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Perspectives on legislation, regulation and litigation

Hot Topics and Current Developments in Labor and Employment Law in 2007

How your employees, and their
lawyers, can hunt you down and
destroy your bottom line and what
you can do to stop it

Marc A. Antonetti



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Bridging Business and Government

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PREFACE

Of all the issues that keep corporate executives and general counsel awake at night, few are more challenging than the employer-employee relationship in today’s workplace. The legal environment governing the employment relationship has become increasingly complex, resulting in greater uncertainty and unexpected consequences. Managing in this environment is not for the faint of heart.

In this *Briefly*, the author, Marc Antonetti, walks the reader through the landscape of laws governing the employment relationship and offers practical advice for avoiding costly mistakes. The workplace has become even more hazardous with the expansion of electronic data and the new rules of federal procedure regarding discovery of electronically stored information. Mr. Antonetti also alerts the reader to developing issues in the courts, the agencies, and Congress that will be important to watch in 2007.

Like all other publications of the National Legal Center, this monograph is presented to encourage greater understanding of legal issues, legal procedures, and the law. It is intended to enlighten its readers through the thought, experience, and knowledge of others. The views expressed in this monograph are those of the author and do not necessarily reflect the positions of the advisers, officers, or directors of the National Legal Center.

This publication is presented purely as an educational public service. This monograph is for general information and should not be used as a substitute for legal consultation on a specific matter.

Richard A. Hauser

President, National Legal Center

INTRODUCTION

The challenge in writing about hot topics in labor and employment law for the busy executive is to fairly describe the legal hazards in today's workplace without resorting to a footnote-laden legalistic summary of the law, as lawyers are prone to do. This is especially hard when one considers that labor and employment law presents a more fluid, complex, and challenging legal framework than perhaps any other area of the law.

Of the fifty titles in the United States Code, laws commonly applied to the employment relationship (in the private sector alone) can be found in at least ten titles, including one entirely devoted to "Labor," title 29. The laws most commonly associated with employment litigation, however—those statutes that make most types of discrimination in employment unlawful—are not even in title 29. Rather, the Civil Rights Act and the Americans with Disabilities Act are located in title 42—"Civil Rights." Moreover, the Railway Labor Act is in title 45—"Transportation," while the Uniformed Services Employment and Reemployment Rights Act is in title 38—"Veterans."

Of course, the federal statutory framework does not even begin to cover the landscape of potential sources of the laws governing the employment relationship. Indeed, a number of federal agencies have regulations, internal procedures, opinion letters, and informal guidance that govern how workers may be treated by their employers. An encounter with a litigious employee could involve proceedings before, or visits from, the Office of Federal Contract Compliance Programs, the Occupational Safety and Health Administration, the National Labor Relations Board, the Civil Rights Division of the Department of Justice, the Equal Employment Opportunity Commission, the National Mediation Board, and the Wage and Hour Division of the Department of Labor.

The federal government, however, does not have a monopoly on the regulation of all labor and employment issues. An employer must multiply all of the federal laws, regulations, and agencies by the number of states, and many of the counties and cities in those states, in which it does business to

get a true picture of all the statutes and regulations with which it must comply. Unfortunately, the federal and state systems do not precisely align with each other. For example, many of the state and local laws and regulations confer rights on employees that generally are *in addition to* those provided under federal law, including rights to workers' compensation benefits.

Finally, and for good measure, on top of the myriad of federal and state statutory and regulatory provisos is the common law of each state. For example, employees can bring claims for breach of contract, negligent hiring and retention, defamation, tortious interference with contract, and wrongful termination.

Given the legal landscape, it is a wonder that companies hire anyone at all, or manage to stay in business. This monograph will provide you with a strategic approach to addressing labor and employment issues, while discussing how this strategic approach fits in with current trends and hot issues in labor and employment law, and offering insights along the way as to what an employer might do to prevent being stuck in a difficult, and expensive, situation.

THE PERSPECTIVE OF THE PLAINTIFF AND THE PLAINTIFF'S LAWYER

If you are a chief executive officer, general counsel, or manager of a corporation, your primary responsibilities are to maintain and increase profitability, productivity, and creativity while enabling front-line managers that report to you to do their jobs effectively. An employee's status, therefore, is evaluated by what they do to enhance these areas. Decisions about hiring, promotion, and retention are influenced, if not determined, by what front-line managers conclude about how each employee enables them to do their job and, as such, increase the company's overall bottom line.

Such an approach seems perfectly reasonable, unless, of course, you are an employee who is adversely affected by a company's decision.

Typical employees who suffer an adverse employment action will rarely admit, even to themselves, that they might not have been as "good" as the person who was hired, promoted, or retained. Instead, they will be prone to see decisions affecting them as part of the unfair practices of a company more concerned about making money than the people that work for it, or even as part of a discriminatory or retaliatory scheme to exclude them from employment. The employee, therefore, will be tempted to see an adverse employment decision as emanating from an improper motive.

Moreover, an adverse employment decision affects a real person. The terminated or demoted employee likely has a family to support. There may be real anxiety, want, or fear pushing an employee to seek money from his or her former employer, especially if they are not readily able to find another job.

When one combines an unrealistic self-assessment with the perception of an improper employer motive and economic anxiety, it is easy to understand that the employee may be highly motivated to seek assistance from a state or federal agency, or worse, from the company's perspective, a plaintiff's attorney.

The instant an employee retains counsel, the likelihood of a more expensive outcome occurring than if the company had independently worked out an amicable resolution with the employee prior to termination, no matter how the matter turns out, is almost assured. The increased expense occurs for a number of reasons. First, and foremost, perhaps, is that when an employee retains counsel, in addition to the employee, the plaintiff's lawyer also will want to be paid. Second, if the employee has a lawyer, the company will need a lawyer. Defense lawyers, even relatively inexpensive ones, cost a lot of money. It is easy to say "not one cent in tribute" and "millions for defense." This principle is a bit harder to bear for even the most profitable of companies, however, when reality, in the form of monthly legal bills, begins to set in.

In this regard—and in a bit of a "don't shoot the messenger" self-serving observation—it is important to keep in mind that a defense lawyer will not be the one to determine whether a case costs a great deal of money. Indeed, when litigating with employees, or former employees, honest defense counsel, when asked how much a case will cost, can only say this: "It depends." He or she cannot reliably predict how much the case will cost to take to trial, only what he or she (and his or her law firm) can do to keep the expenses down. The employee's lawyer has it almost entirely within her or his power to determine how much work will need to be invested by the company and its counsel in the case. This is because discovery is almost invariably the most expensive part of litigation, and the employee can attempt to discover a great deal about the employer. Moreover, as discussed below, two recent developments—the new Federal Rules of Civil Procedure that address electronic discovery and the Supreme Court's expansive reading of what conduct constitutes retaliation—will have the effect of dramatically increasing the potential expense of litigating even a single plaintiff employment case.

What your defense lawyer can predict about case expense is this: plaintiffs' lawyers generally work on a contingency basis, which is to say, they do not get paid unless they get something for their client. The longer a case goes on, the more the plaintiffs' attorneys will have invested in a case, and the less motivated they will be willing to accept—and the less willing they will be to convince their client to accept—anything other than a handsome settlement. Knowing this, savvy employers will not have an emotional reaction to the fact that they have received an initial demand letter or been

sued; rather, they will know that one of the best times to try and settle a case is right at its outset, before the plaintiff's lawyer has invested a great deal of time or effort in the case. One plaintiff's lawyer told the author that he measures success by how *thin* his file is when the case is ultimately settled. The experienced plaintiff's lawyer knows that the more time he or she spends on a case, the more value has been invested in it and the greater the risk the lawyer, and not his or her client, is personally taking on the case.

If, however, despite one's best effort, a case cannot be settled soon after its filing, it is important that the employer play a perfect game when responding to discovery. Plaintiff's counsel knows that, although his or her risk increases with every hour the case goes on, so does the expense the employer bears, and the greater the likelihood that the employer will make a mistake, especially in discovery, that will allow the case to get to a jury. Moreover, plaintiff's counsel knows that if a case gets to a jury, it most likely will consist of a jury of the *employee's* peers.

Consider the likely jury pool: almost everyone has been an employee. Many people have been laid off, terminated, or passed over for a job. At some basic level, most people want the employee to have had a second or third chance because they would like to have a second or third chance with their own employer if their job were in jeopardy. Everyone instinctively expects that the employer, an organization worth millions, if not billions, of dollars, is organized, efficient, and careful, and thus will be able to easily produce clear, unequivocal, accurate documentation about why an employee has been adversely impacted by a decision. Although not required under the employment at-will doctrine, people will expect employers to have been *more* than fair with their employees.

Knowing how the plaintiff and his or her lawyer think, and the environment in which any case will be tried, will bring the importance of a number of recent developments into crystal clarity.

HOT TOPICS

A. The Supreme Court Reworks the Test for What Constitutes Retaliation

Retaliation claims continue to prove to be a thorny issue for employers under state and federal employment law. Under traditional retaliation jurisprudence, if an employee complains of unlawful conduct—“protected activity”—it is, in turn, unlawful for the employer to take adverse action against the employee because he or she made the complaint.

Last year, the Supreme Court did not make things easier on employers with its decision in *Burlington Northern and Santa Fe Railway Co. v. White*.¹ In *White*, the Court considered the proper test for evaluating title VII retaliation claims as well as how one might determine what constitutes retaliatory employment action. In reaching its decision, the Court was virtually unanimous, with a lone justice, Justice Samuel Alito, concurring in the judgment.

The issues, as framed by the Court, were:

Does [title VII’s] provision [that prohibits employers from “discriminat[ing]” against an employee who opposed an unlawful employment practice] confine actionable retaliation to activity that affects the terms and conditions of employment? And how harmful must the adverse actions be to fall within its scope?²

In answering these questions, the Court ultimately found that the relevant standard focuses on whether the employer’s actions “would have been materially adverse to a reasonable employee or job applicant.”³ In addition, the employer’s actions must have been harmful to the point that they could dissuade a reasonable worker from making or supporting a charge of discrimination.⁴

¹ ___ U.S. ___, 126 S. Ct. 2405 (2006).

² *Id.* at 2408.

³ *Id.* at 2409.

⁴ *Id.*

The case before the Court involved a female employee, White, who worked at the employer’s rail yard, primarily as a forklift operator. White, originally hired in June 1997 as a track laborer, had expressed an interest in being a forklift operator. When the position became available shortly after she was employed, she was assigned to the forklift operator position.

White was the only female employee in her department. A few months after she had been employed, in September 1997, she complained that her supervisor had made inappropriate remarks to her and that, in his view, “women should not be working in the Maintenance of Way department.”⁵ Following an investigation, the company required the supervisor to attend sexual harassment training and suspended him for ten days. The company also removed the employee from forklift duty and returned her to the position she had first occupied—a track laborer—on the grounds that a more senior person should have the less arduous and cleaner job of forklift operator.⁶

The employee then filed a charge of discrimination with the EEOC, complaining that she had been reassigned based on unlawful gender discrimination and in retaliation for having complained about her supervisor’s actions.⁷ She later filed a second retaliation charge alleging that she had been placed under surveillance by her supervisor. A few days after the second charge was filed, her immediate supervisor claimed White had been insubordinate. Another supervisor suspended her immediately without pay. She was suspended for thirty-seven days, over the Christmas holidays and without pay, for allegedly being insubordinate to her new supervisor.⁸ White then filed a third charge alleging retaliation based on the suspension.⁹

White also invoked the company’s internal grievance procedures. Burlington conducted its own investigation and concluded that White had not been insubordinate. Accordingly, she was reinstated, with thirty-seven days of back pay.¹⁰ In the lawsuit that followed, a jury awarded White \$43,500 in compensatory damages. Burlington appealed and a panel of the Sixth

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Circuit reversed the award. However, in *en banc* review, the full Sixth Circuit vacated the panel's decision and affirmed the district court's judgment in favor of White.¹¹ Burlington, in turn, appealed the case to the Supreme Court.

The Court first addressed whether there must be "a close relationship between the retaliatory action and employment" or whether the plaintiff must show only that the employer's challenged action would have been material "to a reasonable employee," which means that the employer's action would dissuade the reasonable worker from making or supporting a charge of discrimination.¹²

After analyzing the statute, the Court first concluded that the "scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harms."¹³ The Court acknowledged that the anti-retaliation provision does not protect employees from all retaliation, but only "from retaliation that produces an injury or harm."¹⁴ Thus, the retaliation must be "materially adverse" such that a reasonable worker would be dissuaded from bringing a charge.¹⁵ Although the Court reasoned that the inclusion of a "reasonableness" requirement would assure that trivial slights would be excluded, it also emphasized that the "significance of any given act of retaliation will often depend upon the particular circumstances."¹⁶ In other words, the relevant standard focuses on the challenged action and "the perspective of a reasonable person in the plaintiff's position."¹⁷ Under this standard, the Court upheld the jury's finding that a thirty-seven-day suspension without pay constituted retaliation.¹⁸

Justice Alito, concurring, agreed that a thirty-seven-day suspension without pay could constitute retaliation.¹⁹ However, Justice Alito, in disagreeing with the Court's analysis of what constitutes retaliation, observed that the

¹¹ *Id.* at 2410.

¹² *Id.* at 2410-11.

¹³ *Id.* at 2414.

¹⁴ *Id.*

¹⁵ *Id.* at 2415.

¹⁶ *Id.*

¹⁷ *Id.* at 2416.

¹⁸ *Id.* at 2418.

¹⁹ *Id.* at 2421 (Alito, J. concurring).

majority's "conception of a reasonable worker is unclear."²⁰ Indeed, as Justice Alito observed:

[T]he majority's test is not whether an act of retaliation well might dissuade the average reasonable worker, putting aside all individual characteristics, but rather, whether the act well might dissuade a reasonable worker who shares at least some individual characteristics with the actual victim. The majority's illustration introduces three individual characteristics: age, gender, and family responsibilities. How many more individual characteristics a court or jury may or must consider is unclear.²¹

Justice Alito's concerns should be shared by any employer that is required to defend a retaliation claim, precisely because so many factual considerations, the types of factual considerations that make summary judgment difficult to obtain, are potentially at play in the Supreme Court's standard.

B. Retaliation Challenges to Settlement Agreements and the Breadth of Waivers

Retaliation claims also have been implicated in what one might think is an unlikely context—the settlement of claims. In this regard, a recent Maryland federal case could prove to be somewhat controversial. In *EEOC v. Lockheed Martin Corp.*,²² the United States District Court for the District of Maryland addressed whether a proposed release offered in exchange for a severance package could itself constitute unlawful retaliation.

The court first found that Lockheed's requirement that an employee dismiss her EEOC charge in order to get a severance package was retaliatory. According to the court, to condition the receipt of a benefit on the dismissal of an EEOC charge presents the employee with a "Hobson's choice."²³ It found that Lockheed could not grant severance benefits only to those

²⁰ *Id.*

²¹ *Id.*

²² 444 F. Supp. 2d 414 (D. Md. 2006).

²³ *Id.* at 419.

employees who refrain from engaging in protected activity.²⁴ Accordingly, it granted summary judgment in favor of the EEOC on this issue.

Moreover, the court found Lockheed's release language (language that many might have considered to be relatively standard) to be "facially retaliatory" under a variety of anti-discrimination laws.²⁵ In what the court stated was an issue of "first impression" in the Fourth Circuit, it found that a release that applied to all "claims and charges" and that barred both monetary relief and "other remedies" was broad enough to suggest that signatories to the release did not have the right to file EEOC charges. This would, the court reasoned, interfere with the EEOC's enforcement of the anti-discrimination laws.²⁶ Thus, summary judgment also was granted to the EEOC because the release was "facially retaliatory."

Employers should carefully review any standard release language they may be using to determine whether it would run afoul of the *Lockheed* case, especially those employers based in Maryland and the Fourth Circuit.

The *Lockheed* case may prove to be the catalyst for a broader review of whether separation agreements can constitute retaliation. In this regard, it should be noted that one of the cases relied on in *Lockheed*,²⁷ *EEOC v. SunDance Rehabilitation Corp.*,²⁸ was recently reversed by the Sixth Circuit.²⁹ Much like the situation in *Lockheed*, the release in *Sundance* required the employee to agree "that she will not institute, commence, prosecute or otherwise pursue any proceeding, action, complaint, claim, charge, or grievance against Company or any other released parties in any administrative, judicial or other forum whatsoever with respect to any acts or events occurring prior to the date hereof..."³⁰

In a two-to-one decision, the majority of the Sixth Circuit noted that such language might not be enforceable, "but its inclusion in the Separation

²⁴ *Id.*

²⁵ *Id.* at 420.

²⁶ *Id.* at 421.

²⁷ See *id.* at 417, 420, 421 (citing and discussing the district court's decision in *EEOC v. SunDance Rehabilitation Corp.*, 328 F. Supp. 2d 826 (N.D. Ohio 2004).) Indeed, the Maryland district court noted that because the release included EEOC charges within its scope, the case was "indistinguishable" from *Sundance*. 444 F. Supp. 2d at 421.

²⁸ 328 F. Supp. 2d 826 (N.D. Ohio 2004).

²⁹ 466 F.3d 490 (6th Cir. 2006).

³⁰ *Id.* at 493 (emphasis added by court).

Agreement does not make [the offering of] that Agreement in and of itself retaliatory."³¹ The decision analyzed the case under a traditional retaliation analysis, which required a showing that the employee engaged in protected activity, that the employer knew of the protected activity, that the employer "thereafter took an adverse employment action," and that there is a "causal connection between the protected activity and the adverse action."³² The court found that, unlike the situation in *White*, the employee had not suffered an adverse employment action.³³ The court also noted that there was no evidence that the employer did not pay her severance because she had expressed opposition to an unlawful employment practice, and, thus, the EEOC had failed to establish causation.³⁴

The dissenting judge disagreed with the court's analysis, stating, "[a]ny act by an employer which interferes with or chills a protected right is ... contrary to public policy and in violation of the anti-retaliation provisions of the several statutes involved."³⁵ Between the *Lockheed* and *Sundance* decisions, there certainly is room for argument about the validity of many separation agreements.

Retaliation is not the only issue presented by separation agreements. Employers must also consider whether certain statutory rights can even be waived. For example, the Fourth Circuit's 2005 decision in *Taylor v. Progress Energy, Inc.*³⁶ addressed the Department of Labor's regulations regarding the Family and Medical Leave Act ("FMLA"). Under the Labor Department's regulations, "[e]mployees cannot waive, nor may employers induce employees to waive, their rights" under the FMLA.³⁷ The Fourth Circuit reversed the district court decision and instead found that, just as there can be no waiver of rights, prospectively or retrospectively, under the federal Fair Labor Standards Act, there can be no waiver of FMLA rights absent prior approval by the Department of Labor or a court.³⁸ Notably,

³¹ *Id.* at 501 (emphasis in original).

³² *Sundance*, 466 F.3d at 501.

³³ *Id.* at 502.

³⁴ *Id.* at 502-03.

³⁵ *Id.* at 503 (Cohn, D.J., dissenting).

³⁶ 415 F.3d 364 (4th Cir. 2005), rehearing granted and vacated, 2006 U.S. App. LEXIS 15744 (June 14, 2006).

³⁷ 29 C.F.R. § 825.220(d).

³⁸ 415 F.3d at 369-71. *But see* *Faris v. Williams WPC-1*, 332 F.3d 316 (5th Cir. 2003) (holding that the relevant DOL regulation applied only to prospective waivers of rights of current employees and that former employees could waive their rights). A recent district

the Fourth Circuit recently (June 14, 2006) granted rehearing and vacated its decision in *Taylor*, likely because the Department of Labor sought to intervene (albeit on an untimely basis) in the case.³⁹ As of this writing, the Fourth Circuit has not issued a revised opinion and *Taylor* remains a case to watch in 2007.

C. The Use of Electronic Systems

Technological change and advances continue to affect the employment relationship. These technological advances potentially bring new responsibilities to employers to monitor their employees' electronic activities and act upon information garnered through such monitoring, creating fertile ground for future litigation. Indeed, although the benefits of technology far outweigh the difficulties it can create, being mired in a lawsuit involving technological issues may have the company's outside counsel pining for a warehouse full of documents to review.

The law has evolved, albeit belatedly, to address the Information Age. Last December, the new Federal Rules of Civil Procedure, which are discussed at greater length below, were implemented to specifically address electronic discovery. With these new rules, new and somewhat daunting problems will confront employers in their defense of litigation initiated by their employees. These problems are discussed in Section F below. In addition to the substantial issues presented by the Federal Rules, technology also has proven to be a way in which employees can create potential liabilities for their employers.

One recent New Jersey case presents a cautionary tale. In *Doe v. XYZ Corp.*,⁴⁰ an employer was sued for negligence by an employee's wife for the employee's posting of pictures of the wife's minor daughter, and the employee's stepdaughter, in nude or semi-nude positions. The employee was arrested on child pornography charges. Significantly, in the years prior to the employee's arrest, the employer was aware that the employee had

court decision followed *Taylor* instead of *Faris*. *Dougherty v. Teva Pharmaceuticals USA*, Civ. Action No. 05-2336, 2006 WL 2529632, at *7 (E.D. Pa. Aug. 30, 2006).

³⁹ The Fourth Circuit referenced the *Taylor* case, and the Department of Labor's tardy effort to intervene, in *LaRue v. DeWolff, Boberg & Assocs.*, 458 F.3d 359 (4th Cir. 2006). The court observed that the "Secretary's belated entry" into the *Taylor* case was "a discourtesy both to the parties in that case and to the court." *Id.* at 361.

⁴⁰ 887 A.2d 1156 (N.J. App. Div. 2005).

been visiting pornographic Web sites and was doing so even after having been warned by his employer to stop. On a number of occasions, despite being aware of the activity, the Company declined to follow up on such knowledge.

The court evaluated the employer's potential liability to the employee's wife, stating:

[T]he following issues must be addressed: (1) whether defendant [the employer] had the ability to monitor Employee's use of the Internet on his office computer; (2) assuming defendant had the ability to do so, whether it had the right to monitor Employee's activities; (3) whether defendant knew, or should have known, that Employee was using the office computer to access child pornography; (4) whether defendant had a duty to act to prevent Employee from continuing his activities; and (5) whether any failure to act on the part of defendant proximately caused harm to Jill [the child].⁴¹

The court resolved the first four questions against the employer, remanding only the fifth question to the trial court for a determination on whether the employer's failure to take appropriate action was the proximate cause of any actual harm to the child.⁴²

The court's discussion of the first four components of the test, however, warrants close attention. For example, the court criticized the employer for instructing one of its employees who reported the activity "not to investigate Employee's Internet usage again" and for not actually exploring the Web sites that it identified the employee had visited.⁴³

The court also found that the employee did not have a privacy interest that "trumped defendant's right to monitor his computer use at work."⁴⁴ Indeed, the court specifically noted that each employee had been required to sign an acknowledgment that improper use of the company's electronic systems could be grounds for discipline. The court therefore rejected the employer's privacy argument, stating that there was nothing preventing the employer

⁴¹ *Id.* at 1164.

⁴² *Id.* at 1170.

⁴³ *Id.* at 1164.

⁴⁴ *Id.*

from accessing the employee's computer to "determine if he was using it to view adult or child pornography."⁴⁵

The court also concluded that the employer had a reason to investigate what the employee was doing. The reports it received of inappropriate computer usage were not based on "gossip," but instead "on credible, first-hand information."⁴⁶ Thus, the court held, "defendant was on notice of Employee's activities and was *under a duty to investigate further*."⁴⁷ The court went further concluding that because the possession and viewing of child pornography is a crime under both state and federal law, "defendant *had a duty to report Employee's activities to the proper authorities and to take effective internal action to stop those activities, whether by termination or some less drastic remedy*."⁴⁸

Most employers now have the ability to, and do, track Internet usage. While some personal use by employees cannot be avoided, it also stands to reason that where obvious inappropriate usage is being engaged in by the employee, especially the viewing and use of illegal child pornography, the *Doe* case certainly suggests that turning a blind eye to such activity can lead to litigation, if not liability.

⁴⁵ *Id.* at 1166.

⁴⁶ *Id.* at 1167.

⁴⁷ *Id.* (emphasis added).

⁴⁸ *Id.* at 1167-68 (emphasis added).

D. Collective Actions under Federal and State Law—How Five Minutes Here and There Can Make a Big Difference in Wage and Hour Litigation

One of the most publicized areas of employment litigation in recent years involves collective actions under the federal Fair Labor Standards Act ("FLSA").⁴⁹ Although the FLSA is nearly seventy years old, many of its provisions are counter-intuitive and the FLSA continues to prove difficult for employers to administer. Moreover, the difficulty in attempting to comply with the FLSA is compounded by the simultaneous application of state laws, which often have different requirements and impose different, and sometimes more substantial, remedies than the FLSA.

If any additional incentive to monitor closely wage and hour compliance were necessary, more than a few recent verdicts and settlements in the wage and hour context involving prominent corporations have ranged from \$25 million to nearly \$100 million. In addition to claims brought by private plaintiffs, the Wage and Hour Division and state enforcement agencies have brought claims ultimately involving large sums of money. In 2006, the Wage and Hour Division reported that it collected \$172 million for 246,000 employees.⁵⁰

Recent wage and hour litigation has focused on three general areas: the misclassification of employees, meal and rest periods under state law, and failure to pay for all hours worked.

By way of background, in broad terms, the FLSA requires that "non-exempt" employees must be paid a minimum wage, which is currently \$5.15 per hour.⁵¹ The FLSA also requires that employers pay non-exempt

⁴⁹ 29 U.S.C. § § 201 et seq.

⁵⁰ U.S. Department of Labor ("DOL") Wage and Hour 2006 Fact Sheet (Dec. 2006) (<http://www.dol.gov/esa/whd/statistics/200631.htm> (last viewed March 7, 2007)). More recently, the DOL announced a settlement with Wal-Mart in the amount of \$33 million for alleged violations related to overtime pay. U.S. Department of Labor, Wal-Mart Workers to Receive More Than \$33 Million in Back Wages, (Jan. 25, 2007) (<http://www.dol.gov/opa/media/press/esa/ESA20070110.htm> (last viewed March 7, 2007)).

⁵¹ 29 U.S.C. § 206. Note that the District of Columbia and many states mandate a minimum wage higher than what is provided in the FLSA. In addition, as discussed below, Congress is contemplating increases to the federal minimum wage. See *infra* Section E.6.

employees who work more than forty hours per week overtime pay, which is one and one-half the employee's "regular rate" of pay.⁵²

1. *The Misclassification of Employees*

Just because an employee may be well educated, important to an employer's operations, and have some supervisory duties does not automatically mean that the employee is exempt from the minimum wage and overtime provisions of the FLSA.

The FLSA has specific requirements that apply to individuals employed "in a bona fide executive, administrative, or professional capacity" or as an "outside salesman" (29 U.S.C. § 213(a)(1)), or as a "computer systems analyst, computer programmer, software engineer, or other similarly skilled" employee engaged in systems analysis and design work (29 U.S.C. § 213(a)(1)). These exempt classifications, in turn, are defined by DOL regulations, which were revised in 2004. In addition, a number of states, including Alaska, California, Washington, and Illinois, have their own tests for determining exempt status. Thus, it is conceivable that an employer who is in full compliance with the federal FLSA could still be in violation of state law.

2. *Pre-Shift and Post-Shift Duties/Work "Off-the-Clock" and "On-Call"*

The most notable recent development in wage and hour jurisprudence relates to the Supreme Court's decision in *IBP, Inc. v. Alvarez*.⁵³ *Alvarez* related to "doffing and donning," or, in plain English, getting dressed and undressed out of protective clothing. While some may attempt to minimize the case's significance by arguing that it should apply only to the manufacturing context, the Supreme Court in *Alvarez* confirmed that any activity that is "integral and indispensable" to an employee's "principal activity" is compensable hours worked under the FLSA.⁵⁴ The Court also

⁵² 29 U.S.C. § 207.

⁵³ 546 U.S. 21 (2005).

⁵⁴ *Id.* at 27. In one recent case, *Burton v. Hillsborough County*, 181 Fed. Appx. 829, 2006 U.S. App. LEXIS 16807 (11th Cir. May 18, 2006) (unpublished), *cert. denied*, 127 S. Ct. 556 (U.S. Nov. 6, 2006) (unpublished), the court of appeals concluded that employees' time spent traveling between a parking site and their work site was compensable as the employer required employees to pick up and drop off the county's vehicles used in such travel at parking site. "[G]etting a county vehicle from the parking site and driving it to the first worksite and returning it to the parking site was integral and indispensable to

affirmed the "continuous workday" principle—that activity for the benefit of the employer during the period between the commencement and completion of an employee's principal activity or activities on the same workday is covered by the FLSA, constitutes compensable hours worked, and is not excluded by the Portal-to-Portal Act.⁵⁵ Plaintiff's counsel no doubt will look to recover, as unpaid wages, time spent preliminary to and following what employers may have considered to be an employee's normal working hours. It is important, therefore, to determine when the workday begins.

The impact of technology on the scope of the workday remains an open question, especially after *Alvarez*. For example, does the workday for non-exempt employees who check their e-mail or voice mail before they come to work begin at the moment they log onto their home computer or check their BlackBerry or PDA? Will such home activity convert normally non-compensable home to work commuting activity into compensable travel time? Will plaintiffs seek to recover for time spent on cellular telephones as work time? Does the time spent waiting for a computer to boot up or shut down constitute working time? If so, do computer-based time recording systems accurately record hours worked?

These and other questions, especially in light of the new Federal Rules of Civil Procedure addressing electronically stored information, will no doubt be addressed in the coming years.

Related to claims involving time spent at the beginning and end of shifts are those involving activities off-the-clock or while on-call. The Department of Labor has specifically targeted "new economy" workplaces, such as call centers.⁵⁶ Types of activity that can prove problematic may include the completion of paperwork, calls taken during break or lunch periods, or other peripheral time spent for the employer's benefit.

As with most employment law questions, whether "on-call" or "wait" time is compensable work for purposes of the FLSA is done on a case-by-case basis, making every inquiry potentially challenging.⁵⁷ When the facts tend

the plaintiffs' principal activities." *Id.* at 20. "[T]hat time significantly benefited the county." *Id.*

⁵⁵ *Alvarez*, 546 U.S. at 27.

⁵⁶ See *FLSA: Enforcement Efforts Extend to Call Centers, Other "New Economy" Jobs*, DOL Official Says, Daily Lab. Rep. (BNA) (Feb. 18, 2005).

⁵⁷ *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931 (9th Cir. 2004).

to show that an employee was “engaged to wait,” such time is compensable.⁵⁸ An employee “waiting to be engaged,” on the other hand, is not entitled to compensation during that on-call time.⁵⁹ Time spent “on call,” when such time is spent predominantly for the employee’s own personal benefit, is not compensable time under the FLSA.⁶⁰ Whether such time is actually considered to be for the employee’s own benefit, as opposed to the employer’s benefit, depends on the evaluation of a number of factors, including whether the employee is required to live on site; whether the employee is excessively restricted from moving geographically; whether there is a restrictive frequency of calls; whether a fixed time limit for response is unduly restrictive; whether the employee can trade on-call responsibilities; whether the use of a pager can ease restrictions; whether the employee actually engages in personal activities during call-in time.⁶¹

3. Automatic Work Deductions

Some employers automatically impose deductions to account for meal or rest periods taken by their non-exempt employees. The deductions, for example, may take the form of a thirty to sixty minute deduction for a meal period every day. Although not illegal per se under the FLSA, such employer action can be fertile ground for collective actions.⁶² In these types of collective action cases, as with other wage and hour actions, evidentiary issues arise in an employer’s attempt to demonstrate the actual hours that employees have worked. In states like California and New York that have specific statutory requirements governing meal and rest periods, a practice of automatic deductions often can translate into employer non-compliance.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See, e.g., *Ingram v. County of Bucks*, 144 F.3d 265, 267 (3d Cir. 1998).

⁶¹ See *Owens v. Local No. 169, Ass’n of Western Pulp and Paper Workers*, 971 F.2d 347, 351 (8th Cir. 1992); *Spencer v. Hyde County*, 959 F. Supp. 721, 726 (E.D.N.C. 1997); *Martin v. Ohio Turnpike Comm’n*, 968 F.2d 606 (6th Cir. 1992). Note that the list is not exhaustive and no one factor is controlling. See also 29 C.F.R. §§ 705.14-.17 (Wage and Hour Division interpretations).

⁶² See, e.g., *Barrus v. Dick’s Sporting Goods, Inc.*, 2006 U.S. Dist. LEXIS 84814 (W.D.N.Y. Nov. 3, 2006) (lawsuit alleging, among other things, that lunch hour was automatically deducted from pay, whether or not it was actually taken, was properly maintained as a collective action).

E. Cases, and Legislative and Administrative Initiatives To Watch in 2007

1. The Employee Free Choice Act

The House of Representatives passed the Employee Free Choice Act (H.R. 800) on March 1, 2007, by a straight party-line vote. While it is not clear whether it will pass the Senate, and if so would likely be vetoed by President Bush, it will generate a great deal of publicity and reflects a possible statutory modification to the National Labor Relations Act in the event the Democratic Party controls both houses of Congress and the White House. In sum, the Employee Free Choice Act would allow unions to be certified as the bargaining representative if the National Labor Relations Board found that a majority of the employees in appropriate bargaining unit had signed authorizations.⁶³ In other words, secret-ballot elections would no longer be required to certify a union.

Although less publicized, the Act would also strengthen the remedies for unfair labor practices and would require the parties to reach an agreement for a first contract within ninety days, and if this were unsuccessful, through the use of a Federal Mediation and Conciliation Service and, if no agreement were reached, through the use of an arbitrator who would decide the terms of the agreement, which would be binding for two years.⁶⁴ Plainly, the Employee Free Choice Act, which is the labor movement’s highest priority, has the potential to reshape employer-employee relations and warrants close attention and scrutiny by employers.

2. *Dukes v. Wal-Mart, Inc.*⁶⁵

In what well may be the largest civil rights class action in history, a group of more than one million employees of Wal-Mart’s female employees allege that Wal-Mart discriminated against women in promotions, pay, and job assignments. In 2004, the federal district judge ruled in favor of class certification, finding that the centralization of Wal-Mart’s business practices made class action treatment efficient. Wal-Mart unsuccessfully appealed

⁶³ Office of the Committee on Education and Labor Democrats, Summary of the Employee Free Choice Act (Feb. 2007).

⁶⁴ *Id.*

⁶⁵ 222 F.R.D. 137 (N.D. Cal. 2004), *aff’d*, 474 F.2d 1214 (9th Cir. 2007).

the district court's decision to the Ninth Circuit, which issued a decision on February 6, 2007.⁶⁶ Notably, the court, after addressing a number of evidentiary concerns, found that the district court had not abused its discretion in finding that the plaintiffs had satisfied the commonality and typicality requirements for purposes of a class action.⁶⁷ Notably, the Ninth Circuit, in addressing the commonality requirement, actually held that the fact that Wal-Mart's managers had the ability under company policies to make subjective decisions about pay and promotions, rather than proving that there was no commonality between plaintiffs, actually supported the notion that the "centralized company culture" provided a "nexus" between "subjective decision making" and the statistical evidence of discriminatory pay and promotions for female employees.⁶⁸ The court took a very dim view of any process that involved subjective decision-making, stating that "[i]t is well-established that subjective decision-making is a 'ready mechanism for discrimination' and that courts should scrutinize it carefully."⁶⁹ The court also found that individualized hearings were not necessary under the statutes at issue or the Constitution and that even claims for punitive damages could be addressed collectively.⁷⁰

In dissent, Judge Kleinfeld observed:

This class certification violates the requirements of Rule 23. It threatens the rights of women injured by sex discrimination. And it threatens Wal-Mart's rights. The district court's formula approach to dividing up punitive damages and back pay means that women injured by sex discrimination will have to share any recovery with women who were not. Women who were fired or not promoted for good reasons will take money from Wal-Mart they do not deserve, and get reinstated as well. This is "rough justice" indeed. "Rough," anyway. Since when were the district courts converted into administrative agencies and empowered to ignore individual justice?⁷¹

⁶⁶ 474 F.3d 1214.

⁶⁷ *Id.* at 1231, 1233.

⁶⁸ *Id.* at 1231.

⁶⁹ *Id.* (quoting *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986)).

⁷⁰ *Id.* at 1238-42.

⁷¹ *Id.* at 1249 (Kleinfeld, J., dissenting).

Plainly, we have not heard the last of the *Dukes* case. All large employers should pay close attention and consider whether proactive steps, such as entering into arbitration clauses with one's workforce, should be taken.

3. *EEOC v. Sidley & Austin*⁷²

In yet another piece of class action litigation, the EEOC has brought suit on behalf of thirty-one former Sidley & Austin partners who allegedly were either demoted and forced out of the partnership or were involuntarily retired pursuant to the firm's mandatory retirement age. Numerous discovery battles had ensued when the case was pending before the EEOC, with Sidley & Austin asserting that because the individuals in question were "partners" as opposed to "employees," they were not covered under the Age Discrimination in Employment Act. The firm lost that argument in its previous appeal as the EEOC successfully argued that the partners in question were actually employees because they never voted on firm policy and all decisions (including partner compensation) were made by the firm's executive committee. The *Sidley & Austin* case bears close attention for all major law firms and other partnership entities.

4. *Welch v. Cardinal Bankshares Corp.*⁷³

In a case working its way simultaneously through the federal court system and the Department of Labor's administrative systems, *Welch v. Cardinal Bankshares* represents one of the first decisions involving the reinstatement of an alleged whistle-blower under the Sarbanes-Oxley Act. The federal court case involves the issue of whether a preliminary order of an Administrative Law Judge ("ALJ") that reinstates an employee can be enforced while the case is pending before the DOL's Administrative Review Board ("ARB"). The district court in that case determined that the employee was not entitled to be immediately reinstated notwithstanding the ALJ's preliminary order. The district court's decision is being appealed by the former employee and the DOL to the Fourth Circuit.

In addition, the ALJ's underlying decision is currently on appeal to the ARB. One of the issues raised by the employer on appeal,⁷⁴ and of interest

⁷² No. 05 CV 0208 (N.D. Ill.)

⁷³ 454 F. Supp. 2d 552 (W.D. Va. 2006), and 2006 WL 3246906, ARB 06-062, ALJ 2003-SOX-15 (U.S. DOL's ARB, June 9, 2006).

⁷⁴ In the interest of full disclosure, Baker & Hostetler, the author, his partner Betty Southard Murphy, and the law firm of LeClair Ryan Flippin Densmore represent the

to both in-house attorneys and outside counsel, is whether an employee has a right to be represented by outside counsel while participating in an employer's investigation of alleged corporate wrongdoing.⁷⁵ Even for this reason alone, *Welch* will be one of the cases to watch in 2007.

5. Revisions to the Family and Medical Leave Act's Regulations

Another item to watch for in 2007 relates to the Family and Medical Leave Act ("FMLA"). The application of the FMLA, especially in conjunction with the Americans with Disabilities Act, state leave laws, and the workers' compensation system often has proven quite difficult for employers to administer. The Department of Labor, as set forth in a December 1, 2006, request for information published in the *Federal Register*, sought contributions from interested parties about potential modifications to the Family and Medical Leave Act's regulations.⁷⁶ Comments were originally due on February 2, 2007, although the commentary period was extended to February 16, 2007.⁷⁷ The Labor Department sought specific comments on, among other things: who are eligible employees; the definition of a serious health condition; whether company holidays count against the FMLA leave period; light duty; and communications with employees on leave. It can be anticipated that the revised regulations, whenever they are finalized, will address these topics.

6. An Increase in the Federal Minimum Wage

The Congress has been working toward an increase in the federal minimum wage. The proposed increase would take the minimum wage from \$5.15 to \$7.25 over two years. The legislation has been bogged down, however, over what tax relief would be granted to businesses in conjunction with the wage increase. The House and Senate continue to negotiate over what the legislation will ultimately provide. It can be anticipated that these differences will be worked out, that the legislation will be finalized, and that the President will sign off on the increase sometime later this year.

employer in the ARB appeal.

⁷⁵ 2006 WL 3246906, at *3.

⁷⁶ 71 Fed. Reg. 69,504 (Dec. 1, 2006).

⁷⁷ 72 Fed. Reg. 3775 (Jan. 26, 2007).

F. The New Federal Rules of Civil Procedure and the Discovery of Electronically Stored Information

The absolute "hottest" development in the employment and labor arena has nothing to do with substantive law. Instead, the development has been entirely procedural. On December 1, 2006, the modification of the Federal Rules of Civil Procedure regarding electronic discovery became effective.

The rules have been modified to require additional discussions between parties and their counsel about how to address electronically stored information and are the subject of numerous articles that are of the most interest to outside counsel.

The primary difficulty in applying the new rules will not come from what they explicitly say, but, rather, from what they implicitly allow in terms of discovery.

In an employment case, the most relevant of issues is *why* a particular action has been taken. Thus, a person's motivations become of critical importance. In addition to direct testimony about someone's motivation, one might attempt to discern what a relevant decision-maker thinks by virtue of their electronic correspondence and the Web sites they visit. Also often of critical importance is how one employee, against whom adverse action is taken, compares with other employees who may be similarly situated but who are not similarly affected. Of course, *when* certain actions occurred is also of high importance.

A hypothetical situation illustrates the potential difficulty of what the new rules may involve, especially in conjunction with some of the other "hot topics" discussed above. Assume that a non-exempt female sales associate is terminated from employment. The sales associate has been a "difficult" employee, often late, or insubordinate in tone. In addition, her sales numbers have been "low" and she is often seen "surfing the net" and sending personal e-mails. As part of a general nationwide corporate downsizing, in which local managers are directed to cut their staff by ten percent, her manager selects her to be laid off, because, in his view, she is a below-average performer. Her online performance reviews are not stellar, but do not

indicate that she was in any danger of being let go. The employee is offered a severance package, but refuses, and her employment terminates. Upon her termination, she turns in her laptop computer.

The employee then retains a lawyer, who writes to the company's corporate Human Resources office, which is located in another city. The lawyer threatens to bring a sexual harassment and gender discrimination lawsuit and also claims her client was not paid all of her overtime. The employee alleges that her manager made inappropriate comments to her, left her messages of a sexual nature on her voice mail, and sent her lewd e-mails.

Because the employee's manager is an important member of the Company's management team, the corporate Human Resources office then begins to investigate the employee's claims, albeit quietly and on a confidential basis. In the meantime, the local Information Technology Department at the employee's former work site, as part of standard corporate policy, has wiped the now former employee's laptop clean of data. Three weeks later, again as part of normal policy, backup tapes for a particular day are recycled.

When the case cannot be settled, the former employee files suit and serves the following discovery requests:

1. Please produce all documents and electronically stored information, including, but not limited to, drafts of documents, such as correspondence, memoranda, letters, e-mails and voice mails, in their *native* format,⁷⁸ referencing Plaintiff, including, but not lim-

⁷⁸ Rule 34 added the words "electronically stored information" to the types of "documents" that may be sought in discovery. Rule 34 now provides that:

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or *electronically stored information*—including writings, drawings, graphs, charts, photographs, sound recordings, images, and *other data or data compilations stored in any medium from which information can be obtained*—translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served....

FED. R. CIV. P. 34(a) (emphasis added). The modification to Rule 34(a) works in tandem with an additional modification to Rule 34(b)(ii) regarding the form in which "documents" or other data must be produced. Specifically:

Unless the parties otherwise agree, or the court otherwise orders:

- (i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

ited to, e-mails and voice mails sent to or by Plaintiff or Plaintiff's manager. This request includes all documents on all personal desk assistants, cellular telephones, laptop and home computers.

2. Please produce all records and information showing all Web sites visited by the Plaintiff's manager.

3. Please produce all records reflecting Plaintiff's entry and exit from the facility through the use of her electronic key during the past three years.

4. Please produce all time and attendance records for Plaintiff during the past three years.

5. Please produce all time and attendance records for all other sales associates for the past three years.

6. Please produce all sales data for all other sales associates who were not laid off by the Company during the past three years.

7. Please produce all records of Internet and electronic mail message usage by all other sales associates who were not laid off by the Company during the past three years.

8. Please describe all policies and procedures the Company has with respect to the retention and destruction of electronic data.

9. Please describe all efforts to preserve electronic data from the date the Company first learned of Plaintiff's complaint, and if such data has been lost or destroyed, please describe why such data has been lost or destroyed.

In the hypothetical, the discovery, despite its breadth and burden, all is potentially acceptable to discern the manager's motivations, to test the employer's stated reasons for the employee's termination, and to determine

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and
(iii) a party need not produce the same electronically stored information in more than one form.

FED. R. CIV. P. 34(b)(ii) (emphasis added).

what efforts were made to preserve the employee's electronic data at least from the time her attorney wrote the company to threaten litigation.

The Company may be vulnerable to a charge of spoliation because it did not preserve the employee's laptop or the backup tapes that might contain information that might otherwise have been deleted by the employee's manager. In addition, the Company will need to assess whether deleted files are truly gone. Indeed, if not overwritten, it is possible that such information resides in slack space.

It is also necessary to consider all the potential sources of electronic information that will need to be checked to respond to the discovery requests, including remote computer servers, home computers, cell phones, personal desk assistants, and other electronic machinery. Other issues will arise out of the documents that are available to be produced. For example, when the production is made in its "native" format, it is likely that documents and e-mails may contain "metadata," which includes codes that can reveal even more information about the electronic data.

Perhaps the better way to think about the new rules of civil procedure is this: imagine how your organization would respond to the hypothetical discovery requests, what information would actually be found in response to such requests, whether such information might be quickly lost in the absence of placing a quick hold on the destruction of such information, and the cost involved to respond to such requests. The time for companies, their outside counsel, and internal information system professionals to prepare for this new form of "electronic warfare" is now. The cost of such discovery, however, further suggests that it is almost always better for employers to avoid litigation, regardless of the merits of the underlying dispute.⁷⁹

⁷⁹ The rules have a number of seeming protections built into them that would, at first glance, appear to give an unwary defendant some cover in the event a document production runs into problems. Rule 37(f), which is part of the rule imposing sanctions for failure to make discovery, has been modified to state:

(f) Electronically Stored Information.

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Similarly, Rule 26 now provides that:

- (B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue bur-

"EMPLOYERS, DON'T LET YOUR EMPLOYEES GROW UP TO BE PLAINTIFFS"

How an hour of prevention, even at \$400 an hour, is worth more than six months of successful litigation

Almost all labor and employment lawsuits are avoidable. As the issues surrounding electronic discovery highlight, the costs of litigation can be extremely high. Accordingly, the prudent employer will: (1) take steps to prevent potentially meritorious claims from arising; (2) make it less attractive for employees against whom adverse employment action is being taken to sue and thereby make it less attractive for plaintiff's counsel to take the case; and (3) take steps that will prevent procedural issues from dominating any employment litigation that is ultimately brought against the employer.

Lawsuit avoidance and the protection of corporate assets begin with clear up-to-date policies that are actually acknowledged by employees. Just as the Federal Rules of Civil Procedure have been updated, corporate policies and practices must be changed to address new issues presented by technology. For example, corporate policy should clearly discourage the use of the company's electronic equipment except for business purposes by emphasizing that the company can and does monitor Internet and e-mail usage. If the company actually does monitor such Internet usage, it should consider following through on the results of such monitoring. For example, it could first warn its workforce generally that it will be conducting active monitoring of Internet usage in the coming year. After an initial sampling,

den or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

FED. R. CIV. P. 26(b)(2)(B). It would be a mistake to rely overly on these protections. As numerous recent cases addressing electronic information decided before the implementation of the new rules prove, courts often are unsympathetic to the cost involved in being a litigant, especially where it can be assumed that the corporation in question is large, or to the failure to protect and preserve data.

it could publish its results, without reference to specific employees, and warn employees generally that certain Web sites should not be visited and that high-level personal Internet activity will be noted. If and when such monitoring is next conducted, the company should warn individual employees of inappropriate usage if it still proves to be an issue. Then, if problems persist in subsequent monitoring, the company should administer consistent discipline.

The company should also have reliable Information Technology professionals involved as soon as it receives any indicia that a lawsuit implicating electronic data is or could be filed. The preservation and destruction of data, even more than what information the electronic data contains, can be the single most important aspect of any case.

Moreover, although it seems both trite and obvious, if one does not take adverse employment action against one's employees, one is not particularly likely to be sued. This means employees should be given documented chances to improve. Managers frequently are reluctant to communicate with their employees about their performance in ways that are clear. Expectations are left unsaid and difficult conversations avoided. Indeed, even written performance reviews do not consistently reflect an accurate picture of an employee's performance shortcomings. If a case must go before a court or jury, documented performance issues, fair reviews, and patient second chances will go a long way to convincing the trier of fact that the company was more than fair.

Most front-line managers, however, are not particularly adept at filling out paperwork, being patient with difficult employees, or communicating with the employees they supervise about their performance. Instead, they get frustrated at an employee's poor performance and reach a breaking point beyond which a relationship cannot be salvaged. If a company does not have the resources to train each manager to be an HR expert, it can at least mitigate the risk of employment litigation by making sure that *all* hiring, promotion, discipline, and termination decisions involve the Human Resources office.

In this regard, Human Resources professionals must be trained to recognize that their job is not to be a facilitator of potential wrongdoing by rubber-stamping every manager's employment decisions. Rather, their role

is to evaluate each employment decision to be sure it is consistent, justified, thoughtful, and well documented. If the HR manager cannot conclude that the decision meets these four criteria, additional corporate decision-makers, or outside counsel, should be brought into the process. Upper management should strongly endorse the Human Resources Department's role as the protector of corporate assets, even if this means that the relevant managers are frustrated by the pace at which employment decisions are made.

If a termination is necessary, in all but the most egregious of cases, the company should consider offering a fair severance package. More often than not, an employee will accept a severance and provide the company with a general release, subject to some of the constraints discussed above. An offer of severance likely will make the employee feel that he or she is not being treated completely unfairly and will mitigate a major motivation for an employee to sue, namely, economic hardship. Moreover, the fact that an employee has signed a release will deter most plaintiff's attorneys from bringing a claim, notwithstanding the *Lockheed* decision.

Finally, and, from the management side lawyer's perspective, most importantly, the Human Resources Department should be required to consult with in-house or outside counsel when thornier issues arise. If an attorney is brought in to provide an overview of the relevant legal considerations before a decision is arrived at, it is far less likely that an unsustainable decision will be reached. Rather than viewing an hour's consultation with an attorney as \$300 to \$500 lost, the company should instead regard it as saving literally hundreds of hours, and tens, if not hundreds, of thousands of dollars in expenses avoided. Consider this, very few matters in which an attorney is consulted *before* an employment decision is finalized ever result in litigation. An ounce of prevention really is worth a pound of cure.

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