” which did not exist before the recession.

Job value – employees today look at jobs differently than they did two years ago. Jobs have a new meaning they didn’t have before national unemployment figures reached 10%. Jobs are more valuable now than they ever have been in recent memory.

Employee awareness – with the almost instantaneous spread of news, employees know about the economy. They experience the bad effects of the economy everyday in their personal lives. They understand on an intensely personal level that things are tough.

Lowered expectations – employees see stores and businesses close, and they read about or experience people losing their homes. They hear of long-established corporations declaring bankruptcy.

There is a new air of realism in the country, a new awareness of the fragility of our system and of the uncertainties we are all facing. The opportunity we see in all of this is the chance for the employer to make use of this new level of awareness in employees to communicate realistically to employees the challenges and obstacles the business is facing and the steps the company is taking to deal with the current and foreseeable problems.

This isn’t the time to sugarcoat reality but rather to tell employees the problems and challenges and to enlist their support and help in meeting those challenges. Such communications send an unmistakable message of respect to employees. It tells employees that they are important enough to have these very important matters shared with them. Effective communications also enlist employee suggestions and understanding and ensure that employees understand the business’s strategy and the anticipated way forward. Employees now have the ability to buy in to the plan and to do what they can in their own area of expertise to forward that effort.

Making It Count

Don’t misunderstand. By these recommendations we’re not urging that management immediately schedule a meeting to get all of this done and check Employee Communications off the old To Do list. We all know, but regularly lose sight of the fact, that effective communications is a process and not an event. The message we are envisioning cannot be delivered in one well-crafted speech, no matter how eloquent the speech writer or how gifted the speaker. Communicating important messages to employees cannot be a one time event, any more than listening to employees is a one time event. In order to be effective, an effective communications process must be an ongoing back and forth process, not a hit or miss or a one time occurrence.

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The movie is rich in depth and character, starring Chris Cooper and James Earl Jones. The lengths to which Sayles went to portray the story accurately are documented in his fascinating book "Thinking In Pictures," which is a great read for anyone who wants to know all about the inner workings of making a motion picture.

Least Realistic Movie: Disclosure (1994) – A corporate exec (Michael Douglas) files sexual harassment charges against his new boss (Demi Moore) and within 24 hours, both sides have already hired lawyers and are conducting a mini-trial before a federal mediator? Anyone who has been dragged through typical harassment litigation for several years realized that this movie was a bit of a stretch. **Runner Up: Enemy of the State (1998)** – Will Smith plays a dashing labor lawyer who meets with mafia bosses in the back room of an Italian social club, tries to intimidate them with a secret videotape highlighting illegal union business, and then threatens to report one to the federal authorities. The mafia boss responds by warning Smith that he'll be killed within a week unless he gives up his informant, which leads to a whirlwind of espionage and hair-raising chase scenes. Just another day in the life of your typical labor lawyer.

For more information and additional movie recommendations (including links to film clips) contact the author at rmenehello@laborlawyers.com or 503.242.4262.

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Real World HR

Having It Your Way

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Furthermore, if as we predict, employers are likely to have much less time to communicate with employees in future union-organizing campaigns, the prudent employer will ensure that communications with employees are a regular and on-going process, not an occasional indication that there is some new crisis brewing. In the new world, employers had better start communicating like crazy – not just about unions but about the business, about issues of importance to employees, about all aspects of the business and about the relationship.

We also urge that employers look carefully at their business and consider a communications program which will fit their unique circumstances. There is no one size which will fit all and an effective communications program can and should include a number of methods such as periodic meetings at all levels of the organization, regular employee updates by a senior management official, employee newsletters, video clips of important communications, and routine small group meetings with employees to answer their questions and to communicate matters of importance. The communications program needs to be tailored to your company, as well as to each facility within the corporation.

The one absolute that we do offer is that it is urgent that every employer in America look at its communications program and get busy communicating effectively with employees and, equally importantly, listening carefully to employees. It makes no sense to give the other side a huge head start in the race for the minds and hearts of employees.

For more information contact the author at jmclachlan@laborlawyers.com or 415.490.9000.

Clients Can Benefit From Several Webinars in 2010

The attorneys at Fisher & Phillips again are busy preparing and presenting numerous educational webinars to help clients deal with workplace issues. Here is a list of webinars that are scheduled through May, but we will be adding several more in the near future. Please visit www.laborlawyers.com/news.aspx for the most up-to-date listing of events.

Using FCRA / Background Check	Apr. 20
Medical Marijuana.....	Mar. 4
Social Networking	Mar. 11
Creating and Keeping Employment Law Records	Mar. 16 & Apr. 13
FMLA Intermittent Leave.....	Mar. 17
Union Avoidance	Mar. 25
Conflict Resolution & Dealing with Difficult Employees	Mar. 30
Performance Evaluations, Job Descriptions, and Effective Documentation for HR Managers.....	Apr. 1
Handling Stepped-Up EEOC Enforcement	Apr. 7
Religious Accommodations in the Workplace	Apr. 6
Crisis Management	Apr. 15
Sexual Harassment	Apr. 22
Discipline & Termination	May 20
Pre-Employment Screenings & Background Checks.....	TBA
Internal Investigations.....	TBA

All of these webinars are being presented free of charge. To register, or for more information, contact Gail Rice at 404.231.1400.