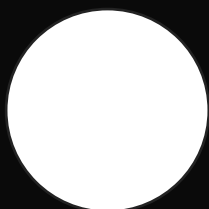
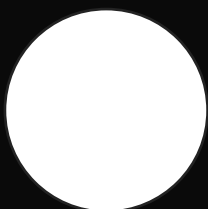


# LABOR & EMPLOYMENT LAW:

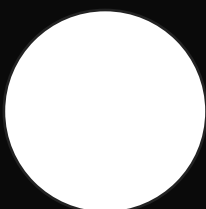
What Every Company  
Must Know.



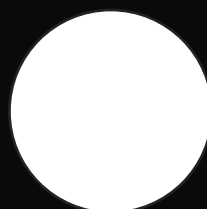
JEFF GOLUB



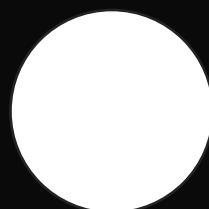
ETHEL J. JOHNSON



JERRY D.  
REDMOND, JR.



MICHAEL D.  
RICHARDSON



MARCOS G.  
RONQUILLO



# PERFECT 10

So maybe "perfect" is a stretch, but we are 10 years old.  
Just imagine what we'll be like in our teens.



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How is the weakened economy affecting labor and employment law? Should employers anticipate tougher times with more regulation and more litigation? What changes should employers expect in the upcoming months? To help answer these relevant issues, Texas Lawyer's business department gathered some leading experts in labor and employment law for a roundtable discussion. The following discussion has been edited for length and style:

**MIKE ANDROVETT, moderator, attorney, owner of Androvett Legal Media & Marketing, Dallas:** . . . *I've asked the panelists to not only talk a little bit about who they are and what law firm they work at but to also talk a little bit about the very nature of their work. So if I could start with you, Ethel.*

**ETHEL J. JOHNSON, partner, Shook, Hardy & Bacon, L.L.P., Houston:** I joined Shook two weeks ago as a partner in the employment litigation and policy section, after nine years with Ogletree Deakins. I've been practicing labor and employment law for basically my entire legal career. I'm board certified in labor and employment law. My practice consists of mainly employment discrimination cases, noncompete issues, labor arbitrations, employment arbitrations, and the other issues that comes under the general advice and counsel umbrella, which is basically once I pick up the phone, whatever a client needs, I find an answer. I have tried lots of cases in the employment litigation context. Lately, though, I have been consumed, it seems, with labor arbitrations. The steelworkers are very busy in Houston right now. I spend a lot of time doing that these days. But it is a very dynamic and interesting practice. I'm excited about some of the new

things coming down the pike, new areas to focus on, and providing creative solutions.

**MARCOS G. RONQUILLO, shareholder, Godwin Ronquillo PC, Dallas:** We're primarily a trial law firm. We're a trial law firm that happens to try employment and labor cases. We have a very diverse practice in the public law section. We've handled and currently are handling desegregation lawsuits, whistle blower, class action claims. We represent *Fortune* 500 companies in class action securities litigation. And we also have represented just about every major political and governmental subdivision at some point in time in North Texas the airport, the city, county, the transportation authority and of course, the major school districts in North Texas. We've handled a lot of major high profile civil rights, labor and employment discrimination lawsuits. We also work with smaller businesses as well. Our practice is not really a counseling or preventive medicine practice. So we're pretty much a trial law firm.

**MICHAEL D. RICHARDSON, partner, Rose•Walker, L.L.P., Dallas:** We are a trial firm. Basically I'm a trial lawyer who has happened to have tried quite a few what would mostly be considered labor and employment type issues. I've tried cases involving noncompetes. I've enforced noncompetes on behalf of corporations against individuals who have left those corporations and stolen trade secret information, confidential proprietary information, and tried to start competing businesses. I have also represented individuals as well who have been terminated from companies in breach of their employment contracts, and that sort of thing. But our firm is clearly a trial firm. We don't handle the counseling type issues on labor and employment. And then we try cases of all different sorts from patent infringement, IP type cases, to the labor/employment type cases that I

discussed earlier.

**JERRY D. REDMOND, JR., senior associate, Conner & Winters, Houston:** Conner & Winters is a full-service law firm, we handle both corporate and litigated matters. My practice is primarily labor and employment, immigration and general litigation, whether it be commercial, products liability or personal injury litigation. The labor and employment portion of my practice includes handling employment discrimination matters, harassment matters, and et cetera, and the labor portion, similar to what Ethel is doing now, involves labor arbitrations dealing with traditional labor issues that are being filed under the National Labor Relations Act. My immigration practice is primarily consists of assisting employers with obtaining employment visas for their workers or family-based visas and et cetera, along with assisting individuals in obtaining permanent green cards. I also represent individuals who unfortunately are in deportation proceedings, whether they are an employee of a client or in their individual capacity. Our firm's practice is directed towards litigation of employment and labor matters and also towards counseling employers on preventative measures to avoid litigation, and also counseling with respect to immigration matters.

**JEFF GOLUB, partner, Beck Redden & Secrest, LLP, Houston:** I have been at Beck Redden & Secrest for the last 12 years. We are a general civil litigation boutique that focuses exclusively on trial and appellate work. I'm a member of our firm's employment law practice group, and we have extensive experience litigating trade secret disputes between employers, employees and competitors, discrimination cases, ERISA, and FMLA matters.

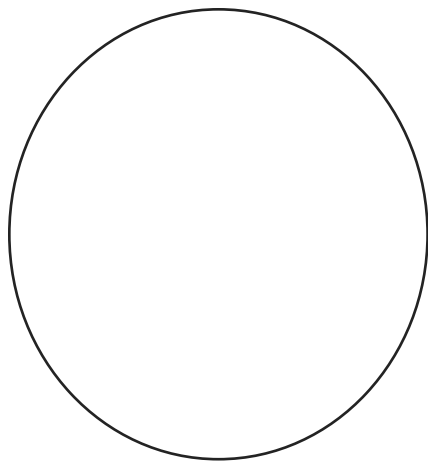
**ANDROVETT:** *When we last convened for the labor and employment roundtable, it was March. And a consensus seemed to*

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Jeff Golub is a partner at Beck, Redden & Secrest, L.L.P., a litigation boutique located in Houston. He joined the firm in 1997 after serving as a law clerk for the Honorable David Hittner, United States District Judge for the Southern District of Texas. Golub's practice focuses on complex commercial litigation, business disputes, labor and employment law, and products liability litigation. Golub routinely represents companies and individuals in diverse employment matters, including non-competition, executive contract disputes, trade secret, fiduciary duty, discrimination, and ERISA matters.

*develop that the combination of the sinking economy had created, or contributed to, conditions to what Marcos referred to as "a perfect storm," in that we could anticipate tougher times for employers, more regulation and perhaps more litigation. Here we are almost in September. Marcos, if I could pick on you, were the predictions true or what is the environmental landscape right now?*

**RONQUILLO:** Well, the prediction is true. We're right in the middle of it. I guess the case in point would be the heightened activity by the FDIC. Our firm has been engaged to pursue professional liability claims from failed financial institutions in the southwest. What I said was: Given the eight years of the Bush Administration and lax enforcement, you can point to Madoff and Stanford and all the other high profile criminals we read about in the press, because of that lack of enforcement. The fact was that whistle blowers were out there and they weren't heard. Now you are hearing about the whistle blowers and they are being heard. This invariably continues to be a heightened enforcement environment. I shouldn't say heightened, maybe a start of enforcement by the SEC and other regulatory agencies. How does that translate and how is that relevant to this discussion? Well, we're talking about employees. We're talking about folks that are either coming forward or participants in internal, civil, and criminal investigations whether you're dealing with the US Attorney or the FBI. Employers ought to be aware of this heightened scrutiny and this heightened regulatory enforcement by governmental entities. You throw on top of that, of course, the economy and of course anyone that's laid off or is let go is obviously going to be getting a lawyer and looking for claims to bring. We've always found in our trial practice that as the plaintiff's bar — nothing against plaintiff's lawyers. But when we had the HB4, we had downturn on medical negligence, the cap on damages and so they are moving over into the employment area. They're also pursuing some kind of regulatory qui tam type of enforcement proceedings as well. That's what I would do. We have federal and state civil rights laws that heretofore really haven't been aggressively enforced. So I see somewhat of a change in that.

**ANDROVETT:** *Anyone else seeing the same sort of perfect storm?*

**GOLUB:** Yes. We do a lot of work clients in the energy industry. We're seeing an uptick in the energy industry with respect to disputes between former employees and employers. Our clients want to keep their customers and sources of revenue. But they're looking for ways to reduce their costs and in some instances, their staffing. That's putting a strain on employer-employee relationships. So we've seen an increase in the number of cases involving employees who have either been asked to leave or who are jumping to competitors. And yet their employers are being very aggressive, including by initiating litigation, in trying to make sure that they are not losing any valuable company information or clientele when their employees leave. So the downturn has resulted in a significant increase at our firm of those types of cases involving disputes between former employees, or soon to be former employees and employers.

**JOHNSON:** Not so much a perfect storm, but moreso a process of trends. As the stock market swings back and forth, the defense bar from the employment law perspective — and I've been a beneficiary of that, we've had the plaintiffs bar on their heels for some years now. In some ways, particularly with disability cases and cases that hardly ever get past summary judgment, the pendulum swing is likely more pro-employee now, which in some ways is going to force the defense bar to sharpen our skills again, because we've sort of been in the driver's seat for some time. So from the bench to the bar, things may swing in a different direction. In a lot of ways that is positive in that employers can sharpen their policies and practices, recognizing a trend that is more plaintiff-oriented.

**RICHARDSON:** I agree with the other panelists that we have seen a huge upswing in former employees leaving companies either because they've been terminated because of the downturn in the economy or they're leaving because they see the writing on the wall. Invariably they are accused by their former employer, who we represent, of taking confidential and proprietary information and, of course, violating their noncompetes. The one

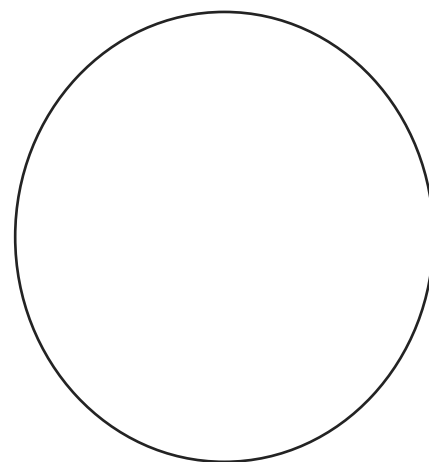
thing I would disagree with is the law, at least in Texas and there are some trends elsewhere, that noncompetes are being opened up a little bit in terms of they're more easily enforced now than they used to be because of the Supreme Court decision in Texas that occurred in 2006. So I am finding that it is easier for me to enforce these noncompetes and enforce the nondisclosure agreements that these former employees have signed. So in that sense it's a little easier on the defense side but in that limited sense. I would agree with you otherwise.

**REDMOND:** Mike, to follow up on the perfect storm, there are government regulations that are affecting employees/employers, the Obama Administration, in the spring and summer of '09, made several announcements regarding the institution of immigration control policies and their initiative to start enforcing immigration laws against employers. To that effect the INS has recently started what we consider audit initiatives. As of July 1st at least 562 audit initiatives were initiated by the INS to employers. The audits consists of entering an employer site, looking at I-9s, and determining whether the employees who are working for these various employers are in fact employment authorized or illegal aliens. This initiative has trickled over into the H-1B visa category, which is a visa category that is designated for an approximate time of about six years for an employee who is in a specialty field and who has a bachelor's degree allowing the employee to work for an employer on an employer sponsored H-1B visa. We are now seeing an initiative by the federal government to start site inspections of H-1B petition employers. These site inspections have increased and there have been reports from the government that they expect thousands of these types of audits to occur over the coming weeks in at least 28 various cities. The government has not identified which cities will be affected by these audits, but the administration has made it clear that it intends to crack down on immigration control. Its cracking down on immigration control includes criminal sanctions against employers, managers and human resources individuals who harbor or employ illegal aliens, as well as civil

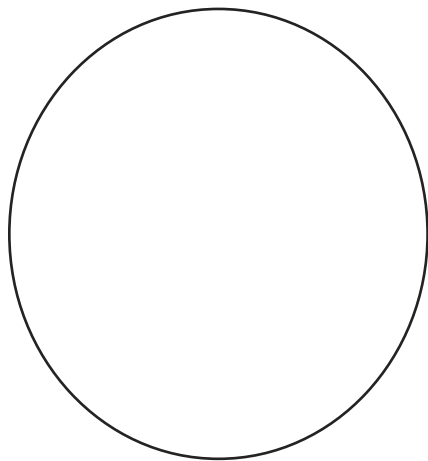
penalties against these employers.

**RONQUILLO:** If I may add to that, we're also finding that our clients in what I call the labor intensive industries — hotel, motel, light manufacturing, heavy construction, food and beverage — are going to be prime targets for those kinds of investigations. Also, under the last administration there wasn't a lot done with respect to the issue that every employer probably works with or has to address and that is bogus Social Security card numbers. I'm sure all of us at some point who are handling employment related matters get the phone call from the HR guy saying, "Hey, Joe Blow's Social Security number just doesn't quite work. I've got all this stack of letters from the Social Security Administration trying to figure out basically what's going on." We're going to see a lot more of that. That stuff is not going to be swept under the rug, and we're going to see more enforcement and more penalties and more cooperation between the Social Security Administration and the immigration service.

**REDMOND:** Mike, can I follow up on that portion of Social Security Administration? In July the Obama Administration announced that the federal E-Verify rule would go forward. E-Verify is the Internet-based employment verification system. President Bush signed an executive order in June 2008 requiring that some federal contracts issued to, prime contractors and/or subcontractors include an E-Verify provision in the contracts. Along with that announcement, the Obama Administration also announced that the Social Security Administration would be rescinding its no match regulation that has been in litigation for the past two years. The no match regulation was designed as a safe harbor for employers who received no match letters. If you received a Social Security no match letter, the employer, under the prior regulation that's about to be rescinded, had a 90-day period in which to allow the employee to correct the Social Security mismatched number. If they could not do so within the 90-day period, the employer then could proceed with discharging that employee. Now that that regulation has been rescinded, it's a little murky as to how the Social Security Administration



Ethel J. Johnson's practice focuses on the national representation of management in all aspects of labor and employment law, including employment discrimination cases, complex employment litigation, employee benefits litigation and labor arbitrations. Along with her litigation practice, Ms. Johnson counsels clients regarding discipline and discharge issues, wage and hour, workplace privacy, internal investigations, employee handbooks/manuals, employment agreements, medical leave policies and practices, drug and alcohol abuse, as well as other issues arising in the human resources context. America's Leading Lawyers for Business has recognized Ms. Johnson as a leader in the labor and employment law area every year since 2005. Ms. Johnson has been named a "Texas Super Lawyer" every year since 2003. Most recently, Ms. Johnson was selected for inclusion in the 2010 edition of *The Best Lawyers in America*. Ms. Johnson is a member of the Houston Bar Association (Council, Labor and Employment Law Section), the State Bar of Texas (Labor and Employment Law Section), and the American Bar Association (Labor and Employment Law Section). She is also a member of the National Order of Barristers.



Jerry Redmond is a senior associate in the Houston office of Conner & Winters, LLP. Redmond concentrates his practice on labor and employment, immigration, and various areas of litigation defense. His experience in representing corporations in labor and employment includes the defense of discrimination, harassment, retaliation, and FLSA claims, traditional labor matters filed under the NLRA and union grievances, OSHA matters, trade secret and non-compete disputes, and ERISA litigation. He also counsels and assists corporations and individuals with immigration matters, including I-9 and E-Verify compliance issues, internal audits, government investigations, preparation of compliance programs, obtaining employment, investor, and family based visas, including temporary nonimmigrant "work visas" and permanent immigrant visas (commonly referred to as "green cards"), and represents individuals in deportation proceedings. Redmond was recognized by *Texas Lawyer* as a "Texas Rising Star" in 2005 and 2006.

will proceed with respect to no match letters. We are pretty sure no match letters will continue to be issued. Employers now will have to determine how long they will give an employee to clear up the none matching social security number once the no match letter is received. There was a recent California decision where an arbitrator decided that three days was an insufficient amount of time for an employer to allow an employee to go to the Social Security Administration and determine whether or not there was an error in the no match letter that the employer received. So obviously three days is not going to be sufficient. Employers may have to adopt something that's similar to the no match regulation that is being rescinded or they may be able to adopt something that provides a longer time period, but they need to address these no match letters when they are received. They are not only geared towards the Social Security Administration determining whether the wages that are paid for this individual are indeed paid to the proper individual, they are also used by DHS to determine whether the individual is indeed who they claim to be and is employment authorized. So employers should try and come up with a policy to address these no match Social Security letters and give the employee a sufficient amount of time to speak with the Social Security Administration to try and find out whether or not there's an error with the Social Security number and correct that problem. Then and only then, after they have given them that sufficient time and they've been unable to correct the problem, should the employer proceed with taking some form of adverse action.

**ANDROVETT:** *Jerry, I just want to circle back on that. The no match letter initiative dictated a very specific protocol that required employers to be fairly aggressive.*

**REDMOND:** Yes.

**ANDROVETT:** *Is it your counsel that in the absence now of the technical requirement that maybe they just follow that 90-day protocol?*

**REDMOND:** It's been my counsel to employers that you continue to follow that 90-day protocol even though it's been rescinded. The 90-day protocol

was designed to provide a safe harbor in the event that some type of action was brought against you by the Social Security Administration or DHS. Since there will no longer be a safe harbor, employers should still try as best as they can to follow that 90-day protocol or a protocol that is very similar to that in determining whether or not there is a error in the Social Security no match letter that they received.

**ANDROVETT:** *Panel Members, you have done an excellent job of laying out some of the challenges for HR managers and in-house lawyers and outside firm lawyers who represent companies. I want to start taking some bites out of these individual topics. First, on this notion of increased scrutiny, the perception is that the Obama Administration right now is completely preoccupied with health-care and not healthcare, two wars. What is contributing to this heightened scrutiny? Is it a mood? Is it a philosophy? Is it tangible administrative steps? Or is it more a change of judgeships in Houston and in Dallas where you once had Republican strongholds and, now, you have more Democratic party judges? Or is it all of the above?*

**RONQUILLO:** It's a combination of all of the above. Essentially like I said, not to belabor the point, but you do have a confluence of issues, trends, perfect storm, whatever label you want to use. It really doesn't matter. Bottom line is you do have this precipitous change in our legal regulatory environment. That translates to a lot more headaches for HR professionals. We talked about the Social Security issue. That's just basically symptomatic of a much larger problem that employers, trade associations, manufacturing associations, industry groups, chambers of commerce are going to be facing after the healthcare debate. That is the ultimate realization that the profit margin is very slim in these labor intensive industries. Their profit margin is usually based on undocumented labor. So the Obama Administration, along with the Mexican government, are going to have this issue to address. It's my understanding that once they get past this healthcare debate — hopefully we'll have something soon — that they're going to turn to the whole issue of immigration to the extent it has an impact on our economy.

**JOHNSON:** I'm with that. It's a combination of all of the above. But it's not the administration and the bench. You have agencies such as the Equal Employment Opportunity Commission. For example, this year the EEOC has decided it's focusing more on race claims. Race claims have always been the most prevalent of charges brought, but they tend to be the least successful at trial. With the EEOC focusing now more on race cases, we're going to see cases that have more — I don't know if I'd say legitimacy but cases that are stronger. Stronger for prosecution purposes, and therefore more difficult to defend. The trickle effect of agents and agencies of the government taking it upon themselves, as the EEOC in this instance, to ensure that cases with more factual legitimacy actually end up getting brought and in the hope, I guess from their perspective, that they be more successful.

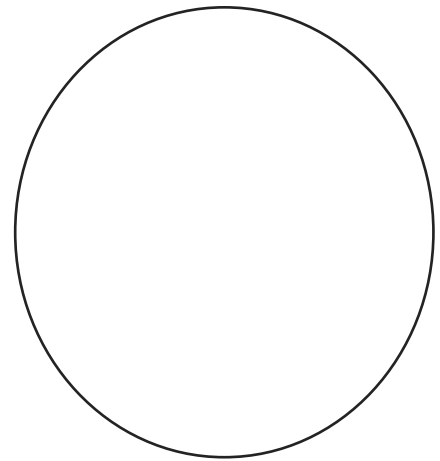
**RONQUILLO:** I was a former Government attorney in the Carter Administration. It's like anything else in life: Who is your Attorney General? Who is going to head up the civil rights division? Who's going to head up your anti-trust division? Who's going to head up your voting rights section? We see a lot of change. There's going to be a change in philosophy with respect to government intervention, a change in philosophy for being anti-regulatory. You're going to see that change in philosophy as the Department of Justice is slowly rebuilt. That will take a period or passage of time. But at some point all the major moving pieces of the Department of Justice that affect daily our clients will be in place. We anticipate it's going to be basically a new day.

**REDMOND:** I would also like to add on to Ethel's comment regarding the EEOC now taking a more aggressive approach. The EEOC recently released an advisory opinion regarding severance agreements. The opinion itself didn't change much about what we know about severance agreements, but it did make a few broad statements. Although this isn't a regulation, this is something that the EEOC will likely look at when an age discrimination claim or any other type of discrimination claim is filed by an employee. This particular advisory opinion by the EEOC makes several broad suggestions,

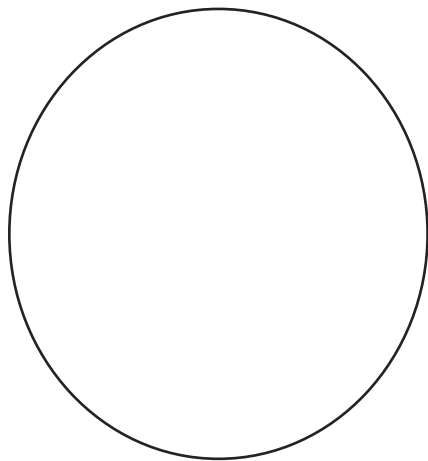
one being that an employee cannot waive any types of claims that they may bring to the EEOC and cannot waive their right to participate in any type of investigation that is ongoing by the EEOC when they sign a severance agreement. Obviously an employee can waive past claims but according to this particular advisory opinion they can't waive claims that are presently ongoing or in which they could actually file an EEOC charge regarding. The EEOC also addressed the compensation that needs to be offered to employees who may be subject to a layoff and offered a severance agreement. The compensation that needs to be offered according to this particular advisory opinion doesn't need to be compensation that the employee would have otherwise been entitled to. If the employee was entitled to a bonus or vacation pay or something of that nature, it is insufficient compensation, at least according to this particular advisory opinion from the EEOC, to justify the severance agreement and it going forward.

**ANDROVETT:** *Can we talk a little bit about how an HR manager now protects themselves against the "perfect storm."* Mike Richardson, I want you to sort of sit in the back for a second as a trial lawyer. My guess is trying some of these cases for both defense and the plaintiffs, you might have the benefit of looking in the rearview mirror and saying, "Boy, if the company had only done this or boy, if the employee had only done this." Generally, advice to HR managers who are facing either disgruntled employees or the necessity to lay people off or cut the workforce. What's your general advice? And I realize that many times this is fact sensitive and very nuanced.

**RICHARDSON:** My general advice would be to follow your policies and procedures manuals to a T that you have in place, which a lot of employers have not done as much of in the past. You need to follow the advice of your labor and employment counsel and that is paper the files of your employees very well. If you're going to terminate somebody, you better have a very well-documented reason for the termination because of the fact that we've been talking about the economy being bad and unemployment being high. If people are unable to get jobs when they get terminated, then their



Mike Richardson, an attorney and Administrative Partner at Rose•Walker, L.L.P. in Dallas, brings a trial lawyer's perspective to the practice of labor and employment law and other business disputes. His wide-ranging trial practice includes work for businesses and individuals, as both plaintiffs and defendants, in a variety of labor and employment cases, including those that involve trade secrets, defamation, breach of contract, covenants not to compete and other issues. Richardson represents the largest health care recruiting company in the country and regularly assists its representatives with issues that can arise when employees leave and start their own companies. Just recently, the *Dallas Business Journal* honored him as one of the top business defense lawyers in the city. His trial wins include a \$9.8 million verdict on behalf of a doctor who sued his former medical group. Many of Richardson's labor and employment cases settle after he has secured a temporary injunction against the other side.



Marcos Ronquillo, COO and managing shareholder of Godwin Ronquillo PC, 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. Ronquillo 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. Ronquillo has served on numerous boards and commissions including the Dallas Museum of Art, Dallas Area Rapid Transit Authority, Children's Medical Center and JPMorgan Chase to name a few. Ronquillo received a J.D. from The George Washington University Law School and a B.A. from the University of Notre Dame.

next step is going to be getting back at the employer that terminated them. Follow the advice of your labor and employment counsel to a T, because one of the recent cases that I handled, and that my firm had been noted for, was a case where a huge medical practice group fired one of its physicians and they did not follow their policies and procedures. They also did not follow his contract he had with them. And that's why we got the verdict that we got on his behalf, because they did not follow those procedures. They did not follow that contract. Had they done so, it would have been a different story.

**RONQUILLO:** A jury looks at three things on any employment case whether you're on the defense side or the plaintiffs' side: First is do you have a policy? Yes or no? Second, if you have a policy, did you follow it uniformly and consistently across the board? Yes or no? As to the plaintiff, did you implement the policy consistent with No. 1 and No. 2? So as you go in and analyze that case, think of it from a jury's perspective. That's what they're going to be looking at. You need to counsel your client. I've seen a lot of lawyers, young and old, that are afraid to give their client the bad news. Give them the bad news early. If you have to, sit down with that CEO, that chairman of the board, or that controller, or whoever you need to sit down with and lay it out for them. So you might be able to avoid a bad verdict and a bad decision for your client. But that's the analysis right there.

**ANDROVETT:** *Is it better to have no policy or to have a policy and not follow it?*

**GOLUB:** Let me step in here because that raises an important issue. We are seeing a lot of companies that historically haven't had a lot of people moving around, haven't had significant layoffs or staff losses, now facing issues that they really haven't dealt with very frequently. Their policies were not particularly robust and were not consistently enforced. Now companies are sharpening their pencils so to speak. They're seeking advice from their employment law counsel to put new policies in place. As trial lawyers, we're often faced with the older policies that were in place prior to the time that an employee was terminated or the adverse action was taken. But because

of increased layoffs and the downturn, those companies recently put in new policies that are far more comprehensive, far more uniform in their application. We constantly get the question from clients: should I have done that? Should we have embarked on this new initiative, and put in new policies and procedures, because now we may have to produce them in a piece of litigation? The concern is that the new policies are Exhibit A as to why the client's older policies really didn't cut the mustard. It's a tough area to advise your client on. Now, they need to have new policies in place if the prior ones were not sufficient. And you leave it up to your litigation counsel to convince the court that the new policy is not admissible, or you deal with the facts as they're presented. But it's dangerous to advise your clients not to have a policy in place, or not to make changes if they're needed.

**JOHNSON:** I would add along with the obvious of having policies and following them and delivering the bad news, we sound like a broken record in this instance, but if we have employees who are not performing, we need to make sure that we document that. I can have a witness on the stand all day talking about what a good for nothing employee Joe Blow was, but if the documentation doesn't support it, it is absolutely all for naught because the jury, any day of the week, is going to believe more so what you have written down than what you say. So that part of it, particularly now, when there are a lot of reductions being made, decisions are being made that are performance-based, lines are having to be drawn sometimes that are very tight and very vague, it's going to be important that if you have individuals who are not performing, that the documentation supports that so that there's at least a chance you can convince the jury that it didn't have to do with this person's age, their sex, their race, whatever the case might be. That sounds like such an obvious kind of thing, but we say it over and over, but we see it over and over again in trials. That's what I would say particularly now, with so many cuts and so many tough decisions being made. Sometimes tough decisions made as to a very good pool of employees. We've got to be able to support the decisions that

were made and for the most part, make sure there is an objective element to the decisions.

**RICHARDSON:** I'll add to that that I am the administrative partner at my firm. One of my responsibilities includes the HR component in the hiring or firing of our employees as well as our lawyers. I will tell you that we have a policies and procedures employee manual in place. We try to follow it consistently across the board with regard to whoever we are dealing with. In my mind as a trial lawyer that is key. There is proof that we have a policy in place and that we follow it.

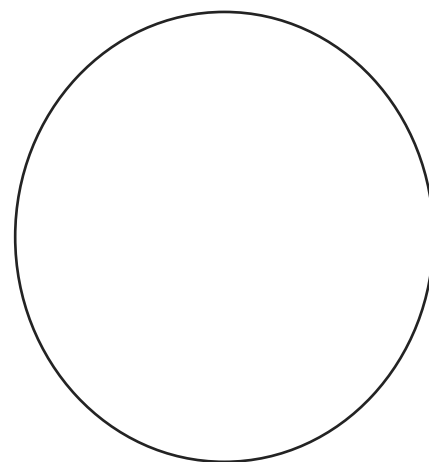
**RONQUILLO:** I have to underscore that with my colleague over here. The first time I took over as managing shareholder of our law firm, in December of 2005, my first act was to find the smartest lawyer in the firm. You're my general counsel. Then when we have an employment matter, guess what we do? We hire outside counsel to work with our general counsel to make sure we've got it right. But the point I'm trying to underscore with that is communications. E-mails, yes. Document the file, yes. Because there's documentation and there's documentation. What you don't want is saying, "Well, we're going to start documenting the file." You have to be really careful of what you say. And there should be a good communications policy or a firm culture that underscores the importance of e-mails and electronic data communications, storage, and retrieval. That could be your best friend or it could be your worst enemy. Unfortunately with technology with Twitter and all that other good stuff, we tend to just think out loud and text it. We've got to be very careful with that because now we're moving on to other areas for data. We're going to Facebook, we're going to Twitter, we are going to cell phones. So you may walk into Court with a great personnel file, updated, ready to go, and all of a sudden opposing counsel has come up with a text message six months ago, a Twitter deal over here, and a Facebook entry over there. And you're saying, oh, my God. We were doing everything right internally. We weren't watching the big picture. So HR managers need to watch the big picture.

**RICHARDSON:** And I don't care what

kind of trial it is we're handling, whether it's a theft of trade secrets case or an IP case or a labor and employment case, e-mails are the most dangerous thing in any lawsuit I've ever handled. They always impact the case significantly. You have got to tell all of your employees that e-mail is not just something for you to e-mail back and forth with your coworkers and talk about the person next door to you or this, that or the other. E-mail is a business tool. It is to be used in the company for business purposes. If you want to go and do something else on your personal e-mail, then that's fine at home, but not in the company e-mail database.

**RONQUILLO:** Well, I would disagree a little bit with the last statement. My rule of thumb is if I'm going to put something down in writing, would I mind if tomorrow morning it shows up in the headlines of the *Washington Post*. Now, I don't care what kind of medium you're using, because like I said on the other side of the docket they will take advantage of every single technological thumbprint that the employee or employer has made. With the change in our culture with respect to Facebook and we get them all the time, too, all this "log in and join my friendly network." But the point I'm trying to make is people are putting personal information on there. And you've heard about the cases where somebody says, "I have an FMLA claim. I was out sick that day. I had a serious health condition." Then you go to their Facebook entry, "Today I went on a picnic with my kids." Not that egregious, but you get the point. I see jurors expecting to see that kind of information because they do it all the time, too. It's part of our culture. So I would still be very careful, and not recommend that an HR manager go, "off line" and maybe do something on their own cell phone, because I ask them in a deposition, if I'm on the other side, about their cell phone. Do you ever use your cell phone for business? Oh, no, I just always use it just for my personal. Okay. Well, let's check into that. That leads to other things. So we need to be very careful of what we put down. It's going to be stored, and it can be retrieved.

**ANDROVETT:** *Is it fair game to not hire someone based on what you see on YouTube*



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.

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or maybe to fire someone for something they'd said on Facebook?

**REDMOND:** Yes. It is fair game to release an employee for something that they've stated on YouTube, MySpace, or Facebook. As you're aware all employees have access to site and employers have access to them as well. I would caution employers against making these types of decisions if there is some type of proxy setting set up on the Facebook account or the MySpace account that only allows certain individuals who are invited to become a part of this particular blog, to actually have access to the blog. Employers should be really careful before they go to an employee and say, "Hey, I hear there's a blog out there and you're talking about what's going on at the company, and how you feel about things. Can we have your password so we can go in and look at it and see what's going on?" And then going in and actually looking at what is being said by employees on the blog, and taking some type of adverse action as a result of the statements that were made in the blog. There was a recent decision in California against the Houstons Restaurant chain, where a jury verdict was entered against it on the basis of invasion of privacy because the employer went into a blog site and accessed what was supposedly a private site that was set up by employees where they could basically rant about their employment at the Houstons Restaurant. Crude comments were made, including sexual comments about management and et cetera. The private section of that particular MySpace page was by invitation only. A manager asked one of the employees who had access to that private section of the blog for her password. Even though the employee testified at trial that she didn't think that she would be terminated if she didn't give her password, she gave it to him anyway because she felt that some form of adverse action might be taken against her. The Court shifted its focus from what the employee did, to what the employer was thinking at the time that they decided to access the particular site. So employers need to be really careful when they start accessing these social networking sites and seeing what employees are saying about the company and about management and in

accessing what type of action they should take as a result of the statements that they read on these particular blogs.

**ANDROVETT:** *We have been talking about layoffs, how you protect yourself and the importance of having a policy. But it strikes me in this kind of economy, when one door closes another one opens. There are probably a lot of fledgling companies that are starting now, seeing opportunities to be more nimble and more aggressive than some of their bigger competitors. There are a hundred issues there. But I'll just identify two. There's the possibility of actually raiding companies and saying, "Hey, don't stay with these companies. They're going to lay you off anyway. Come with me." And then, of course, there's the 300-pound gorilla, which is, in this day and age of easily transferable information, how does a company protect what its proprietary information, their trade secrets, their intellectual property? When someone says, "I'm going down the street." I've thrown a lot out there for you and jump in any of you in any part of that, but if I'm an HR manager, those are issues that I'm grappling with every day with not a lot of clarity.*

**JOHNSON:** I was just going to say initially and very quickly, normally we encounter noncompete and nondisclosure type cases most prevalently in a good economy. That's been the trend, but this year and in the latter part of last year, it's been sort of different, which is kind of odd. And to the extent employers are relaxed right now, because they're saying there's nowhere for anybody to go, there are no jobs out there, I would just caution you not to take that posture, because we are seeing more competition in a market that's flat, than I've seen in the 18 years I've been practicing. The idea of protecting trade secrets and confidential lists and that sort of thing, to the extent you kind of want to relax right now to say: There's nowhere for anybody to go, that's probably a mistaken belief.

**GOLUB:** I agree with that. We're actually seeing an increase in litigation in this area. And taking a different approach than what we typically see. Typically when clients feel that an employee has left and taken client lists or other valuable information, you pursue a common law misappropriation of trade secrets claim,

maybe a breach of a noncompete agreement. We've seen an increase in creativity in terms of what employers are asserting in lawsuits against former employees and competitors. For example, taking advantage of statutes such as the Computer Fraud and Abuse Act, the Texas Theft Liability Act, and the Texas Wrongful Access to Computer Act. Those statutes offer a means of recovering attorneys fees to the plaintiff if they're successful, and they give more venue choices and a lower burden of proof. Traditionally, to prevail on a misappropriation claim, you've got to prove that the information is qualitatively confidential and that it was actually used. Some courts are looking at that with more scrutiny. So employers are looking to us for strategies that use some of these statutes to pursue employees, former employees and competitors. If a former employee has in any way copied, deleted otherwise wrongfully accessed computerized information, then there is a pretty good chance that the CFAA has been implicated.

**ANDROVETT:** *And this is a federal law, right?*

**GOLUB:** This is a federal law. You can get federal question jurisdiction in CFAA cases, whereas in the past, you might only be looking at a state court misappropriation claim. The CFAA opens up some venue choices to you as a plaintiff, and it offers a lower burden of proof as compared to a state law claim for misappropriation. So we think these statutory claims are going to become more and more common, and we're seeing that in our practice.

**ANDROVETT:** *And in the absence of going to the courts, what can a manager do to try and get their arms around this to make the best policy for nondisclosure or the best policy for noncompete? Are there any general principles that we can offer?*

**GOLUB:** It comes back to company policies. You need to put in place policies, for example, so that when new employees arrive, they first sign acknowledgements that they're not bringing any confidential information with them from a former employer. Second, that they're not intending to rely on any confidential information of a prior employer to do their job for you. Therefore, you hopefully protect the company from any claim by your new

employee's former employer. How well do your policies and procedures protect your own information? Do you have an IT department that has put in place measures to protect information that's stored on your servers? Do you have a policy and a procedure in place such that when you are going to terminate an employee, your IT department puts a watch on the computer systems that that employee is using to make sure that your information is protected? When they get notice, you want to be in a position to react quickly in the event of threatened information loss. You just want to have policies and procedures in place to react to it quickly and effectively so that if you have to take action, you are in a good position to do so.

**RICHARDSON:** That's really good advice. I might add the advice about when you hire a new employee having them sign some documentation stating that they are not violating any prior non-compete by coming to work for you, that they do not have any specific confidential information that they are bringing with them or relying on in order to work for you. Because at least if you have those things in place, you can demonstrate when some other company sues you, another company that this new employee goes to work for tortious interference with those agreements, is you can say, "Well, we did everything we could to make sure that they were not violating a noncompete and were not bringing us confidential information." Perhaps that unfortunate claim will just sort of go away as a result. But if you don't do those sorts of things, you are inviting, like I said, a lawsuit against not just this new employee that you've hired but against your company as well. I know any time we bring cases on behalf of our corporate clients for those violations of noncompete, we also sue the new employer.

**JOHNSON:** I would add just a bit of simple advice: If it's a secret, then treat it like it's a secret. If it's confidential, treat it like it's confidential. If it's on the company Web site, then there's going to be a difficult argument to make that it's private, that it's confidential, and that it's secret. You'd be surprised how often it happens that there's information on

the Web site that the company then later wants to claim is confidential and private. It just doesn't make for a very successful argument.

**RICHARDSON:** Mike, also I want to just circle back to something that was said earlier and that is I would caution the members of the audience from discounting this new judiciary, a lot of them Democrats, because we have found that they are very hardworking and very fair minded. It seems like I've been down to the courthouse seeking temporary restraining orders against former employees who were accused of taking trade secrets and confidential information every other week. I have found the new judiciary to be extremely receptive to the arguments and very open minded and very fair in analyzing the issues. So don't just discount this new judiciary out of hand because they're Democrats.

**ANDROVETT:** *Are there any ethical quandaries or ethical overlay here? I'm thinking about that scenario where you have the company and the new employee and you're representing both. Can any of you talk about some of the ethical issues that arise in these situations?*

**RONQUILLO:** I wanted to throw something out that may lay a predicate to that point. I want to make sure I get it out. And that is your internal investigations. Don't do this at home and alone. Let a professional do it. The way the company goes about doing the investigation is very important. You can have all kinds of potential breaches there, and then you can have another threat of retaliation claim

that comes with all that. So I just wanted to alert the audience that with respect to conducting internal investigations, there should be a very disciplined, professional, defined protocol. It needs to be compartmentalized and on a need-to-know basis. Get some kind of outside professional assistance to help you conduct that investigation so you're not put in some kind of conflict and ethical quandary. Also, there's oftentimes is a distinction between the counsel that conducted the investigation and your trial counsel. In terms of, uh-oh, that he be a fact witness.

**GOLUB:** Let me address the ethical issue that you touched on. We often have cases involving competitors where an employee has left and gone to a competitor. Sometimes the hiring company is not a party and the former employer sues only their former employee. That employee is now working for a company, and the company hires us to represent the individual. And what often happens in these cases is the new employer pays our fees, and the employer is often a client with which we have a prior relationship. We often talk to their in-house counsel, and they're our client, but the individual employee is somebody that we're just now meeting for the first time. You really have to tread carefully in those types of situations. Your client is the individual and you owe your ultimate loyalty to that individual. Yet you're often corresponding with the company and the company's in-house counsel on strategy because unquestionably the lawsuit affects the company and they want the new employee to be able

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to come into the company and be a productive part of the company. You need to address in your engagement letter with the individual any potential conflicts. You want to make sure that there are no conflicts from the start and obtain an acknowledgment that there are no actual conflicts. Ensure that everybody is aware of all the facts so that you can make an assessment of whether you have a conflict or that there may be a potential conflict. If the company and the individual are both defendants to the case, you may be presented with a decision about whether it is permissible to represent both. Depending on the facts and to prevent conflicts from arising, it may be preferable for the company to hire separate counsel from the individual employee. In cases where employees have been accused of theft or other criminal conduct related to trade secrets, you may need to make a determination on whether to bring in criminal counsel to advise your individual client on potential criminal liability. If you are representing both the individual and the company, you may have a potential conflict there on how to proceed in the case. Often there's no perfect answer for those multiple representation situations, but you want to address them up front, particularly in engagement letters, to protect you and your clients.

**ANDROVETT:** *When we met in March, we spent a good amount of time talking about the Family Medical Leave Act. There were some new amendments that had a lot*

*to do with making it easier for members of the military and their families. But I remember at the time that members of the panel warned that this was another area that while well intentioned for employers, was fraught with peril because it may give rise to yet other claims of retaliation and the like. How is that hashing out in the current climate where in other areas you've discussed, retaliation, whistle blower, discrimination, both race and age, there seems to be an uptick in claims? Same with the FMLA? And what should we know about crafting that policy?*

**RONQUILLO:** It's been our experience that as employees we're seeing a lot of this with political and governmental subdivisions. We're becoming very knowledgeable about the act. There raises questions about how they use the act essentially. Employers ought to be very vigilant about their FMLA policies. Have good, solid, clear guidelines how to implement those policies, so that those policies are designed to actually implement the spirit and intent of the act. But it's like any other regulation that one encounters. Someone somewhere somehow some way will figure out a couple of loopholes in that act or that regulation, and they'll try and take advantage of those loopholes. So when we go back and talk about development of policies, what you don't want is a situation where everybody can go online these days and can I have a policy on this? Can I get a policy on that? And they buy it for a couple of hundred bucks or whatever

the case may be and slap it into a three-ring binder and circulate it and say that's our policy. Essentially, that's why it's very important to craft and look at those policies from a business perspective. We lose sight of that all the time. It's not just the sake of having a policy. It's what are we trying to do? What are the goals? What is the objective of the company? Do we have a legitimate nondiscriminatory business reason or purpose for doing this and more importantly, does it make common sense? Would I want to be treated this way if the shoe was on the other foot? Those are the kind of questions that need to be asked. If you have a policy, whether it's FMLA or whatever we're talking about, that basically meets that criteria, meets those standards and you get up on the stand and testify in court, you're going to be doing okay. So with respect to the FMLA, yeah, it's like anything else in life, when a regulation has been around and there are some amendments and changes to it, people are looking at it. There is a trend out there where folks are trying to take advantage of some of the loopholes with respect to that policy. Then the definitions, oh, my goodness. What are we talking about here? So those are the kinds of issues that an HR manager needs to be aware of, with respect to their FMLA policy and its implementation.

**JOHNSON:** The FMLA is similar to my feeling about the Fair Labor Standards Act. I would bet there are analysts out there somewhere combing through that statute to figure where can we get them next. It's just one of those very complicated statutes. There are land mines all over the place. For the most part, my practice has been to represent very large companies who have large HR departments and folks who are very sophisticated in the analysis of the statute and implementation. What happens a lot of times is that the first line supervisor is not as informed, is not as trained, and is not as versed. That's where there's break down. A beautifully-drafted and well-implemented policy is fantastic. But it needs to be pressed down organizationally in terms of the understanding of the statute because there are so many places, as with the Fair Labor Standards Act, that you can just make a mistake. The problem is in a lot of instances, it is

not an intentional violation of the policy. It's just that there is a lack of understanding about it. So I would argue that along with having a well-versed HR person, also make sure your first line supervisors and those folks who get the call, I'm at home, I broke my foot, I can't come in to work or whatever the case, those folks know what to contemplate in the event they get those calls because that's where the cleanup work needs to be done.

**GOLUB:** Clients in industries where employees engage in strenuous activities or there are specific qualifications that the employees must meet, such as commercial drivers or crane operators, are at risk for getting tripped up by the FMLA. Or at a minimum, they need to devote some additional attention to their policies and their procedures, just to make sure that they're consistent with the FMLA notice requirements. If they have somebody out on FMLA leave, they need to know what they need to do to bring them back. What types of notices do they have to give? What types of certifications does the employee have to get in order to come back? Does the employee have to be re-qualified to operate the crane or drive the commercial vehicle? The client needs to have policies and procedures in place that it can apply consistently across the board to all their employees taking leave. Uniform application of FMLA policies is one of the keys to not running afoul of the FMLA. And so those are the types of industries where you should advise your clients to redouble their efforts regarding the FMLA's requirements because, as Ms. Johnson said, it's not an intentional violation. And the other comment about making sure that second line supervisors are aware of FMLA requirements is important as well. It dovetails with the issue of e-mail and its danger in litigation. HR may be sending all the right notices and putting all the right FMLA forms in place, yet somebody in payroll or another department fires off e-mails that are damaging: "Hey, this employee has been out for eight eight weeks. Can we terminate them now? Why haven't we terminated them? I'm planning to give their position away." And so clients need to make sure that their second line supervisors and administrators also are aware of FMLA

requirements and procedures.

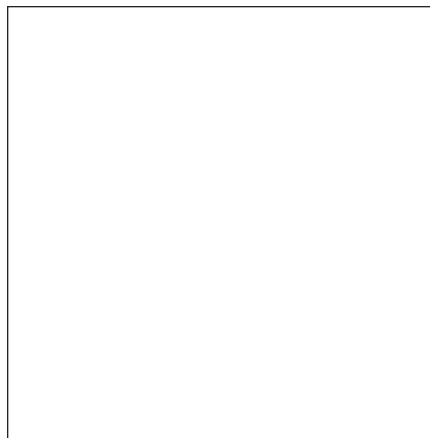
**REDMOND:** I would advise that employers train their HR as well as their first line supervisors regarding the FMLA requirements and including whether when an employee can be reinstated to work after FMLA leave, or whether an employee is required to receive light duty or a modified work schedule. If an employee is unable to perform the essential functions of the job while on FMLA leave and their leave is exhausted, the employer has the right to discharge this particular employee because they cannot perform the essential function of the job. Those types of things or those types of policies need to be administered to HR and to your first line supervisors so that they know when they're taking some type of action with respect to an employee who is on FMLA leave, whether they can take some type of adverse employment action against the employee. For instance, you have a procedure that requires the employee to call in and report that they're going to be absent or that they call in and say that their absence will be the result of FMLA leave. Is that going to count against the employee as an absence if they don't do so? Or is the employee going to be disciplined as a result of failing to do so? It's important for employers to advise their HR representatives and their first line supervisors on what the company's policy is with respect to FMLA leave and how they should handle these types of issues.

**GOLUB:** I have advised clients that, if an employee makes a request for FMLA leave, they should get in-house counsel involved from the start, because I just think it's an area where there's a lot of potential to get tripped up on the FMLA's technical notice and other administrative

requirements. In-house counsel is going to be well-versed in the area, and it can't hurt to get their advice from the start, when leave is first requested.

**ANDROVETT:** *Mike, I want to go back to something you had said. We haven't had time to really explore this. That was in the area of enforcing noncompetes. Contrary to any of the popular view, you've been pretty successful in enforcing those. As an employer, I can tell you this is an area of great ambiguity and urban myth to most people. Oh, they're not enforceable. Yes, they are. Oh, they're arbitrary. Can you provide some guidance into what made those attempts at enforcement successful? Is there something magical in those noncompete agreements that made them enforceable?*

**RICHARDSON:** There's nothing magical about it. There's been a distinction between some of the appellate courts in Texas up until 2006 with regard to whether or not you had to provide the confidential information to an employee at the time that they signed their nondisclosure agreement. In other words, at the time, the day they were hired, or whether you could provide them with that information later and that sealed the deal. The Texas Supreme Court said in 2006 that you could provide that information later, which brought the two appellate courts together and made it a little bit easier to enforce. But the reality is that you need to have outside counsel very much involved in the creation of your documents that your employees sign when you hire them, your nondisclosure agreements, and the document that has the noncompete in it so that the language in those documents tracks the law very closely. Then the most important thing, which was discussed earlier by one of the panelists, is that your



trade secret and your confidential information is so vital that you do in fact treat that information as confidential and as secret. In other words, it cannot be easily publicly disseminated, that it's protected, that you have policies in place to protect it, so that when somebody goes out to enforce when an employee leaves, goes out to enforce that they've stolen trade secret information, that it is truly secret. One major hurdle that we come across when we're seeking a temporary restraining order and injunction is that the lawyer on the other side always argues that it isn't really secret information and that this information is out in the public sector. It can be obtained here, it can be obtained here. If you have truly protected that information and kept it a secret, and your lawyer can go in and demonstrate these are the steps that my client has taken to keep this information secret and to keep it out of the public sector, then that goes a long way to enforcing the noncompete. And then, of course, there are all the issues about making sure the noncompetes are reasonable and that they don't go too far. There's been a kind of a flux in the law around the country recently. For instance, they used to have — and still do in many places — a narrow geographical scope to them. But with the advent of the Internet and all of the marketing and whatnot that's done on the Internet, there has been some case law recently — and I've argued it many times — that that geographical issue really is no longer a significant requirement, for the reasonableness issue. For instance, marketing companies market nationwide. So whether the employee is in Dallas or Houston or whether the employee is in a hundred miles away in

some other town, it really doesn't matter. The 50-mile radius thing just doesn't make sense anymore.

**ANDROVETT:** *There was a sense that on day one the Obama Administration would push for the passage of the Employee Free Choice Act, which would make it easier to organize unions. For one reason or another, the final action has been deferred, although it's passed both houses. I'm just curious whether you think that will come back again or if there have been counter availing forces, which either render it moot or not as relevant right now?*

**RONQUILLO:** I'm really not sure, to tell you the truth. Back in March that was the 800-pound gorilla. Everybody was afraid of it and talked about it. But right now with all the other things that are going on, I'm not sure that we would see that anytime soon.

**JOHNSON:** I would agree with that.

**RONQUILLO:** One point I would like to make, though, is just because a person is in a protected class, that doesn't mean they don't have to do their job. I get this all the time. I've got a whistleblower, I've got a person that's alleged national origin discrimination, whatever the case may be. You need to operate on separate tracks. That's why I always like the idea of an outside internal investigation or some kind of review where that process continues but at the same time that employee, he or she, needs to perform. We constantly get these scenarios where employers are — I hate to say this — too conscious, in the sense that, oh, my God, we can't even sneeze in that person's direction because they filed a complaint or they raised a concern. Well, first off, everyone has a right to have or express a concern and to make a complaint. That should be the company's culture. The big question is what do you do with it after they express that concern. Of course, the knee jerk human reaction is to take offense. You're not a team player. You're an outsider. We need more cheerleaders, blah, blah, blah. The point being is to separate that issue emotionally, separate that issue on paper, and separate that issue in terms of your approach to that issue. If you don't think you can handle it in-house, get some outside help. Have someone come in. Don't let that investigation or that inquiry, whether it's taken after

that statement or doing something, linger for six or four months. In the meantime, continue to do what you're supposed to be doing. If that person is in a sales position and they have goals to meet, they have to meet those goals. Because once you begin to mix the two up, you take an innocent situation and it begins to look suspicious.

**ANDROVETT:** *I'd like you all to look into your crystal ball over the next 18 months. When clients are calling you, what do you anticipate will be the hot button issues that you'll be asked to cope with and strategize on or respond to?*

**GOLUB:** Since we're a litigation focused firm, the calls we typically get and have been getting with increased frequency are the trade secret and competition related inquiries. We don't expect that to trail off. If anything, it's may increase over the next year or so. It may depend on what happens in the energy industry and how much employment flux there is in that industry and the other industries that we primarily deal with. So I anticipate that we're going to continue to get a lot of calls from our clients regarding litigation involving competitors and departing or new employees.

**REDMOND:** I would say that even though the Employee Free Choice Act has kind of taken a back burner to healthcare and other issues that the Obama Administration is focusing on right now, there have been recent statements from the Department of Labor that the administration intends to pick up this Act again once these issues are resolved, in particular, the healthcare issue. So I would advise employers to be mindful that the Employee Free Choice Act has passed both houses, and it is sitting out there and has the potential of going into effect. When you're looking at your collective bargaining agreements and you're looking at your workforce, make sure that your policies that you have in effect are consistent with the collective bargaining agreement and any other laws that may affect the workers' bargaining units' rights. Bargaining units right now are lobbying hard for the Employee Free of Choice Act to get implemented. I would also suspect that there will be an increase in immigration claims going forward. The Obama Administration made it very

clear in July that they will not take the relaxed position that prior administrations took in the past with respect to determining whether or not employers are harboring illegal aliens as employees. There are initiatives going on right now, I-9s, H-1Bs and other types of visa initiatives to determine whether or not employers are harboring illegal aliens. Employers should take action to make sure that their I-9s, and any type of visas that they have in effect for employees that are working for them, are properly in order, and should potentially suspect a site visit. The number of initiatives that were issued on July 1st almost doubled the number of initiatives that had been issued in 2008. So the Obama Administration is clearly making immigration a key segment that they intend to look into. I would advise employers to make sure that their immigration policies are strong, well implemented and that they are aware of what the I-9 requirements are, the E-Verify requirements are, and that employers are paying close attention to the new federal E-Verify rule that goes into effect on September 8th, which will require federal contractors to comply with this particular E-Verify rule, as well as making sure that any type of H-1B and H-2B visa individuals have their

paperwork in order and that these individuals have not lapsed or committed some type of fraud in submitting either their labor certification applications or their petition to the government.

**RICHARDSON:** I agree 100 percent with Jeff. In our economy, the most important asset it seems for most companies now is their intellectual property, which is all encompassed within that trade secret's, confidential proprietary information. Protecting that information is for my firm and from my experience the most important thing for companies right now. I don't see that trend changing anytime in the near future.

**RONQUILLO:** We've seen a rise in the filing and enforcement of regulatory agency subpoenas. If you haven't been a recipient of one, you ought to go back and look at your policies and procedures in terms of how would you handle, let's say, a subpoena from a US Attorney for corporate records. If you have an in-house counsel, you may want to talk to your in-house counsel and ask how we handle something like this? What does that beast look like? Do we keep our information in a form that we can be able to comply with those subpoenas and what are our rights with respect to enforcement of those subpoenas, be it in the administrative level,

investigative level, or with respect to a state or federal proceeding.

**JOHNSON:** I anticipate an uptick in age claims as it has to do with the Older Workers Benefit Protection Act with layoffs and such. In addition, with respect to change-in-control packages and severance agreements, there will be more ERISA litigation on those matters because of a lot of mergers and acquisitions. We're going to see some of the fallout from those ventures in the next 18 months. Also look at the Americans with Disabilities Act, because of the amendments to the act and the expansion of who in fact is disabled. Lastly, I think there'll be an uptick in race claims because the EEOC is heightening its focus on those claims. All in all, I suspect we'll see more cases with "teeth" in the future. ❖

For more information on  
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**Don't wait.  
The clock is  
ticking...**



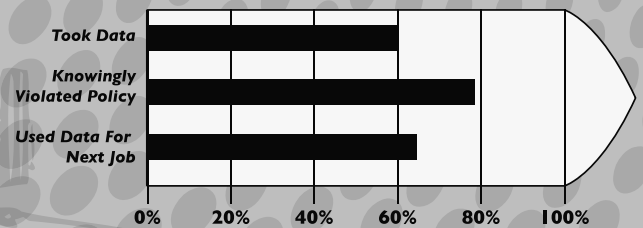
**L A T E R A L  
CONSULTING GROUP**

## ***Detect the theft of confidential info - BEFORE it becomes a major issue***

Make no mistake about it. Your confidential info and trade secrets walk out the door when an employee separates from your firm. A recent study revealed that nearly 2/3 of departing employees ADMIT to taking proprietary data. And it is getting worse.

The real enemy is time. The longer it takes to uncover data theft, the greater the risk to your business, not to mention increased litigation and clean-up efforts. LCG can help you minimize your exposure.

**Your Data Is At Risk**



\*Source: Ponemon Institute - "Trends in Insider Compliance with Data Security Policies."

### **LCG's "First 48" service is a preemptive strike against data theft:**

- Low cost and fixed-fee
- Identify data theft or other wrongdoing
- Enables early temporary injunctive relief or other actions

### **What is "First 48"?**

LCG will make a forensic copy of your employee's hard drive and create a report that details what information has been taken, how it was taken and if any cover-up was attempted. **LCG will uncover any red flags that suggest data theft.**

### **Who is LCG?**

LCG is operated by successful forensics and eDiscovery veterans who have earned the trust and business of some of the top law firms and corporations in the world. We are computer forensics experts. We specialize in trade secret misappropriation, data theft, breach of restrictive covenants and other related matters. LCG can help you detect data theft early before it becomes a major issue.

### **LCG provides the full spectrum of eDiscovery services, including:**

- Consulting & Identification
- Preservation & Collection
- Computer Forensics
- Expert Testimony
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