

# Federal Probation

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Elizabeth Piper Deschenes*

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# Federal Probation

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## This Issue in Brief

**What Punishes? Inmates Rank the Severity of Prison vs. Intermediate Sanctions.**—Are there intermediate sanctions that equate, in terms of punitiveness, with prison? Authors Joan Petersilia and Elizabeth Piper Deschenes report on a study designed to examine how inmates in Minnesota rank the severity of various criminal sanctions and which particular sanctions they judge equivalent in punitiveness. The authors also explore how inmates rank the difficulty of commonly imposed probation conditions and which offender background characteristics are associated with perceptions of sanction severity.

**Using Day Reporting Centers as an Alternative to Jail.**—An intermediate sanction gaining popularity is day reporting in which offenders live at home and report to the day reporting center regularly. Authors David W. Diggs and Stephen L. Pieper provide a brief history of day reporting centers and explain how such centers operate. They describe Orange County, Florida's day reporting center, which is designed to help control jail overcrowding and provide treatment and community reintegration for inmates.

**Locating Absconders: Results From a Randomized Field Experiment.**—Absconders are a problem for the criminal justice system, especially for probation agencies responsible for supervising offenders in the community. Authors Faye S. Taxman and James M. Byrne discuss how the Maricopa County (Arizona) Adult Probation Department addressed the problem by developing a warrants unit devoted to locating and apprehending absconders. They present the results of a randomized field experiment designed to test the effects of two different strategies for absconder location and apprehension.

**Rehabilitating Community Service: Toward Restorative Service Sanctions in a Balanced Justice System.**—While community service sanctions used to be regarded as potentially rehabilitative interventions for offenders, now they are often used as a punitive "add-on" requirement or not clearly linked to sentencing objectives. Authors Gordon Bazemore and Dennis Maloney argue that community service could be revitalized by developing principles and guidelines

for quality and performance based on a clear sanctioning policy and intervention mission. They propose restorative justice as a philosophical framework for community service and present the "Balanced Ap-

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# Prohibition Against Certain Offenders in the Labor Movement: A Review of 29 U.S.C. 504

BY ARTHUR L. BOWKER

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COURTS AND parole authorities frequently require "obtaining gainful employment" as one condition of a suspended sentence or release from a correctional institution. Financial conditions, such as payment of restitution, fines, and court costs, indirectly require obtaining employment. Probation and parole officers, however, must be cognizant of the fact that not all employment opportunities are legally open to probationers and parolees. One study found state and Federal statutes bar or restrict employment of offenders in approximately 350 occupations employing close to 10 million individuals (Downing, 1985). One of the most important of the Federal statutes is title V, section 504, of the Labor Management Reporting and Disclosure Act of 1959, as amended (LMRDA), which is contained in chapter 29, section 504, of the United States Code.

## *Background*

The LMRDA specifically provides for the reporting and disclosure of certain financial transactions and administrative practices of labor organizations and employers; makes embezzlement of union funds a Federal crime; prohibits certain convicted offenders from holding union office or position; and provides minimum standards regarding the election of officers of labor organizations. The LMRDA has jurisdiction over all local, intermediate, and international labor organizations with the exception of those unions whose members are made up entirely of municipal, state, or Federal employees. (Unions made up entirely of Federal employees are under the jurisdiction of the Civil Service Reform Act of 1978 or the Foreign Service Act of 1980, which in many respects mirror the LMRDA, including section 504.)

The LMRDA and another labor law, the Welfare and Pension Plans Act of 1958,<sup>1</sup> were the result of hearings by the Senate Select Committee on Improper Activities in the Labor-Management Field. This committee, later known as the McClellan Committee after the chairman, Arkansas Senator John McClellan, discovered numerous cases of corruption and criminal influ-

ence in labor unions and their relations with employers.

The hearings before the McClellan Committee began on February 26, 1959, and over the next 2 years revealed numerous incidents of convicted felons in the labor movement who had violated their position of trust to the detriment of union members and the country as a whole (Bellace & Berkowitz, 1979). Secretary of Labor James P. Mitchell testified, prior to the LMRDA's passage, that 40 men in one particular union in New York City had been arrested a total of 178 times and been convicted of 77 offenses ranging from auto theft to murder. South Dakota Senator Karl Mundt noted that:

Our hearings under the chairmanship of the Senator from Arkansas (Mr. McClellan) sometimes became quite nauseating to those of us who had to sit where we watched a parade of racketeers and crooks and thugs and plug-uglies, who sat in front of us—who were known to be officials of labor unions, known not to have any concern whatever for the welfare of the working men, and known to be utilizing their offices to steal funds of the workers and betray their interest—cringing and hiding behind the fifth amendment (NLRB, 1959).

This criminal influence over labor organizations was deemed unacceptable by Congress, and as a result the provisions of section 504 were included in the LMRDA when President Dwight D. Eisenhower signed it into law on September 14, 1959 (Lee, 1990).

Section 504, as enacted in 1959, prohibited individuals convicted of embezzlement, robbery, bribery, extortion, grand larceny, burglary, arson, violations of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or violations of the reporting and trusteeship requirements of the LMRDA from holding any union position (nonclerical/custodial), being a labor relations consultant, or holding any position that deals with a labor organization for 5 years from the date they were sentenced or released from prison, whichever was later.<sup>2</sup> The only exceptions to this prohibition were: if the individual had been granted an exemption by the United States Parole Commission; if the individual had his or her citizenship rights restored; or if the disabling conviction was overturned on appeal. The 1959 penalty for anyone holding a union position or allowing someone to hold a union position in willful violation of this statute was 1 year imprisonment and/or a \$10,000 fine. Convicted offenders were not

\*The views and opinions expressed in this article do not necessarily represent those of the United States Department of Labor.

prohibited from being a member of a labor organization or, with the exception of holding office, from enjoying all membership rights and privileges.

### *Provisions of Section 504 Strengthened*

Congress reiterated its 1959 position with the enactment on October 12, 1984, of the Comprehensive Crime Control Act, which included the Labor Racketeering Amendments. The provisions of section 504 were strengthened by: 1) increasing the number of disabling convictions; 2) expanding the number of positions in the labor movement covered; 3) lengthening the period after sentencing or imprisonment that an individual is prohibited to serve in the labor movement; and 4) increasing the penalty for willful violations.

The number of disabling offenses were expanded from the original 14 offenses by including: 1) any felony conviction involving the abuse or misuse of an individual's position or employment in a labor organization or beneficiaries of an employee benefit plan (for instance, a union official selling or supplying marijuana at a union function or operating an illegal gambling operation out of a union hall); 2) any convictions for conspiracy to commit or attempt to commit any of the 14 enumerated offenses, i.e., attempted robbery or conspiracy to commit murder; and 3) any conviction where an enumerated offense was an element (for instance, the Hobbs Act includes "extortion" as an element).

The second area expanded by the Labor Racketeering Amendments was the positions an individual is prohibited from serving in or being employed as due to the individual's conviction for a disabling offense. Originally, section 504 positions were limited to those either within a labor organization, involved with labor relations, or dealing with labor organizations. The Labor Racketeering Amendments not only clarified these positions but included two additional position categories. Specifically, subsection (a)(1) prohibits individuals convicted of enumerated offenses from being a consultant or adviser to any labor organization (for example, an individual hired by a union to assist in the collective bargaining process or financial planning).

Subsection (a)(2) covers officer and employee positions within a labor union, such as president, treasurer, financial secretary, business agent, steward, or grievance committeemen. The officer or employee positions do not have to be full-time or even paying positions, as was the case prior to the amendments.

Subsection (a)(3) covers labor relations consultants or advisers to any employers engaged in interstate commerce. Individuals convicted of an enumerated offense are also prohibited under this subsection from

being an officer, director, or employee of any employer group/association that deals with a labor organization (for example, the president of an association of construction companies that deals with construction unions during a major project). Subsection (a)(3) also covers positions where an individual is responsible for the collective bargaining process or labor relations, such as a personnel manager in a large plant.

Subsection (a)(4) covers any position where the individual receives a share of the proceeds from any entity whose activities are in whole or substantial part devoted to providing goods or services to any labor organization (for instance, the owner or co-owner of a company that specializes in producing union memorabilia, i.e., hats or jackets with union logos).

Subsection (a)(5) covers any position that has control, custody, or decisionmaking authority over or concerning union money, funds, assets, or property, such as a rental manager of a union's building or hall.

The new changes to section 504 lengthened the period after sentencing or imprisonment that an individual is prohibited to serve in the labor movement from 5 years to 13 years. However, recognizing in the words of Utah Senator Orrin Hatch... "the rare occasions where a ban might be too harsh," Congress provided for the reduction of the disability to not less than 3 years (Congressional Record, 1982). The reduction is accomplished by the filing of a motion with the sentencing court where the disabling conviction occurred. The sentencing judge then decides whether or not a reduction in the disability is warranted.

Congress also changed the maximum penalty for willful violations of Section 504 from 1 year to 5 years imprisonment. A fine of up to \$10,000 could also still be imposed.

### *Authority for Granting Exemptions*

The authority for granting exemptions was also changed due to the Sentencing Reform Act of 1984, the Sentencing Reform Amendments Act of 1985, and the Sentencing Act of 1987. These changes to the exemption provision reflect the "phasing out" of the United States Parole Commission. For individuals who were convicted after October 12, 1984, and whose offenses were committed prior to November 1, 1987, requests for exemptions are still heard by the United States Parole Commission. For individuals who were convicted after October 12, 1984, and whose offenses were committed after November 1, 1987, the Federal district court where the individual was sentenced, or in the case of a state conviction the Federal district court in which the crime was committed, entertain motions for exemption.

The granting of an exemption or reduction in the bar is governed by the principle that the individual has

been rehabilitated at the time of the application for an exemption or reduction and will not endanger the organization in which he or she seeks to hold a position. The exemption or reduction in the bar must not be used as a tool in the rehabilitation process. The U.S. District Court for the Eastern District of New York held in a pre-1984 amendment case (*Nass v. Local 348, Warehouse, Production, Sales, and Service Employees* (1980)) that:

... it is clear that that portion of the statute regarding exemption was intended to apply only after the officer had shown prior to the five year ban that he [the officer] had been substantially rehabilitated and could so prove to the satisfaction of the Board of Parole of the Justice Department.

### *State and Federal Convictions*

Courts have held that section 504 should be viewed as a "remedial" statute and broadly construed when determining whether or not an offense is disabling (*Bellace & Berkowitz*, 1979). The U.S. District Court for the District of New Jersey held in *Illario v. Frawley* (1977) that:

The obvious impossibility of drafting federal legislation which makes specific, as opposed to generic, references to state-proscribed criminal activity compels conclusion that ambit of statute prohibiting certain persons from holding union office not be read as being restricted to four corners of the list of generic crimes specified by Congress.

Courts have been unwilling to classify convictions as only disabling on the basis of whether or not the offense is a "felony." In *United States v. Priore* (1964) and again in *United Union of Roofers, etc. No 33 v. Meese* (1987) the importance of a felony status has been discounted. The First Circuit Court of Appeals found in the latter case that:

To make the felony/misdemeanor distinction determinative risks making disqualification turn on irrelevant state or federal classifications or terminology. Rather, in our view, the disqualification statute should apply where (1) the statute of conviction aims, in part at serious conduct of the kind listed in the disqualification statute and (2) the offender violates the statute of conviction by engaging in the type of conduct that the disqualification statute lists.

The rationale that a conviction did not involve a union or involve one's "union conduct" has also been discounted as a factor in determining whether an offense is disabling under section 504. U.S. district courts in *Lippi v. Thomas* (1969) and *Illario v. Frawley* (1977) found that "union conduct" is not required for a conviction to be covered by section 504. *Lippi v. Thomas*, which involved the offense aiding and abetting in the willful misapplication of bank funds (18 U.S.C. 656), firmly establishes that:

... Section 504(a) was intended by Congress to apply to non-union conduct, as well as Union Conduct. Otherwise, Congress would not have included within its prohibition such crimes as rape, narcotics violations, and arson. As a result, the fact that plaintiff was convicted of a crime not involving the union is of no moment.

Courts have held that state or Federal offenses which are not listed by name can still incur the disabling provisions of section 504. A reading of *Illario v. Frawley* (1977) and earlier cases, *Lippi v. Thomas* (1969) and *Berman v. Local 107 International Brotherhood of Teamsters* (1964) reveals that courts have consistently held that when the facts behind a conviction reflect conduct which is "functionally identical" or "equivalent" to a enumerated offense, that conviction is disabling for purposes of section 504.

### *Probation/Parole Violation*

Sentencing authorities always require that those being granted a suspended sentence or conditional release "refrain from further violation of any law." Frequently courts have imposed a specific condition that a defendant not hold union office or position. This is especially true when the offense involved a union, such as embezzlement of union funds, 29 U.S.C. 501(c). In both cases a violation of 29 U.S.C. 504 would constitute a violation of probation or conditional release (*United States v. Barasso* (1967) and *United States v. Scaccia* (1981)).

### *Summary*

Section 504 viewed as a "remedial" statute has become exceedingly important in preventing the influence of criminal elements in our Nation's labor movement. A general study of the LMRDA found no local union officers or dissidents who could think of any modifications, reflecting that many in the labor movement may be in favor of congressional intent on this issue (*McLaughlin & Schoonmaker*, 1979). The 1984 amendments to section 504 have greatly expanded its original scope. The current provisions of section 504 demonstrate how strong congressional intent is "... to have an antiseptic and purifying effect on the conduct of union affairs by union officials and officers ..." (*Serio v. Liss* (1961)).<sup>3</sup>

### NOTES

<sup>1</sup>The Welfare and Pension Plans Act of 1958 was the forerunner of the Employment Retirement Income Act of 1974 (ERISA). Part of ERISA, contained in chapter 29, section 1111, of the United States Code, prohibits individuals convicted of certain offenses from holding positions in connection with employee benefit plans in much the same manner as 29 U.S.C. 504 covers positions in the labor movement.

<sup>2</sup>Section 504 also originally prohibited members of the Communist Party from holding union office. On June 7, 1965, the United States Supreme Court held that this prohibition was unconstitutional, as a bill of attainder (*United States v. Brown*, 381 U.S. 437, 85 S. Ct. 1701).

<sup>3</sup>Persons having questions on whether or not an offense is disabling or a position is covered should direct their concerns to the United States Attorney's Office in their area or to Labor Manage-

ment Racketeering, Criminal Division, United States Department of Justice, Suite 300, 1001 G Street, N.W., Washington, DC 20530.

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