The Legal Intelligencer

presents

A Labor & Employment Roundtable Discussion

SPECIAL ADVERTISING SECTION

Panelists from left to right: (Standing) Eric Meyer, John DiNome (moderator), Michael Fortunato and Scott Pollins; (Sitting) Tracy Walsh and Laura Mattiacci

The Legal Intelligencer's Labor and Employment discussion on issues presently facing practitioners today features a number of topics that have been trending over the last few months, including the Fair Labor Standards Act and the National Labor Relations Act.

Our panel includes Michael Fortunato of Rubin, Fortunato & Harbison, P.C.; Laura Mattiacci of Console Law Offices, LLC; Eric Meyer of Dilworth Paxson; Scott Pollins of Willig, Williams & Davidson; and Tracy Walsh of Weber Gallagher Simpson Stapleton Fires & Newby, LLP. John DiNome of Reed Smith, LLP, served as moderator.

DiNOME: Our first topic will be background checks. It's not necessarily a new topic, but I'd like to have some conversation concerning the federal level, what the EEOC is doing in this area, as well as in the state law — for example, the Pennsylvania criminal histories statute.

Tracy, I'll start with you. How do you balance the needs of employers who want to do background checks to protect their workplace versus the push and pull on the rehabilitation end, where the EEOC may be taking us?

WALSH: Federal law doesn't necessarily prohibit employers from asking applicants about criminal history, and state law doesn't necessarily prohibit it either. There is some prohibition at the local level, at least in Philadelphia; however, there are guidelines and restrictions on what information is obtained and how it is used.

There may be certain industries where the criminal background check is necessary in that there may be regulations which would not allow a company to employ individuals who may have been convicted of certain offenses. Examples of that include the Patient Abuse Prevention Act and Child Protective Services Laws.

In addition, employers are interested in conducting background checks because of concerns about theft or workplace violence. And those concerns may not be directly related to a particular position, but more so from an overall standpoint that the employer may be concerned about.

Examples would be an applicant for a chief financial officer position, or industries involving healthcare or services for children. On one hand, employers may be seeking to comply with regulations in their industry. They may also be concerned about issues of workplace violence, theft or fraud, as well as negligent hiring claims that could result if a proper background check was not conducted.

On the other hand, there is the desire to rehabilitate and not stereotype, and to provide job opportunities for individuals who may have had a conviction in the past, perhaps remote in time or for an offense unrelated to the job. There are certainly factors that go into consideration based on federal and state laws at this point in time.

DiNOME: Let's think about this through the prism of the Pennsylvania statute. An employer is looking to hire an administrative assistant and that individual had a criminal conviction for theft, say, 12 years ago. What would be a way to analyze that if the employer was looking at that individual's criminal background? I'm going to contrast that then with a different employer who's going to have a person with a criminal conviction for a violent crime go into homes as part of their duties. Can you compare and contrast those?

POLLINS: If you have an administrative assistant, it would depend on the type of employer. If this assistant is going to work for a bank, that might be different than if they were going to work for, say, a retail store. And the reason I say that is that Pennsylvania statute permits employers to not hire someone if the nature of their criminal history relates to their suitability for the job. I would question whether a conviction for something that happened 12 years ago impacts suitability for a job. But if you're a bank, you probably need a zero tolerance for any history of theft.

DiNOME: Even given the 12 years?

POLLINS: Yes. I think that employers will avoid

these kind of claims if they're straight and honest, which is sometimes not easy with people they don't hire and say, "I'm sorry, we can't hire you. We're a bank, the people that hold your positions regularly handle large amounts of money, and we have a policy where we don't hire anyone with any criminal history involving theft, regardless of how long ago it was." I wonder if the bank did that, would they run afoul of the PA statute, or could there be a viable claim that that person was suitable because it was so long ago when they were 18 and now they're 30?

DiNOME: Anyone have any thoughts on that?

FORTUNATO: If you think back to the purpose of the statute, the best practice is to at least do an initial interview before you inquire into someone's criminal background. The social engineering behind the policy is a good one if you're trying to remediate a discriminatory practice. And both the Philly ordinances and the state statutes provide for exactly the type of situations that Scott and Tracy are talking about, which is, if your job is to handle money and you've been convicted of a theft, that's one issue; but if the conviction is remote in time and not relevant to your potential new job, that's a different issue.

I think that the exceptions to the rule once you get through the first interview or through the application, are sufficient to balance the needs of the employer and the employee. I think the "ban the box" legislation is probably so new that we haven't seen a lot of negligent hiring claims.

> "You can't make an employment decision based on an arrest; it has to be a criminal conviction, and it has to be at a certain level. For example, an employer can't base an employment decision on a summary offense like a traffic ticket." —**Eric Meyer**

DiNOME: Let's talk about that. Philadelphia, like some other cities, has instituted what we call "ban the box." Who wants to take a stab at describing what that is because it's a bit more procedural than substantive, and it kind of changes the order on how employers need to do things?

WALSH: It's often referred to as "ban the box," but it's actually the Philadelphia Fair Record Criminal Screening Standards Act. It provides that an employer may not ask about arrests of applicants or criminal convictions during the application process. This means that the employer may not ask about arrests or convictions on the application or at the first interview.

"Ban the box" applies to any person or company that employs 10 or more persons within the City of Philadelphia, and that includes job placement agencies. For example, you may have your headquarters outside of Philadelphia, but perhaps you employ individuals who work in the city, or maybe you contract for them to work for another entity that's actually within the City of Philadelphia. It would apply in that regard.

As John indicated, it's a procedural issue as far as when can you get into that type of inquiry. As long as you've gotten past the first interview, for example, in a second interview it's permissible to ask about the criminal background.

DiNOME: So from a practical standpoint, for an employer in Philadelphia with 10 or more employees, they do not put that question on your application, correct?

WALSH: Exactly. An employer cannot have the "box" asking about arrests or convictions on the application.

DiNOME: Do the first interview. At that point, could the employer then ask you to sign the appropriate paperwork to give us permission to do a criminal background check?

WALSH: After the first interview, I believe the ordinance allows that.

POLLINS: I have a question. Do either the Pennsylvania law or the Philadelphia "ban the box" law or any of the EEOC regulations impact the use of arrests in making hiring decisions? Would any of that prohibit asking about arrests? It seems like it's even more unfair to base hiring decisions on whether someone's been arrested, especially if they were never convicted. What happens if you were arrested and the charges were dropped, but you didn't think you needed to expunge your record? Can employers use an arrest record, or do these laws limit that?

MEYER: You can't make an employment decision based on an arrest; it has to be a criminal conviction, and it has to be at a certain level. For example, an employer can't base an employment decision on a summary offense like a traffic ticket. However, once you get into felonies, and to a lesser extent misdemeanors, if the offense relates to the nature of the position for which the company is hiring, it could impact someone's suitability for the job.

POLLINS: What about ARD, which in Pennsylvania is a probation diversion program for first time offenders if they're charged with a relatively nonviolent crime like driving under the influence? Offenders do probation, pay fines, perform community service, and have their record expunged. Sometimes people don't do the last step of having their record expunged, so it shows they were arrested for a DUI and entered the ARD program.

Is that status on someone's criminal record something these laws would prohibit an employer from using?

FORTUNATO: To answer the first issue, but under the Philadelphia ordinance as well, employers may not ask job applicants about arrests or criminal accusations where there has been no conviction.

In your scenario, what it would boil down to is whether the ARD is tantamount to a conviction. If it's not, then I don't think it's appropriate, and it's obviously a tricky issue for someone with an ARD/DUI resolution who's being hired as a driver. But if it's not technically a conviction under the state law, it's inappropriate for the employer to consider.

POLLINS: So we're talking mostly about hiring decisions. I had a case that never ended up being a case. Really unfortunate story. An older African American male, probably around 70, had worked at a hospital as a security guard for almost 40 years and the hospital decided to institute a background check policy, not only for people they were hiring, but also for people who already worked there. It turned out this guy had a conviction for burglary 40-plus years ago when he was 25; he had no other criminal record at all, but they fired him because of that.

At that point, I told him that the disparate impact claim based on his race seemed like a long shot, but take that out of the equation. Would any of these, the ban the box, if the hospital was in Philadelphia, the PA statute, is there any way that either of those would come into play in a situation like that?

DiNOME: Yes. I don't think it's a ban the box issue because the person was already hired. So it would then become a PA statute analysis. And you're going to have the temporal nature that the 40-plus years and the person's work record would have to be looked at.

MEYER: It's a practical matter, too, with such little jurisprudence in this area. A lawyer is going to be

less inclined to represent someone who claims they were victimized by the criminal background check statute. These types of cases are tough to prove, and I think that's part of the reason we see so few lawsuits in this area.

WALSH: Along the lines of the scenario that Scott brought up, there's some question in the case law as to whether the state law would apply in a termination decision versus a hiring — this was not a hiring decision. It was a termination decision.

But putting that aside, what the issue comes back to is where there's disparate impact or treatment. Was the decision applied in a uniform and equal manner to all employees or all applicants?

FORTUNATO: I'd be curious to know how a 40-year-old conviction for burglary for a guy who's been working there for 25 years came bubbling to the surface.

POLLINS: It doesn't cost anything to go under the PA Uniform Judicial website. If you know someone's name or county, you can look for the type of conviction — criminal or civil. Things from the 1950s or 1960s will come up, and I know this because I've done it in situations where I wanted to see if there's something about a particular witness or my own client I should be aware of heading into a deposition, or even if I'm thinking about taking on a case.

DiNOME: I think what happens is employers put in a new system and decide they're going to use it for new hires. Then they run everyone through it, and sometimes it happens like that. Then you're faced with the conundrum of now we have this information, but it's pretty old. In your case it's very old. So you have an employee's track record, and it becomes a difficult situation for an employer to remove someone from the workplace based on those facts.

FORTUNATO: I've seen it in the banking, broker/dealer merger world where the regulations for broker/dealers are not as stringent are as they are for banks. But when they merge and the registered employees need to comply with banking regulations, sometimes they can't make the cut for certain level convictions.

DiNOME: Let's say the nature of a company's business is to send employees into private homes, say a moving company or a physical therapist. Let's further say we have a person with a certain type of conviction, perhaps for some type of violent assault. How should an employer analyze that situation? This gets closer to this potential for negligent hiring.

POLLINS: This opens up the employer to a tort-type claim. If someone goes into the house and does something similar to what they had been convicted of, and the employer knew about it or should have known about it, that could be a negligent hiring or negligent retention claim, and they're subject to tort liability where the damages are not necessarily capped by some of the statutes in employment law.
WALSH: When we're talking about working in individuals' homes, and if it's care giving, for example, that's where other statutes come into play. For example, with the Older Adult Protection Services Act, there are certain offenses that if an individual has been convicted of that offense, the employer is not to hire that person.

DiNOME: Let's move into the next area: discrimination in the workplace. I'd like to talk about two statutes that have been around for a fair amount of time now, the Family and Medical Leave Act and the Americans with Disabilities Act. Let's start with the situation when you have a family and medical leave that expires. The employee is now supposed to return to the workplace because their leave is expired, but they can't for some reason. They're still injured. They're still ill. What's the approach from the employee and the employer standpoint?

POLLINS: This is definitely a hot topic because there's the question of how much certainty or how much predictability is the employer entitled to with someone who's going to be out beyond their FMLA leave. It depends in large part on how difficult it's going to be for the employer to keep its business going with this person out more than the 12 weeks they're entitled to under the FMLA. Is the person somewhat irreplaceable? Have they already been replaced? Other issues that come into this are does the employer have other leave of absence policies other than FMLA that are longer than 12 weeks?

I have a case right now where a large pharmaceutical company has a 30-day personal leave of absence policy you can use for anything at all. However, the company has complete discretion as to whether or not you can have that leave.

My client used up all his FMLA. It was a mental illness and he wasn't ready to come back. His psychiatrist thought he'd be able to come back within a month. So he asked for the 30-day personal leave of absence, and the company said no, without engaging in any type of dialogue whatsoever with either the employee or his doctor.

We're basing the case on the fact they stopped the interactive discussion before it even started to determine whether the additional four weeks is appropriate.

It's a tough position for an employer to be in. I believe the EEOC is saying you can't have arbitrary leave policies because that conflicts with the ADA's right that the employer should engage in some type of interactive discussion.

DiNOME: So in this situation, the FMLA is over and we're dealing with the Americans with Disabilities Act. The real question becomes, is some type of extra leave — maybe even an indefinite leave — an undue hardship for the employer? Is it a reasonable accommodation?

MEYER: The key from both sides is communication. And, Scott, you touched upon it, there's an obligation under the Americans with Disabilities Act to engage in interactive dialogue. The law tasks the employee with triggering that dialogue, but once FMLA ends and the ADA kicks in, it's debatable as to whose obligation it is to discuss. It's probably the employee's obligation to initiate, but there's already been an ongoing dialogue with respect to the FMLA. It comes down to asking how much more time do you need, and what other policies may be in place.

Scott, in your example, it depends on whether the handbook says the 30-day personal leave of absence can be stacked on top of the FMLA, or if it's silent. If it's silent, there's a pretty good argument you can stack it because the employer drafted the policy, and if they didn't want you to stack it, they probably should have said don't stack it.

Now, John, to your point of an indefinite leave of absence. Unless you're in New York City, it's never a reasonable accommodation. There actually is a statute in New York City which says an indefinite leave of absence in certain circumstances can be a reasonable accommodation. However, the employer needs some sort of certainty in terms of knowing when the employee is going to come back so they can stack their workplace accordingly.

But it's not a one size fits all. An accommodation for Wal-Mart may not be a reasonable accommodation for a "mom and pop" operation. It comes down to size and different characteristics of the employer.

POLLINS: It's a thorny issue for employers because like Eric is saying, it depends on the size of the company. It also depends on the employee and their medical condition. Is it a physical condition that's easier to determine when someone should have recovered, or is it a mental condition which can be a little dicier in determining recovery?

FORTUNATO: Our tendency has been to silo both the FMLA and the ADA, but the ADA applies to employers with 15 employees or more, not 50, and it doesn't have the same requirements as the FMLA. Eligibility for FMLA is different than a qualified individual with a disability under the ADA.

So even if you've exhausted your FMLA leave, or you're not FMLA eligible, some reasonable leave may still be a possible accommodation. I think we're going to have to litigate the overlap between these issues to get a clearer answer.

DiNOME: What advice do you have for employers with respect to these types of leave policies and how they would play into FMLA if a worker needed more time to get over their condition? For example, Scott said that this particular employer had a personal leave policy which seemed fairly open-ended, but the company had the ability to control the timing of when somebody would take it, but no restriction on the purpose of the leave.

FORTUNATO: The key is what both Eric and Scott were saying, which is the open dialogue. If the idea is that you may not be able to come back to work and you're covered by a disability policy, aren't you being compensated pursuant to that disability policy? If you come back to work on a limited basis, I think the interactive dialogue that's required by some of the statutes needs to apply to the ADA as well.

DiNOME: In the New York City case you referred to earlier, the Romanello case, are they saying an indefinite leave could be an example of a reasonable accommodation?

MEYER: There was something unique to the New York discrimination statute, which left the door open to a possible indefinite leave of absence as a reasonable accommodation. It contrasted the New York City statute in that case with the New York state statute, and I believe it's under the city statute that an indefinite leave would not be a reasonable accommodation. The indefinite leave issue has been tested in courts throughout the country. The New York City decision is the only one of which I am aware where an indefinite leave of absence would even be considered a reasonable accommodation.

POLLINS: Every ADA case I've seen where it's a true indefinite leave, there's just no predictability about when the person is going to come back, and there's never going to be a reasonable accommodation regardless of whether it's Wal-Mart or a mom and pop. It puts the employer in an impossible situation.

DiNOME: So this becomes an issue of whether the employee's employment is going to be terminated or not?

POLLINS: Right.

MEYER: Let's expand the scope a little bit and think about other forms of reasonable accommodation once we finish the 12 weeks of FMLA. One that's certainly contemplated under the ADA is "light duty." Light duty may be a reasonable alternative to other forms of accommodation such as additional leave.

WALSH: Or telecommuting, for example. Is it a position they could possibly work from home?

POLLINS: How does the employer show undue hardship if extended leave is the requested accommodation? The most obvious way is "it's going to cost us money." But, number one, how does an employer show that if the person has already been out for three months? And number two, are there other ways the employer can prove undue hardship beyond "this is going to cost us money" if the person stays out longer?

DiNOME: Particularly for smaller employers, the question is about filling the position. I'll use me as an example. DiNome is ready after 60 days to come back to work, but we filled his position because we couldn't wait anymore. We already waited 12 weeks for his FMLA. Now he's saying maybe he needs 12 or more weeks. The question for the undue hardship piece becomes filling the position. Does anyone have any thoughts on that?

FORTUNATO: I read somewhere recently that employers rarely assert cost as the basis for undue hardship. Even if it's the economic reality, most of the time the position is put forth as some disruption to the operation such as lost sales, lower quality of products, inability to train.

> "How does the employer show undue hardship if extended leave is the requested accommodation? The most obvious way is 'it's going to cost us money.'"
> —**Scott Pollins**

WALSH: I would agree with that. And how the employer handles the last 12 weeks is a real litmus test for determining if more time is necessary. Have other employees assumed the duties, or did you bring in someone from the outside? The issue can revolve around how it's been handled for those 12 weeks, and how much more additional leave is requested.

FORTUNATO: With smaller employers the "rabbit hole" is someone is out on leave. They distribute the work to other people, then realize they can get along just fine without so many employees. So, what do you do? Do you sever? Do you get a release? You have to — otherwise you're walking into a litigation buzz saw.

POLLINS: I have a question that leads into what Laura is going to talk about. What if you have a small employer with an employee who's pregnant? She goes out on her leave and wants to take 12 weeks instead of the typical six weeks that this employer gives because she's going to have a C section. Is that a reasonable accommodation, or is she even entitled to an accommodation for the extra six weeks she needs because she's having a C section? Laura, is there any pregnancy accommodation, is that part of the Pregnancy Discrimination Act, or is that part of the ADA?

MATTIACCI: The pregnancy accommodation law was passed earlier this year in Philadelphia and includes any condition affected by pregnancy, including C section. It applies to all employees and all employers, so with the example you just gave, that employee would have protection under the new law.

Under federal law, she has the ability to ask for that type of accommodation because it doesn't matter that that the condition isn't permanent anymore. If she has this temporary condition but it's affecting major life activity, it falls partially under the ADA, and potentially under the Pregnancy Discrimination Act.

POLLINS: Laura was talking about a pregnancy accommodation law that's been enacted in New York as well as New Jersey. I recently spoke with the executive director at the Philadelphia Commission on Human Relations, and she indicated there's

already legislation to implement a similar amendment to the Philadelphia Fair Practices Ordinance.

MATTIACCI: One major difference in this law is a job reassignment requirement and a job restructuring requirement. While that could be interpreted as being an accommodation under the ADA, you're not required to restructure somebody's job just because they are pregnant. But under the Pregnancy Accommodation Law, you do.

WALSH: Is the difference that the Americans with Disabilities Act has historically not applied to pregnancy per se as a disability? If you had a condition related to pregnancy it may, and this new ordinance in Philadelphia, for example, would allow an employee to ask for accommodations during the pregnancy that aren't necessarily related to a condition arising from the pregnancy.

MATTIACCI: You are correct. Since the ADA amendments are more beneficial to employees and they lessen the standard of what a disability is, there is more room for the plaintiff to argue that there should be accommodations because of the pregnancy. But under the Pregnancy Accommodation Law, you don't have to have any specific condition related to the pregnancy. Most women who are asking for accommodations related to the pregnancy have some sort of medical condition, and we could make an argument that that somehow fits under the ADA as well. But under the Pregnancy Accommodation Law, if you are a healthy pregnant woman who needs accommodation and you don't have one of those other conditions, you're now going to have protection.

DiNOME: Let's consider the possibility of an otherwise healthy female early in her pregnancy. Can she request some restructuring of duties, let's say, less manual labor? Can that be based on a simple request, or does there have to be medical support?

FORTUNATO: I don't think it's meant to be prophylactic. I think a pregnant female could anticipate

that maybe three weeks from now she is not going to be able to lift something, so she doesn't want to lift it now, but I think there has to be some sort of physical manifestation of a medical condition that then is accommodated as opposed to speculating what the conditions may be and asking for an accommodation up front.

POLLINS: This question might have an obvious answer. But do these Pregnancy Accommodation Laws stop once the baby is born?

MATTIACCI: Under this law, employers have to give accommodation for nursing. They have to provide an appropriate place to be able to nurse the baby and give appropriate breaks to be able to do that. I've had women come to my office and complain about conditions in the workplace where they have to nurse; hopefully that will change.

MEYER: To Laura's point before, does the employer have to accept the employee's say so that she needs this accommodation? The employer has the right to know that someone is in fact pregnant, and there are certain accommodations that are medically necessary. That being said, you want to have a workplace in which your employees are happy, and the statute basically says just give it to them. Have that conversation and avoid problems down the line.

FORTUNATO: And to Scott's point earlier, the ordinance actually spells out examples of undue hardship to the employer. So you don't have to start guessing.

POLLINS: I've wondered if you had someone who lived in New Jersey but worked in Philadelphia and was covered by the Philadelphia Fair Practices Ordinance. If they brought a case in U.S. District Court based on diversity of citizenship, could that person say that while the Seventh amendment in Federal Court gives us the right to a jury trial, we now have a jury trial for this local law that doesn't expressly provide for one. What would you as the employers' lawyer say?

MEYER: In Federal Court, especially when you pair a Pennsylvania Human Relations Act claim with a federal anti-discrimination statute, you're going to get a jury trial. There's a separate line of jurisprudence in federal court as to when the person who asserts a Pennsylvania Human Relations Act claim has a right to a jury trial. They don't follow the Pennsylvania Supreme Court decision.

POLLINS: But what if it's a really small employer that is not covered by Title VII or any of the federal statutes? It's only either a PHRA, or even a super small employer, just the Philadelphia Fair Practices Ordinance. The only basis to be in Federal Court is diversity of citizenship, the parties on each side are from different states and there's more than $75,000 at issue. Would that person be able to get a jury trial in Federal Court?

FORTUNATO: I suspect that in Federal Court here you're going to get an advisory jury at a minimum.

DiNOME: Let's go into something that's been around longer than this more recent pregnancy accommodation, sexual harassment. Tracy, I'm going to start with you. We're just coming off Valentine's Day. What's a love contract?

> "An employer may have a 'no dating' policy, particularly between managers and subordinates. A consensual relationship agreement acknowledges that a relationship is consensual." — **Tracy Walsh**

WALSH: A "love contract" is a consensual relationship agreement. It's an adjunct to "dating or no dating" policies. As we all know, there are two types of sexual harassment under Title VII, the quid quo pro or the hostile work environment. What we're talking about here involves a consensual relationship in the workplace. An employer may have a "no dating" policy, particularly between managers and subordinates. A consensual relationship agreement acknowledges that a relationship is consensual.

The question is whether such an agreement would minimize the risk if there were a future sexual harassment claim. However, it would seem that the agreement would only apply during the course of the relationship being consensual. I don't see how it minimizes potential liability post termination of the relationship. The issues tend to center on the nature of the positions held by the individuals, i.e., someone in a supervisory position and a subordinate.

DiNOME: So everything is going fine. We have this love contract or dating policy. Everything is happy, consensual, but then we have the breakup. This is where everything typically will go one direction or the other.

WALSH: Where the issue then arises is, are unwelcome advances occurring? Is the person who perhaps didn't want the relationship to end pursuing the other individual, or perhaps allegedly retaliating in some way?

DiNOME: What advice for the employee who is in one of these relationships that has now ended — let's go with the bad breakup — but they still work in the same location?

MATTIACCI: I'm salivating at the thought of a woman telling me that her employer asked her to sign a contract saying that she was in a consensual relationship, especially if it was a supervisor, because now the employer has notice. From my standpoint, when there's a relationship between a subordinate and a supervisor, it's never fully consensual because there's an inherent disparate power structure that exists.

DiNOME: Let's back it up one step. I think what happens is that employers sometimes have policies that say either no dating in the workplace or no dating between a subordinate and a supervisor, but we realize we're a small location. As long as we give everyone notice, we're going to allow it; otherwise, one of you has to leave.

MATTIACCI: I think it's very dangerous for an employer to have a policy that allows a relationship between the subordinate and the superior.

DiNOME: Do you think it's okay for the employer to say that one of you have to leave the company? That there's no dating between us because I'm your superior, so now one of us has to terminate employment as opposed to the love contract?

MATTIACCI: If there is a policy or rule in place that says managers cannot have relationships with subordinates, and if the relationship occurs the manager's out because they're the person in the position of power. And if that's what occurred, I will likely not have a case to bring on behalf of the subordinate. You fire the subordinate, I'm bringing the case, because why is she going to be out? He's the person in the position of power. He's the person who's manipulating the relationship.

DiNOME: So say this is the company. We all work here, and nobody is dating anybody and we all know that's the policy, but if you start dating, somebody has to leave.

MATTIACCI: I think the safest route for the employer to take is to terminate the supervisor, not the subordinate.

DiNOME: Or conversely, sign a love contract and

give us all notice, these two are now dating, everyone knows.

MATTIACCI: Which is fine, yes. There would be no other reason for the employer to do it, except to guard against later liability. And the later liability is not going to occur unless there's some sort of termination or hostile environment. Overall I don't see how it benefits the employer.

DiNOME: But oftentimes the reality is the opposite, right? The superior is usually making more money. So the subordinate who is making less chooses to leave. Maybe they're living together and it doesn't make sense for the superior to leave and live off the subordinate's salary. So usually when it happens on the front end, because everyone is happy at that point, the subordinate just leaves and there is no claim at that point. Conversely, some employers try to keep everyone within their bread basket by doing the love contract. But you're making a very good point, the love contract may be worthless later on.

POLLINS: All of these discussions seem to say that the more we have policies at work that intrude on people's personal lives, the more we're going to have these dicey issues. I can't think of any policy about what the consequences are of having a loving relationship that goes negative is going to improve employee morale. It's just going to create more of the sentiment that going to work is not a pleasant experience because if you really like someone at work, then something bad is going to happen.

WALSH: It's important to point out that the EEOC's Title VII doesn't prohibit a consensual relationship in the workplace. But, what kind of potential liabilities or claims could arise post relationship? Whether there's some sort of retaliatory action --

DiNOME: So let's talk about that because that's the issue, retaliation. For example, let's say Laura and I are dating, she's my supervisor, and now there's the breakup. Then the claim becomes, she doesn't look at me anymore. She doesn't invite me to happy hour anymore. When I come to the lunch table she gets up and leaves. She doesn't invite me to the meetings where we discuss important agenda items. Do I have a retaliation claim against Laura and the company? She was and is still my supervisor. We were dating, but we're not anymore. Are these examples sufficient to make out a retaliation claim? Or does it have to be where you fire me or reduce my pay?

MATTIACCI: No. For retaliation claims, if anything happens to you that would dissuade another person from coming forward and complaining about discrimination, that will suffice to be retaliation. It can be a lot of things that are below being terminated or demoted.

From a hostile work environment standpoint, you look at the circumstances and say, is this something where a reasonable woman, and subjectively the woman who is being affected by this, does she feel she's in a hostile work environment?

When these things occur, that person has a case because it's affecting the terms and conditions of her employment and how she is being treated in the workplace. There's clearly the causal connection between her rejecting his advances and now being treated differently because of the way it occurred.

> "From my standpoint, when there's a relationship between a subordinate and a supervisor, it's never fully consensual because there's an inherent disparate power structure that exists." —**Laura Mattiacci**

POLLINS: What about the employer's response? They just don't like each other. They had a relationship. They broke up. Now one doesn't want to deal with the other. How is that a gender situation when it's really just a breakup of a relationship that is a personal issue? How do you convert that into a gender claim?

MATTIACCI: First, you have the power relationship between the manager and the subordinate. The person in the example is controlling the work circumstances of the subordinate, and if the things the manager is doing are negatively affecting the subordinate's work environment, what is the motivation behind it? The motivation is, I rejected his advances and therefore he's now treating me this way, or vice versa if it's a female manager.

POLLINS: I think if John came in our offices we definitely have to ask how does Laura deal with the other men? Is she treating them that way? Is she ignoring them? Is she real friendly with the women? So what do you do if Laura, the supervisor, is only ignoring John, but John works with Jim and Scott and she's friendly with them? That's a bit more dicey as to whether or not this conduct is the kind of protected activity that would give rise to a retaliation.

MATTIACCI: I still see it as a pretty clear case from a plaintiff's lawyer's standpoint. Let's say this female manager treats everyone like crap, but was having a relationship with John and treated him really well, then John breaks off the relationship and the female manager goes back to treating him like crap. In my opinion John still has a claim, because the work relationship he had with her negatively changed after he rejected her advances.

MEYER: And that would set up more as a quid quo pro claim rather than a retaliation claim, because there is no protected activity at that point. If just by virtue of breaking up he is being treated differently by his female supervisor, that's basically an implied "you date me, I'll give you the good assignments. If you don't, I'm going to give you the junk assignments." That's a huge problem, however you couch it under Title VII.

DiNOME: Scott, I wanted to ask about a potential development in a discrimination case with respect to proof issues. This was in a recent case called Burrage.

POLLINS: This is a criminal case that the U.S. Supreme Court decided not long ago. The characters in the case are Mr. Burrage and Mr. Banka, both very bad guys. Mr. Banka is a drug addict. Mr. Burrage is the drug dealer.

Mr. Burrage, the defendant, gave Mr. Banka some heroin. And Mr. Banka, by the time he did the heroin, had already smoked marijuana and shot up some Oxycodone. He did some of Mr. Burrage's heroin, and six hours later he OD's and dies. So Mr. Burrage gets prosecuted under federal drug laws. There's a mandatory enhancement of sentencing if a drug dealer provides drugs that result in death. So the question is what type of proof does that require?

How this relates at all to employment is that in his opinion, Justice Scalia referenced two Supreme Court cases dealing with employment discrimination, the Gross case from 2006, Gross versus FBL. That case said that in age discrimination cases you have to show that age was the but for cause of the adverse action. The more recent Nassar case dealt with retaliation claims under Title VII saying that's the same standard for Title VII retaliation claims. So the court looked at what does but for causation mean?

There was a movement since Nassar to say that but for meant that discrimination had to be the sole cause of the adverse action. There was an argument for that because the word "the" was used in those cases. What was most interesting about the Burrage case is that Scalia used a bracketed "A" when he was talking about what but for means. And the familiar phrase referenced in this case is what but for causation is. If the phrase was the straw that broke the camel's back, then the employer is responsible. So for employment cases, this criminal case helps to

clarify what but for causation means, particularly in age cases and Title VII retaliation cases.

DiNOME: So it would be interesting to see if the Supreme Court or a lower court uses some of this analysis in another employment case.

MEYER: As a practical matter, for purposes of getting summary judgment as the employer, I don't think many judges are going to try to split hairs between a motivating reason versus THE motivating reason. They're more inclined to let it go to a jury.

FORTUNATO: I think Justice Thomas's opinion in Gross was pretty clear that the conservative majority of the court likes "but fors." Support for the "but for" is clearly what he was articulating. In practice, I agree with Eric. If it's close it's going to the jury.

MATTIACCI: Generally I think there is no real difference between "but for" and the motivating factor jury instructions.

DiNOME: I'd like to talk about social media. It's all around us; it's in the workplace. One topic that comes up frequently is what should employers do, and what should applicants do when they're looking for a new job. Should an employer look at whatever is available online about an employee or a potential employee?

MEYER: There's no right or wrong answer. If the employer wants to get into searching social media, it may not just be for red flags. It may be for a position where someone's online presence enhances that person's hiring value. But if the employer makes the decision to do that, they need to make sure that they're doing it in a way that is responsible and complies with the law.

As an employer, don't make an employment decision based on protected class information. There are ways to avoid that. One way would be to have a non-decision maker do the online background screening and only provide red flags, such as online hate speech or drug references, to the ultimate decision maker. Redact the rest. Another red flag may be productivity issues. It find someone is updating their Facebook status 25 times a day, how productive are they going to be in my workplace? These are things that, yes, they're doing on their own time, but it reflects poor judgment to post that on Facebook. In my opinion, do I want someone with that kind of judgment working for me? Decision makers must rely solely on the red flags and not the protected class information to make employment decisions.

If I'm the employer and I'm going to be conducting a social media search, I'm going to tell prospective candidates upfront. And frankly, if it's a really close call in terms of two candidates, and I find something on someone's Facebook page I'm a little lukewarm about, I'm going to give the candidate the chance to explain it, because I'm trying to hire the best person. Just because I see something on someone's Facebook page does not necessarily make that person a bad candidate. It also doesn't mean it's true. So I'm more likely than not going to give them a chance to explain it.

Also, if that's the reason that I'm not going to hire them, I'd probably tell them, especially if obligated to do so under the FCRA. It's easier said than done, but to me it comes down to open communication, just being forthright and honest with these candidates.

DiNOME: How about with respect to policies? Employers have certain policies about social media, use of devices in the workplace, how to communicate about issues like confidentiality policies. Many employers have policies that say don't discuss confidential information outside the workplace, and that would include through social media. Any thoughts about that?

MEYER: The NLRB basically has two lines of cases in this area. One is discipline. I see that one or more employees are engaging in some sort of discourse on Facebook, Twitter or some form of social media. The rule is if it's two employees discussing the job, there's some form of protected concerted activity, whether it's done on Facebook or the proverbial water cooler, telephone, email, or what have you. Employees have the right to discuss the terms and conditions of employment.

So, in these cases where employees are getting terminated because of their Facebook speech or Twitter speech, the NLRB generally looks at it, and if it's two or more employees talking about terms and conditions of employment, these employees are going to get their jobs back. If it's a single employee griping — that's generally the word that you see in these NLRB decisions — there's no protected concerted activity and the employer can discipline freely.

In terms of the other line of cases, and that gets more into the social media policy type case, one big issue is, can you be critical of the employer? There are policies that are so broadly worded that you can't be critical, which would infringe on an employee's right to try to improve the terms and conditions of their employment.

"Many employers have policies that say don't discuss confidential information outside the workplace, and that would include through social media. Any thoughts about that?" —**John DiNome**

With confidentiality, it's how broadly are you defining what's confidential. Clearly, the formula to Coke is confidential. If you're a Coca Cola employee, divulging the formula through any form of communication is forbidden. But if we're talking about company salaries and benefits and things like that, those are terms and conditions of employment that employees are generally allowed to discuss with one another, over any medium.

A confidentiality policy should be narrowly tailored to that which is truly confidential. Your secret sauce, which if it got out in the public would cause you a huge competitive disadvantage, yes, sure. Salaries and benefits and things like that, not so much.

POLLINS: A related topic is the "bring your own device to work" issue, or whether an employer should have such a policy. Let's say you have a law firm that does not provide phones or smart phones to their partners and lawyers. But most lawyers have their own phone and use it for work. They make phone calls and use it to send and receive E-mails. They use it to send and receive texts to clients and other lawyers, but also to take videos of their kids, to take pictures, send personal texts, or the like.

So when the employment ends, there's this device that has stuff that relates to the job. What rights does the employer have to recapture anything they feel should not be outside of their control?

DiNOME: You're talking about taking the device back and then scrubbing it?

POLLINS: Not necessarily taking the device back, but looking at the device and saying what is on this phone that you no longer need because you don't work for us anymore? It's obvious that confidential information — trade secrets stored in a particular word file on an iPad as a better example — would be something a "bring your own device to work" policy would permit the employer to take back electronically.

FORTUNATO: If your work email is driven to your own device, and your employer has granted you access to the servers, I think the employer on their IT end can wipe that information from your phone whether you give them permission or not.

POLLINS: Does the employer run a risk if when they wipe the email, they wipe the employee's personal email as well? If this wipe captures both and the employer doesn't realize it, but then they find out, is that a violation of the Storage Communications Act?

MEYER: What the employer should be concerned about is setting expectations so that the employer and employee are on the same page as to what happens if I decide that I'm going to use my personal device for personal and work purposes. If I lose my phone or leave the company, there are clear expectations as to what happens to the data.

WALSH: What rights to privacy, if any, do you think an employee has if it's a company issued device and you're using it for work and personal?

FORTUNATO: I would say none.

MEYER: I would say, in a word, "none."

FORTUNATO: I agree with Eric that you set the expectations, but none. Take for example an iPhone. It's your phone, you back it up to your iCloud but it contains both private and work information. Your employer could wipe the device clean, but there's a backup of confidential proprietary information on your iCloud. The best practice is to have the policy spelled out as to what the employer is entitled to get back. But for the most part, if there's damage to personal information by virtue of the employer wiping out its proprietary information, it's essentially de minimus. It comes with the risk of you deciding to use your personal device and having both email accounts linked together and not backed up.

DiNOME: Anything else about social media? How about monitoring employees in their off duty, what employees are posting on various Facebook or other social media sites, what do we think about that?

MEYER: Who has the time? I think any utility that can be gained is far outweighed by the potential risks, legal risks, and also the time spent. I don't know what you'd be looking for other than pejorative talk about the employer, but then you potentially run into a National Labor Relations Act issue. Unequal enforcement could run into some kind of disparate treatment issue. Depending on what state you're in, there could be certain off duty conduct laws which apply.

MATTIACCI: I could add from the plaintiff's lawyer standpoint in terms of social media, usually you hear it as something where they're digging up the plaintiff's Facebook page and finding all this stuff about how she's a horrible person or he's a horrible person. But I find social media incredibly helpful from a plaintiff's lawyer's standpoint in terms of finding information about defendants.

I encourage plaintiff's lawyers to use all of those tools, not just to monitor and see what defendants, witnesses or their bad guy is putting on Facebook or Instagram or Twitter. The defendants are the ones with all the documents, all of the witnesses, the current employees, and we only have our plaintiff who is telling us what happened to them. So we have to be detectives in finding the rest of the information to make the case. I have found that using LinkedIn to find employees who are no longer there, but who could be witnesses in the case, is amazing because I can view their whole employment history and easily contact them. I can see where they currently are working, go to that company's website and within five minutes call them up and say, hey, let's meet for a cup of coffee and talk about what you may know about the facts of this case.

I can think of many examples in cases where plaintiffs' lawyers can use social media affirmatively and not just as something that's going to harm their case because their own client may have posted something that could somehow reflect negatively on them.

FORTUNATO: The relevance of what you find online from an evidentiary trial standpoint may be dubious, but it can be extraordinarily compelling in resolving a case at mediation. To the extent that 98 percent of all cases settle, what you find on social media from both the plaintiff and defendant standpoints can be used as extraordinarily persuasive fodder in an attempt to resolve a matter.

MEYER: A comment and a question for Laura. I think you have to be careful using social media when you're representing an employer. I agree it can be helpful for settlement purposes, but it also can get you in some trouble. I think of the situation where you have a woman bringing a sexual harassment claim and you see on Facebook that she's posting pictures of herself at a bar, carousing and having fun. If you aim to use that as part of a "she was asking for it" defense, you're going to get yourself in a whole lot of trouble. But certainly in the FMLA situation where someone is saying that they're taking time off to treat for a bad back, and on the day they say they're treating with the doctor, they're out snowmobiling. That's obviously pretty strong evidence that they don't have a bad back.

The question, in terms of using social media as an affirmative tool to build your case, do you use it more as an investigative tool to link up with former employees to talk about the company? Or do you also use it affirmatively in discovery through document requests to put the employer through their paces and let them know that, look, we're on to you and what you're doing on social media and how it could impact the defense of your case?

MATTIACCI: I think both. It depends on the facts of the case. It's partially trying to find people that you can talk to that you couldn't easily locate before, and also just trying to gather information. It is amazing what you can find and how bits and pieces come together to tell the full story. You are correct that when the information is salacious, those cases usually settle.

DiNOME: But you know what's interesting, you also have to be careful because what you see may not even be true. There's no proof of veracity for anything on social media because anyone could say I put crazy stuff on my Facebook, but it doesn't mean anything.

Now, I want to go into the FSLA. We have this older law from 1938 that's coming up on 75 plus years old, and it's being applied to a 2014 workplace. Today's workplace for many people is everywhere, right? And unless you're actually on an assembly line in a factory, for many professionals who work in administrative-type jobs, the workplace can be everywhere. So I want to talk about that, and also a little bit about independent contractors.

So why don't we start with the mobile workplace. What does that mean for employees and employers?

FORTUNATO: When the Fair Labor Standards Act was first passed in 1938, the minimum wage was 25 cents an hour, which for a 44-hour work week at the time was $11.00 a week. And the definitions of work week and workday really haven't changed much in the last 50 or 60 years. Apply that to how we work now, and trying to manage non-exempt employees during a traditional work week is becoming virtually impossible. Not because employers are saying I want you to work off the clock, but because it's very natural for people to check their email after hours, to want to have a mobile device where work email is available to them. As our work world has expanded, the definitions are having a difficult time keeping up with the realities.

POLLINS: I think employers can do a little bit to protect themselves. I came across a case last year where the outcome surprised me. An employer had a policy saying you can't work overtime if you're not exempt unless you get permission from the supervisor. But there was someone who kept working overtime without permission. They still had to be paid under the FLSA for that overtime; however, that employee got progressively disciplined and eventually was fired because they were insubordinate. They violated the policy.

These are ways that employers can minimize some of this mischief if people are using it in an improper way. But it's difficult if they're using it properly and will cost more money because if they're non-exempt, you really do have to pay them whenever they are working.

DiNOME: How about policies along the lines of cutting off access to work email for certain classes of employees; meaning they don't have permission to log on after a certain hour? To avoid this, what if once you leave the workplace, if you're a non-exempt employee you can't work; meaning you have no ability to log on, even if you're trying to be the overachiever and keep up with email at night or on weekends? If you don't permit them to log on is that going to be helpful?

POLLINS: Is a policy or practice like that more motivated by saving money than productivity because the employer just wants to prevent people working and then having to pay them?

DiNOME: I'd frame it as a policy where you need permission to work overtime. So Scott, I call you on Friday night and say there's something really hot going on and I need to work. And you say good idea, I need you to work a couple hours overtime, so I'm going to give you permission to log onto the system. I was framing it as perhaps a policy in support of

a permission, non-permission system for working overtime.

POLLINS: I think it's a good idea for employers to have those kind of policies.

MEYER: If the utility of doing that outweighs paying the overtime, certainly it's a policy an employer could impose.

WALSH: There's probably some management training that should be involved, too, because perhaps a manager may be aware but is not expressly giving permission and then, all of a sudden the payroll time comes up and there's a question of what's going on?

DiNOME: These topics come up a lot because, for example we're in the middle of a tough winter here in Philadelphia. There've been days now when folks have either been coming in late or not at all, and the question begs, is work still taking place elsewhere?

FORTUNATO: We've had a lot of questions come up over the last six weeks. We closed the office because we were without power, but our servers are in a remote location and people could access them and their email, and work from home. But the office was officially closed and they're non-exempt, but they were able to work during the workday and they're getting paid for it.

MEYER: The FLSA does have a de minimus exception. If an employee is going to check an email here and there and it just adds up to a few seconds, under the Fair Labor Standards Act they're not entitled to be compensated. And again, this is only really an issue if we go above 40 hours during a particular work week in terms of time and a half; although, I suppose if someone is being paid hourly, even under 40 hours would be an issue. But if you have a salaried employee who is non-exempt, it only becomes an issue for bumping over 40 hours in a work week.

FORTUNATO: And Justice Scalia has said we don't want judges in the business of being timekeepers and managers, litigating those issues, so you all need to work them out.

DiNOME: Was that in that recent Sandifer case?

FORTUNATO: Yes. That's the donning and doffing versus changing clothes. In the Sandifer case it was an issue under the Fair Labor Standards Act in which U.S. Steel had negotiated pursuant to its collective bargaining agreement how they were going to compensate or not compensate employees for "changing clothes," including head sets, hard hats, goggles, and earplugs. The Supreme Court basically found that the vast majority of what the employees were talking about, putting on safety pads, safety boots, safety vests and your hard hat all relates to changing clothes as the language was appropriately interpreted. And, therefore, not that you are not to be compensated for it, but that it was appropriate for the employer and the union to negotiate that as part of the collective bargaining agreement.

DiNOME: The last thing I'd like to discuss under the Fair Labor Standards Act is the continuation issue that comes up between classifying employees and independent contractors. In the evolving workplace and given some issues with the economy over the past four or five years, some employers and even some employees have chosen to be independent contractors or consultants. Some employers have found it beneficial to have fewer employees and more independent contractors. What's the latest on that? How does the Third Circuit analyze whether a person is an independent contractor or an employee?

> "The relevance of what you find online from an evidentiary trial standpoint may be dubious, but it can be extraordinarily compelling in resolving a case at mediation."
> —**Michael Fortunato**

FORTUNATO: The Third Circuit still applies a 23-year-old six part test. The degree of the alleged employer's right to control the manner in which the work is performed; the alleged employee versus the independent contractor's opportunity for profit or loss depending upon his or her managerial skills; the investment in equipment and materials — that piece is sort of the outlier that not all circuits adopt; whether the service requires a special skill; the degree of permanence of the working relationship; and whether the service that's rendered is an integral part of the alleged employer's business. But the most important fact it seems, across the country but certainly in the Third Circuit, is the employer's right to control the manner in which the work is to be performed.

As the cost of benefits increase, employers are looking more and more to have independent contractors rather than employees. And assuming that therein lies the rub, you have to analyze first and foremost what the employer is doing to control the work. If the employer is controlling when the "independent contractor" comes to work, what they're supposed to do, and the like, more often than not they're going to be employees as opposed to independent contractors.

DiNOME: Would it be fair to say that when the employer is telling the contractor what time to report, when they can leave, what days they should be here, or when you've been treating them somewhat like an employee with respect to, say, sick days or vacation, that's starting to smell like an employee?

FORTUNATO: I think that's absolutely fair to say. You look at it in — IT may not always be the greatest example, but many employers suggest that IT folks may be independent contractors. But if you require them to be on site for certain hours and you dictate the menu they choose from and how to perform the work, then they're probably your employee.

POLLINS: Do the courts place any stock on agreements between people, like I am an independent contractor, this is an independent contractor agreement, and that person comes to someone like Laura and I because they're not sure if they really are and I say you're definitely an employee, will that agreement hold any water at all?

FORTUNATO: I believe that that is more form over substance. The fact that the employer calls you an independent contractor is not determinative of anything. You have to analyze the underlying facts.

MEYER: Although what probably flows from that is if you have an independent contractor agreement, there will probably be related provisions that discuss tax treatment. Being paid as a 1099 independent contractor versus an employee would cut in favor of an independent contractor. You would assume that part and parcel with calling someone an independent contractor in an agreement, there would be other control factors that would flow from that within the agreement. Mike is right. Control is the big factor the courts are going to look at.

MATTIACCI: One other thing related to this under the FLSA is about interns, because there was a recent article in the New York Times talking about the new generation of interns. People are stuck in these perpetual internships because, one, the economy is not good, and, two, companies are realizing they have free workers and they can just steal their wages.

The article talked about how there's been an influx of cases being brought on behalf of interns saying they should be paid for their work. If the intern is getting a higher educational benefit than the benefit the intern is providing to the employer, that's an internship and does not need to be paid. But if it's the reverse and the education is secondary to the

work the intern is providing, then the intern needs to be paid for the time they are working.

MEYER: Doesn't it really come down to if the intern is displacing someone else who would otherwise get paid to do that task?

DiNOME: It's a tough issue. There could be certainly be the potential for abuse where you have somebody who's perpetually an intern and they should probably be at some point treated and paid like an employee.

On the other hand, if employers are going to be hesitant to start calling people interns for fear that they're going to come back with wage claims, we may lose the benefit of the experience that an individual — in many cases a younger person — can gain from having some entree into an industry or a profession.

MATTIACCI: They're going to have to hire somebody to do that work. So if they're going to say, we're not hiring interns anymore, they're going to hire an entry level person and they're going to have to pay them something.

DiNOME: But that begs the question, if certain industries or professions have had this decades long tradition, the first stop is that's what interns do and that's how you learn and make your connections in this industry. If that stops, then those jobs won't exist anymore.

FORTUNATO: I think if you're talking about a time-honored way to develop an interest or a skill in a particular business, you want an intern in mom's office for a summer to see whether you want to pursue the same career that she has. And those opportunities are going to be denied at a time when they're probably at a premium because of high unemployment.

POLLINS: There's a bigger societal question that came up during a panel at the ABA conference last year, which is: let's say you have internships in the modeling field or Hollywood or TV or entertainment. It may be easier for children of people like us, lawyers, to spend a summer not getting paid; whereas, if you have a family that's just scraping by, there's no way that they can send their kid to New York City for a summer without getting paid. So the question is, are these unpaid internships unfair in the respect they're only for the more wealthy kids who can afford to not get paid?

DiNOME: Good point. The final area that I thought might be interesting to explore is arbitration, particularly arbitration in place of court driven litigation. I know many of us have been involved in that and many of the folks that are going to read this are involved with that. One place we could start is a case called DR Horton. This is another example where the NLRB has kind of jumped in and attempted to place some restrictions. Mike, maybe you can start us with that and then we can go from there?

FORTUNATO: In a nutshell, the NLRB held in January 2012 that arbitration agreements requiring waiver of class or collective actions addressing wages, hours and working conditions violate Section 7 and Section 8(a)(1) of the National Labor Relations Act. The employer in that instance requested that its employees sign an arbitration agreement to arbitrate their employment disputes, and the agreement contained a class action waiver. Everything has to be arbitrated on an individual basis, not on a class basis. The ALJ held that it was a violation of Section 7 and the Board held it was a violation of Section 7 and Section 8(a)(1). It gets appealed to the Fifth Circuit in December 2013. So just three months ago, the Fifth Circuit says the NLRA does not override the Federal Arbitration Act.

The Fifth Circuit held that arbitration contracts enjoy the same protections as any other contract, and employees or employers are free to negotiate arbitration agreements. The NLRB's decision to elevate the NLRA over the FAA was inappropriate and the court vacated the decision. That lasted for about a month in the eyes of the NLRB, who last month in a separate case said not so fast, we don't need to follow the Fifth Circuit. If the Supreme Court tells us we're wrong, then we're wrong.

So you have a lot of employers across the country who believe that alternative dispute resolution through arbitration for individual employment claims — even arbitrations that employers are willing to pay for — are the fastest, fairest and most expeditious way to get matters resolved. But you have this NLRB ghost now hanging over your shoulders saying you may be subject to an NLRA violation if you entered into such agreements.

DiNOME: We'll have to see if this case will get to the Supreme Court at some point. And I guess the million dollar question probably will be, are collective actions equivalent to concerted protected activity? Is that really a Section 7 right? That seems to be the nub of the question. Clearly employees have Section 7 rights. But the question will be does that mean you have a right to engage in collective lawsuits or class action lawsuits? That's going to be a question for the Supreme Court.

FORTUNATO: Is a single plaintiff asserting collective action on behalf of similarly situated persons really a bargaining issue?

DiNOME: That's correct, and that will be the question. Right now we know what the NLRB's answer is and we know where they stand, so I guess it's fair to say the law is a little unsettled right now.

POLLINS: Congress can bring some certainty if they pass the Arbitration Fairness Act, which has been percolating for a year or so. That act simply says you can't have forced arbitration in the employment context and the consumer context. There would have to be an agreement. That means for employers there can still be arbitration. The Arbitration Fairness Act does not bar arbitration. It just bars forced arbitration.

FORTUNATO: Or pre-dispute arbitration versus post-dispute arbitration. But that doesn't provide, from the employer's standpoint, the cost of litigation protection, particularly when you start getting into e-discovery issues.

DiNOME: Laura, that's something that you had mentioned, the issue about the Federal Court docket and maybe this plays into this issue a little bit if you're balancing arbitration versus court. Is that's what it's looking like right now?

MATTIACCI: No, I would prefer that American citizens retain their constitutional right to a jury trial. I find it abhorrent that forced arbitration is becoming a condition of employment.

The major downside for the plaintiff is, especially in regards to large defendants, they're going to arbitration all the time. And the arbitrator knows there's repeat business. So if they find for this company, there's probably going to be another arbitration next week and they have a chance to be chosen (and paid) again. If they find for my plaintiff, she's never coming to arbitration again. So the reality is there's a lack of incentive to find for a regular person — except for of course justice — but there is usually no right to appeal so you just have to hope and pray your arbitrator doesn't care about his next job/case.

Another downside for the plaintiff is that the "docket" is not accessible. If it's filed in court I can see that, wow, this company has been sued 10 times for pregnancy discrimination across the country and I can locate that witnesses and gather relevant information. This is very difficult to find in arbitration. Also, it has been my experience that arbitration is neither quicker nor less expensive. Even if there is a backlog in the courts, that is not a reason to deprive citizens of their 7th amendment rights.

FORTUNATO: We sit here remotely with D.C. being 150 miles away and say there are problems in Washington, but they don't resonate with us. And you see the latest statistics are that Federal Court judges are incredibly backed up, there are not enough of them, and there are too many vacancies.

So if you're talking to the individual on the street and want to know at least in the jurisprudence area how does the stalemate in Washington impact you, it's that you may not get your trial for three or four years. There may be a backup, not because the judges aren't working hard. It's because they're incredibly overworked or they're understaffed. And we may not get clarity on this employment arbitration issue because they're not appointing new board members to the NLRB.

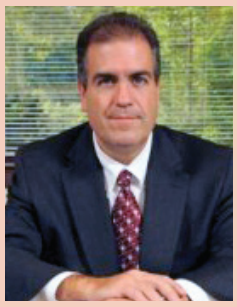
I think that's where it ends up hurting because you can't make an intellectually honest decision about what may be best for your clients on the forum because you may have inherent prejudices for or against arbitration. On the other hand, litigation is costly and it's being stretched out because the courts are stretched too thin.

DiNOME: I think that may be a nice way to end the morning. I'd like to thank the panel members for their tremendous patience and insight in trying to answer some difficult issues. I think we tackled some policy issues as well as statutory issues. I thank everyone for the time and have a great day.

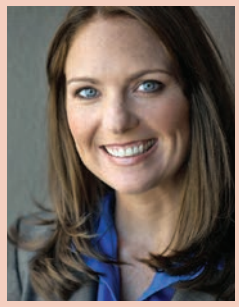
John DiNome represents a variety of regional and national employers in collective bargaining, labor arbitration, and employment-related litigation. He is also labor counsel for a number of municipalities, representing them in their dealings with both union and non-union employees. Specifically, John has handled matters with the SEIU, UFCW, 1199C Healthcare and Hospital Employee Union, CNA, International Union of Operating Engineers, and PASNAP. He has served as presenter and partial arbitrator for numerous Act 111 interest arbitrations and represents employers in grievance arbitrations. He regularly advises municipal clients on labor and employment issues.

In the private sector, John represents employers in the steel, construction, health care, chemical, transportation, food services, waste management and public utility industries. In the public sector, John deals with both union and non-union employees for a number of municipal governments.

John recently taught a course in collective bargaining and arbitration at Rutgers Law School and Widener University's School of Business. He is a frequent author and lecturer on several national education programs in the field of labor and employee relations. John has lectured extensively on all facets of private and public sector labor and employment law on behalf of numerous organizations, including the American Arbitration Association, National Academy of Arbitrators, Council on Education; International Bridge, Tunnel and Turnpike Authority; International City/County Management Association; and the National League of Cities.



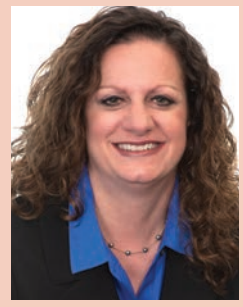
Michael J. Fortunato chairs the Employment Practices Group of Rubin, Fortunato and Harbison, P.C., an employment litigation firm in Paoli. Mr. Fortunato represents clients nationwide with respect to the federal, state, and local laws that govern today's workplace. He has represented clients in trials and arbitrations under Sarbanes-Oxley, Title VII, the Age Discrimination in Employment Act, the Equal Pay Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Americans with Disabilities Act, and their state counterparts. He also has prosecuted and defended common law claims arising out of employment relationships, including wrongful termination, constructive discharge, retaliation, defamation, fraud, and breach of contract. Mr. Fortunato has extensive experience mediating employment-related claims. Mr. Fortunato successfully obtained a defense verdict and then a plaintiff's verdict in two unrelated jury trials held two months apart under the Sarbanes-Oxley whistleblower protections. Rubin Fortunato also focuses its practice on restrictive covenant and trade secret matters. Mr. Fortunato received his undergraduate and law degrees from The Catholic University of America in Washington, DC. Mr. Fortunato has received an "AV" rating from Martindale-Hubbell, and has been a featured speaker at Pennsylvania and American Bar Association events regarding employment law and trial practices, witness preparation, ethics and mediation and arbitration advocacy.



Laura Carlin Mattiacci is a partner at Console Law Offices LLC. She represents individuals in whistleblower, discrimination, retaliation, harassment and wrongful termination cases. In 2013, she was named to the "Super Lawyers" list in Philadelphia Magazine and was named a "Pennsylvania Rising Star" in Philadelphia Magazine for seven consecutive years prior. In 2011, she was selected as a "Lawyer on the Fast Track" by The Legal Intelligencer — a distinction given to only 27 lawyers under the age of 40 in Pennsylvania. Ms. Mattiacci is designated Trial Counsel for the firm's most significant cases. In 2013, Laura won the largest employment law verdict in Pennsylvania, as reported in The Legal Intelligencer — a $1.678 million jury verdict (plus attorney's fees and costs) on behalf of a whistleblower who was fired after complaining of illegal activity in the workplace. In 2009, Ms. Mattiacci won a six-figure jury verdict, while nine months pregnant, in a defamation and intentional interference with contractual relations case. Five years ago, Ms. Mattiacci, who is the mother to two young boys, founded Philly-MAMA (Mother-Attorneys Mentoring Association; www.PhillyMAMA.org) a group dedicated to empowering attorney-mothers, now 150 members strong. Ms. Mattiacci is a 2002 graduate of Temple Law School where she won the AAJ National Championship for Trial Advocacy as a member of Temple Law's National Trial Team. She has been a presenter on issues of employment law and trial techniques at Pennsylvania Bar Institute (PBI) seminars, National Employment Lawyers Association (NELA) conventions, and area law schools.

Eric B. Meyer is a partner in the Labor and Employment Group of the Philadelphia-based law firm, Dilworth Paxson LLP. He focuses his practice on employment discrimination and retaliation; workplace harassment; employee pay practices; leaves of absence, disabilities and reasonable accommodations; non-competition and trade secret disputes; employment contracts, reductions in force, severance arrangements and other contractual matters; and union-management relations and collective bargaining. He also publishes The Employer Handbook (www.TheEmployerHandbook.com), which was recently voted the ABA Journal's top Labor & Employment Law Blog of 2013. Eric has also been quoted in ABCNews.com, NBCSports.com, AMEX's Small Business Open Forum, Inc., Business Insurance, Entrepreneur, Mashable.com, Wall Street Journal, and the British tabloids.

Scott Pollins is Of Counsel at Willig, Williams & Davidson in Philadelphia. He is an employee rights lawyer who represents employees in a wide array of work situations, including discrimination, harassment, whistleblower, payment of wages and review and negotiation of employment and severance agreements. He is president of the National Employment Lawyers Association, Eastern Pa. chapter and the co-chairperson of the Plaintiff's Employment Panel for the U.S. District Court for the Eastern District of Pennsylvania. He has spoken on numerous occasions about employment law issues. Mr. Pollins is committed to creating great futures for his clients and those with whom he works.



Tracy Walsh focuses her practice on the representation of private and public employers and individuals in all areas of employment-related litigation. Tracy's practice also includes counseling employers on compliance with workplace laws.

Tracy is the Chair of the firm's Employment Group, and regularly defends clients in Pennsylvania and New Jersey, as well as before administrative and government agencies such as the U.S. Equal Employment Opportunity Commission, the Pennsylvania Human Relations Commission, the New Jersey Division on Civil Rights, and the Department of Labor. She represents employers in cases alleging discrimination, harassment, and retaliation (Title VII of the Civil Rights Act, 42 U.S.C. Section 1981 and 1983, Age Discrimination in Employment Act, Americans with Disabilities Act, Pennsylvania Human Relations Act, New Jersey Law Against Discrimination), as well as claims under the Fair Labor Standards Act, the Family Medical and Leave Act, the Conscientious Employee Protection Act, the Pennsylvania Whistleblower Law, and state wage and hour laws.

Tracy's practice includes providing risk management advice, guidance and training to employers and management personnel on matters including handbooks and policies, on-site anti-harassment training, FMLA and ADA compliance, and discipline and termination strategies.