



What Every Company (and their Lawyer) Needs to Know:

An In-Depth Look at Changes to the Family and Medical Leave Act and Other Labor and Employment Laws



LINDA M. GLOVER



PAT RICHTER



MARCOS RONQUILLO

HOW WILL YOU MAKE YOUR MARK?

Full Service Advertising • Public Relations
News Releases • Strategic Planning • Media Training
Ad Creative Development • Announcement Cards • Newsletters
Brochures • Professional Photography • Print Advertising
Reprints • Radio & TV Advertising • Invitations • Airport Dioramas • Website Creative • Graphic Design
State Bar of Texas Ad Compliance • Airport Dioramas • Marketing Budget Management • Internet Advertising • Email Announcements
Billboards • Ad Campaigns • Media Buying & Placement • Web Design • Mailing • Internet Advertising
PR Campaigns • Media Monitoring • Marketing • News Releases • Website Creative • Strategic Planning • Logos
Full Service Advertising • Public Relations • Announcements • Mailing • Professional Photography
Media Training • Ad Creative Development • Print Advertising • Invitations • Website Creative • Ad Campaigns
Professional Photography • Print Advertising • Ad Campaigns • Strategic Planning • Litigation PR
Media Buying & Placement • Ad Campaigns • Litigation PR • Airport Advertising
Ad Creative Development • Logos • Logos • Airport Advertising
Announcement Cards • Logos • Airport Advertising • Airport Advertising
News Releases • Full Service Advertising • Airport Dioramas • Airport Advertising
State Bar of Texas Ad Compliance • Airport Dioramas • Print Advertising • Airport Advertising
Brochures • Professional Photography • Print Advertising • Airport Advertising
Ad Campaigns • Media Buying & Placement • Airport Advertising
Radio & TV Advertising • Invitations • Airport Advertising
Ad Creative Development • Print Advertising • Airport Advertising
Full Service Advertising • Airport Advertising
PR Campaigns

The **ONLY** Advertising and Public Relations firm in Texas working exclusively with Law Firms and Legal Professionals.

ANDROVETT
LEGAL MEDIA & MARKETING

DALLAS | HOUSTON
214.559.4630 | 713.383.0090
www.androvetf.com

Because of the sea change and recent developments in our government, banks and economy, the Texas Lawyer business department asked some top labor and employment experts to discuss how these changes affect businesses, employers and employees. The panelists also were asked to discuss the newly enacted regulations of the Family and Medical Leave Act. The following discussion provides some hands-on information about many different aspects that you may encounter as an attorney trying to help your clients. The following has been edited for length and style.

MIKE ANDROVETT, moderator, attorney and owner of Androvett Legal Media & Marketing, Dallas: *Panel members, if I could, please introduce yourself to all of us here and talk a little bit about what you do on a day-to-day basis.*

PAT RICHTER, partner, Shannon, Gracey, Ratliff & Miller, LLP, Austin: Shannon Gracey is a Texas law firm with offices in Dallas, Fort Worth, Arlington, Houston, and Austin. My practice is a mix of a little bit of everything, heavy on labor and employment. In the labor and employment end, it's a lot of executive compensation, employment agreements as well as traditional labor and employment discrimination lawsuits. The rest of my practice is devoted to IP cases, which for me tend to get back into the employment area as employee non-compete and trade secret cases.

LINDA M. GLOVER, partner, Ryan Glover LLP, Houston: Ryan Glover is a boutique firm with offices in Houston

and Austin. A group of attorneys left Baker Botts to form Ryan Glover with the goal of providing our clients with personalized high-quality legal service at reasonable rates. I'm a trial lawyer; and as such, have handled a wide variety of matters. I have been across the table from the SEC, DOJ and FBI defending a client against allegations that they had violated the Foreign Corrupt Practices Act, and I have stood before a federal court jury in a patent case involving nanotechnology. If I were to divide my career into thirds, labor and employment would take up at least one third. I have handled all types of discrimination claims and some executive compensation claims as well. I have also done quite a bit of labor work. I particularly enjoy labor and employment work because, at its very core, it's very much about the human experience. It also permits me to gain a better insight into my clients' businesses. When I know more about my clients' business, I can be a better advocate for them.

MARCOS RONQUILLO, partner, Godwin Ronquillo, PC, Dallas: I'm a trial lawyer, like Linda just stated, and we try cases. My experience in labor and employment, discrimination or civil rights law goes back to my service in the Carter Administration back in '79. And since then I've had the opportunity to represent major *Fortune* 500 companies and just about every major political subdivision in North Texas at some point in time in state or federal court, handling a wide range of cases from class-actions, desegregation, civil rights, whistle-blower and employment discrimination claims. We also do a lot of work for small businesses. I represent a lot of small business employers, and like Linda, have been across the table from the FBI and the SEC and the Department of Justice. And currently we're working on several other civil rights, desegregation

cases as well for other public entities here in North Texas.

ANDROVETT: *Twice a year, typically, Texas Lawyer will convene a roundtable about labor and employment issues. And our most recent one was in October of 2008. And I was struck going back over that transcript about how so much of that discussion really related to what I would consider problems of prosperity. We've got a great thing, we're trying to hold onto it, someone else is trying to steal it, how do we protect those secrets. That was a lot of our discussion. Also, and you might be interested to know that this is probably, around the country, one of the first labor and employment roundtables in the Obama administration. And so our comments today are likely to be studied and reviewed, thanks to the glory of the internet, by lawyers and HR professionals and company executives all over the country. So, stacking up that level of responsibility and putting that directly in your laps, I'd like to start by asking you maybe to define for me what's likely to be different in an Obama administration than what we saw in eight years under the Bush administration.*

RONQUILLO: Right now we're in the middle of what I would call the perfect storm. And let me preface my comments by stating the following: Anyone that's been involved in any kind of enforcement activities over the last eight years who has had the pleasure of representing both federal, state and local government is very well aware that there hasn't been a lot of enforcement actions or activities the last eight years. So it's my impression that under the Obama administration and with the new attorney general, that there will be a lot more enforcement activity. One just has to pick up the newspaper and read about Bernie Madoff and the SEC basically asleep at the switch for the last eight years, being handed on a



With more than 25 years of experience, **HG Litigation Services** introduces **Trial Resource** as your one-call source for all your trial support needs.

Trial Consulting
Trial Web Repository
Trial Presentation and Graphics
The Resource for all your trial needs.



LINDA M. GLOVER

is a partner in Ryan Glover LLP, a boutique firm that emphasizes high quality legal representation and personalized service. Glover has represented clients in a broad range of complex trial, arbitration and appellate matters, including breach of contract claims, class actions, product liability, labor and employment, and patent litigation. Glover also has substantial experience in corporate investigations. Companies successfully represented by Glover include Marathon Oil Corporation, CenterPoint Energy, Elan Drug Delivery, BASF, Reliant Energy, Crescent Real Estate, Hines and Novartis. While Glover ascribes to the theory that a good trial lawyer can try cases involving any subject matter, she has gained particular expertise in the area of labor and employment law, and has been honored by the State Bar of Texas for her writing in the field. Glover is an active member of the Houston Bar Association, which has recognized her outstanding contribution to pro bono matters.

silver platter a \$50 billion Ponzi scheme and no one actually ever looked into it. So we're going to see a little more heightened enforcement actions from Washington, D.C. I think take that, on top of the financial crisis that we're in the middle of right now, we are going to see a lot of activity from the FDIC. I see a lot of investigations into failed banks and failed institutions. I see that coming down the pike. With respect to the local level, I see a lot of governmental entities being more scrutinized, especially recipients of federal funds and federal dollars to make sure that they're complying with the panoply of executive orders and civil rights statutes. And what that translates into is a more heightened awareness of civil rights and equal opportunities in the Obama administration. And then my final comment on that is that employers in the private sector will also be scrutinized a lot more. And then you have the recent changes in the FMLA, which I'm sure we'll talk about later on. That, coupled with this fact, there's been 2.6 million jobs eliminated this past year, the most since 1945 at the end of our post World War II economy, a lot of folks out there that have been caught up in all these investigations that are either getting ready to be laid off or have been terminated and are going to seek plaintiffs' counsel to try and pursue aggressively their rights, thinking that now with the change from the Bush administration to the Obama administration, they're going to get a fair break this time. And there's going to be a flood of class-action litigation in those areas.

GLOVER: With the Obama administration you're also going to see an increased emphasis on laws that bolster unionization. I'm sure you've heard about the Employee Free Choice Act. Although it's not currently on the legislative horizon, we certainly expect it to reappear. And there are a panoply of laws on the political forefront, all of which tend to increase workers' rights. These potential laws come from the Obama administration's belief that the middle class has drastically diminished and must be re-built. This administration believes that unions are essential to that rebuilding process.

RICHTER: The other thing you're going to see besides statutory changes, which

you're already seeing in the Ledbetter Fair Pay Act, which will be more subtle, is the changes in at the enforcement and judge level, particularly with the NLRB. The NLRB tends to be very political, and it has swung very hard to the right the last eight years. You'll need to look at that. For example, the Board's *Register-Guard* opinion about e-mail solicitation is one that even as a management labor lawyer had me scratching my head. And I think you're going to see at the administrative enforcement level for a lot of these agencies swing back more to the employees' side, where the last eight years has been very management-friendly. And that's going to be layered on top of all these statutory changes, so we're not looking at smooth-sailing for employers.

ANDROVETT: . . . *Are you finding that your clients, the small business, the large business, the HR professionals, the people who are in charge of workforces, those people who might have to contend with a new dynamic regarding unions, are they there yet or are they coping to try to understand this new environment?*

RICHTER: I don't think they're there yet. As management lawyers, we've tried to warn them that this is coming, but I think they're too busy dealing with the crisis of the moment, the day-to-day stuff. In Austin, in particular, a lot of my clients are startup technology companies. And they're not worried about whether a union is going to come in July; they're worried about whether they're going to have money to make payroll in February. So I haven't seen them looking too far down the road. They're more interested in what's going on at the moment and how can they cut back the way they need to without getting sued; how can they cut back without hurting themselves, how can they protect themselves if they run out of money and have to turn their employees out on the street. Those are the kind of things that they currently worry about. They're not looking down the road at what might come. I hope they make it that far.

GLOVER: I would agree; although, I do see some clients paying close attention to the Employee Free Choice Act. They are looking at the bargaining units in the company and determining if there is a

way to reorganize those so that unionization is less likely. They're taking political action. They are also taking steps to instruct supervisors and managers on how to respond to unionization efforts. It is important that management knows how to respond because the Employee Free Choice Act, if passed in its current version, would increase penalties against employers for unfair labor violations related to organizing efforts.

RONQUILLO: I agree with my panelists. And it doesn't matter whether it's a small business or a *Fortune* 500 company; everybody is dealing with bread-and-butter issues right now. They're just trying to survive. But they may be looking over their shoulder at all these new statutes, new regulations and new legislation coming down the pike. So it's going to be very important for the HR professionals or the folks that are in charge of risk management for their respective companies to be cognizant of these new laws, regulations and policies that are coming down. And make sure you get the needed help or expertise to come in and look at these situations so you don't make a bad situation worse.

ANDROVETT: *Marcos, to build on that, Pat mentioned that some of his clients are trying to figure out how to cut back without being sued. At the risk of gross generalization here, is there a checklist that we could amass in the next couple of minutes that would form some guidance for our attendees today and for our readers in Texas Lawyer?*

RONQUILLO: There are a couple of things that people ought to be looking at. The first would be the new changes in the FMLA. And I also see — without getting too off track — in various instances, the FMLA is basically used as a shield or as a defense mechanism to avoid, thwart or delay adverse employment actions. And employees are getting really sophisticated. They understand timelines and they understand what's required by the law. At the same time, you ought to take a look at, like I said before, just the routine issues. I've been serving as the managing shareholder and chief operating officer for our firm since December of '05, so in many ways my heart goes out to some of the CEOs and HR professionals out here, because at the end of

the day, some of those issues fall in my lap, too. And I'll tell you, the first thing I do is consult a lawyer. You and I need a lawyer. It's important. But it's getting complex. And I wouldn't give short shrift to these new changes. I would develop a policy committee or some folks that's trusted at a cabinet level for the company to look at these new changes. You have wage and hour issues. You have workers' comp issues. The whole notion of retaliation with respect to whistle-blowers, that's something that also has to be looked at. And there has to be a very fundamental grasp of the whole concept of retaliation and that your HR professionals have an appreciation for that. Also, how you conduct internal investigations is important. If something pops up on your desk, you really don't want to create liability by the way you go about trying to insulate yourself from liability. And oftentimes we've seen scenarios, because they've botched an investigation, they made a bad situation worse. Where at the end of the day there was a finding that there was really no discrimination, but guess what, there was retaliation by the way the company responded to it. So those are the kind of things that are hot-button issues and a checklist is a very good idea.

ANDROVETT: *What else do we put on the checklist?*

GLOVER: Picking up from what Marcos just said, the FMLA does cover retaliation. And one of the problems that an employer faces is that the Fifth Circuit finds a layoff in close proximity to FMLA leave potential evidence of discriminatory intent. In fact, in one particular case, the Fifth Circuit found that proximity alone was sufficient to establish a plaintiff's *prima facie* case. Another item to add to the checklist has to do with authentication and clarification of an employee's certification for FMLA leave. Under the new regulations, employers no longer have to use a health care provider to authenticate or clarify an employee's certification for leave. Instead, a member of management other than the employee's direct supervisor can make that call. A potential problem with these new regulations is that health care providers are very cognizant of their confidentiality obligations and are unlikely to pass on information about



PAT RICHTER

is a partner with Shannon, Gracey, Ratliff & Miller, LLP in Austin. Richter received a B.S. in Economics from Texas A&M University, and a J.D. from the University of Houston. While at the University of Houston, Richter was an associate editor of the *Houston Law Review*. Richter has represented employers in discrimination, wage and hour, contract, non-compete, trade secret, tort, and retaliation matters in state and federal courts in Texas and elsewhere. In addition, Richter has significant experience with matters before the NLRB and assisting clients with union campaigns and avoidance. Richter is a member of the State Bar of Texas, the Austin Bar Association, and the Austin Human Resources Management Association. Richter is also a member of the Green Technology Alliance, the Capital City A&M Club, and the Society for American Baseball Research. He is a volunteer coach for his son's soccer team.



MARCOS RONQUILLO

has over 30 years of trial experience. He has represented governmental agencies, such as the Dallas Independent School District, and Fortune 500 companies in high profile litigation where politics, media and social concerns collide in the courtroom. Marcos is a past recipient of the State Bar of Texas Presidents' Special Citation Award and Outstanding Lawyer of the Year Award from the Texas Mexican American Bar Association. He is the former President of the Dallas Mexican American Bar Association and former Chairman of the Dallas Hispanic Chamber of Commerce. *Texas Monthly* and *Law and Politics* magazines have consistently honored him as a Texas "Super Lawyer" from 2003 to 2007. Marcos has served on numerous boards and commissions including the Dallas Museum of Art, Dallas Area Rapid Transit Authority (DART), Children's Medical Center and JPMorgan Chase to name a few. Marcos received a J.D. from The George Washington University Law School in 1979 and a B.A. from the University of Notre Dame in 1975.

an employee's illness or injury learned during the authentication or clarification process. A person in management who has not been fully trained might slip up and talk about the employee's illness or injury with other employees. That could raise privacy issues. So, whoever is making those calls should be cautioned about the need for strict confidentiality.

RICHTER: In terms of a checklist, if you're talking about the steps you would advise somebody to take in approaching a termination, it would vary greatly depending on whether it was a single person being terminated and how you'd go about documenting that versus a reduction in force. And in a reduction in force, it can vary greatly, too, depending on the size of the company and how far across the company the RIF is going. Obviously, you want to document the process along the way and make sure you've identified who the decision-makers are, and then have somebody take a look at the global overall effect and make sure that there's not one of these statistical outliers that makes it look like you're letting go all of the older workers or all of the minority workers. Just to take a step back and look at the whole picture when you're doing it, even though the decisions might get made on a department or division basis.

ANDROVETT: *When you say "document the process," do your clients know what that means? Do they need to know that or is there a protocol to that? Is there some guidance that we can give?*

RICHTER: I think it's largely common sense. There's no magic to it. Whoever it is that's making the decision, if the decisions are on a shift-by-shift or division-by-division or unit-by-unit basis, those supervisors and managers who are deciding who gets cut need to be sure to keep records of how and why it is that they're letting people go, and then that the people that they let go should be consistent with that. So if the company said, "You have to let go your bottom four performers," make sure that when you go back and look at the performance evaluations that you in fact let go the bottom four performers; you didn't let go the bottom three performers and then the guy in the middle who recently was out on FMLA leave. So when I say "document it," I just

mean have a plan, have an articulated basis for why you're choosing the people that you're choosing, and then make sure that the formula you've drawn up matches the facts that are in hand. Because if they don't, that's the surest red flag, and you're going to get a plaintiff's lawyer nosing around and you might have to pay somebody a little bit more severance to get them to sign a release.

RONQUILLO: I think the other issue there, too, is that — and it doesn't matter the size of the company, whether you're talking about three or four employees or 5,000 employees — it's very important to take the emotion out of the equation. We're all human beings. We all get frustrated. You're looking at the bottom line. But it's very important to step back, take a moment, sleep on it, do the memo, think about it again, maybe not send it, and let it sit, then come back and look at it again. Because at the end of the day, you're going to be faced with a court and jury looking at three things: First off, did you have guidelines and policies in place? Number 2, did you follow those guidelines and policies in place? And Number 3, did you treat everybody in a uniformly, similarly-situated, same way across the board. And at the end of the day, isn't that how we want to be treated? So I agree, there is a lick of common sense in there as well. But I think those are the things that you need to be looking at as an HR professional or a VP in charge of human resources getting ready to cut somebody out.

ANDROVETT: *Are you more likely to get sued for letting a single individual go or for letting a group go through some sort of reduction in force?*

RONQUILLO: I think the important thing there is, what is the legitimate business function and purpose? What is best for the company? What is best for the franchise? I think that should be a guiding principle.

GLOVER: I think, too, that in a reduction in force, whether an employer gets sued depends at least partially on the way in which the termination message is delivered. The message can be delivered very compassionately. It also can be delivered with support provided to employees that are being terminated. Providing outplacement resources to terminated employees

goes a long way toward diminishing the number of lawsuits that employers have to face as a result of a reduction in force.

RICHTER: I agree. I lived through the tech bubble in Austin in 2001 and we did a lot of layoffs and, knock-on-wood, we were either lucky or good. We didn't have very many lawsuits. And I think a big reason for that back then was people thought they were going to get another job either before the severance you were giving them ran out or not long after, and so they looked at it as a four-week vacation where they could sit at home and get on Monster.com and find an as-good or better job before you finished paying them severance. And I don't know that that's going to be the same way this time around. I think there are going to be a lot more people who look really hard at what you're offering them, go to a lawyer and see if they can't either get you to give them a little more severance by making some noise about having a claim or just turning your severance down if they really think there's something there and taking their chances by suing you. Because of the pessimism about the economy, I don't think very many people are going to look at two-week severance or four-week severance and say, "That sounds perfect; I'll have a job before that's up."

ANDROVETT: *One of you touched on this and I want to get into a more in-depth discourse on FMLA. But before I do, if I could just ask this one question: I had a company executive who happened to be a lawyer say to me, "We're going to see some radical departures in labor and employment and a lot more enforcement actions." But then he said, "Thank God we'll have a lot of Republican judges who will be able to knock some of these out of the park." And maybe this goes more deeply into trial strategy and litigation than this audience cares for, but are the courts a wild card in this dynamic as we start to look at some of these changes being implemented and then being challenged?*

RICHTER: I think where we are in the Fifth Circuit, it's going to be a pretty good buffer for employers. I think they're still going to read the statutes narrowly, and they're going to stick with their decisions from the past that make it harder to prove discrimination. I think judges in Texas

federal courts are still going to be willing to grant summary judgments when they're appropriate. The one area that's going to be necessarily different is the ADA, because the new statutory amendments say all those old cases that you used to read to say "nobody was disabled" don't apply anymore. But in general terms, we have good judges in Texas, especially in federal court, and I think there's still going to be a pretty good buffer to keep frivolous claims from going forward and taking up too much of our time.

RONQUILLO: I agree with that. And the Fifth Circuit is very clear with respect to their positions as to employment law going forward. I think when you get down into the state court, though it will depend upon the venue. I mean, if you're in South Texas or if you're in Houston or in Dallas or you're picking a jury in Fort Worth, I think you have to be very cognizant of the venue, the jury pool, and the kind of judges you're going to draw. I don't really look at the party affiliation. I take that into consideration, but I don't let that be too much of a factor one way or the other. But I do want to make one point on the earlier topic of reduction in force. Two things, before I forget, that have to do with e-mails. You read in the newspaper about where Lehman Brothers just sent out an e-mail to about 8,000 employees and that's how they found out that the company was going bust and they didn't have a job. No one wants to be treated that way. So if you have an adverse employment action let's face up to it. Let's don't do it via e-mail. Meet with the person. Give them the courtesy and respect that they deserve and that you would want if you were in the same kind of situation. That goes a long way in terms of whether you end up filing a lawsuit or a grievance or a claim. The second is, every e-mail you send out is an exhibit. Every e-mail you send out is susceptible to discovery. So be very careful in what you put in an e-mail. Use some discretion and common sense. If it's something very sensitive, maybe you may want to just have a face-to-face one-on-one meeting or maybe a phone call. But you've got to be careful with that too these days. So be cognizant of that. And every time you sit down to get ready to hit that send button, step back, think twice,



MIKE ANDROVETT

is in business to make sure that his lawyer clients get positive news coverage and their law firms are marketed effectively through advertising and public relations. Androvett is the founder of Androvett Legal Media & Marketing, the largest public relations and advertising firm in the Southwest exclusively devoted to lawyers and the legal profession. Established in 1995, Androvett Legal Media serves the specialized needs of law firms in communications with outside audiences, including news media coverage, brochures and Web sites, and sophisticated advertising of all kinds. Androvett's firm assists lawyers in virtually all areas of practice while observing the highest ethical standards. Lawyers and their clients who receive media training from Androvett Legal Media are much better prepared to deal with reporters and TV camera crews. And, as a former chairman of the State Bar of Texas Advertising Review Committee, his expertise and experience is essential to firms seeking to comply with the state rules governing lawyer advertising. Androvett and his team take the mystery out of public relations and advertising by recognizing law firms' true goals and providing the know-how to make them happen. He can be reached at 214-559-4630 or mike@legalpr.com.

LABOR AND EMPLOYMENT LAW

“Would I have a problem if this ends up in the *Dallas Morning News* tomorrow morning?” That’s happened to me a couple times in other cases a long time ago. I actually read my investigation for a public entity in the Sunday section, complete with the memo and everything else I had given to that political subdivision. So just be cognizant of that. Don’t let that happen to you that happened to me.

RICHTER: I hate e-mail. If I could go back in a time machine to about 1994, I would tell every company not to give any employees access to e-mail, because it’s a nearly permanent, indestructible record of what the person was thinking at that minute. And we treat it, and our employees treat it, like it’s an informal mode of communication. But it’s not. And they get mad at a co-worker and they fire off an e-mail saying “So-and-so is a no-good, rotten, dirty rat.” Then they hit send. Well, inevitably the subject of the email ends up suing the company and in discovery you’ve got to go haul your servers out and produce all these e-mails, and the other side is going to have lawyers who are willing to fish through them and find the bad e-mails and then there it is. It’s Exhibit 1 and it’s the size of the side of your house and the jury looks at it and says, “Look, it comes from Company.com; it’s clearly their communication, and look at what they’re saying this about this person.” I can’t stand e-mail. It’s the worse thing to happen to litigation in the last 15 years, because we haven’t yet figured out how to get rid of them right and the courts are grappling with how to decide what’s reasonable to go grab and what’s not reasonable to go grab. It’s cheap to have those tapes stuck in a box somewhere and so you’ve got it, and when the other side asks for them you can’t really say, “We don’t have it; it’s gone.”

GLOVER: To the extent that you can get rid of backup tapes as part of a document retention policy, get rid of them. Of course, you cannot do that if there is pending litigation. But if there is not, don’t store them on a shelf somewhere because it will cost thousands and sometimes millions of dollars to restore them, print out e-mails and have attorneys review them. Be vigilant with your document-retention policies. They should be up to date and

uniformly administered throughout the organization.

ANDROVETT: *Several times we have touched on the Family Medical Leave Act, but we haven’t really attacked it in a comprehensive way. These amendments in 2009 are the first amendments in 15 years, and it seems to be an interesting process that led us to the amendments, a lot of calibrating based on what is happening in the workplace, but then also in the courts. Once again, because I love checklists, can we create an A-to-Z list of the amendments that folks should care about?*

GLOVER: The two most important additions to the FMLA are the family military leave provisions. The first one is called “Exigency Leave.” It permits employees with family members in the National Guard or Reserves to take FMLA leave when the military family member is called to duty or called to active duty status. It allows the employee leave to take care of all the issues that must be addressed if a family member is suddenly called to active duty in say, Afghanistan or Iraq. The second is the “Military Caregiver Leave.” It permits an employee to take leave when a military family member is injured or becomes seriously ill in the line of duty while on active duty. It provides 26 work weeks of leave, which is a significant difference, obviously, from the other leaves provided under the FMLA. The governing procedures of Military Caregiver Leave are intricate, so I would encourage employers to read the regulations carefully. For example, the 26-week leave must all be taken within a 12-month period. That 12-month period begins on the first day that the employee is absent for the leave. The 26 weeks is available for the military caregiver leave, but includes any other leave for FMLA-qualifying reasons. In other words, an employee could take 16 weeks leave for the birth of a child, and then 10 weeks military caregiver leave in the specified 12-month period. There are special certification requirements for military caregiver leave too. I would urge employers to use the government forms that are available at the DOL Website in order to certify military caregiver leave, because it is a fairly complex leave in comparison to other leaves under the FMLA.

RICHTER: That’s one of the best things they did this time around was they promulgated these forms that you can use for the various certifications. If you just go on the Department of Labor Web site for things like the military caregiver leave and the exigency leave, there are Department of Labor-approved forms that you’re allowed to give the employee and they fill them out. And it clarified a lot of that where before we were kind of operating in the dark when the FMLA first came out about what does the form need to contain.

ANDROVETT: *I’m just following back on my law school nightmares — but I remember the long classroom discussions we’d have about this phrase “exigency.” Is this a word we should talk about as it relates to the National Guard deployments and family medical leave?*

GLOVER: The DOL has done employers a great favor in that they have listed the circumstances that qualify as an exigency. The first one is short-notice deployment. An employee is entitled to seven days leave if a family member belongs to the National Guard member or Reserves and has been called to active duty with seven days’ notice. The exigency leave applies to child care activities. For example, if an employee needs to enroll or transfer a child because family member in the National Guard or Reserves has been called to active duty. It also permits employees to take care of financial or legal arrangements. For example, if an employee needs to go to the bank and transfer signature authority because a family member is leaving for active duty, exigency leave gives him or her the opportunity to do so. Exigency is very well defined in the regulations.

RICHTER: Again, I think that’s the big favor the Department of Labor did this time around in issuing these regulations was they were a lot clearer than they were initially with the FMLA about what these things mean, about what’s a qualifying exigency, how you take the leave, how you approve the leave and what the certification is you can ask for and what the timelines are.

RONQUILLO: The only thing I would add to that is from a practical standpoint. Now that you have new guidelines out — and I’m talking to the HR folks in the

audience — please have some kind of an orientation session. Please be able to document and show that you were aware that, “Oh, there was a change in the law? Gee, when did that happen?” And more importantly, you analyzed and met with your management team to discuss it. So if it ever comes up in a deposition or in a court hearing, “Hey, yes, we were aware of it; yes, we had an orientation on it; and, yes, we changed our policies to comport with the new policy,” so you can document that you’re on top of your game and that you’re implementing the law to the best of your ability.

RICHTER: There’s a notice requirement in the new Regs, and there’s an officially-approved poster that includes all the language you are required to have. And the Regs say you can use the DOL’s poster or you can produce your own, as long as it has everything that the approved poster has. So, I don’t know why you wouldn’t just use the DOL approved poster. And in addition to posting the notice in a break room or somewhere visible to employees, you also need to communicate it directly to them. I would just take the same DOL-approved flier, shrink it down and issue it to employees as a policy.

GLOVER: And if you have employees eligible for FMLA leave and have an employment manual, notice has to be included in the manual as well. While it may sound self-serving, I would recommend employers contact an attorney and walk through the required steps for a leave under the new regulations when that leave is first requested by an employee. It will save time and a whole lot of aggravation.

ANDROVETT: *FMLA applies to companies 50 employees and over; is that correct?*

RICHTER: Right, 50 employees at a single site of employment or within 75 miles. One of the things they tweaked a little bit is how you determine where the single site of employment is if the person works remotely. Now, it’s where their home base is or where their work is assigned out of. You can’t declare the house an employee who works primarily from home to be their single site of employment, even there are a hundred people at the mother ship where they report. You have to count them with the site they report to or get their direction

from. And then you still have the 12 months and 1,250-hour as employee eligibility requirements. And all of those requirements apply to the new military leave as well. You still have to meet the eligibility requirements. The employer has to be covered and then the employee has to be eligible. One of the changes on the eligibility they did is if you’re out on non-FMLA leave and you cross the threshold — which would almost have to be the one year, because you’re not working; you couldn’t achieve 1,250 hours of work on leave — you become eligible for FMLA leave.

ANDROVETT: *Do you find that the principles that are articulated in FMLA somehow in some other setting find their way into applications against companies smaller than 50 employees?*

GLOVER: There is legislation on the horizon that would expand FMLA to smaller businesses, and it would also permit part-time employees to take FMLA leave regardless of whether they meet the 1,250 hour requirement.

RICHTER: We’re lucky in Texas. We don’t have our state legislatures monkeying around with trying to come up with new kinds of paid or unpaid leave to give employees. California, every other day they’re passing a new statute and giving somebody paid leave to go do something that isn’t work-related.

GLOVER: Speaking of which, one of the things employers should be aware of is that on President Obama’s agenda is a requirement that employers provide every employee with seven days’ paid sick leave. So that’s something to keep in mind.

ANDROVETT: *What other FMLA amendments are meaningful for us to discuss today?*

RICHTER: A lot of the other changes in the regulations are just clarifications. Where either courts were split or the Department of Labor hadn’t been clear about what a particular section meant. They’re tiny little niches in the statute. There aren’t any other big changes. Most of the same rules we were operating under apply, just in a handful of cases now the Regs say what we thought or clarify that we were wrong. For example, if the employee on intermittent leave would have been required to work overtime,

those overtime hours can count against the intermittent leave if they’re out during a time when they would have been required to work overtime. That was one where it wasn’t clear whether the statute in the Regs previously permitted that and now they do.

GLOVER: The new regulations clarify what qualifies as a serious health condition. As I recall, it is a period of incapacity for more than three consecutive, full calendar days, and any subsequent incapacity relating to the same condition that also involves treatment by a health care professional two or more times within 30 days of the first incapacity. It can also be treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under that provider. The second definition encompasses chronic, long-term illnesses such as diabetes or asthma.

RICHTER: The only other thing I can think of that we haven’t talked about is, in terms of a specific, is in the employer notice requirements. It used to be two business days if you became aware that an employee had a condition. You had a deadline to designate the leave as FMLA leave, and now it’s five business days. So it basically gives you a week now to figure it out, understand if the employee needs this leave and then designate it if it’s properly called FMLA leave.

ANDROVETT: *Implicit in some of your comments earlier was that family medical leave just generally gives rise to retaliation claims. Employers don’t like it. The person is gone for a long time. They’re not in the flow of the workplace. Do the revisions speak at all to retaliation?*

GLOVER: The revisions clarify that retaliation is available under FMLA and they discuss certain instances in which an employer would be required to compensate an employee for failing to designate the employee’s leave as FMLA leave. But beyond that, the regulations don’t really go into great detail about retaliation.

RONQUILLO: They also provide for attorneys’ fees, too. So, if you’re counseling your client, you have to be very watchful of the other side’s attorneys’ fees. And if you get to a point where you look at it and you’re trying to decide “How are we going to file an answer and what are

LABOR AND EMPLOYMENT LAW

we going to say here,” and you come to a particular point in time where you’ve got to be thinking about attorneys’ fees and not dragging things out if you’re able to get in there and settle it.

RICHTER: I guess that makes me think of one other thing we hadn’t talked about. The Regs make clear that an employer can settle an FMLA claim directly with an employee. The DOL doesn’t have to approve it. You can have a settlement for all past claims. The Regs go out of their way to say you can’t get a waiver of future claims. But you can waive past claims now without DOL involvement.

ANDROVETT: *And, Pat, why is that meaningful for an employee or employer?*

RICHTER: It just takes a layer of complexity out of the mix. If you had an employee before who had a potential FMLA claim, a retaliation claim or otherwise against you, and you were letting him go and offering him a release, because of a Fourth Circuit decision you were taking your chances if you didn’t get the Department of Labor involved. There was a risk that that the release and waiver might not be valid and that an employee could take your severance, go, and still sue you for an FMLA violation. Now, the DOL has clarified that employees may voluntarily settle or release their FMLA claims without court or DOL approval.

RONQUILLO: One last thing on that. From a tactical standpoint, whenever you’re handling an FMLA claim on behalf of a client the first thing I’d do is pick up the phone and if the person is represented, talk to their lawyer. Sometimes the person is not represented. And you’d be surprised. Sometimes they’re just, pardon my French, throwing stuff up on the wall to see what sticks, and FMLA is basically thrown in there. And I think it’s important to try and figure out just exactly what is going on. What is the rub here? All these cases boil down to human beings with relationship issues, and if you can resolve it and get to it quickly, you might be able to save your client and also that person a lot of time and money.

ANDROVETT: *Marcos, just to put a fine point on something you said, this notion of attorneys’ fees is very compelling, because what this really comes down to is that there might be folks out there who want to go*

sue your company but honestly there’s not a lawyer out there who would have an incentive financially. But if the attorneys’ fees are provided for, it does foster a climate where you might see more litigation. Is that a fair comment?

RONQUILLO: Absolutely right. And, what you’re trying to do for your client is to provide cost-effective legal services. And you get to a point, especially if you’re in federal court with the briefing and the motion procedures as opposed to state court, it gets kind of expensive. So we look at it from a cost-benefit analysis. We look at it from a budget standpoint. Are we looking at one employee? Are we looking at a class action? And we try to plan accordingly. The next thing we look at is the attorney-fee statutes that are at play. What kind of liability are we looking at? And then in these days you go in front of a jury and it’s shake and bake. It’s hard to say what’s going to come out. Yes, we do take comfort in the Fifth Circuit. Of course, that’s equity and relief five years down the road. After a couple hundred thousand dollars have been spent, there’s no comfort to an HR professional trying to keep within their budget. So we do look at the attorneys’ fees statutes, the Equal Access to Justice Act and some of the other provisions that allow for getting attorneys’ fees. And you have some very good plaintiffs’ lawyers out there that are very astute and they know what they’re doing, and they’ll throw in this little phrase here and throw in that little statute there and they’ll ask for that little attorney-fee provision which is upping the ante.

RICHTER: I think the one thing with FMLA adding these attorneys’-fee provisions is it will create a market for it. You’ll have plaintiffs’ lawyers who might not have touched the case because it might not have been economically viable to chase a \$2,000 FMLA claim who might be interested if they can get \$20,000 in attorneys’ fees. So, you might have somebody take those cases. It’s like the FLSA cases. A lawyer I’ve known since law school who was a personal injury lawyer went with me to a seminar on employment law. And he heard a plaintiffs’ Fair Labor Standards Act lawyers get up and say every one of your big companies is

doing this wrong, and it doesn’t matter how big the violation is, you can get your attorneys’ fees. Well, now his practice includes a bunch of Fair Labor Standards Act cases, because he became aware that there are attorneys’ fees available no matter what the size of the claim is.

ANDROVETT: *A lot of those class actions seem to coincide with the passage of HB 4, where all of a sudden medical malpractice claims were not as viable.*

RICHTER: With the caps on the personal injury cases, the plaintiffs’ lawyers are going to go to another avenue, because it doesn’t matter what the recovery is. The default rule on the wage and hour cases is you get your hourly rate times the number of hours worked. And an employer might get a judge to knock that down fee award a little bit, but the lawyer is still going to get a pretty good fee out of it.

ANDROVETT: *Let’s talk about this notion of retaliation, because in the clinical atmosphere of the courtroom or the law books you can nail it down and define it, but in the ebb and flow of the workplace where you’re telling an employee you’re not really doing the job and they say, “Well, you’re just trying to get rid of me because I complained about a supervisor,” and the employer is saying, “What are you talking about? You’ve never been a good employee.” Isn’t that the kind of maelstrom of conflicting stories that go on? How can an employer know, “Uh-oh, that’s the line; that’s retaliation; I can’t go there?”*

GLOVER: Once an employee has engaged in a protected activity, from that point on employers must be very careful. They have to be sure that if adverse employment action is taken against the employee, it is for reasons unrelated to the protected activity and is well-documented. In other words, employers should maintain a history of disciplinary action and/or counseling about performance. If there is a history of problems, then even if an adverse employment action is taken following an employee’s participation in protected activity, it may be fully justified. If there is no history of disciplinary or performance problems and an employer still feels it essential to take adverse action against an employee for reasons unrelated to the protected activity, then the employer should do so, but understand that there may be legal ramifications down the road.

Hopefully, they can be addressed. But it's far easier to prove your case in court if you have written documentation that, "I counseled this employee on Monday; I counseled her two weeks before Monday; I counseled her a month before that, and now the company is going to let her go because the counseling has not worked."

RICHTER: What I see all too often in retaliation cases is a really bad discrimination case that the employer could win on the merits real easy, but what happens is the employee who made the complaint starts trying to get away with a little bit, maybe pushing the envelope. Then you have supervisors who are ticked because they're being dragged in front of the company's lawyer or the EEOC and having to answer questions and be part of an investigation and then they get mad and they do something. Well, now you've made a really great retaliation case out of a really bad discrimination case. You had a discrimination case you could have won nine times out of ten and now you're stuck with a retaliation case you're going to lose nine times out of ten. And when you let the person go and you get to the jury, it doesn't matter that you were going to win the discrimination case. What they see is the person took a protected act, not long thereafter here comes the bad employer and fires the person.

GLOVER: And what qualifies as retaliation is something that a reasonable person would perceive as being an adverse employment action. If you move an employee to a new office, would a reasonable person perceive that as being retaliation? Well, it depends. Did you move the employee from a spacious office to a new office that used to be a broom closet and in which the brooms are still stored? Is the employee forbidden from leaving that broom closet for breaks or lunch, unlike other employees who may leave their offices at will? Or is the new office equivalent to the office that the employee used to have? Whether retaliation occurred is a factually-intensive inquiry. Employers should pay close attention to every action taken against an employee who has engaged in a protected activity.

RONQUILLO: It may be the *Breaux v. City of Garland* case. I think the Fifth Circuit has already clarified what their



opinion would be of those kinds of adverse employment actions. They're not going to be looking at, "Oh, my God, Sally got a bigger desk than Jimmy," or like you said, "I've been transferred to the broom closet." I mean, there is a lot of guidance on what constitutes an adverse employment action in the context of retaliation. But that kind of goes to the point I was saying earlier in the seminar, and that is you've got to have a lick of common sense, because we've seen those cases where, as the panel has just got through saying, you have a very weak or maybe no discrimination, but it's the way you went about handling it or investigating it. And also, remove yourself from the equation. If the supervisor or the person that's taking the adverse employment action should have somebody above him or her looking at this entire situation so that it's not viewed by the court and the judge or the jury that the supervisor is the final official. And try to have some kind of a process where you have a recommending official and then you have a deciding official, so it's not just the same person doing everything. So at least you have some kind of — I don't want to say insulation, but at least another layer, another look-see before that adverse employment action is taken.

ANDROVETT: Several of you mentioned that the employee has to be engaging in protected activities. Can we identify some of the most common protected activities?

RICHTER: We know now from the new Supreme Court case that being a witness in an investigation counts. It says "opposition and participation" is the way the statute reads. And it used to mean you had to stand up and say, "Hey, discrimination is

happening here and it shouldn't happen," and I think it's been broadened quite a bit now with this new opinion.

ANDROVETT: It has to do with internal investigations, right?

RICHTER: Correct.

ANDROVETT: The company is looking into a claim and you're sucked in as a witness. You used to say, "Yeah, this bad stuff is going on"; now you're protected from retaliation?

GLOVER: Yes. Retaliation is prohibited against an employee who has engaged in a protected activity or opposed a discriminatory act. In other words, if an employee files a racial discrimination claim with the EEOC, the employee has engaged in a protected activity. Or if an employee perceives that a co-worker is being sexually harassed and reports it to management, that employee is opposing a discriminatory act. In both instances, the employee would be protected against retaliation. Employees can assert retaliation claims under the FMLA, under Title 7, under the ADA, and other acts.

RONQUILLO: Right. It's been expanded. It goes back to what I was saying earlier about the perfect storm, because now you have a lot of other investigations that are, one, internally driven, and, two, externally driven. Mix well and you have a recipe for disaster. And so I think it's very important to be alert, and if you have these investigations, to have a strict and well-defined protocol for handling these investigations so that no one can say, "Hey, when you investigated Sally, you sure didn't do it the same way you investigated Jimmy. So what's the que pasa here? Why did you deviate basically from your standard protocol?" So it's very important that if you don't have one, get it established and handle it in a way that insulates as much as possible the exposure and liability for the company.

ANDROVETT: We touched on this a little bit, but with the amendments to FMLA, several of you have used the phrase "perfect storm." They come up against an economy that's certainly headed south and may be continuing that way for a while. Are there any particular issues or does the economy generally have some impact on how a company implements these FMLA amendments? Are you at a greater risk? We're at a different

LABOR AND EMPLOYMENT LAW

place, aren't we?

RONQUILLO: Well, I think we certainly are. I got this newspaper yesterday, the *National Law Journal*, right? First off, the headline, "Stage is Set for Legal Labor Brawl — Free Choice Act: Could it Alter Balance of Workplace Power." So I'm flipping to try to finish the article, and there is another headline in employment law, "Class-Action Workplace Litigation Hot Item in '08." And what do they talk about? FMLA and ERISA. We haven't even talked about that yet. Then they talk about wage and hour. And at the



end of the day they say the top ten private plaintiff settlements for employment discrimination class-actions totaled 118.4 million in '08. Now, this is in the Bush Administration. Imagine what it's going to be like in the Obama Administration, all right? And I won't bore you with the rest of the article, but the bottom line is, you've got what I call the federal government's alphabet soup panoply of statutes and regulations. And when you combine that with 2.6 million jobs that have been eliminated over the last year, you have that perfect storm. What you're going to see is a lot of plaintiffs' lawyers regrouping, especially in light of HB 4 here in Texas where you really don't have much tort litigation anymore. Well, all that resource, power, intellect, and expertise, in my humble opinion, will be now redirected towards employment matters. And I see that there's going to be a lot more litigation. I also see in Texas possibly some more class-action litigation, because we've had a lot of class-action cases, and oftentimes it's not so much the claim — it's like our attorneys' fees discussion a few

minutes ago — it's the fact that, "Hey, I may get this class certified," and there is where the real value is and the real hit to the company. Even though the claim is minuscule, but you multiply that a couple hundred times and attorneys' fees, and you're off to the races.

RICHTER: Ronald Cooper, who was until recently the general counsel of the EEOC, spoke at a seminar I attended recently. He said he thought 2009 was going to be a perfect storm for age discrimination cases. He said they hadn't published the full data yet, but the number of age discrimination charges filed with the EEOC went up close to 40 percent last year. And like Marcos said, under the Bush administration the EEOC established this systemic initiative where they were pursuing these big multi-plaintiff cases. Now you're going to have the Obama administration come in and take that ball and really run with it. I hate to keep saying that phrase, but I think it will be a perfect storm. I don't think it's going to be specific to the FMLA, though. I think it's going to be across the board.

GLOVER: Age discrimination will be a major issue in the near future. Baby-boomers are reaching the age of 60 and they are a large part of our population. In the past there have been some legislative initiatives that would do away the caps on employment discrimination claims, one of which was The Civil Rights Act of 2008. It didn't pass, but who's to say someone won't pick up the standard and carry it forward. So the next few years are going to be difficult for employers on the labor and employment front.

RONQUILLO: And to make a bad situation worse, I'll go ahead and say the "I" word this morning: Immigration. We know it's not going to be on the table anytime soon. I think the president has enough to say grace over right now. But I foresee at some point within the next four years there's going to be some legislation up on Capitol Hill. It's going to talk about immigration reform. And we're going to have to also continue to deal with those issues of Social Security, bogus Social Security numbers not matching up, I-9s, not filling out I-9s, not keeping records with respect to I-9s, the continued influx and inflow of documented

or undocumented labor that basically is the driving force of your labor-intensive industries, such as food and beverage, retail, hotel, light construction and heavy manufacturing. All of these are the heart of our economy. And Texas is one of those states that is very affected by immigration. And employers are going to have to wrestle with the heightened enforcement activity and those employers and those industries that I just talked about are not going to get the kind of grace that they've gotten in the Bush Administration.

ANDROVETT: *During the Bush administration there was an emphasis on the sort of front-page high-profile raids. There's some suggestion that under the new labor secretary there'll be more emphasis on working conditions and standards, the theory being that if you hold the employer's feet to the fire, you have less of that kind of environment where you're attracting the illegal immigrant. But just as a practical matter, do you find in 2009 that employers are better positioned? That they know more now about how to respond to, say, a no-match letter?*

RONQUILLO: Personally, I do. But then it also goes back to the size and the sophistication of the employer. For example, to be frank, I think the difference between their profit and loss is the undocumented labor work force, and so they're in a bind. I mean, to make the profit margins and to make the enterprise work they rely on that kind of labor. And I think right now, because of lack of enforcement and lack of resources, everybody's been able to kind of go about their business under the radar screen. I know the new secretary of labor has not been confirmed yet, but, my sense of things given her background she's going to really take a tough look at that. And I could see some proposed regs in the CFR coming out sometime shortly after in her administration, looking at those exact issues to raise the standards so you don't have these "sweatshops" that are basically exploiting undocumented labor.

ANDROVETT: *I'm going to try to string together about three separate Texas Lawyer roundtables over the last three years. In one of those roundtables, there was a very aggressive point of view that employers in Texas just had to get their arms around immigration. In another roundtable, I remember one panelist was very strenuous that employers*

had to get their arms around the incoming unionization, because unions were going to target the immigration population in a way that they never had before. And now in this panel we're talking about the Free Choice Act, which I'm going to ask you to make relevant to all of us here, but would seem to make unionization more probable in the workplace. So let's talk a little bit about what the Free Choice Act does.

GLOVER: The Employee Free Choice Act really has three separate provisions that employers should be aware of. The first is what's called a card check process. It provides that once 50 percent plus one of the employees in a bargaining unit has signed an authorization card, the employer must recognize the union. It does away with secret ballot elections for unionization. The second provision, which is more concerning to me, is called a mandatory arbitration provision. And in this provision, an employer must recognize a union within ten days after being notified that the union has obtained the required number of authorization cards. The employer has to reach an agreement or contract with the union within either 90 or 120 day depending on the draft of the legislation that you are looking at, of that recognition. If the employer and union do not reach an agreement in that period of time, they must submit the controversy to a federal arbitrator. The federal arbitrator then determines the terms and conditions of the contract and that contract governs for the next two years. It's fairly frightening to most employers that a federal arbitrator will be telling them what their labor agreement will be for the next two years. And then the third part the Act increases civil penalties for violations of the NLRA, the National Labor Relations Act.

RICHTER: It's interesting that most of the public debate about this statute seems to be around the card check issue, but I don't think that's the really troubling part of the statute. I was telling a client the other day, if it was up to me, I would swap the card check for the mandatory arbitration. I would let the unions have the card check elections -- they are winning about half of the elections anyway -- and make the threshold for winning the card check 75 or 80 percent instead of just 50



percent, if they would back off the mandatory binding arbitration. That's what scares me. You're going to have a federally appointed arbitrator deciding everything from wages and hours to, depending on the business, working rules, working conditions and those kinds of things.

GLOVER: It has reasonably wide support. Senator Arlen Specter supports this legislation. So there's some support for it on both sides of the political aisle.

RICHTER: I read an article last week from a blogger, and he had two different polls. And it showed, depending on how you phrased the question, "yes" for the Employee Free Choice Act got 75 percent, and if you tweaked the language just a little bit, "no" for the Employee Free Choice Act at 75 percent. So I'm not sure where public opinion is on this. The good news if you're an employer and you're looking to see the statute get compromised down from the way it got pushed through last time and didn't pass the Senate is that I think the unions got kind of a black eye in the automaker bailout. When all those charts in the Wall Street Journal and everywhere else showed what Detroit union auto makers make and here's what non-union non-Detroit auto makers make, I think those things are good in terms of trying to push legislators to compromise. But there's a lot of lobbying on both sides about this. I saw an article this morning that said the Democrats in the Senate were just waiting for Al Franken to get sworn into the Senate and then they're going to introduce it. I think it will be very interesting to see if it gets tweaked.

RONQUILLO: I was surprised to see so

much support on both sides of the aisle. But at the same time, while the Obama Administration is dealing with the trade deficit and the trade imbalance, with respect to the international debt, and with the whole emphasis to try and make our economy and, arguably, our work force more competitive, you're in a great conflict at this point in time, if you're now looking at this kind of legislation. I agree with you, it's a very scary thought when you have to negotiate with a federal arbitrator with respect to the terms of working and employment conditions of your employee work force. Yet, at the same time, we want to reduce our trade deficit and we want to be as competitive as we can in the global economy. We're competing with workforces in China and India that don't have anything that comes close to what we're looking at in this legislation.

RICHTER: The short timing also is pretty disturbing. And 120 days is not that long once you have to recognize the union to figure out can you have a deal. And I don't want to suggest that the unions are the only ones with bad motives in these negotiations. But if I was a union lawyer, I would go into that negotiation as high up as I could possibly be and not be laughably unreasonable, because I want the ceiling to be as high as it can be when we go submit it to the arbitrator, because my guess is the arbitrator is going to land somewhere in the middle. And so I'm not going to negotiate myself down very much at all if I know I've only got to wait four months before the Federal Mediation and Conciliation Service is going to pick somewhere between our two numbers. I wonder if they won't tweak that arbitration mechanism a little bit. And if the unions are successful in terms of getting the card check and the mandatory arbitration, I wonder if they'll get it to an arbitrator within 120 days. If we have a flood of unions that have to be recognized and four months go by and employers haven't agreed to contracts, how long after it gets submitted is going to be until the arbitrator makes a decision? I don't think they're going to move quite as rapidly in terms of issuing decisions and issuing contracts. I don't know who's going to appoint those arbitrators. I don't know

LABOR AND EMPLOYMENT LAW

where they're going to come from. I don't know whether or how their authority is going to be limited. How far can they go in terms of dictating to companies how they deal with their employees?

GLOVER: And I wonder if it raises the whole question of freedom of contract.

RICHTER: I know there are articles flying around that suggest that the entire statute is unconstitutional. That's over my head.

RONQUILLO: That's another seminar.

ANDROVETT: *Obama's first act was to sign into law the Fair Pay Act or the Lilly Ledbetter Act. Can you talk a little bit about what that is and what that means for employers and if you see any larger symbolic significance in that?*

RICHTER: Well, it undid a Supreme Court decision, the *Ledbetter* case. In that case, the Supreme Court said that the original act of paying this woman less than her male counterparts was the act of discrimination. Even though she continued to receive less over the years, it didn't matter. She should have brought suit 10 or 15 years ago, whenever it was it first happened. The statute undoes that. It basically says every subsequent paycheck that's less than a male counterpart based on discrimination is a new act of discrimination and starts a new limitations period running. On the one hand, I think it's bad. But on the other hand, the statute of limitations for recovery is still two years, three years if it's willful. In the patent world they call it a "submarine patent," where somebody files an application and they keep amending it to keep it from issuing. And then, when a product pops up that they think their patent covers, then they let the patent pop up and they go sue. We might see that in the employment context in terms of a submarine pay claim where somebody knows they're not being paid what their male counterparts are and waits and waits, and the HR person leaves the company or the CEO leaves, and all of a sudden, they pop up and say "aha." But, I think that's unlikely. In terms of a practical bit of advice, I've told clients if you have a rule that says employees can't talk about their paychecks, get rid of it. More transparency is better. The statute doesn't have any language about knew or should

have known. But I would really argue to a judge with a straight face that this person sat on their hands. Argue some equitable defense, dust off the tort law school books and argue laches -- that the person knew they had a claim but waited 15 years to come forward with a claim and you shouldn't let them proceed now.

GLOVER: I agree. It's a good time for employers to take a look at pay scale across the organization and be sure that women and men are being paid on an equivalent basis. And that's difficult to do, because people come to employers with different skill sets, but it's going to be something that plaintiffs' lawyers will latch onto quickly.

RONQUILLO: Going back to your protocols and process, I think when you're doing your annual performance reviews, if everybody has a set time to basically do that, that's a practical time and a good point in time that makes sense to a judge and a jury to go back and look at all of these issues. So you may have given a person a raise, but then you take a look at how she or he compares to their peers and take a look at that again, and if you think there's a problem, now is the time to fix it. But you need to do it across the board all at one time.

RICHTER: I think about all of these issues about Employee Free Choice Act and Fair Pay Act as an employer, my advice to employers is be more open and give more communication to employees. The old days of employers making decisions in a smoke-filled room, or the process being a black box and employees not understanding what's going on, needs to stop. Because the more communication you have with your employees, the more they understand what's going on in the work force and the less likely they are to turn to a union to try to step in. Also, you're less likely to see these dormant pay claims pop up out of nowhere 15 years down the road.

ANDROVETT: *We've been talking for the most part about federal legislation and about the federal courts. At the state level, do you see anything in your crystal ball that we should know about in the next couple of years?*

RICHTER: Being in Austin, I kind of keep an eye on the legislature, and they

really don't do too much in terms of tinkering with the employment laws. They're pretty content to sit back and let us be governed by federal law. This time around, there are a couple of bills introduced that touch on immigration issues more than purely employment issues. There are a couple of bills filed that say you may lose your state contract or your state license, if you're licensed by the state, if you knowingly employ undocumented workers. I don't know how far those are going to go. They were introduced the last time around and got bogged down in the process because there were memos saying they were unconstitutional. I know other states, I think Arizona is one, have a similar statute, but they've never enforced it, even though it's on the books. I don't see our state legislators doing a whole lot, particularly in a bad economy, to make more red tape for employers. I think it will go the opposite way. I think we'll do more to try to attract business and attract employers who will hire and employ Texans.

ANDROVETT: *Pat, something that I recall from your bio, you do a fair amount of IP-related work. As recently as October, in our roundtable, we spent a lot of time talking about this dynamic where the company is tootling along and unbeknownst to the corporate hierarchy there's some person or group of people who are marshaling on their thumb drives and on their hard drives all this proprietary information. And so one day, they just up and announce, "Hey, we're going to go form a competitor, and lo and behold, you find out the foundation for that new company is all your trade secrets and all your proprietary information. Is that issue less acute for employers now because it's a tough market out there?"*

RICHTER: I don't think so. I think the opposite. I think you'll see more competitors looking to poach people from other competitors. In Austin we have a lot of tech companies. A lot of the technologies they work on are similar. They know who the players are. They know who the really good engineers across the street are and what they are trying to do. And in a bad economy, you might see more companies trying to lure people from their competitors. I don't know that they're going to want them to come over and bring their trade secrets. If they're my clients, we're

going to try to prevent that. But I don't think the down economy is going to make that happen any less.

ANDROVETT: Which leads to the age-old question: How does a company protect itself?

RICHTER: Well, you've got to start back at the beginning. You've got to know what it is you want to protect and you've got to have a strategy of how to protect it, whether it's trade secrets or patents or copyrights or trademarks. And then you need to come up with a plan and then uniformly get employees to sign off on it, whether it's a noncompete agreement or a nondisclosure, however it is you decide to address it. And it needs to be there from the beginning. Our Supreme Court occasionally waffles back and forth on non-competes. I think we're now in a world where almost every non-compete is enforceable, which I don't know if it's a good thing or a bad thing, but that's where we are. I would decide as a company how you're going to pursue it. Some of my clients don't like non-competes. They'd rather have just a nondisclosure and a non-solicitation agreement, and they don't care if a guy walks across the street to a competitor, so long as he's not doing something similar where he would use the trade secrets. Others say, depending on what the technology is and who the person is, if he goes across the street we're too much at risk. So know what it is you want to protect, come up with a strategy to protect it, put agreements in place that'll put you in the best position to protect it. And then make sure that your HR people and your company follow that process.

ANDROVETT: Each of you give me your top three take-aways that we should walk out of here with.

RICHTER: The Number 1 thing is the employee Free Choice Act. Just start laying the groundwork now so that your hands-on supervisors communicate with the employees and, again, get rid of this secrecy between the company and the employees, so your employees know what's going on. I've done a bunch of union campaigns, and, inevitably, the issue that caused employees to go ask a union to come in and represent them is they didn't feel like they were effectively communicating with their employer. On



the FMLA and the other statutory or regulatory issues we've talked about, I would just say go back and take a look at your policy and procedures manual, maybe with outside counsel, and take a review of it and make sure that you've got everything in place. A lot of the changes don't change the basic structure of what you were already doing and it's just a matter of making sure where the tweaks are that you're in compliance. Finally, I would say if you end up in the a bad situation and you need to do a reduction in force, just make sure you plan it out carefully and make sure you take that step back and look at the big picture. Like Marcos was saying, put a couple of layers in there so that the people who are making the decisions aren't necessarily hands-on or emotionally tied up with the people who are being terminated. Look at the overall picture and make sure there's not a giant red flag waving out there.

GLOVER: There are approximately five or six new legislative initiatives that employers should be aware of. Employers should take the time to look at the acts that are on the horizon in the labor and employment area and become politically active. Tell your congressmen or your senators what you think about potential legislation. I think the second thing I would recommend to employers is that they hold routine training sessions with their frontline people. It's all well and good for HR personnel to be knowledgeable about labor and employment law, but unless the knowledge seeps down into

the organization, it will not benefit the organization. And finally, I would advise employers with workforces that might be susceptible to unionization efforts to take a look at potential bargaining units and see if there is a way to shift people around or revise the units in a way that they would be less susceptible to unionization.

RONQUILLO: I think the first thing I would do, if I'm an HR professional, is go back and take a look at your employee manual and make sure, number one, it's up to date, make sure it's current, make sure you understand the amendments, the changes in the legislation, then — I'll piggyback on Linda's comment — set up an orientation or a training session. That's point one. Point two, if you do have to conduct an investigation, do yourself a favor and get outside counsel or somebody else to do it. Take that headache off of your plate and let somebody do it and report back to the board of directors. And then the third thing is that, watch your e-mails. I see too many e-mails where people are basically thinking out loud, and that's not a good thing. ❖

For more information on
upcoming events and
sponsorship opportunities,
contact Deni Ruddy at
800-456-5484, ext. 766.

We ~~identify~~ the problem.
We ~~confront~~ the problem.
We SOLVE the problem.

WE SOLVE THE PROBLEM™

RESPECTED | PROVEN | RELIABLE



Marcos G. Ronquillo



Donald E. Godwin



R. Alan York



Bruce W. Bowman, Jr.

GODWIN RONQUILLO
A Professional Corporation

Dallas 214.939.4400 | Houston 713.425.7420 | GodwinRonquillo.com

Attorneys and Counselors