



CHALLENGE STRATEGY KNOWLEDGE RESULTS

# Labor Law & Labor Arbitration

February 21-23, 2010

Miami Beach, Florida

LABOR ARBITRATION INSTITUTE

[www.laborarb.com](http://www.laborarb.com)

# Labor Law & Labor Arbitration

The place to learn is where the teachers are first-rate, the materials are complete, there is time to get answers to your questions, and the instruction is practical so you can put the training to use.

At this conference, you will learn the latest developments in labor law and labor arbitration, update your advocacy skills, and make time for strategic thinking.

Each year, we change the program to reflect what has changed in the field and to give new perspectives on the old issues. We also invite new faculty to join a core group. Together, they have received the highest audience ratings.

The Conference begins on Sunday afternoon and ends on Tuesday afternoon. Each day's schedule is compact, so you have some free time, while still putting in a full day of work.

Information on the hotel, continuing education credits, faculty credentials, the registration form, and a complete agenda is reprinted below.

We welcome you to Miami Beach. Come for the education — and especially the insights to tackle the next case or personnel issue.

## Conference Agenda

Sunday, February 21, 2010

3:00-4:00 p.m.

**Registration and Reception**

4:00-5:00 p.m.

### ■ Making the case before an Arbitrator

Would you make the same case before an arbitrator that you would make before a judge? In arbitration, all evidence is admitted into the record and all arguments are heard as if it were a trial, but an arbitration hearing is also like an appellate court in which the arbitrator can ask questions. There is also a significant difference between an arbitrator ascertaining the facts, and the jury finding the truth. Some arbitrators, in fact, give little weight to the traditional burdens of proof. Or consider that you cannot call up a judge or labor arbitrator and ask how they would decide your case. However, you could choose an arbitrator who will take you and the other side out in the hall. Those arbitrators can and often do subtly suggest how they will rule. These advocacy topics and more will be addressed.

*Arb. George Roumell*

5:00-5:30 p.m.

### ■ Theory of the Case

Arbitrators will hunt for and find the strongest arguments as the case unfolds, but every arbitrator wants to

## Faculty Credentials

All of the faculty members have appeared at past LAI conferences. The criteria for selection were experience level, teaching ability, and most importantly, past audience ratings. We looked at how attendees in other cities rated each faculty member on knowledge of subject matter and communication skill. Each of these faculty members has received the highest ratings.

If you have attended this program before in Miami, you will have heard from some of the same faculty members, but each will be presenting on new topics. And all of the case studies are new. In addition, there will be two new formats.

One of the benefits of attending is hearing from arbitrators who are analytical and multi-faceted in their thinking. They look at cases from the perspective of both sides, and with detailed memory, raise their own cases.

In summary, you will hear from the best teachers in the field.



know what each side considers to be the winning argument. A new lecture on how arbitrators evaluate your case theory.

*Arb. Harry Graham*

**5:30-7:00 p.m.**

■ **Discipline & Discharge**

We present recent and actual cases to the arbitrators and ask them to listen to the arguments made by the parties, give a bench decision, and explain their rationale. In each case, there are nuggets of wisdom about just cause for discipline.

*Panel: Arbs. Adelman, Graham, Parker & Roumell*

**7:00 p.m. Recess until 7:30 a.m. Monday**

## Monday, February 22, 2010

**7:30-8:30 a.m.**

■ **The Rules of Evidence**

First, an expert overview of the Rules which every advocate must know. Then, an in-depth discussion of the Rules which were argued in actual cases and the arbitrator's ruling.

*Arb. Richard Adelman*

**8:30-9:30 a.m.**

■ **Workplace Threats**

The veiled threat, the quasi-horseplay statement, zero-tolerance policy, and the legal question of protected activity make these cases among the worst to try. Learn the current views of arbitrators who are reacting to the enhanced security measures in most workplaces.

*Panel: Arbs. Adelman, Graham, Parker & Roumell*

**9:30-10:00 a.m.**

■ **Insubordination**

There are three elements and then a number of questions: What is the workplace culture, the supervisor-employee's relationship, the employee's job description, the kind of response and attitude displayed by the employee? The answer affects the investigation for both sides. An interactive session, so you can ask follow-up questions.

*Arb. Joan Parker*

**10:00-10:15 a.m. Break**

**10:15-11:15 a.m.**

■ **Serious Offenses**

The arbitrators discuss cases that rise to the level of a serious offense, but there are mitigating factors or the evidence is mixed: Computer misuse, theft, drug-test, and sexual harassment. These involve some of most frequently arbitrated issues, so everyone can benefit from hearing the arbitrators' ruling and rationale.

*Panel: Arbs. Roumell, Parker, Graham & Adelman*

**11:15-11:45 a.m.**

■ **Job Performance**

How to analyze the range of cases in which the issue is the reasonableness of the production standards, employee defenses, retraining, and new technology.

*Arb. Harry Graham*

**11:45 a.m.-12:15 p.m.**

■ **Troubled Employee**

When do you order a fitness for duty exam, opt for a last chance agreement, or order rehab? The debate is whether to treat the troubled employee case as a disciplinary matter or as a performance problem. A review of the issues and the most likely resolution.

*Arb. Joan Parker*

**12:15-1:15 p.m.**

■ **Advocacy**

A new lecture on effective advocacy skills that affect how you prepare and present a case. Arbitrators pick up cues and reach judgments that surprise even veteran advocates. The speaker is one of the foremost teachers of trial advocacy in the country.

*Prof. John Sonsteng*

**1:15-4:30 p.m. Free Time**

## Location

The Miami Beach Resort & Spa is 11 miles from the Miami International Airport and a 30-minute ride from the Fort Lauderdale Airport. For information on the area, see the website, [www.visitsobeonline.com](http://www.visitsobeonline.com)

This is high season, so we recommend that you make your airline and hotel reservations as early as possible.

When you check-in, the view will include the Intercoastal Waterway and the Atlantic Ocean. The lobby and the meeting rooms are stylish and conducive to a pleasant stay. The outdoor pool and the beach are right there. Mid-February is the most perfect time to be in Miami, for the number of sunny days and ideal evenings.

Miami Beach is internationally known for its restaurants and music, but if you are looking for a superb place to learn, just walking down Lincoln Mall or along the beach will give you time to reflect and problem-solve.

Our goal is to make your stay supremely comfortable while giving you a first rate education.

**4:30-5:30 p.m.**

**■ FMLA**

New regulations and the Military Caregiver Leave provision can affect your compliance with the FMLA. Plus, advice on cases involving abuse of leave, the medical certificate, and other coverage issues.

*Arb. George Roumell*

**5:30-6:30 p.m.**

**■ Past Practice**

Several factors affect the outcome in even the purest past practice case: is it a prescribed or present way of doing business? Does it involve a management right or an employee benefit? Does the practice grow out of a contract provision? Or is the contract silent? The arbitrators discuss actual cases, in which they explain the elements and how to apply the doctrine.

*Arbs. Adelman, Graham, Parker & Roumell*

**6:30 p.m. Recess until 7:30 a.m. Tuesday**

**Tuesday, February 23, 2010**

**7:30-8:30 a.m.**

**■ Contract Law**

Contract law includes ancient rules and contemporary notions of how negotiating parties deal with each other. In the labor context, arbitrators also look at past contracts, bargaining notes, industry standards. And they do this at the same time they are looking at the legal principles. Advice for the new and experienced advocate.

*Arb. Richard Adelman*

**8:30-9:30 p.m.**

**■ Contract Law – Applying the Principles**

We present interesting and educational cases to the panel and ask them to rule. Then, they individually explain their rationale. This is one of the best ways to learn contract law and understand how arbitrators weigh your arguments.

*Panel: Arbs. Graham, Parker, Roumell & Adelman*

**9:30-9:45 a.m. Break**

**9:45-10:30 a.m.**

**■ Arbitration: Recession-driven issues**

Interpreting the seniority provision is unavoidable in most cases involving a layoff, bumping and bid rights. An in-depth analysis of the issues, and advice dealing with the dual pressures of outsourcing and job protection.

*Arb. George Roumell*

**10:30-11:30 a.m.**

**■ The Best Cases of all Time**

Whether new to the field or an experienced hand, you will hear the nuances and the facts that led to four of the most-cited and influential decisions in labor-manage-

ment relations. Learn why these arbitration decisions have reached legendary status.

*Panel: Arbs. Adelman, Graham, Parker & Roumell*

**11:30-1:00 p.m.**

**■ Advocacy Part 2**

As a sequel to the previous day's lecture, a noted trial advocacy teacher discusses the techniques which work in the hearing room. What constitutes an effective opening, direct & cross-exam, and closing argument? The best techniques are those which have been tried and proven successful.

*Prof. John Sonsteng*

**1:00 p.m. Conference Adjournment**

**Other Important Information**

**Tax Deductibility**

Expenses incurred in attending this conference, such as tuition, travel, meals and lodging are deductible under the Internal Revenue Code (Treas. Reg. 1.162-5). Check with your tax professional about the details.

**CLE Credit for Attorneys**

CLE credit is available in all states with mandatory CLE requirements. Just let us know where you hold a license (see the box to check on the registration form). The Labor Arbitration Institute is an accredited provider for Illinois, Pennsylvania, and California attorneys. This program has been approved in other states, as well. Depending on the state, the total credits awarded are between 14 and 19.

**Tuition**

We have two rates. The early enrollment rate helps us plan for space and other conference expenses. If you register by November 15, 2009, tuition is \$595. After November 15, the regular tuition rate of \$645 applies. Tuition covers admission to all sessions, course materials, two continental breakfasts, and all coffee breaks. It is not necessary to pay by November 15, since we can bill your office. We do ask that tuition be paid by the first day of the conference, unless prior arrangements are made. Our cancellation policy tries to accommodate all registrants whose plans change. In the spirit of good relations, call us and we will work something out.



## More to learn?

The fun in attending a conference is discovering that there is more to learn. Here are just three examples.

### Contract Law Principle

Advocates overlook this principle of contract interpretation more than any other. In Latin, the phrase is: *expressio unius est exclusio alterius*.

That phrase means: To express or include one thing implies the exclusion of the others.

An everyday application of this legal principle is when you bring your child to the amusement park and the sign reads: 14-year-olds and older. You do not have to ask the ride attendant if your 13-year-old can get on the ride. The park has stated who is included and by implication who is excluded.

Consider what happened in an actual case between a school board and its teachers. The collective bargaining agreement stated that remote cameras “cannot be installed where instruction takes place.” The teachers wanted evaluations to be conducted by a person sitting in the classroom, and not by a tape.

The school board became concerned about security, and installed cameras in the entrances and hallways. The board also installed them in the gym and auditorium because large numbers of students congregate in those areas where safety is of paramount concern, as it is in any large public area.

The union filed a grievance because the gym teachers teach in the gym and the music teachers conduct rehearsals in the auditorium.

Here again, the arbitrator looked to the contract and applied the same principle. When the parties expressed that cameras would not be installed where instruction takes place, the parties agreed to be governed by that standard, and not by anything else (such as security).

The obvious solution was to turn the cameras off during classes, and turn the cameras on during assemblies, but the provision was also clear to say, cameras cannot be installed.

The arbitrator reached his decision easily. He told the audience: The parties asked me to interpret the contract and give effect to their language. This canon of construction does that.

### Past Practice versus Zipper Clause

Management likes the zipper clause because it means that whatever is not in the contract, it does not exist. The union can only enforce those benefits or rights which are found in the contract.

But the question remains whether an enforceable

practice can arise in the middle of the contract term? Take the case where management and the union mutually acknowledge how to do something and then they follow it (clear, long, and repeated). In the union’s eyes, it becomes a benefit. In management’s eyes, it is just a way of doing business or a discretionary act on their part.

The union takes the case to arbitration. Management can and should argue that the zipper clause zipped out the practice. But the union can also argue that the contract could only zip out those practices which existed at the time the contract was signed. Since the practice arose in the middle of the contract term, can the zipper clause still apply?

There are usually other issues in a case (esp. whether the practice has a “home” in other contract language, even if not specifically stated). Bottom line is that a zipper clause has a limit.

### FMLA

Management asks the employee (requesting FMLA leave) to bring in a doctor’s statement. The employee has 15 days to produce the statement. If the employee fails to do so, the employee is not covered by the FMLA, so long as management gave notice to the employee.

Suppose the employee produces the statement in a timely fashion, but management disagrees with it. The regulations state that management can send the employee to a company doctor. And if the employer’s doctor disagrees with the employee’s doctor, then the two doctors get together and select a third doctor. This third doctor’s opinion is final and binding, as to whether the employee is covered by the FMLA.

However, take the situation where the statement by the first doctor is, on its face, not credible or medically supported. The employer rejects the FMLA leave request. There are court decisions which say that if the employer’s decision to reject the request is made in good faith, the employer is justified in denying FMLA leave to the employee. The key is whether a jury would agree with the employer that it acted in good faith.

Arbitrators advise management to not take this risky route, because in a labor arbitration case, an employer has to be nearly 100 percent sure that the doctor’s note is a fake or unsupported. The safer route is to ask the employee for verification or clarification from the doctor or to send the employee to a company doctor.

These are just three areas in which the faculty will go in-depth. Come to Miami Beach, and learn more.

## Registration Options

1. Register Online at [www.laborarb.com](http://www.laborarb.com)
2. Complete this form and mail to the Labor Arbitration Institute, or
3. Complete this form and fax to 507-645-2474

# 10th Annual National Institute on Labor Law & Labor Arbitration

**February 21-23, 2010**

**Miami Beach Resort & Spa**  
4833 Collins Avenue • Miami Beach, FL 33140  
[www.miamibeachresortandspa.com](http://www.miamibeachresortandspa.com)

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**Privacy Policy:** The email address you provide is only used by the Labor Arbitration Institute (LAI). LAI does not sell or share its email lists, or any customer lists.

**TUITION:** \$645 per registrant (if registering after November 15, 2009)  
**Save by Registering Early!** Register before November 15, 2009, and tuition is \$595.

### PAYMENT

Check Enclosed \$ \_\_\_\_\_

Credit Card Payment \$ \_\_\_\_\_

Card Number (VISA, MasterCard or American Express) \_\_\_\_\_

Exp. Date: \_\_\_\_\_; Cardholder \_\_\_\_\_

Payment must accompany registration, unless other arrangements are made ahead. Please call the conference registrar at 507-663-1220 for details. Checks may be made payable to Labor Arbitration Institute.

### HOTEL INFORMATION

A block of rooms has been reserved at the Miami Beach Resort. Conference attendees and everyone in their party are entitled to a group rate of \$189.00 (single or double). Please make your reservation as early as possible by calling the hotel at 305-532-3600. This special rate will expire on January 19, 2010 or earlier, if the room block is exhausted. We recommend that you make your reservation as soon as possible, and preferably before the early enrollment deadline of November 15, 2009.

### MISCELLANEOUS

I am an attorney and request information on CLE credits for the state of \_\_\_\_\_. The Labor Arbitration Institute is an accredited provider in several states. Please let us know in which states you hold a license.

I would like to subscribe to "Wisdom of the Week", which provides strategies and tips from the best labor arbitrators in the country. Wisdom is a weekly (500-700 word) email on current issues in labor law and labor arbitration. The annual subscription rate is \$95.

I cannot attend, but please send me information on future conferences.

**MAIL TO:** Labor Arbitration Institute, 205 South Water Street, Northfield, MN 55057

*For more information, call 507-663-1220 or FAX number 507-645-2474.*

