

Labor & Employment



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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 year with regard to the ADA and FMLA? 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 and owner of Androvett Legal Media & Marketing, Dallas: *I've asked the panel members to introduce themselves to you and to talk a little bit about the nature of their work.*

STEVEN E. CLARK, shareholder, Kennedy, Clark & Williams, PC, Dallas: We're a small IP and employment law boutique based in Dallas. And I'm the employment counsel in the firm. I'm also the outsider in a sense that I do plaintiff's employment work as well as advise companies. So I probably have among the panel members the plaintiff's perspective on litigation and some of the cases. And our firm likes to get involved in what we call high-stakes litigation on both IP and employment related cases.

JERRY REDMOND, JR., of counsel, Conner & Winters, LLP, Houston: Conner & Winters is a regional firm based out of Tulsa, Oklahoma. My practice primarily consists of labor and employment and immigration. I am the designated immigration attorney for my firm; therefore, I handle all immigration related matters with respect to employees and employers. Also, I handle traditional employment discrimination matters as well as traditional labor matters. Texas is not a heavily unionized state, but I have handled various unionized matters in other states where I practiced as well as for clients that have operations outside of Texas. Conner & Winters, is a full service defense firm, not plaintiff's firm like my colleagues. As a result when it comes to labor and employment matters, we pursue these claims aggressively in hopes of obtaining summary judgment.

RACHEL POWITZKY STEELY, partner, Gardere Wynne Sewell LLP, Houston: I am

a labor and employment partner at Gardere Wynne Sewell. I've practiced my entire life in Houston. I grew up in Pasadena and went to Texas A&M. My practice is focused primarily on preventive measures for my corporate clients. I represent quite a bit of corporations in matters ranging everywhere from hiring the employee and dealing with federal and state issues through termination. I have a 24-hour-a-day-type practice because it's not always the circumstance that you can plan a termination or a problem, which I'm sure every single person in this room is aware of. Although I do quite a bit of preventive work, my love is still the courtroom. And I see quite a bit of trial work because a large part of my practice is representing corporations and executives in prosecuting and defending unfair competition matters, which includes noncompetition agreements, confidentiality agreements, nondisclosure agreements. I also strategize companies to determine what's the best way to go about planning a new business or making sure a competitor does not poach their business and employees. My proudest accomplishment is my family. I am the mother of three girls and my husband is a trial attorney at Porter and Hedges in Houston.

A. KEVIN TROUTMAN, partner, Fisher & Phillips LLP, Houston: We are a national law firm and we devote our practice exclusively to representing management in employment matters. This is all we do. My background is somewhat unique in that I spent 17 years as a human resources executive before completing law school. So the law is a second career for me. I have been a client and that experience has served me well. Before practicing law, I spent most of my time in the healthcare industry. In fact, I am now the chairman of our firm's healthcare practice group. In terms of what my practice involves in a first focused upon employment law, I could probably be best described as a generalist. I do a lot of preventive work, which most of us do when we represent management. That is something I really enjoy, particularly calling upon experience from my days in HR. I also do a lot of litigation in the areas of discrimination, retaliation, whistleblower, wage and hour and that sort of thing.

JOCELYN Y. LABOVE, labor counsel, Continental Airlines, Houston: I've had the pleasure of actually serving in government as well as practicing in the private

sector. And my primary responsibility since I have joined Continental is to administer our contracts within the confines of our EEO laws as it's included in ERISA as well as the whistleblower act that are relevant to the airline industry. I will tell you I'm really glad to be out here this morning amongst my colleagues.

ANDROVETT: *If I could start maybe by going off script. Kevin, something you said intrigued me. In your 17 years as a human resources executive, what did you not know then that you know now as a labor and employment law practitioner?*

TROUTMAN: Well, we only have an hour and a half, right? When I was a client and human resources executive, I did not recognize all the detail work that a lawyer does to position a case for summary judgment. This is a huge part of our practice that would ideally begin before a lawsuit is ever filed. We are always looking at how we can prevent the claim and if there is one, how we position it for summary judgment. Even though I thought I knew the law, I enjoyed that part of my job as an HR executive, I found out there was so much more that I did *not* know. For example, I thought I knew how to document and how to train supervisors about documentation. I have learned so much more about effective documentation as a lawyer. Unfortunately, new clients sometimes call me after "the horse is out of the barn," so to speak, when a difficult situation has already unfolded. We may recognize things that could or should have been done, but at that stage you have fewer options. So what have I learned? Most importantly, the nuts and bolts of what goes in to positioning a matter to resolve it for a reasonable cost. Ultimately, it is all about helping my client achieve the result it desires. When I work with clients, part of my job is always to help them understand what we are doing and why I am asking particular questions. This helps us work together most effectively.

ANDROVETT: *Panel members, because sometimes in a given year Texas Lawyer will look at labor and employment law several times, there have been some highs and lows in terms of what lawyers see in terms of prospects for employers and then also for employees. When we last visited this topic — Jerry, you may remember this in October of last year — there was this phrase rolling around called "perfect storm." Do you remember that?*

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REDMOND: Yes.

ANDROVETT: *The notion of it was that the pendulum had swung in favor of more regulation on employers and just more liberalization in terms of rights regarding employees. Looking at the paper this morning, there is one of many articles about what's being called the "double-dip recession," which gets me to wondering are we still in the midst of that perfect storm or are we in some nuanced new ground in that area? What's the state of labor and employment relations right now as you see it?*

REDMOND: Currently, with the problems that our economy is still facing, I think we are still in a bit of a perfect storm. Obviously, the possibility of double dip recession is not good news and the high unemployment numbers remains disturbing. The administration has taken efforts to address these problems by again extending the length of time in which individuals can receive unemployment benefits. As a result, employees who are unfortunately faced with either a layoff or a termination that is not for misconduct are able to continue to receive unemployment benefits. Additionally, the administration has extended the 65 percent subsidy for COBRA that the employers pick up to aid in the recovery. However, because recovery has been slow, employment related lawsuits are beginning to increase from employees who obviously, in a down economy, feel as though there is not a job available for them. My favorite phrase is when the economy is great employees tend to think I can leave this job if I'm laid off and I can go down the street and find a new job. When an economy is bad, an employee immediately says, "I don't want any job. I want this job, and I will do whatever it takes to get it." That is the type of perfect storm I believe we remain in currently.

POWITZKY STEELY: One additional change I have seen is the proliferation of whistleblower statutes. Typically if you're in Texas, you may not be terribly concerned with whistleblower lawsuits. But now we see a plethora of regulations and laws that have come out over the last two years that provide whistleblower protection for employees of companies who receive almost any type of federal subsidy or are engaged in certain types of particular businesses. The consumer safety has a very strong whistleblower provision. Now, there is new whistleblower legislation resulting from the BP oil spill, meaning



there is going to be protection for offshore oil-field workers who complain about safety issues. We already have OSHA as far as a whistleblower concern. And now you're going to have these other concerns. If a company has received any type of funds under the American Recovery AARA act, there is a whistleblower provision as well. Most of these types of whistleblower provisions have a reasonable belief-type standard, meaning the person just has to have a good-faith belief of a violation of the law to receive protection. Lately, some of the legislation provides even a looser standard. So when a company is considering terminating an employee, the initial thought is about proper documentation and risks of discrimination, workers' compensation relief. But the risks are now expanding, and it seems like almost every couple of months there's a new whistleblower protection out there as well, which makes it even more difficult going forward and trying to assess the situation.

TROUTMAN: I am seeing more whistleblower claims too. ADA claims are also becoming more challenging—we'll probably get into that a little bit later. Another aspect of the perfect storm is that the Department of Labor and the EEOC are better funded and more aggressive than they have been. We saw a situation just recently where a charge related to a termination turned into a full-blown investigation of a company's hiring practices. It started with some simple policies the employer submitted to the EEOC.

Keep in mind this was a charge based on an individual termination, which turned into an investigation of system-wide hiring practices. This is just one more aspect of what employers currently face.

ANDROVETT: *I'm going to ask about the whole notion of different avenues of relief under the whistleblower statutes. For most employers that seems sort of remote. I would imagine many employers would say, "There's nothing to blow the whistle on in my company." Can you talk a little bit about how these claims come up and what advice do you have for employers or HR professionals and the key steps along the way?*

LABOVE: I'm going to speak to that even though I'll tell you whistleblower is not the focus of my practice. I believe in any whistleblower action one of the best ways to defeat it is certainly through documentation of problems with a particular employee because those claims usually arise somewhere in the midst of correction/discipline. So if your documentation is there, that's probably what will mitigate liability. Certainly that's what's worked in my practice. At the airlines I have to assess a case for not only its success at arbitration, but also litigation. And the best way to do that is to document our issues early and often so that you're not reacting when that employee has filed a whistleblower claim no matter its merit. Also it's easier at summary judgment if you've got a really good file.

POWITZKY STEELY: One recommendation is to document a situation in any manner that is available. Many times a company has

supervisors out in the field who are dealing with these individuals without the benefit of a computer or forms. These managers may think that “documenting” a problem means using a particular form, but really we’ll take anything, right? A manager can use a piece of paper torn off a notebook and jot down a note and put the date on it. I tell companies to encourage documentation in any way possible. Even if the manager has to document the matter three days later, it works. Memories fail in time. I have found that formality of a particular process or documents puts off supervisors, but if they know they can document performance on a more informal basis, it makes people more comfortable going forward. The supervisors will actually do it. The goal is just for them to write it down. A company shouldn’t be so concerned about what it looks like as long as it’s done and dated.

ANDROVETT: *Steve, thank you for being our plaintiff’s attorney on this group. What mistakes do you see companies make in this regard?*

CLARK: I think one of the big problems in the whistleblower realm is that employers have policies that either encourage or require their employees to report misconduct or problems up the chain of command. And some companies have adopted confidentiality policies to protect disclosure or they have an anonymous hotline. But what I see happening over and over again is that confidentiality isn’t maintained, and the information gets back to the management that is involved in the complaint. And inevitably that leads to retaliation. And at that point in time then you have set up the classic whistleblower case. So I think one of the things employers need to take a better look at, besides documenting, is that they need to have a truly independent review mechanism that does not allow management that is the subject of the complaint to find out that the employee has come forward with this complaint. Now, can that be done in all cases? No. But I think if that goal is worked towards, then it can avoid and cut back on the number of whistleblower claims being filed.

REDMOND: Making sure you have an investigative lead when you get one of these types of complaints from an employee, it is very important as well as making sure that the investigative lead understands the necessity of confidentiality. Obviously, in an employment environment employees have a tendency to talk. However, employees

should always be advised that the communications are confidential, that they are to stay confidential, that the communications they are having with the investigative lead will not leave the room, and that information will only be shared with individuals who are on a need to know basis. If employers hear individuals discussing this type of information, they should advise the employee that everyone has a right to file a complaint regarding behavior that they believe is improper, but the complaint and investigation do not need to be discussed with other employees. Additionally, documentation, as my colleague stated, is very important. You mentioned the hotline, which a lot of employers have in place. If you receive a call on the hotline, I always recommend that clients return those calls immediately and try to follow up on what the complaint is within 24 hours. A lot of employers tend to believe that whistleblower only relates to accounting regulations, airline regulations, and that they are free from whistleblowers claims just because someone left a statement on the hotline, regarding a safety regulation or something similar. As Rachael stated, there are tons of whistleblower regulations currently out there and a lot of the whistleblower claims that I am seeing deal with safety issues. If an employee complains that they believe that some type of illegal conduct is going on or if they’ve been advised that they should do something that is illegal or something that is unsafe, that needs to be followed up on immediately and documented, and the investigation needs to be as thorough as possible. Do not allow management to place some type of unreasonable time line on your investigation. Take the necessary time to conduct an investigation and get all of the documents in order so that if the employee files a lawsuit, the attorneys then have the necessary documentation to properly defend the action.

TROUTMAN: You have to tie all of these points together. You must have a policy, which includes nonretaliation language; there needs to be a bona fide investigation; and there ought to be some separation, if possible, between the investigation and any decision maker related to that employee. Even with all that in mind, there may still be a perception that, “I can’t use that hotline” or “I can’t use that reporting procedure” because somebody in management is going to find out and do something about it. You must



Rachel Powitzky Steely, partner at Gardere, specializes in the practice of employment law in state and federal courts. She counsels companies with an emphasis on measures to prevent costly litigation and to improve the performance of executives and employees. She represents clients in defending against or seeking expedited relief based on unfair competition, non-competition, non-disclosure, and non-solicitation agreements. Steely also counsels and represents companies and executives in matters involving discrimination, terminations, trade secret misappropriation, harassment, wage and hour issues, disability laws, workers compensation retaliation, defamation, ERISA and benefits. She is a former student investigator for the Wage and Hour Division of the Department of Labor and is Board Certified, Labor & Employment Law, by the Texas Board of Legal Specialization. Steely is recognized as a top advocate in the field of employment litigation and has been selected a “Texas Super Lawyer” by Law & Politics Media Inc. annually since 2005. Steely has been and listed in “Houston’s Top Lawyer and/or Professionals on the Fast Track” by *H Texas Magazine* annually since 2004.

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keep that potential in mind. Then it comes back to the first point. Ensure good documentation. If you take an action toward an employee, make sure that you can explain and justify it in the light of day. Another problem arises if a company has a policy saying we are going to investigate. But when they get a call, it takes three weeks before the investigation begins. It may take three weeks to wrap it up, it may take longer, but do not wait three weeks to get it started. Make sure you follow your own policies, because if you do not, plaintiff's lawyers will have a field day with it at your expense.

ANDROVETT: *This isn't really a legal question, but what are most employers' relationships with their policies like? Do they do it right? Do they follow them? Do they have enough stuff? Do they have too much stuff? What's your experience with companies, large and small, when it comes to their employment policies?*

LABOVE: I've had various experiences; sometimes employees freely admit that policies are out there and well-published and I should have known, but I just didn't. But in most instances, like with regard to the whistleblower claims, they're digging deep for reasons to save their job. And you're never going to see employees resort to those tactics more so than in times like these. You have to be prepared to demonstrate, whether you're going into litigation or whether you're going into arbitration, that your policies clearly are well published outside of what an employee states in testimony. So I think employers probably need to have certification systems set up within their computer systems where they have to go in and certify that they've accepted the terms of the policies. Now, I have heard arguments where "I was just acknowledging it." At the end of the day, everybody knows there are terms and conditions for employment. So I think, even with a jury, someone saying: I knew it was there, but I never agreed to it; I think that is a weak argument. The best policy is for an employer to get it out there, get it acknowledged, and get it accepted. So when litigation arises, you're well insulated concerning the understanding and the expectations that existed between the employee and the employer.

POWITZKY STEELY: I know one policy that can be great if consistently followed or a disaster if ignored: the progressive discipline policy. The reason I know it so well is because I've been beat with it in court! I'm kidding.



But seriously, if a company does not follow a progressive discipline policy, then it's usually game over on summary judgment. The plaintiff's attorney is going to come back and say "here is evidence of discrimination, retaliation, whatever it is. Why would you have this policy in your handbook if you don't follow it with your employees? And with my client, you certainly didn't follow it. So there's evidence of discrimination and harassment." And, in fact, there is case law here in Texas that says that can be used as evidence of discrimination, harassment, or retaliation.

ANDROVETT: *And does that sort of paradigm the example of when an employee has been terminated says, "Hey, I had no warning. Best I knew I was doing fine in my job and then, boom! One day I'm just terminated."*

POWITZKY STEELY: Exactly. A progressive discipline policy provides steps that must be taken before an employee is terminated. First, the employee gets an oral warning and then they typically get a written warning, and then they may get suspension and the final step is termination. So you have these steps that are supposed to be followed. But the policy also says, "We have the right to skip any step we see as deemed necessary by the situation. This is not an absolute policy." Well, you have the steps one, two, three, four, five. And then that's at the bottom. When it's blown up as an exhibit, the jury just seems to ignore that bottom paragraph. The bottom paragraph seems to fade away.

So some people are big fans of them. I personally am not, unless they're used correctly. And if they're used, it's perfect for getting the case dismissed.

LABOVE: I would like to add one more point to that. I appreciate exactly what you're stating there about it locks you. If your policy is well written, it has a little get-out-of-jail-free card clause in it. And that clause should state that the steps can either be progressed or accelerated if indicated. When you someone's conduct is so egregious, you can escalate it to the ultimate penalty; a termination. And here again, well published policies will serve the employer best.

TROUTMAN: Have the policy, but don't say more than you need to say. A few weeks ago, I heard a panel of plaintiff's lawyers respond to almost the same question. They said the longer that employee handbook, the more policies the company has, the more they like it because it provides more opportunities to find things the company didn't do. That is a good comment to keep that in mind.

CLARK: I think I would concur with that. It's not quite a get-out-of-jail card with those kinds of provisions if the company doesn't apply it on a consistent basis in disciplining the employees. If they go through the progressive steps with some employees and then they don't with another, then you've got disparate treatment. And that may turn it into an actionable claim.

REDMOND: What I found to be occurring

a lot with HR representatives, especially with progressive discipline policies is, as Jocelyn stated, once you go outside the realm of progressive discipline, you have an employee who threatens to kill another employee, that's obviously something that's terminable. And we do not have to go through the progressive discipline policy. We can get rid of that employee. But what a lot of manager and human resources individuals fail to do is evaluate employees accurately during the evaluation process. As a result when they grow tired of an employee who is under performing, they decide they want to terminate the employee. However, there is a progressive discipline policy in effect, and employers end up skipping Steps one and two and deciding to issue a final warning, followed by discharge. This is where you end up with most of the problems that become difficult to litigate. As a result, in addition to developing the necessary documentation when a complaint is lodged, I also urge that anyone who is in a human resources role make sure that any evaluations they perform on employees are accurate and timely. I have handled cases and, lost a few unfortunately, where employees who were rated excellent under a progressive discipline policy, a month later were terminated by a new supervisor who thought that this was the worst employee ever and couldn't believe that the employee was ever employed with the company. Clearly, you don't go from being an excellent employee to being an employee that's capable of being terminated within one month. Therefore, make sure that your evaluations are accurate, thorough and that they actually represent the employee's performance, so that if any discipline has to be taken in the future, you will have sufficient documentation to support it.

TROUTMAN: If 75 percent of your employees are above average according to their performance evaluations, which we see in many situations, you better take a closer look at whether those evaluations are being done honestly.

ANDROVETT: *Are there pitfalls to hiring employees right now? And, if so, what are they and what advice do you offer? And since it is kind of a buyer's market, as an employer I'm feeling pretty heady about being able to get better quality employees. So I might be more inclined, for example, to look at sources like publicdata.com or I might want to look at credit reports or look at things I may not have looked at a*

year ago. Is there anything I need to know about taking those kinds of strategies as I look to hire new employees?

TROUTMAN: Hiring the right person is one of the most important responsibilities that any supervisor or HR person has. When you look at all the information that's available out there, it is tempting to look at it. But if you access information, say, on somebody's Facebook page, and they talk about their physical condition or what might be a disability, now you have information that you really don't want and should not consider. You must therefore be careful because have the capacity to obtain more of this information. But do you really want it? So again, you need a structure to address how to manage technology, access to information and how to ensure that we don't obtain information that we shouldn't be considering. I recently saw another case where the EEOC challenged decisions to terminate based on arrest records of employees, discovered after the employee started work. The theory was that use of the arrest records had a disparate impact on minorities. That generated questions about whether the company needed that information, whether they obtained it properly, and whether they used it properly. So again, you must think about what information you're going to seek and how you will use it.

POWITZKY STEELY: I think the background check is important. An employer can't consider an arrest when a background criminal history is performed. And even if an applicant has convictions, it still has to be related to the job. You have to have a policy in place for everybody in that job category that restricts employment of persons with certain types of convictions that are relevant to the job duties.

ANDROVETT: *How about things like credit reports? Is it fair game to make a decision in promotion or hiring based on the status of somebody's credit report?*

REDMOND: Some employers do, and I would advise against it unless you're in a banking or credit card industry. Generally credit-reporting requirements do not apply to your typical employer. However, recent legislation passed by the Fair Credit Act Administration states that employers are now considered furnishers of information. Furnishers are basically individuals who provide consumer information, and in this case it would be employee information, to a



A. Kevin Troutman is a partner in the Houston office of Fisher & Phillips LLP and serves as the chair of the firm's Healthcare Practice Group. In addition to his experience as an employment attorney, Troutman has considerable practical experience, which he gained as a human resources executive in the healthcare industry. Before completing law school, Troutman spent more than 17 years in healthcare management positions, including a period when he was the senior HR manager for 22 hospitals in five states. He remains active in the industry, as a member of the American College of Healthcare Executives (ACHE), state and regional healthcare groups, the Society for Human Resources Management (SHRM) and the American Society for Healthcare Human Resources Administration (ASHHRA), where he has spoken several times at the group's annual conference. He has also been a member of the governing board of a community hospital. Troutman earned his law degree, summa cum laude, from Loyola University New Orleans School of Law, in 2001.

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consumer reporting agency. This generally occurs if an employer outsources its payroll, references and other items. There are various organizations that handle employer payroll, reference checks, and et cetera, and if this information is reported inaccurately, the employee has the right to dispute the information that is disclosed. If the employee disputes the information, the employer has an obligation to investigate the employee's concern and correct if the information if it turns out to indeed be inaccurate and to report the correct information to all credit agencies. Employers have always had a similar obligation; however, now the employee actually has the right to go to the employer and dispute it as opposed to going to the credit agency and saying, well, I dispute it and having the credit agency contact the employee and say, well, the employee contacted me and said he disputes X. Now the employee can pick up the phone and call either his current or prior employer and provide information that substantiates his claim basically, provide information establishing that the information provided by your outsourcing company is incorrect, and advise the employer that it has negatively affected their credit, which could negatively affect the employee's ability to be hired for a particular job, and to request that the employer correct the issue immediately. The employer then has 30 days to do so. I would also advise employers that given current economic environment noncompetes are being enforced very heavily. Anytime you're looking at a candidate, you need to ensure that the particular candidate does not have a noncompete in place. And if the employee does have a noncompete in place, you need to make sure that you are not violating that noncompete by placing that employee in a job that would either be in an industry that somehow falls within the terms of the agreement. If the employee can get the employer to waive the noncompete and allow him to work at the company, that's great. You should always be mindful of noncompetes because once a noncompete action is filed, they're immediate, and the fees related defend noncompetes are expensive.

ANDROVETT: *Rachel, you mentioned the case where you had this client that had this employee and come to find out they embezzled 4 million. That's not an epidemic, but that happens from time to time. Just some general*



advice about how an employer should handle that once they have a suspicion that someone in the company is embezzling.

POWITZKY STEELY: We're seeing a lot of that right now. People are desperate for money and are taking small amounts to millions. With employee embezzlement, there are a couple of preventative avenues and then there's strategy once a company finds out about embezzlement. With regard to preventative measures, there are several avenues. First, have policies in place that do not allow employees too much access or authority with accounting and invoicing functions. Does a person have approval for invoices and opening accounts? Have two check-signers. A second preventative measure is to have proper privacy policies in place that allow a company to inspect an employee's work area and belongings. A third preventative measure is to have proper insurance in place because nine times out of 10 the person who has taken the money has spent it. Another preventative measure is to be aware of a person's sudden change in financial status. If they have access to funds or accounts at the business and then are suddenly purchasing items well over their means, this could be sign. Once a company has discovered a current or former employee has perhaps taken money, the first reaction of a company is always to fire them immediately and prosecute. But the advice that we usually give is slow down and not fire the person immediately. If the employee does have money remaining and the employee is fired, he

will either spend or hide the money. There are mechanisms by which a company can quietly grab the money without letting the employee know they are caught. A company needs to first make an action plan. Next, the company should investigate. Investigations including reviewing and imaging computers, inspecting offices and reviewing bank account information. If a company does not first investigate and rather runs down to the DA's office or the FBI, they are going to receive very little help. Our experience has been that if the matter is under \$100,000, the DA's office will probably not investigate. And, you should definitely have a notebook full of the evidence and documentation already in hand when you go to the DA's office. Our experience with the FBI is that they are not looking at anything under a million dollars. You may have heard of a man by name of Allen Stamford. He's going to trial in January. And he has (allegedly) taken \$7 billion. So the federal government is focused on much larger issues at the moment. So have your policies in place. Be keen to the activity and distribute job functions as much as possible.

TROUTMAN: Those internal controls: appropriate background checks and everything else we've just mentioned are critical. When you have a suspicion that there might be a problem, keep in mind the recent public debacle involving Shirley Sherrod, the former employee at the U.S. Department of Agriculture. Some of you remember she was hastily shown the door without an appropri-

ate investigation. Then we found out that the Department did not have all the relevant facts. So when you start down this road, be sure you conduct a thorough investigation. This is critical, whether you are looking at possible embezzlement, harassment or a more straightforward termination for misconduct. I cannot tell you how many times an initial report of misconduct turns out to be incomplete or just plain wrong. Try not to take one person's word for it. Make sure you can demonstrate that you sought both sides of the story, gave the employee a chance to respond, examined all the facts and considered them before making the ultimate employment decision, termination. If necessary, you can always buy more time by suspending an employee before terminating.

AUDIENCE MEMBER: *While Mr. Redmond is correct that a lot of candidates have noncompetes, that seems to be the most difficult area because so many noncompetes are not enforceable. And yet as a hiring employer, you want that person. What advice would you give in terms of what to do when you look at that noncompete? And do you think it's probably not enforceable or fully enforceable? And what can you do other than negotiate?*

POWITZKY STEELY: If the noncompete is not enforceable, then proceed forward. Damages do not accrue under an overbroad or unenforceable noncompete. However, if you do not respond, the ex-employer may seek a TRO, which may or may not be enforced. The new employer has to incur all the upfront costs of getting the TRO. For those who haven't worked with a noncompete in Harris County, typically what happens is you have a situation wherein the ex-employer claims a departed employee is violating the noncompete. The ex-employer puts together a lawsuit or petition either in federal or state court. In Harris County, the attorney runs down to the courthouse at 10 o'clock in the morning. The prosecuting attorney calls the other side to give them very little notice of a TRO hearing. It's done different in different other counties. If you're attempting a TRO in federal court, it's different. In federal court, you file your lawsuit and give the other side notice, and then between the two of you, you schedule a time that you can see the Judge within the next two to three days. It's not as much of a surprise game in federal court. Going back

to your initial question, if you believe the noncompete is invalid, then you can always wait and negotiate. One method is to wait until they have incurred money to file a lawsuit, have gone down and sat all day and waited on the Judge. At that point, you can sit down with the other side and say, "Listen, we are here to work with you. We do not want to take employees under a valid noncompete, but your noncompete is not valid. So, there's no damage to you at this point." Suggest working out an agreement you can live with for a short period of time. When hiring a new employee with an invalid noncompete, the concerns are (1) the expensive of the TRO and injunction process and (2) a new employee who is nervous to death that they're going to rack up attorney's fees that they can't afford with a new job. So, from an employer's perspective, it is important to have a frank conversation with the new employee if you do not want to engage in initial negotiations. Give the new employee, if it's a valued employee, some assurances that they are going to be reimbursed to some extent, if possible, for attorney's fees and expenses. You can do it in writing. It will be discoverable. Or you can just give them assurances. Hopefully that will be enough to keep them going forward.

ANDROVETT: *In Texas is there a noncompete that is enforceable?*

POWITZKY STEELY: Yes. They all are almost right now. They all are. The secret is getting a court on the TRO level to actually put their foot down and keep somebody out of work. Because in this economy, it is difficult for an elected official, or anyone, to look a guy in the eye who is making 30, 40, \$50,000 a year, and say, "Sorry. I know you're a good salesperson, but you can't work now until after this temporary injunction hearing." That's the problem or the issue that we see right now.

CLARK: Another possible option to consider is, of course, you want to get your counsel involved in reviewing the noncompete and make some decisions about whether counsel thinks it's enforceable or not. And if counsel feels strongly that it's not enforceable, another option is to file a pre-emptive suit for declaratory relief to declare that the covenant is unenforceable. It also has the benefit of maybe getting you attorneys' fees if you prevail. Under the statute the employee may be able to collect attorneys'



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fees if he can show that the employer knew or should have known that the covenant was unenforceable. So one thing I think that I would recommend, and I have done with clients in this area, is if there's a strong feeling the covenant is not enforceable, write a letter in response to a demand and say: We don't think it's enforceable. And then if you feel like they're going to file an injunction case, one other option is to beat them to the courthouse and file that declaratory action.

POWITZKY STEELY: That's a great point about the response because many times you get that letter first that comes out that says, "Cease and desist. Stop working. You are restricted from working under a noncompete." Always respond because if you do not respond, the ex-employer will go down to the courthouse and say, "Judge, we've tried to work this out amicably, but the ex-employee is ignoring us and stealing all of our clients." And that puts you on the wrong footing with the judge from the get-go.

CLARK: I can tell you that I've had several of those situations where I've written that letter, and we've never heard back. So I think you have to sometimes be proactive. Obviously you've got to be willing to spend the money, but I think spending the money in a more proactive manner is probably better than having to defend that injunction case and being on the defensive side.

REDMOND: My advice to all employers is when you're drafting noncomplete agreements, have someone in your legal department or outside counsel review the agreement to make sure that it actually is valid. You would be surprised by the number of agreements that we run across where an employer thinks just because I gave you a job or just because you're being paid a salary, that's sufficient consideration to support the noncompete. That in fact is insufficient consider and that noncompete will be attacked. Make sure that your noncompete is as airtight as possible. It can always be limited, but you don't want it to be completely thrown out by the court. You want to be successful at the TRO hearing, even if you have to negotiate the terms of the noncompete down with respect to the term and geographic area. But you do not want to get involved in a situation where you do not have sufficient consideration to support the noncompete.

ANDROVETT: *At least one case recently*



seems to show that the Supreme Court justices acknowledge that technology is moving so quickly that they're reluctant to create hard and fast rules. A higher authority, my 10-year-old son Matthew, informs me that e-mail is old fashioned. So I'm wondering can you offer some advice for employers or for their outside attorneys or in-house counsel about getting their arms around what I would call digital policy?

LABOVE: I'd have to tell you that this is an area that I love because I came out of government. And I'm now working for a private employer and so when *Quon* was published, I was just all excited, because I like to think of myself as being the plaintiff's lawyer who is just wrapped up in management's clothing.

ANDROVETT: *Quon is a Supreme Court case, right?*

LABOVE: Yes. And in that case it really highlighted the interest that an employer has in the appropriate use of its electronic devices and an employee's expectation of privacy.

ANDROVETT: *Jocelyn, if I might just quickly talk about the facts. It involves police officers and their PDA's and pagers. It's a dispute about whether or not their text messages can be audited and whether the officer has a privacy interest in those messages, correct?*

LABOVE: Absolutely. But in the Supreme Court case, they didn't take up the expectation of privacy. What they really looked at was whether or not the search was reasonable. And one of the things that struck me was the court used a standard akin to the

legitimate business reason standard present in Title VII cases. Summarily, is the employer search legitimately related to a business concern? And indeed it was. In that case the managers were looking at whether or not the high text usage that was registered by this particular police officer, and I think maybe one or two others, was due to the high volume of work related texts or some other reason. If found to be due to a high level of work related issues exchanged by text, then perhaps the underlying contract for pager service needed to be amended to meet the officers needs. The search began for this reason and through that search it was discovered that this particular police officer had inappropriate texts between himself and another coworker. So the legitimate reason, if you will, was about productivity. And so the Court found that the search was not excessively intrusive. This opinion has value for private employers as long as the search is related to a legitimate business interest of the entity, whether or not it's a computer, e-mails, your telephones, your cell phones or other electronic media. It's fair game for an employer on that basis. The Court sanctioned the initial search directed at productivity and the derivative investigation regarding misconduct. It's an extraordinary opinion that affirms and employer's legitimate interest in the appropriate use of electronic devices provided to employees.

ANDROVETT: *As a practical matter, employers will say to employees, "I will look at*

your navigating the Internet. I have the right to look at your e-mail." But as a practical matter do employers typically do it?

POWITZKY STEELY: One recent situation was surprising. An employee was blogging trade secret information and the company was very upset about it. The firm provided it to the DA's office not expecting much because there was no monetary loss per se. The DA is pursuing it. Now, if you think about it, on a blog you're nameless. You don't know where it's really coming from. So now the companies are becoming more sensitive to new methods of misappropriating confidential information.

REDMOND: It's also important to make sure that you look at employee blogging. The Federal Trade Commission recently passed a regulation that basically says if you have an employee who is making inaccurate statements to consumers in a blog, on Facebook, or on Twitter or the employer can be liable. For instance, say you're a sales representative and you're quoted talking about a particular product you're advertising the product as being capable of perform more than it actually can, and the consumer finds out that the product doesn't actually do what the salesman says it should do, the employer can be liable for the statements that that employee made in that blog, even if the employer did not know that the employee was making these statements. The Commission was very clear that ignorance of this law and ignorance of the blogging is not a defense. Since the enactment of this law, my advice to employers is that you should adopt a policy that discusses what type of employee information you will be monitoring. I also suggest that you advise employees that just because they're anonymous on a blog, the information regarding their identity is still obtainable because the administrator of the blog generally retains that information, so the employer retains capable of finding out who the employee is, and if it does, the employer may take disciplinary action and potentially file suit against you for the damages that it incurred due to the consumer suit it is forced to defend. The types of claims consumers will likely pursue claims for liable, slander and other similar claims. So employers need to be very much aware that if you have an employee in a high sales position that has quotas that need to be met, to make sure these employees are not blog-

ging. And if you have a policy in place that says you have the right to check blog, check them to see if your product is out there being discussed, and if so, make sure it's being discussed accurately.

LABOVE: Jerry brought up a very good point about the liability that's associated with blogs. You'd be surprised how employees get very upset if their name appears on somebody else's blog in a disparaging manner. First thing asked, is if the employer will investigate and take action against their co-worker. The most immediate measure to address the issue is policy enforcement. That's why a well written policy with regards to use of social media needs to be in place. Require inaccuracies to be corrected or take it down or face discipline. But to get back to the question that was originally asked: how does the employer actually go about this? I don't think most employers are actually actively going after the blogs. I think the information comes in through anonymous sources and then that's when your investigation if any is begun. It's just amazing to me the extent that employees will go to retaliate against a manager using Facebook, blogs and etc. It's very important to heed the tips that you've heard so far; getting a good policy in place, making sure that employees understand that those pages like Facebook really aren't private, and that employers will monitor to protect not only it's product and brand, but injury to their other coworkers and employees.

TROUTMAN: There is another angle from the perspective of medical clients that I deal with, and that is medical privacy. Remind employees that they do not have free reign to disclose information, including photographs or x-rays, regarding patients or anything else like that on a Facebook page or on a blog. Believe it or not, this has happened. There was a situation in Michigan where some nurses shared an x-ray of a patient and posted it on Facebook. They should know not to do that, but sometimes people do things without thinking. In any industry, you need to educate employees, starting with a policy that addresses confidentiality of company information, financial data or even commenting publicly about your company. This complements your e-mail policies. So whether it's on a blog, Facebook or anywhere else, such situations should be encompassed within your broader policy.

CLARK: A good starting point is to have a



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very strong nondisclosure agreement with the employees, if your company has sensitive information, and to provide training or at least have meetings to discuss and emphasize that policy. If you have a strong nondisclosure policy, then you have remedies that you can enforce in terms of getting relief. And the courts, I think, are much more likely to enforce a nondisclosure policy than a covenant. So it may not prevent that situation where the employee puts sensitive information out there, but at least it provides some consequences for that. Hopefully nine out of ten times by having that kind of a policy and educating the employees as to what the company considers to be sensitive, confidential information that needs to be protected, a suit is not necessary. I think that's the starting point to prevent that. And tell them you can't go out and blog about it. You can't put it on your Facebook page. And then if it happens, you have the ability to take steps not only to punish that employee but to remove the information. I know our firm was involved in a case recently where information was put up on a website and it violated a nondisclosure agreement. We immediately responded and said take it off. And when they failed to do that, then we sued them. And we got it off the website. It was there initially, but they did take it down. When they got a lawyer involved, they realized that they had a big problem on their hands. So I would certainly recommend a strong nondisclosure agreement and educating the employees about what the company considers to be sensitive and confidential information. And that it is not to be discussed on private or public media. It is company property and information, and they have a duty to protect it.

TROUTMAN: If you have designated information as private or confidential, make sure you treat it that way. That problem arises more often than you might expect. The company wants to protect confidential information, but when the facts develop, you may find out they haven't treated it as confidential. It has not been locked away and may in fact have been shared with too many other people to be considered confidential. So make sure you give some thought to what is designated and treated as confidential information.

ANDROVETT: *There are two federal statutes where for years employers have grappled with trying to do the right thing. And it got to a*



point where they thought they knew the rules and now the rules have shifted. And one of those is the Family and Medical Leave Act and the other is Americans with Disabilities Act. Can you talk a little bit about what has changed or is changing and what we should be looking for? And coupled with that, any advice you have about recalibrating your policies, perhaps?

TROUTMAN: I would start with the Americans with Disabilities Act, as amended. Pre-ADA amendments, a lot of cases went away because plaintiffs could not establish that they were disabled within the meaning of the Act. Now far more people will be considered disabled and therefore entitled to reasonable accommodation. So the accommodation aspect of the ADA is much more important now. Here is a critical issue to consider: Most companies' leave of absence policies limit how much leave employees can take, whether it ties to the FMLA or provides additional time off. Let's say a policy allows up to 12 weeks of FMLA leave, and limits grand total leave of absence to 180 days. After you use 180 days of leave, you're terminated. If an employee is disabled and says, "If you'd give me another 30 days, I'm going to be able to come back to work and perform the essential functions of my job." If you do not at least consider that request and probably if you do not grant it, you will violate the ADA. The fact that you have consistently administered the 180-limitation

policy will not help you. You must conduct an individualized assessment when you are dealing with an employee who is disabled. So do not rely on these so-called "drop dead leave policies" because more and more companies are finding them to be very problematic. About two years ago, a large company settled a case similar to this for several million dollars. So make sure that leave policies take into account your obligations under the ADA.

POWITZKY STEELY: That's a great example because it begs the question, "Why did the company have that policy in the first place?" Under a workers' compensation retaliation law, the Texas Supreme Court has basically given employers a get-out-of-jail-free card if they maintain an absence-control policy. An absence-control policy states that an employee is removed from the books if they are absent for a particular amount of days without calling in or for a longer extent of time, say six months. And at least here in Texas, workers' compensation-retaliation claims are expensive because there are no caps and punitive damages are involved. They are very attractive cases for plaintiff attorneys. So what do you do if that policy is in place? Well, one way to help it comply with the ADA is to add some qualifying language to the end of it: unless as otherwise prohibited by law. Companies should also take each situation on a case-by-case basis.

The same considerations hold true for the Family and Medical Leave Act. Under the FMLA, an employee has protection for 12 weeks. So the employer is waiting, waiting at that 12-week mark. But an employer really shouldn't automatically fire an employee that does not return at 12 weeks and one day. Now, under the ADA, additional time off is a reasonable accommodation. And since disability is such a broad term under the new regulations ... then an employer needs to give them that additional time.

LABOVE: One of the things that struck me is the difficulty in managing both acts as shown in the recent *Southwest* case. You're trying to be a good manager, you're trying to be empathetic to your employees, and you're trying to have flexible attendance policies, but when you have an employee that gets to that point to where he's now got a record of excessive absences, and he's got FMLA you've protected that, and believe you are in good stead, you later learned you may have walked right into establishing that your employee is a "qualified individual with a disability." In the *Southwest Airline's* case, there was no evidence the FMLA had been revisited and reassessed to determine if it was still appropriate. In addition, due to its flexible attendance policy, this particular employee had never been brought up for review of absences over a seven-year period of time, although he had only worked half of his duty each month during that seven year period. And the reason cited by the court was the attendance policies use a rolling point system, that permitted point to drop off at a certain point. The Court found it reasonable for the jury to conclude that attendance may or may not have been an essential function of his job under such an attendance policy. I once said the ADA is not a leave act. That's not entirely true anymore. I used to say the FMLA was a leave act and not an accommodation statute. So I have to agree with the panel members here, you have to look at the interplay between these two acts, otherwise where you might be actually do the right thing under one act, you also may be creating fodder for yourself under the other. Managers must stay smart and sharp.

CLARK: I think also in the ADA cases a lot of employers forget that the ADA imposes a duty on the employer. If they potentially have a qualified individual with a disability that is asking for accommodation, they have

a duty to engage in an interactive process under the statute to try to find a reasonable accommodation if it allows the employee to perform the essential functions of the position. And a lot of employers get in trouble because they don't engage in that interactive process. And I know on the plaintiff's side, if I have somebody come to me with an ADA claim that's one of the things I'm going to look at first is has the employer engaged in any kind of interactive process or have they just said: Well, we don't have anything that will accommodate you and how strongly have they documented that. If they haven't done that, then there's a potential claim. It's not easy. I mean on the plaintiff's side in employers' cases, it's very difficult anyways. The defense has the easier go of it in litigation. One, because we have a very conservative climate in terms of enforcing the statutes; but, two, defense counsel get several bites at the apple through summary judgment and taking it to trial which the plaintiff's lawyer usually doesn't get. But what you look for is an edge. And on the plaintiff's side this is one area in ADA cases where the employers often fall short because they don't engage in that interactive process.

REDMOND: Mike, getting back to your original question on how the statutes have actually grown and, I guess, developed, as Kevin stated, the ADA has obviously been amended and developed greatly as has the FMLA. I think employers need to be aware and they need to check their policies and make sure that they are providing individuals who are qualified for FMLA leave with the particular FMLA leave they're qualified for. Last year, as I'm sure many of you are aware, military benefits leave was extended. Employees who care for military personnel who are injured are allowed to take FMLA leave, and their leave can be up to 26 weeks. Employers need to make sure that they have the proper certifications and the proper notices and are aware of who's entitled to the actual FMLA leave so that they're not violating an employee's rights when an employee request FMLA leave. As recently as last week the department of labor issued what is an interpretation letter regarding what constitutes a son or a daughter under the FMLA. Although this regulation isn't law yet, the interpretations letter states that if a parent or an individual is, in *loco parentis* that they are entitled to FMLA leave. All that they have to establish is that they either



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are responsible for the day to day care of the child or they're financially responsible for the individual. In the past both requirements had to be met; however, the interpretation states that if you can establish either, you're entitled to the leave. The interpretation letter states that it applies to individuals who may not be biologically related to the child. Depending on how it is interpreted by the courts it has the potential to affect your work force heavily, because this will affect same sex partners, individuals who may be aunts and uncles and et cetera, because those individuals can come forward and say we provide day-to-day support for a child and request FMLA leave. The interpretation letter for the first time addressed same sex partners and stated that if a same sex partner is an individual who provides day-to-day care or provides financial support then that individual, according to the Department of Labor's interpretation, should be allowed the time off to bond with or care for a new or sick child. So these types of entitlements that employees have under the FMLA need to be addressed in your policies, and you need to review your policies to make sure that you are providing the proper type of leave to employees and that you're not denying leave to an employee simply because you believe the employee is not entitled to it.

TROUTMAN: Many times supervisors do not recognize these situations and do not understand they must call human resources and get help when they arise. Some supervisors have been accustomed to the "old FMLA" for many years now. They think they know the rules. Well, the law has changed. If they deny legally protected leave, even with good intentions, the company is on the hook. You must ensure that your supervisors are aware of these changes.

AUDIENCE MEMBER: *When can an employer actually say: We can no longer retain you. It's a hardship and we're getting personnel to take over your position or temporary personnel, and it's just not working.*

LABOVE: This should be handled on a case-by-case basis and especially in light of the fact that the ADA has moved toward broad coverage. And the answers just aren't out there yet. So to protect yourself, I really think you're going to have to take advantage of what the FMLA offers you, if it's an excessive absence. You do have the ability to recertify. Take advantage of that to avoid scenarios like *Southwest*. Southwest may have

actually had the employee recertified, but it was not stated in the case. To the contrary, the employee was repeatedly approved and nothing dispelled that he continued to meet the essential functions of his job as a flight attendant. There was no dispute that when he came to work, he could actually do the job. That's not the issue. Attendance really is an essential function of most people's jobs. And so in this instance the policy, the flexible policy, that was in place played against the employer. So it is going to be a real balancing act. Managers must be proactive about the enforcement of policies and revisiting what the statutes allow them to do.

REDMOND: And I would also follow up and just say with employees on the leave policies, if you have an employee who is on intermittent FMLA leave, that's going to be a difficult employee for you to get rid of regardless. You may say enough is enough, but if they have been approved by a doctor for intermittent leave, and that's basically I have to go home and take care of my sick child for three hours a day, three times a week or five hours a day four times a week, that may present a problem in the workforce because that employee is not present at work and someone else has to cover that employee's shift. Unfortunately, if that employee receives certification an employer's hands are somewhat tied as to what they can do to that particular employee. So I would advise employers if you have an employee who is on intermittent FMLA leave, think very carefully before you take some type of action against that employee, because they have the right, as long as they're certified, to take FMLA leave and take it in accordance with what the doctor and the employer has agreed to under the circumstances.

TROUTMAN: Keep in mind that before you play the "undue hardship" card, you should consider offering some alternate accommodation. Even if the employee's proposal represents an undue hardship — and you're going to have to prove that it does — if you've offered alternatives, that puts you in a much better position. You do not have to provide the accommodation that the employee chooses, but you normally must offer a reasonable accommodation. So look at alternatives and make sure you can show you have considered them.

POWITZKY STEELY: When considering undue hardship under the ADA, you need

to make sure you can show on the documentation that the company and employee have engaged in the interactive process. The best alternative is really not to even consider the undue hardship defense. Flip it back and ask yourself, "Are they able to perform the essential functions of their job with or without reasonable accommodation?" If the impairment is to the point they cannot perform their essential functions with a reasonable accommodation, then you can terminate. The reason for the termination is an inability to perform the essential functions.

LABOVE: I have to join in with Rachel, because it really is about documenting the performance. I mean, even though we all want to say the sky is falling with regard to these amendment changes, the Court was basically stating they're in the business of preventing discrimination against people who have disabilities. It's performance instead of the behavior that is at issue. Go after the performance and document whether or not that performance actually meets your expectations. I think that's a safe place to start. You don't know where you're going to end, but that's the safe place to start.

TROUTMAN: This point is critical. If an employee or applicant cannot perform the essential functions of the job, with or without reasonable accommodation, they are not a qualified individual with a disability. Therefore, they are not entitled to an accommodation and you need not deal with the "undue hardship" argument. Just make sure your evidence, such as the job description, clearly establishes the job's "essential functions."

POWITZKY STEELY: As far as the new ADA amendments, I encourage a little patience. For so long before the new law came out, the decisions had swung very far to the right. I mean, when the Texas Supreme Court has to step in and say that an amputee is disabled, then it's gone a little to far. So now the pendulum is swinging all the way back to the other side. Eventually it should even out a little bit. The ADA amendments say that a disability exists for almost any condition. I encourage you to look at the regulations. They give a lot of examples. Some, to me, are almost startling. For instance, a person who has a lifelong 20-pound lifting restriction is considered disabled. So look at the examples in the regulations about the types of circumstances that at least the federal government is considering as disabilities.

ANDROVETT: *Jerry, over the last couple of years, there have been different kinds of eruptions in the news media regarding attempts to control illegal immigration. And I remember even going back to last October where you were advising employers regarding the so-called I-9 audits and all of that. What's the status now of immigration regulation as it relates to employers?*

REDMOND: Well, obviously Arizona is a hot topic and it is a bit insane what's going on out there. ICE has taken the position that it is going to continue to actively enforce any type of I-9 violations and actually enforce H-1B audits as well in the investigations. This process started last July and it has continued to date. Over the past year, ICE has issued almost 40,000 notices of inspection for I-9s. Once a notice is issued it gives an employer only three days in which to get its I-9s in order and to verify that the employees are actually employment authorized. The issuances of these notices will continue to grow. For this particular region, the ICE regional director in New Orleans stated that he has every intention of going forward with these notices of inspection. He further stated that he intends to make sure employers are following their I-9 and E-Verify obligations and will not go soft on employers who are violating the law. Once ICE comes to your facility and investigates your I-9s, you also open yourself up to investigation of other employee file material. ICE is working now in conjunction with the EEOC and the Department of Labor for any type of discriminatory conduct that may have occurred as a result of employees who were not hired or who were fired because they were believed not to be employment authorized. The enforcement actions that are being taken now are serious, and employers need to be careful and ensure when they are filling out I-9s that they get the appropriate documentation that establishes not only identity but employment authorization. If an employee comes forward with information later that suggests that the employee is not employment authorized, then the employer needs to make a decision. I get a lot of calls about this all the time. An employee shows up with new Social Security card or the employee just handed the employer a permanent resident card or his permanent resident card is no longer valid. So he gives the employer a Social Security card that says valid for employment only.

If all of these things start occurring and you want to amend your I-9 to attach that information to it, be aware that you have now been placed on notice that that employee likely is not employment authorized. If you do not feel comfortable terminating the employee because of the employment authorization issue, there is always the fallback of terminating the employee or disciplining the employee because he provided fraudulent information to the company regarding his identity and employment authorization. So I would encourage every employer to have a broad policy in their handbook that states that if you provide fraudulent information to the company regarding any particular information, you can be subject to termination. With respect to H-1B visas, they've been slow getting filed, but unfortunately the immigration service has taken the position that they're going to increase audits of these documents. INS has already issued 20,000 audits to date. Unlike I-9 audits, employers do not receive notice of the audit. Someone from the immigration office shows up at your facility and says we want to check your H-1B visa documentation, and because they are working in conjunction with the EEOC, it also means that you want to check your employee files as well to make sure all documents are proper. Employers need to be careful to make sure that all of their H-1B visa documentation is accurate and that they also have their employee files well documented.

POWITZKY STEELY: I'm not sure if you can tell me if it's still the case. Twenty or something years ago, I was an investigator with the wage-and-hour division. And we were trained to look at I-9s. When we would go in for the wage-and-hour audit and pull the I-9s, if they are suspect, then we would contact ICE and get that process started as well. So it's really from other investigations as well.

REDMOND: Yes. ❖

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