

THE LITTLER TEN: Employment, Labor and Benefit Law Trends for Navigating the New Decade

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IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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THE LITTLER TEN: Employment, Labor and Benefit Law Trends for Navigating the New Decade

INTRODUCTION

The second decade of the 21st Century promises to redefine the way employment, benefit, and labor law are practiced. By 2020 Internet users worldwide will more than double to nearly 4 billion, processing speeds will increase 100 fold, and capacity will expand exponentially. Apart from changing the workplace forever, global employment law information and new digital technology will demand a new way of practicing law. Worldwide regulations, statutes and judicial decisions will be immediately accessible and categorized. Attorneys will add value not by providing static reports on what the law requires, but how the law applies to unique factual settings. Understanding trends and anticipating change will be essential. To help meet this challenge Littler offers ten employment and labor law trends for the second decade.

These trends and predictions are an evolution of similar efforts that Littler first reported in 1990 divided into nine topics. A decade later Littler presented the LITTLER ELEVEN (See Appendix A),¹ eleven trends in employment law for the first decade of the new millennium. The Littler Eleven in 2000 were:

- The Cyber-Employment Law Revolution — The New Law of the Digital Workplace
- Second Generation Harassment and Discrimination Standards — Developing a New Workplace Etiquette
- The Aging of the Workforce and the Rise of Age Consciousness in the Workplace — The Coming Age Discrimination Litigation Explosion
- Hiring, Retention and the Impact of the Skilled Labor Shortage — Litigating, Legislating and Engineering New Employment Relationships
- The Expansion of Worker Privacy Rights
- The Globalization of Employment Law Issues and Standards — From Immigration Legislation and NAFTA to Multinational Workplace Conduct Policies, Global Considerations Are Redefining Employment Law
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- Increasing Workplace Safety Requirements — From Violence Prevention and Ergonomics Regulations to the Challenge of Pseudoscience in the Workplace Safety Will Be a Growth Industry

The first decade of the 21st century is now a part of history. However, the events and developments of the last decade, and especially the end of the 20th century, directly shape what can be expected as we chart the employment and labor law challenges of the next decade. Certain challenges will become less significant as the law becomes mature and the solutions well established. For example, case law and legislation have answered many of the important legal questions involved in at-will employment and traditional wrongful termination claims. Other trends were only in their infancy in the early 2000s and will blossom in the coming decade. Globalization and the digitization of work readily occupy this category. Thus, it is unwise, if not impossible, to separate the developments of the first decade from those of the coming decade in undertaking the task of decoding the future.

For two years, Littler has been deciphering the hundreds of cases and thousands of developments that disclose the employment law trends of the coming decade. This effort has resulted in ten trends that comprise the LITTLER TEN. They evolved from a review of over 30,000 employers’ experiences by our nearly 800 employment attorneys. Not surprisingly, the influence of technology has shaped many of our observations. From the growth of social networking over the Internet, explosion of technological advances that allow employees to work outside of the confines of their offices, to an increase in terrorism globally, as well as other society-shaping developments are directing the future course of employment and labor law. Political change, demographics, cultural evolution, and dozens of other influences all play critical roles in the new law of the workplace.

The Littler Ten are not distinct trends unconnected to each other. On the contrary, the trends interrelate and overlap. An excellent example is the pervasive effect of technology on the other trends.

Most importantly, the Littler Ten is not a theoretical presentation. Each trend is supported by concrete examples. Moreover, each developing trend is related to practical recommendations on how employers can prepare for the predicted changes. Imagine how targeted your legal and human resource department could become if they had a “blueprint” for the future of employment and labor law. Building new policies, providing proper training, anticipating legislative and court-directed changes are just some of the examples of what could be achieved with such foresight.

THE LITTLER TEN

LITTLER ONE: The Digitization of Work Redefines Employment Law — From Virtual Employment, Cloud Computing, and Expanded Bandwidth to Fourth Generation Robots and Green Technology, Work and the Workplace Are Transforming the Application of Law

Overview

The Internet has brought us closer to our neighbors while allowing us to sit further apart. In no corner of the world has the impact of information electronization been more acute, in terms of both benefit and detriment, than the workplace. Over the past decade, employers have battled through this potential minefield, hoping to stay on the cutting edge of technology, reaping its rewards but at the same time avoiding its pitfalls. Over the coming decade, technology is expected to continue its exponential growth and intrusion into our everyday lives, and employers who are prepared to accept and exploit the growing benefits of this technology, while also preparing for and avoiding its pitfalls, will inevitably have an advantage over their competitors.

In 2009, as part of the infamous stimulus package, the American Recovery and Reinvestment Act of 2009 (ARRA) was signed into law by President Obama.² This legislation charged the Federal Communications Commission with creating a national broadband plan, allocating \$7.2 billion of federal funds (which has been matched by private contributions) to help ensure that all Americans reap the benefits of broadband.³ One key aspect of the ARRA is the financial assistance it lends to the Broadband Technology Opportunities Program (BTOP), which utilizes these funds by creating extensive broadband infrastructure, enhancing and expanding community computer centers, and encouraging sustainable adoption of

broadband service throughout the United States.⁴ In this way, the ARRA is designed not only to help the government sector (through enhanced public safety and homeland security) but also to benefit the private sector through job creation, worker training, and general economic growth in those rural communities that are held back by limited or no access to broadband.⁵ Legislation like the ARRA reinforces the notion that utilizing the potential of broadband will be a top priority of the federal government. In fact, countries like Finland and France have passed legislation that makes access to broadband a civil right, and the United States may not be far behind.⁶

Furthermore, recent technological improvements promise to upgrade the Internet from an old country road to an information super highway, with exponentially more speed, power, and capacity. For instance, Google claims that it will be able to produce Internet speeds that are 100 times faster than those available today through its own fiber-optic network.⁷ Recent estimates also suggest that broader bandwidth could increase worldwide Internet usage to 50% of the world’s population as early as 2015.⁸

Along the same lines, the emergence of cloud computing will allow businesses to draw from resources all over the country at the click of a button, reducing the need for costly storage centers, hardware or mainframes. Under a cloud computing system, shared resources, software and information are provided to computers and other devices on demand, like a public utility. When combined with broadband’s rapid improvement in connectivity and capacity, cloud computing has the potential to transform the way in which people work.

For example, increasingly more workers will be able to telecommute, avoiding the office altogether and thus saving a staggering amount of money for both employers and the country as a whole. Research suggests that if 40% of U.S. workers telecommuted only half of the time, this would lead to productivity gains of up to \$200 billion and save 276 million barrels of oil, equaling 32% of all U.S. oil imports from the Middle East.⁹ As President Obama declared in a speech at the White House Forum on Workplace Flexibility, “work is what you do not where you are.”¹⁰ Workers in the coming decade will become untethered from a specific workplace or work time, utilizing technological advancements to create work product away from the confines of their offices and beyond regular work hours.

While telecommuting and a more flexible workforce have the potential to save employers vast amounts of money, they may also increase the risk of litigation. Employees may seek additional compensation for hours worked away from the office on employer-issued smart phones or laptops, and technology may allow for

an assault on exempt status in wage-and-hour law. Similarly, telecommuting may make it harder for employers to protect valuable trade secrets. Furthermore, the emergence of social media platforms like Facebook make it easier for employers to conduct background checks on applicants, which may create legal challenges for employers in the coming decade as well.

Predictions for the Next Decade

In the May 2009 Littler Report, the focus was on *The Emerging New Workforce: Employment and Labor Law Solutions for Contract Workers, Temporaries, and Flex-Workers*.¹¹ In that Report, we analyzed recent trends and expert studies and envisioned employers hiring and utilizing an ever-growing number of contingent employees as companies across the country emerged from the recent world-wide recession. Such a trend is likely to escalate considering the flexibility of the model and the continued surge in the development and use of the Internet by individuals, businesses, governmental entities, and other organizations.

As Internet speeds improve, network mobility continues to expand, and the baby boomer generation is gradually replaced by a generation of children growing up under this technology-driven paradigm, we are likely to see dramatic changes to how employers conduct business. We should expect to find fewer and fewer workers stepping into brick and mortar buildings and, instead, find them logging in to online networks to participate with other “virtual employees” to complete a specific project. More and more employers will replace traditional overhead with investments in technology so they can recruit, hire, and coordinate assignments for their “virtual employees.”

Telecommuting

Increased use of contingent employees by employers resulting from the recent recession is one of many contributing factors to an anticipated increase in telecommuting by 2020. Another factor is the relatively high cost of overhead associated with office space — \$10,000 annually for the average worker.¹² As mentioned above, productivity gains resulting from telecommuting could also save employers up to \$200 billion. Some companies are preparing for such a change by reducing their current real estate holdings with the expectation that telecommuting is inevitable.¹³ And it just may be. In 2009, 34 million adults in the U.S. telecommuted at least occasionally, and research suggests that by 2016, 63 million workers (or 43% of the U.S. workforce) will telecommute.¹⁴

Another contributing factor is that the exiting generation — baby boomers — have developed a reputation for being workaholics, while their future replacements — Gen-Xers and Gen-Yers — are

more family-oriented, demanding a better work-life balance.¹⁵ Telecommuting options will not only be preferred by these younger generations, but employers may be inclined to offer flexible working options to their older and more experienced employees who otherwise would be left to choose between a full working schedule or retirement. Therefore, we can expect to see telecommuting options as part of a larger benefits package commonly offered by the employers of tomorrow.

For these reasons, along with the expansion of technology, the decreased cost associated with technology, and the emerging use of video on demand and social media, telecommuting will be an obvious advantage for a number of employers. The key will be managing potential pitfalls, which will be discussed later in this section.

It is also important to note that by 2020, almost all types of workers will be subject to telecommuting. While the advantages of telecommuting are most obvious as applied to professional workers like lawyers or software designers, technology can also make telecommuting applicable to employees engaging in physical labor. This can occur through a process called indwelling, where humans remotely control robots to complete a given physical task. The increased speed of the Internet has created broad enough bandwidth to make extensive indwelling a legitimate possibility in the coming decade, making it every bit as possible for a construction worker to telecommute as a lawyer. And eventually, as fourth generation robot technology gets even more sophisticated, self-sustaining robots may be able to complete increasingly complex physical tasks completely on their own. Employers must be prepared for this radical change in the way people get to work.

Social Media

Social media is rapidly becoming a common and accepted form of communication by a wide array of individuals and businesses. Teenagers and adolescents are no longer the sole users of this emerging platform. The explosion in the total number of social media users¹⁶ is primarily attributable to growth in the number of adult users.¹⁷ Facebook, the most popular social networking site in terms of users, experienced a 276% rise in its 35-54 year old demographic in a six-month period.¹⁸ Although this age group is seeing the largest growth in numbers, teenagers remain the most likely to use social networking sites. However, over the next decade, these teenagers will enter the workforce and expect that communication through social media will be the norm for both personal and business reasons. Other social media, like LinkedIn, were created to cater to the professional and job-seekers. By 2020, it is likely that more of these professional sites will develop, or existing ones will promote use of their media specifically for business networking and hiring purposes. Recruiting

coordinators can target their candidates to fill their hiring needs by accessing qualified candidates through searches of these sites. Any business reluctant to join the trend could already find itself behind the ball. An article appearing on www.marketingrestaurantonline.com notes that more than 80,000 websites have implemented Facebook Connect since December 2008, and more than 700,000 local businesses have active pages on Facebook.¹⁹

Blogs, social networking, web conferencing tools, and video conferencing will not be limited to social activities. All of these developing technologies could, and have, found their appropriate position in the workplace. Blogs and social networking can be used internally or externally to develop and share knowledge bases, assist in project-oriented assignments, and develop relationships. These tools could especially become useful for employees who are reaching retirement age as a resource to utilize their knowledge and experience and share with incoming generations. Similarly, web conferencing tools assist in creating “virtual offices” where employees can “meet” online for training exercises or to collaborate simultaneously on one document or project, diminishing the need for costly travel.

Problems with Developments in Technology

Although the obvious benefits associated with increased use of technology in the workplace ensure its continued proliferation, its use is not without significant pitfalls that can be costly if not avoided.

Discrimination

One significant problem that has already surfaced is the threat of litigation against employers who currently use social media like Facebook to conduct background checks on potential employees. A recent survey of employers revealed that more than 80% of employers review applicants’ social media profiles at least sometimes.²⁰ While the practice of reviewing public information on the Internet is not illegal, employers may expose themselves to litigation risk when they make hiring decisions based upon what they find. Confirming the weight accorded to information gleaned from social network sites, a recent survey showed that 70% of HR professionals have rejected candidates based on information found online, and 84% of respondents think it is proper to consider *personal* data found online.²¹ This is alarming because these profiles often contain sensitive information about applicants (like sexual orientation, possible disability, and religion) that employers should never ask applicants about directly in an interview, and should not consider in a hiring decision.

In the past, claims of age, race, or gender discrimination routinely followed employers who requested photos of potential employees on their applications. While most employers have

abandoned this hiring practice, many employers fail to recognize that the same exposure follows those that have access to this same information through checking online profiles. A New York Times article detailed how employers rejected promising applicants after reviewing their Facebook profiles and discovering reference to their sexual escapades and recreational drug use.²² Moreover, a recent study found that the top reasons for rejecting candidates included concerns about lifestyle (58%), inappropriate comments (43%), and unsuitable photos or videos (55%).²³ The risk of litigation from these practices is truly unnecessary. Helpful information found through these online profiles is rare and should be discovered during a proper interview. Employers need to develop a comprehensive policy to proactively deal with this issue, one which goes beyond simply forbidding the use of Facebook background checks. This type of broad prohibition is unrealistic and employers should craft a more flexible and detailed policy to combat this emerging litigation threat.

Wage and Hour

The digitization of work raises numerous issues under wage-and-hour law. For example, how does an employer determine and record the hours of work of a nonexempt employee working in his or her home, including time spent reviewing and responding to e-mail on company-issued cell phones and laptops? The fact that a nonexempt employee is telecommuting does not change an employer’s obligation to pay for overtime worked. Although overtime issues are present in all working environments, they are extremely difficult to manage when the employee is working away from direct supervision from outside the office. This is becoming more visible as class-action wage and hour lawsuits proliferate around the country as employees seek overtime compensation for hours they claim they worked at home.²⁴ In one high profile example, an assistant to Oprah Winfrey claimed more than \$65,000 in overtime over a 16-week period due to activity on her personal digital assistant (*e.g.*, Blackberry or iPhone), and the company paid it.²⁵

As technology becomes more sophisticated, it becomes more feasible for plaintiff’s lawyers to argue that once complex tasks have become routine through the use of this technology, thus mounting an assault on wage-and-hour overtime exemptions. Furthermore, the expectation that employees will have access to work responsibilities while on vacation raises employment law issues as well. According to a recent survey, 86% of executives reported that workers will be more connected to the office while on vacation in the future.²⁶ If this increased employee connectivity to the office while on vacation is a result of explicit instructions or a requirement by the employer to keep in touch, these employers will likely be subjected to lawsuits in the next decade.

Workplace Safety

In 1999, the Occupational Safety and Health Administration (OSHA) issued an opinion stating that employers were responsible for ensuring that telecommuting workers' home offices were in compliance with safety standards.²⁷ After widespread criticism, OSHA quickly retracted the opinion and issued a directive that it would not conduct inspections of employees' home offices and does not expect employers to conduct inspections of home offices.²⁸ Although, OSHA's directive likely eliminates some liability for employers, liability is still a threat in a telecommuting world. Employers should still be wary of potential claims of negligence from visitors or family members of the telecommuting employee who suffer an injury in the employees' home/home office.

Protection of Trade Secrets

Telecommuting also exposes employers to internal threats because it may be more difficult to manage business and other proprietary information that is created and stored remotely. For example, remote employees may maintain unique files containing client information, customer lists, pricing, sales data, profit-margin data, engineering drawings and other sensitive information. And employer's ability to maintain protection of this information in a remote office is likely to be more difficult than in an on-site office. For these reasons, it is highly recommended that *all* remote work either be done on an employer-owned laptop or through a direct connection to the network.

Nevertheless, even these solutions are not fail-proof in today's world. Regardless of whether employees are telecommuting or taking a laptop to an out-of-town meeting, theft or loss of a company laptop could lead to loss or ultimate disclosure of confidential or proprietary information. Some threats can occur without the loss of a laptop. Employers should ensure that adequate security (firewall, network encryption) is installed and working in any telecommuting environment so unwanted visitors do not gain access to employers' proprietary information.

Driving and Texting

Liability for employers related to the expanding use of technology is not limited to employers who embrace contingent workforces or encourage telecommuting by their employees. Developments in mobile technology over the past decade have allowed more employees to conduct business on handheld personal digital assistants. Employers should be concerned about their employees' use of mobile technology while they are working or driving company vehicles. Because employers are generally considered "deep pockets," litigation is on the rise across the country where employers are being sued for negligence in cases involving

accidents on roadways.²⁹ Many cities across the country are banning cell phone use while driving in school zones, while some are prohibiting cell phone use altogether while operating a vehicle — and for good reason. Studies have shown that approximately 70% of all drivers admit to have texted while driving.³⁰ More alarming still is a recent study conducted by the Virginia Tech Driving Institute demonstrating that this behavior increases the risk of accidents by more than 23 times.³¹ As technology has developed, more and more employees have mobile devices that are capable of much more than talking and texting, such as Internet and video access, so employers should carefully regulate use of such devices when employees are "on the clock."

Recommendations/Best Practices

Technology has much to offer the employer who is willing to respect its power and influence. The question to answer today is not whether to invest in technology, but how best to manage it. Change is here. The employer who is prepared to meet the challenges of the changing workplace will be the most successful in overcoming those challenges.

- Conduct an audit of company practices regarding electronic resources to discover how much time employees spend on the Internet, what sites they visit, and how often employees complete work-related tasks away from their offices.
- Embrace the telecommuting revolution but understand that not every employee or position is suited to telecommuting, and carefully choose employees who will be able to effectively work from home in order to maximize telecommuting's benefits while minimizing its costs.
- Design a telecommuting policy that helps first-time telecommuters transition to the new position by setting clear boundaries and deadlines, while keeping these employees as involved with your organization's culture and policies as possible.
- Monitor employee use of electronic resources, most notably by installing software on company computers that monitor and limit Internet access to certain sites.
- Develop and implement a comprehensive electronic resources policy to control the use of all forms of electronic resources including e-mail, cell phones, laptops, and social media websites.
- Educate employees on the intricacies of this comprehensive policy, perhaps through a webinar, and document that each employee has received training on the policy.

- Train employees who may conduct background checks on applicants through social media sites on the relevant federal and state discrimination laws.
- Do not require employees on vacation to check their email or take work-related phone calls.
- Utilize the Internet to distribute compliance material and tools to your workforce by, for example, creating webinars to train your employees on employment law, or posting disciplinary information on the web in order to ensure uniform standards for violations.

LITTLER TWO: Privacy Rights Vacillate in a World of Monitoring, Genetic Medicine, Social Networking, and Combating Terrorism

Overview

Technology has advanced to the point many are predicting that privacy is dead.³² Radio frequency identity chips (RFID) are already used for products, and can be implanted in documents, cards, cell phones, watches, bank notes, jewelry, etc. allowing remote monitoring of individuals without their knowledge. The U.S. State Department embeds them in U.S. passports.³³ RFID chips have been subcutaneously implanted in Japanese school children to allow tracking at school and on the way to and from school. The Ministry of Justice in Mexico implanted RFIDs in 160 people to make it easier to track them in case of kidnapping.³⁴ Several states have adopted laws prohibiting the involuntary implantation of microchips.³⁵ India has just commenced a census of every citizen over the age of 15, in which it is collecting biometric data.³⁶ “Smart dust” would allow nanomachines to monitor, transmit information and images, interact with the environment, etc. While the benefits to drug delivery systems, health care technology, anti-theft mechanisms, energy, and security are obvious, the potential loss of privacy is profound.³⁷ The use of this technology in the workplace to monitor employees has revived the idea of a “panopticon,” a system that allows one-way surveillance without making the subject aware of the surveillance.³⁸ There have been calls for legislation to address the potential issues.³⁹

More conventional workplace monitoring continues to be a subject of frequent litigation over privacy rights. The Ninth Circuit Court of Appeals ruled that review of personal and sexual text messages made on an employer-owned pager violated the employee’s right of privacy. On appeal, the U.S. Supreme Court reversed, holding that the employer’s review of text messages was motivated by a legitimate work-related purpose and was not excessive in scope.⁴⁰ The New Jersey Supreme Court ruled that an employer violated an employee’s rights of privacy by reading emails between the employee

and her lawyer found on the employer’s computer, even though the company had a policy banning personal use of the computer. The court declared such a policy overbroad and unenforceable, and found that the company’s policy failed to give adequate notice of the type of monitoring that occurred.⁴¹ The California Supreme Court found no actionable privacy violation when the employer installed a hidden camera operated only at night to determine the identity of the person suspected of using a company computer at night to access pornography, because the occupants of the office where the camera was installed were never filmed.⁴²

Some states are beginning to limit the ability of employers to obtain and use credit history information for job applicants and employees unless they can show that the information is job related. Oregon recently added a law that prohibits an employer from obtaining or using the credit history of a job applicant or employee in connection with hiring decisions or as a basis for adverse employment actions.⁴³ Both Hawaii and Washington also have laws placing similar restrictions on employers.⁴⁴ Introduced July 29, 2009, the Equal Employment for All Act⁴⁵ would amend the Fair Credit Reporting Act (FCRA) to prohibit use of consumer credit checks against both prospective and current employees for the purpose of making adverse employment decisions, including hiring, promotions, transfers, and terminations.

Technology allows users of the Internet to mask web browsing, but emerging deep packet inspection (DPI) technologies would allow Internet service providers to intercept virtually all Internet activity, and then filter the information for marketing, law enforcement, anti-virus protection and spam. The privacy implications have made the technology controversial.⁴⁶

Security of data is a top concern. As of April 2010, 46 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands have enacted laws requiring notice of a security breach.⁴⁷ The duty to give notice does not depend on whether the data pertains to an employee or the consumer. California adopted tough new laws in the healthcare sector after high profile instances of workers gaining access to health records of celebrities.⁴⁸

The implications of the 2008 Genetic Information Nondiscrimination Act will be worked out in years to come, as regulations are adopted. Interim final regulations for the insurance industry were adopted in 2009, but final regulations are pending for the employment provisions of the law.⁴⁹ The protection of family medical history is juxtaposed against an employer’s interest in wellness programs, and the frequent publication of family and personal medical history information on social networking sites and blogs.

Social networking is also challenging the limits of privacy. If an employee posts on Facebook that he won a bowling tournament shortly after filing a claim for a work-related back injury, can the employee realistically expect the employer not to notice, and use the information?⁵⁰ While many employers use these sites for background checks on prospective employees, the full legal implications are unclear and will be worked out in the coming decade. Employee rants, drug use, sexual orientation, religious and political beliefs, as well as race and national origin are all discovered by this medium. Further, the information may be reliable. A study of young adults between the ages of 17 and 22 demonstrated that the way this group portrayed itself on Facebook was true to life.⁵¹

Also uncertain is the right to speak privately on the Internet. Efforts to unmask identities or go after the Internet providers have met with mixed success.⁵²

Privacy concerns evaporate in the face of terrorist threats. The ubiquity of closed circuit televisions (CCTV) in London dates from attacks by the IRA. As threats continue, efforts to screen for potential bombers may lead to more forms of scanning as a condition of entry into public spaces.

Predictions for the Next Decade

During the next ten years, employers can expect a wave of privacy legislation from the states as legislators seek to win votes from Generation Y and Millennials. These new voters, weaned on the Internet and social media, will grow frustrated with court decisions, based on a century of well-established precedent, holding that individuals can have no expectation of privacy in information and activities that are known to more than a small, circle of trusted friends and family members. At the same time, legislators will be under increasing pressure from voters of all ages to force businesses to implement measures that will improve information security and reduce the risk of security breaches and identity theft.

The new wave of legislation will address the following areas:

- **Lawful Off-Duty Conduct:** States will implement broad protections against adverse action based on lawful off-duty conduct that does not conflict with an employer's legitimate business interests, similar to laws currently in place in Colorado and New York.
- **Location Tracking:** Employers will be generally prohibited from tracking employees' location through the use of GPS-enabled cell phones and in-vehicle GPS units. In the limited circumstances where employers will be permitted to engage in location tracking, such as for service employees, legislation

will substantially restrict the categories of information that can be collected, when they can be collected, and how they can be used, and will require that tracked employees receive detailed notice of the tracking.

- **Implanted Computer Chips:** As RFID (radio frequency identification) technology becomes increasingly ubiquitous and more uses for it are developed, more state legislatures will join California in barring employers from requiring that employees submit to implantation of an RFID chip to permit location tracking and for other uses.
- **Encryption:** Following the lead of Massachusetts and Nevada, businesses will be required to encrypt (1) laptop computers and other portable storage devices on which personal information has been stored and (2) e-mail containing personal information.
- **Job Applicants:** Employers will be permitted to collect Social Security numbers from job applicants only at that point in the application process where the employer is ready to conduct a background check.
- **Comprehensive Information Security Programs:** A significant minority of states will forego piecemeal, information security legislation and enact omnibus information security legislation. This legislation will require businesses to address the full gamut of administrative, physical, and technical safeguards for personal information in a comprehensive information security program.
- **Statutory Damages for Security Breaches:** A significant minority of states will impose statutory damages on businesses responsible for a security breach. Such damages will be recoverable in a private lawsuit regardless of whether individuals whose information has been compromised can prove actual harm. These laws will trigger a new wave of class action litigation.
- **Changes Regarding Credit Reports:** Congress will likely amend the Fair Credit Reporting Act, and states will likely follow suit and amend analogous state laws, in two important ways. First, in response to the foreclosure crisis that destroyed the credit rating of millions of Americans during the Great Recession of 2007 to 2010, these laws will generally prohibit employers from obtaining and relying on credit information in employment decisions. Congress also will impose express restrictions on the disclosure by employers of background check reports to third parties, such as customers of the

employer's business who demand proof that the employee can be trusted before permitting the employee to access the customer's premises or information systems.

- **Changes to Stored Communications Act:** The federal Stored Communications Act, which regulates the use and disclosure of stored electronic communications at third-party service providers, will be substantially overhauled. The primary impetus for the change will be the explosive growth of "cloud computing" services. These services typically provide data storage and/or data back-up as well as software applications — such as e-mail or instant messaging, and social networking platforms — and hardware infrastructure. The amendments will make it easier for employers to obtain information from service providers for whom the employer is the subscriber but impose additional restrictions on access to information stored by providers, such as social media sites, for whom the employee is not the subscriber. The new law also will include a streamlined procedure for law enforcement authorities to access information stored by a cloud vendor when that information is needed in connection any criminal investigation.

There is a similar initiative to amend the 1986 Electronic Communications Privacy Act to reflect the realities of cloud computing.⁵³

- **Convergence of Data Protection Requirements:** During the next ten years, a wave of countries seeking the economic benefits of easy cross-border data transfer with the European Union (E.U.) will enact omnibus data protection requirements that are similar to those in place in E.U. countries. This legislative change will be viewed as necessary because under the European Data Protection Directive, personal data related to a resident of the E.U. can be transferred outside the E.U. only if the laws of the country where the information will be received provide an adequate level of protection, meaning protections similar to those required by the E.U. These new laws will make it more difficult for global organizations to consolidate and centralize human resources information on servers located in the United States and to use cloud computing services to reduce IT costs.

Recommendations/Best Practices for Employers

Employers looking toward 2020 may take several steps to prepare for the legislative onslaught and to reduce the risk that they will be targeted for government enforcement actions or class action lawsuits.

- Develop electronic resources and social media policies that embrace the efficiencies and other benefits of new communications technologies and adapt to changing social norms, including setting expectations for privacy; establish guidelines crafted to protect the employer against potential liability for postings by employees as well as to maximize protection of trade secret and proprietary information; permit a reasonable level of non-business use that is lawful and not detrimental to the employer's interests.
- Revise policies frequently to stay abreast of changing restrictions on monitoring and to provide appropriate notice to employees.
- Train employees on privacy limitations.
- Engage in location tracking only when justified by business necessity, restrict the use to business hours, and strictly control access to, and the use of, the fruits of the surveillance.
- Enhance existing technical, physical and administrative barriers between employees' health information and the personnel decision-making process.
- Develop robust information security policies, practices, and procedures that apply not only to all categories of employee health information but also to any category of personnel information that could be used to commit identity theft or otherwise harm employees.
- Implement an aggressive security incident response program that will rapidly halt any leakage of sensitive information; ensure prompt coordination with relevant law enforcement authorities; mitigate the known, harmful effects of the incident to affected individuals; and reduce the risk of a media backlash, government enforcement action, and class action litigation.
- Develop policies for employees regarding social networking sites and employer information that balance the business uses with privacy expectations.
- Make sure that persons using the Internet to research employees and candidates for employment are trained on the restrictions imposed by state and federal law regarding certain information.
- Keep up to date with this fast-changing area of the law by subscribing to RSS feeds from the Littler privacy blog: <http://privacyblog.littler.com>.

LITTLER THREE: The Brave New World of Employment Litigation — E-Discovery, Next Generation Class Actions, Privatization of Litigation Through ADR and Virtual Trials

Technology has already profoundly affected how employment cases are prepared and tried. E-mail evidence has made even the most routine cases document intensive. Electronic discovery issues have hijacked litigation on the merits in many cases. In class actions, electronic records of various kinds are often the centerpieces of proof, and proof of liability increasingly relies on statistical analyses of vast quantities of electronically stored data. In trials, the wired courtroom is now commonplace. Evidence is displayed with electronics; lawyers rely on sophisticated data base technology to store, organize, search and retrieve documents, testimony, and work product “on-the-fly” in the courtroom. The instant retrieval and display of video deposition testimony during cross-examination is now common, and necessary to achieve trial “drama” expected by juries accustomed to the pace and appearance of presentation of information from television and movies. During the next decade the technology existing and emerging will revolutionize the way cases are prepared and tried.

Technology is not the only driver for change. Cost and sustainability concerns will also accelerate the use of alternative dispute resolution mechanisms to resolve cases.

Overview — e-Discovery

These days you cannot pick up a legal newspaper without hearing some type of horror story about sanctions being issued for the mishandling of electronic data in litigation. E-Discovery is one of the most important and transformational legal developments in recent years. It has become a \$200-billion-a-year industry and a legal subspecialty in its own right.

It has become a fact of life in today’s digital age that:

- **Businesses conduct business and store information electronically.** It has been estimated that over 95% of business information is stored electronically, and 70% of that data is never printed out into hard copy format. It is estimated that: two-thirds of the United States workforce uses e-mail as part of their daily routine; 60% of business intellectual property is stored in the e-mail system; and a typical user stores more than one-half of his/her critical business information within the confines of the e-mail system. Accordingly, electronically stored information (ESI) is often at the heart of labor and employment litigation. A recent survey of major U.S. businesses concluded that 1 in 5

companies have had e-mails or Instant Messages requested in the course of a lawsuit or governmental investigation and 13% of those companies surveyed had a lawsuit *triggered* by an electronic communication.

- **The volume of ESI is staggering.** It has been estimated that billions of e-mails are sent and received by U.S. businesses everyday and the volume of e-mail sent by businesses worldwide has now exceeded 1 Exabyte (1 billion Gigabytes, or the equivalent of all of the words spoken by mankind in recorded history). In 2009, daily e-mail traffic was estimated at 247 billion messages/day. That number is expected to double to 507 billion by 2013. Indeed, in one wage and hour class action that Littler handled 67 terabytes of e-mail were in play. A terabyte is the equivalent of an academic library of printed documents. Ten terabytes is the equivalent of all of the printed material in the Library of Congress. Thus, for this one case alone, Littler’s client has the equivalent of 6.5 Libraries of Congress of arguably relevant e-mails. A single laptop computer can hold the equivalent of 40,000,000 typewritten pages of paper documents.
- **The cost to store data has shrunk immensely.** In 1956, the estimated cost to store 1 Gigabyte of data was over \$2 million dollars. Today, the cost to store that same amount of data is less than \$1.
- **ESI is very different than traditional paper records.** Among other things: electronic data is dynamic — merely opening up an e-mail can change its metadata (including information about who last accessed and modified the e-mail), oftentimes without the user’s knowledge; and ESI can be incomprehensible when separated from the system(s) that created it. (*e.g.*, if you do not have access to the Microsoft Outlook program, it can be quite difficult to view e-mails that are stored on a thumb drive).
- **Many companies and lawyers lag behind when it comes to e-Discovery and records management.** Multiple surveys have concluded that most large companies⁵⁴ and lawyers themselves are behind the curve in responding to these issues. Not only are companies being sanctioned with greater frequency, but the sanctions are now focusing on both in-house and outside counsel when e-Discovery mistakes occur in a case. Furthermore, plaintiffs’ lawyers have latched on to an employer/defendant’s failure to adapt. The plaintiffs’ bar is educating itself about the intricacies of ESI, and then using that knowledge to create e-Discovery sideshows in

litigation, in the hopes that a defendant will settle a case irrespective of the merits of the underlying claim when faced with the prospect of sanctions for e-Discovery misconduct (intentional or not) or the immense costs of preserving, harvesting, processing, reviewing and producing large amounts of ESI.

Moreover, both the way the modern workforce operates and the way that the next generation of employees communicate is changing. For example:

- There are approximately 500 million active Facebook users, which represents the third largest country on earth.⁵⁵ It has been estimated that Facebook users collectively spend 6 billion minutes a day on Facebook.⁵⁶
- There are 4.5 billion cell phone subscriptions worldwide.⁵⁷ It is estimated that 3.5 billion cell phone text messages are sent every day in the United States alone.⁵⁸
- Approximately 76% of the Fortune 100 companies use at least one social media site.
- Over 1.5 billion people use the Internet worldwide, and around 10 million static pages are added to the Internet every day.
- Cloud computing, *i.e.*, shared computing services accessible over the Internet that can expand or contract on demand, topped Gartner's 2010 list of the 10 top technologies that information technology personnel need to plan for.⁵⁹ Gartner also predicted that the value of cloud computing will jump from \$46.41 billion in 2008, to \$150.1 billion by 2013.⁶⁰
- While there are about 65,000 articles in the Encyclopedia Britannica, there are over 3,152,266 Wikipedia articles written in English alone.
- Over 3 billion Google searches are conducted every day.
- There are about 50 million "tweets" on Twitter everyday with an average of 600 tweets per second.⁶¹
- The typical 21-year-old graduate has in his/her lifetime:
 - Exchanged 250,000 e-mails and instant messages
 - Spent 10,000 hours on mobile phones
 - Spent 3,500 hours surfing the Internet⁶²

Predictions for the Next Decade — e-Discovery

Faced with this landscape, here are predictions of what will happen in the e-Discovery arena over the course of the next decade:

As the Law with Respect to e-Discovery Becomes More Established, Courts Will Continue to Be Less Tolerant of e-Discovery Abuses or Misconduct

The legal landscape with respect to e-Discovery issues (both domestically in the United States, and also around the world) is changing literally on a daily basis. Although federal courts amended the Rules of Civil Procedure to address ESI about three years ago,⁶³ in that short period of time it has become crystal clear that courts will not hesitate to hold a party accountable for mishandling electronic data.

In the recent case of *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities L.L.C.*,⁶⁴ Judge Shira Scheindlin, who many regard as the matriarch of the e-Discovery world,⁶⁵ held that the following e-Discovery standards are now so well entrenched, that the failure to adhere to them is not merely negligent, but instead constitutes gross negligence for purposes of imposing severe sanctions:

- The failure to issue a written litigation hold when litigation is reasonably anticipated;
- The failure to identify all of the key players and to ensure that their electronic and paper records are preserved;
- The failure to cease the deletion of email or to preserve the records of former employees that are in the party's possession, custody, or control;⁶⁶ and
- The failure to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

Lawyers Will be Held Accountable with Their Clients for e-Discovery Mishaps

Almost everyday a new case is published sanctioning a litigant for e-Discovery mishaps and abuses. Yet, a new trend is developing where counsel — both in-house and retained counsel — are also being sanctioned for e-Discovery matters. For example, in *Bray & Gillespie Management L.L.C. v. Lexington Insurance Co.*,⁶⁷ a plaintiff was sanctioned for producing TIFF⁶⁸ files without metadata that eliminated the search capabilities that would have been available if the plaintiff had produced ESI in native format.⁶⁹ The attorney was also sanctioned for misrepresentations that were made about how the data was collected and produced (manually printed and imaged prior to production in electronic TIFF form vs. electronically harvested and transferred to a litigation support database in a way that "deliberately manipulated [the ESI]... to withhold from the defendants the information that had been requested, specifically metadata").

e-Discovery Will Continue to Be a Sub-Specialty of the Law

Given the significant impact e-Discovery can have on the outcome of a case and the rapid developments in this area of the law, an entire cottage industry has arisen around e-Discovery. Lawyers and other professionals that specialize in this area can provide focused guidance and expertise on all aspects of e-Discovery in litigation, including case- and client-specific advice about meeting preservation obligations, addressing initial mandatory “meet and confer” obligations, developing strategies for efficient and effective data harvesting, reviewing and production of e-Discovery and implementing cost-shifting/reduction strategies. Such specialization ultimately allows parties to cut through the morass of complex IT systems and the sheer volume of data in an efficient and cost effective manner, saving time, money and resources, as well as to avoid the unfortunate and severe consequences discussed in the cases above.

As an example, one of the most misunderstood aspects of e-Discovery is metadata. Metadata is information about a particular data set that may describe, for example, how, when, and by whom it was received, created, accessed, and/or modified and how it is formatted. Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. It can be altered intentionally or inadvertently. Metadata is generally not reproduced in full form when a document is printed. Typically referred to by the less informative shorthand phrase “data about data,” it describes the content, quality, condition, history, and other characteristics of the electronic data.

Yet there are weapons available to “push back” on such blanket requests for metadata. First, before getting into a discussion of metadata, counsel should insist that the requesting party make a threshold showing why metadata is relevant to a particular case.⁷⁰ Second, even if such a threshold showing is made, the requesting party should be required to identify what specific metadata fields are relevant in a particular case (as an example, there are 22 specific metadata fields in a standard outlook file), so only those that are relevant are produced.

As another example, given the explosion in the volume of ESI, keyword searches and litigation search and review tools that use advanced analytic and linguistic technologies are also starting to gain widespread acceptance for reviewing large volumes of ESI. However, as one Judge who is recognized as a thought leader in the e-Discovery world observed:

[A]ll keyword searches are not created equal; and there is a growing body of literature that highlights the risks associated with conducting an unreliable or

inadequate keyword search or relying exclusively on such searches for privilege review...⁷¹

Simply stated, as the field of e-Discovery continues to mature, the need for specialization will continue to deepen.

The e-Discovery Rules of Civil Procedure and Evidence Will Continue to Adapt and Change

In September 2008, Federal Rule of Evidence (FRE) 502 was enacted. This rule protects against the inadvertent waiver of the attorney-client privilege or the work product protection, and is to be used in combination with the protocol envisioned by Federal Rule of Civil Procedure 26(b)(5)(B) to notify, sequester and return privileged material. An express purpose in enacting FRE 502 was to stem the rising costs of discovery of ESI.

Since the federal rule amendments concerning e-Discovery were enacted in December 2006, over 25 states around the country have also enacted rules that specifically address e-Discovery.⁷² Many other states have e-Discovery rules pending or are in the process of evaluating e-Discovery rules of their own. The Seventh Circuit Court of Appeals recently embarked on an Electronic Discovery Pilot Program, whereby during Phase I of the Program, individual district court judges, magistrate judges, and bankruptcy judges in the Seventh Circuit have agreed to adopt “Principles Relating to the Discovery of Electronically Stored Information” and a “Proposed Standing Order” in select cases. The Seventh Circuit Principles not only expand upon fundamental e-Discovery issues that are already part of the Federal Rules of Civil Procedure addressing e-Discovery (for example, delineating exactly what e-Discovery subject matters must be addressed at the parties’ mandatory initial “meet and confer” conference, *see* Seventh Circuit Principal No. 2.01), but also incorporate forward-thinking, emerging principles around e-Discovery.

So over the course of the next few years as the field continues to mature, new rules at the state and federal level will most likely be adopted or amended.

Industry Groups Will Continue to Take a Leading Role Around Developing Law and Best Practices

The Sedona Conference® is a research and educational institute dedicated to the advancement of law and policy in multiple areas of law, including e-Discovery.⁷³ The Electronic Discovery Reference Model (EDRM) is an industry group created to develop and establish practical guidelines and standards for e-Discovery.⁷⁴ It has projects dedicated to:

- XML (the purpose of which is to provide a standard, generally accepted XML schema to facilitate the movement of ESI from one step of the e-Discovery process to the next, from

one software program to the next, and from one organization to the next);

- Metrics (the goal of which is to provide an effective means of measuring the time, money and volumes associated with e-Discovery activities);
- Information Management (the goal of which is to provide a common, practical, flexible framework to help organizations develop and implement effective and actionable information management programs);
- Search (the goal of which is to provide a framework for defining and managing various aspects of search as applied to e-Discovery workflow); and
- Model Code of Conduct (the goal of which is to evaluate and define acceptable boundaries of ethical business practices within the e-Discovery service industry.)

The EDRM also provides industry-standard, reference data sets of ESI and software files that can be used to test various aspects of e-Discovery software and services. The conceptual framework of the EDRM (which has phases for information management, identify, preservation, collection, processing, review, analysis, production and presentation) is the vernacular used by judges, lawyers, academics and vendors when addressing any aspect of e-Discovery. As this field continues to mature, vendors will take a leading role in its development.

e-Discovery Will Focus More on the Merits of a Case vs. Sideshows

The Socha-Gelbmann Survey is an independently prepared examination of the state of electronic discovery for each year they are published, and has been recognized by Am Law top law firms and the largest corporations in the country as the most comprehensive analysis of the e-Discovery industry. A significant finding of the 2009 Socha-Gelbmann survey was that while finding the right data and figuring out what to do with it should be primary drivers in e-Discovery, all too often those considerations are not even part of the e-Discovery conversation. This sentiment has not been lost on courts. At least one court observed:

The process of pretrial discovery in this case has seen endless disputes, many of which are only faintly, if at all, related directly to the causes of action that have been asserted by plaintiff. The defendant's motion for sanctions now before the court is a further example of how discovery has become a veritable "black hole" having the potential to draw in and annihilate the case itself.⁷⁵

Over the next few years as this area matures, the focus of e-Discovery should return to finding focused evidence that supports the parties' claims and defenses in a case, instead of engaging in a more general search of every scintilla of data that exists and e-Discovery sideshows that often are only tangentially related to the merits of the case.

Companies Will Increasingly Face Challenges Preserving and Collecting Their ESI Stored "in the Cloud"

Companies are rapidly moving storage and computing tasks to "the Cloud." This move is driven by a desire to decrease costs, speed deployment of systems, and, in many cases, to avoid complicated corporate bureaucracies. Today it is not uncommon to find companies that have outsourced many business functions, including HR information systems, accounting systems, project management tools, payroll processing and performance management.

While the short-term financial benefits of outsourcing these functions may be compelling, companies also need to consider the challenges they may face from losing control over these systems. In the e-Discovery context, companies may find it challenging to preserve information as necessary for litigation hold or to actually collect the information in a manner that is required for discovery. Cloud computing vendors specialize in standardized, scalable systems. Unique, one-off requests pose challenges for them that will likely require additional money and time to overcome.

Using information from a cloud-based system at a hearing or at trial may also take more planning and coordination. Judges are increasingly asking parties to properly authenticate electronic information and explain why the court should trust that an electronic record is accurate and complete.⁷⁶ To meet this burden, courts are expecting parties to provide testimony about the systems that created, stored, and ultimately produced a paper copy of the electronic record. This will require that companies obtain the cooperation of their Cloud vendors and that the vendor have the staff and records necessary to provide this testimony.

While the Cost Per Gigabyte to Handle ESI in Litigation Will Decline, the Volume of Data at Issue in Labor and Employment Cases Will Continue to Grow

Vendors and creative lawyers who specialize in e-Discovery will continue to find ways to reduce the costs of preserving, collecting, and processing ESI. The last two years have seen strong growth in the development and use of Early Case Assessment tools that help parties "cull" or minimize the amount of data that is processed and reviewed. In addition, the recession caused many e-Discovery vendors to re-evaluate their pricing models and reduce their per

gigabyte fees for processing and hosting of data. Some larger companies have even begun moving e-Discovery services “in house” to reduce costs even further.

However, while these measures may reduce the per unit cost of e-Discovery work in litigation, the volume of information that must be handled continues to grow.⁷⁷ This is due in large part to the rapid adoption of social networking tools and the proliferation of cell phones, smart phones, and other devices that now create large volumes of discoverable data. The combination of these changes will most likely result in overall e-Discovery costs continuing to grow, but at a slightly slower pace than in prior years.

In sum, e-Discovery will have an immense impact on the world of employment litigation. We predict that by 2020, half of all employment litigation will be over e-Discovery issues, and as a corollary, that every major employer will have an e-Discovery litigation program integrated into the company’s data storage plan to help minimize e-Discovery’s immense costs.

Overview — Next Generation Class Actions and Federal Wage and Hour Statutory Law While Federal Wage and Hour Statutory Law Stagnates, New Affirmative Defenses Emerge, and Compliance Training Is Mandated

A paradox that confronts any effort to forecast the future of class action employment litigation is that employers have become more compliant with employment and labor laws over the last decade, yet over 3500 class actions were filed nationally in 2009, approximately five times the number filed in 2000. Almost 90% of these lawsuits involved wage and hour disputes, which has become a hotbed of legal activity. Therefore, it is tempting to conclude that the number of future filings will be shaped far more by plaintiff’s attorneys, court decisions, and federal and state legislators, rather than the policies and practices of employers.

One particular point of concern is the stagnation of federal wage and hour law. In 1938, General Motors started mass producing diesel engines, DuPont began producing nylon fibers, television had just been patented, and most Americans worked in fixed brick and mortar worksites. It was in this year that the Fair Labor Standards Act (FLSA) was passed setting forth the nation’s wage and hour laws, and establishing the minimum wage at 25 cents per hour.⁷⁸ Computers, cell phones, and the Internet were science fiction and decades from commercial use. Factory whistles and manufacturing assembly lines have faded, yet the same laws that governed pre-World War II workplaces are being applied to jobs and compensation systems that did not exist in the twentieth century.

From 2001 to 2006, the number of federal court wage and hour class actions doubled,⁷⁹ and the pace has continued to accelerate. The number of reported wage and hour class action settlements/verdicts also increased, from 86 in 2008 to 124 in 2009.⁸⁰ However, despite the increase in numbers of settlements/verdicts, the average settlement/verdict decreased slightly from approximately \$8.8 million in 2008 to \$8.2 million in 2009.⁸¹ Nonetheless, the amount awarded per work week for a full-time employee remained relatively constant with \$100 per workweek representing the plaintiff’s “rule of thumb” for lawsuits filed for California workers, and significantly less (\$25 to \$35 per workweek) for non-California settlements.⁸²

The substantial recent growth in case filings can also be attributed to the recent recession. The reduced hours and layoffs prompted many to seek legal counsel, and savvy attorneys inevitably asked about potential wage law violations. Even those on Wall Street who believed their long hours would be rewarded with job security and lucrative stock grants and bonuses, have joined others in becoming frustrated and angry when jobs are eliminated. They too have often turned to wage and hour class/collective actions claiming misclassification and a corresponding multiplicity of violations.⁸³

The growth of wage and hour class/collective actions litigation has been matched by the Obama Administration’s pledge to make wage and hour enforcement a priority. Toward the end of 2009, Secretary of Labor Hilda Solis announced, “Make no mistake, the DOL is back in the enforcement business.”⁸⁴ In early 2010 the DOL, in cooperation with advocacy groups, embarked on a “public awareness” program to inform workers about their rights.⁸⁵ The DOL has also hired 250 new investigators, a one-third increase.⁸⁶ In 2008, 78% of DOL investigations resulted in findings of violations⁸⁷ and it collected \$185 million in back wages for 228,000 employees.⁸⁸ In 2010, as DOL initiatives take shape, these numbers may seem modest.

Does the recent explosion of wage and hour class actions and the coming surge in government enforcement signal an even greater increase in wage and hour class actions, or will they subside and change over the next decade?

Predictions for the Next Decade — Class Actions and Wage and Hour Litigation

An important consequence of the rapid growth in employment class actions is that appellate courts have lagged far behind this trend. As a consequence, lower courts and the parties involved in these cases must decide legal issues and strategic matters with minimal guidance from the appellate courts. Faced with this dearth of authority, there is a great incentive for all concerned to avoid the risks of adverse, higher-court rulings and to settle cases on terms that include a substantial risk premium. The result, of course, is to

perpetuate the state of uncertainty and to defer appellate review of the fundamental principles and procedures that are at the heart of these cases.

For example, the ubiquitous two-step or *Lusardi* approach to “class certification” in collective actions under the FLSA has never been considered by the U.S. Supreme Court. This is no small matter because many of the safeguards of Rule 23, such as the requirement that courts consider the qualifications of putative class counsel, largely are absent from class certification decisions that follow the two-step approach. Because class certification decisions under the FLSA may not be directly appealed, Supreme Court review of this legal framework may be years away. But if and when it comes, it may transform the class action landscape.

A corresponding trend, which we anticipate will continue, has been that employment discrimination class actions have largely been replaced by FLSA wage and hour collective actions. In our view this trend reflects an obvious cost-benefit analysis on the part of the plaintiff’s bar. FLSA collective actions simply are much easier and less costly to certify, at least conditionally, than discrimination cases under Rule 23. Courts frequently note that, according to the *Lusardi* framework, the burden to conditionally certify an FLSA class is a light one. Although the possibility remains that an employer can decertify a class by means of a second-stage motion, many employers find the potential risks too great and choose to settle before reaching the second stage. In contrast, the Supreme Court has famously held that the court’s Rule 23 certification decision requires a “rigorous analysis.” As a result, plaintiff’s attorneys are more likely to obtain an earlier and more favorable decision, at a lower cost, in FLSA litigation than in Title VII litigation.

The trend in FLSA collective actions is partly lawyer-driven, as evidenced by the concentration of these cases among a relative handful of plaintiff’s firms, and the marked regional imbalance in case filings. Unless the Supreme Court acts to vary the rules, we believe that the current explosion of FLSA collective action filings will continue with plaintiffs’ attorneys focusing on new industries and regions, and that the calculus of private attorneys regarding the relative unattractiveness of discrimination will be unchanged. Yet, because issues regarding workplace inequality will continue to percolate, we anticipate that this void will be filled by the government. Therefore, we predict that over the next 10 years, employment discrimination class actions will primarily be the domain of the EEOC (perhaps joined by private plaintiff’s attorneys), and FLSA class and collective action litigation will be dominated by private counsel.

The government will certainly play a role, however, in the emergence of wage and hour lawsuits. In 2008, the Department of Labor (DOL) added 250 examiners as part of its continuing effort

to combat wage theft. About 78% of investigations initiated by the these examiners reported a violation.⁸⁹ These statistics demonstrate the federal government’s recent effort to increase enforcement of wage and hour laws. Therefore, between a regulatory crackdown by the DOL and increased class action filings by private plaintiff’s attorneys, wage and hour litigation will continue to burden employers over the next decade. In fact, every state in the U.S. has reported the filing of at least one wage and hour class action in state court. Illinois, New York, and Texas have reported the most significant growth, as wage and hour class action lawsuits have increased 700% in these jurisdictions.

In short, we anticipate that the current level of class action litigation will continue unless brought to a halt by the courts or legislative bodies. Further, the fact that these cases are concentrated among a relatively small number of plaintiff’s class action “mills” means that they can be maintained at relatively low cost, and target violations amounting to just a few dollars per day per employee. Therefore, absent a legislative or judicial fix, employers will find that even the most hyper-technical rules and regulations can be ignored at their peril. Correspondingly, employers can anticipate that the government will be the prime mover behind Title VII and ADEA class actions. The result will be continuing pressure to settle FLSA cases quickly with private plaintiffs and an accompanying trend for Title VII litigation to become more protracted.

It is almost inevitable that between 2010 and 2012, the number of wage and hour class and collective actions will continue to sharply increase and spread geographically. Until 2009, California led the nation in wage and hour class actions.⁹⁰ Indeed, between 2000 and 2005, employment class actions in California state courts grew more than any other type of class action, increasing by 313.8%.⁹¹ Initially, most cases were filed in state court under California’s unique state wage laws, which are generally broader than the federal FLSA and provide greater penalties and damages. In addition, California state courts were perceived to be more willing to grant class certification, especially after the 2004 California Supreme Court *Sav-On Drug*⁹² decision described class actions as an efficient way of enforcing state wage and hour laws. California led the nation for the next four years both in number of actions as well as size of settlements.⁹³

While many employers believed their FLSA-based pay practices had merely hit landmines unique to California, such as the requirement that exempt employees could not spend more than 50% of their time doing nonexempt tasks, pay issues were percolating on the East Coast and Midwest. Exemption from overtime, independent contractor status, off-the-clock work, commissions, tip-pooling, travel time, pre- and post-work activities, and meal periods were issues everywhere both under the FLSA and under various state laws.

By 2009, more wage and hour class/collective actions were filed in Florida than California, and every state recorded such lawsuits.⁹⁴ New York, Illinois, and Texas saw significant growth totaling more than 1200, while in Alabama, Georgia, Illinois, New Jersey, Ohio, Oregon, Pennsylvania class/collective actions reached triple digits.⁹⁵

For these reasons, we predict that by the end of 2010 more than half of the wage and hour class/collective actions will be filed outside of California and Florida, and that over the next two years this geographical trend will continue with accelerated growth in wage and hour class actions in populous East Coast and Midwest states.

Future Growth Will Be By Industry and New Claims Will Evolve

In addition to the East Coast and Midwest expansion, lawyers are increasingly identifying and challenging industry-based pay practices. Large retail employers have already been the focal point of such suits. In 2009 and 2010, there has also been an explosion of class and collective actions against healthcare employers. Starting with cases filed by a law firm in Rochester, New York, against several large healthcare systems in the Northeast,⁹⁶ the initial lawsuits have now snowballed and given rise to “copycat” lawsuits across the country.⁹⁷ Many of these cases involve claims relating to off-the-clock-work and automatic deductions from pay for meal periods, but the cases often also assert claims for violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act, the Employee Retirement Income Security Act (ERISA), breach of contract, estoppel, and other types of claims. Claims for miscalculation of the regular rate of pay for short and long shifts are also prevalent in the healthcare industry.⁹⁸ In time, many of these claims will disappear and others will become more tailored as court decisions provide guidance on the types of claims that will support class certification and survive motions for summary judgment.

Similar growth has taken place in the financial industry. These cases often involve misclassification claims focusing on specific jobs, such as mortgage brokers and underwriters.⁹⁹ Once a major settlement or significant legal decision suggests that such actions are viable, they spread quickly.

Wage and Hour Compliance and Training Programs Will Greatly Expand

One consequence of class actions is the economic incentive they provide for legal compliance. Wage and hour audits, improved policies, and more careful monitoring of the implementation of compensation policies and practices are increasing. Employers are also becoming increasingly aware of the pros and cons of electronic timekeeping and payroll systems. While these systems provide

greater efficiency, the detailed documentation of employee working time they provide may not necessarily be accurate if the time is not recorded correctly. In fact, some electronic timekeeping and payroll systems have often been a source of litigation. A classic example is systems that automatically deduct meal periods, which have given rise to actions by employees claiming that deductions are taken even when they worked through lunch. As technology becomes more individualized and sophisticated, better systems will evolve to make pay and attendance records more accurate. However, precisely because they are so accurate, these types of systems give rise to class actions challenging rounding errors.

One of the best uses of technology has been the creation of online training on timekeeping and pay policies and practices. Generally, the best programs are interactive, requiring online input from viewers who must answer questions at the end of various vignettes illustrating the issues and requirements for legal compliance. Upon finishing the online course, employees certify that they will report any unpaid time. They are assured that such reports will be welcomed by the employer and that retaliation will be prohibited. Quality training will increasingly provide a legal defense or mitigate damages, yet as this becomes industry practice, organizations without such extensive training programs will likely experience lawsuits claiming a lack of training. Of course the major advantage of training systems will be greater compliance and less of an incentive to litigate.

Compliance training has also become increasingly important since the DOL, under the leadership of new Obama appointees, is seeking to identify and impose maximum sanctions against employers who have been found liable for previous violations. Indeed, considering that certain employers are now experiencing a third or even a fourth class action or DOL investigation for alleged violations identical to those that previously resulted in settlements or sanctions, it is surprising that compliance systems and training has not accelerated faster among employers. We expect such compliance programs and training to become standard by 2020.

We also anticipate that wage and hour class action litigation will continue to dramatically increase in the next few years, particularly in states other than California. For example, we expect increased attacks on independent contractor classifications as laws and regulations change and the DOL, IRS, and state task forces focus on this issue. These task forces will attempt to, among other things, ensure tax collection from independent contractors and impose penalties and back taxes on employers for misclassified employees. In response, employers will increasingly enter into contracts with third-party vendors to attain workers and verify that taxes have been paid. Ironically this will happen while the number of contingent

workers significantly increases to adjust to changing skill needs and economic conditions.

Beyond the next few years, we anticipate that wage and hour class actions will still be very significant, but their impact will decline as such litigation focuses on middle size and smaller employers and settlement sizes decline. By 2013, we predict that the number of wage and hour class actions will stabilize, but employers should still view wage and hour liability as a top HR priority. At the same time, compliance efforts will make litigation less likely. Judicial decisions will answer decades-old questions, and there may be greater judicial consideration of the merits of the underlying case as part of the certification process. Additionally, as wage and hour class actions become more commoditized and predictable, settlements will become easier. For those cases not settling, the increased predictability will increase the willingness to go to trial. For the foreseeable future, however, it is unlikely that national legislation will streamline wage and hour laws. In many situations old laws and complicated rules will make it very challenging to fully comply, especially in California.

During the second half of the decade complex new issues will predominate wage and hour actions. For example, the off-duty use of blackberries, iPhones, iPads, and all sorts of portable Internet communications will challenge the definition of compensable work. What jurisdiction and law cover the compensation requirements of virtual workers? When does work start and end for such workers? Are workers exempt who accomplish complex professional tasks but do it with artificial intelligence systems that require increasingly simple human commands? Absent legislative overhaul of federal and state law, courts and litigants will grapple with trying to put square pegs in round holes, as technology transforms traditional notions of work time, yet wage and hour laws are still in place from prior generations.

Eventually, very likely beyond 2020, there will be greater recognition of the necessity of new wage and hour laws reflecting the reality of the digital workplace. It is also inevitable that technology will make national borders less significant as “digital work” and employee avatars perform most tasks. Through the imagination and film making of James Cameron, we can better envision workplaces where mental and physical tasks are performed across great distances.

Recommendations/Best Practices for Employers for Dealing with Wage and Hour Class Action Litigation in the Next Decade

Employers looking towards 2020 can take several steps to reduce their exposure to wage and hour class actions.

- Implement manager and employee training regarding their responsibilities for ensuring accurate recording of time worked. Online training is a valuable, cost-efficient tool that provides education, confirms participation and provides a defense, or at least reduces damages, in litigation.
- Update employee handbooks to address the use of personal digital assistants and other technology after normal work hours and while on leaves of absence. Limit use of these devices during non-work hours absent supervisor consent to avoid overtime claims.
- Conduct periodic wage and hour reviews or audits to ensure proper classification of employees, especially for new positions created.
- Implement an effective wage and hour complaint and reporting system

Overview — Privatization of Litigation

Since 1990 there has been explosive growth in the use of alternative dispute resolution (ADR) mechanisms, such as arbitration and mediation. The courts’ dockets are too crowded; litigation through trial is too expensive; and the litigation process is slow and relatively inflexible in terms of the remedies provided.

For many employers, arbitration is the preferred means for achieving final and binding resolution of disputes that otherwise would be heard by a court or jury. Arbitration is generally considered to be less expensive and more efficient than court proceedings. Unfortunately arbitration has not always met this promise, particularly in the face of judicially imposed requirements for full discovery, and the imposition of full arbitration fees on the employer. Arbitration is under attack by the plaintiff’s bar and others. The Arbitration Fairness Act introduced in Congress would invalidate mandatory pre-dispute arbitration agreements between employers and employees. While the likelihood of passage is uncertain and we predict that pre-dispute arbitration will survive going forward, employers nevertheless should be thinking about other means of ADR.

Mediation, by contrast, has been strongly supported by both the plaintiff’s and defense bar, and is a low cost, private, and highly effective means to resolve disputes. A study of 2,054 California cases showed that, statistically, both sides do better by settling than they do by not settling and going to trial. Essentially, the parties avoid the costly results of “decision errors.” The study also found that lawyers trained in mediation and who had mediation experience made fewer decision errors.¹⁰⁰

The U.S. Supreme Court has in the past several decades strongly supported arbitration and, in particular, arbitration of employment disputes. It has routinely rejected claims that arbitrators are presumptively biased or that the arbitral forum is inferior to courts. The Supreme Court has applied federal preemption principles to invalidate attempts by state legislatures to limit arbitration only to certain issues or to treat arbitration agreements covered by the Federal Arbitration Act more harshly than other contracts.

Predictions for the Next Decade — The Privatization of Litigation Through Creative Use of ADR Will Become Commonplace

- If the Arbitration Fairness Act passes, mandatory, pre-dispute employment arbitration agreements will be a thing of the past. In that instance, employers likely will develop alternative dispute resolution programs to which employees may opt in after a dispute arises. The goal would be to ensure that post-dispute arbitration has all the benefits that make arbitration attractive: a fair, speedy and efficient way to resolve disputes. Employers may provide incentives for employees who wish to opt in to such a program, such as employer-paid mediation or even advancement of legal fees for employees wishing to participate. Even if the Arbitration Fairness Act does not become law, employers may wish to develop programs that encourage employees to mediate disputes before they go to the arbitral forum, because after all, mediation is faster and more efficient than even arbitration.
- Mediation will continue to be a common method to resolve cases in the next decade.
- The interest in mediation in Europe will result in the “export” of mediation practices and techniques from the United States.
- Legal education will increasingly emphasize negotiation and dispute resolution skills.
- Employers will adopt more sophisticated internal dispute resolution mechanisms that are more effective, more flexible, and more nuanced than grievance procedures.
- Lawyers who specialize in the increasingly complex law of mediation confidentiality, ethical issues in mediation and arbitration, and the law of arbitration will become a recognized sub-specialty in the law.

Employer Recommendations/Best Practices — Privatization of Litigation

Employers also should consider developing self-contained

alternative dispute resolution programs that achieve resolution of a controversy even before the arbitral stage. Mediation is a useful tool in these programs. The mediator need not be a lawyer, as there are more and more trained mediators who specialize in workplace disputes who are not lawyers.

Ensure that arbitration agreements are drafted in a way that provides for a fair resolution of disputes. Agreements should provide for a neutral arbitrator, adequate discovery, the same remedies that would be available in a court of law, allocation of the costs of arbitration as provided by law, and a written award. Employers should avoid drafting agreements that limit any of the foregoing or stack the deck in favor of the employer.

Overview — Virtual Trials

Both the increased financial pressures on the court system and technology enhancements may well combine to provide for streamlined and “wired” proceedings. Over the next decade we predict that virtual trials will become a real possibility, where all of the legal proceedings can be recorded onto a DVD, which the jurors will view before making a verdict. Given the growing popularity of Internet arbitrations, this new era in court proceedings is not too far away. One impediment to creating technologically advanced courtrooms is the lack of resources devoted to some court jurisdictions. Court furlough days and reduced staff are leading to what some courts view as a crisis situation with case backlogs. The degree to which courts now have technological capacities differs from state to state, county to county, and between federal and state jurisdictions. There will be continued tension between the expenditures needed to develop technology-friendly courtrooms and the ultimate efficiencies and cost-savings that should result from such advances.

Predictions for the Next Decade — Virtual Trials

Technological advances will continue, and procedures will adapt with them, lagging behind the technology. For example, courts may allow process to be served by Facebook. This has already happened in Australia and New Zealand.¹⁰¹

Witnesses will be subject to video examination from distant locations, and the courts will have the ability to hold inter-jurisdiction proceedings. Jurors may be given computer screens to follow testimony, and searchable exhibits and transcripts should be available during deliberations.

One of the most exciting developments is that trials may be shown live on Internet feeds. In 2008 in *Litigation*, a publication of the American Bar Association, the Litigation Section Chair depicted a trial provided to the jury on a DVD that had been edited to delete objections, inadmissible testimony and sidebars.¹⁰² Advantages of

such a system would include reduced jury service time, the potential of reducing mistrials, a lesser cost for preparing the record on appeal, and a reduced cost for a mistrial. More mistrials would be avoided because the DVD would be edited to eliminate erroneous instructions or rulings, for example, before being shown to a new jury. Such a system would also eliminate the extent to which jurors are likely to be influenced by “hallway” observations of the parties. While the jurors would appear for selection, they would return only at the end of the trial to watch the proceedings.¹⁰³ Disadvantages of this system include reduced jury interaction, eliminating the opportunity for jury questioning and increasing the opportunity for jurors to be influenced by their own investigations. A likely scenario is the gradual introduction of some of these changes, for example, live questioning of remote witnesses and the availability of searchable transcripts and exhibits in the deliberation room. A safe prediction is that technological re-creations or presentations of events giving rise to the trial and of pre-trial discovery will continue to increase in use and effectiveness. And, the availability of a digital record will increase pressures to make the proceedings contemporaneously available on the Internet.

LITTLER FOUR: Discrimination and Harassment Theories Morph to Protect Employees with Family Responsibilities, Secular World Views, and Victims of Workplace Bullying

Overview

Over the 46-year history of Title VII of the Civil Rights Act of 1964 (“Title VII”), and with the implementation of other laws prohibiting discrimination in employment, the prohibitions on discrimination against applicants and employees on the basis of protected characteristics such as race, sex, religion, and disability have become ingrained. However, not so well imbedded is the notion that it may be unlawful to discriminate against applicants and employees who display subtle characteristics that may be associated with a protected status. The coming decade is likely to experience significant expansion in the nature and types of bans against discrimination imposed upon employers. Some appear on the relatively immediate national horizon, such as increased gender equality in compensation through the proposed Paycheck Fairness Act, or the expanded enforcement of existing laws.¹⁰⁴ Other new prohibitions may be gradual, percolating up from individual municipalities and through various states, as well as finding their way “across the pond” from countries globally.

Predictions for the Next Decade — New Bases of Discrimination

Caregiver Discrimination

Currently there is no distinct statutory protection under federal EEO laws for caregivers. Some localities have recently added caregiver status as a protected category under state human rights acts or local ordinance.¹⁰⁵ In addition, under existing laws on the federal level, there are circumstances in which discrimination against caregivers may be actionable because it constitutes discrimination based on sex, disability, or another category protected by federal employment discrimination laws.

For example, women are disproportionately likely to assume primary care-giving responsibilities, including the care of children, parents or relatives with disabilities.¹⁰⁶ Consequently, women are most likely to bring claims that may fall under the rubric of caregiver or family responsibility discrimination. In this sense, family responsibility discrimination becomes an extension of gender discrimination under Title VII. Similarly, data shows that minority women are more likely to exercise primary care-giving responsibilities and in this sense, family responsibility discrimination becomes an extension of race discrimination under Title VII.¹⁰⁷ Thus, even without specific statutory protections, issues impacting family responsibility discrimination are being recognized under existing law.

Part and parcel of family responsibility discrimination is the concept of “flexibility stigma” - this is based upon the assumption that one needs to be physically present at the office every day to qualify for advancement, without recognizing the need for flexibility.¹⁰⁸ Thus, while the flex worker might have strong skills and productivity, he/she may fail to gain promotions because he/she does not match the employer’s profile of a regular career. In this sense, the flex worker hits a glass ceiling of sorts — for caregivers it becomes gender discrimination not so much because of animus toward women, but failure to accommodate the need for flexibility. Flexibility stigma can also affect individuals with disabilities whose conditions require flexible working arrangements.

Nearly half of the labor force is women, nearly 50% of children live in households where the parents work full time, 43.5 million Americans are unpaid caregivers to a person over age 50, and nearly one-fifth of employees are caregivers for someone over age 50.¹⁰⁹ These statistics will increase. We predict that as more caregivers enter the workforce and as the children of aging baby boomers take on more care-giver responsibilities, pressure will mount to pass additional legislation, including federal legislation, to extend

existing protections to caregivers. The issue has been extensively analyzed by legal commentators,¹¹⁰ and the business benefits to both sexes have been widely publicized.¹¹¹ In uncertain economic times, workers who are flexible about working hours and schedules may be particularly attractive.¹¹² The Working Families Flexibility Act was introduced in the House on March 3, 2009, but is still in an initial phase, in the Subcommittee on Courts and Competition Policy.¹¹³ Several other bills were introduced to expand Family Medical Leave Act protections by removing the 1250 hours of service requirement, allowing leave for parental involvement in school or extracurricular activities of children, creating an insurance fund to provide paid FMLA leave, and extending leave to care for same-sex spouses, domestic partners, adult children, siblings, and grandparents.¹¹⁴ Similarly, the Healthy Families Act was introduced to require employers of 15 or more employees to provide up to 56 paid hours of sick leave per year to care for themselves and persons related by “blood or affinity.”¹¹⁵ In the meantime, the number and kinds of lawsuits involving caregiver status brought by both individual litigants and federal and state agencies under existing law will continue to mount.¹¹⁶

National Sexual Orientation/Gender Identity Discrimination Prohibition

No federal law exists at the moment that explicitly prohibits discrimination against employees on the basis of sexual orientation or gender identity or expression. Court rulings and state and local employment laws with respect to the treatment of gay, lesbian, bisexual and transgender employees have created a legal patchwork from jurisdiction to jurisdiction, often making it difficult for employers to navigate. Currently, 21 states, the District of Columbia, and 180 counties, cities and municipalities have incorporated sexual orientation into their anti-discrimination laws, making it illegal to discriminate in employment decisions on the basis of sexual orientation. In addition, 12 states, the District of Columbia, and 108 counties, cities and municipalities have added explicit protections against discrimination in employment decisions based upon gender identity or expression.

In June 2009, the Employment Non-Discrimination Act (ENDA)¹¹⁷ was introduced in Congress, and currently is pending before the Senate Health, Education, Labor, and Pensions Committee. Closely modeled on Title VII, ENDA provides basic protections in every jurisdiction in the United States against workplace discrimination on the basis of sexual orientation and gender identity or expression.

ENDA is closely modeled on Title VII. Once passed, ENDA will provide basic protections in every jurisdiction in the United States

against workplace discrimination on the basis of sexual orientation and gender identity or expression.

Regardless of when — or whether — ENDA passes, the trend is clear: hundreds of companies have enacted policies protecting their lesbian, gay, bisexual and transgender employees. For example, as of February 2009, 434 (87%) of the Fortune 500 companies had implemented nondiscrimination policies that include sexual orientation, and 207 (41%) had policies that include gender identity. The majority of these employers also provide benefits to same-sex partners and spouses of employees.¹¹⁸

Discrimination on the Basis of Personal Appearance

Much of the present body of law on “personal appearance” discrimination is rooted in Justice Sandra Day O’Connor’s now famous concurrence in *Price Waterhouse v. Hopkins*¹¹⁹ wherein the Justice observed that Title VII prohibits gender discrimination based upon a stereotypical ideal of how a woman ought to appear in order to be considered “professional.”¹²⁰ Thus, while the word “appearance” is not listed among the categories protected by Title VII and other federal laws, employers must proceed with caution if they choose to make employment decisions based upon opinions made from an individual’s personal appearance. Moreover, while no federal statute specifically prohibits appearance-based discrimination, a trend is developing among states and municipalities. Some jurisdictions have made it illegal to discriminate against an employee based upon such quantifiable factors of height and weight. Even more recently the District of Columbia passed legislation that prohibits a more generalized personal appearance standard, based upon “the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards.”¹²¹

In the next decade, we are likely to see employees and applicants push the edges of existing federal law to make personal appearance discrimination illegal. For example, employers are likely to face resistance to implementing work rules that bar clothing styles that originate in Eastern and African cultures or in various religious denominations. It is also likely that more and more jurisdictions will pass legislation that prohibits personal appearance discrimination (*i.e.* employees who appear overweight or unattractive) because such practices are perceived as unfair and unrelated to the work the employee performs.

Socio-Economic Discrimination

The issue of discrimination against an individual or class of individuals based on their socio-economic status has begun to

receive increased attention across the globe. This attention has been particularly focused in countries where there remains a defined class structure leading to limits on educational or employment opportunities for individuals from certain socio-economic groups. Recent developments include a bill under debate in the United Kingdom containing a “Socio-Economic Duty”¹²² that would require that public bodies, including national and local governments, “when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.”¹²³ India has similarly undertaken efforts to eliminate socio-economic discrimination, where the Indian government maintains a “reservation” system, whereby 27% of civil service and government jobs would be reserved for members of castes that are considered “backwards classes” according to a number of factors, including social, educational, and economic backgrounds.¹²⁴

While the U.S. does not have a similarly well-defined class structure, the association between racial, ethnic and national origin discrimination and socio-economic outcomes makes this an area on which employers should focus attention over the coming decade. Consistent with the trend abroad, it is likely that Congress will introduce legislation that attempts to narrow the gap between the educational and economic opportunities available to individuals of different socio-economic backgrounds. At both the federal, state and local levels, efforts will be made, both through training and recruiting, to reduce socio-economic discrimination in civil service employment. For private employers, it is unlikely that socio-economic status will become a statutorily protected class through legislation, mostly due to the difficult nature of defining and identifying socio-economic status. However, we will see the development of government programs encouraging the hiring by the private sector of individuals from disadvantaged social or economic backgrounds through tax credits and other incentives.

“World View” Discrimination as an Extension of “Religion”

In the last decade, the U.K. has passed several laws extending protection to individuals who face discrimination based on “religion or belief.” The new laws in the U.K. are part of a broad push through the U.N. to protect individuals against religious discrimination in Europe. The inclusions of “belief” in the express terms of the U.K. regulations and increased protections throughout Europe in this area have raised several issues, the most relevant of which in the U.S. is: to what extent does the inclusion of “belief” extend protection from religious discrimination to those who strongly hold beliefs that are not religious in character?

World view is much broader than any traditional interpretation of “religion,” and encompasses the entire collection of beliefs about life and the universe held by an individual or a group.¹²⁵ In the U.K., “religion or belief” has already been broadly interpreted by courts to include such strongly held beliefs as the belief in climate change,¹²⁶ finding that sustainability affected a “weighty and substantial aspect of human behavior,” and was sufficiently cogent, serious, cohesive and important to be deemed a “philosophical belief” worthy of protection. The employer’s argument that its former employee’s beliefs were based on fact and science, and therefore dissimilar to religion, was rejected by the Tribunal, which extended protection to secular beliefs.

In the U.S., Title VII and other laws prohibiting discrimination on the basis of religion cover all aspects of religious observance and practice as well as belief. To date, however, the concept of “belief” has not yet been interpreted broadly enough to cover such secular views and values. Though certain strongly held views about reproductive choice are deemed to be religious in nature,¹²⁷ case law expressly states that social and political views and opinions are not covered under Title VII, regardless of the fervency with which they are held.¹²⁸ Though atheism is covered under Title VII,¹²⁹ as are certain arguably secular beliefs that are held for religious reasons, expansion of Title VII to cover such secular beliefs as “sustainable living” would constitute a broad departure from the current approach.

Title VII has already been interpreted broadly to include not only beliefs held pursuant to membership in traditional, established religious organizations, but also individuals’ sincerely held moral and ethical beliefs, and even a belief in the absence of God. Thus, employers can expect that those areas will continue to be covered under “religious discrimination.” Recent developments in Europe toward a more secular, “world view” approach to religious discrimination are sufficiently wide-spread and established to warrant a firm conclusion that they constitute a trend.¹³⁰ It is likely that the secular approach in Europe will be influential in the U.S. Accordingly, as many secular beliefs are already protected under Title VII where they are held pursuant to a set of religious beliefs, employers should continue to be sensitive to facially secular beliefs.

Workplace Bullying

The concept of workplace bullying (also known as “mobbing” in the United Kingdom) has garnered much attention in recent years. In 2004, the National Institute of Occupational Safety and Health (NIOSH) conducted a survey in which 24.5% of the companies surveyed reported that their organizations have experienced one or more incidents of workplace bullying.¹³¹ The survey also found that workplace bullying is not limited to employees, but includes

instances where a customer or supervisor was either the perpetrator or the victim of workplace bullying.¹³² Another survey indicates that about one-third of the U.S. workforce, or 54 million workers feel that they have been bullied on the job.¹³³

While there is no single uniform definition of workplace bullying, it is often characterized as repeated, unreasonable acts of intimidation, slandering, social isolation, or humiliation by one or more persons against another, with the intent to intimidate or harass the victim. The key characteristic of workplace bullying is the repetitive, as opposed to isolated, nature of the intimidation or harassment.

A number of foreign countries have passed laws or ordinances that aim to prevent workplace bullying. The first to do so was Sweden, which in 1994 passed an ordinance requiring employers to “plan and organize work so as to prevent victimization as far as possible,” and to “make clear that victimization cannot be accepted.”¹³⁴ In 1997, the U.K. passed the Protection from Harassment Act of 1997, which not only prohibits workplace harassment and bullying, but also provides victims of harassment with a legal cause of action, which includes remedies such as injunctive relief and damages.¹³⁵ Additionally, the Australian states of Queensland and Victoria and the Canadian provinces of Quebec and Saskatchewan have passed legislation that prohibits workplace bullying.

In the U.S., there have been no federal or state laws passed that prohibit workplace bullying. However, the Workplace Bullying Institute (WBI), an organization that was formed to raise awareness of the issue of workplace bullying, has developed the “Healthy Workplace Bill,” and is currently lobbying state legislatures to pass the bill. While the WBI has not made the text of the Healthy Workplace Bill public, it has stated that the bill will provide a method for victims of workplace bullying to seek legal redress, including the ability to sue both the employer and the bully.¹³⁶ In early 2010, the bill was introduced in at least 17 state legislatures, and was debated in nine states — Connecticut, Illinois, Kansas, Massachusetts, New Jersey, New York, Oklahoma, Utah, and Vermont.¹³⁷

A 2007 survey of workplace bullying identified the damaging effects bullying can have on employee health and morale, leading to increased absenteeism and possible job loss.¹³⁸ As greater light is shown on the issue in the coming decade, an increased recognition of the costs of such conduct to employees and their employers, in conjunction with concerted legislative lobbying efforts, will lead a number of states to pass the Healthy Workplace Bill in some form over the next decade.

Medical Marijuana and Disability Discrimination

As a result of the passage of state laws legalizing the prescription of medical marijuana in at least 14 states, doctors in the United

States recently began prescribing marijuana for the treatment of such illnesses as glaucoma, cancer and AIDS. Meanwhile, at the federal level, marijuana continues to be classified as an illegal substance. For employers, the use of medical marijuana by employees raises several issues under the ADA and other disability discrimination laws. For example, must employers accommodate the use of medical marijuana by employees outside of the workplace, including using special drug tests that determine only whether an employee is currently under the influence of the drug? Must an employee arrange for such accommodations prior to testing positive for marijuana, or is a doctor’s note after a positive drug test sufficient? Must employers allow employees to use medical marijuana while working? During breaks? What if an employer is concerned that workplace safety will be compromised if employees are permitted to use medical marijuana? These issues will become more pervasive in coming years as more states pass medical marijuana laws and the use of medical marijuana becomes more widely accepted.

Under current law, employers are faced with confusing conflicts between state and federal laws and inconsistent requirements from state to state. For example, though California was the first state to authorize the use of medical marijuana, the California Supreme Court has held that employers may discriminate based on a positive drug test even where an employee uses medical marijuana pursuant to a doctor’s orders.¹³⁹ The Rhode Island statute, on the other hand, explicitly provides that employers may not discriminate against employees based on medical marijuana use.¹⁴⁰ Similarly, in Montana, a registered medical marijuana user may not be denied any right or privilege based on such status.¹⁴¹

Court determinations of the extent to which medical marijuana use must be accommodated under the ADA and other disability laws are similarly conflicting. In Washington, a federal judge rejected a plaintiff’s argument that the ADA protected disabled individuals who used medical marijuana.¹⁴² The Montana Supreme Court has come to a similar conclusion.¹⁴³ Meanwhile, an Oregon Court of Appeals has found that an employer violates state disability laws where it terminates an employee for medical marijuana use.¹⁴⁴ From this disparate authority it is unclear what is expected of employers and what may be expected in the future. It is reasonably clear that, at present, legitimate safety concerns trump any requirement that employers accommodate the use of medical marijuana. More nuanced issues, however, such as what sort of accommodations might be reasonable and whether an employee must disclose medical marijuana use prior to failing a drug test have not yet been addressed.

In the coming decade, state legislation protecting doctors and patients from criminal liability for prescribing, possessing or using

medical marijuana will continue to expand. Protections will likely extend, as they already have in Rhode Island, to the employment context. And because the federal government recently announced that it will no longer prosecute medical marijuana that is allowed by state law, the use and prescription of medical marijuana under state laws is likely to become more common. Coverage of medical marijuana use under disability discrimination laws is also likely to increase, particularly in light of the expansive definition of disability provided in the ADA Amendments Act which become effective last year.

Retaliation

Retaliation charges were 36% of all charges filed with the EEOC in 2009.¹⁴⁵ The trend in charges has sloped upwards every year in the last ten years. The same may be expected for the next ten years.

Retaliation theories have become more nuanced. For example, the United States Supreme Court defined adverse action for the purposes of retaliation under Title VII very broadly in *Burlington Northern & Santa Fe Railway. Co. v. White* in 2006.¹⁴⁶ The federal courts are divided about whether an individual manager may use superiors or human resources professionals as a “cat’s paw” to have the employer engage in retaliation.¹⁴⁷ The United States Supreme Court granted certiorari on a case that would have resolved the issue, but the employer dismissed the appeal, so the issue remains undecided.¹⁴⁸ This issue can expect to be before the Court again, as another case has been put before the Court.¹⁴⁹

Two important retaliation cases are before the U.S. Supreme Court now: *Kasten v. Saint-Gobain Performance Plastic*,¹⁵⁰ and *Thompson v. North American Stainless*.¹⁵¹ The *Kasten* case implicates the federal Fair Labor Standards Act (FLSA), but involves the crucial issue of whether a complaint must be written to constitute protected activity. The FLSA protects an employee who has “filed any complaint.” In the *Thompson* case, the issue is whether a person who did not engage in protected activity on behalf of himself or another may make a claim for retaliation for the protected activity of a person with whom he is associated. Courts in four circuits have said no, but district courts in two circuits have said yes.¹⁵²

As new discrimination laws or other laws created workplace rights are adopted, these usually include anti-retaliation or whistleblower provisions. The new healthcare law is an example.

Practical Recommendations for Addressing Emerging EEO/Discrimination Trends

As with any employment decision where the potential for discrimination may arise, employers are well advised to stick to the tried and true defense - always act in good faith and always have a legitimate business reason for taking any adverse action. For those

policies or practices that may tend to affect certain portions of a given population, make sure that they are job-related and consistent with business necessity.

- Given the likelihood of expanded litigation regarding gender differences in pay, consider a privileged audit of pay practices from a gender perspective.
- Because state-by-state regulation of these emerging trends is likely to increase in the coming decade, pay close attention to the specific requirements of the laws of the states in which you operate, periodically reviewing the laws in the cities, counties and states where facilities are located as they relate to workplace protection.
- Train managers on how to approach employees with caregiver issues, with an explanation as to how their individual decisions may impact workers and care-giving responsibilities. The training should also include information regarding how managers can address those coworkers without care-giving responsibilities who feel that they are “picking up the slack” for those who cannot stay late or work extra hours because of family obligations.
- Make sure that your EEO policies include a prohibition against discrimination on the basis of “religion or belief.” Use your diversity education efforts to promote nondiscrimination based on larger ideas of secular beliefs or views.
- Revise your company’s nondiscrimination and/or equal employment opportunity policies, anti-harassment policies and any other documents or statements to include “sexual orientation” and “gender identity or expression” as categories that are protected classes with respect to the conditions of employment.
- Consider extending benefits, such as health insurance and dental care, to lesbian, gay, bisexual and transgender employees and their families by including an employee’s same-sex partner and the partner’s children within your health care coverage.
- Ensure that the internal climate and work environment at your company enables all employees to feel safe and comfortable, regardless of sexual orientation or gender identity or expression.
- Include a segment on sexual orientation and gender identity or expression in your company’s diversity or harassment training.

- Examine hiring and employment practices to eliminate any potential disparate impact on those who may be disadvantaged because of their educational or economic backgrounds.
- Update diversity and inclusion policies to include the recognition that having a diverse workforce includes diversity among employees' social and economic backgrounds.
- Update your code of conduct to address workplace bullying. While behavior that can be classified as bullying should be prohibited, employers should also develop policies that promote how employees should treat coworkers, customers, vendors, and any other people employees interact with while at work.
- Train your managers and supervisors to recognize the signs of bullying, and to intervene when it is apparent that an employee is either being bullied or is bullying other people, and develop a reporting system and investigation procedure whereby victims of bullying can report the behavior, allegations are immediately investigated, and appropriate disciplinary action is administered.
- In those states with medical marijuana legislation, revise your policies and practices, including drug testing policy, to incorporate clear statements explaining to employees their rights and responsibilities with respect to its use, including the provision of written notification to applicants of your organization's medical marijuana policy.
- Make sure managers are educated on the duty to avoid retaliation and the reach of anti-retaliation laws. Carefully coach managers accused by employees on post-complaint behaviors.

LITTLER FIVE: Labor Organizing Intensifies Under the New NLRB

Overview and Current State of Affairs of Labor/Management Relations

The turn of the new decade ushered in substantial uncertainty for organized labor. It is no secret that since its zenith in the 1940s and 1950s, union membership has steadily declined in the United States. The Bureau for Labor Statistics reports that in 2009 only 12.3% of workers were union members, a significant decrease from 1950 where 38% of the workforce was unionized.¹⁵³ Yet these statistics — which suggest a possible demise of the American labor movement — do not tell the entire story. To the contrary, organized labor (both in the United States and internationally) is currently under a period

of significant transition. The transition is precipitated by concerns over organized labor's perceived decline, the Obama administration's arrival, and the far-reaching implications of globalization.

Predictions for the Next Decade

Organized Labor Will Modify Its Target Audience

On the domestic front, in 2010 and in the upcoming decade, we expect that organized labor will focus its organizing efforts on groups of employees whose jobs cannot practically be moved offshore. For example, unions are becoming increasingly active in organizing health care workers and other workers in the public sector. Indeed, the shift toward public sector unionization is one of phenomena unaccounted for by the numbers showing a decline of union represented workers. Despite a precipitous decline in numbers among private sector unions, membership in the public sector remains robust. Specifically, 37.4% of the public sector labor force is unionized, in stark contrast to only 7.2% of private sector employees.¹⁵⁴

In fact, more public sector employees belong to a union than private sector employees despite there being five times more wage and salary workers in the private sector.¹⁵⁵ While the reasons for this disparity are manifold, the spotlight should shine even brighter on public sector unions as states like California teeter on the brink of financial meltdown. Compensation levels in the public sector have outpaced those of the private sector since 1980 largely because of the proliferation of public sector unions.¹⁵⁶ Often, the pay advantage is most pronounced with grossly excessive pensions that have ballooned state deficits. Moreover, public sector unions have far-reaching influence on state finances. To illustrate, the California Teachers Association spent \$211.8 million in the past decade to influence California voters and politicians, more than any other special interest group in the state.¹⁵⁷ Graduate school teaching assistants, interns, fast food employees, gaming dealers, finance, insurance and real estate employees are all now being increasingly targeted by labor organizations. While unions have not yet been successful at organizing employees in the high-tech field, whether they will become successful as start-up and Internet-based companies falter and as employees seek greater job security, remains to be seen.

In an effort to increase the number of workers eligible to be organized under the National Labor Relations Act (NLRA), labor organizations are increasingly challenging employers' classification of workers as independent contractors through class action lawsuits and through alerting government wage and hour investigators of questionable employer practices.¹⁵⁸

Unions who have lost membership due to the economic downturn are now focusing their efforts on non-union employers in the same industry that have historically remained immune to union organizing. For example, the United Automobile Workers has faced a historic loss of membership in recent years, in large part due to the bankruptcies that have plagued American automobile manufacturers. With its membership at an all-time low, we anticipate that traditional non-union automobile manufacturers (such as Toyota) in the United States will become a prime target for organizing in the years to come.

Efforts to Implement “Labor-Friendly” Legislation Will Continue

Organized labor has also recently amplified its calls for more favorable law in the private sector. The most controversial of these calls for reform is the renewed push for “card check,” a system by which unions can bypass the current need for a secret ballot election at the workplace by enabling workers to form a union simply if a majority of them sign cards in favor of one. The oft-mentioned Employee Free Choice Act (EFCA), presently before Congress, proposes to amend the NLRA by instituting a “card check” system and other controversial reforms such as increased penalties for employer misconduct.¹⁵⁹ Although President Obama’s 2008 election against the backdrop of democratic majorities in both chambers of Congress initially signaled the potential passage of EFCA, any attempt to include “card check” in the final legislation is now highly doubtful.¹⁶⁰ Notwithstanding, labor leaders show no signs of giving up their intentions to push forward pro-labor policies and reform.¹⁶¹

In contrast, radical change under the Railway Labor Act (RLA), the federal law governing labor relations in the railway and airline industries has already occurred. On June 20, 2010, the National Mediation Board (NMB), the federal agency charged with administering the RLA, changed the RLA’s representation election procedure.¹⁶² Previously, it was well-settled under the RLA that a majority of employees eligible to vote in representation elections determined the outcome of the election.¹⁶³ The NMB’s new rule changes this policy by basing the voting outcome on the majority of those who actually vote. Nonetheless, it underscores the extent to which labor law can significantly evolve, again flouting the notion that the demise of unions is inevitable in the next decade.

Labor Organizations Will Focus on Moral and Ethical Issues Instead of Economic Issues

When the NLRA was first introduced in 1935, its primary purpose was to provide employees basic worker protections that simply did not otherwise exist. Flash forward to 2010. Almost every aspect of the workplace is governed by federal, state and local laws geared to protect the workers. As a result, labor organizations, who historically have gained popularity by promising the lure of

fair treatment, higher wages and greater benefits, are now shifting focus to an employer’s morals and ethics, especially at a time of economic uncertainty. The underlying messages in such campaigns is that if an employer has moral and ethical problems dealing with others, employees cannot trust his or her employer to deal morally or ethically with them either. In that regard, unions are allying with human rights groups and religious organizations so that employees will link basic human rights with organizing rights.

Perhaps the most momentous change in labor relations over the next decade will be the way in which unions adapt to an increasingly globalized economy. Facing pressure to reduce costs and in stiff competition with international competitors, U.S. companies continue to outsource work to foreign countries and there are no signs that this trend is going to decline. Indeed, American and international labor leaders have already recognized globalization as a threat. To provide a counterweight to multinational companies and to survive on a local and international level, unions will increasingly forge transnational labor coalitions in increasing numbers. At an international conference of trade unions, former AFL-CIO President John Sweeney proclaimed, “[t]he global economy that corporations have forged can only be tamed by the international solidarity of working families everywhere....”¹⁶⁴

Technology Will Become a Worldwide Weapon for Organizing and a Potential Poison Pill for Employers

In that regard, Unions already have, and we predict will continue, to implement new strategies to unite workers on an international level. Ironically, while the challenges to the downsizing of U.S. employers presents major challenges for traditional organizing models, the increased ability of unions to organize workers through the use of “cyber organizing” makes a labor organization’s ability to reach out to workers easier than it has possibly ever been. For example, for employees who do not report to a central workplace (such as truck drivers or flight attendants), unions have had somewhat limited face-to-face interface with employees who did not otherwise seek them out. Now, through the use of the Internet, Twitter, social media websites, message boards, blogs, email, text messages, labor organizations can target a wider audience. At the same time, the use of technology creates new challenges for employers, including the extent to which an employer will be able to monitor employer-issued computers or limit the extent to which employees will be able to view this material while at the workplace. The challenge is even greater for larger employers who have a workforce that does not report to one centralized location. Not only do email and Internet organizing efforts pose challenges for employers, dozens of unresolved legal questions pertaining to these practices will be before the National Labor Relations Board (NLRB) in years ahead.

In the Next Ten Years, the Impact of Global Union Federations and Multi-National “Super Unions” Will Skyrocket

Worldwide, labor organizations have united by industry and have created Global Union Federations, whose purpose is to advocate for uniform and fair labor standards. These conglomerations of labor organizations will become increasingly insistent that multi-national companies enter into “corporate codes of conduct,” “international trade agreements” or other forms of agreements guaranteeing free trade and fair treatment of workers. Where companies are not recognizing these principles, we expect labor organizations to unite worldwide in protest to these employers. Unions are also creating international “super” unions representing employees in multiple countries and are increasingly seeking to negotiate collective bargaining agreements that would apply to workers in several countries.

Global Union Federations (GUFs) are worldwide federations of unions who represent employees working in specific industry, craft or occupation. The role of GUFs has expanded with globalization. They have grown in membership and play a greater part when affiliates are confronted with problems that do not respond to purely national solutions. Increasingly, local organizations call on global affiliates to bring attention to what were once purely local labor activities, such as contract negotiations. GUFs represent employees all over the world in all types of industries.¹⁶⁵

Recently, GUFs have increased pressure on multinational companies to enter into “International Framework Agreements” (IFAs) or international “codes of conduct.” While the GUFs help negotiate and are a party to such agreements, the agreements are between a multinational company and its employees. The IFAs or “Codes of Conduct” commit a company to respecting minimum labor standards in its operations around the world. Typically, such agreements offer commitments on trade union rights, collective bargaining rights, information and consultation, equal opportunities, safety and health, minimum wage standards, and the banning of child labor and forced labor.

The GUFs’ objective of entering into such agreements is to use IFAs and Codes of Conduct as stepping-stones to supplemental agreements negotiated at a more local level that will more specifically address an employee’s terms and conditions of employment.

The United Steelworkers (U.S.W.), which claims to be the largest industrial union in North America, has been one of the leaders of this new, multi-national initiative. Starting in 2004, U.S.W. began to form a series of international labor alliances, beginning with one with German IG Metall, the world’s largest union.¹⁶⁶ Subsequently, U.S.W. expanded its European alliances with U.K.-based Amicus, Europe’s third largest union. These relationships were followed with alliances

with Latin American union groups such as the Brazilian CNM-CUT and the National Union of Mining Steel and Allied Workers of the Republic of Mexico as well as several Australian unions.¹⁶⁷ The American-based International Association of Machinists and Aerospace Workers has also fostered similar relationships.¹⁶⁸

In spite of the intent of the IFAs and Codes of Conduct, they have not prevented companies from implementing layoffs or from moving jobs to countries that offer lower labor-costs.¹⁶⁹

However, IFAs have provided some ammunition for union organizing. For example, Swiss-based retailer H&M, signed an IFA with the Union Network International in 2007, part of which required the retailer to be labor neutral to organizing efforts in the United States. After H&M’s U.S. operations became targets of union campaigns alleging violations of the IFA, in 2007, the Retail, Wholesale and Department Store Union organized clerks, cashiers and other workers at the company’s Manhattan-based retail stores. In May 2009, the parties agreed to a three-year collective bargaining agreement.¹⁷⁰

Global Union Federation alliances and the IFAs and Codes of Conduct they negotiate will likely become indispensable to unions as they seek to challenge decisions made by multinational corporations.

Moreover, these alliances have already formed a natural precursor to global unions. In 2008, U.S.W. and Unite the Union, the United Kingdom and Ireland’s largest labor organization, collaborated to form Workers Uniting, the self-proclaimed “world’s first global union.”¹⁷¹

Labor Organizations Will Create and Solidify International Alliances Geared to Protesting Unfair or Unlawful Working Conditions

In addition to insisting that multinational companies agree, in writing, to fair and consistent labor principles, protests of unfair trade agreements and unfair business practices are being coordinated by various labor organizations on an international scale. These protests insist that any trade agreement must guarantee the citizens of all participating nations a livable minimum wage, protections against child labor and prison labor, responsible environmental protections and guarantee the freedom for all workers to organize. For example, for several years, the AFL-CIO has been embarking on a campaign to assist Chinese workers to obtain improvements in wages and working conditions.¹⁷²

Despite only being created in 2008, Workers Uniting has already illustrated the potentially global reach of the next decade’s union solidarity. For instance, on November 9, 2009, members of Unite the Union picketed outside a Deutsche Bank metals conference in London.¹⁷³ The protest, organized by Workers Uniting, was in

support of striking Canadian mineworkers who were members of U.S.W. Similarly, Workers Uniting joined German union Verdi to sign a Joint Solidarity Statement in support of workers in Bangladesh. Together, these two unions represented over 5.5 million workers.¹⁷⁴

With the coordination of union efforts on an international scale, there will likely be increased litigation testing the application of the NLRA with respect to primary and secondary boycotts that originate on foreign soil. Traditionally, courts have held that the NLRA does not apply to disputes in U.S. territory that involve foreign labor relations.¹⁷⁵ But the NLRA does apply to picketing of a foreign vessel in U.S. waters where the purpose is to protest wages paid by a foreign employer to U.S. residents performing longshore work on U.S. soil.¹⁷⁶

Likewise, the Norris-LaGuardia Act prevents federal courts from issuing injunctions in international labor disputes, such as those involving wages on foreign-flag vessels.¹⁷⁷ But state courts may be available to enjoin even peaceful picketing under these circumstances (assuming the state does not have a “little” Norris-LaGuardia Act).¹⁷⁸

Secondary picketing by an American union against an American employer is covered by the NLRA, even where the underlying issue is a foreign dispute.¹⁷⁹

The courts are split on whether it is a violation of the NLRA for a U.S. union to induce a foreign union to engage in economic activity against ships in foreign ports to protest U.S. labor issues. For example, in *Dowd v. International Longshoremen’s Association*,¹⁸⁰ the court found that a refusal by Japanese unions to load ships in Japan, at the request of U.S. unions that had a dispute with U.S. stevedoring companies, violated the secondary boycott provisions of the NLRA. A different result in similar circumstances was reached in *International Longshoremen’s Association v. National Labor Relations Board*,¹⁸¹ on the theory that the Japanese union was not the agent of the U.S. union.¹⁸²

As the importance of coordinated efforts among U.S. and foreign labor organizations increases, the NLRB and courts will likely be tested to revisit, and perhaps rethink, precedent that was created before the globalization of the 21st century.

Whether Collective Bargaining Agreements Will Be Enforceable Outside U.S. Borders Will Be Hotly Contested

As noted above, the jurisdiction of the NLRA extends only to workplaces in the United States and its possessions.¹⁸³ Thus, the NLRA only applies to employees in the territorial United States, and not to American employees working abroad.¹⁸⁴ Even Americans whose permanent employment relationships are with American

firms in the United States lose the protections of the NLRA while on temporary assignment outside the United States.¹⁸⁵

As companies continue to outsource traditionally organized labor to foreign countries, we anticipate that unions will increasingly push for “international collective bargaining agreements” that transcend U.S. borders. These agreements would include participants from within and outside the United States. However, whether these agreements will be held enforceable outside of U.S. boundaries remains uncertain. Courts have applied different standards in determining whether U.S. labor and non-labor statutes apply in situations where foreign conduct is involved.¹⁸⁶

Given the increased globalization of the economy and the legal uncertainty that currently exists in this arena, it is probably safe to predict that in the next decade, courts will be presented with opportunities to explore the appropriate decisional framework for determining whether U.S. labor law properly applies to matters in which foreign conduct plays a central component. The outcome of this question could potentially shape the international landscape of organized labor for years to come.

Recommendations/Best Practices

- Employers must be cognizant of organized labor’s increasing reliance on technology and social media as an organizing tool. Employers need to adopt, and enforce electronic-media use and social networking policies that limit the effectiveness of such tactics at the workplace. Employers must be mindful, however, of the risks to employee morale that may result if employers implement policies that are too restrictive.
- Employers should become aware about the efforts of organized labor outside of the United States in their respective industries.
- Employers with collective bargaining agreements should review provisions that could limit the employer’s ability to outsource. A collective bargaining agreement with an anti-subcontracting provision or even silence on this subject could prevent the employer’s ability to change its workplace in order to achieve competition on an international scale.
- Non-union employers in the United States in industries that have been traditionally organized, such as the automotive and manufacturing industries, need to be prepared for becoming a target of a union organizing campaign.
- Employers should conduct “labor audits” to determine whether there are any areas in the organization that are more

prone to union organizing drives and devise strategies on how to limit such vulnerabilities.

- Creating a well-drafted and carefully implemented international code of conduct, or international framework agreement may yield extensive social and operational rewards for an employer. However, companies considering such policies should think strategically about their potential consequences and costs.
- In drafting employment agreements for employees who will work abroad, employers must consider whether affected rank and file employees and, in some countries, managers, are represented by labor organizations and are covered by collective bargaining agreements.
- Employers must be increasingly sensitive to the threat of union organizing in professions that have not historically been targeted.
- Employers who contract with independent contractors should review the arrangements with each individual contractor and consider operational changes that could help defeat any challenge that the contractor is misclassified.

LITTLER SIX: No Man is an Island — U.S. Law Will Increasingly Adapt International Labor Standards to Maintain Global Competitiveness

Overview

U.S. multinational companies employ one out of every five private sector workers in the United States. They also employ about 32 million workers worldwide, either directly or through foreign affiliates. While most of the affiliates are in high-income countries, there has been rapid growth in employment in Brazil, China, Mexico, and Poland.¹⁸⁷ By 2020, the increasing pace of globalization will create greater pressures for the creation and adoption of international labor law standards, international forms of employment contracts, changes in immigration practices, and efforts to organize workers on an international basis. As these new standards and tools develop, lawyers who specialize in the practice of international labor and employment law will become more numerous and more essential to the functioning of transnational businesses.

International Labor Standards Now

Outside of the 27 European Union member nations,¹⁸⁸ labor and employment law is, for the most part, a local affair. The United States developed its own labor law starting in the early 20th century, and each state has developed its own employment law principles.

While the 20th century saw a distinct proliferation of federal statutes related to the workplace, and a greater centralization of employment law, much employment law remains distributed among the 50 states, District of Columbia and U.S. territories.

Outside the United States international efforts to formulate basic labor standards have been much more influential. One of the earliest efforts was Pope Leo XIII's encyclical in 1891 urging that there should be limitations on child labor, fairness for women in the workplace, workplace sanitation, a living wage, and endorsing labor unions.¹⁸⁹

The International Labour Organization

In 1919, at the end of World War I, as part of the Treaty of Versailles, the same nation states who formed the League of Nations also created the International Labour Organization (ILO). The ILO now includes 183 nations, and has adopted 188 conventions, which are treaties creating international labor law standards.

In contrast to many nations, which have ratified dozens of ILO conventions, the United States has adhered to only two of the core conventions (treaties) on labor standards adopted by the ILO: Convention 105 on the Abolition of Forced Labour, and Convention 182 on the Worst Forms of Child Labour.¹⁹⁰ The United States has resisted adoption of other ILO conventions on the theory that its own labor law provides at least equivalent standards. This is not always the case, however. Outside the United States, the ILO conventions have had enormous influence. In many developing countries they provide the foundation for the system of regulation of workplace rights and practices. Under the ILO Constitution, a member state in the ILO that adopts a convention must implement the convention through national legislation.¹⁹¹ If it fails to do so, workers or employers (or another member state) may lodge a complaint with the ILO, which will initiate an investigation, which may lead to a formal Commission of Inquiry, and even resort to the International Court of Justice.¹⁹²

The European Community

The ILO tripartite labor standards negotiation process, in which representatives of government, workers and employers¹⁹³ participate, furnished an example followed in the treaty establishing the European Community.¹⁹⁴ This process creates a role for citizens of the member states to elect a European Parliament to develop legislation for the European Union, and calls for the European Commission to consult with labor and management on the development of laws regarding employment standards and rights; social security; occupational health and safety; and rights of association and collective bargaining.¹⁹⁵

The E.U. Parliament and Council of Ministers create regulations, directives and decisions,¹⁹⁶ and the European Court of Justice interprets these. The court may issue advisory opinions,¹⁹⁷ or rule in specific cases. Individuals may bring cases before this court.¹⁹⁸ Regulations apply to the member states, without national legislation, and are used to ensure uniformity. Directives must be implemented by national legislation (like ILO conventions), and decisions are usually directed at a member state and are subject to review by the Court of Justice of the European Union. E.U. member states are required to coordinate their actions with international organizations and at international conferences (such as the ILO).¹⁹⁹ Citizens of E.U. member states are citizens of the European Union and are free to live, work, and establish businesses in any member state. They may not be discriminated against in employment on the basis of nationality.²⁰⁰

Other Communities and Agreements

There are movements toward the creation of more integrated systems of employment law as part of efforts to create common markets in other parts of the world. For example, Burundi, Kenya, Rwanda, Tanzania and Uganda formed the East African Community. In South America, Argentina, Brazil, Paraguay and Uruguay formed Mercosur; Bolivia, Colombia, Ecuador and Peru formed the Andean Community; and in 2008, the countries in these two communities agreed with Chile, Guyana and Suriname to form the Union of South American Nations.

The United States has entered into bilateral free trade agreements and treaties of friendship, commerce and navigation with a variety of nation states that address limited employment issues. The United States has also entered into multilateral agreements on various subjects related to employment, such as the Organisation for Economic Co-operation and Development (“OECD”) Anti-Bribery Convention.²⁰¹

Predictions for the Next Decade

International Labor Standards Will Have More Influence in the United States

In order to remain fully competitive and engaged in world commerce, the United States will need to begin bringing its labor and employment law into closer alignment with international labor standards. The Obama administration has already shown an interest in the work of the ILO that was not apparent during the Bush administration.²⁰² On an ad hoc basis, some U.S. companies with international supply chains have already started using existing international labor standards as terms and conditions for selection and retention of suppliers. These standards may be integrated with a corporate code of conduct.²⁰³

Minimal labor standards in some countries may create a competitive advantage in manufacturing. Thus, the United States and other developed countries have a strong interest in applying labor standards in developing countries, to ensure a more level playing field. Union voices have been strong in this process.²⁰⁴ The U.S. Department of Labor has announced that it is stepping up efforts to monitor and improve rights and working conditions for workers in developing countries, and to make sure that free trade agreements between the U.S. and other countries contain provisions related to labor standards.²⁰⁵ The World Bank’s *Doing Business* report was revamped to improve the rating system on worker protections, to provide an indicator rating how well a country is adhering to core labor standards and using law to protect workers.²⁰⁶

The influence of global standards is showing in several areas. For example, hazard communication warnings about chemicals have been the subject of a U.N. subcommittee, which created a Globally Harmonized System and has urged its worldwide implementation. The European Union approved legislation imposing that system on its 27 member countries, and it has been embraced by Japan, New Zealand, South Korea, Taiwan and Thailand.²⁰⁷ In the United States, the Occupational Safety and Health Administration (OSHA) announced its intention to adopt the system with an advance notice of public rulemaking,²⁰⁸ and then issued a letter of interpretation saying it would consider labels prepared under the Globally Harmonized System to comply with the OSHA hazard communications standard if the label contains all of the information required by OSHA’s standard.²⁰⁹

Similarly, there are efforts to harmonize international rules for executive compensation and stock options.²¹⁰ The conflict between the Sarbanes-Oxley Act (“SOX”) requirement for tip lines for anonymous whistleblowers and privacy requirements of the European Union continues to bedevil U.S. companies operating in the European Union. The SOX provisions for anonymous tips conflict with strongly held values determined by history with dictators and informants. Similar challenges are posed by workplace monitoring of electronic communications. Efforts to bridge these divides continue.

Global Employment Contracts

For global businesses, a single form of employment contract is a “holy grail.” Should such a form be developed, it is unlikely to memorialize at-will employment. The United States is one of the only countries to recognize at-will employment, a concept that was adopted as part of 19th century laissez-faire economics. At-will employment is often not acceptable to foreign nationals working in the United States in white collar positions. Nor is it always palatable

to U.S. nationals who have learned about greater protections in the event of termination offered under the laws of most nations. As more people migrate across borders to take responsible service sector jobs, U.S. employers will increasingly turn to written employment agreements with restrictions on termination.

Equal Pay

Another area where U.S. law is likely to come closer to international labor standards is in the area of equal pay for equal work.²¹¹ The ILO adopted Convention 100 in 1951 calling for equal pay for work of equal value. The United States did not adhere to this convention. The same concept is found in Article 157 of the Treaty on the Functioning of the European Union, which requires each member state to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. Certain provinces of Canada have also adopted this concept (*e.g.*, Ontario, Quebec).²¹² The methodologies to determine what work has equal value have been created in the European Union and Canada, and in the ILO.

Working Time

The European Union has adopted a Working Time Directive, which limits the hours of work per week (to 48), and which requires that accumulated but unused sick leave must be paid out if an employee is terminated or quits.²¹³ This directive may influence U.S. practice, where there has been movement toward legislating paid sick leave, and protecting the rights of workers with family obligations.

Temporary Workers

The European Union also adopted a directive on Temporary Agency Work, requiring that temporary workers be given equal treatment with permanent workers with respect to pay, holidays, working time, rest periods, maternity leave, and access to services provided by the employer.²¹⁴ Given the substantial growth of the contingent workforce in the United States, this directive is likely to serve as a model for actions to protect temporary workers in the United States.²¹⁵

There Will Be International Agreements to Facilitate Global Migration

Immigration laws serve as significant barriers to the transfer of employees for global businesses. A recent survey of 500 executives around the world concluded that foreign workers had a positive impact on the economy and provided competitive advantages, but that visa quotas and visa processes posed significant challenges to their hire.²¹⁶ In developing countries there is a high interest in creating a skilled workforce that may emigrate but provide remittances to their home country that form a significant part of the gross

domestic product.²¹⁷ International agreements between multiple states to facilitate the movement of workers reduce these barriers and promote global business. The European Union eliminated these barriers between its member states, and has entered into agreements with non-E.U. states, such as Switzerland, to reduce or eliminate barriers. The European Union created a simplified fast-track system for work permits for workers and professionals.²¹⁸

The United States is likely to find it useful to enter into agreements to simplify the ability to bring skilled workers to the United States, particularly in light of the anticipated shortage of skilled labor in the United States in key technical positions.²¹⁹ The United States and other English-speaking countries are already competing for university students in the sciences and other highly skilled workers.²²⁰ Workers are also more likely to look for career opportunities outside the United States in thriving economies such as Brazil, China, India, Canada, and Australia.²²¹

There Will Be Increased Use of the Alien Tort Claims Act to Litigate Claims of Violations of International Labor Standards

The Alien Tort Claims Act, originally adopted in 1789, confers on U.S. District Courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²²² There has been increased use of this statute by foreign litigants to address actions by corporations that can be sued in the United States for acts in violations of various treaties.²²³ If the United States were to adhere to additional ILO conventions, this statute would be used to try to enforce those international labor standards. In jurisdictions outside the United States, there has been increased litigation over human rights abuses, such as human trafficking and severe workplace safety violations. This trend will continue, as various treaties on human trafficking are enforced in various forums.²²⁴

International Organizing Efforts Will Increase

The AFL-CIO is very active in international organizing efforts, is very active within the ILO, and has become active in seeking the inclusion of labor and social issues with international organizations such as the International Monetary Fund, the World Trade Organization, and the World Bank. The Council of Global Unions has announced actions to raise awareness of international labor standards and promote organizing. The European Commission has recast the European Works Council Directive to improve the provision of information from employers and increase consultations when transnational decisions are made.²²⁵ The AFL-CIO and European Trade Union Confederation were invited to participate in talks to reduce, and eventually eliminate, trans-Atlantic trade barriers

between the United States and the European Union, through the Transatlantic Economic Council.²²⁶ The Communications Workers of America is conducting a joint organizing effort with the German union, Verdi, through a newly created union named T-Union, to organize workers T-Mobile workers in the United States and to support German union members working for T-Mobile in the United States.²²⁷ The global union federations are seeking to form networks of unions to address the transnational employers, conducting global campaigns on issues such as “precarious employment” (meaning the use of contingent, part-time or temporary workers without full protections from dismissal), supply chain issues, and outsourcing. These campaigns effectively use the Internet, and social networking, and may involve NGOs, pressure on pension funds and financial stakeholders, legal actions, and shareholder resolutions.²²⁸

Some transnational employers have entered into international framework agreements (IFAs) with unions, which often incorporate ILO standards and the concept of social dialogue. At least 89 such agreements exist, overwhelmingly in Europe.²²⁹ IFAs may be seen as a labor response to codes of conduct. A key focus is the supply chain. One advantage of an IFA is to build involvement with the employer, and avoid “losing” the employer as a social partner if the employer moves operations to a different country.²³⁰

The Effects of the Great Recession Will Continue

The impact of the Great Recession on different economies is a stark reminder that all countries are bound together, but not all suffer equally when there is a downturn. Economies that are heavily based on limited sources of income were profoundly jeopardized. Examples are Bangladesh, which invested heavily in textile and clothing manufacture, and Egypt, which depends heavily on tourism, Suez Canal fees, and remittances from Egyptian workers abroad. By contrast, Canada and Australia were significantly less affected.

Certain results of the Great Recession will affect employment for years to come. Recovery in Asia is expected to be fastest. Recovery in the United States is expected to lead Europe and Japan, but be very gradual.²³¹ Unemployment is expected to rise in the European Union through the end of 2010.²³² Youth unemployment is particularly high in developed nations.²³³ Cohorts of young people who hoped to start their working lives during the Great Recession could not, and are in danger of being “left behind” as younger people come into the workforce.²³⁴ In some countries age discrimination laws prohibit discrimination against younger workers. This idea may spread, as the ranks of younger workers unable to get ahead grow. There is a growing concern that education of workers is not keeping pace with need, and that there must be international support for skills training.

Many nations adopted measures to address the effects of the Great Recession, including tax cuts, extended unemployment benefits, job subsidies, expanded public employment, job training programs, and health insurance assistance.²³⁵ In the European Union many employers reduced working hours rather than laying off employees. Denmark modeled an approach called “flexicurity” which provided employers with greater flexibility to lay off workers, but provided more generous unemployment benefits.²³⁶ Job creation remains a critical challenge for governments across the globe.²³⁷

Recommendations/Best Practices

- Become informed about the international changes in employment and labor law. New ideas developed in other developed countries are being imported to the United States. Some quick resources are the Global Employment Law blog (written by Littler and several other members of the Ius Laboris international alliance of labor and employment law firms): <http://www.globalemploymentlaw.com> and Littler’s Global Immigration Counsel blog: <http://www.globalimmigrationcounsel.com>
- Adopt an international perspective as you write your Code of Conduct and develop your compliance programs, as well as when conducting training on these codes and programs. Get advice regarding labor and employment requirements in the locations where you do business, or where your suppliers do business. Make sure your compliance training has an international perspective.
- Adopt best practices for your relationships with suppliers, so that suppliers are complying with local labor standards, at a minimum, and they are unlikely to become an embarrassment.
- Develop employment contract forms for employees who are transferred across borders that contemplate the possibility of “forum shopping” by a discharged employee who wishes to use the potentially more favorable law of another country, and take into account pension, benefits, and tax issues involved in international employment.
- Educate human resources and management personnel on international employment and labor standards and local cultural norms. Claims that managers engaged in illegal activity in developing countries may become high visibility claims in the United States through the Alien Tort Claims Act and other U.S. laws.

LITTLER SEVEN: Corporate Ethics and Compliance Increasingly Become Survival Touchstones — Codes of Conduct for the Employer, Compliance Audits, the Supply Chain and Government and Private Enforcement

Overview

Since 2007, with markets crashing, hundreds of thousands of jobs lost around the globe, employers everywhere trying to find their way through the Great Recession, workplace ethics and compliance has taken on a new role in the business world and in our workplaces. There is no question the extraordinary economic events of the last three years have had an impact on ethical climates in the American workplace and around the globe. Indeed, it has become imperative for companies to have a robust compliance and ethics program to succeed in today's marketplace.

Until quite recently, the disciplines of ethics, compliance, risk management and human resources have operated in separate silos within most organizations. In today's world, these disciplines must converge and be managed together in a unified front in order to meet the varying needs of the market place and government regulators, and to regain the trust of their stakeholders. Organizations from around the globe are rethinking and restructuring their compliance mechanisms to meet the challenges presented by increasingly stringent ethics laws and government regulations, and the unprecedented rigor with which these laws and regulations are being enforced. Times have changed and we are already beginning to see massive effects of that change in the ethics and compliance world.

Following the passage of Sarbanes-Oxley Act, the U.S. government has been aggressively fighting corporate corruption. Most new legislation passed in the U.S. now includes whistleblower, retaliation and compliance components. In addition, U.S. compliance-related laws and regulations are more stringent and more detailed than ever before. Further, through a variety of statutes and initiatives, these laws affect both American and global companies. In fact, complying with laws and codes of conduct throughout the globe is crucial for corporations to protect their brands, to reduce litigation and to ensure they are viewed as progressive and proactive.

The U.S. government continues to crack down on unethical acts by corporations, both in America and abroad. In January 2010, 22 executives and other employees from 16 companies were arrested for allegations of various unethical acts, including violations of the Foreign Corrupt Practices Act (FCPA). The latter law prohibits employees from bribing government officials in foreign countries for the purpose of acquiring or retaining business. The sting operation

that led to these prosecutions was unprecedented in terms of its size, but also in terms of its target — the individuals involved were from small to midsize companies. In the past, large public companies were the usual targets on Department of Justice (DOJ) investigations and many businesses believed smaller companies and private companies were immune. Today this is clearly not the case.

There has never been greater scrutiny or enforcement of the FCPA and related anti-corruption and anti-bribery conventions. In 2009, for the fourth time in five years, the DOJ and Securities and Exchange Commission set records with the most FCPA trials, individual prosecutions and corporate fines in any year in the FCPA's history. This record-setting pace of enforcement activity shows no signs of slowdown—as of January 2010 the DOJ had more than 130 open FCPA investigations. All this comes at a time when global corporations increasingly seek growth in new and developing markets, many of which pose higher risks of bribery and corruption. It is more important now than ever before for those companies conducting business internationally to accurately measure and manage anti-bribery and anti-corruption risk and assess current global compliance program effectiveness.

The U.S. government is also focusing on domestic fraud. This past year the DOJ developed a taskforce — the Health Care Fraud Prevention and Enforcement Action Team, “HEAT.” The federal government plans to multiply by ten the number of agents and prosecutors targeting Medicare fraud in Miami, Los Angeles and other strategic cities where officials say tens of billions of dollars are lost each year.

The Federal Sentencing Guidelines, which were initiated in the 1980's, and amended most recently in 2009, specifically require companies that hope to take advantage of the guidelines and receive more lenient sentences when convicted of wrongdoing to create a culture of ethics and compliance. Chapter 8 of the Guidelines, which applies to organizations, includes a provision directing organizations to establish an “Effective Compliance and Ethics Program.” The Guidelines also state that organizations shall exercise due diligence to prevent and detect criminal conduct and otherwise promote a culture that encourages ethical conduct and a commitment with the law.²³⁸ Among its many requirements, the Guidelines further instruct that an organizational compliance and ethics program minimally requires several steps, including the establishment of standards, appropriate oversight of the ethics and compliance program by the organizations governing body, and the implementation of an effective training program throughout the organization. The majority of criticism of these requirements is that they are unduly vague and that the DOJ holds organizations to a moving target of

higher standards. The proposed amendments nevertheless shed some light on the DOJ's expectations.

The 2009 amendment also adds a new application note that describes the reasonable steps to respond appropriately after criminal conduct is detected, including remedying the harm caused to identifiable victims and payment of restitution. Notably, restitution is already a significant remediation step considered under current Department of Justice guidelines in determining whether to prosecute business organizations.²³⁹ The amendment also inserts specific language regarding the engagement of an independent, properly qualified, corporate monitor. This language reflects current governmental policy and best practices with regard to the appointment of such independent corporate monitors. The amendment also includes specific language requiring an organization to submit to a reasonable number of regular or unannounced examinations of facilities subject to probation supervision. In addition, the amendment contains a new paragraph that clarifies what is expected of high-level personnel and substantial authority personnel. Such personnel "should be aware of the organization's document retention policies and conform any document retention policy to meet the goals of an effective compliance program under the guidelines and to avoid any liability under the law." There is also a proposed amendment to clarify that when an organization periodically assesses the risk that criminal conduct will occur, the "nature and operations of the organization with regard to particular ethics and compliance functions" should be included among the other matters assessed. It reads:

The seventh minimal requirement for an effective compliance and ethics program provides guidance on the reasonable steps that an organization should take after detection of criminal conduct. First, the organization should respond appropriately to the criminal conduct. In the event the criminal conduct has an identifiable victim or victims the organization should take reasonable steps to provide restitution and otherwise remedy the harm resulting from the criminal conduct. Other appropriate responses may include self-reporting, cooperation with authorities, and other forms of remediation. Second, to prevent further similar criminal conduct, the organization should assess the compliance and ethics program and make modifications necessary to ensure the program is more effective. The organization may take the additional steps of retaining an independent monitor to ensure adequate assessment and implementation of the program.

An issue for comment is also included on whether to encourage direct reporting to the board by responsible compliance personnel by allowing an organization with such a structure to benefit from

a three-level mitigation of the culpability score, even if high-level personnel are involved in the criminal conduct.

The recently published 2009 National Business Ethics Survey, prepared by the Ethics Resource Center, reported that more employees than ever are reporting misconduct and that the recession has caused an "ethics bubble" that is likely to implode once the recession has ended.²⁴⁰ That may be why, prior to the recession, the office of Chief Compliance Officer was the fastest growing new position in companies of medium to large size in America.

On a global front, ethics and compliance and anticorruption are also being examined. The Recommendation for Further Combating of Bribery of Government Officials was released on December 9, 2009, when the OECD (The Organization for Financial and Economic Development) marked the tenth anniversary of the OECD Anti-Bribery Convention. The Recommendation was adopted by the OECD in order to enhance the ability of the 38 State parties to the Anti-Bribery Convention to prevent, detect and investigate allegations of foreign bribery. The Recommendation also includes materials described as the Good Practice Guidance on Internal Controls, Ethics and Compliance.

Predictions for the Future

The focus on ethics and compliance will only grow as the future moves forward. Social network criticisms of organizations and environmental and branding pressures will increase. As a result, organizations will need to continue to do the right thing ethically to protect themselves. Concepts of sustainability will become particularly important business values.²⁴¹

Ethics and executive compensation will overlap. Executive compensation practices will be viewed through the lens of whether the compensation is ethical.

More significantly, leading countries and organizations, from the E.U. to the U.N., will continue to pass more specific and demanding laws related to ethics and compliance. In addition, some countries, including the U.S., will seek to expand coverage of their laws to operations abroad. This push for global law will force organizations to push compliance and ethics into emerging countries, even to those where bribery and under the table payments are an accepted way of doing business.

The new laws also will increase the pressure of compliance by expanding enforcement and increasing penalties. Further, because global operations will allow potential plaintiffs to choose their forums for enforcement, employers should expect to be sued or be placed under government investigations in places where they would least like to be subject to such pressures.

There Will Be More Focus on International and National Enforcement of Anti-Corruption Laws

The U.S. has already significantly stepped up its enforcement of the Foreign Corrupt Practices Act, and there are important international initiatives as well. The U.S. is a party to the Anti-Bribery Convention of the Organization for Economic Co-operation and Development (OECD). In late 2009, the OECD adopted a Recommendation to extend the enforcement of this convention by beefing up enforcement measures.²⁴² The states that are parties to the United Nations Convention Against Corruption have engaged in a self-assessment, with the view to evaluating the state of enforcement and improving enforcement. International development banks, such as the World Bank, Asian Development Bank, European Bank for Reconstruction and Development, and the Inter-American Development Bank are also engaged in anti-corruption strategies and investigations. There will be increased pressure on states with significant corruption problems through international organizations and non-governmental organizations (NGOs), and strong pressures between the major investing nations to adhere to international standards on corruption and to eliminate the competitive advantage of engaging in corruption to secure business opportunities.

Codes of Social Responsibility and Codes of Conduct (COC) will become more meaningful. The use of voluntary corporate codes of conduct, and various means for monitoring compliance has grown substantially.²⁴³ To bring greater discipline and effectiveness to this practice, the U.N. Secretary-General appointed a Special Representative, John Ruggie, to study the relationship between human rights and transnational corporations. The *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*,²⁴⁴ proposes a framework founded on three principles:

1. The duties of nation states to protect their citizens from abuse by businesses, including the duty of home states to hold corporations accountable for abuses overseas, and the duties of host states to coordinate with home states to integrate human rights concerns in trade practices, investment agreements and export credit agency lending;
2. The duties of companies to establish human rights policies that are integrated into everyday company practices, track performance by monitoring and auditing, and consider the human rights impacts of their activities in countries where there are human rights challenges and whether their activities may contribute to the abuses through the relationships formed; and
3. More effective judicial and non-judicial (such as grievance mechanisms) remedies for victims of abuses.

Under pressure from unions, non-governmental organizations and some countries, these codes will become more specific and more demanding of companies. As a result, ethics requirements within CSRs and COCs will include direct actions in support of NGOs and global unionizing efforts.

COCs will have to cover the supply chain. Companies in the U.S. are increasingly subject to significant public and legal pressure to assure that their suppliers are meeting basic labor standards and not engaged in human rights or environmental violations. This means that COC's must be drafted with a variety of jurisdictions and local conditions in mind. Having the COC is not enough. There must be a program to monitor for compliance by the companies in the supply chain.

Finally, the concept of ethics training will become more global in nature. For companies to protect themselves, they must act to avoid ethics issues, and not merely say they will be ethical in nature. This will especially be the case in emerging countries. As a result, substantial training will be required. More awkwardly, some executives will have to be punished to get the attention of those who resist the expansion of ethical and compliance requirements. Such discipline should be limited, however, through appropriate training and a true insistence on the importance of ethics standards.

Recommendations/Best Practices for Employers

As government crackdowns continue and corporate reputations are under attack on the Internet, employers should be aware of the legal sensitivities surrounding compliance and ethical standards for not only large public companies but small and mid-sized ones as well. These issues are not simple, and they go well beyond technical "floor" compliance. Codes of Social Responsibility and Codes of Corporate Conduct have set the stage for change, and laws like the Foreign Corrupt Practices Act have set the bar of enforcement.

- The new laws and standards require all organizations to have an "effective compliance program." The FSGs set the floor, the *minimum* standard. It is no longer a question of should we have a program but how strong a program is necessary to be compliant with the DOJ's perception of an effective compliance program. Most business leaders agree this is a smart investment and the lack of a credible program will lead law enforcement officials to conclude a company is irresponsible after all the prosecutions, huge fines and publicity. An "effective compliance program" should include,

minimally, a strong code of conduct, including a clear anti-bribery provision.

- Training for the entire organization, including focused training for upper level management, board members and executives. Manager conduct is a particularly high risk area — managers need to know what to do when unethical conduct occurs or criminal issues arise. Focused training should be directed at them in these areas. According to several members of the Department of Justice, training at the executive and upper management ranks should be face-to-face training, rather than online training to be deemed compliant with the Federal Sentencing Guidelines. Online training is an effective and efficient way to educate the overall workforce.
- Codes of social responsibility and codes of ethics need to be created and enforced to address the fact that we live in a world where brands can be attacked through social networking and Internet publicity.
- Get your ethics and compliance officer, risk manager, human resources, and legal to work together, so that ethics programs are embedded in business systems.
- Make sure ethics programs and training address new issues such as social networking and privacy laws, bullying and new forms of discrimination.
- Constantly assess and reassess your risk areas to improve the effectiveness of identification, monitoring, and management of risks.
- Don't live with the minimum — it works to create a true culture of integrity, and to do so an organization should be consistently underscoring the message of ethics, integrity and core values.
- Values work better than rules!
- Tone at the top - make it happen with constant communication from the executives and managers that integrity matters. Make sure your executives are role models, who create an ethical culture.
- Create an ethical culture. If employees do the right thing even when no one is looking, you have reached success.

LITTLER EIGHT: A Large Permanent Contingent Workforce, a Growing Skill Shortage, High Structural Unemployment, and Undocumented Workers Will Force Legislative, Judicial and Regulatory Reform

Overview

There will be unprecedented growth in the United States' contingent workforce during the next decade. As the United States slowly emerges from the Great Recession, unemployment will remain at higher levels than previous years, leading to a state of relatively high structural unemployment. The largest U.S. demographic group, the Baby Boomers (approximately 76 million people born between 1946 and 1964)²⁴⁵ will be hitting retirement age during this decade. Specifically, the oldest Baby Boomers will be turning 65 in 2011. Years of job experience and skills will be walking out the door, challenging organizations to replace that skill and experience. Replacing that experience will be a challenge.

The education level of the coming workforce will not be up to the needs of employers, given the changing demographic profile of the United States. For example, in the United States, Science and Engineering degrees are approximately one-third of all bachelor's degrees awarded where as in Japan 63% and in China 52% of undergraduate degrees awarded in the Science and Engineering field.²⁴⁶

To help make up some of the skill shortage, organizations increasingly will need to take responsibility for providing training to their own employees. Yet to remain competitive, the organizations must ensure that this training is delivered as efficiently as possible. Learning Management software will allow HR managers to tailor training specific to individual or groups of employees, and monitor progress of that training. As for training delivery methods, the trend of increased use of technology will continue as more and more tech-savvy employees and companies grow and thrive. Concise, modular training, delivered electronically to employees' computers or personal, portable devices will be the norm.

In 2000, we predicted the explosive growth in the use of the Internet, and its use in connection with the workplace. This prediction came true. Just one example is the increased use of the Internet to provide employee training. A 2005 ELT survey of over 2,000 HR, legal, and compliance professionals revealed that 25% of their organizations were using online training; a follow-up survey in 2007 revealed that the percentage of organizations using online training had jumped to 40%, a trend will continue into the next decade.²⁴⁷

To meet critical skills shortages, employers may need to increasingly rely on workers who do not speak fluent English,

whether these workers are physically working in the U.S. or remotely from foreign countries. This is particularly true given the possibility of full legalization for illegal immigrants currently working in the U.S. We predict that by 2012, the threat of terrorism and the drug war in Mexico will force legislators to push through immigration reform that will legalize the approximately 14 million undocumented workers currently residing in the United States. Employers therefore will need to face the numerous challenges presented by a multi-lingual workforce. One such challenge is the difficulty in training this new, multi-lingual workforce. Accordingly, organizations will need to provide at least some of its employee training in multiple languages, which will only increase the use of electronic or online training delivery methods.

The converging pressures of the coming skills shortage, a growing contingent workforce, and high structural unemployment will necessarily demand national legislative, regulatory and judicial reforms.

Predictions for the Future — The Contingent Workforce

As the nation slowly emerges from the Great Recession, companies are pressed to exercise measured judgment when making hiring decisions. Currently the country's total contingent workforce stands at approximately 14 million people, with U.S. businesses spending over \$400 billion on these workers.²⁴⁸ As companies move forward, mindful of the deep labor cuts that were made during the past 18 to 24 months, the ability to achieve median savings of 9% by using contingent workers²⁴⁹ will be a very attractive and compelling reason to embrace the recovery with contingent workers.

Economic indicators show that job losses have slowed and companies are ready to hire, however, the first hires are likely to be those in contingent positions. Indeed, heading toward the recession, all forms of contingent workers were the first to be laid off and the trend in the last two decades is that such workers are the first to be hired back in a recovery. Studies of just-in-time labor suggest that companies are becoming more sophisticated in their use of contingent help and increasingly use such workers and delay permanent hiring as the economy improves.²⁵⁰ Indeed, Bureau of Labor Statistics (BLS) economist Amar Mann said that the BLS's analysis suggests that employers have become increasingly more sophisticated and are using forms of contingent labor as a "clutch to downshift into recessions and upshift into recoveries."²⁵¹ The flexibility and cost-savings associated with contingent labor will be attractive to executives who will be wary in the slow recovery, which has been dubbed the "jobless recovery." Now that workforce numbers seem to have stabilized, companies want to remain nimble.

Professor Gary Chaison, Clark University (Worcester, MA) said "I think it's coming — we might be heading into a time of large-scale hiring of contract workers."²⁵²

All forms of contingent work is projected to rise faster than general employment in the coming decade. The BLS predicts that general employment will increase by an average annual rate of 1.0% from 2008 — 2018.²⁵³ Interestingly, BLS projects that one segment of the contingent workforce — temporary employment — will grow nearly twice that fast — at 1.8% annually.²⁵⁴ Staffing Industry Analysts believes the BLS projection is understated because it does not take into account the large increases in temporary employment in late 2009 or that companies have become more savvy in their use of contingent workers after the most recent layoffs.²⁵⁵ Taking those factors into account, SIA believes that the temporary worker market penetration will be 2.05% by 2018. By 2020, SIA predicts that contingent work will represent 20% of all work.

The foregoing facts demonstrate a very strong public and private consensus that use of contingent help will increase in the coming decade. Littler believes the convergence of the growing demand for contingent workers (including 9% savings), the passage of national healthcare and the economic recovery will be the catalyst to chart a new course to an exploding contingent workforce. We predict that contingent workers will comprise 50% of the U.S. workforce added after the Great Recession. The significance of national healthcare is not considered in the predictions of BLS or SIA, however, its importance is undeniable and cannot be understated.²⁵⁶ These conventional estimates do not account for the impact of national healthcare on the future of the contingent workforce, yet those estimates still place the total number of contingent workers at 20% of America's workforce.²⁵⁷ As a result, we predict that by 2020, approximately 25% to 35% of the entire U.S. workforce will be made up of temporary workers of some form, including contractors.

While there is no way to specifically quantify the importance of national healthcare passage, we know that this factor will be very significant in freeing workers to support and embrace alternative work forms in a way never before seen. Thus, Littler posits that when the full effect of portable national healthcare comes to bear, it will result in strong individual desires to embrace contingent work — a previously unknown factor in our current economic model. Since the advent of the industrial revolution — more than a century ago — and favorable tax treatment of healthcare offerings by employers since the 1930's, healthcare has been linked to traditional employment and has become increasingly more difficult and expensive to procure outside conventional employment. It has been nearly three generations since Americans felt free to pursue

employment alternatives without fear of losing quality healthcare. We are about to see America unleashed in a way that our capitalism model has never experienced and we have never witnessed — companies and workers eager and unencumbered in their mutual desire to pursue all forms of contingent work. The new demand for contingent workers, the economic recovery and the passage of national healthcare will serve as the perfect trifecta to catapult contingent work arrangements to previously unachievable levels that will become known as Workforce 2020.

Employer Recommendations/Best Practices

- Become knowledgeable about national healthcare. You must understand the effects of these new requirements in order to market it to contingent workers.
- Expect potential candidates to be interested in exploring all forms of alternative work arrangements; make certain your company is positioned to be flexible and responsive to creative proposals by talented and eager workers.
- Review all areas of your business to determine all areas where you will benefit from contingent work arrangements and savings.
- Learn how to effectively recruit talent in the face of a shrinking talent pool through strategic alliances, informal networks and creative HR strategies.
- Understand that legal compliance becomes more complicated with an increasingly contingent or contractor-based workforce, where there is a potential for creation of multiple joint employer relationships.
- Make sure that the independent organizations with which you work have compliant discrimination policies and reporting procedures.
- Plan now for the coming exodus of Baby Boomers from your workforce.
- Embrace technology to help you deliver much-needed training to the next generation (post Baby Boomer) workforce.
- Consider delivering training in concise, impactful modules.

LITTLER NINE: Employee Benefits Law Will Move to Center Stage as U.S. Employers Deliver Mandated Health Care Coverage, Dictate Wellness, Reform Executive Compensation, and Help the Boomers Retire

The next decade will be a time of tremendous change for the U.S. workforce. Mandated health care, now adopted may result in more limited coverage from employers and a greater uniformity of coverage overall. The process of adapting to the new healthcare laws will consume much energy in the first few years of the new decade. As the new law creates incentives for wellness programs, these will become more standard, and often mandatory. The World Health Organization foresees more unhealthy workers, predicting that diabetes will rise 50% in the next decade and that global obesity levels will skyrocket.²⁵⁸ Wellness programs may be one of the best social tools available.

The role of executive compensation in the economic collapse in 2007-2008 will not be forgotten. The American public wants reform. What form that will take will be the subject of much political jockeying during the next decade. The value “greed is good” will be replaced by values of accountability and transparency. The relationship between legitimate business objectives, risk, conflict of interest, and compensation will be subjected to penetrating analysis.

In 2011, the first cohort of Baby Boomers will turn 65, 79 million strong.²⁵⁹ Will they retire? Will they be able to afford to retire? At the same time there are more than seven million unemployed workers, and a survey in August 2009 shows that 84% received no severance pay, and more than 60% received no notice.²⁶⁰ Some of these may “retire” and accept a lower standard of living. Some will not. Older workers who stay in the workplace could limit opportunities for the young. Employers will face challenges to legitimately help older workers retire.

Overview — Health Care

Based on current health coverage designs and structure of the current health care market, employers largely insulate employees from the substantial cost of health care. However, the increasing rate of health-related costs borne by employers is unsustainable if American business is to remain competitive in a global economy. When an employee selects lifestyle behaviors and medical treatment options that add to the cost, the consequence to the employee is likely minimal. The cost of care for obesity related chronic conditions has increased by 180% since 1997. 14% of Americans were obese in 1987; 30% were obese in 2007. If current trends continue over 70% of Americans will be obese by 2020. Obesity accounts for \$150

billion of medial spending annually.²⁶¹ Currently 1 in 3 children is overweight or obese. Employers are trying to change employee behavior in order to reduce costs through wellness programs and various health initiatives.

Predictions for the Next Decade — Health Care

On March 23, 2010, President Obama signed into law the historic Patient Protection and Affordable Care Act, with amendments in the Health Care and Education Reconciliation Act on March 30, 2010. These laws will profoundly change the delivery of healthcare coverage. These laws will require most legal U.S. residents to obtain health insurance and will provide government subsidies to help lower-income individuals to obtain health insurance through newly created health insurance exchanges. An exchange is a virtual market where individuals and groups can shop for plans and purchase plans that best meet their needs. Two multi-state insurance plans will also be created. It is anticipated that by 2019 fewer people will obtain employer-provided health insurance.²⁶² The funding for the cost of the legislation will come from several sources, including higher taxes on households making more than \$250,000 per year. The objective is to have 95% of people covered, up from 85% today.²⁶³ The significant aspects of the law are set forth below, with the timeline in which they are expected to take effect:

- In 2010/2011, for plan years starting six months after March 23, 2010, all plans must have the following features:
 - No lifetime or annual limits on essential benefits (a defined term). Annual limits may be permitted under future regulations;
 - Dependent coverage up to age 26 if the plan covers dependents;
 - No pre-existing condition exclusions for children under age 19;
 - No rescission of coverage;
 - New disclosure requirements (easy to understand explanation of coverage).
 - Health flexible spending accounts (FSA) maximum pre-tax contributions will be capped at \$2500 (indexed for inflation) starting in 2013, but the use of FSA, Health Savings Accounts (HSA) or health reimbursement accounts (HRA) funds for over-the-counter medicines will be limited starting in 2011.
- W-2 reporting of the value of coverage provided in 2011 on W-2s issued in January 2012 (the reporting does not make the coverage taxable).
- Immediate amendment to the Fair Labor Standards Act (FLSA) to require employers covered by the FLSA to provide reasonable break time to nursing mothers, and private place (not a bathroom) where nursing mothers may express breast milk.
- Preventive care will be covered from first dollar (except for grandfathered plans).
- Starting in 2010 businesses with 25 or fewer employees may be eligible for a tax credit of up to 35% of employer health insurance costs depending on size and employees' income.
- Effective June 23, 2010, a reinsurance program becomes available for employers providing retiree health coverage for retirees over 55 who are not Medicare eligible;
- Starting in 2011 employees must have automatic enrollment procedures for a new national social insurance program for limited long term care insurance.
- After 2011, all plans will have certain features:
 - No waiting periods over 90 days effective January 1, 2014.
 - Automatic enrollment for employers with more than 200 full-time employees (no effective date yet, but may be as late as 2014).
 - No pre-existing condition exclusions for all enrollees (effective January 1, 2014).
 - No annual limits for all enrollees (effective January 1, 2014).
 - Encourage wellness programs through offer of substantial discounts in costs of coverage to employees (effective January 1, 2014).
 - Annual fee on prescription drug makers starting in 2011; excise tax of 2.9% on medical device makers starting in 2013, and per life fees for research assessed against insurers (effective January 1, 2014).
 - Tax deduction to employers who receive federal subsidy to offer prescription drug coverage to retirees ends in 2013.

- Notice to current employees and new hires about the state insurance exchanges and subsidies effective 2013.
- New Plans
 - 2010/2011 — New standards for: coverage, preventive care, cost sharing, out of pocket expenses; emergency care: elimination of discrimination in favor of highly compensated employees, elimination of certain referral requirements for women, and elimination of wellness program deductibles.
- Health Insurance Exchanges (effective January 1, 2014)
 - State established Exchanges that facilitate the purchase of individual or group health plans will come into existence. Initially they will be available for individuals and small businesses (generally under 100 employees), then to large employers in 2017.
- Individual Mandate (effective January 1, 2014)
 - Play or pay penalty for individuals who do not buy insurance through Exchanges, group health or individual policies, with tax credits available to persons earning up to 400% of the Federal Poverty Limit.
- Employer Mandates (effective January 1, 2014):
 - Penalties for employers of 50 or more employees who fail to provide coverage for Essential Benefits
 - Play or pay penalty is generally: (1) \$2,000 per full-time employee (30 or more hours per week) for employers who fail to provide coverage, if any employee received a federal subsidy to purchase health insurance through an exchange; or (2) \$3,000 per full-time employee opting out with premium tax credit or cost sharing where the employer's coverage is unaffordable (costs more than 9.5% of income) or covers less than 60% of the actuarial value of the plan.
 - Certain low income employees (those for whom the premium share for employer's plan costs between 8-9.8% of employee's household income) who do not qualify for a federal subsidy may opt out of employer coverage and receive a "free-choice voucher" from the employer equal to the value of the benefits from the employer plan. These vouchers may be used to purchase coverage from an exchange.

- High Cost ("Cadillac") Plans (effective 2018) 40% excise tax on plans with premiums above \$10,200 (single) and \$27,500 (family). This excludes dental and vision premiums.

Further Predictions for the Next Decade — Health Care

- Health care reform efforts will continue, but with an emphasis on wellness initiatives and consumer driven health care.
- The health care reform efforts will be seen to have done little to slow the rate of the increase of the cost of health care, but will likely be viewed as increasing the administrative burdens and risks of penalty placed on employers.
- Employers will begin to exit the medical benefit business.
- Competitive pressures will continue to shape the health care industry as employers continue to spend significant budgets on health care. Legislation will continue to be passed that pressures the costs in the health care industry.
- The best doctors and hospitals will be actively improving their ability to put the cost of treatment and treatment options within reach of their patients. The glut of health-related data on the Internet will be higher quality, global, and better organized and easier to use by 2020.
- State and local laws dictating insurance coverage will be amended to conform to the new federal laws.
- Employers will become increasingly involved in health-related education of employees.

Overview — Wellness Initiatives

As healthcare costs skyrocket, employers across the United States are desperate for ways to control costs. Recent empirical data confirms that mandating wellness in the workplace results in significant return on investment as health care costs go down. Unfortunately, legal pitfalls abound, due to limitations on an employer's ability to enforce mandatory wellness.²⁶⁴

The legal landscape is undeveloped and employers across America are testing the limits to determine what is permissible. Some employers have mandated that employees cannot use tobacco products. Others require comprehensive health assessments and use third-party administrators to evaluate the data. Many more are offering discounts on health insurance to achievement of wellness benchmarks like low body mass index or smoking cessation. Legislative and legal challenges abound, however. The adoption of the Genetic Information Nondiscrimination Act threatens the

viability of comprehensive health assessments. Legal challenges to mandatory wellness programs have been filed and precedent will soon exist.

Predictions for the Next Decade — Wellness Initiatives

Employers will embrace mandatory wellness programs as a critical tool to help them compete in the global marketplace. As evidenced by the recent passage of the healthcare bill, which contains numerous provisions to foster mandatory wellness in the workplace, there is a growing consensus that employers *must*, not *may*, adopt wellness programs to reduce costs and increase productivity. In the next decade, the legal challenges will be resolved, legislative roadblocks removed and employers will navigate the terrain to determine how best in their workplace to mandate wellness.

Overview — Executive Compensation

Executive compensation is a subject of increasing scrutiny from at least two sources: the government (Congress and the SEC); and investors (particularly institutional investors — and ISS (Institutional Shareholder Services)).

This complex area of the law is heavily influenced by several sources of rules and regulations, including securities regulation (the SEC and stock exchange rules) and tax rules. In an economy that is exiting recession and only slowly improving, there is further concern and interest coming from Congress and regulators with a continuing focus on issues related to perceived or real abuses and questions of fairness. For example, legislation has been introduced in Congress to give shareholders at public companies advisory say on executive pay packages, and to adopt rules to allow regulators and investors to claw back bonuses if it is later discovered that they engaged in misconduct. In addition, executives fired for performance-related reasons would be barred from receiving generous severance packages. The law would also prevent executives at publicly listed companies from cashing out of their shares and options all at once, restricting cash outs to 20% per year over a five-year period.²⁶⁵

At the same time that public focus on executive compensation has raised cries for reform and restriction, companies have reacted to the decline in stock prices by changing executive compensation programs. A number of the changes are contrary to direction from the U.S. Treasury. Kenneth Feinberg, the U.S. Special Master on Executive Compensation who was appointed by President Obama in June 2009, was quoted in a Bloomberg.com article: “To the extent there is more emphasis on cash than stock, that’s unfortunate. We’re pushing the other way.”²⁶⁶ A strong motive appears to be to make up for the drops in stock price. Thus, there is a focus more

on short-term cash flow rather than return on equity, a lowering of thresholds for short term incentive eligibility, and a focus less on long term compensation where there is less predictability, but with a redefinition of parameters for awards. Similarly there has been a trend to provide restricted stock, which vests with the passage of time, rather than stock options, the value of which depend on company performance. However, there has been movement to reduce severance packages, reduce retirement benefits, and in some cases, introduce clawback policies.²⁶⁷

Predictions for the Next Decade — Executive Compensation

The existing trends will continue and be strengthened. There will likely be much stronger regulation of executive compensation, not only with regard to required disclosure to shareholders, but also in terms of more specific limitations on terms and timing of payments. There will be increases in restrictive tax rules limiting or taxing executive compensation and more specific rules that will curtail discretion regarding compensation at the top executive levels of public companies. Mandatory shareholder approval for executive compensation programs will expand (“say on pay” that is more than merely advisory). In addition, there will be more precise parameters on what constitutes proper corporate governance, as it relates to compensation.

Overview — Retirement Plans

Employers currently provide employees with a mix of retirement vehicles. Although 401(k) plans, which put the risk of investment performance on employees’ shoulders, are the most common employer-provided retirement vehicle, there are still companies that maintain traditional defined benefit pension plans. These plans provide for great variability in annual expense and annual funding as such factors are dependent not only upon the plan’s pension formula but also upon the plan’s investment performance, prevailing interest rates and actuarial factors. These traditional pension plans provide much greater benefits to long-term workers than others as the formula dramatically increases benefits as employees reach retirement age. Employers have started to switch to less expensive and less volatile retirement vehicles and to those which provide less of a premium on longevity of employment. Employees, however, do not appear to be saving sufficiently to make up the shortfall created by employers moving to new vehicles.

Predictions for the Future — Retirement Plans

- Employers will shift from defined benefit to defined contribution plans.

- There will continue to be a distaste for traditional pension plans on account of volatile costs and a workforce that increasingly values current, as opposed to deferred rewards.
- The U.S. government will encourage employers, either through the tax code or through some other means, to provide incentives for employees to save more for retirement.
- Social Security will lower benefits to retirees.

Employer Recommendations/Best Practices for Employee Benefits in the Coming Decade

- Develop health care plans that help reconnect the consumer with the cost of the health benefits to ensure their doctor is billing them correctly and to bring greater control over purchasing habits.
- Offer employee training to increase the familiarity and understanding of various healthcare options, Flexible Spending Accounts, and Health Savings Accounts, and strategies to select a medical insurance policy from a menu of choices that best addresses their needs in a cost effective fashion.
- Provide wellness education to employees, including reliable information about prevention, nutrition, exercise, mental health, and medications. The proliferation of unreliable health information on the Internet has created significant confusion.
- Establish wellness programs to address the consequences of smoking, obesity, poor nutrition and inactivity to slow the rate of cost increases for health care due to lifestyle choices.
- For developments in Washington D.C. as they relate to employers, subscribe to the Littler Washington D.C. blog at <http://www.dcmplemploymentlawupdate.com/>.
- Subscribe to the new Littler Healthcare Blog, which also includes wellness, and is found at <http://www.healthcareemploymentcounsel.com/>.
- Create/amend executive compensation programs so that they are tied closely to the values of the company, the public corporate objectives of the company.
- Review the effectiveness of executive compensation to motivating behaviors that serve the interests of the company on a long-term as well as short-term basis.
- Assume that executive compensation will be subject to public scrutiny and second-guessing.
- Do not underestimate the importance of the Board's Compensation Committee. Recruit outside Board members to serve on the Compensation Committee who are both well versed in their fiduciary obligations, understand the public significance of compensation decisions, and are willing to retain appropriate expertise to help ensure that compensation plans are addressing the various constituencies with interests in the subject.
- Management must have a deep understanding of the maze of legal and regulatory restraints, as well as the public relations aspects of compensation in order to provide practical and intelligent assistance to the board as a whole, and to the Compensation Committee in particular.
- Employers should move to retirement vehicles which provide greater predictability of cost such as 401(k) plans and cash balance plans.
- Employers should perhaps provide some retirement incentive for those in the contingent workforce, such as contributions for temporary workers, so that an employer will look more attractive to such workers.
- Employers should encourage employees to save more for retirement by providing significant matching contributions with short vesting schedules.
- Those employers with traditional pension plans should assess the value provided by such plans and contemplate freezing or terminating the plan.

LITTLER TEN: The Corporate and Private Practice of Employment and Labor Law Will Change More During the Decade Than Has Occurred in a Century — Disruptive Technologies, Advanced Knowledge Management, Standardized Processes, New Value Models, and Ubiquitous Access to Digitized Information Will Lead the Transformation

Overview — Restructuring of Legal Services Delivery

The delivery of legal services will fundamentally change for many law firms and clients over the next decade. Currently, most corporate clients in the United States pay for legal services by the billable hour, a billing method that has dominated the legal profession for 50 years. For many clients and for many types of engagements the billable-hour model will continue to work. However, for other

clients, particularly those confronting an ever-increasing volume of litigation and other legal claims, the billable-hour model may no longer be viable. For these clients, the current economic conditions, internal demand for greater predictability and reduced spending on outside counsel and the belief that the billable-hour model acts as an impediment to greater efficiency and innovation, will create a compelling case for change. By 2020, successful law firms will be those that can deliver quality service at a reasonable and predictable price, and are willing to share in the risks faced by clients through partnering arrangements. The successful law firms will be those that are willing to reexamine how they provide their clients with legal information, deliver basic and even complex services and staff their client engagements.

At the time the Great Recession hit, lawyers in the United States found themselves delivering legal services to corporate clients pretty much the same way they had been doing it for the past 50 years. Certainly, there had been stunning changes in technology and an exponential increase in the laws and regulations they would have to deal with. But the lawyers of past decades would be very familiar with the service delivery methods used by lawyers and the business models of most major law firms in the first decade of the 21st Century. Whether in drafting documents, advising on major transactions, litigating cases or providing trusted advice and counsel, the business model had not changed substantially. Consider that, up until 2010:

- Most large law firms continued to manage document reviews in litigation matters the way they had for decades: assigning teams of associates to this monotonous tasks. Of course, in the age of e-Discovery, associates review gigabytes of data, rather than a few hundred documents in a cardboard file box.
- Most large law firms continued to staff litigation matters with teams of barely experienced associates who spent countless hours conducting legal research, observing depositions, attending meetings, drafting motions and reviewing and discussing those motions with more senior attorneys.
- Most lawyers continued to draft transactional documents as they had for decades: hand-tailoring each document to the specific needs of the client, often relying on documents they had previously created or on precedent documents in the firm's database, but always finding the need to fine-tune the document with an additional number of hours of their own time.
- Most lawyers continued to answer legal questions and provided clients with current information on legal

developments through individualized memos or, more and more, emails.

And, more critically, most lawyers continued to charge clients for their services on an hourly basis.²⁶⁸ Despite the inherent conflict between the client's desire to have its work performed efficiently — with as few hours expended as necessary — and the attorney's natural desire to bill as many hours as possible — in order to meet the firm's established billable-hour benchmarks — the billable hour remained the coin of the realm.

Corporate clients have been expressing dissatisfaction with billing by the hour for years. As far back as 2002, the American Bar Association (ABA) Commission on Billable Hours surveyed lawyers and clients and reported concerns with billable hours, including whether clients received value for the hours billed, the lack of predictability in legal costs, disassociation of client's interests from lawyer's interests, the temptation to over-lawyer and duplicate effort, the failure to encourage project management, disincentives for efficient lawyers, competition based on hourly rates and disincentives to use technology and knowledge management.²⁶⁹ But this general dissatisfaction did not result in widespread demands for change until the Great Recession forced the issue.

By 2010, the billable-hour business model finally received intense scrutiny with the general counsels of major corporations publicly decrying the status quo business model. In addition to the economic pressures prevailing then, clients experienced an almost inevitable adverse reaction to an economic equation that placed all of the risk on the purchaser of legal services and immunized the law firms from any downside risk. Some clients came to the conclusion that the billable-hour model remained viable; they were willing to pay by the hour for an experienced litigator to handle the bet-the-company case or for strategic counsel and advice on new compliance obligations. For other clients, facing dozens of administrative charges or single-plaintiff claims each year, the billable-hour model could not be sustained. What all clients agreed upon was that whether their law firm charged by the billable hour or by alternative fee arrangements, they had to deliver legal services much more efficiently.

In-house counsel — the key purchasers of legal services — demanded change. They began to reward those firms that could: (1) re-engineer their legal-service-delivery processes to increase efficiency; (2) focus more on the client's interest in compliance and minimizing risk; and (3) restructure the economic relationship between law firm and client so that both would share the risk and benefit from increased efficiencies and effective risk-management.

Additional pressure was placed on the traditional legal industry model by non-law firm players eager to accelerate the

disintermediation of legal services by unbundling so-called commodity work from the array of legal services law firms offered. Information service providers such as LexisNexis and Westlaw began to offer far more legal content, beyond just case law, providing in-house counsel with direct access to model documents, forms, practice guides and other knowledge they might have previously obtained from their outside counsel. Legal process outsourcers (LPOs), both domestic and off-shore, such as NovusLaw, CPA Global and Integreon, began to aggressively market document review, legal research and document drafting services at substantially reduced costs. Indeed, LPOs have two distinct advantages over the traditional law firm model. First, they approach the performance of legal services as any rationale business would: breaking each service into defined tasks and then determining the most efficient way to perform that task and the most-appropriately compensated employee to perform that task. They also apply accepted principles of project management and quality control that law firms had ignored for years. Second, LPOs have access to investment capital enabling them to hire talented staff (*e.g.*, young lawyers laid off by large firms during the Great Recession), develop innovative systems and implement sophisticated marketing, sales and client service practices that law firms rarely do well. Indeed, as one astute observer has noted, “private equity firms are preparing to invest in the legal marketplace — but they’re not looking at law firms, which they consider bloated, inefficient, and impossible to manage well. They’re looking at alternative providers of legal services, and they’re likely to start with LPOs.”²⁷⁰

Predictions for the Next Decade

The New Business Model

In the coming decade, the billable hour will no longer predominate. Many clients will increasingly demand and law firms will provide legal services in a variety of arrangements based on predictable pricing and partnering relationships. Internally, law firms will emphasize and reward project management skills and create incentives for lawyers who are more profitable, rather than simply rewarding those who can record the greatest number of billed hours.

- **Predictable Pricing.** The days of cost-plus pricing via the billable hour will end. Employment lawyers will offer employers fixed-fee retainers for legal counseling and advice about employment issues. Litigation matters will be priced based on flat-fee pricing for the phases of the litigation. Non-litigation legal work not otherwise covered by retainers will be priced by the project based on expected activities. Flat-fee pricing models will discourage lawyers from over-lawyering

matters or padding bills, thus aligning the law firm’s interests more with the client’s interests.

- **Partnering.** Over time, clients and law firms will develop relationships that mutually benefit both parties. Clients and law firms will use the Association of Corporate Counsel (ACC) Value Challenge and its Covenant with Counsel to develop a balanced alignment of expectations for both parties. The partnering relationship will require a reduction in the number of firms utilized by corporations and favor firms with greater specialization. Law firms will communicate more regularly with their clients, getting to know the client representatives on a more personal basis and their business more intimately. This will help the law firm render advice with the understanding of the motivation and needs of the client. Partnering also will involve the law firm sharing in certain risks. This typically will involve the risk of uncertain outcomes in litigation or administrative proceedings but it will also involve more attention to early risk assessment and greater definition of the client’s goals and the amount of effort required to resolve the litigation. Law firms will strive for, and clients will expect, transparency in terms of staffing, matter management and financial information. Clients will evaluate their law firms on a regular basis, providing important feedback on expectations and performance.
- **Project Management.** Law firms will insist that their attorneys develop project management skills to manage litigation and other legal work more efficiently and profitably. Law firms had no incentives to appropriately manage legal work under the cost-plus billable hour. This will change and project management skills developed in other industries will now be used to great advantage in delivering legal services. Law firms will provide their attorneys with greater resources to help manage projects including training, dedicated project managers and online tools to help track matters and review case metrics, such as where the actual costs of the matter are in relation to the pre-determined budget. Project management will further drive down the cost of legal services as firms become more efficient. Of course, litigators will, quite reasonably, question their ability to prepare and adhere to case budgets asserting that each case is unique and that there are too many variables when dealing with opposing counsel, judges and witnesses. But, civil engineers prepare budgets and manage huge road construction projects and they have to anticipate the variables caused by the weather. Any law firm with experience at handling a particular type of engagement

— at least experience sufficient to earn the client’s trust — should be able to use that experience to anticipate and plan for the cost of any variable that may arise.

Innovations in the Delivery of Legal Services

The law firms that succeed in this new environment will do so by critically examining every service they deliver, every task they perform and every manner of imparting knowledge to their clients. Law firms must ask, “is there a way to do this more efficiently, with less expense and greater quality?” Here are just some of the answers the successful firms will discover:

- **Provide Clients with Direct Access to the Firm’s Knowledge Management Resources.** The days of clients calling their employment lawyer and asking for the minimum wage in Arkansas, and willingly paying the lawyer for that information, have long past - thanks to Google and the Internet. But law firms must still play a key role in keeping clients informed of their compliance obligations, legal developments and other knowledge that clients must have to fulfill their risk-management roles within their organizations. Critically, lawyers are capable of analyzing information and explaining how it impacts a client and what the client should do to respond. Certainly, the client can find the minimum wage on Google, but Google will not know that the client is a restaurant and can take advantage of a tip credit against the minimum wage obligation. Successful law firms will provide their clients with online information services and databases enabling clients to tap into the knowledge resources of the firm — either on an unpaid, value-added basis or on a paid, subscription basis.
- **Create Online Communities to Communicate with and Inform Clients.** Up until recently, most law firms and lawyers eschewed social networking, believing it to be a fad or something that had no relevance to the practice of law. They could not be more wrong. As Richard Susskind, a long-time prognosticator on the future of legal practice, has observed, “[w]hy on earth should lawyers feel they are exempt from using tools that are enabling others to communicate and network with unprecedented ease?”²⁷¹ Putting aside the marketing potential of sites like LinkedIn and LegalOnRamp, the possibilities for social networking as a means of communicating with, informing and enhancing relationships with clients are unprecedented. Law firm blogs are already ubiquitous. But in the future, law firms will offer their own social networking sites focused on specific client industries or legal topics. These sites will provide clients with access to vast collections of legal content, current awareness of new developments and, most important, the opportunity to interact with lawyers and their in-house counsel colleagues who share an interest in the latest legal trends affecting, for example, retailers or wage-hour class actions.
- **Automate the Delivery of Routine Services.** Successful law firms will adopt document automation and workflow tools that standardize repetitive processes and transactional work as never before. Attorneys will be able to access online systems that guide them through the creation of client documents and the delivery of advice. These “intelligent” systems will feature constantly-updated wiki’s of research and practice notes, issue checklists, decision-trees and web-forms for document generation. These systems will provide additional benefits to the client beyond just greater efficiency. They will ensure higher quality and more standardized work product across a law firm; clients will know that the work product they receive from a firm’s New York office will be of the same high caliber as, and will be consistent with, that produced by the firm’s Dallas office. These systems may be the firm’s proprietary system or they may be provided by third party vendors such as LexisNexis®.
- Really successful law firms will offer self-service portals permitting clients to enter, select from an online menu of documents (*e.g.*, employment applications, arbitration agreements, human resource policies), complete an online questionnaire and generate a polished document, custom-tailored for the client’s use. Clients will be able to access self-audit tools for compliance issues. For example, a client interested in determining whether a job position is overtime-exempt would answer a series of questions specifically focused on exempt status requirements — with subsequent questions changing based on the client’s previous answer. Once submitted, the system would analyze the answer set and generate a determination or, if the answer set suggests the need for greater scrutiny, the answer set would be submitted to a wage-hour attorney for review and analysis.
- **Innovate the Delivery of More Complex Services.** Automation of routine matters will become a standard law firm service. But really innovative firms will apply these practices to litigation and other adversarial proceedings automating, for example, elements of the discovery process or the process for responding to administrative agency charges. The more complex the matter, the greater the opportunity

to reduce the costs. From the filing of a charge or a pleading through the resolution of the matter through settlement or judgment, there are a myriad of processes that can be systematized creating greater efficiencies and facilitating accurate budgeting and effective case management.

- **Use the Right People for the Right Job.** Successful law firms — and their cost-conscious clients — will eventually recognize the inherent inefficiency in having law firm associates sit at computer screens reviewing gigabytes of data as part of a document production. Where in their law school training did they develop the acumen — not to mention the temperament — to perform this type of mind-numbing work and why in the world should clients pay \$250 per hour to have them do this? Whether off-shored to legal process outsourcers in India, subcontracted to contract attorney agencies or in-sourced to lower, hourly-paid — but extremely well-trained — document reviewers, successful law firms will find alternatives to case rooms filled with associates conducting massive document reviews. But this is only the beginning. Really successful law firms will look at every task and ask whether it is being performed by the best person. Firms will realize that their experienced research librarians are far more efficient at legal research than first-year associates; dedicated “discovery specialists” can better prepare deposition subpoenas and responses to interrogatories; and “legal knowledge engineers” — highly-skilled, non-lawyer specialists — will be able to create a myriad of advanced legal knowledge systems to support the work of lawyers and paralegals.²⁷²
- Whether for good or bad, these changes may represent the end of the associate-as-apprentice model that has been employed by law firms for generations. In the future, much of the “training” work traditionally performed by associates as they learn the basics — such as preparing basic discovery documents or conducting legal research — will be performed by this new cadre of legal process specialists because clients, quite rightly, will refuse to pay for an associate’s learning curve. Law firms will have to redesign their associate partner-track programs to focus more deliberately on developing the skills that will be necessary in the associates’ careers as litigators, deal-makers or business developers. And the firms will have to substantially subsidize these programs and not pass their full cost on to the clients.²⁷³ For associates, their motivation will be to develop the best skill set likely to advance their future careers, rather than merely meeting billable

hour requirements.

- **The Virtual Law Office.** As client demand for more predictable and reasonable fee structures accelerates, law firms will be forced to aggressively control costs. The really successful law firms will look to reduce significantly their infrastructure and capital costs. They will question the need for large partner offices, reception areas that could grace the pages of *Architectural Digest*, huge libraries filled floor to ceiling with books that few people read, or high support staff to attorney ratios. Firms will be able to slash their real estate costs by having significant numbers of lawyers who rarely travel to the office, instead connecting to their colleagues through virtual networks that bring Cisco TelePresence-quality capabilities right to their PDA’s or home tablet-computers. The automated document systems, described above, and work-flow-enabled intranet portals will allow the firm to provide outstanding support to the attorneys while still reducing overhead by eliminating manually-delivered support services. Cloud computing will enable firms to drastically reduce their IT costs. A firm’s actual real estate footprint in a prime downtown location may consist only of a conference center for client meetings and depositions, a small number of offices for visiting attorneys and some space for support services. Back-office operations may be relocated to less expensive space within the city or even out-of-town.

Recommendations/Best Practices

Clients must be ready to work with their law firms to implement the new model of legal services delivery. Best practices will include:

- Reducing the number of firms utilized to those that recognize the inefficiencies in the old business model and are willing to develop a win-win partnering relationship with their clients.
- Consider and adopt the principles laid out by the Association of Corporate Counsel’s (ACC) Value Challenge including the ACC Covenant with Counsel.²⁷⁴
- Utilizing flat-fee arrangements for routine work such as employment policy drafting, administrative agency charge work, and employee benefit plan work.
- Developing phased, flat-fee arrangements for single plaintiff employment litigation and some class action work.
- Requesting that firms provide direct access to their knowledge management systems, such as providing in-house legal and human resources professionals with access to 50-state survey

databases and document automation systems to generate employment agreements and other employment-related documents.

- Requesting that firms provide flat-fee retainer arrangements for advice and counseling, preferably utilizing online systems that capture questions asked and answered for future reference.
- Ensuring that retained law firms utilize the most appropriate level of staffing for the work being performed, taking advantage of skilled document reviewers, legal researchers, paralegals and other skilled knowledge management professionals.
- Requesting that law firms focus on project management requirements and devote sufficient management attention to keeping costs in line with projected budgets.

ENDNOTES

- 1 A full description of the Littler Eleven is included as Appendix A.
- 2 Pub. L. No. 111-5 (2009).
- 3 Fed. Communications Comm'n, Recovery Act Broadband Initiatives, at <http://www.fcc.gov/recovery/broadband/> (last visited Sept. 16, 2010).
- 4 Nat'l Telecommunications and Information Administration, Broadband Technology Opportunities Program, at <http://www2.ntia.doc.gov/about> (last visited Sept. 16, 2010).
- 5 *Id.*
- 6 Bobbie Johnson, *Finland Makes Broadband Access a Legal Right*, Oct. 14, 2009, *GUARDIAN.CO.UK.*, available at <http://www.guardian.co.uk/technology/2009/oct/14/finland-broadband> (last visited Sept. 16, 2010).
- 7 Ari Levy and Brian Womack, *Google Dangles 100 Times Faster Internet Speeds in Fiber Plan*, *BUS. WK.*, Feb. 10, 2010, available at <http://www.businessweek.com/news/2010-02-10/google-dangles-100-times-faster-internet-speeds-in-fiber-plan.html> (last visited Sept. 16, 2010).
- 8 *The Digital Divide, ICT and the 50 x 15 Initiative* at <http://www.internetworldstats.com/links10.htm> (last visited Sept. 14, 2010).
- 9 Max Chafkin, *Telecommuting by the Numbers*, *INC.COM*, Apr. 1, 2010, available at <http://www.inc.com/magazine/20100401/telecommuting-by-the-numbers.html> (last visited Sept. 16, 2010).
- 10 *Remarks by the President at the Workplace Flexibility Forum*, Office of the Press Secretary, available at <http://www.whitehouse.gov/the-press-office/remarks-president-workplace-flexibility-forum> (last visited Sept. 16, 2010).
- 11 Available at <http://www.littler.com/PressPublications/Lists/Littler%20Reports/DispReport.aspx?id=30> (last visited Sept. 16, 2010).
- 12 *The Pitfalls of Telecommuting and How to Avoid Them*, *HRDISPATCH*, available at <http://www.extensigroup.com/news/article4.htm> (last visited Sept. 16, 2010).
- 13 *Office 2020: Predicting How and Even If We'll Use Office Space in the Future*, *INDIANA BUS. MAG.*, Sept. 1, 1997, available at www.allbusiness.com/north-america/united-states-indiana/638335-1.html (last visited Sept. 16, 2010).
- 14 Ted Schadler, *U.S. Telecommuting Forecast, 2009 To 2016*, *FORRESTER RESEARCH*, Mar. 11, 2009, available at http://www.forrester.com/rb/Research/us_telecommuting_forecast%2C_2009_to_2016/q/id/46635/t/2 (last visited Sept. 23, 2010).
- 15 Jennifer Ludden, *When Employers Make Room for Work-Life Balance*, *NPR.COM*, Mar. 15, 2010, available at www.npr.org/templates/story/story.php?storyId=124611210 (last visited Sept. 16, 2010).
- 16 As of September 2010 Facebook had more than 500 million active users more than double the active users in 2009. <http://www.facebook.com/press/info.php?statistics> (last visited Sept. 16, 2010).
- 17 *Facebook Confirms 200 million User Mark*, *INSIDE FACEBOOK.COM*, available at http://www.facebook.com/note.php?note_id=64660927739 (last visited Sept. 16, 2010).
- 18 Peter Corbett, *2009 Facebook Demographics and Statistics Report: 276% Growth in 35-54 Year Old Users*, Jan. 5, 2009, available at <http://www.istrategylabs.com/2009/01/2009-facebook-demographics-and-statistics-report-276-growth-in-35-54-year-old-users/> (last visited Sept. 16, 2010).
- 19 *Are Restaurants Prepared to Take Advantage of the Marketing Opportunities that Facebook Offers*, Jan. 4, 2010, available at <http://www.marketingrestaurantonline.com/2010/01/04/are-restaurants-prepared-to-take-advantage-of-the-marketing-opportunities-that-facebook-offers/> (last visited Sept. 16, 2010).
- 20 Jobvite Social Recruiting Survey 2010, June 30, 2010 available at <http://recruiting.jobvite.com/news/press-releases/pr/jobvite-social-recruiting-survey-2010.php> (last visited Sept. 20, 2010).
- 21 *Microsoft Study: Online Reputation in a Connected World*, Dec. 2009, available at <http://www.microsoft.com/privacy/dpd/research.aspx>.
- 22 Alan Finder, *For Some, Online Presence Undermines a Resume*, *N.Y. TIMES*, June 11, 2006, available at <http://www.nytimes.com/2006/06/11/us/1irecruit.html> (last visited Sept. 16, 2010).
- 23 *Microsoft Study: Online Reputation in a Connected World*, Dec. 2009, <http://www.microsoft.com/privacy/dpd/research.aspx>.
- 24 Sheri Qualters, *Telecommuters Are Reaching Out to Sue Their Employers*, *NAT'L L.J.*, Dec. 15, 2006.
- 25 *Oprah Assistant Clocks 800 Overtime Hours in 4 Months*, Aug. 17, 2007, available at http://www.huffingtonpost.com/2007/08/17/oprah-assistant-clocks-800_n_60832.html (last visited Sept. 16, 2010).
- 26 Int'l Assoc. of Administrative Professionals, *Office of the Future: 2020*, available at http://www.iaap-hq.org/researchtrends/Office_of_Future_2020.htm (last visited Sept. 16, 2010).
- 27 U.S. Dep't of Lab., Occupational Safety & Health Admin, Statement of Charles N. Jeffress Assistant Secretary for Occupational Safety and Health U.S. Department of Labor Before the Subcommittee on Employment, Safety, and Training Senate Committee on Health, Education, Labor and Pensions, Jan. 25, 2000, available at http://www.osha.gov/pls/oshaweb/owadis.show_document?p_table=TESTIMONIES&p_id=123 (last visited Sept. 16, 2010).
- 28 *Id.*
- 29 *Employee on Cell Phone in Car Can Be Costly for Employer*, *EMPLOYERS ADVOCATE*, available at <http://theemployersadvocate.com/?p=589> (last visited Sept. 16, 2010).
- 30 *Driving Statistics — Accidents, Cell Phones & Texting — Car Reviews & Ratings*, available at <http://ezinearticles.com/?Driving-Statistics---Accidents,-Cell-Phones,-and-Texting---Car-Reviews-and-Ratings&id=3522061> (last visited Sept. 16, 2010).
- 31 *Id.*
- 32 See A. Michael Froomkin, *The Technologies and Perils to Privacy Described a Decade Ago - The Death of Privacy?* 52 *STANFORD L. REV.* 1461 (2000). As far-seeing as the article was, the technology has grown faster and more intrusive than even Mr. Froomkin predicted.
- 33 *U.S. Passports to Receive Electronic Identification Chips*, *WASH. POST*, Oct. 25, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/25/AR2005102501624.html> (last visited Sept. 16, 2010).
- 34 See Jeroen van den Hoven, *Nanotechnology and Privacy in Nanoethics: The Ethical and Social Implications of Nanotechnology*, by Fritz Allhoff et al. (2007).
- 35 California, Missouri, North Dakota, Ohio, and Wisconsin.
- 36 Jeremy Page, *India Launches Biggest National Census "Since Beginning of Mankind"*, *THE TIMES*, Apr. 1, 2010, available at <http://www.timesonline.co.uk/tol/news/world/asia/article7083415.ece> (last visited Sept. 16, 2010).
- 37 The 2001 smart dust project investigators and the University of California said of privacy, "Yes, you can hype Smart Dust as being great for big brother (thank you, new Scientist). Yawn." Available at <http://robotics.eecs.berkeley.edu/~pister/SmartDust/> (last visited Sept. 16, 2010).
- 38 See A. Michael Froomkin, *The Technologies and Perils to Privacy Described a Decade Ago - The Death of Privacy?* 52 *STANFORD L. REV.* 1461 (2000).
- 39 See publications of the Electronic Privacy Information Center, including *Privacy Implications of Nanotechnology*, available at <http://epic.org/privacy/nano/> (last visited Sept. 16, 2010).
- 40 *City of Ontario v. Quon*, 130 S. Ct. 1011 (2010). Ninth Circuit Court of Appeals decision available at 529 F.3d 892.
- 41 *Stengart v. Loving Care Agency, Inc.*, No. A-16-09 (9th Cir. 2009), 2010 N.J. LEXIS 241 (N.J. Sup. Ct. Mar. 30, 2010).
- 42 *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009).
- 43 Oregon Senate Bill 1045 available at <http://www.leg.state.or.us/10ss1/measures/sb1000.dir/sb1045.en.html> (last visited Sept. 16, 2010).
- 44 HAW. REV. STAT., ch. 378, pt. I, §378-2, revised July 1, 2009; RCW 19.182.020 revised 2007.
- 45 H.R. 3149.
- 46 *Deep Packet Inspection and Privacy*, Electronic Privacy Information Ctr., available at <http://epic.org/privacy/dpi> (last visited Sept. 16, 2010).
- 47 See: <http://www.ncsl.org/IssuesResearch/TelecommunicationsInformationTechnology/SecurityBreachNotificationLaws/tabid/13489/Default.aspx>.
- 48 A.B. 1298 amending CAL. CIVIL CODE §§56.06, 1798.29 and 1798.82 (2008).
- 49 See 74 Fed. Reg. 51664 (Oct. 7, 2009) for regulations adopted by Dept. of Health and Human Services. For proposed EEOC regs, see 74 Fed. Reg. 9056 (Mar. 2, 2009).
- 50 Roberto Cenicerros, *Comp Cheats Confess All on Social Networking Sites*, *WORKFORCE MANAGEMENT ONLINE*, Sept. 2009, at <http://www.workforce.com/section/02/feature/26/66/08> (last visited Sept. 16, 2010).
- 51 Bruce Bower, *Facebook Users Are the Real Thing: Young Adults Don't Deceive Others on Social Networks*, *SCIENCE NEWS*, at 10, Mar. 27, 2010.

- 52 See, e.g., *Doe v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008); *State of New Jersey v. Shirley Reid*, 194 N.J. 386 (2008).
- 53 *Dial-Up Law in a Broadband World*, N.Y. TIMES Apr. 9, 2010, available at <http://www.nytimes.com/2010/04/09/opinion/09fri1.html> (last visited Sept. 16, 2010).
- 54 See *Electronically Stored Information Management Is Top of Mind for Corporations, But Effective Implementation is Falling Short*, Kroll Ontrack, Oct 21, 2009, available at <http://www.krollontrack.com/news-releases/?getPressRelease=61375> (last visited Sept. 16, 2010) (“A strong majority in the U.S. and U.K. have a document retention policy, but a much smaller number — 46% in the U.S. and 41% in the U.K. - claim to have an ESI discovery readiness strategy. This gap highlights a potential risk and a false sense of security that the existence of a document retention policy is adequate to protect organizations when litigation or other events requiring the discovery of ESI strike.... This year’s survey also reveals... [that] only 57 percent of U.S. and 39 percent of U.K. corporations have a mechanism to preserve potentially relevant data when litigation or a regulatory investigation is anticipated. Without an identified means to suspend the expulsion of potentially responsive data, many companies are not positioned to execute proper preservation protocol or claim their ESI discovery readiness policy is effective.”).
- 55 <http://www.facebook.com/press/info.php?statistics> (last visited Sept. 16, 2010).
- 56 Under appropriate circumstances, the contents of social networking sites are discoverable in litigation. See, e.g., *Beye v. Horizon Blue Cross Blue Shield of N.J.*, Case No. 2:06-5337 (D. N.J. Dec. 14, 2007) (because they may be relevant to the core issue of whether eating disorders are non-biologically based mental illnesses, minor-plaintiffs in class action case ordered to preserve and produce “writings shared with others including entries on websites such as ‘Facebook’ or ‘Myspace’”).
- 57 Under appropriate circumstances, the contents of cell phones and PDAs are discoverable. *Southeastern Mechanical Servs. Inc. v. Brody*, 2009 WL 2883057 (M.D. Fla. Aug. 31, 2009) (holding that spoliation sanctions were warranted because the individual defendants’ blackberries “were completely wiped of any data.”).
- 58 Under appropriate circumstances, text messages are discoverable in litigation. *Smith v. Café Asia*, 2007 WL 2849579 (D.D.C. Oct. 2, 2007) (court ordered plaintiff to preserve text messages stored on cell phone as they might bear on defendant’s claim that plaintiff invited the alleged sexual harassment forming the basis for her claims). See also *Textual Harassment is No Laughing Matter*, NAT’L L.J. July 16, 2009, (attorneys say that text messaging in the workplace is turning into a growing liability for employers, which are landing in court over inappropriate and offensive texts that are popping up on employees’ cell phones), available at <http://www.law.com/jsp/article.jsp?id=1202432277162> (last visited Sept. 16, 2010); *Kilpatrick Pleads Guilty — I lied under oath*, THE DETROIT NEWS Sept. 4, 2008, (former mayor of Detroit resigns, pleads guilty to obstruction of justice charges, and agrees to pay \$1 million in restitution, after 14,000 text messages, many of which were sexually explicit, obtained by the Detroit Free Press contradict his sworn testimony under oath in a lawsuit against the city about whether he had an affair with his Chief of Staff), available at <http://detnews.com/article/20080904/METRO/809040440/Kilpatrick-pleads-guilty--I-lied-under-oath> (last visited Sept. 16, 2010).
- 59 See *Gartner: Brace Yourself for Cloud Computing*, available at http://news.cnet.com/8301-30685_3-10378782-264.html (last visited Sept. 16, 2010).
- 60 See *Tech Crunchies — Internet Statistics and Numbers*, Jan. 1, 2010, available at <http://techcrunchies.com/cloud-computing-growth-forecast/> (last visited Sept. 16, 2010).
- 61 <http://blog.twitter.com/2010/02/measuring-tweets.html> (last visited Sept. 16, 2010). “Tweets” can also be used as evidence in a lawsuit. See Helen Popkin, *Twitter Gets You Fired In 140 Characters or Less: The ‘It’ Social Networking Tool of the Hour Streamlines Your Humiliation*, Mar. 23, 2009, available at <http://www.msnbc.msn.com/id/29796962/wid/11915829> (last visited Sept. 16, 2010).
- 62 *Digital ‘Natives’ Invade the Workplace*, PEW INTERNET & AMERICAN LIFE PROJECT Sept. 28, 2006, available at <http://pewresearch.org/pubs/70/digital-natives-invade-the-workplace> (last visited Sept. 16, 2010).
- 63 For an in-depth analysis of the ESI Rules of Civil Procedure that became effective in December 2006, see Paul Weiner and Mary Kay Brown, *Navigating the New E-Discovery Rules*, 33 ABA J. OF THE SECT. OF LITIGATION, No. 2, at 29–35 (Winter 2007).
- 64 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan 15, 2010).
- 65 Judge Scheindlin authored the landmark *Zubulake* line of opinions, which include:
- *Zubulake v. UBS Warburg L.L.C.*, 217 F.R.D. 309 (S.D.N.Y. May 13, 2003) (*Zubulake I*) (addressing the novel question of to what extent inaccessible electronic data is discoverable and who should pay for its production and setting forth seven factor cost-shifting test);
 - *Zubulake v. UBS Warburg L.L.C.*, 216 F.R.D. 280 (S.D.N.Y. July 24, 2009) (*Zubulake III*) (applying seven factor cost-shifting test for inaccessible data and holding that the cost to restore back-up tapes should be allocated 75% to defendant and 25% to plaintiff);
 - *Zubulake v. UBS Warburg L.L.C.*, 220 F.R.D. 212 (S.D.N.Y. Oct. 22, 2003) (*Zubulake IV*) (setting forth both the scope of a litigant’s duty to preserve electronic evidence and the consequences for failing to preserve evidence that falls within the scope of that duty); and
 - *Zubulake v. UBS Warburg L.L.C.*, 229 F.R.D. 422 (S.D.N.Y. July 20, 2004) (*Zubulake V*) (setting forth additional steps that must be taken to ensure compliance with preservation obligations and issuing an adverse inference instruction against defendant as a sanction for failing to meet those obligations, and forewarning in a Postscript: “Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information”).
- 66 *Control* in this context is more than legal ownership or actual physical possession of the documents/data, but instead documents/data — including arguably data held by third parties — are considered to be under a party’s control for purposes of triggering a preservation obligation when a party has “the right, authority, or practical ability to obtain the documents from a non-party to the action.” See *Goodwin v. Praxair Servs., Inc.*, 2009 WL 1955805 (D.Md. July 7, 2009) (Grimm, M.J.).
- 67 2009 U.S. Dist. LEXIS 24250 (M.D. Fla. Mar. 4, 2009).
- 68 In simplest terms, a Tagged Image File Format (abbreviated TIFF) is a picture or an image of data document. The TIFF file format came into being just as lawyers began looking for a way to manage huge volumes of paper in large cases, as with TIFF, paper documents could easily be converted into electronic format by using a scanner and saving the file as a TIFF image. (A TIFF file is technically identified as a file with a “.tiff” or “.tif” file name suffix.) Moreover, special software is required to view a TIFF image.
- 69 Computer application software programs generally maintain their data in proprietary file formats commonly referred to as “native file” format. A native file is a file saved in the format of the original application used to create the file. Stated another way, it is the source document, in its original file format, and as collected from the source computer or server, before any conversion or processing of the document, including all associated metadata for ESI.
- 70 See, e.g., *Wyeth v. ImPax Labs., Inc.*, 2006 WL 3091331 (D. Del. Oct. 26, 2006) (“Emerging standards of electronic discovery appear to articulate a general presumption against the production of metadata... unless the requesting party can demonstrate a particularized need for the metadata or database production it has requested.”). Compare also, *Kingsway Fin. v. PwC*, 2008 WL 5423316 (S.D.N.Y. Dec. 31, 2008) (“In the absence of an issue concerning the authenticity of a document or the process by which it was created, most metadata has no evidentiary value... Plaintiffs do not identify the types of metadata they seek nor do they explain why metadata is relevant in this matter. In addition, plaintiffs do not raise any questions about the authenticity of any documents produced by PwC nor do they claim that any document has been improperly ‘doctored’ or modified... In light of the dubious value of metadata and plaintiffs’ total failure to explain its relevance to the claims and defenses in this action, plaintiffs’ application to compel its production is denied.”).
- 71 *Victor Stanley v. Creative Pipe*, 250 F.R.D. 251 (D. Md. May 29, 2008) (Grimm, J.).
- 72 As of date of publication, the following states have enacted e-Discovery rules or statutes: Alaska; Arizona; Arkansas; California; Idaho; Indiana; Iowa; Kansas; Louisiana; Maine; Maryland; Michigan; Minnesota; Mississippi; Montana; Nebraska; New Hampshire; New Jersey; New Mexico; North Dakota; Ohio; Tennessee; Utah; Virginia; Washington; and Wyoming.
- 73 Sedona’s White Papers are not just academic articles. Instead, they have contributed to some of the most innovative and significant developments in the field of e-Discovery. For example, the Sedona Cooperation Proclamation is designed to facilitate cooperative, collaborative, transparent discovery of ESI. It has been publicly endorsed by over 95 state and federal judges, and has been cited in over thirteen federal court opinions. Justice Stephen G. Bryer publicly endorsed the principles of the Cooperation Proclamation in a special Supplement to the Sedona Conference® Journal that focused on the Sedona Conference Cooperation Proclamation. See 10 Sedona Conf. J., Preface (2009 Supp.)
- 74 Information on the EDRM can be found at: www.edrm.net (last visited Sept. 16, 2010).
- 75 *Lathem Equip. Co. v. Deere and Co.*, 2009 U.S. Dist LEXIS 86109 (E.D. Mich. Aug. 31, 2009) (denying defendants’ motion for sanctions based upon alleged spoliation of evidence).
- 76 See, e.g., *In re Vinhnee*, 336 B.R. 437, 445 (B.A.P. 9th Cir. 2005); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) (describing in detail how

to apply various evidentiary rules, including relevancy, FRE 105, 401 — 402, authenticity, FRE 901 — 902 and hearsay, FRE 801 — 807, to various forms of electronic evidence, including: e-mail, Internet web postings; voice-mail messages; text messages; chat room communications; computer stored records and data; computer animations and computer simulations; and digital photographs). In *Lorraine*, the court *sue sponte* rejected all emails submitted by the parties in their cross-motions for summary judgment on the grounds they were not properly authenticated, reasoning:

[M]ost of the facts relevant to the contract negotiations at issue have been provided by counsel *ipse dixit*, without supporting affidavits or deposition testimony. The evidentiary problems associated with the copies of e-mail offered as parole evidence likewise are substantial because they were not authenticated, but instead were simply attached to the parties' motions as exhibits. Because neither party to this dispute complied with the requirements of Rule 56 that they support their motions with admissible evidence, I dismissed both motions without prejudice to allow resubmission with proper evidentiary support. I further observed that the unauthenticated e-mails are a form of computer generated evidence that pose evidentiary issues that are highlighted by their electronic medium. Given the pervasiveness today of electronically prepared and stored records, as opposed to the manually prepared records of the past, counsel must be prepared to recognize and appropriately deal with the evidentiary issues associated with the admissibility of electronically generated and stored evidence.

- 77 George Socha & Tom Gelbmann, *Strange Times*, Aug. 1, 2009, LAW TECH. NEWS, available at <http://www.law.com/jsp/PubArticle.jsp?id=1202435558482> (last visited Sept. 16, 2010).
- 78 Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. Dep't of Lab., <http://www.dol.gov/oasam/programs/history/flsa1938.htm> (last visited Sept. 17, 2010).
- 79 Michael Orey, *Wage Wars*, BUS. WK., Oct. 1, 2007.
- 80 This data was obtained from publicly available information in sources such as Employment Law 360, the Daily Labor Reporter, newspapers, and a variety of other publications. The data is, of course, limited by the availability of such information, and the accuracy of the reporting sources. In addition, settlement amounts are not reported for every case. Accordingly, we believe this data represents just the "tip of the iceberg."
- 81 *Id.* The settlement amounts used are the gross settlements reported, including attorneys' fees and costs. If the settlement provided for a maximum and a minimum (i.e. a floor and a ceiling), the minimum rather than the maximum amount of the settlement was used. The settlements and verdicts reported for 2008 may be slightly larger than those for 2009 because they include a \$187 million jury verdict. For information on settlements from 1993 to 2007 see Samuel Estreicher and Kristina Yost, *Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment*, J. OF EMPIRICAL LEGAL STUDIES (Dec. 2009) at 805-34.
- 82 This is an estimate based on settlements involving the authors, however, these numbers vary dramatically between employers and also depend on the claims. For example, a missed meal and rest period class action might settle for far less than a misclassification case for high paid technical workers.
- 83 *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009).
- 84 CCH WorkWeek, Week of Sept. 21, 2009, <http://hr.cch.com/netnews/employment-law/emp092109.asp> (last visited Sept. 17, 2010).
- 85 WHD News Release, Nov. 19, 2009, <http://www.dol.gov/opa/media/press/whd/whd20091452.htm> (last visited Sept. 17, 2010).
- 86 *Id.*
- 87 2008 Statistics Fact Sheet, U.S. DOL, <http://www.dol.gov/whd/statistics/2008FiscalYear.htm> (last visited Sept. 17, 2010).
- 88 *Id.*
- 89 U.S. Dep't of Lab. 2008 Statistics Fact Sheet, available at <http://www.dol.gov/whd/statistics/2008FiscalYear.htm> (last visited Sept. 16, 2010).
- 90 See footnote 80, *supra*.
- 91 *Report: Findings of the Study of California Class Action Litigation, 2000-2006*, California Courts: Court Research and Statistics, available at <http://www.courtinfo.ca.gov/reference/caclassaclit.htm> (last visited Sept. 17, 2010).
- 92 *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004).
- 93 See footnote 80, *supra*. Federal and state courts do not report the number of class actions filed so there is no "official" data on such cases.
- 94 *Id.*
- 95 *Id.*
- 96 *E.g., Hintergerger v. Catholic Health Sys.*, 2009 U.S. Dist. LEXIS 97944 (W.D.N.Y. Oct. 20, 2009); *Taylor v. Pittsburgh Mercy Health Sys.*, 2009 U.S. Dist. LEXIS 57328 (W.D. Pa. July 7, 2009); *Colozzi v. St. Joseph's Hosp. Health Ctr.*, 595 F. Supp. 2d 200 (N.D.N.Y. 2009).
- 97 *E.g., Bajestani v. Consulate Healthcare*, 1:10-cv-00030 (E.D. Tenn. Feb. 17, 2010); *Cason v. Vibra Healthcare*, 5:10-cv-10642-JCO-VMM (E.D. Mich. Feb. 12, 2010); *DeMarco v. Northwestern Mem'l Healthcare*, 1:10cv397 (N.D. Ill. Jan. 20, 2010); *Creely v. HCR ManorCare Inc.*, 3:09-CV-02879 (N.D. Ohio Dec. 11, 2009).
- 98 *E.g., Parth v. Pomona Valley Hosp. Med. Ctr.*, 584 F.3d 794 (9th Cir. 2009); *Thomas v. Howard Univ. Hosp.*, 39 F.3d 370 (D.C. Cir. 1994); *Huntington Mem'l Hosp. v. Superior Ct.*, 131 Cal. App. 4th 893 (Cal. App. 2d Dist. 2005).
- 99 *E.g., Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009); *Mevorah v. Wells Fargo Home Mtg. (In re Wells Fargo Home Mtg.)*, 571 F.3d 953 (9th Cir. 2009); *Edwards v. Audubon Ins. Group, Inc.*, 2004 U.S. Dist. LEXIS 27562 (S.D. Miss. Aug. 31, 2004).
- 100 Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, *Let's Not Make a Deal: An Empirical Study of the Decision Making in Unsuccessful Settlement Negotiations*, 5 J. OF EMPIRICAL LEGAL STUDIES 451-91 (Sept. 2008), available at <http://www.blackwellpublishing.com/jels> (last visited Sept. 16, 2010).
- 101 Nick S. Pujji, Anahit Tagvoryan, and Joshua M. Briones, *Facebook: The Future of Service of Process? PRIVACY ADVISOR*, at 15, May 2009.
- 102 34 LITIGATION, No. 4, Summer 2008.
- 103 For example, jurors may "friend" a litigant, in defiance of instructions from judges not to communicate with anyone about the case by telephone, text message, email, Internet chat, blog, social websites, or Twitter. See, e.g., Noleen G. Walder, *Juror's Activity Poses Challenges for Bench*, N.Y.L.J., Mar. 5, 2010, available at <http://www.law.com/jsp/article.jsp?id=1202445530564> (last visited Sept. 16, 2010).
- 104 The Paycheck Fairness Act is H.R. 12, S. 182. Several recent studies have shown that women have not achieved gender equality in pay. See, e.g., Nancy M. Carter and Christine Silva, *Pipeline's Broken Promise*, released Feb. 18, 2010 by Catalyst, <http://www.catalyst.org/publication/372/piplines-broken-promise> (last visited Sept. 16, 2010); Institute for Women's Policy, Fact Sheet, *The Gender Wage Gap: 2009*, IWPR Publication #C350, released Sept. 16, 2010, available at <http://www.iwpr.org/Publications/pdf.htm> (last visited Sept. 16, 2010); Ctr. for Am. Progress, *The Shriver Report, A Woman's Nation Changes Everything*, Oct. 19, 2009, available at http://www.americanprogress.org/issues/2009/10/womans_nation.html (last visited Sept. 16, 2010).
- 105 See Chicago Human Rights Ordinance 2-160-030; D.C. Human Rights Act § 2-1402.11. For others see, Stephanie Bornstein and Robert J. Rathmell, Center for Worklife Law, Hastings College of the Law, Univ. of Cal., *Caregivers As A Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination*, Dec. 14, 2009, available at <http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf> (last visited Sept. 16, 2010).
- 106 See, e.g., Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J. L. REFORM 371, 378-80 (2001).
- 107 *EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, at nn. 15-20, available at <http://www.eeoc.gov/policy/docs/caregiving.html> (last visited Sept. 16, 2010).
- 108 See, e.g., Stephan Benard, In Paik, and Shelly J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L. J. 1359 (2008).
- 109 *Work-Life Balance and the Economics of Workplace Flexibility*, Executive Office of the President, Council of Economic Advisers, Mar. 2010.
- 110 See, e.g., Joan C. Williams and Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 THE LAB. LAWYER 293 (2007); Joan C. Williams and Stephanie Bornstein, *The Evolution of 'FREd': Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L. J. 1311 (2008).
- 111 Corporate Voices for Working Families Report, *Business Impacts of Flexibility: An Imperative for Expansion*, Nov. 2005, available at <http://www.cvworkingfamilies.org/publications/workplaceflex> (last visited Sept. 16, 2010); Corporate Voices for Working Families Report, *Innovative Workplace Flexibility Options for Hourly Workers*, May 2009, available at <http://www.cvworkingfamilies.org/publications/workplaceflex> (last visited Sept. 16, 2010); Stephanie Ann Hewlett, *Making Flex Time a Win-Win*, N.Y. TIMES, Dec. 13, 2009, available at <http://www.nytimes.com/2009/12/13/jobs/13pre.html> (last visited Sept. 16, 2010).
- 112 Sylvia Ann Hewlett, *Flexible Work Arrangements: A Smart Strategy In Troubled Times*, FORBES.COM, May 15, 2009, available at <http://www.forbes.com/2009/05/15/work-life-balance-forbes-woman-leadership-flexitime.html> (last visited Sept. 16, 2010); White House Forum on Workplace Flexibility hosted by White House Council on Women and Girls, opened by the First

- Lady on March 31, 2010, at which President Obama was introduced as “Our Teleworker-in-Chief,” found at http://www.workplaceflexibility2010.org/index.php/whats_new/white_house_forum/ (last visited Sept. 16, 2010).
- 113 H.R. 1274 (2009).
- 114 Family Fairness Act, H.R. 389 (2009); FMLA Enhancement Act, H.R. 824 (2009); The Family Leave Insurance Act, H.R. 1723 (2009); The Family Leave Inclusion Act, H.R. 2132 (2009).
- 115 S. 1152; H.R. 2460.
- 116 For collections of cases and theories, see materials available at <http://www.worklifeflaw.org> (last visited Sept. 16, 2010).
- 117 H.R. 2981 (2009).
- 118 Human Rights Campaign Foundation, The State of the Workplace (Feb. 12, 2009) available at http://www.hrc.org/about_us/7061.htm (last visited Sept. 16, 2010).
- 119 490 U.S. 228 (1989).
- 120 Indeed, the trial court in *Price Waterhouse* observed that the employer criticized the plaintiff for her lack of professionalism, which could be resolved if she would “walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry.”
- 121 Washington, D.C. prohibits discrimination based on personal appearance. D.C. CODE ANN. § 2-1401.02.11(a). The State of Michigan prohibits discrimination based on height and weight. M.C.L. 372202 § 202. Some cities prohibit discrimination based on personal appearance, notably San Francisco and Santa Cruz, California.
- 122 See Equality Bill, 2008, Part 1, available at <http://www.publications.parliament.uk/pa/cm200809/cmbills/085/voli/2009085i.pdf> (last visited Sept. 16, 2010).
- 123 *Id.*
- 124 See The National Commission for Backward Classes Act, No. 27 of 1993, available at <http://www.ncbc.nic.in/html/ncbc.html> (last visited Sept. 16, 2010).
- 125 [Translation of German *Weltanschauung*] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 3d ed., 1992.
- 126 *Nicholson v. Grainger Plc.*, Case No. 220336712008, London Central Employment Tribunal (Judgment dated Mar. 18, 2009).
- 127 See *Wilson v. U.S. West. Comm’ns*, 58 F.3d 1337 (8th Cir. 1995).
- 128 See, e.g., *Bellamy v. Mason’s Stores, Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973), *aff’d*, 508 F.2d 504 (4th Cir. 1974) (finding the Ku Klux Klan is not a religion within the meaning of Title VII because its philosophy has a narrow, temporal, and political character).
- 129 See, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 489-90 (1961) (government may not favor theism over pantheism or atheism); *EEOC v. Townley Eng’g & Mrg. Co.*, 859 F.2d 610 (9th Cir. 1988) (Title VII prohibits employer from compelling its atheist employees to attend religious services).
- 130 Apart from the United Kingdom, Austria, Belgium, Czech Republic, Finland, Germany, Italy, Netherland, Norway, Spain and Turkey prohibit discrimination based on belief, world view, or philosophy. Religious Discrimination in the Workplace, *Ius Laboris*, Brussels, 2010.
- 131 Ctrs. for Disease Control, National Institute for Occupational Safety and Health, *Most Workplace Bullying is Worker to Worker, Early Findings From NIOSH Study Suggest*, <http://www.cdc.gov/niosh/updates/upd-07-28-04.html> (last visited Sept. 16, 2010).
- 132 *Id.*
- 133 <http://www.workplacebullying.org/employers.html> (last visited Sept. 16, 2010).
- 134 Statute Book of the Swedish National Board of Occupational Safety and Health, Ordinance AFS 1993:17, *Victimization at Work*, available at <http://www.av.se/dokument/inenglish/legislations/eng9317.pdf> (last visited Sept. 16, 2010).
- 135 Protection from Harassment Act 1997, available at <http://www.legislation.gov.uk/ukpga/1997/40/contents> (last visited Sept. 16, 2010).
- 136 See The Workplace Bullying Institute, *Quick Facts About the Healthy Workplace Bill*, <http://www.healthyworkplacebill.org/bill.php> (last visited Sept. 16, 2010).
- 137 See The Workplace Bullying Institute, *State Involvement in the Healthy Workplace Bill Campaign*, <http://www.healthyworkplacebill.org/states.php> (last visited Sept. 16, 2010). A bill in Illinois was passed by the Illinois Senate in March 2010.
- 138 *WBI-Zogby 2007 U.S. Workplace Bullying Survey*, available at <http://www.workplacebullying.org/research/WBI-Zogby2007Survey.html> (last visited Sept. 16, 2010).
- 139 See *Ross v. RagingWire Telecomm’n, Inc.*, 174 P.3d 200 (Cal. 2008).
- 140 R.I. GEN. LAWS § 21-28.6-4(b) (2010).
- 141 MONT. CODE ANN. § 50-46-201.
- 142 *Barber v. Gonzales*, 2005 U.S. Dist. LEXIS 37411 (E.D. Wash. 2005).
- 143 *Johnson v. Columbia Falls Aluminum Co., L.L.C.*, 2009 MT 108N (Mont. 2009).
- 144 *Emerald Steel Fabricators v. Bureau of Labor and Indus.*, 220 Or. App. 423 (2008).
- 145 <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Sept. 16, 2010).
- 146 548 U.S. 53 (2006).
- 147 The District of Columbia, First, Second, Third, Fifth, Sixth and Ninth Circuit Courts of Appeal have imposed vicarious liability on the employer even when the biased manager was not a decision maker, but the biased manager influenced, affected or was involved in the adverse employment action. *Griffin v. Washington Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998); *Cariglia v. Hertz Equip. Rental Corp.*, 363 F.3d 77, 83 (1st Cir. 2004); *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 82 (2d Cir. 1992); *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226 (5th Cir. 2000); *Johnson v. Kroger Co.*, 319 F.3d 858, 868 (6th Cir. 2003); *Poland v. Chertoff*, 494 F.3d 1174, 1183 (9th Cir. 2007). The Fourth Circuit has ruled to the contrary. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004). The Seventh Circuit ruled that the employer avoids liability unless the biased manager exercises singular influence of the decision, by, for example, supplying misinformation. An investigation may break the chain of causation, if properly conducted. *Brewer v. Bd. of Trustees of U. of Ill.*, 479 F.3d 908, 917 (7th Cir.), *cert. denied*, 552 U.S. 825 (2007). The Eighth and Eleventh Circuits ruled similarly to the Seventh. *Richardson v. Sugg*, 448 F.3d 1046, 1060 (8th Cir. 2004); *Stimson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000).
- 148 *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 549 U.S. 1105 (2007), *writ of cert. dismissed*, 549 U.S. 1334 (2007).
- 149 *Staub v. Proctor Hosp.*, 560 F.3d 647 (7th Cir. 2009), *cert. granted* Apr. 19, 2010.
- 150 585 F.3d 310, *cert. granted*, Mar. 22, 2010.
- 151 567 F.3d 804 (6th Cir. 2009), *cert. granted*, June 29, 2010.
- 152 567 F.3d at 809-11.
- 153 Bureau of Labor Statistics, Union Members Summary, at <http://www.bls.gov/news.release/union2.nr0.htm> (last visited on Sept. 16, 2010).
- 154 *Id.*
- 155 *Id.*
- 156 Chris Edwards, *Public Sector Unions and the Rising Cost of Employee Compensation*, CATO JOURNAL, Vol. 30, No. 1 (Winter 2010).
- 157 Marisa Lagos, *15 Groups Spent \$1 Billion To Sway Policy*, S.F. CHRON. (Mar. 11, 2010), available at http://articles.sfgate.com/2010-03-11/bay-area/18384570_1_political-process-measures-california-state-council (last visited Sept. 16, 2010).
- 158 Independent contractors are not eligible to be organized under the National Labor Relations Act.
- 159 Employee Free Choice Act of 2009 (Introduced in House), H.R. 1409, 111th Cong. § 1 (2009), at <http://thomas.loc.gov/cgi-bin/query/z?c111:h.r.1409>: (last visited Sept. 16, 2010).
- 160 Jack Katzanek, *Outlook Grim for Labor’s Agenda in Congress*, THE PRESS-ENTERPRISE (Feb. 17, 2010), available at http://www.pe.com/business/local/stories/PE_Biz_W_labor18.39adaac.html (last visited on Sept. 16, 2010).
- 161 29 C.F.R. pts. 1202 and 1206.
- 162 Representation Election Procedure, 74 Fed. Reg. 56750 (Nov. 3 2009), at http://www.nmb.gov/representation/proposed-rulemaking/reprotingproposal_11-03-09.pdf (last visited Sept. 17, 2010).
- 163 29 C.F.R. §§ 1202, 1206. See also Jack Lambremont and Chip McWilliams, *District Court Clears Way for Implementation of New NMB Rules for Union Elections in Air and Rail Industries*, June 2010, available at <http://www.littler.com/PressPublications/Lists/ASAPs/DispASAPs.aspx?List=edb4a871%2D9e73%2D24eae%2Dbf81%2D3d045b6ede6d&ID=1516> (last visited Sept. 17, 2010).
- 164 Univ. of Iowa Ctr. for Int’l Fin. and Dev., *Labor & Globalization*, available at <http://www.uiowa.edu/ifdebook/issues/globalization/readingtable/labor.shtml> (last visited on Sept. 17, 2010).
- 165 The more active GUFs represent employees in the following “industries:” construction (Building and Wood Workers International), education (Education International), music and entertainment (the International Arts and Entertainment Alliance), energy, mining and paper, (International Federation of Chemical, Energy, Mine & General Workers’ Union);

- broadcasting and print media (International Federation of Journalists); automobile and steel (International Metalworkers' Federation); transportation and trucking (International Transport Workers' Federation); textiles (International Textile, Garment & Leather Workers' Federation); food, restaurant, tourism, hotels, farming and tobacco processing (International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco & Allied Workers Association); local government, public health and social services (Public Employees International); See <http://www.global-unions.org> (last visited Sept. 17, 2010).
- 166 *U.S.W. Strategic Alliances* at http://www.usw.org/join_us/news?id=0371 (last visited on Sept. 17, 2010).
- 167 *Id.*
- 168 Kyle James, *In Era of Globalization, Unions Looks Beyond Their Own Borders*, DEUTSCHE WELLE (Jan. 22, 2007), available at http://www.dw-world.de/popups/popup_printcontent/0,,2318734,00.html (last visited on Sept. 17, 2010).
- 169 For example, Volkswagen, which signed a IFA agreement in with IG Metall guaranteed 100,000 jobs in Germany throughout 2011. In light of heavy financial losses and a realization that it is "living beyond its means," Volkswagen entered negotiations to break its agreement with the union. It should be noted that the IFA agreement did not prevent Volkswagen from moving its Audi production line from Germany to Slovakia.
- 170 <http://cityroom.blogs.nytimes.com/2009/05/26/hm-workers-ratify-first-union-contract/> (last visited on Sept. 17, 2010).
- 171 *Our Union*, United Steel Workers at http://www.usw.org/our_union?id=0001 (last visited on Sept. 17, 2010).
- 172 See <http://aficio.org/issues/jobseconomy/globaleconomy/> (last visited Sept. 17, 2010).
- 173 *Global Union Pickets Vale in London*, Bloomberg.com (Nov. 9, 2009), available at <http://www.bloomberg.com/apps/news?pid=conewsstory&tkr=VALE%3AUS.&sid=agrEroVsrUDs> (last visited Sept. 17, 2010).
- 174 *Workers Uniting (the Global Union) Celebrates Bangladesh Demin Workers' Victory*, at <http://www.uswa.ca/program/content/5869.php> (last visited Sept. 17, 2010).
- 175 *Benz v. Compania Naviera Hidalgo S.A.*, 353 U.S. 138 (1957) (holding that the NLRA does not apply to picketing of foreign ship concerning foreign sailors' wages, even when in U.S. waters).
- 176 *ILA Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970).
- 177 29 U.S.C. §§ 101 et seq.; *Marine Cooks & Stewards Union v. Panama S.S. Co.*, 362 U.S. 365 (1960).
- 178 *Windward Shipping (London) Ltd. v. American Radio Ass'n, AFL-CIO*, 415 U.S. 104 (1974); *American Radio Ass'n, AFL-CIO v. Mobile S.S. Ass'n*, 419 U.S. 215 (1974).
- 179 *ILA v. Allied Int'l*, 456 U.S. 212 (1982); *Madden v. Grain Elevator Flour & Feed Mill Workers Local 418*, 334 F.2d 1014 (7th Cir. 1964).
- 180 975 F.2d 779 (11th Cir. 1992).
- 181 56 F.3d 205 (D.C. Cir. 1995).
- 182 See also *St. Clair Intermediate Sch. Dist. v. Intermediate Edu. Ass'n/Mich. Edu. Ass'n*, 581 N.W.2d 707, 716 n.19 (Mich. 1998) (acknowledging circuit split and disagreement).
- 183 *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957).
- 184 See *RCA Oms, Inc. (Greenland)*, 202 N.L.R.B. 228 (1973) (holding that NLRB does not have jurisdiction over employees located in Greenland, a possession of Denmark, despite the fact that the employees were hired in the United States, paid from the United States, and returned to the United States upon completion of their jobs).
- 185 *Id.*
- 186 See, e.g., *Independent Union of Flight Attendants v. Pan Am World Airways, Inc.*, 923 F.2d 678 (9th Cir. 1991) (U.S. labor law inapplicable to a collective bargaining agreement between a U.S. airline and a U.S. union where CBA included clause purporting to apply worldwide — notwithstanding the fact that the CBA appeared to cover the carrier's flying throughout the world); but see *Local 553, Transport Workers Union of America v. Eastern Air Lines*, 544 F. Supp. 1315, (E.D.N.Y. 2002), *aff'd as modified*, 695 F. 2d 668 (2d Cir. 1982) (U.S. labor law was applicable and a collective bargaining agreement between a U.S. employer and a U.S. labor union was enforceable).
- 187 161 Daily Lab. Rep. (BNA) D-18 (Aug. 24, 2009).
- 188 These are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.
- 189 *Rerum Novarum*, Leo XIII, English version, available at http://www.osjspm.org/majordoc_rerum_novarum_official.aspx (last visited Sept. 17, 2010).
- 190 <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105> and <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (last visited Sept. 17, 2010).
- 191 Constitution of the International Labour Organization, Article 19.
- 192 ILO Constitution, Arts. 24-34.
- 193 ILO Constitution, Art. 3.
- 194 The founding treaty is the Treaty of Rome 1957, which was amended by the Single European Act of 1986, the Maastricht Treaty 1992, the Amsterdam Treaty 1997 and the Treaty of Nice 2001. The consolidated treaty is available at http://europa.eu/abc/treaties/index_en.htm.
- 195 Treaty on the Functioning of the European Union (Consolidated) Articles 152-156, 300.
- 196 Treaty on the Functioning of the European Union (Consolidated) Articles 288-289, 294.
- 197 Treaty on the Functioning of the European Union (Consolidated) Article 267.
- 198 Treaty on the Functioning of the European Union (Consolidated) Article 263.
- 199 Treaty on European Union (Consolidated), Article 34.
- 200 Treaty on the Functioning of the European Union (Consolidated), Articles 18, 20, 45, 49.
- 201 http://www.oecd.org/document/20/0,3343,en_2649_34859_2017813_1_1_1_1,00.html (last visited Sept. 17, 2010).
- 202 <http://www.globalemploymentlaw.com/2009/10/regions/north-america/united-states/us-department-of-labor-taking-an-interest-in-the-ilo/> (last visited Sept. 17, 2010).
- 203 For an example of such a code of conduct and a study of the effectiveness of enforcement mechanisms, see *Beyond Corporate Codes of Conduct: Work Organization and Labour Standards at Nike's Suppliers*, 146 International Labour Review 21 (2007).
- 204 See, e.g., Joint letter from Teamsters, Steelworkers and others to President Obama urging that free trade agreements should enforce core ILO standards. 182 Daily Lab. Rep. (BNA) A-15 (Sept. 23, 2009).
- 205 46 Daily Lab. Rep. (BNA) A-15 (Mar. 11, 2010).
- 206 81 Daily Lab. Rep. (BNA) A-14 (Apr. 3, 2009).
- 207 8 Daily Lab. Rep. (BNA) C-1 (Jan. 14, 2009).
- 208 174 Daily Lab. Rep. (BNA) A-14 (Sept. 8, 2006).
- 209 213 Daily Lab. Rep. (BNA) A-7 (Nov. 6, 2009).
- 210 157 Daily Lab. Rep. (BNA) C-3 (Aug. 14, 2008); see also *Pressures by Global Unions at the G-20 Summit in Philadelphia in September 2009*, 184 Daily Lab. Rep. (BNA) A-11 (Sept. 25, 2009).
- 211 As of September 21, 2010, it is expected that the Senate will soon vote on the reintroduced Paycheck Fairness Act (S. 3772). This legislation — which cleared the House of Representatives in January 2009 — would subject employers to potentially unlimited compensatory and punitive damages for violations of gender-based wage discrimination law, and would weaken the affirmative defense available to employers in such cases. See <http://www.demploymentlawupdate.com/2010/09/articles/employment-wage-and-hour-law/vote-on-paycheck-fairness-act-imminent/#more>.
- 212 <http://www.labour.gov.on.ca/english/es/pubs/guide/equalpay.php> (guide to Ontario equal pay legislation) and http://www.hrsdc.gc.ca/eng/labour/equality/pay_equity/about/guide.shtml (overview of Canadian pay equity legislation) (last visited Sept. 17, 2010).
- 213 Council Directive 93/104/ED 23 Nov. 1993, amended by Directive 2000/34/ED of the European Parliament and of the Council of 22 June 2000; see *European Court of Justice Clarifies Interplay of Sick Leave and Annual Leave Entitlements Under the Working Time Directive*, Mar. 2009, available at <http://www.littler.com/PressPublications/Lists/ASAPs/DispASAPs.aspx?List=edb4a871%2D9e73%2D4eae%2Dbf81%2D3d045b6ede6d&ID=1341>.
- 214 Directive 2008/104/EC of the European Parliament and of the Council directive of 19 November 2008.
- 215 See *The Emerging New Workforce: Employment and Labor Law Solutions for Contract Workers, Temporaries, and Flex-Workers*, Apr. 2009, available at <http://www.littler.com/PressPublications/Lists/Littler%20Reports/DispReport.aspx?id=30> (last visited Sept. 17, 2010).

- 216 *Western Union Global Workforce Impact Study*, conducted by The Economist Intelligence Unit and Western Union, 246 Daily Lab. Rep. (BNA) A-2 (Dec. 29, 2009).
- 217 Kathleen Newland, *A New Surge of Interest in Migration and Development*, Migration Policy Institute 2007, available at <http://www.migrationinformation.org/Feature/display.cfm?ID=580> (last visited Sept. 17, 2010).
- 218 188 Daily Lab. Rep. (BNA) (Sept. 29, 2008).
- 219 Before the Great Recession, the United States had a shortage of middle-skilled workers. Armand Bironak and Kermit Kaleba, *The Bridge to a New Economy: Worker Training Fills the Gap*, National Skills Coalition (Jan. 28, 2010). The National Commission on Adult Literacy projects that by 2030 half the U.S. workforce will be comprised of working adults lacking the education needed to occupy middle- and high-skill jobs. See Andrew Sum, *Forces Changing Our Nation's Future: The Comparative Performance of U.S. Adults and Youth on International Literacy Assessments, the Importance of Literacy/Numeracy Proficiencies for Labor Market Success, and the Projected Outlook for Literacy Proficiencies of U.S. Adults*, June 18, 2007, available at <http://www.nationalcommissiononadulthoodliteracy.org/content/forceschangingfuture.pdf> (last visited Sept. 17, 2010). See also Irwin Kirsch, Henry Braun, Kentaro Yamamoto, and Andrew Sum, *The Perfect Storm*, Policy Information Center, Educational Testing Serv., Princeton, 2007. For Secretary of State Clinton's discussions with India on H-1B visas, see <http://www.globalimmigrationcounsel.com/2009/06/articles/us-immigration/clinton-comments-on-role-of-h1b-visa-program-in-usindia-relations/> and <http://www.globalimmigrationcounsel.com/2009/05/articles/us-immigration/leader-of-indian-software-and-it-industry-association-visits-washington-dc-to-discuss-immigration-policy/> (last visited Sept. 17, 2010). There is a worldwide shortage of health workers, according to the World Health Organization. 46 Daily Lab. Rep. (BNA) A-6 (Mar. 10, 2008).
- 220 Jeanne Batalova, *The "Brain-Gain" Race Begins With Foreign Students*, Migration Policy Institute 2007, available at <http://www.migrationinformation.org/Feature/display.cfm?ID=571> (last visited Sept. 17, 2010). The United Kingdom simplified its work and study routes to enter the United Kingdom, and adopted the Borders, Citizenship and Immigration Act of 2009.
- 221 See <http://www.globalimmigrationcounsel.com/2009/03/articles/us-immigration/number-of-highly-skilled-immigrants-leaving-the-us-expected-to-rise-sharply-due-to-better-opportunities-back-home/> and <http://www.globalimmigrationcounsel.com/2009/11/articles/international-migration-1/growing-numbers-of-us-jobseekers-look-abroad-for-opportunities/> and <http://www.globalimmigrationcounsel.com/2009/08/articles/international-migration-1/asia/china-china-offers-employment-opportunities-for-american-college-graduates/> (last visited Sept. 17, 2010).
- 222 28 U.S.C. §1350.
- 223 There are about 40 cases brought under ACTA to date, most since 1980. Many of these focus on corporate complicity in criminal acts. Business & Human Rights Resource Center, International Commission of Jurists — Report of the Expert Legal Panel on corporate complicity in International Crimes, available at <http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity>.
- 224 See, e.g., United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2003), ratified by 116 parties, Council of Europe Convention on Action Against Trafficking in Human Beings, which went into force in 2008.
- 225 Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (recast).
- 226 88 Daily Lab. Rep. (BNA) A-11 (May 11, 2009).
- 227 See <http://www.globalemploymentlaw.com/2009/11/regions/north-america/united-states/recent-framework-agreements-indicate-the-continued-influence-of-european-labor-unions-in-north-america/> (last visited Sept. 17, 2010).
- 228 Brent Wilton, Deputy Secretary-General, USCIB briefing on Global Industrial Relations, Int'l Organization of Employers, Dec. 2009.
- 229 For a recent study of these agreements, see *International framework agreements and global social dialogue: Parameters and prospects*, by Dimitris Stevis, International Labour Office, Geneva, 2010 found at http://www.ilo.org/employment/Whatwedo/Publications/lang-en/docName--WCMS_122176/index.htm (last visited Sept. 17, 2010).
- 230 For additional discussion of the future of labor management relations, see section five of this Littler Report, *supra*.
- 231 International Forecast, 01 Daily Lab. Rep. (BNA) S-16 (Jan. 5, 2010).
- 232 European Commission Report, *Employment in Europe*, 23 Nov. 2009, <http://op.bna.com/dlrcases.nsf/r?Open=kpin-7y4s8u> (last visited Sept. 17, 2010).
- 233 150 Daily Lab. Rep. (BNA) A-3 (Aug. 7, 2009).
- 234 For OECD recommendations to address youth jobs in the United States, see *Jobs for Youth: United States*, http://www.oecd.org/document/42/0,3343,en_2649_33927_44152682_1_1_1_37457,00.html (last visited Sept. 17, 2010).
- 235 OECD Report: *Addressing the Labor Market Challenges of the Economic Downturn*, <http://www.oecd.org/dataoecd/15/29/43732441.pdf> (last visited Sept. 17, 2010).
- 236 225 Daily Lab. Rep. (BNA) A-2 (Nov. 25, 2009).
- 237 176 Daily Lab. Rep. (BNA) A-5 (Sept. 13, 2010).
- 238 Federal Sentencing Guidelines, § 8B2.1.
- 239 See U.S. Attorney's Manual, chs. 9-28.300(A)(6) and 9-28.900(A) & (B).
- 240 2009 National Business Ethics Survey, available at www.ethics.org/nbes (last visited Sept. 23, 2010).
- 241 For an example of expectations for the future in this regard, see *Ceres' 21st Century Corporation Vision: 20 Key Expectations*, available at www.ceres.org/Document.Doc?id=567 (last visited Sept. 17, 2010).
- 242 The recommendation is found at <http://www.oecd.org/dataoecd/11/40/44176910.pdf> (last visited Sept. 17, 2010). For a discussion of its context see <http://www.globalemploymentlaw.com/2009/12/regions/united-states/small-facilitation-payments-are-higher-risk-now-due-to-oecd-recommendation/> (last visited Sept. 17, 2010).
- 243 A recent study found that 28% of multinationals have labor and human rights policies applicable to their global supply chain. See <http://www.globalemploymentlaw.com/2009/11/regions/cross-border/benchmarking-study-finds-significant-percentage-of-global-companies-have-labor-and-human-rights-poli/> (last visited Sept. 17, 2010).
- 244 U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf> (last visited Sept. 17, 2010). This report, which is the definitive work on the subject, is based on a three-year study in which thousands were interviewed and a library of documents collected.
- 245 See http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb06-ffse01-2.html (last visited Sept. 17, 2010).
- 246 See <http://www.nsf.gov/statistics/seind10/c2/c2h.htm>.
- 247 See www.elt-inc.com.
- 248 *North American Insight*, Staffing Industry Analysts (SIA) (Oct. 26, 2009), noting that the Bureau of Labor Statistics and Government Accounting Office provide different estimates, which range from 2.5 — 5.7 million and 42.6 million, respectively, however such estimates are based on a different definition of how "contingent" is defined. SIA defines contingent from the perspective of the end-user buyer to include three groups: (1) unincorporated individual independent contractors with no employees; (2) temporary workers employed via staffing agencies; and (3) temporary workers not employed via staffing agencies. Under this definition, workers are: (1) employed on a temporary basis with no expectation by the buyer of indefinite employment; (2) not operating as an outsourced business service; and (3) providing labor to a company, not to a private individual. Littler follows this definition of contingent. Staffing Industry Analysts (www.staffingindustry.com), is the leading contingent workforce advisory services, offering — through its CWS Council membership — contingent labor sourcing strategies, cost savings methodologies, best practices and analytics designed to benefit organizations that strategically plan and engage a domestic and/or global contingent workforce.
- 249 *Estimated Total Expense Savings Due to Use of Contingent Labor*, Contingent Workforce Strategies 30, Staffing Industry Analysts (Mar. 15, 2010).
- 250 Tom Abate, *In Economic Woes, Firm Count On Temp Workers*, S.F. CHRON., Dec. 6, 2009, available at http://articles.sfgate.com/2009-12-06/business/17182732_1_employment-temporary-workers-jobless-recoveries (last visited Sept. 17, 2010).
- 251 *Id.*
- 252 *Now Hiring: Contract Workers?*, Bus. Wk. (June 30, 2009).
- 253 Bureau of Labor Statistics, *Employment Projections 2008-2018*, Dec. 10, 2009, available at <http://www.bls.gov/news.release/ecopro.nr0.htm> (last visited Sept. 17, 2010).
- 254 *North American Insight*, Staffing Industry Analysts (SIA) (Feb. 2, 2010).
- 255 *Id.*

- 256 National healthcare was discussed as a very important factor in Littler's *The Emerging New Workforce: 2009 Employment and Labor Law Solutions for Contract Workers, Temporaries and Flex-Workers*, At 4, 30 (May 2009), available at <http://www.littler.com/PressPublications/Lists/Littler%20Reports/DispReport.aspx?id=30> (last visited Sept. 17, 2010).
- 257 *North American Insight*, Staffing Industry Analysts (Feb. 2, 2010).
- 258 Seth Brown, "Future of Work" predicts jobs and home life will merge more U.S.A TODAY, Feb. 8, 2010, http://www.usatoday.com/money/books/reviews//2010-02-08-futurework08_ST_N.htm (last visited Sept. 17, 2010).
- 259 *Id.*
- 260 *Id.*
- 261 Ctr. for Disease Control and Prevention, *U.S. Obesity Trends*, available at <http://www.cdc.gov/obesity/data/trends.html> (last visited Sept. 17, 2010). See also Dep't Health and Human Services - Office of the Surgeon General, The Surgeon General's Vision for a Healthy and Fit Nation Fact Sheet, available at http://www.surgeongeneral.gov/library/obesityvision/obesityvision_factsheet.html (last visited Sept. 17, 2010).
- 262 For additional information, see Ilyse W. Schuman and Steven J. Friedman, *Health Care Reform — What are Key Considerations for Employers*, Mar. 2010, available at <http://www.littler.com/PressPublications/Lists/Insights/DispInsights.aspx?id=153> (last visited Sept. 17, 2010).
- 263 David Leonhardt, *In Health Care Bill, Obama Attacks Wealth Inequality*, N.Y. TIMES, Mar. 23, 2010, available at <http://www.nytimes.com/2010/03/24/business/24leonhardt.html> (last visited Sept. 17, 2010).
- 264 See Stephanie Overman, *Prescribing Wellness: Employers can push the envelope on wellness initiatives without prompting employees to push back*, HR MAG., at 49-54 (Mar. 2010), available at <http://www.shrm.org/Publications/hrmagazine/EditorialContent/2010/0310/Pages/0310overman.aspx> (last visited Sept. 17, 2010). See also *Employer Mandated Wellness Initiatives: The Continuum from Voluntary to Mandatory Plans*, Apr. 2010, available at <http://www.littler.com/PressPublications/Lists/Littler%20Reports/DispReport.aspx?id=25> (last visited Sept. 17, 2010).
- 265 S. 3049.
- 266 Alex Landis, Jessica Silver-Greenberg, and Tara Kalwinski, *CEOs Defy Obama with More Cash Instead of Pay for Performance*, Mar. 25, 2010, BLOOMBERG.COM, available at <http://www.bloomberg.com/apps/news?pid=20601109&sid=a1wYqBZEwV6g&pos=10> (last visited Sept. 17, 2010).
- 267 James F. Reda & Associates, L.L.C., *Executive Compensation Trends for 2009: Balancing Risk, Performance and Pay*, Aug. 2009. See also Wall Street Journal/Hay Group 2009 CEO Compensation study, available at <http://www.haygroup.com/www/services/index.aspx?id=2589> and <http://graphicsweb.wsj.com/php/CEOPAY10.html> (last visited Sept. 17, 2010).
- 268 Historically, lawyers performed legal work by the project and billed a flat fee for that work based on criteria such as the novelty and difficulty of the issues involved, the skill required to perform the service, fees customarily charge for similar work, amounts at stake and results obtained, and the reputation and abilities of the lawyer. Practicing law back in Illinois, Abraham Lincoln probably never heard the term "billable hour." and had no hourly billing rate as we know it today. Instead, he and the other lawyers of his era billed an agreed amount for the legal work for which he was retained.
- By the 1960's, this system changed for several reasons. Bar association fee schedules were attacked for violating antitrust laws. Clients demanded more information about the legal work being performed. Lawyers also struggled for ways to determine the amount to charge for their work and their own productivity. See ABA Commission on Billable Hours Report (2002). As a result, the billable hour became the predominate means for determining the value of legal work.
- 269 See ABA Commission on Billable Hours Report at 5 (2002), available at <http://www.abanet.org/careercounsel/billable/toolkit/bhcomplete.pdf>.
- 270 Jordan Furlong, *Here Comes The LPO Tsunami*, THE LAWYERS WKLY, Apr. 10, 2010. Currently, private equity ownership of law firms would be prohibited in the U.S. However, in the U.K., the 2007 Legal Services Act, most of which will go into effect in 2011 or 2012, authorized the creation of alternative business structures enabling non-lawyers to serve in management and ownership roles within legal service providers and law firms. To assume that U.S. law firms will not face competition from well-capitalized LPOs based in the U.K. would ignore recent history and the current state of the global economy.
- 271 R. Susskind, *THE END OF LAWYERS?* (Oxford Univ. Press, 2008), at 85.
- 272 *Id.* at 7.
- 273 While it is well beyond the scope of this Littler Report, one can envision a re-examination of the traditional law school curriculum, with greater focus on the "practice of law." One can even envision internship programs in which law school graduates receive intensive, structured and mentored training programs, similar to residency programs for physicians. Of course, the compensation models of the past — where first-year associates make as much as experienced federal judges — may have to be re-examined as well.
- 274 <http://www.acc.com/valuechallenge/getinvolved/index.cfm>.

APPENDIX A: The Littler Eleven in 2000

Chapter 1

THE LITTLER ELEVEN: Decoding The Employment And Labor Law Trends Of The First Decade

INTRODUCTION

Ten years ago, Littler presented the LITTLER NINE, nine trends in employment law for the 1990s. The predictions proved so accurate that one general counsel recently likened them to “photographs of the future.” The Littler Nine were:

- The Desexification of the American Workplace — The Explosion of Sexual Harassment Claims and the Ascent of Women to Positions of Power;
- The Emergence of a Multi-Billion Dollar Leasing Industry and Government Crackdown on the Misclassification of Workers;
- The Growth of Employment Contracts and Litigation Over Employment Contracts;
- Expansion of the Social Duties of Employers, Including Adoption of Family Leave;
- Direct Employer Involvement in the War on Drugs;
- Major Legislative Changes to Benefits Laws and Workers’ Compensation Reform;
- Expansion of Rights for Individuals with Disabilities and the Aged;
- Globalization of HR Practices and Legal Compliance; and
- The Redefinition of Employee Privacy in a World of Increasing Intrusive Technology.

The twentieth century is now a part of history. However, the events and developments of the last century, and especially the last decade, directly shape what can be expected as we chart the employment and labor law challenges of the first decade. Certain challenges will become less significant as the law has become mature and the solutions well established. For example, case law and legislation have answered many of the important legal questions

involved in at-will employment and traditional wrongful termination claims. Other trends were only in their infancy in the 1990s and will blossom in the first decade. Globalization and employee privacy readily occupy this category. Thus, it is unwise, if not impossible, to separate the developments of the last decade from those of the first decade in undertaking the task of decoding the future.

For two years, Littler has been deciphering the hundreds of cases and thousands of developments which disclose the employment law trends of the first decade. This effort has resulted in eleven “photographs of the future,” which comprise the LITTLER ELEVEN. They evolved from a review of over thirty thousand employers’ experiences by our four hundred employment attorneys. Not surprisingly, the influence of technology has shaped many of our observations. From the growth of the Internet to the breakthroughs in DNA mapping, society-shaping developments are directing the future course of employment and labor law. Political change, demographics, cultural evolution, and dozens of other influences all play critical roles in the new law of the workplace.

The Littler Eleven are not distinct trends unconnected to each other. On the contrary, the trends interrelate and overlap. An excellent example is the pervasive effect of technology on the other trends. A central element in understanding the evolution of employee privacy is to study the electronic privacy standards mandated by the European Economic Community. Of course, this is also an example of the influence of globalization on the workplace.

Most importantly, the Littler Eleven is not a theoretical presentation. Each trend is supported by concrete examples. Moreover, each developing trend is related to practical recommendations on how employers can prepare for the predicted changes. Imagine how targeted your legal and human resource department could become if they had a “photograph of the future” of employment and labor law. Building new policies, providing proper training, anticipating legislative and court-directed changes are just some of the examples of what could be achieved with such foresight.

THE LITTLER ELEVEN

Littler One: The Cyber-Employment Law Revolution—The New Law Of The Digital Workplace¹

In the first decade of the twenty-first century, the Internet will be the most powerful force controlling how work is performed and, in many instances, reinventing what we consider “work.” The Internet Age has arrived and the implications are practical and dramatic. Today, every part of business is linked to the Web. Whether it is providing information, placing orders, sending business directives, or advertising, Bill Gates is right: “The Internet has changed everything!”

The invasion of the workplace (or its empowerment) by the Internet has inevitably created employment law issues of the first magnitude. These range from the challenges of establishing employee identity over the Internet, to the sending of Internet threats in the workplace. Digital communication has dissolved the wall that separates the workplace from the outside world. The Internet is an essential recruiting tool, and is used in every aspect of hiring, reaching around the world. Employers are now facing claims that Internet hiring discriminates against those who are not computer literate. At the same time, Internet access for employment is being defended with the argument that minorities have greater opportunities to learn about positions and apply. From antiharassment and discrimination law to the legal standards for workplace privacy, cybercommunications have redefined the employment law issues of the first decade.

Moreover the Internet has caused a reinvention of work in many fields. In computer programming, much of the work can be done by “employees” who are never seen, who receive their assignments electronically and return them in the same manner. Form I-9 requirements, independent contractor status, wage-and-hour requirements, workers’ compensation, wrongful termination, public policy violations, and discrimination have unique expressions with these “virtual” workers. In one recent case, the invisible virtual employees proved to be not in Iowa, as had been thought, but in India.

These legal issues continue to intensify and expand as the Internet increasingly becomes the information channel for employees. The distribution of employment policies by Internet, acknowledgments by cybersignatures, and electronic access to personal information set the stage for a revolution in employment law.

The impact of the Internet on the future of employment law

¹ For more information of this trend, please refer to Chapter 23, *Digital Workplace 2000: A Comprehensive Guide To E-employment Law*, in THE 2000 NATIONAL EMPLOYER®.

cannot be overstated. Employment attorneys and human resource professionals have already experienced the first wave of these issues in the workplaces of high technology employers. Their experiences will shortly become the norm. It is conservative to envision technology being involved in over fifty percent of the workplace issues requiring an employment law analysis. This will range from the dark side of the net (*cybersabotage*) to the rules governing the virtual workplace (*cyberpolicy*). The new world offers *cyberlitigation* (attorneys who seek plaintiffs through the Web and collect workplace horror stories to stir up litigation), while promising *cybermediation* and arbitration (attorneys and judges who resolve disputes in cyberspace). The cyberemployment law revolution was forecast by Littler in 1994 and divided into eight categories in 1999. In the first decade, it will dominate the workload of human resource professionals and employment attorneys.

- The blizzard of workplace electronic mail now exceeds *sixty billion* a year. (John Sheridan, *You’ve Got More E-mail*, INDUSTRY WEEK, p. 10 (Jan. 24, 2000).) This rising storm of communication creates an exponentially increasing possibility of miscommunication and “malcommunication” by and among employees. The employer can be expected to continue to serve as the resource of last resort when it comes to righting alleged wrongs in workplace messages.
- From beginning to end, the work relationship will be defined by, and subject to, the electronic media. Companies such as Home Depot, with an estimated 105,000 new hires last year, have undertaken to recruit online. (Cora Daniels, *To Hire a Lumber Expert, Click Here*, FORTUNE, Apr. 3, 2000) In a bizarre recruiting twist, DVCi Technologies, a Web marketing firm in New York City, tells applicants that two working cameras will broadcast their every working hour to the company’s Web site. The benefit: applicants are able to log on to the Web site to get a preview of the offices and of life at the company. The constant monitoring does not appear to have deterred potential recruits. (Dimitry Elias Leger, *My Office, The Peep Show*, FORTUNE, Feb. 21, 2000).
- There will be a marked increase in the percentage of workers who telecommute part time or full time. (Katie Hafner, *For the Well Connected, All the World’s an Office: Cell Phones, Pagers and Wireless E-mail Have Created a Workday That Never Ends*, NEW YORK TIMES, Mar. 30, 2000) According to a 1999 study by the Consumer Electronics Association, more than half of the respondents reported that they would work from home for two or more days during the week if given the opportunity to do so. (CEA, EIA, TIA *Commend Introduction of Legislation*

Encouraging Teleworking, Company Press Release, Business Wire, Mar. 2, 2000.) Monster.com assists employment applicants with obtaining at home employment. Magazines such as *Working Mother* advise their audiences on how to set up home based businesses. More legislation introduced will encourage telecommuting. Thus, for example, the Telework Tax Incentive Act (H.R. 3819) would establish a five hundred dollar tax credit toward the purchase and installation of electronic and computer equipment which allows employees to telework. This tax credit, which would be available under certain conditions to either the employee or the employer, has been commended by certain industry groups. Numerous other bills promoting telecommuting currently are pending in Congress.

- The increase in telecommuting will cause a corresponding focus on the home as a workplace, regardless of contrary assurances from the DOL. At least for the time being, however, the home appears to have preserved at least some of its sanctity. On February 25, 2000, citing a respect for the privacy of the home, the federal Occupational Safety and Health Administration (Fed-OSHA) formalized a policy of not conducting inspections of employees' home offices, not holding employers liable for employees' home offices or their inspection, and not accepting employee complaints relating to conditions in their home offices. The directive does not apply to other home based work sites, such as home manufacturing operations, where OSHA receives a complaint that indicates a violation that threatens physical harm or an imminent danger, nor does it affect OSHA recordkeeping requirements. Further, under the directive, employers are responsible for hazards in home work sites caused by materials, equipment, or work processes that they have provided or require to be used. (OSHA Directive on Home-Based Work Sites, Directive No. CPL-2-0.125, effective Feb. 25, 2000).
- Even as OSHA has adopted a hands-off approach to the home office, however, fears of new workplace hazards and corresponding safety concerns are expected to rise. Thus, employers likely will see a continued increase in claims of repetitive stress injuries from computer use and will be forced to address issues of electromagnetic frequency radiation and cancer, which are at least anecdotally associated with computers and cellular telephones. Moreover, employers may anticipate a dramatic increase in workers' compensation claims from injuries arising in the home office.
- In the First Decade 2000, employers will be forced to develop

new means to protect their trade secrets, particularly where employees perform work from remote work sites, and the information simply cannot be secured. In this regard, a year 2000 survey performed by Pinkerton of Fortune 1000 companies ranks Internet/Intranet security as one of the greatest security threats ever to face corporate America.

- As employee use of technology continues to increase, organized labor will benefit from the ability to cyberorganize, reaching its audience through numerous Web sites, electronic mail, and cellular telephones. It also will attempt to ensure that current laws protecting employees' rights to organize and to bargain collectively keep pace with technology. See, e.g., *Timekeeping Systems, Inc.*, 323 N.L.R.B. 244, 248 (1997) (employee who utilized office e-mail system did not forfeit protections of the National Labor Relations Act); *Adtranz, ABB Daimler-Benz Transportation, N.A., Inc.*, Cases 32-CA-17172, 32-RM-759, 32-RC-4540, 2000 NLRB LEXIS 80, at *12-13 (Jan. 13, 2000) (an employer, who permitted personal use of electronic mail, could not exclude union as a topic of discussion).
- Necessary job skills will quickly become obsolete unless workers relentlessly upgrade them with training purchased privately or provided by the employer. Research indicates that this year alone, that approximately twenty-three percent of organizational training will be provided by various learning technologies, compared to only nine percent in 1997. (Laurie J. Bassi & Mark E. Van Buren, *The 1999 ASTD State of the Industry Report*.) This number is expected to increase dramatically over the course of the first decade.

The practical implications of the change are immense:

- Workers now in their forties and fifties may have to entirely retool for new jobs in order to stay employed into the new decade. Employers will have to provide substantially increased training opportunities, and will face greater challenges in recruiting.
- Science and pseudoscience will go head-to-head over the existence of a cause and effect relationship between the use of high technology devices, on the one hand, and cancers, and other illnesses and conditions, on the other hand. Employers will face new and more exotic workers' compensation claims, requiring much more sophisticated investigation and defense.

- The home will cease to be a sacrosanct private domain as the employer assumes legal responsibility for home offices. Employers will be responsible for the physical equipment, layout, and use of home offices, and will require inspections of home offices to assure compliance.

Littler Two: Second Generation Harassment And Discrimination Standards—Developing A New Workplace Etiquette²

Sexual, racial, and national origin harassment cases (as well as cases associated with the full range of protected categories) will continue throughout the first decade of the twenty-first century. However, more of the litigation and preventive activities will focus on second generation issues. These issues will include greater protection from harassment on the basis of sexual orientation, and new standards for speech and behavior in the politically correct and religiously tolerant workplace. Second generation issues will also involve increasingly subtle forms of harassment and discrimination. For example, limiting a CEO search to individuals who have served as CEO's of organizations with annual revenues in excess of one billion dollars (a facially neutral criterion) will greatly limit access to otherwise qualified female and minority applicants.

As we move into the second generation harassment cases, employers will be forced to continually redefine the boundary between rudeness and illegal harassment. Unwelcome conduct based on a protected characteristic which creates a hostile work environment, called environmental harassment, has already pushed past sexual conduct into environmental harassment based on race, national origin, religion, age, disability, and sexual orientation. The Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998) declined to read federal antidiscrimination law as a code of general civility touching upon "genuine but innocuous differences" in the ways humans interact. *Id.* In the First Decade 2000, the courts will define the boundary between rudeness and forbidden harassment. Meanwhile, the role of religion in the workplace will increasingly complicate personnel policies, while protections for those with different sexual orientations will grow. The First Decade 2000 will continue to reflect the inherent tension between employees' rights to free speech under the First Amendment and the law of harassment. The balance is tilting against free speech at work. Free speech rights will give way to the right to be free of an illegally hostile or abusive working environment. *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th 121, 126 (1999)

² For more information on this trend, refer to Chapter 6, *Employment Discrimination Law: A Basic Overview*, Chapter 7, *Harassment In The Workplace*, Chapter 8, *Disability Discrimination*, and Chapter 22, *Religion In The Workplace*, in THE 2000 NATIONAL EMPLOYER®.

("[W]e hold that a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to freedom of speech if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile or abusive work environment and therefore will constitute employment discrimination.").

In the new and diverse workplace, however, where communication is constant and meanness is frowned upon—where employees provide one another with the most startling details of their personal lives—it will become increasingly difficult to draw the line as to what is appropriate conversation and what is not. (See Charles McGrath, *The Way We Work Now: Mar. 5, 2000; Office Romance*, THE NEW YORK TIMES MAGAZINE, Mar. 5, 2000) The media reports a new vigilance in what is acceptable workplace communication, noting the many ironies which exist in this new decade of sensitivity. (John Stossel, *You Can't Say That! What's Happening to Free Speech?, Free Speech in America*, ABC News (Transcript), Mar. 23, 2000.)

The new workplace will create many opportunities for tension between employees, and employers will be forced to mediate the intricacies of human interaction in the workplace. In the aftermath of *Faragher v. City of Boca Raton*, 524 U.S. 775 (U.S. 1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (U.S. 1998), however, an employer will have a defense to a charge of noneconomic harassment if it can show that it had in place a mechanism by which to deal with employee complaints, and an employee unreasonably fails to avail him- or herself of this complaint procedure. Thus, employees who are offended by other employees' sexual preferences or religious beliefs and the means by which those beliefs manifest themselves in the workplace will be forced to complain to the employer, or risk waiving the right to do so.

In the First Decade 2000, employers will continue to make progress toward workplace diversity. (Geoffrey Colvin, *The 50 Best Companies for Blacks, Asians & Hispanics: Outperforming the S&P 500: Companies that pursue diversity outperform the S&P 500. Coincidence?* FORTUNE, July 19, 1999.) In increasing numbers, businesses are realizing that workplace diversity is an important goal to be achieved in the coming decade. (*Josie Thomas Named Senior Vice President, Diversity*, CBS Television: *New Post Will Oversee Outreach and Recruitment, Hiring, Promotion and Development of Minority Representation Throughout the Company*, Company Press Release, PR NEWSWIRE, Apr. 4, 2000.)

The resurgence of religious belief and practice and the variety of its forms will play out in the workplace, as employees express their beliefs, seek to proselytize others, and employers adopt values that

may be founded on specific religious beliefs. Some employers send employees to mandatory training sessions based on barely disguised religious doctrine. Others provide on-the-job meditation and relaxation classes based on Eastern spiritual practices. Employers adopt and display religious symbols at work. Employees demand prayer meetings at work or the right to time off for retreats or pilgrimages. Other employees object to the display of religious symbols by others, or screensavers with religious messages. The courts will demarcate the boundary between the freedom to practice one's own religion and the freedom to not be forced to participate in another's.

- There will be an increased sensitivity to religious beliefs in the workplace, as the new diversity brings with it new ways of practicing religion. (Randy Cohen, *The Way WE Work Now: Mar. 5, 2000: The Ethicist; Pray No More*, THE NEW YORK TIMES MAGAZINE, Mar. 5, 2000.)
- Even as some employers turn to religious-based means of dispute resolution (Glen G. Waddell, Judith M. Keegan, *Christian Conciliation: An Alternative to 'Ordinary' ADR*, 29 CUMB. L. REV. 583 (1998/99) (espousing Christian conciliation, with its emphasis on reconciling relationships and resolving disputes in a biblical manner, as superior both to litigation and to traditional ADR), there may be less tolerance among employees for what they perceive to be encroachments on their own religious beliefs. See *Grant v. Joe Myers Toyota*, Tex. Ct. App., No. 14-98-01210-CV (Jan. 20, 2000) (failure to hire applicant who refused to attend a training program containing motivational themes which applicant claimed conflicted with her religious beliefs); *Altman v. Minn. Dep't of Corrections*, 1999 U.S. Dist. LEXIS 14897 (D. Minn. 1999) (Christian public employees who were reprimanded for protesting mandatory training on gays and lesbians stated claim for violation of constitutional right of free religious expression); *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997) (repeated, unsolicited, and unwelcome workplace lectures by the police chief on his views of appropriate Christian behavior may violate the Establishment Clause of the First Amendment). See also Main, *Trying to Bend Manager's Minds*, FORTUNE, Nov. 1987; *Gurus Hired to Motivate Workers Are Raising Fears of Mind-Control*, THE NEW YORK TIMES, Apr. 17, 1987.
- The overwhelming majority of Americas believe in God. About ninety-five percent believe in God or a universal life spirit. In spite of the retrenchment in some sects, overall attendance at religious congregations is as high as it was forty

years ago. (Richard Cimino & Don Lattin, *Shopping for Faith* (Jossey-Bass Publishers 1998)).

- Employers in the first decade may continue to be faced with litigation over the rights of applicants or employees to assert nontraditional, albeit arguably *bona fide*, religious beliefs. See *Seaworth v. Pearson*, 203 F.3d 1056 (8th Cir. 2000) (applicant who was not hired for his refusal to provide a Social Security number, asserting that it represented the "Mark of the Beast," did not state a claim for religious discrimination where requirement was imposed by the Internal Revenue Service, not the employer); *Weber v. Roadway Express, Inc.*, 199 F.3d 270 (5th Cir. 2000) (a Jehovah's Witness's assigned shift, which would have required him to travel overnight with a female who was not his spouse, did not state a claim for religious discrimination).

As more and more states adopt statutes prohibiting discrimination against employees on the basis of sexual orientation, the pressure will intensify to adopt gay rights protections on a federal level. A federal statute prohibiting discrimination on the basis of sexual orientation should not be a surprise regardless of the political success of either party. This movement also suggests changes to ERISA, FMLA, and other laws to allow the equivalent of spousal benefits to domestic partners.

- Consistent with the Supreme Court's lead in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), which made same-sex sexual harassment actionable under federal antidiscrimination laws, the states have undertaken to eradicate workplace discrimination irrespective of sexual orientation. The following states already prohibit discrimination on the basis of sexual orientation as a matter of state law: California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, and Vermont (plus the District of Columbia). The State of Iowa prohibits sexual orientation and gender identity discrimination in state employment by Executive Order. (*IA House OKs Rights Repeal, Vetoed*, COMMUNITY HEADLINES, <<http://DailyNews.yahoo.com>>, Apr. 5, 2000.) It is anticipated that numerous counties and municipalities throughout the country will continue to follow suit.
- Continued attention will be paid to the rights of individuals to obtain health insurance and other benefits on behalf of their domestic partners. On January 31, 2000, an arbitrator held that the State of Connecticut must extend health insurance benefits to same sex domestic partners of state employees

and their children. (See Conn. H.R. 4, Conn. S.R. 6, dated Mar. 3, 2000.) Colorado employers are prohibited by law from determining insurability and premiums on the basis of sexual orientation. (See COLO. REV. STAT. § 10-3-114)

- The San Francisco Equal Benefits Ordinance prohibits the City and County of San Francisco from entering into contracts or leases with any entity that discriminates in the provision of benefits between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of employees. San Francisco employers eager to attract and retain talented employees—as well as to demonstrate their commitment to workplace diversity—are offering domestic partner benefits in increasing numbers to their workforces. Likewise, unions also are including domestic partner benefits in collective bargaining agreements. In fact, domestic partner insurance coverage currently is available in all fifty states.
- The controversy over treatment of gays in the military will continue, as growing dissatisfaction with the “don’t ask, don’t tell” policy of the 1990s will force Congress to address, once and for all, the rights of homosexuals to serve their country.

The practical implications for employers are tremendous.

- Employers will invent a new workplace etiquette to address the differences that will be expressed at work.
- Just as an etiquette of e-mail developed quickly (using capital letters is shouting), an etiquette of sensitive tolerance and self-setting of boundaries will develop. Managers must master these skills, and human resources professionals will be the individuals leading the effort to inculcate these skills in the workforce.
- Employers will be teaching employees new skills to resolve conflicts, and how to listen empathetically and reflectively (witness the Emotional Intelligence movement and increasing amount of training by EQ providers).
- Employers will increasingly accommodate the spiritual needs of employees at work, evolving an etiquette of “each to his or her own,” which allows voluntary participating by employees, but controls active proselytizing and involuntary exposure to religious content.
- Employers will face more claims for sexual orientation discrimination, and will include sexual orientation in EEO policies and harassment prevention policies and training.

Little Three: The Aging Of The Workforce And The Rise Of Age Consciousness In The Workplace—The Coming Age Discrimination Litigation Explosion³

Thanks to medical advances, workers may expect to live longer and experience a higher quality of life. However, their retirement benefits have not kept pace, and Social Security payments are inadequate. The 1999 Retirement Confidence Survey reported that twenty percent of individuals in their forties had not yet begun to save for retirement, and of those who had, the median amount saved per household is roughly forty-five thousand dollars. Workers will have to work longer. Yet, employment opportunities for older workers seems to be declining, in part, due to the rapid changes in technology. New knowledge and the Web-way-of-life is replacing traditional experience and established methodologies of production. Unfortunately, this movement has often been interpreted as the “knowledge” of younger and more recently educated employees compared with the older “typewriter” generation employees. The explosion between employment needs of older workers and the available opportunities is about to be heard not just in the world of technology, but in the courtroom.

What will happen to the growing numbers of older workers as they encounter a world that does not value their historical skills and “assumes” that they are not “internet-savvy”? The original legislative purpose of the Age Discrimination in Employment Act in 1967 was to keep experienced and talented older workers at work, and to prohibit mandatory retirement. Now this thirty-three-year-old law is about to redefine its original purpose. In the next decade there will be an explosion of individual and class action lawsuits for age discrimination. New theories of liability will be advanced: For example, workers will sue for age discrimination when they have been given no training by their employers in new business processes and then are laid off for not possessing skills desired by their employer. The question of whether an employer discriminates on the basis of age if it fails to provide its workforce with necessary training, opting instead to hire “younger” workers who have such training, will be litigated. Also addressed both through litigation and legislation will be the needs of the older workforce and the prejudices of a civilization that for the first time in history equates “youth” rather than experience or age with knowledge and wisdom. The implications of this paradox are breathtaking. One could foresee a profound change in which workers would take long sabbaticals from active employment to renew skills. Other economically successful

³ For further information on this trend, please refer to the portions on age discrimination of Chapter 6, *Employment Discrimination Law: A Basic Overview in THE 2000 NATIONAL EMPLOYER*®.

workers might experience leisure periods early in their work lives leading to second and third careers at ages we now associate with retirement. Concepts of age and work will radically change in the first decade. This is a trend likely to continue well into the twenty-first century.

- The cap on Social Security benefits, which was put in place during the Depression as a means of dissuading older workers from taking jobs away from younger workers, has been repealed. Recent amendments to the Social Security Act to remove the seventeen thousand dollars earnings limit for persons age sixty-five to sixty-nine and extend the Social Security Trust Fund to 2054 have been adopted. As a result, the “older workforce,” which effectively had been dissuaded from continuing to work by the potential forfeiture of its retirement benefits, may remain active in the American workplace. Indeed, it is estimated that the repeal potentially could increase the available labor pool by about five percent. “Phased retirement” concepts are under study. (BNA Daily Labor Report, Vol. 30, p. C-1, Feb. 14, 2000).
- The early retirement trend which persisted throughout the mid-1980s has ceased. Currently, one in four Americans age sixty-five to sixty-nine has at least a part time job and eighty percent of baby-boomers say they intend to work past age sixty-five. (CONTRA COSTA TIMES, Apr. 8, 2000.) The National Restaurant Association estimates that some 400,000 restaurant employees are over fifty-five years old.
- In reorganizations and downsizings, disproportionate numbers of older workers are often laid off. The federal courts are divided on whether the Age Discrimination in Employment Act allows a suit based on disparate impact. This key issue will be resolved soon. *Compare Smith v. City of Des Moines*, 99 F.3d 1466, 1470 (8th Cir. 1999) (disparate impact claims cognizable under ADEA); *Seth v. City of Seattle*, No. 98-35386, 1999 U.S. App. LEXIS 28046, at *2 (9th Cir. Oct. 28, 1999) (same); *District Council 37, AFSCME v. New York City Dep’t of Parks & Rec.*, 113 F.3d 347, 351 (2d Cir. 1997) (same) with *Mullin v. Raytheon Co.*, 164 F.3d 696, 701 (1st Cir. 1999) (disparate impact claims are not cognizable under ADEA); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-10 (10th Cir. 1996) (same); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076-78 (7th Cir. 1994) (same).
- At least one state, California, has amended its age discrimination law to prevent employers from selecting the most highly compensated workers for layoff, recognizing

that compensation is a proxy for age. CAL. GOV’T CODE § 12941.1.

- Older workers now have two-tiered or multi-tiered careers: A career from which they retired and from which they may be collecting a pension, and a second career which may be part time, or a consulting position. Some individuals who enjoy working but who have retired from one career—such as former Chrysler president Robert Lutz, now sixty-eight years old and the CEO of a car-battery company in Reading, Pennsylvania; or Stanley Gault, the former CEO of Rubbermaid, then of Goodyear, and of late, a nonexecutive chairman of Avon Products, now seventy-four—pursue postretirement careers simply because they enjoy the challenge. (Alex Taylor III, *Getting Back in the Fast Lane*, FORTUNE, Mar. 6, 2000.) Other individuals benefit from “phased retirement”—a mechanism by which employees are permitted to partially retire and receive a partial salary and partial pension benefits—as a tool to aid in the retention of employees. (BNA DAILY LABOR REPORT, Vol. 30, p. C-1, Feb. 14, 2000.) The phenomenon of phased retirement will continue to raise legal issues as we enter the twenty-first century because of the regulatory impediments which already exist, as well as the lack of guidance upon which employers may rely.
- Medical advances will allow the generations now in their youth to live for more than a century. (Michael R. Rose, *Can Human Aging Be Postponed?* SCIENTIFIC AMERICAN, Dec. 1999.) Unfortunately, notwithstanding recent reforms, Social Security cannot meet the retirement needs of older workers, and may be further overwhelmed by the shrinking number of individuals who are available to support the aging population. (Kerry A. Dolan, *Motivated to Work*, FORBES, Mar. 20, 2000.) Compounding the problem is the fact that the so-called “baby-boomers,” who were born in the period between 1946 and 1964, although widely invested in the stock market, are historically poor savers. When it comes time for these individuals to retire, some predict a massive dumping of stock which will destroy the national economy. (Matthew Bell, *Economists Worry As Boomers Retire*, BUSINESS FIRST OF BUFFALO, Mar. 13, 2000.) Others worry that the continued exercise of stock options will result in watered-down stock, ultimately undercutting economic growth. (David Leonhardt, *In the Options Age, Rising Pay (and Risk): Will Today’s Huge Reward Devour Tomorrow’s Earnings?* NEW YORK TIMES, Apr. 2, 2000.)

- Employers must deal not only with the longevity of some of its workers, but also with how to replace them when they do, eventually, retire. As the current workforce does move toward retirement, employers will be forced to grapple instead with a workforce comprised of Generation X-ers, who are considered to be lazy and difficult to motivate. So unusual is this demographic that consulting groups conduct seminars to train employers how to attract, manage, and motivate Generation X employees. (*Fusing the Generational Gap*, BUSINESS WIRE, Apr. 4, 2000; Noel Brinkerhoff, *Gen X: The Unknown Quantity*, CALIFORNIA JOURNAL, Dec. 1999 Brucotulgan, *Managing Generation X* (Merritt Publishing 1995).)

The practical implications for employers in the next decade are significant:

- Employers should address the age discrimination epidemic now by training, by vigilant review of decision-making processes, and by conducting adverse impact analyses in layoffs and other larger selection/deselection processes.
- Employers must train and retrain older workers in job skills to afford them the opportunities to stay with changes in business.
- Health enhancement at work will become more common and will bestow a competitive advantage upon those companies which foster it.
- As defined benefit pension plans vanish, employers should offer improvements to defined contribution plans and 401(k) plans to remain competitive.

Littler Four: Hiring, Retention, And The Impact Of The Skilled Labor Shortage—Litigating, Legislating, And Engineering New Employment Relationships⁴

With unemployment at a thirty-year low, the “Company Man” is a dead concept. Employees no longer expect the employer to loyally promote them and take care of them in return for faithful service. Employees now see their relationship to employers differently. What does the employer offer them? What career development opportunities will this job offer the employee for furthering his or her life goals? What some people think of as a new wave of selfishness may be nothing more than a new kind of self-determinism. The

impact is enormous: new compensation structures, new benefits, more flexibility in the terms of work, higher mobility between jobs, and more lawsuits for misrepresentation against employers who fail to deliver on their promises.

Almost everyone knows of someone who has become a stock-option millionaire after joining a start-up or one of the expanding employers focused on e-commerce. The Microsoft, Yahoo, and Cisco stories are daily news. Now thousands of dot-com employers are racing to become future giants in their market sectors. These employers lure talent with promises of stock options, benefits, and representations of future growth and ownership. Large numbers of employees in management positions (including human resources and legal professionals) are making and considering significant career changes.

Many of the promises made will be broken. In the coming years, employers will be hit by claims for breach of contract, fraud, misrepresentation, and benefits law violations by disappointed employees. Many fast-moving companies are taking few or no steps to protect themselves from this predictable deluge of litigation.

- Employees with numerous job opportunities available to them may be quicker to litigate their disappointment over a broken promise. In the largest jury verdict of kind in several years, a federal jury in San Francisco recently awarded \$2.64 million to a woman who alleged that she was fraudulently induced to move from California to Massachusetts by MicroTouch Systems, Inc. for a position which was already filled when she arrived. *Behne v. MicroTouch Systems, Inc.*, N.D. Cal., No. C97-21012 EAI (jury verdict Mar. 12, 1999) (former employee stated valid claim for termination despite at-will status as result of employer’s false promises); *see also Hord v. Environmental Research Inst.*, No. 98-200481 (Mich. Ct. App. Mar. 17, 1998) (upholding \$170,000 jury verdict in favor of employee who alleged employer fraudulently misrepresented its financial status by providing the employee with outmoded information to induce him to accept employment with the company); *Pearson v. Simmonds Precision Products, Inc.*, 160 Vt. 168 (1993) (employer has affirmative duty of prehire disclosure to prevent statements from being untrue, ambiguous, or misleading); *Meade v. Cedarapids, Inc.*, 164 F.3d 1218 (9th Cir. 1999) (concealment of material facts deemed equivalent of misrepresentation). *Compare Fort Washington Resources v. Tannen*, 901 F. Supp. 932, 942 (E.D. Pa. 1995) (doctor, who was promised \$100,000 per year salary and company stock in the event a new drug application with FDA was successful, failed to state claim of misrepresentation based

⁴ For more information on this trend, please see Chapter 15, *Innovative Hiring Strategies: Building A Winning Team*, and Chapter 28, *Contingent Workers: Independent Contractors And Leased Employers*, in THE 2000 NATIONAL EMPLOYER®.

on representative's assurance that funding was available for the project, where court was not convinced that the representation was untrue because additional monies could be raised).

- In this economy, recruitment of skilled employees will become an increasingly daunting task. The Bureau of Labor Statistics anticipates that the number of high-technology jobs in the United States will rise to 2.7 million by the year 2008—a figure which is nearly double the fewer than 1.4 million in 1998. The supply of high-tech employees, however, will fail to keep pace.
- The Society for Human Resource Management reports a marked increase in recruitment as a priority among human resource executives. To find candidates, companies are resorting to increasingly unorthodox methods. The QTI Group, a staffing agency in Madison, Wisconsin, pays individuals just for completing job applications. A Wisconsin mail-order company offers free bus service and free breakfast at Burger King. (David Brooks, *O Percent* Unemployment*, THE NEW YORK TIMES MAGAZINE, Mar. 5, 2000.) Wall Street firms and consulting houses have actively marketed their work-life initiatives and have sought new audiences among gays and lesbians at second-tier business schools. (Cora Daniels, *Wall Street Says 'Please,'* FORTUNE, Mar. 6, 2000.) The Harris Group, a staffing agency based in Chicago, has arranged for payment of 160 separate \$100,000 signing and retention bonuses on behalf of a single Internet company. (John Fried, *The Way We Work Now: Mar. 5, 2000: Salient Facts: Employment; Help Wanted Really Badly*, THE NEW YORK TIMES MAGAZINE, Mar. 5, 2000.)
- The First Decade 2000 will be the era of the “portfolio career.” The new corporate employee will continue to jump from job to job quickly, each time seeking stock options, more flexible working conditions, and enhancement of skills—in short, a series of perfect jobs. In this regard, it is estimated that the turnover rate for companies in the Silicon Valley is twenty-five percent per year, and that the average thirty-two-year-old has already worked for nine different companies. (Adrian Wooldridge, *Come Back, Company Man!* THE NEW YORK TIMES MAGAZINE, Mar. 5, 2000.) Keeping pace with our economy, this trend is expected to continue over the next decade.
- One study estimates that nearly one-fifth of employees—approximately nineteen percent—were eligible for stock options in 1999, compared to only twelve percent in 1998.

Employers will continue to utilize stock and stock options as a means of compensating their employees. Some experts predict that the use of “golden handcuff” stock option arrangements, in which executive employment agreements provide for the payment of large compensation packages only upon completion of the contract term, will be utilized to retain top executives. (*Golden Handcuffs' Tie Up Talented CEOs*, USA TODAY, Feb. 22, 2000.) Others forecast the use of “clawback provisions,” which require employees who leave a company not only to forego stock options, but also to return some of the proceeds of options previously exercised. (Robert Kowalski, *Whose Stock Is It? With Employee Options, You'd Best Vest to Be Sure*, The Street.com, Mar. 20, 2000.) In contrast, the percentage of companies relying solely on pension arrangements as a means of retaining employees will likely decrease. (Adrian Wooldridge, *Come Back, Company Man!* THE NEW YORK TIMES MAGAZINE, Mar. 5, 2000.)

- Employers will continue to seek innovative methods to retain valuable employees. In an effort to build employee morale, Home Depot currently employs more than 100 Olympic athletes to work alongside its 210,000 employees. (*A Tale of Muscle and Morale: Why Home Depot Employs Olympic Athletes*, NEW YORK TIMES, Apr. 12, 2000.) Ford Motor Company has offered free computers and printers, and discount Internet access, to its 350,000 employees worldwide. SAS Institute, which boasts a turnover rate of less than four percent, provides its employees with on-site day care, a full-indemnity health insurance plan, a thirty-five-hour workweek, and recreational facilities. (Adrian Wooldridge, *Come Back, Company Man!* THE NEW YORK TIMES MAGAZINE, Mar. 5, 2000.) Ernst and Young offers its employees a concierge service. Although health insurance costs to employers are reported to have risen at three times the rate of inflation, many companies not only have refused to pass this cost on to their employees, they are instead enhancing their benefit packages in an effort to retain valuable employees. Likewise, employer enrollment in dental benefits plans and preferred provider organizations has increased notably.
- The boss is no longer the boss. Employees and applicants can find information about bosses on Internet sites. For example, the AFL-CIO sponsors the “Executive PayWatch” Web site, a self-described “‘working families’ guide to monitoring and curbing the excessive salaries, bonuses, and perks in CEO compensation packages.” (See <www.aflcio.org/paywatch/>.) Authority is no longer derived from fear of what the boss can

do. (Michael Lewis, *The Artist in the Gray Flannel Pajamas*, THE NEW YORK TIMES MAGAZINE, Mar. 5, 2000.)

- In the First Decade 2000, employers will see employees demand more attention to their needs as individuals: Thus, employees may insist upon the right to telecommute or upon other flexible arrangements. (See, e.g., *Home Work Pays: How to Sell Your Boss on the Merits of Telecommuting*, WORKING MOTHER, Apr. 2000.) Savvy employers may begin to offer arrangements such as flexible schedules and day care at work as prerequisites of employment. (Cora Daniels, *You Two Go Out: The Boss Will Babysit*, FORTUNE, Jan. 24, 2000.)
- Work spaces in the First Decade 2000 will become less individual and less restricted. Instead, they will be more open, flexible, communal, and personal—to appeal to the young and highly mobile Internet workforce. (*Building Dilbert's Dream House*, NEW YORK TIMES MAGAZINE, Mar. 5, 2000.) Technology will permeate the workplace, yet at the same time, it will gradually disappear into unobtrusiveness, as face-to-face communication—by computer, or hologram, or otherwise—will continue to improve. (Nicolas Stein, *Office Fantasies of the Future*, FORTUNE, Mar. 6, 2000.)
- A shrinking percentage of workers have full-time jobs with benefits. There are more workers on their own, working as consultants, or leased to employers, or working multiple part time jobs. Web sites such as FreeAgent.com match parties seeking independent contractor, freelance, part-time, and moonlighting situations. The issue of whether the new contingent workforce is a natural outgrowth of today's flexible work styles and places, or is instead creating an underclass of workers wholly subordinated and denied basic employment rights by unscrupulous employers, will continue to be hotly debated throughout the First Decade 2000. And the employers who rely upon the services of this new breed of contingent workers will be forced to take painstaking care to maintain their contingent status. See *Wolf v. Coca Cola Co.*, 200 F.3d 1337 (11th Cir. 2000) (discussing proper exclusionary language in benefit plans to deny coverage to contingent workers); *Herman v. Time-Warner, Inc.*, 56 F. Supp. 2d 411 (S.D.N.Y. 1999) (permitting breach of fiduciary suit by Department of Labor against plan fiduciaries for denying access to ERISA-covered benefit plans based upon employers' misclassification as contingent workers).
- Organized labor will continue to take a strong stance with regard to the contingent workforce. The United Auto Workers

have decried the plight of temporary workers, urging that these temporary workers are “paid lower wages with limited benefits or no benefits at all, with no job security and few labor rights”—and has vowed to strenuously oppose the use of temporary workers in positions which should be held by permanent full-time workers. (See “Excerpts from UAW's Proposed 1999 Collective Bargaining Program Presented to UAW's Bargaining Convention, Mar. 28-30, 1999” BNA DAILY LABOR REPORT, Issue 61, p. E-1 (1999).)

- Information-sharing will continue on the Internet by plaintiffs' lawyers and unions who set up Web sites to share information about lawsuits, information discovered, and recruit potential plaintiffs. Thus, a Web site entitled <www.walmartsucks.com> urges potential plaintiffs—and the disgruntled employees among them—to “HELP START CLASS ACTION SUITS AGAINST ANAL MART.” These uses of the Internet will proliferate.

The practical impact of the change in the “loyalty” relationship between employer and employee are:

- Management practices founded on the traditional model of discipline and cause will be obsolete, and management methods will have to recognize the truly reciprocal at-will relationship. The employee will stay because there is a good inducement to stay, not because that is expected or the norm.
- Employers must refine their agreements with future and present employees to avoid making promises they cannot keep. Careful drafting of written agreements is essential, and oral employment agreements will become less common.
- As the courts decide how much an employer must disclose to employees about future business plans and financial status, employers will be obliged to adapt to higher duties of disclosure.

Littler Five: The Expansion of Worker Privacy Rights⁵

The ability to monitor employees increases constantly. Employers are better able to monitor computer keystrokes, e-mail content, Web sites visited, and to listen to voicemail. Many employers also test for alcohol use, and a growing number of employers subject employees to genetic tests to screen for predisposition to specific diseases. Many employers routinely search purses, bags, lockers, and even bodies of their workers. A number of employers use electronic

⁵ For more information on this trend, please see Chapter 21, *Employee Privacy And Individual Statutory Rights*, in THE 2000 NATIONAL EMPLOYER®.

surveillance in workspaces. Employers have adopted workplace rules prohibiting small talk or gossip, and limiting bathroom breaks. Technology will shortly give employers the ability to monitor an employee's physical condition, as they walk through sensors which can read their vital signs. With technology offering tools that will explore every corner of human existence, where will the line be drawn in the workplace between what is "private" and what an employer must know to carry out its business objectives? To what extent will employers be allowed to self-define these limits? When will the limits be set by legislation, court direction, and administrative rule making? Correct answers to these questions will define the human resource and legal departments of the successful employers of the future. Some of these answers exist today and are largely unexpected. For example, scores of U.S. businesses are bound by European privacy standards, and yet are unaware of these obligations. In the first decade, decoding the standards of workplace privacy will often happen in the courtroom. The European Economic Community has adopted standards for computer privacy that are substantially more protective than U.S. standards and must be adhered to by U.S. companies doing business in European Economic Community countries. (See Directive 95/46/EC of the European Parliament and the Council of 23, Nov. 1995.) The Directive provides mandatory minimum protections for individuals with respect to the collection, processing and dissemination of personal data. (Lisa M. Brownlee, Trenite Van Doorne, *E-Commerce and the European Union*, 1st Annual GULC/CLE Advanced Electronic Commerce Institute, Georgetown University Law Center, Dec. 9-10, 1999.) Is your organization covered by these mandatory standards?

- In contrast, the United States' privacy standards are barely keeping pace with international developments. Although new legislation is being introduced in Congress and in the states to limit employee monitoring and to protect confidential information, it is reported that medical histories, speeding tickets, bounced checks, and delayed child support payments are freely available over the Internet. (*It's Time for Rules in Wonderland*, BUSINESSWEEK ONLINE, Mar. 20, 2000.)
- In the interim, the availability of technology has led to employer abuses. In *Saint Barnabas Medical Center*, Case No. 22-CA-22907, 1999 N.L.R.B. LEXIS 582 (Aug. 24, 1999), the employer unilaterally implemented a "composer communication system" throughout its hospital facility. Under the system, nurses were required to wear locator badges which were picked up by sensors located in various places throughout the hospital. The system effectively tracked the nurses' movements throughout the hospital, and these

movements, as recorded, were retained on a computer for up to ten days. Not surprisingly, the union raised concerns about personal and patient privacy, potential disciplinary action, and professional liability.

- Last year, the California legislature approved a bill which would prohibit employers from secretly monitoring electronic mail or other personal computer records generated by an employee. (S.B. 1016) The bill was vetoed by the Governor.
- However, California did adopt a statute prohibiting demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises. CAL. LAB. CODE § 96(k).
- A growing number of companies have begun to utilize genetic testing to screen out applicants who carry genes for certain ailments. Likewise, eighty-one percent of large companies currently require some form of drug testing—a notable increase from the twenty-seven percent who drug tested their employees in 1987. (Barbara Ehrenreich, *Warning: This is a Rights-Free Workplace*, NEW YORK TIMES, Mar. 5, 2000.)
- A growing number of states, including California and New Jersey, prohibit genetic testing for workplace uses. In addition, the courts are increasingly willing to find that genetic testing as a selection device violates the ADA's prohibition against discriminating against individuals who are regarded as having an impairment. The Equal Employment Opportunity Commission has taken the position that genetic predisposition to disease does in fact constitute a protected disability under the ADA. EEOC DIRECTIVE 915.002 (Mar. 15, 1995).

The practical implications for employers loom now:

- Employers may find themselves at odds with their own insurers who create incentives for testing and monitoring, and cost penalties for employers who choose not to test or monitor.
- Employers will face individual and class action claims for invasion of privacy and disability discrimination.
- Employers will have to adopt workplace rules that strike a balance between the employer's need to know and the employee's right to a measure of personal privacy.

Littler Six: The Globalization of Employment Law Issues and Standards — From Immigration Legislation and NAFTA to Multinational Workplace Conduct Policies, Global Considerations are Redefining Employment Law⁶

As the twenty-first century begins, international barriers continue to dissolve in the business world. Greater numbers of domestic businesses have looked to foreign markets for economic competition and prosperity. The number of multinational companies continues to grow very rapidly. Employers are seeing tremendous opportunities abroad. At the same time, employers now face a variety of global employment issues.

American businesses find new markets overseas, and the markets come to them on the Internet. Manufacturing is relocated offshore where labor is cheaper. Highly skilled labor is in short supply in the United States, leading to pressures to change the immigration laws. The next decade will bring new legislation opening up immigration to highly educated and highly skilled workers. It will also bring increased litigation against U.S. companies that locate manufacturing overseas to save labor costs, seeking to impose minimum wage and working conditions standards on those manufacturing operations. As a result, more protective labor law standards will be adopted in Asia and Latin America.

The real lesson of the first decade will be found in the search for “global-standardization of employment policies and procedures.” The international employer will rise in economic stature leading to the promotion of a “corporate” code of values and standards for the workplace. Of course, these will have to comply with native employment laws, but they will continually be influenced by the protective legislation. Policies built to comply with the most restrictive environments will be viewed as safe and socially progressive elsewhere. Moreover, the Internet will provide employers with immediate knowledge of legal and social standards in foreign locations. This in turn will encourage employment law trends to reach legislatures and courts around the world much faster than ever before.

Additionally, globalization envisions the truly international employee. Historically, this has referred to “assignees” who travel to and temporarily work in foreign countries. In the first decade, it will be common for workers to travel to and work in foreign countries for minutes or hours through the Internet. The global virtual worker will

present employers and nations with new employment law challenges which are only now being defined.

- Current immigration laws will continue to lag behind the needs of businesses. For the past several years, Congress has increased the cap on H-1B visa allotments, and each year, the cap is reached earlier. As a result of fierce lobbying by companies in the Silicon Valley, Congress raised the annual limit on H-1B visas from 65,000 to 115,000 for 1999 and 2000. In 1999, that allotment was depleted by early June. This trend has continued in the year 2000.
- Although it is difficult to cross the border into the United States, once inside the country, illegal immigrants essentially are left alone. The Immigration and Naturalization Service reports that deportation arrests dropped to approximately 8,600 last year, down from 22,000 two years ago. Rather than focus its attention on illegal immigrants who are seen as a benefit to American employers in their willingness to accept lower-paying jobs, the INS has elected, as a matter of current policy, to focus its attention instead on those aliens who are a danger to the community. (*I.N.S. is Looking the Other Way as Illegal Immigrants Fill Jobs*, NEW YORK TIMES, Mar. 9, 2000.)
- There is a very real shortage of skilled workers in both high technology and low technology jobs. The percentage of high school students who are enrolling in classes to learn the skilled trades has decreased notably. At the same time, the U.S. Commission on the 21st Century Workforce is addressing the “digital divide” in information technology education, looking to find a way to ensure that skills keep pace with the needs of technology.
- In this decade of low unemployment, more suits will be filed against companies who contract out manufacturing overseas, accusing them of operating sweatshops.
- The fiercely polarized opinions on the impact of the globalization of the American workforce are expected to become even more heated in the First Decade 2000. Since its passage in 1994, there has been an ongoing debate as to whether the North American Free Trade Agreement (NAFTA) has created more and better-paying jobs for American workers, or whether the reverse is true. (*Is NAFTA Creating Higher-Paying Jobs?*, REUTERS, Apr. 3, 2000.)
- Organized labor will begin to embrace the plight of the undocumented worker. The AFL-CIO, which in 1986 supported employer sanctions under the Immigration Reform

⁶ For more information on this trend, please see Chapter 2, *Employment Issues Affecting Multinational Employers*, and Chapter 29, *Immigration: How To Employ Foreign Talent When You Need It And Comply With Federal Immigration*, in THE 2000 NATIONAL EMPLOYER®.

and Control Act for the employment of undocumented workers, has reversed its position. In February 2000, its executive council voted to call for the repeal of employer sanctions, for amnesty for the undocumented worker, and for a massive program to educate these workers about their rights. (David Bacon, *Labor's About-Face; Alien Labour Regulations*, THE NATION, Mar. 20, 2000.)

The practical implications for employers will be:

- International recruiting will become the norm in certain skilled jobs.
- Employers will have to learn more about immigration laws, and immigration compliance will be an important human resources competency.
- Employers will have to design and adopt more sophisticated contracts with employees to address international relocation and potential labor law liabilities under the law of other countries.
- Employers will adopt “terms of engagement” and monitor compliance with these terms by foreign contractors to forestall lawsuits alleging sweatshop use.
- Employers will face local political pressures to train local workers in desirable skills rather than import skilled workers.

Littler Seven: Challenging HR Competencies— Investigations, Training, And Compliance Requirements Become The New Litigation Battlegrounds⁷

During the next decade, lawsuits filed by employees will put the competence of human resources professionals under a microscope. Every accusation of wrongdoing is subject to investigation, and every investigation will be subjected to scrutiny. Was the investigator trained, qualified, and neutral? Was the investigation fair, timely, and complete? Was the person accused given a chance to respond to the allegations? Was there a written report?

Employers are already subject to a variety of training requirements. They must train workers on a myriad of safety rules. They must train employees not to sexually harass each other. The growth in training obligations in the next decade will be phenomenal. Training will no longer be an optional function. Now with the arrival of the affirmative defense requirements to harassment claims, training has become essential. The burden of

employment law compliance will fall primarily on a business’s human resources staff. As the knowledge required for compliance becomes more specialized, human resource professionals must develop more expertise in a broader spectrum of employment laws. Noncompliance will be used as evidence of wrongful intent by the employer. Moreover, proper training will be a key element in defeating claims for punitive damages.

The Internet will radically change training requirements through the introduction of Technology-based-training (TBT). The ability to inexpensively bring employment law learning to manager and employee desktops will invite the question of whether it is negligent to fail to provide such instruction. Already, this theme is common in the opening and closing statements of plaintiff attorneys litigating harassment and discrimination cases.

- Employers who conduct investigations will face liability if the investigations are not competently performed by trained investigators. See *Cotran v. Rollins Hudig Hall International, Inc.*, 17 Cal. 4th 93 (1998) (critical inquiry in sustaining employer’s decision to terminate employee is “whether at the time the decision to terminate his employment was made, defendant[s] act[ed] in good faith and follow[ed] an investigation that was appropriate under the circumstances...”).
- Employers will be liable for failure to train employees not to discriminate against each other or to engage in environmental harassment. See, e.g., *Williams v. Spartan Communs., Inc.*, No. 99-1566, 2000 U.S. App. LEXIS 5776, at *6-8 (4th Cir. Mar. 30, 2000) (absence of training for certain managers and lewd remarks made in training by others called effectiveness of harassment policy into question, precluding summary judgment); *Shaw v. Autozone*, 180 F.3d 806, 812 (7th Cir. 1999) (harassment policy effective where it was distributed to every employee and employer regularly trained managers regarding policy); *Baty v. Wilamette Indus.*, 172 F.3d 1232, 1242 (10th Cir. 1999) (limited training inadequate in light of severe harassment problem); *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d 1026, 1030 (N.D. Ia. 2000) (failure to train supervisors about sexual harassment); *Hooker v. Wentz*, 77 F. Supp. 2d 7534, 757-59 (D.W. Va. 1999) (affirmative defense where company distributed sexual harassment policy and trained its managers on the topic).
- Denying training to employees also may be a form of discrimination. See, e.g., *Thomas v. Eastman Kodak Co.*, 183 F.3d 38 (1st Cir. 1999) (failure to train contributed to showing of

⁷ For more information on this trend, please see Chapter 5, *The Law Of Training Expands*, in THE 2000/2010 NATIONAL EMPLOYER®.

race discrimination). *But see Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 407 (5th Cir. 1999) (denial of training not an adverse employment action under Title VII).

- Employer liability for failure to train may increase during the first decade of the twenty-first century. *See Kolstad v. American Dental Assoc.*, 527 U.S. 526, 119 S. Ct. 2118 (1999) (employer's good faith efforts to comply with antidiscrimination laws—such as by training personnel on what is and is not permissible under applicable laws—relevant to employee's entitlement to punitive damages award).
- Even when an employer provides all training that is required by law, a court may nevertheless find that the employer should also have complied with higher training standards to the extent those standards are common in the employer's industry. Thus, there may be an increase in employer liability for failure to provide training which exceeds the minimum level; instead, there will be a new, higher threshold for training. In this regard, employers may invite negligent training lawsuits if they ignore reasonably foreseeable workplace training needs. *See Board of Cty. Comm'rs of Bryan County, Oklah. v. Brown*, 520 U.S. 397 (1997) (discussing burden of proof in negligent training litigation); *City of Canton v. Harris*, 489 U.S. 378 (1989) (validating the existence of negligent training lawsuits), *limited by Farmer v. Brennan*, 511 U.S. 825 (1994).

As a practical matter, employers must invest in training their managers and employees in order to sustain a minimal level of employment law compliance. Training is essential in the following areas:

- Basic employment law compliance for managers and supervisors;
- Conducting investigations for human resource professionals and managers charged with this duty; and
- Sophisticated employment law compliance for human resource professionals.

Littler Eight: Decoding The Complexity Of Leaves And Benefits—From Leaves Of Absence Rights And Unvested Stock Options To HMO Reviews And ERISA Confusion—The Litigation Floodgates Are Opening⁸

As the working relationship between employer and employee changes, and the compensation and benefits offered to employees change, there will be an explosion of litigation over benefits. Nearly twenty percent of new employment law cases in the year 2000 are projected to involve an interpretation of employee leaves. The numbers will grow until the questions in this rapidly evolving area are settled. Employees are already entitled to a host of different leaves, including the Family and Medical Leave Act (FMLA) and related state statutes, pregnancy disability leave, workers' compensation disability leave, and leave as a reasonable accommodation under the Americans with Disabilities Act (ADA). Employers must understand an employee's rights and an employer's obligations under each leave statute, and must be able to integrate the different requirements under these statutes where they overlap. Employers must also consider the impact these leave laws have on employee benefits, bonuses, attendance policies, and disciplinary determinations. Employees will sue for lost stock options more frequently, claiming that they were terminated so as not to interfere with vesting, or induced to accept options in lieu of pay by misrepresentations by the employer. The use of experts to value employee stock options will become a fixture in employment litigation.

- It is estimated that between seven and ten million employees in the United States currently hold stock options. As option and stock ownership continue to be offered to employees at all levels of the corporate hierarchy, employers will begin to see increased litigation alleging misrepresentation and breach of contract under nonqualified stock option plans. Recently, consistent with a trend that has taken hold throughout the country, two employees of DoubleClick have sued the company for terminating their employment before they could reap the full benefit of their stock options. (Robert Kowalski, *Whose Stock Is It? With Employee Options, You'd Best Vest to Be Sure*, *The Street.com*, Mar. 20, 2000.)
- The federal courts appear to be facilitating such litigation. At least one court has held that once a potential class representative establishes individual standing to sue his

⁸ For more information on this trend, please see Chapter 13, *The Family And Medical Leave Act And Related Parental Rights*, Chapter 14, *Military Leave And Civic Duty Leave*, Chapter 24, *Employee Benefit Plans: Pitfalls In Creating, Modifying, Administering And Terminating ERISA Plans*, and Chapter 25, *New Developments In Employee Benefits*, in *THE 2000–2001 NATIONAL EMPLOYER*[®].

- own ERISA plan, there are no additional constitutional impediments relating to his standing to represent a class of participants or beneficiaries in related plans. *Fallick v. Nationwide Mutual Ins. Co.*, 162 F.3d 410, 424 (6th Cir. 1998).
- The new breed of employees will become increasingly well-educated about the rights and privileges of their employment. For example, as part of an aggressive plan to educate participants, the Department of Labor has published a booklet on its Web site entitled, *A Look at 401(k) Fees*, which teaches employees about the fees which are associated with their retirement plans. (See <<http://www.dol.gov/dol/pwba/welcome.html>>.)
 - Employees also are suing for breach of fiduciary duty when business decisions cause bonus programs and other benefits to depreciate or become worthless. In this regard, the courts have recently held that an employer has an obligation to disclose information to employees so that they may make informed choices about whether or not to retire. See *Bins v. Exxon Co. USA*, 189 F.3d 929, 939 (9th Cir. 1999) (holding that once an employer-fiduciary gives serious consideration to a proposal to change ERISA benefits, it has an affirmative duty to disclose information about the proposed change to all plan participants and beneficiaries to whom the employer knows or has reason to know the information is material), *reh'g granted*, 198 F.3d 1191 (9th Cir. 2000); *Wayne v. Pacific Bell*, 189 F.3d 982, 984 (9th Cir. 1999) (employer-fiduciary had obligation to disclose proposed enhanced early retirement program once it offered this program to employees' union during collective bargaining); *McAuley v. International Business Machines Corp.*, 165 F.3d 1038, 1045-46 (6th Cir. 1999) (serious consideration occurred when proposal was concrete enough to propose to senior management); *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1539 (3d Cir. 1996) ("*Fischer II*") (serious consideration takes place when "(1) a serious proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change").
 - Stock options have received the attention of the Department of Labor, which in a February 12, 1999, opinion letter took the position that the value of employees' stock options should be factored into their regular rates of pay for purposes of determining entitlement to overtime. As the First Decade 2000 progresses, there will be increased pressure on government by employers who urge that the Fair Labor Standards Act, like so many other laws affecting the workplace, is wholly out of step with today's financial reality.
 - Suits against HMO's for negligence and other breaches of duty will greatly increase as employees push for the right to the best healthcare, rather than the most cost effective healthcare. In *Nealy v. U.S. Healthcare HMO*, 93 N.Y.2d 209 (N.Y. Mar. 25, 1999), the widow of an employee successfully sued her husband's HMO for wrongful death based on administrative delays in providing specialized cardiac care. See *In re U.S. Healthcare, Inc.*, 193 F.3d 151 (3d Cir. 1999), challenging an HMO's decision to discharge a mother and her newborn from the hospital twenty-four hours after giving birth; (*but see Danca v. Private Health Care Systems, Inc.*, 185 F.3d 1 (1st Cir. 1999) finding a claim for negligent precertification review preempted by ERISA). The U.S. Supreme Court will have to define the line of demarcation between a claim for benefits under ERISA, and professional negligence in withholding or controlling the availability of treatment.
 - There will continue to be an increase in litigation over leaves of absence as well. *Mora v. Chem-Tronics, Inc.*, 16 F. Supp. 2d 1192, 1230-32 (S.D. Cal. 1998) (recognizing a common law tort cause of action for termination in violation of public policy under the FMLA and state law).
 - There will continue to be efforts made to expand the federal Family and Medical Leave Act. Indeed, several proposals to extend the FMLA already are pending before Congress. These proposals include: the "Family and Medical Fairness Act" (S.B. 201), which would extend coverage to employers of twenty-five or more employees; the "Family Income to Respond to Significant Transactions Act" (S.B. 1355), which is designed to provide paid leave through the unemployment compensation system; the "Employee Pension Portability and Accountability Act" (S.B. 1213), which would require that FMLA leave be treated as hours worked for purposes of pension participation and vesting; the "Family and Medical Leave Improvement Act" (H.R. 91), which among other things, would amend the FMLA to provide eligible employees with the right to take up to twenty-four hours of leave per year to attend their children's school or organizational activities; and the "Family Medical Leave Clarification Act" (S.B. 1530), which would tighten the definition of serious health condition and revise intermittent leave provisions.
- As a practical matter, the explosion in leave benefits and litigation will push employers to take several actions:
- Train human resources professionals on the complex leave laws and compliance;

- provide clear and complete stock option agreements to employees, with valuation provisions and binding arbitration provisions; and
- intervene on behalf of employees to advocate for healthcare coverage.

Littler Nine: The Decade Of Employment Law Class Actions, Retaliation Claims, And ADR⁹

During the next decade, employers should prepare for a substantial increase in two particularly expensive and difficult types of employment litigation: class action claims and claims of retaliation. The upsurge in employment class actions began during the 90s, but class actions then were still exceptional. In the First Decade, class actions will become more common. Flush with victory (and cash) from the successful nationwide class action settlements with the tobacco industry, the plaintiffs' bar will turn its sights to new targets. And what is a more tempting target of opportunity than American employers? Plaintiffs' counsel that lack the resources for class litigation will associate with expert class action counsel to pursue class actions on a joint venture basis. The payoffs can be huge. For an outlay of perhaps \$250,000 to \$400,000 in hard costs (including expert fees) and an investment of time over a two- to four-year period, plaintiffs' counsel can collect attorney's fees of many millions, a rate of return not possible in most lawsuits. Nor is the risk very great, especially for those attorneys who are in the multi-millionaire and billionaire club as a result of actions in other industries.

Technology also has increased the reach of the class action attorney. The Internet greatly assists plaintiffs' counsel, who can set up Web sites to collect information, advertise for potential class members, and create chat rooms. Counsel for a class can communicate with class members by e-mail at very modest expense, and can quickly update and change information being provided. The challenge for employers is a mighty one. Employers must be prepared to confront the need to defend monstrously expensive class claims that may have little merit, and often are not insured.

The other major type of claim will be retaliation claims. Retaliation claims can be supported under a broad variety of statutes, and are relatively easy to assert. Often they are based on nothing more than the fact that an adverse action against an employee occurred after the employee criticized a manager, or some aspect of the employer's operations or practices. Currently, a

quarter of all new lawsuits and charges allege retaliation. Moreover, when juries are unable to find harassment or discrimination, but still have sympathy for the plaintiff, they are willing to believe a claim of retaliation. From the jury's perspective, the employer disliked the allegation that it discriminated. Is it not conceivable that this dislike took the form of retaliation?

Finally, the resolution of employment law claims will continue to flow through ADR procedures. Mediation has become an established tool in the workplace and arbitration is increasingly common. During the First Decade, the U.S. Supreme Court will resolve the conflict between the Circuits regarding the application of the Federal Arbitration Act to employment contracts. If this resolution is to apply the Act as most management employment attorneys forecast, then such programs will dominate the workplace. Ironically, this will likely happen at the same time that class action litigation and retaliation claims reach landslide proportions. Littler currently projects that by 2005 over ninety percent of employers on the Fortune 500 list will have experienced at least one employment law class action claim (and many employers will have had multiple claims).

- Lawyers and employees can share class notices on the Internet. Certain sites hold themselves out as central repositories (<www.notice.com/classactions>). The same site promises to help find people to join class actions and provides a directory of attorneys.
- In consumer class actions settlements are sometimes paid in the form of transferable certificates. There is a secondary market in these certificates. (See <www.certccc.com>.) It is only a matter of time before this vehicle is adapted to employment claims, such as certain wage and hour claims.
- Major discrimination class actions, once certified to proceed as a class action by the court, generally settle. Settlements have occasionally exceeded \$100 million, and often exceed \$10 million. (Lucky Stores, \$107.25 million; Albertson's, \$29.5 million; Home Depot, \$87.5 million).
- Class actions have been allowed in harassment cases, based on a company culture that fosters and maintains a hostile work environment, even though the individual facts of harassment claims differ widely. (Suits against Mitsubishi Motor Mfg., and Ford Motor Company; *Asians Suing Boeing Seek Class Action Status*, SEATTLE POST INTELLIGENCER, Oct. 14, 1999.)
- Class actions have been increasingly used as a device to litigate claims under the wage and hours laws for overtime,

⁹ For more information on this trend, see the retaliation sections in Chapter 6, *Employment Discrimination Law: A Basic Overview*, Chapter 9, *Evaluating And Using Employer-Initiated Arbitration Policies And Agreements: Preparing The Workplace For The 21st Century*, and Chapter 10, *Employment Class Actions: A Tool In Transition*, in THE 2000 NATIONAL EMPLOYER[®].

vacation pay, and other pay. (*Two former AOL Volunteers File Class Action Lawsuit Demanding Back Pay*, DETROIT FREE PRESS, May 26, 1999.)

- Class actions are increasingly used in benefits litigation to pursue claims for severance pay, or claims for benefits foregone because of early retirement.
- Class actions are being used to challenge limits on benefits for mental illness and other issues affecting groups of individuals with disabilities.
- Claims of retaliation are on the upswing. More than twenty-five percent of all charges filed with the EEOC asserted retaliation, and the number has increased dramatically every year for the last eight years.
- Retaliation claims can be sustained even if the employee's original complaint was wrong. The employee need only have a good faith and reasonable belief in the merits of his claim.
- Making complaints about managers, the employer, coworkers, or the workplace is perceived as "reversing the power curve," transporting the employee into a position of relative invulnerability relative to the employer, who may feel prevented from pursuing legitimate discipline.

In the face of this trend, employers can take certain practical steps:

- Listen closely to employee complaints and take active steps to audit legal compliance so that there is no fertile soil in which a class claim can take root. Training programs for managers and employees are essential.
- Prepare for major litigation by strategically planning for the possibility. Anticipate the type of evidence needed and build prelitigation documentation.
- Educate managers and HR professionals about particular contexts in which retaliation claims are likely to occur. Training and documentation of employees on a separate antiretaliation policy would be helpful.
- Rigorously enforce requirements to document performance issues, so that documentation of a performance problem is less likely to start after an employee has made a possibly protected complaint.
- Train HR professionals to undertake appropriate investigations of retaliation claims in a thorough and timely fashion.

Littler Ten: The "New" New Employment Law Thing — Identifying And Preparing for the Unknown

In the next decade, we predict with absolute certainty that there will be entirely unforeseeable events that will profoundly affect the way we work, and the specific laws regulations that apply to the workplace. In 1990, the future of employment and labor law was seen based on the pace of change that then existed. Today, the rate of change has dramatically increased with employment law traveling at the speed of the Internet. New technology, new communication patterns, new definitions of work, and new work arrangements are only some of the forces which cloud our view of what the First Decade promises. Within an environment of 24/7 reinvention, the impact of small changes can be disproportionately large and essentially unpredictable. Speech by e-mail has completely changed the evidence patterns now experienced in employment law litigation. Development of software that can recreate deleted computer documents has again changed discovery patterns in employment litigation. It is now a necessity to have a "cyber-policy" to define the use of computers and the Internet in the workplace. Ten years ago, many of these obvious developments were not on the radar scope.

It is possible for employers to build systems for the unpredictable. Time and resources can be allocated without linking it to an immediate purpose. In fact, not to make such an allowance will almost certainly condemn a legal department or human resources group to exhaustion. Last minute changes will be needed, and conflicting priorities will be common. Meanwhile, expecting the unexpected will force an extra level of awareness within the employer for important changes that are almost certain to occur. A simple task to reaffirm known trends and define new ones will be to do an annual survey of expected issues and claims for the next year. To assist in this process we urge your review of the self-audit provided in Chapter 19 of *THE 2000 NATIONAL EMPLOYER*[®].

Littler Eleven: Increasing Workplace Safety Requirements—From Violence Prevention And Ergonomics Regulations To The Challenge Of Pseudoscience In The Workplace, Safety Will Be A Growth Industry¹⁰

Each year, legislation, regulation, and litigation are increasing the responsibilities of employers. Whenever a workplace fatality occurs, the governments agencies affected review the safety

¹⁰ For more information on this trend, please refer to Chapter 31, *Addressing Employee Concerns Over Health And Safety Issues In The Workplace*, and Chapter 32, *Fed-OSHA Pursues Expansive Agenda—Industry Critics Prepare For Compliance Challenges*, in *THE 2000 NATIONAL EMPLOYER*[®].

procedures (or lack of them) that existed at the job site. Given the understandable public sympathy for injured or dead employees, employers must understand that there are no practical political or emotional barriers to the imposition of further safety regulations by governments. Where injury or death occurs, additional government regulation is virtually certain to follow.

Workplace safety litigation is also driven by an undisciplined use of scientific ideas. This pseudoscience poses grave new demands on employers and their resources. Worker safety issues will increasingly challenge employers to keep up with technological changes, and bring the benefits of advances into the workplace. In the coming years, employers will face more responsibility for ergonomic safety, by engaging in medical monitoring, workplace adaptations, and changes in the way work is performed. These changes will come home with the employee, as increasing numbers of workers telecommute part time or full time. The responsibility to protect workers from danger will continue to give rise to grave concerns about electromagnetic radiation exposure (particularly with cellular telephones). Scares about clusters of particular diseases, exposure to volatile hydrocarbon compounds, and the diagnosis of rare forms of cancer in the workplace will lead to class action and individual claims in which the roles of scientific experts, and the distinction between tested theory and untested supposition, will be a central issue.

- The Occupational Safety and Health Administration of the U.S. Department of Labor (Fed-OSHA) has published a proposed rule to set a general industry standard on workplace ergonomics. The initiative is expected to be completed in the year 2000, and promises to make a difference for almost all employers. Once adopted, states with certified OSHA programs will be obliged to adopt standards that at least meet the OSHA standard. The new standard will apply to a broad variety of activities at work that are reasonably likely to cause or contribute to a musculoskeletal disorder.
- OSHA has recently clarified that for work at home, apart from home based manufacturing, the Agency will not conduct inspections of employees' home offices, and will not hold employers liable for employees' home offices and does not expect employers to inspect employees' home offices, and will engage in only limited enforcement activity in this area. (Directive CPL 2-0.125, Feb. 25, 2000) As the proportion of the population who telecommute increases, there will be more pressure on OSHA to undertake some form of regulation of the home office environment. State occupational safety and health agencies may lead the trend, particularly in states with large populations of telecommuters.

- Workplace violence continues to be a serious challenge for employers, who necessarily assume greater and greater responsibility to protect their employees from other violent employees or members of the public. Workplace homicide, assault, and rape continue to be major problems for most employers. The efficacy of effective preventive measures and "zero tolerance" policies and special "soft-exit" programs has been proved by the United States Postal Service, which instituted strong measures in 1995, dramatically decreasing the number of incidents. Employers have duties under the general duty clause of Fed-OSHA, which has issued specific guidelines for healthcare workers. In the coming decade, it is likely that guidelines will be extended to other high risk industries, such as certain retail establishments prone to Type I violence (violence from members of the public with no legitimate relationship to the employer).
- A five-year study by Wireless Technology Research reached somewhat inconclusive results in 1999 about the correlation between cancer and cell phone use. The results only suggested a lack of correlation, so further studies will continue in the U.S. and overseas. Misleading press reports of portions of the data fuel concerns—whether or not well-founded—that use of these devices is dangerous. (Brian Ross, *Wireless Worries?* ABCNEWS.com, Oct. 20, 1999.) When such a safety concern exists, it will result in a spate of workers' compensation claims against employers.
- More and more employers will be subject to claims that particular work activities subjected employees and their unborn offspring to danger *in utero*. See, e.g., *Dimino v. New York Trans. Auth.*, 64 F. Supp. 2d 136 (E.D.N.Y. 1999) (employer properly denied employee's request to return to regular duty after employee requested light duty based on her concern for her fetus); *Duncan v. Children's Nat'l Med. Ctr.*, 702 F.2d 207 (D.C. Cir. 1997) (pregnant employee who refused to work after being denied transfer from position entailing some radiation exposure had no wrongful termination claim where employee failed to take advantage of employer's radiation exposure program, which included the option of applying for leave); *Snyder v. Michael's Stores, Inc.*, 16 Cal. 4th 991 (1997) (exclusivity provisions of workers' compensation act do not bar tort action filed on behalf of a minor who was exposed, *in utero*, to toxic chemicals, at the mother's workplace).
- Employers may find themselves subject to criminal penalties for Fed OSHA-related offenses. California currently has legislation in place which mandates the imposition of

significant penalty assessments on nearly all fines imposed as a result of a finding of criminal liability. (A.B. 1127.) In the twenty-first century, other states may follow suit.

The practical implications of this trend will be substantial:

- Workers' compensation costs will continue to rise, and certain kinds of claims will be catastrophically expensive because of the scientific experts needed to defend them.
- Employers will be obliged to monitor workplace safety more closely, and to assume greater responsibility for training and monitoring programs.
- Employers will increasingly discipline employees for unsafe work practices, even where the only person at risk is the employee himself.
- Employers will aggressively train employees and take other preventative steps to protect employees from workplace violence.
- Employers will hire more specialists in workplace safety and ergonomics.

Practical recommendations for addressing the challenges of the Littler Eleven:

- Conduct an employment law audit of your organization and specifically review each of the above trends for its applicability.
- Consistent with attorney-client privilege, rate each of the trends from one to five (high to low) regarding its litigation risk for your organization. Allocate internal resources based on the above rankings.
- Institute a Cyber-Policy and corresponding technology-based employment law training before the end of 2000.
- Conduct a failure analysis of your HR compliance readiness. This can be done by modeling an employee complaint of retaliation and reviewing how it would be handled and defended by your organization.
- List the Littler Eleven on Microsoft Outlook or comparable computer program for a review reminder each twelve months. At these intervals simply review of the list and ask whether your experiences match the predicted developments and what prior defense measures were instituted. Then incorporate the results of this exercise into your planning and budgeting activities for the next year.

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