Labor & Employment

Panelists, Left to Right, Sitting: James A. Matthews, Kimberly J. Gost, Jennifer Platzkere Snyder, Thomas S. Bloom. Standing: John E. Quinn, Sidney L. Gold, Wayne E. Pinkstone.

MR. QUINN: Good morning, everyone. It's my pleasure to serve today as moderator of our labor and employment roundtable discussion, sponsored by *The Legal Intelligencer*. Today we will discuss some of the major issues that labor and employment practitioners encounter on a day-to-day basis. Our panel consists of defense, plaintiffs and corporate attorneys who will provide their observations and insights regarding this challenging practice area.

REDUCTIONS IN FORCE

MR. QUINN: Given the current economic climate, I would like to begin by discussing reductions in force. Certainly more and more companies are looking for ways to cut costs, which often leads to workforce reductions. My question is, how does a company decide who will be laid off? Jennifer?

MS. SNYDER: The first consideration has to be the makeup of the workforce. Are there non-exempt as well as exempt employees? Usually, most organizations have both, and the differences in the classifications will affect how reductions may be made. Non-exempt employees are those who are not exempt from the wage and hour overtime laws, so they have to be paid for all time worked beyond 40 hours per week at an overtime rate. Employers can cut the pay of non-exempt employees by, for example, instituting reduced work weeks or mandating one or two days off per month — a practice commonly referred to as a furlough. Non-exempt employees can be paid just for the hours that they work. The danger is when you look at how to cut costs associated with an exempt workforce. Exempt employees are those who are classified as administrative, professional, executive, outside sales or computer professionals under the wage-and-hour laws and regulations and, therefore, are exempt from overtime pay. In exchange for not being paid for any time worked over 40 hours in a workweek, exempt employees must be paid for an entire workweek if they do any work during that week. Thus, exempt employees cannot be furloughed by cutting workdays the way non-exempt employees can be.

MR. QUINN: So, we can't do what they do in California, where exempt employees are being asked to take Mondays and Fridays off?

MS. SNYDER: No. But there are other possibilities. For example, there is no law stating that employees have the right to choose when to take vacation — if it is offered — so employers can mandate use of accrued vacation days on a one-day-a-week basis for a certain period of time. Employers can also institute permanently reduced work schedules, with the caveat that the reduced schedule can't fluctuate from week to week based on workload demands.

MR. QUINN: Rather than reducing a workforce, may employers ask employees to agree to a salary freeze or bonus limitations? Wayne, have you ever done that?

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>
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MR. PINKSTONE: It can legally be done, as long as the exempt employee stays at $455 per week, but I think reducing pay may create a morale change in the workforce. A company-wide furlough may be a better option, but, as Jennifer said, the wage-and-hour issue should be an important consideration.

MR. QUINN: When you decide to cut your workforce, how do you decide where to do so and do you document that decision? Jim?

MR. MATTHEWS: In my experience, one of the ways employers get themselves into trouble is by failing to separate the positions to be eliminated from the people who occupy those positions. For example, is there excess capacity? What can the business do without? Which functions could be outsourced? In other words, do not select the position to be eliminated in order to get rid of the incumbent employee. Employers who do this will find that when it comes time to provide a legitimate nondiscriminatory reason for the decision, they are unable to do so because it didn't make any business sense. Or the employer will run into trouble — and this is the kind of thing that makes Sid's eyes get real big when the client walks in — because they laid off the incumbent and then discovered three weeks later that they shouldn't have eliminated that position and need to hire someone to fill it. There's your dispute of fact on pretext. So make the business decision about the position first. Then make the business decision about which people you can live without.

MR. QUINN: As we're considering whom we are going to let go, do we write down what the criteria will be? Kym, do you believe in that?

MS. GOST: Yes, and I agree completely with Jim. You need to examine various job functions and make a business decision, whether that is elimination, suspension, transfer or consolidation. For each position you eliminate or otherwise change, you need to be able to point to objective business criteria designed to reduce your costs. The decision needs to be objective, so you're not necessarily looking at Joe Smith's performance or other personal factors.

MR. QUINN: What if you want to eliminate sales representatives and they are all equally qualified?

MS. GOST: You could approach that as a consolidation. Maybe there are redundancies in that group. And then if you hit a plateau and still need to make cuts, you start looking at performance. That said, the performance evaluation procedure would also have to withstand objective analysis.

MR. QUINN: Who should make that decision? Is this a human resources or in-house counsel decision?

MS. SNYDER: In my view, it should be a team of people, though you want to keep the team small to avoid having news of an upcoming reduction in force leak out before the company is ready to announce it. The team should include HR representatives and in-house counsel, assuming the company has in-house counsel. The team should also include business leaders who can provide insight on the selection criteria. You need all of these people to work together to create a process and criteria that will be able to withstand scrutiny.

MR. QUINN: Sid, what do you look at when a client comes to see you after being laid off as a result of a reduction in force?

MR. GOLD: We're finding that most companies are not really prepared for a reduction in force. They don't have a reduction-in-force policy or any established selection criteria. When a company conducts a RIF on an ad hoc basis, the natural tendency is to let the least desirable people go. These might be older, long-term employees who are pulling in high salaries, or individuals who suffer from disabilities or have taken time off under the Family and Medical Leave Act. Further, selection decisions often lack consistency and employers fail to understand the risk of eliminating employees who have excellent performance records. So, essentially, I look for inconsistencies and contradictions. I also look for any prior complaints against the decisionmaker that might suggest discriminatory animus or retaliatory motivation against the employee. With respect to older employees affected by a RIF, I also look to see if the employer provided the employee with a matrix demonstrating the ages of all individuals in that employee's job category to see if older employees were disparately impacted by the RIF.

MR. QUINN: Tom, what is your perspective as in-house counsel?

MR. BLOOM: We haven't had a reduction in force in the time I've been at Amtrak. But I'm generally of the view that the more people who are involved in terms of HR, counsel and business people, the better. Overall the process looks better when you have more people weighing in on the decision, including people who have very little personal stake in relation to the affected employees. If you wind up in litigation, that detachment can be helpful. I would also be interested to hear Sid's view regarding what Jim said earlier, which is that even with small and midsize employers, if you're making initial judgments on the basis of job functions and responsibilities detached from the employees themselves, does that create a higher hurdle in a litigation context?

MR. GOLD: I don't think there is any way to completely insulate yourself as an employer, but you make a very good point in the sense that the more people who are involved in the decision, the greater the buffer against having a decisionmaker in the hot seat as to why he selected a given employee for termination. The key, though, is to have a policy in place before the RIF. Without that, whatever the methodology, it will be vulnerable to attack. In addition, employers should be mindful of performance evaluations. As an employer, you don't want to be in the position of having to justify terminating a stellar performer. There is a major contradiction there.

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MR. QUINN: Once individuals are selected for a RIF, should the employer go through the personnel files to look for the issues that Sid just raised?

MR. MATTHEWS: Absolutely. While I'm less in favor of a large group of people being involved in this process versus the right group of people being involved in the process, if we go back to the narrow issue of personnel files, I recommend that someone who is not directly involved in the decision take the first cut at the personnel files, just in case there is something in there that you wouldn't want to be part of the decision making process. Examples would be a discriminatory statement in a performance evaluation or an intemperate note from a supervisor. These kinds of items should be removed from the documentation that the decisionmakers are going to evaluate.

MR. PINKSTONE: Provided an employer is not facing an immediate need to reduce resources, it is important to take the time to develop an organizational plan for the future. In other words, decide what you want your organization to look like six months or a year from now, and make employment decisions accordingly. That means making eliminations by job function and similar considerations. I think we have all had cases where there's a decision that's made and the plaintiff argues it was done because of age, sex, race or religion, and the employer produces a document indicating that the company was planning on making workforce changes several months before the employee was terminated, and that helped to create a defensible position.

MR. QUINN: What is your perspective, Jim?

MR. MATTHEWS: It's somewhat unusual for me to quote President Obama, but I like his comment, "Let's not make the perfect the enemy of the possible." Employers have to operate their businesses. They have to do what they have to do, and this isn't just an abstract law school exercise where you get to dot every "I" and cross every "T" to make the lawyers happy. The reality may be that you have to do a round of performance evaluations or a force ranking, but the worst thing you can do, and I think Sid and I would agree, is pretend that you're doing something different from what you're really doing. Trying to create a false impression will ultimately create a dispute of fact on pretext and get you to a jury. So if you make a performance-related decision, don't pretend it was merely an economically motivated reduction in force.

MR. QUINN: Do you take a snapshot of the workforce both before and after the reduction in force to see if there are any particular trends? Kym, have you ever done that?

MS. GOST: I have done that, absolutely. With planned reductions, you can also conduct a statistical evaluation. Of course there are pros and cons to these evaluations. It is unlikely that they would be considered privileged, so you do have to be very careful in performing that kind of analysis. I also agree with Jim in terms of the decision is what it is, and was derived the way it was derived. The best you can do is be deliberate and organized and take your time. Don't make employment decisions on a haphazard basis. Sid's point regarding performance evaluations is also well taken.

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>
> — *JENNIFER PLATZKERE SNYDER*

MR. QUINN: Sid, from your perspective, how important is it for the employer to communicate clearly to the affected employee as to why he or she was selected for a reduction in force?

MR. GOLD: It's very important. The employer owes the employee an explanation as to why he was selected for termination, particularly when the employee has been with the company for a long time. Yet, explanations are rarely given. This also goes back to having an established process prior to a RIF. Businesses have an obligation to look forward and if you think that you're moving in a certain direction, your employees should know that. That way, when employees are being selected, there is nothing wrong with bringing an employee into the room and saying, "OK, we did this analysis and, unfortunately, you were selected." At least the employee knows the reason. If there is no explanation, the person is going to be angry. The family is going to be angry. Being terminated is going to make a dramatic change in the family's lifestyle. It could mean not sending a child to college that year or having to default on a car payment, so that person is owed an explanation as to why he or she was selected and, sometimes, just knowing that allows them to move on. Most of these individuals that consult with my office are simply seeking some sort of explanation as to why they were selected for termination. If more employers provided employees with the reason, there would likely be less litigation stemming from reductions in force.

I should also point out that most people who come into my office are not aware of the concept of at-will employment. They really believe they have some right to a job after putting in their equity for 10 or 20 years. It could very well be that a lot of jurors feel that way too. There is a lot of anger today in terms of what is going on with the economy and most employees are not feeling they were responsible for this economic train wreck we are in right now. In fact, many of them never benefitted from it. In their minds, they did everything right. They put money in a 401(k), they sent their children to college, so now what? That is the mindset that we are seeing.

MR. QUINN: What about severance agreements? Jennifer, what should be included in these contracts?

MS. SNYDER: That depends on whether you are dealing with an individual, performance-based termination or a group economic decision across the board. But before I get to terms, I would like to follow up on one of the things that Sid said. I completely agree that the communication process can be overlooked, because many plaintiffs whose claims I see do not really understand why they were selected for termination, which leads them to litigation. Further, in this economic climate, employees understand that hard decisions have to be made; however, if a reduction is truly motivated by economics, then you don't want to see company executives receiving higher bonuses than they did previously while middle management suffers. There's a disconnect in that situation that has to be considered before announcing a reduction.

With respect to the elements of a severance agreement, I think it should be pretty neutral in that you don't want to set out too much detail about why the person was selected. You do want to give them an appropriate amount of time to consider the agreement, and the Older Workers' Benefit Protection Act requires that companies provide individuals over 40 years of age with at least 21 days to consider a release if it is given as part of an individual termination decision and at least 45 days if the decision is part of a group termination. Releases related to group terminations involving individuals over 40 must also include a disclosure statement, listing the positions of everyone in the department or division where the terminations took place and the ages of the people who were and were not selected for termination. Other terms to think about include confidentiality, non-disparagement, limitations on applying for re-hire and the selection of governing law or forum for disputes.

MR. QUINN: Wayne, do you think that if the employer negotiates certain terms with employee A, it will throw off the whole severance agreement offered to other employees?

MR. PINKSTONE: If it's a single employee and the changes are not material, I don't see a problem with it. If it's a group, it's a much bigger issue. It affects, potentially, hundreds of employees. I think we're kidding ourselves if we think a confidentiality provision is going to prevent an employee from completing negotiations and turning around and telling a co-worker what is in the agreement. Also, as Sid said, how the termination is conveyed is really important to the employee. Putting a document in front of an employee at 3:30 p.m. on a Friday without explanation is not the way to do it.

MR. QUINN: How should notice be given?

MR. PINKSTONE: I would suggest that it be done in private with two company representatives present. Typically at least one of the representatives will be from human resources, and the second will be either a manager or another HR professional. Notice should not be

given at the employee's cubicle or on the assembly line. A conference room or similar location is preferable. Properly letting someone go sounds simple. It's common sense. But it's frequently done the wrong way, which frankly leads the employee to Sid.

MR. BLOOM: I would like to add that one of the intangibles that employees and factfinders take into account is fairness. This is particularly true when you're dealing with an imperfect factual situation, such as an inadequate performance evaluation. Even though fairness cannot be the basis of a legal claim, it can determine the outcome of a dispute. I recommend taking a step back to ask how an employment decision or action would look to a layperson. How did the process look? What about how the employee was treated? This should not only benefit the employer, but also lead to an employee who feels he or she was treated with respect. Many problems can be avoided by keeping an eye to fairness.

MR. MATTHEWS: Following up on what I said earlier, another thing that our clients need to remember is that there must be a balance in terms of treating the employee fairly and protecting the company. The truth is, this is an area in which no good deed goes unpunished and protecting an employee's feelings or avoiding a confrontation by saying, "Look, it's just a question of numbers and your number came up. You're great and it didn't have anything to do with you," can make it difficult to point to performance as the legitimate, nondiscriminatory reason for which the employee was terminated. That's going to put you in front of a jury. You don't have to be brutal, but you're going to get into trouble with inconsistent explanations. You don't have to tell the rest of the world the unvarnished truth, but you need to be up front with the employee and have supporting documentation.

CLASSIFYING EMPLOYEES

MR. QUINN: If we turn to something that Jennifer brought up earlier in the discussion, she was referring to exempt and non-exempt employees, and I have seen numerous problems arise under the Fair Labor Standards Act and various state laws due to misclassification of employees. Jennifer, what do you tell your clients when they ask you whether an employee is exempt or non-exempt?

MS. SNYDER: I begin by asking for a job description, which may or may not exist, depending on how sophisticated the employer is. Then I ask whether the description accurately reflects the reality of the job. Many times the description does not reflect the actual job duties. Once we have an accurate picture of the job duties, we analyze them against a number of tests that the U.S. Department of Labor has laid out to determine whether an employee is properly classified as exempt.

In my experience, employers have the most trouble with the administrative exemption. All too often employers try to designate a position as exempt under this classification because it applies to white-collar employees who exercise independent judgment and discretion about matters of significance to the company. Some employers think that description could fit almost anyone but the DOL often disagrees. As a result, in the last couple of years, we have seen a substantial increase in class action lawsuits filed on behalf of misclassified employees seeking unpaid overtime compensation, back wages and attorney fees, most of which revolve around the administrative exemption. It's a land mine for employers.

MR. QUINN: Kym, have you found that some companies are now saying that individuals are really independent contractors or consultants rather than employees? Is this occurring more frequently now than it did in the '90s, when times were good?

MS. GOST: I certainly have found that, and I've talked to a lot of clients who would like to go that route. The tests are difficult, though, and the DOL and the courts tend to lean toward employee as opposed to independent contractor. So as much as many companies would like to treat people as independent contractors, it's becoming increasingly difficult to do so.

MR. PINKSTONE: I have to agree. I have had clients want to deem an employee or group of employees independent to avoid providing benefits. My response has typically been, "What is this person's function going to be? Will the person be supervised by the same supervisor, work the same shift and perform the same tasks as an employee?" If the answer to any of these questions is yes, and usually there is at least one "yes," the DOL will view the individual as an employee.

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> — *KIMBERLY J. GOST*

MR. MATTHEWS: I think what we all see in terms of employee classifications, is employers trying to wrap a 1930s statute — the FLSA — around a 21st century workforce. One of the first things we have to say to our clients is that they are absolutely right, the law in this area doesn't make sense. The statute was designed for the 1930s industrial workplace where there were blue-collar workers and white-collar managers and professionals, and everybody knew where the line was. We also have to keep in mind that the statute was not meant to generate more income for employees. It was intended to discourage employers from having fewer employees work more hours and encourage them to hire more employees to address the widespread unemployment of the time. At the time, employers didn't incur any additional cost by having two people do the same job. Wages were wages. But now, if Joe presses a button on an assembly line for eight hours and then Mary steps in and presses that same button for eight hours, the employer has to pay twice the benefits, which can be much more expensive than simply paying Joe time-and-one-half for the second eight hours.

MR. QUINN: We know that many complaints come from employees going to the DOL and saying they are not being treated fairly. Kym, what if a non-exempt employee contacts the DOL seeking overtime because he or she is required to be available via a company cell phone or Blackberry?

MS. GOST: That comes up quite bit. There are also a number of class actions involving pagers and whether carrying them is compensable work time. The question is, are they working for the benefit of the employer while they have the device? In my view these need to be dealt with on a case-by-case basis. Simply having the device in and of itself has not routinely been found to create compensable work for the entire time the employee is carrying it, but certainly utilizing it and responding to it does constitute working, at least according to the DOL. I think the Blackberry is a little more difficult. The pager goes off and you respond. A phone rings and you respond. With a Blackberry there are e-mails coming in all the time, and the grey area is determining whether you must record when you opened and responded to each e-mail and how much time that took.

OUTSIDE COUNSEL, AUDITS AND INVESTIGATIONS

MR. QUINN: What role, if any, does outside counsel play in the event of a DOL audit?

MS. GOST: That often depends on what the client wants. Certainly you want to have counsel involved, whether it's in-house counsel or outside counsel. But I have found with investigations that the DOL does sometimes get its back up if the lawyers make their presence known, so I recommend a sophisticated HR person as the initial liaison with the lawyers in the background providing advice.

MR. QUINN: Tom, what is your perspective as in-house counsel?

MR. BLOOM: For the most part, we do not involve outside counsel. There is, however, a continuum of contentiousness and in some instances we have brought in the HR department, our own internal dispute resolution office or in-house counsel if things are looking dicey. In our experience, the DOL can get their hair up a little bit, but less so with in-house counsel. We're a part of the company and it doesn't necessarily turn up the heat in the same way as bringing in outside counsel.

MR. QUINN: Jim, do you review the statements and the documents that your clients give to the DOL? Do you indicate how far you want your clients to go in trying to advocate their positions?

MR. MATTHEWS: Every case is different, because it depends on the circumstances, it depends on the auditor, it depends on the personalities and it depends on what you're worried about, if anything. Certainly I want to talk to my client so I know what's being turned over and if there are potential land mines. To the extent there's going to be a position statement of some kind, I don't find that the auditors get too up in arms if you write them a letter setting forth the company's position. What annoys them is an attorney looking over their

shoulders while they review files. I would say that if a company is going to take a position in writing, outside counsel can lend a useful perspective in terms of having seen other companies and audits and the outcomes of those. While you might think an audit is an audit and it is what it is, the facts are never completely clear and there are different ways to package the same set of facts, whether you are doing that in a document or you are preparing the HR person or assisting in-house counsel.

MR. QUINN: I'd like to direct our attention to the role outside counsel plays when an employer internally investigates employment matters. Wayne?

MR. PINKSTONE: I believe the role should be advisory in nature. I typically do not get involved in the investigations themselves because if that employee turns around and files a harassment suit and part of the defense is that the employer took proper legal action, investigated the complaint and remedied it, I become a fact witness in that litigation. So as outside counsel, my role is more often counseling the HR representative and helping in-house counsel shape his or her involvement in the investigation.

MR. QUINN: Just before we get to Tom, would you ever, as outside counsel, revise the report that was submitted by in-house counsel?

MR. PINKSTONE: Good question. I don't think I would revise. I would review and advise, but ultimately the facts that are derived from the investigation are what they are. I certainly wouldn't provide any advice on changing the facts. I regularly conduct training in these matters, and my recommendation is that whoever is conducting the investigation should keep their opinions out of it. Take the facts and arrive at a conclusion based on those facts.

MR. BLOOM: At Amtrak we have two pretty significant in-house investigatory arms. Our dispute resolution office, which is part of the human resources department, investigates internal complaints of discrimination, harassment and the like. The DRO is staffed with investigators who are experienced in conducting interviews and collecting relevant documents and they generally attempt to resolve complaints based on a well-developed factual record. Generally, neither in-house nor outside counsel participates in DRO investigations. We also have an equal employment opportunity compliance group, which operates under the umbrella of the law department. The EEO group investigates and responds to complaints filed with the U.S. Equal Employment Opportunity Commission or similar agencies. The EEO group conducts its own investigations and writes position statements under in-house counsel's supervision. It also investigates internal complaints where the employee has retained counsel (the DRO generally transfers its investigations to EEO once an employee retains counsel).

We don't typically involve outside counsel at the EEO investigation stage unless it's related to — and maybe not even then — an employee who is in the midst of an ongoing litigation. We might also consult outside counsel if the investigation is particularly complex.

MS. SNYDER: Many of my clients do not have sophisticated internal investigators like Amtrak, and I find that even highly developed organizations often lack experience when it comes to investigations. I do always prefer to be an outside advisor so that I can maintain privilege but, if it's a particularly thorny issue or if I am dealing with a particularly green business manager or HR representative, I may go in and conduct the investigation myself, so long as the client fully understands that I will be gathering facts which will all likely be discoverable if the person who complained files suit. The client would have to be fully aware of that before I would get involved in that capacity, but I would still rather get involved and conduct a good investigation as opposed to having the company do one that is less thorough.

MR. QUINN: Sid, I'm sure you have seen more of these investigations than anyone else, and I know you have some very strong views on this subject. Would you give us your perspective?

MR. GOLD: I think Jennifer makes an excellent point. What I look for is the quality of the investigation. Was the person who conducted the investigation trained and qualified to do so? Who was interviewed and why? Was the finding in the report substantiated by the facts? I frequently see poor investigations that would have benefitted from the advice of counsel, whether in-house or outside. Often, the people conducting these investigations do so in a reactionary manner, not realizing that the investigation may become the focal point of litigation.

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>
> — *SIDNEY L. GOLD*

Additionally, plaintiffs lawyers hear all the time that a company performed an investigation, but failed to interview the complainant. Companies need to let their employees know that complaints will be taken seriously and investigated. Although not legally obligated to do so, I would recommend that companies inform the complainant of the results of the investigation, including whether the accused individual was ultimately disciplined. Frequently, employees come in to see me because they never received any follow-up from their employer after registering a complaint of harassment or discrimination.

MR. MATTHEWS: Something that we're doing with increasing frequency, particularly in the case of a high-profile issue or a high-profile manager, is retaining or helping our clients retain separate outside counsel to conduct investigations. It would be extremely rare for one of our attorneys to perform an investigation, both because of privilege and because we would disqualify ourselves from trying the case. This is becoming a common practice, as we are finding that more and more well-trained employment lawyers are marketing themselves for this purpose, and there is a tremendous cadre of big firm labor and employment alumni — many of them women — who may not be in active practice but who are available to do this work part time at reasonable rates. These individuals offer an effective, efficient and affordable option, and know how to write reports and testify.

MR. QUINN: Wayne, when you said you do a great deal of education and training, do you spend time training managers?

MR. PINKSTONE: Yes. I do a fair amount of what we call supervisory training. We talk about issues that aren't necessarily law-related, but are important to supervising, such as communication and how to react to and handle various complaints. Of course it is also important to ensure that supervisors are aware of the relevant laws, aware of their roles in responding to employment matters and aware of the need to follow the procedures outlined in the employer's handbook. If a manager appropriately responds to an employment situation, that might be all it takes to avoid litigation.

THE EMPLOYEE FREE CHOICE ACT

MR. QUINN: I would now like to address the Employee Free Choice Act. This act has not yet become law, but Jim, with your background in labor, would you review some of the act's key aspects?

MR. MATTHEWS: Well, we may have a bill by the time this is published so we'll see how we do with predicting the future. There are three primary components of the act that are receiving attention. One is the card check recognition that everyone has heard about, and the third is enhanced penalties for unfair labor practices committed during representation campaigns and initial bargaining. In my view it is the second component that is far and away the most important. It represents the single most radical change in federal labor law since the Wagner Act of 1935. This portion of the EFCA provides that if the parties do not reach a first collective bargaining agreement within a specified period of time, let's assume 90 to 120 days, the Federal Mediation and Conciliation Service will appoint an arbitrator to handle the unresolved issues and ultimately determine the terms of the parties' two-year contract. In that regard, it is not unlike the process we have in Pennsylvania under Act 111, which applies to police officers, firefighters and prison guards. The big difference, though, is that under Act 111, the police officers, firefighters and prison guards have surrendered their right to strike in exchange for mandatory arbitration. Clearly there are significant public policy concerns behind that. The situation we have here, as I say, would radically change the way collective bargaining takes place.

My principal concern is that heading into the interest arbitration, management will typically have much more to lose than will the union. So you're really skewing the situation. My own view: Will some form of enhanced penalties pass? Probably. Will some form of expedited recognition process or election process pass? Probably. In exactly what form, I'm not sure. Is it going to be 50 percent plus one card check recognition, I certainly hope not and don't

think so. What I think is the provision that employers need to be most concerned about is the one that the press and the public don't talk about nearly as much, and that is the mandatory interest arbitration.

MR. QUINN: Would the individual from the FMCS determine the management rights clause in the collective bargaining agreement?

MR. MATTHEWS: Presumably, though we don't know at this point. As it's presently drafted the statute basically says that FMCS will conduct arbitrations under regulations it shall issue. We have no idea what will be on the table, what will be off the table, or whether the FMCS arbitrator will have the statutory power to waive the employees' right to strike. The right to strike is fundamental and needs to be clearly and unmistakably waived. Is the mediator going to be able to do that or are we going to have a contract that binds management but allows the union to strike at will? We just don't know and that's one of the reasons why, in my view, it's so terribly dangerous.

MR. QUINN: Jennifer, what do we do now while we're waiting for the statute to become law? What options are there for an employer facing a potential organization drive?

MS. SNYDER: Like Wayne, I do a lot of supervisory and management training. We try to talk through the issues that lead to people signing authorization cards and wanting to form unions. We look at practices that can be employed to maintain a company's independence. The first step is to explain to the management team the importance of communication. Is this a company where managers listen to the employees? Is there regular constructive two-way communication between managers and employees? Do the employees trust management? The second step is to evaluate management. Are they credible? Do they provide progress reviews to employees to let them know where they stand in the organization? Are performance evaluations conducted fairly and according to objective standards? Third, we examine whether there are company policies and whether they are followed. A company that has policies but does not live by them can lead employees to distrust management. Fourth, we look at hiring and firing practices and talk about how to make hard disciplinary decisions. Finally, the most important question I ask supervisors is whether the workforce knows what it would mean to have a union in the workplace. Do they understand the legal significance of signing an authorization card? Will employees be able to withstand pressure from co-workers who want them to sign cards and thereby sign away some significant rights? These are all important considerations.

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>
> ***— JAMES A. MATTHEWS***

MR. MATTHEWS: Let's take a step back and look at the EFCA and the system that we're talking about. Some people might characterize me as an anti-union lawyer, which I most certainly am not. I'm a management lawyer. I'm the son of a management lawyer. But if I'm being intellectually honest, I can't be opposed to labor organizations in concept unless I'm also opposed to corporations in concept. Corporations are a legal fiction created by the legislature to permit individual inventors to aggregate their capital so as to increase their power in the marketplace. What the Wagner Act did in 1935 was to simply permit individual workers to do the same thing with their labor, aggregate it just like investors aggregate their capital in order to increase their power in the marketplace. That's not good, it's not bad, it's just a way in which our economy is regulated. But then the question becomes, what is the labor union as an organization distinct from a given group of employees? While there was a time when organized labor could be fairly characterized as a social movement, I think today's labor organizations sell a service just like we sell a service. The service they sell is collective representation in dealing with your employer and they charge a fee for that, which is dues and fees. When you then come back to the points Jennifer was making, our advice to the employer is, don't create customers for a union. If you treat your employees in many of the ways that Jennifer suggested, there's simply not a ready market for labor organizing.

COMPENSATION

MR. QUINN: Gender bias as it relates to compensation seems to be hot topic right now. Sid, what kinds of problems does an employer face when, for example, a female company vice president receives a salary of $X and the company, finding itself in need of someone to fill a comparable position and lacking anyone in-house, hires a male, but to get that male, must pay $X plus $25,000?

MR. GOLD: Provided there is a legitimate business reason for that decision, I think the company is fairly insulated, at least at the time of hiring. The greater problem arises if it becomes clear that the female is being underpaid after training the new male hire or for performing what is essentially the same work. How do you justify that going forward? If the pay is not equalized, the company would likely face either a lawsuit or the loss of a valuable employee. Whenever you let someone valuable leave, you lose not only a key person, but the time that person has spent learning about your organization and the time it will take to find and train a replacement who will probably get paid at least as much as you would have paid the employee who left.

MR. QUINN: Do you agree Kym?

MS. GOST: I agree on the initial hiring. I think at the vice president level, frankly, there would be arguments that it's not a similar job. You might be OK in there not being parity. But now let's assume the female can reasonably assert that the job is exactly the same. In that case, there would be an obligation under the Equal Pay Act of 1963 to equalize the pay and create parity in the position, and it would not be a substantial or bona fide justification that the male who was hired either came from a higher-paying job or negotiated a better deal. Under Title VII of the Civil Rights Act of 1964, if you document the disparities between people, you may have a better chance, but certainly under the Equal Pay Act, which is getting a lot more play and will continue to do so, under the current administration, those kinds of justifications are not going to support a difference in salary if the individuals' jobs are exactly the same.

MR. QUINN: I agree. It has become clear that the employer cannot rely on the argument that the male was a better negotiator. The question is, what can the company do to try to solve the problem before it really becomes a problem?

MS. GOST: I've worked with a number of companies on compensation analyses. At the end of the day, compensation often becomes the catalyst for raising claims. Sometimes there are simply historical reasons for pay disparities. For instance, you may have an employee who has been with the company longer and whose raises are limited to 2 or 3 percent, versus new hires whose employment agreements do not include such limits. This discrepancy may go unnoticed for some time. However, regardless of whether a disparity is unintentional, the bottom line is if you can't justify it, you need to make changes.

MR. BLOOM: I would like to add that even when you have circumstances where the market absolutely dictated higher compensation to recruit an employee, the justification fades over time.

MS. SNYDER: That is true, under the Equal Pay Act. To allow a system to perpetuate itself and potentially create a greater disparity over time would, in fact, be a violation.

MR. QUINN: Is it any defense if the employer institutes a range of pay for various grades or job titles?

MS. SNYDER: Not if women are always at the bottom of the range. Of course, that's the simple answer. The Equal Pay Act requires equal pay for equal work — literally. If the employer has a pay range, has enough people in each classification, and can show a statistical evenhandedness based on gender within the pay range, that might be permissible. But where you're talking about two vice presidents and there's a pay range and the woman happens to be at the bottom of the range, that isn't going to fly.

MR. GOLD: I think what we're going to see in this area is the passage of the Fair Pay Act, which means that even if a decision was made 20 years ago, the person can challenge that decision this week. More importantly, the Paycheck Fairness Act is presently pending before Congress. This act is on the verge of passing and essentially would give an employee the right

to recover the difference in pay as well as compensatory and punitive damages. So, obviously, Congress has focused on this issue.

MR. MATTHEWS: As with the EFCA, I don't think these enhanced penalties are really the primary focus of concern with these bills. To further the discussion we were just having, historically there were four affirmative defenses in an Equal Pay Act case, one of which was "any factor other than sex," and much to the chagrin of Sid's side of the table, the courts construed that fairly broadly. The reason for that was, if the disparity was justified by a factor other than gender, it wasn't gender-based and therefore didn't violate the Equal Pay Act. Under the Paycheck Fairness Act, on the other hand, the non-gender-based factor would have to be directly related to the job, and the employer would have to meet the business necessity defense as it exists under Title VII. In that sense, Sid is absolutely right, these claims will become much more difficult to defend.

MS. SNYDER: Employers will also need to focus on their documentation and possibly reexamine their document retention policies to ensure they can explain how they made compensation decisions over time.

MR. PINKSTONE: As crucial as documentation is, employers must also remember to document only factual, objective and well-reasoned considerations. Documentation should not contain any subjective factors or opinions. From a defense perspective, documentation that isn't well-reasoned will hurt more than it will help.

DISABILITY DISCRIMINATION

MR. QUINN: Let's turn our attention to the Americans with Disabilities Act and the ADA Amendments Act of 2008, signed into law on Sept. 25, 2008. Sid, how have the amendments changed the causes of action for someone who alleges disability discrimination?

MR. GOLD: Litigation has increased dramatically in this area. The amendments have expanded the definition of major life activities and provide that disabilities may be episodic or in remission. In the past, the focus has always been on whether the individual is disabled, or whether there is a major life activity that has been substantially impaired, or whether there are mitigating circumstances that would negate the existence of a disability. As a result of the ADA Amendments Act of 2008, those issues are now off the table. Going forward, the focus will likely be on the interactive process, whether an employee's accommodation request was reasonable and what the employer has done with accommodations and keeping the employee on the job. In the past, it was very difficult to prove that one had a disability. Now, we are looking at educating the employer in terms of how accommodations should be made. In addition, the focus is turning to cases where a disabled employee is terminated as a result of an employer's maximum leave policy. Employers need to remember that although an employee exhausts his sick or FMLA leave, the company may still be required to afford that employee an additional medical leave of absence as a reasonable accommodation for the disability.

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MR. QUINN: So, if someone comes to an employer now and says, "I'm taking medication for an ailment," does the person have a disability?

MR. GOLD: Yes, because no longer can mitigating measures be taken into consideration when determining whether a disability exists. We also have a very active legislature that, in the act's preamble, indicated the broadest possible interpretation.

MS. SNYDER: Perceived fairness was mentioned earlier in our discussion. It applies here as well. Engaging in a good-faith, detailed discussion about the need for accommodation, the extent of the desired accommodation and whether it is feasible will go a long way in defending against disability claims. I also tell my clients that, even in the absence of an employee request, if an employer knows an employee may have a disability, the employer has an obligation to initiate a conversation about accommodations.

MR. PINKSTONE: The amendments haven't really changed things for those of us who do a lot of work in New Jersey. In New Jersey, whether someone is disabled was essentially already off the table, which means the analysis jumps to whether the employer engaged in an interactive process and could reasonably accommodate the employee. And I think Sid's right: as has been the case in New Jersey, determining whether someone is disabled is no longer going to be the focus of defending an ADA claim.

MR. MATTHEWS: Obviously there's a salutary purpose to this statute, as too many disabled individuals were previously excluded from the workforce or limited in terms of their ability to compete for positions. On the other hand, a broad interpretation of the amended statute leaves a great deal of room for abuse by employees who don't like various aspects of their jobs. In a worst-case analysis, someone who doesn't really want to be on the job and just wants to be on the payroll might look to the ADA to make that happen. I think the only way management is going to be able to fight back, as it were, is to do as Jennifer suggested and have thorough, defensible job descriptions.

MR. QUINN: Wayne, how do the ADA and the FMLA now interact?

MR. PINKSTONE: This is topic that comes up often among labor and employment attorneys and employers. The FMLA provides 12 weeks of unpaid leave to an employee suffering from a serious health condition, and generally an employee with an ADA-qualifying disability is going to be deemed to have a "serious health condition" for FMLA purposes. Where the two statutes really come together, however, is at the end of the 12 weeks, when the employee has used up the FMLA time but says to the employer, "I am still impaired because I am still suffering from this disability, and I need more leave." The employer is now in a difficult position. I believe that a reasonable extension of the FMLA leave is considered a reasonable accommodation. But how long is a reasonable extension? That is where it can get complicated.

MS. SNYDER: Another complication is the newer employee who becomes disabled early on in his or her employment. That individual will not be eligible for FMLA leave because he or she will not have been with the employer for one year and will not have completed 1,250 hours of service. What should the employer do? Again, it goes back to the interactive process. What are the essential functions of the job? What kind of accommodation might be requested? What kind of accommodation is needed? And what kind of accommodation can be given?

MR. QUINN: Following up on these points, what does an employer do when an employee decides that he or she is ready to return to work?

MR. PINKSTONE: If the employee is ready to return and provides documentation stating that he or she is able to perform the essential functions of the job, the law requires the employer to place the employee back into the same or an equivalent position. That is what the employer should do. However, employers are often concerned about an employee's ability to do the job. And I think that, particularly if there's a safety concern, such as in an industrial setting, this kind of situation can become extremely complicated.

MR. GOLD: I think at that point, you go through the interactive process again. If the employee's treating physician clears the employee to return to work with no restrictions, the employer would be taking a real risk in challenging that recommendation. On the other hand, if the employee is returning to work with restrictions, the question becomes, what is a reasonable accommodation? Does the accommodation mean the person is no longer qualified to perform the essential functions of the job? Which then brings us back to the written job description and into a very gray area. My office has recently seen an increase in cases in which an employee has been terminated because of a policy of the employer that requires employees to be 100% healed prior to returning to work. Policies of this nature constitute a per se violation of the ADA in that they fail to provide for an interactive process to determine whether an employee can perform the essential functions of the job with or without a reasonable accommodation.

MR. MATTHEWS: Adding to Sid's point, you have to make the right business decision. I tell my clients to make only the decision they have to make, only when they have to make it. In our example, the 12 weeks is up and the employee wants additional leave. The safe thing would be to give the employee the additional leave. But then the employer has to decide

how much is enough. That's going to depend upon the job and the reasonable ability of the employer to continue to function with that position open. When it is no longer practical to keep a temp or otherwise accommodate the leave, the employer is going to have to make and document the corresponding business decision. Once that decision is made, the employer needs to start the process of filling the job and tell the employee, "Look, this is at the point now where, because FMLA has expired, you don't have a right to come back to the same job. We left the job open as long as we could, but we are beginning the search process. When you are ready to come back, by all means tell us and if the job is still open, that's one thing, but if we have filled the job, we'll have to see what might be available at the time." On the other hand, though, there's no necessity to that point of formally "terminating" the employee, which is what's most likely to get you sued.

MS. GOST: From a practical standpoint the availability of benefits also comes into play in these situations, particularly in the case of a long-term disability benefit. If an employee invokes long-term disability benefits, that may determine or inform a determination as to whether the employee can return to work and whether the interactive process continues once an employee goes out on long-term disability. What becomes difficult is ascertaining the employer's obligation with respect to providing a reasonable accommodation to an employee who is out on long-term disability leave. If an employee is in the first year or two of long-term disability and can't perform the essential functions of his or her job with or without a reasonable accommodation, must the employer find another job the employee can do?

MR. QUINN: Tom, what are your thoughts on this process?

MR. BLOOM: This is one area where the interactive process can serve as an excellent prophylactic measure. Engaging in the interactive process in good faith and with an open mind, will make it very difficult to undermine the resulting employment decision, regardless of whether that decision looks good or bad in hindsight.

MS. SNYDER: And again, it's not really the specific accommodation that the employer ultimately provides — it's whether the employer engaged in a fair process. The courts are looking to see a fair and reasonable decision under the circumstances.

MR. BLOOM: I would add that unlike some other areas, such as harassment, this is one area in which it is very easy to engage in a process that makes the employee feel like he or she is being treated fairly.

MR. QUINN: Which of course helps avoid further difficulties. I see that our time is up this morning. Thank you all for making this a lively and informative discussion.

Panelist Bios

Thomas S. Bloom is associate general counsel, litigation and employment, for the National Railroad Passenger Corp. (Amtrak). As associate general counsel, Mr. Bloom manages commercial and employment litigation matters, and advises internal clients regarding a full range of labor and employment issues. Upon entering private practice in 1999, Mr. Bloom was a commercial litigation associate with Schnader Harrison Segal & Lewis before joining Morgan Lewis & Bockius in 2003 as an employment litigation associate. Mr. Bloom has served as associate general counsel at Amtrak since 2007.

Mr. Bloom earned his juris doctor from the University of Pennsylvania Law School in 1997.

The principal shareholder of Sidney L. Gold & Associates P.C., **Sidney L. Gold** concentrates his practice in representing employees and employers in all aspects of employment litigation, including claims under federal and state anti-discrimination laws and federal civil rights laws. Martindale-Hubbell has recognized Mr. Gold's firm as a preeminent law firm in the field of employment law and civil rights litigation.

Mr. Gold has written extensively on issues of employment discrimination, including numerous articles for The Legal Intelligencer and the Pennsylvania Law Weekly, and is a frequent lecturer for the Philadelphia Bar Association and the Pennsylvania Bar Institute. Currently co-chairman of the Philadelphia Bar Association's Labor & Employment Law Committee, Mr. Gold also serves as an arbitrator and mediator for the U.S. District Court for the Eastern District of Pennsylvania. Mr. Gold earned his law degree from Temple University School of Law in 1975.

Kimberly J. Gost is a shareholder in the Philadelphia office of employment and labor law firm Littler Mendelson P.C. Ms. Gost concentrates her litigation practice in the representation of employers in employment and employee benefit matters before state and federal courts and agencies. Her experience in class action and single plaintiff matters covers the full spectrum of employment law and employee benefits litigation, ranging from harassment, discrimination and retaliation claims to wage and hour, fiduciary breach and wrongful termination matters.

Ms. Gost also counsels employers regarding such issues as hiring and termination, reductions in force, wage and hour compliance, family and medical leave and disability accommodations, among others. In addition, Ms. Gost conducts management training sessions on matters such as harassment prevention, litigation avoidance and affirmative action.

Ms. Gost is a 1998 graduate of Rutgers School of Law – Camden, where she serves as an adjunct professor.

A partner in the Philadelphia office of Fox Rothschild LLP, **James A. Matthews** co-chairs the firm's labor and employment department. Mr. Matthews has been representing management in all aspects of the employment relationship for more than 25 years. His practice includes union organizing campaigns, collective bargaining, strikes, labor arbitration, employment discrimination, wrongful discharge, employment and related agreements, multi-employer benefit plan issues and a variety of other matters.

An author and podcast contributor, Mr. Matthews was previously a partner at Drinker Biddle. He earned his juris doctor, cum laude, from Villanova University School of Law in 1981.

Wayne E. Pinkstone is a partner in the Philadelphia office of Fisher & Phillips LLP. Mr. Pinkstone concentrates his practice in representing management in traditional labor and employment law matters. His broad litigation experience includes handling discrimination, sexual harassment, wrongful discharge, breach of contract, employment tort and whistleblower claims in federal, state and administrative courts. Mr. Pinkstone also counsels employers on compliance matters, including those pertaining to the Americans with Disabilities Act, the Occupational Safety and Health Act and the Family and Medical Leave Act, as well as state and federal anti-discrimination laws and state wage and hour laws. Clients call on Mr. Pinkstone to conduct training seminars on topics such as effective training and hiring techniques, supervisory skills and practices, the legal ramifications of harassment in the workplace and employee discipline and discharge. His practice spans a wide range of industries, including the manufacturing, service, retail, technology and financial industries.

Mr. Pinkstone is a 1994 graduate of Widener University School of Law.

A member of Eckert Seamans, **John E. Quinn** represents both organized and unorganized employers in all aspects of employee relations. He has defended employers in state and federal courts and agencies in matters such as discrimination, wrongful discharge, unfair labor practices and union organizational campaigns, among others. Mr. Quinn has also participated in numerous contract negotiations with unions and represents the management trustees of several Taft-Hartley Act funds.

A past chairman of the Hearing Committee of the Disciplinary Board of the Pennsylvania Supreme Court, Mr. Quinn is a master member of the Temple American Inns of Court. He has been a member of the board of directors of Carson Valley School, a nonprofit institution providing educational and social services to abused and neglected children, for more than 20 years.

Mr. Quinn earned his law degree from University of Virginia School of Law in 1974.

Jennifer Platzkere Snyder is a partner in the labor and employment practice group of Dilworth Paxson LLP. Ms. Snyder represents employers in all aspects of labor and employment law, including traditional union-management relations, employee discrimination, non-compete and trade secret disputes, executive employment agreements, wage and hour audits and a variety of other issues. In addition to representing clients throughout the litigation process, Ms. Snyder counsels employers on minimizing litigation risks and negotiates dispute resolutions.

Ms. Snyder is a lecturer for the American Bar Association and serves on the executive committee of the Temple American Inn of Court. She was recently elected a fellow to the American Bar Foundation.

Ms. Snyder is a 1995 graduate of Villanova University School of Law.