

Beware: The Hidden Dangers In Employment

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INTRODUCTION

I. General Overview of Employment Litigation and Trends

Employers are facing difficult times. The failing economy has resulted in lost jobs because employers can no longer afford to carry dead weight. Employment litigation is on the rise,³ and a number of hot button employment litigation trends are making headlines in the news.

Take, for example, the practice of hiring illegal aliens. As Americans face a limited amount of available jobs in the workforce, local municipalities around the country are reacting to the federal government's failure to enforce immigrant laws by trying to enact their own statutes to prevent illegal immigrants from living and working in their communities.⁴ These measures carry with them the danger of civil rights violations and may expose employers to civil penalties⁵ and even criminal liability.⁶

This paper addresses many of the hidden dangers that lurk in the employment litigation landscape. In Part I, we provide an overview of recent employment litigation statistics and trends. Part II discusses the uncertain legal risks employers face when monitoring their employees' use of social media technology such as Facebook and Twitter. We then present strategies employers can use to regulate the electronic communications of employees while minimizing employer liability for managing use that occurs both during and after work hours and off company premises.

³ See 2010 Fulbright & Jaworski L.L.P. Litigation Trends Survey, available at <http://www.fulbright.com/litigationtrends>

⁴ See, e.g., *Lozano v. City of Hazleton*, No. 07-3531, --- F.3d ----, 2010 WL 3504538, *1 (Sept. 9, 2010 3d Cir.) (local ordinance regulating employment of and provision of rental housing to undocumented aliens pre-empted by federal Immigration Reform and Control Act, 8 U.S.C. 1324a-1324b), discussed *infra*.

⁵ See, e.g., Arizona Senate Bill 1070, discussed *infra*.

⁶ *Id.*

In Part III, we identify the ethical and legal implications which accompany an attorney's decision to speak to the press. We highlight the consequences of sloppy lawyering and propose a set of best practices when dealing with the media. Part IV examines the relaxed legal standard for "certifying" a collective action under the Fair Labor Standards Act,⁷ and offers suggestions to help employers avoid these types of lawsuits. In Part V, we consider responses by local municipalities to a perceived immigration crisis in our country. We conclude by discussing recent legal developments which affect local legislation intended to curb employers who hire illegal aliens. Finally, Part VI describes how businesses can develop and promulgate employment related documents to prevent being sued.

A. The Litigation Swell and Employment Litigation Statistics

Gripped by economic anxiety, employers continue to trim their ranks and reduce wages, and employees are capitalizing on opportunities to file suit.⁸ Over four hundred in-house counsel and corporate law departments in the United States and the United Kingdom surveyed on the state of global litigation issues and trends reported an increase in multi-plaintiff employment litigation cases in 2010.⁹ The majority of these suits involved wage and hour claims premised on misclassification and overtime and evidenced a reduction in claims involving meals and breaks.¹⁰ No one, it seems, is immune to wage dispute litigation—twenty-seven workers recently filed suit

⁷ 29 U.S.C. § 201 *et. seq.*

⁸ <http://laconiclawblog.com/index.php/2010/10/13/2010-fulbright-litigation-trends-survey-shows-increase-in-employment-litigation/>

⁹ One interpretation of the survey results showed that 18% of those polled reported increases in wage and hour disputes under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 ("FLSA"); 11% reported a rise in traditional labor union related matters; 10% reported an increase in age discrimination cases; 7% reported rises in race discrimination suits and ERISA suits; and 6% reported rises in sex discrimination suits and disability discrimination suits. *See* <http://blog.larrybodine.com/2010/10/articles/clients/fulbright-report-sees-upswing-in-litigation/>. *See also* <http://insurancenewsnet.com/article.aspx?id=229869&type=newswires>

¹⁰ <http://blog.larrybodine.com/2010/10/articles/clients/fulbright-report-sees-upswing-in-litigation/>

in Manhattan federal court against Del Posto, Chef Mario Batali's restaurant, claiming the restaurant illegally pooled workers' tips in violation of state labor laws.¹¹ It can prove difficult to stay positive in this grim economic climate—this is not the first time employees have sued Chef Batali over wages,¹² but the most recent lawsuit was filed just after Del Posto was awarded a rare fourth star by *The New York Times*.¹³ Indeed, when asked to identify the most frequent type of litigation pending against their company, 40% of survey respondents cited labor and employment cases.¹⁴

Discrimination claims accounted for much of the swell in employment litigation this past year.¹⁵ According to survey respondents, race, age, and wage and hour claims subjected employers to the most monetary exposure.¹⁶ Part of the reason employment litigation may be popular among plaintiffs and defendants alike is because it is effective. Survey respondents agreed that litigation is the preferred method for resolving disputes which are not international in

¹¹ The lawsuit seeks compensation including backpay, unspecified damages and attorney's fees and alleges that the restaurant created a point system that determined how much each worker received in tips. For example, captains were allotted six points, while stockers received two points. See http://blogs.findlaw.com/law_and_life/employment-law/; see also <http://blogs.wsj.com/metropolis/2010/10/12/del-posto-worker-sue-mario-batali-over-wages-tips/>

¹² <http://blogs.wsj.com/metropolis/2010/10/12/del-posto-worker-sue-mario-batali-over-wages-tips/>

¹³ http://blogs.findlaw.com/law_and_life/2010/10/chef-mario-batali-sued-in-wage-dispute.html

¹⁴ <http://www.fulbright.com/litigationtrends20>

¹⁵ In an attempt to prevent employment discrimination claims, five major companies in Germany have agreed to participate in a pilot scheme using anonymous application forms for certain categories of employees (including apprentices). The forms will not include photographs or supply information about the candidate's age, ethnic origin, sex, marital status, or number of children. The pilot will be evaluated in a year to see whether it causes a reduction in discrimination. However, there are no current plans to make the anonymous application forms compulsory in Germany. See "Employment Trends in Europe" (September 2010), available at <http://www.elexica.com/newsletter.aspx?id=1399>

¹⁶ See <http://www.fulbright.com/litigationtrends20>. See also <http://insuranceneWSnet.com/article.aspx?id=229869&type=newswires>

nature.¹⁷ Those polled pointed to “better results” and “reviewability,” while a minority of respondents preferred arbitration because of its lower cost.¹⁸ Nevertheless, more than one-quarter of respondents in the United States now require arbitration of employment disputes in non-union settings, demonstrating a 6% increase from 2009.¹⁹ Moreover, upwards of 70% of responding companies consider arbitration beneficial for employee relations.²⁰

B. Beware: The Internet Does Not Discriminate

Discrimination suits by employees are not the only litigation risks employers must worry about. Statistics show many employers are using social technology to further their own business strategies.²¹ More than 25% of surveyed corporate counsel said their company utilizes profiles on LinkedIn.com for recruiting; 22% of respondents use Twitter.com as a means of marketing; and 17% use Facebook.com for developing business.²² Nearly one-quarter of companies also reported their use of some form of corporate blog.²³ Increased online activity in the workplace may contain hidden dangers, however, because the acceptance of social networking by both employees and employers can enable abusive behavior such as cyberbullying, discussed later.

Thus, employers need to consider the consequences of social media activity to avoid liability.²⁴ As discussed in detail in Part I, taking adverse action against an employee poses high

¹⁷ <http://www.fulbright.com/litigationtrends20>

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² <http://blog.larrybodine.com/2010/10/articles/clients/fulbright-report-sees-upswing-in-litigation/>

²³ *Id.*

²⁴ Gordon and Rees’ November 2010 Labor and Employment Law Update explains that “On October 27, 2010, the National Labor Relations Board (“NLRB”) filed a precedent-setting complaint against an employer for

legal risk unless an employee's online activities are illegal, and may subject a company to unwanted media scrutiny. Therefore, it is crucial that employers promulgate workplace policies to inform and guide employees' online behavior in order to successfully manage the reputations of their companies.

The recent termination of CNN Senior Editor Octavia Nasr highlights how just one sentence posted online can generate international fervor. Described as an "eminent journalist, with a distinguished, 20-year CNN career,"²⁵ the former senior editor of Middle East affairs was promptly fired four days after she posted a "tweet" on Twitter expressing regret at the death of Lebanese Grand Ayatollah Mohammed Fadlallah.²⁶ Nasr's tweet praised Fadlallah as "one of Hezbollah's giants I respect a lot," prompting outrage from supporters of Israel, who pointed to Fadlallah's links to terroristic activity.²⁷ Nasr has since apologized publicly for her actions, adding, "Reaction to my tweet was immediate, overwhelming and provides a good lesson on

allegedly terminating an employee for criticizing her boss on Facebook. In its complaint, the NLRB alleges that American Medical Response of Connecticut Inc. ("AMR") "maintained an overly broad blogging and internet posting policy" that contained unlawful provisions such as prohibiting employees from posting disparaging remarks about the company on social networking sites. The NLRB also alleges that AMR's enforcement of its internet posting policy resulted in an illegal termination when the company fired an employee after she posted a "negative remark" about her boss online. The significant issue presented by the NLRB's complaint against AMR is whether bad-mouthing an employer on social media sites that reach critical masses will be considered protected activity. Arguably, such employee conduct may be considered "acts of disloyalty," which can lose protection under the National Labor Relations Act and, therefore, provide a legitimate basis for discharge. Until these issues are addressed more definitively by the courts, employers should take preventative measures and invest in effectively managing and protecting company resources against potentially derisive and damaging postings in the first place. A hearing is set for January 25, 2011 before an administrative law judge in Hartford, Connecticut to address the allegations set forth in the NLRB's complaint against AMR." *NLRB Files Complaint Against Employer for Terminating Employee Who Criticized Boss on Facebook*, available at <http://www.gordonrees.com/publications/viewPublication.cfm?contentID=1704>

²⁵ Maria Williams, *How 140 Characters Got a Respected Editor Fired*, Society for Human Resource Management, <http://www.shrm.org/hrdisciplines/businessleadership/articles/Pages/140Characters.aspx>

²⁶ *Id.*

²⁷ Brian Stelter, *CNN Fires Middle East Affairs Editor*, N.Y. Times, July 8, 2010, at B3.

why 140 characters should not be used to comment on controversial or sensitive issues, especially those dealing with the Middle East.”²⁸

According to the 2009 Electronic Business Communication Policies and Procedures Survey, conducted by the American Management Association in partnership with the ePolicy Institute, 26% of companies fired employees in 2009 for inappropriate Internet use, and 3% “admitted rejecting prospective employees on the basis of content posted on a personal social media web page.”²⁹ Nancy Flynn, executive director of the ePolicy Institute and author of *The e-Policy Handbook, Second Edition*, explained that many companies maintain social media policies that are often “needlessly vague.”³⁰ Flynn says that “[A] lot of organizations are short-sighted. They think ‘We don’t tweet or have a corporate blog.’ But even if they don’t, they still need to monitor social media. They need to ask not only, ‘What are our employees writing?’ but also, ‘What are our former employees and our competitors writing?’”³¹

II. Key Risks Associated with Employees’ Use of Social Networking Technology

In today’s world, the possibilities for social networking and other online activities are almost endless. Blogs, YouTube, Twitter, MySpace, Facebook, email, texting, online chat rooms. And most of your employees are probably participating in online social media to some extent -- whether they are blogging about their personal and professional lives, uploading photos of themselves, or watching YouTube videos.

²⁸ Joe Pompeo, *CNN Won't Say They Fired Octavia Nasr Because Her Tweet Outraged People*, <http://www.businessinsider.com/the-real-issue-2010-7>

²⁹ Williams, <http://www.shrm.org/hrdisciplines/businessleadership/articles/Pages/140Characters.aspx>, *supra*.

³⁰ *Id.*

³¹ *Id.*

Most online activities and postings are harmless. But suppose an employee's posting is damaging to your organization, employees, or clients by disclosing sensitive information or by including comments that are defamatory, discriminatory, harassing, or considered to be workplace bullying. Or perhaps the content is simply offensive. In this Part, we examine the key risks associated with employee use of technology -- both during work and after hours -- as well as the risks employers face when they regulate and manage their employees' use of these electronic media.

A. The Risks of Employee Texting, Tweeting and Other Technology

During the work day, employees often spend time Facebooking their friends, Tweeting the latest updates to their followers, or just surfing the web. Though these activities may decrease productivity, they likely will not result in any additional harm to the employer. In more extreme cases, however, employees may harass or bully their co-workers, reveal confidential company information, endorse products or services without proper disclosure, or engage in criminal conduct. In such instances, employers face far greater risks, including the following:

- **Disclosure of sensitive company information:** Employees may inadvertently -- and sometimes intentionally -- reveal proprietary or confidential information on a blog, in an email, or on a social networking site.
- **Defamation of co-workers or clients:** Employers may face liability for defamation based on electronic communications disseminated by employees. For example, employees can create turmoil by posting rumors, gossip, or offensive statements regarding their co-workers and supervisors. Negative comments by management about a departing employee may also create liability.
- **Harassment, discrimination, and retaliation:** Social networking sites, email, and blogs provide employees with additional avenues for engaging in inappropriate conduct, especially during non-work hours. Employees may vent workplace frustrations by posting discriminatory statements, racial slurs, or sexual innuendo directed at co-workers, management, customers, or vendors.

- **Bullying:** A recent study revealed that 35 percent of employees have reported being the victim of workplace bullying.³² Common forms of bullying include verbal abuse, conduct (i.e., threatening, intimidating behavior, etc.), abuse of authority, interference with work performance, and destruction of workplace relationships. And when one considers the prevalence and accessibility of technology, it only stands to reason that bullies may make social networks or other online forums their weapon of choice. Currently, there are no states with laws making workplace bullying illegal but such legislation has been considered in 17 states.³³ In the meantime, employees may be successful in bringing unlawful harassment claims under Title VII or the state equivalent.³⁴ Employers are wise to get ahead of this trend and address workplace bullies in a proactive manner. Current personnel policies should be examined to ensure that bullying is prohibited, there is a policy in place for employees to report such misconduct, and reports of bullying are taken seriously.
- **Reporting requirements for child pornography:** Some states have mandatory reporting statutes that require information technology workers to report child pornography found on computers they are servicing.³⁵ In cases of child pornography or other illegal electronic conduct, employers must take particular care to preserve the evidence for legal authorities.
- **Federal Trade Commission (FTC) guidelines:** According to newly revised FTC Guides addressing the use of “endorsements and testimonials in advertising,” employers may face liability when employees comment on their employer’s services or products on the Internet without disclosing the employment relationship.³⁶ For example, if an employee Tweets that his employer’s sushi rolls are the best around, he must do so in compliance with these FTC guidelines. Failure to do so puts him and the employer on the hook, as both can be liable if the comment is either false or unsubstantiated. So, if the sushi rolls are indeed the best around and there are studies or surveys to show it, there may be no risk of liability.

³² Results of the 2010 WBI U.S. Workplace Bullying Survey, Workplace Bullying Institute (Nov. 2, 2010), <http://www.workplacebullying.org/research/WBI-NatlSurvey2010.html>

³³ California, Oregon, Washington, Nevada, Utah, Montana, Kansas, Oklahoma, Missouri, Wisconsin, Illinois, Vermont, New York, New Jersey, Connecticut, Massachusetts, and Hawaii have introduced healthy workplace legislation. Healthy Workplace Bill (Nov. 2, 2010), <http://www.healthyworkplacebill.org>

³⁴ See *EEOC v. Nat’l Educ. Ass’n*, 422 F.3d 840 (9th Cir. 2005) (holding that the “reasonable woman” standard applies to workplace abusive conduct, even if there is no sexual content to the behavior.). For California employers, see also *Garcia v. Los Banos*, 2006 U.S. Dist. LEXIS 8683 (E.D. 2006) (holding the *EEOC v. Nat’l Educ. Ass’n* analysis would apply under California’s Fair Employment and Housing Act).

³⁵ See, e.g., Ark. Code § 5-27-604, 325 Ill. Comp. Stat. 5/4.5, Mich. Comp. Laws § 750.145c (9), Mo. Rev. Stat. § 568.110, N.C. Gen. Stat. § 66-67.4, Okla. Stat.tit. 21 § 1021.4, S.C. Code § 16-3-850, and S.D. Codified Laws § 22-22-24.18. In addition, the Appellate Division of the Superior Court of New Jersey has held “that an employer who is on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee’s activity, lest it result in harm to innocent third-parties.” *Doe v. XYZ Corp.*, 887 A. 2d 1156 (2005).

³⁶ FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR § 255 (2009).

- **Unfair competition laws:** In a federal lawsuit recently filed in federal district court in Minneapolis, Minnesota,³⁷ TEKsystems, Inc., an IT services and staffing company, has alleged that three ex-employees (and one current employee) used LinkedIn to unfairly compete against it, and breached their non-competition and non-solicitation obligations, by contacting at least 20 of its contract employees. TEKsystems claims it can prove the breach based on evidence from one of the employees' LinkedIn account. It contends the employee had LinkedIn connections with 16 of its contract employees, and that she sent electronic messages inviting them to visit her in her new workplace. This is the first lawsuit to make headlines based on evidence from an employee's LinkedIn account, and is a real-life example of the potential for harm to employers that can result from employees' use of social media.

B. Disciplining Employees for Misuse of Technology

There are myriad scenarios that may prompt an employer to discipline an employee for the misuse of technology. The most obvious situation is when the employee engages in illegal conduct while at work. However, what happens if the employee is engaging in unlawful conduct outside of work? Or if an employee engages in legal, on-duty behavior that the employer finds troublesome or annoying? Consider these recent examples:

- Two former employees of Houston's restaurant in Hackensack, New Jersey, filed a lawsuit in federal court after they were fired for bad-mouthing the restaurant on MySpace.³⁸ They set up a private MySpace forum specifically to vent about work, and emailed invitations to co-workers. A supervisor called a co-worker into his office, asked for the login information, received the information from the employee, then notified higher level supervisors, who logged in and viewed the comments. The restaurant alleged that the online postings violated company policies on professionalism and maintaining a positive attitude. The plaintiffs contended that the employer's unauthorized access to the forum violated the federal Stored Communications Act (18 U.S.C. § 2701 *et seq.*), as well as their right to privacy under New Jersey law. A key issue in the litigation was whether Houston's management properly obtained access to the site by obtaining the login details from a co-worker, or whether the employee who revealed the login information to management was coerced into doing so.³⁹ A jury subsequently found in the employees' favor, awarding them over \$3,400 in compensatory damages and \$13,600 in compensatory damages. At last check, the employees were also seeking attorney's fees of almost \$125,000 under the Stored Communications Act.

³⁷ *TEKsystems, Inc. v. Hammernick et al.*, No 0:10-cv-00819 (D. Minn.).

³⁸ *Pietrylo v. Hillstone Restaurant Group*, 2009 U.S. Dist. LEXIS 88702 (D.N.J. 2009) (unpublished).

³⁹ See Dionne Searcey, *Employers Watching Workers Online Spurs Privacy Debate*, Wall Street Journal, April 23, 2009, at A13.

- A former Delta Air Lines flight attendant filed a lawsuit for sex discrimination after she was fired for posting mildly suggestive photos of herself in her Delta uniform on her blog.⁴⁰ She claimed that Delta had not taken similar action against male employees who had engaged in similar conduct.

Before deciding to take any disciplinary measures against an employee based on the use -- or misuse -- of social media or technology, employers should consider whether there are legal constraints preventing or limiting such action. Generally, it is not illegal to look at an employee's public blog or YouTube video. But, as the Houston's restaurant dispute shows, accessing a private, password-protected site without permission could raise serious legal issues.

And, even if an employer legally learns about an employee's inappropriate or illegal online activities or conduct, there may be restrictions on what the employer can do with the information, as well as limitations on actions the employer can take against the employee. Laws that may apply include:

- **National Labor Relations Act (NLRA):** The NLRA affords employees (even those who are not unionized) the right to engage in "concerted activity," including the right to discuss the terms and conditions of employment affecting the employee *and* co-workers. In fact, the National Labor Relations Board (NLRB) recently lodged a complaint against American Medical Response of Connecticut Inc. alleging that the company violated the NLRA by terminating an employee who criticized her boss on Facebook. Thus, before disciplining an employee who, for example, has complained about the employer on Facebook, an employer should determine if the employee has engaged in protected concerted activity.
- **Off-duty statutory protections:** Some states, including California, Colorado, Connecticut, New York, and North Dakota, have enacted statutory protections for employees who engage in lawful off-duty conduct. For example, the California statute makes it illegal to demote, suspend, or discharge an employee for lawful conduct occurring during non-working hours away from the employer's premises.⁴¹
- **Whistleblower laws:** Many federal and state statutes contain protections for employees who "blow the whistle" on corporate wrongdoing.

⁴⁰ See *Simonetti v. Delta Airlines, Inc.*, No. 5-cv-2321 (N.D. Ga.) (stayed pending bankruptcy proceedings).

⁴¹ CAL. LABOR CODE § 96(k). See also, N.Y. LABOR CODE § 201-d; N.D. CENT CODE § 14-02.4-01.

- **Political activity laws:** Some states, including California, Missouri, Nevada and New York, have laws that prohibit employers from interfering with an employee’s political activities.
- **Wage disclosure laws:** Some states have enacted laws prohibiting an employer from disciplining an employee for disclosing or discussing his or her wages.⁴² Note, too, that taking adverse action in this context could also amount to a violation of the NLRA, depending on the circumstances.
- **Constitutional right to privacy:**⁴³ The right to privacy afforded by the U.S. Constitution does not apply to private employers. However, some state constitutions, like California’s, have broader protections that do extend to private employers and employees. Privacy concerns are most likely to arise when the employee believes the communications are private and the employer gained unauthorized access to those communications (such as by pretending to be someone else).⁴⁴
- **Free speech protections:** The federal First Amendment right to free speech does not apply in the private workplace, but some related state laws apply to private employers. For example, Connecticut law prohibits retaliating against employees for exercising their free speech rights,⁴⁵ and some state constitutions contain free speech protections, although many of these are limited to the public employment context.⁴⁶
- **Discrimination and Retaliation:** In most states and under federal law it is illegal to discriminate on the basis of a protected classification, such as race, gender, disability, religion, marital status, and even genetic information.⁴⁷ Some states prohibit sexual orientation discrimination. **The bottom line is that unless** an employee’s online activities are illegal,⁴⁸ or may be legal but are directly harmful to your business or a clear

⁴² See, e.g., CAL. LABOR CODE § 232.

⁴³ Employee privacy rights are discussed in detail in Section C, *infra*.

⁴⁴ See *Moreno v. Hanford Sentinel, Inc.*, 172 Cal.App.4th 1125 (App. Ct. 2009) (Coalinga high school student who posted a negative article about her city and school on MySpace brought an invasion of privacy action against a newspaper and the high school principal, after the principal submitted the article to the newspaper and it was published. The court concluded that the defendants’ demurrer to the invasion of privacy cause of action was properly sustained without leave to amend because the facts contained in the article were not private and the author publicized her opinions about Coalinga by posting the article online). See also *Konop v. Hawaiian Airlines, Inc.* 302 F.3d 868 (9th Cir. 2002).

⁴⁵ CONN. GEN. STAT. § 31-51q.

⁴⁶ See *Tucker v. Journal Register East*, No. 3:06CV00307 (D. Conn. Nov. 7, 2007).

⁴⁷ The U.S. Equal Employment Opportunity Commission has not yet issued final regulations regarding how the Genetic Information Nondiscrimination Act (GINA) will apply to social networking sites.

⁴⁸ Consider the example involving two Domino’s Pizza employees in North Carolina, who filmed a “prank” video in the kitchen of the Domino’s shop where they worked. The video showed the employees preparing sandwiches while one put cheese up his nose and mucus on the sandwiches. Then, they posted the vignette on YouTube. The workers claimed it was only a joke, but they lost their jobs and were facing felony food-tampering charges. See Stephanie Clifford, Video Prank at Domino’s Taints Brand, N.Y. Times, April 16, 2009, at B1.

violation of company policy, taking adverse action against the employee poses a high degree of legal risk often with minimal benefit to the employer. Disciplining the employee also could subject the company to unwanted media scrutiny. Unfortunately, there is rarely a clear answer on the best course of action in this developing area of law, and employers would do well to proceed with caution before taking disciplinary action.

C. Monitoring Employees' Internet and Technology Use

Considering the significant potential liability and other risks employers face from employee Internet use, how far can employers go in monitoring their online communications? Further, as part of workplace investigations into harassment or misconduct, can an employer search an employee's computer or electronic communications? These are all questions facing employers today, and the answers to these questions are ever evolving.

Although the Fourth Amendment to the U.S. Constitution prohibits unreasonable searches and seizures by the government, it does not apply to private-sector employers. While private-sector employees have no federal constitutional right to privacy, employer conduct in monitoring employee Internet and technology use is limited by common law principles and federal and state privacy laws, including those discussed below:⁴⁹

- **Federal Wiretap Act and the Electronic Communications Privacy Act (ECPA):** The ECPA prohibits unauthorized and intentional "interception" of wire, oral, and electronic communications, as well as unauthorized "accessing" of electronically stored wire or electronic communications.⁵⁰ The Stored Communications Act, which is part of the ECPA, covers stored communications.⁵¹ Courts have held that employers do not violate the ECPA by accessing stored emails on the company's *own* file server.⁵² The point is that employers cannot hack into another server or access employees' private communications using improper means, such as that alleged in the Houston's case discussed above.

⁴⁹ Some of the laws just discussed - *e.g.* the California constitution - may apply to employer conduct in monitoring employee Internet and technology use.

⁵⁰ 18 U.S.C. §§ 2510-20, 2701-11.

⁵¹ 18 U.S.C. § 2701, *et seq.*

⁵² *See Fraser v. National Mutual Ins. Co.*, 352 F. 3d 107 (3d Cir. 2003).

- **Invasion of privacy actions:** Most employees who have sued their employers for monitoring the use of electronic media have done so through invasion of privacy actions. In this circumstance, the most applicable invasion of privacy theory is “intrusion upon the plaintiff’s seclusion or solitude.”⁵³ Under this theory, the employee must prove: (1) an intentional intrusion, physical or otherwise; (2) upon the employee’s solitude or seclusion or private affairs or concerns; (3) which would be highly offensive to a reasonable person. An employer may successfully defend itself against such a claim if it can prove that the employee did not have a reasonable expectation of privacy in the electronic communications. Courts are generally more inclined to rule in the employer’s favor where the employee voluntarily uses an employer’s network and/or computer and consented to be monitored or was advised of the employer’s written electronic communications policy which expressly provides for employer monitoring.⁵⁴

D. Strategies for Regulating Electronic Communications

Employers should have clear, well-crafted policies regarding Internet and social media use and employee online communications, both inside *and* outside the workplace. Employees -- who may not realize they can expose their employers to risk by posting information on blogs and private social networking sites during work or non-work hours -- should be informed of potential risks and made aware of the employer’s expectations. Although the realities of the modern workplace make a ban on private use of the Internet or email unrealistic for many companies, a comprehensive policy regarding use of these electronic media is invaluable. While the precise terms of the policies will depend on the employer’s needs, here are some best practices associated with drafting and implementing Internet and email policies, and avoiding legal disputes:

- Provide employees with written notice that they should not expect privacy when using company-owned computers, communication systems, or other electronic equipment (Blackberries, pagers, etc.), and that computer use will be monitored.

⁵³ RESTATEMENT (SECOND) OF TORTS § 652 (1965).

⁵⁴ See *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) (holding, on narrow grounds, that audit of employee’s text messages did not invade employee’s right to privacy); *Thygeson v. U.S. Bancorp*, 2004 U.S. Dist. LEXIS 18863 (D.Or. Sept. 15, 2004) (holding that an employee had no reasonable expectation of privacy in the internet websites he accessed while using his work computer); *Smyth v. Pillsbury Corp.*, 914 F. Supp. 97 (E.D. Penn. 1996) (holding that employee did not have a reasonable expectation of privacy in the contents of emails he sent of the company’s email system). *But compare Stengart v. Loving Care Agency*, 990 A. 2d 650 (N.J. 2010) (holding emails between employee and her attorney are protected by attorney-client privilege).

- Provide employees with notice that their company-owned computers and devices, email, and voicemail, are subject to search.
- Adopt and distribute an Acceptable Usage Policy, defining acceptable personal usage, if any, and the consequences of noncompliance.
- Put employees on notice that electronic communications with the following kinds of content will not be tolerated and could result in discipline: (1) proprietary and confidential company information; (2) discriminatory statements or statements that would violate the company's policies against harassment and workplace bullying; and (3) defamatory statements.
- Obtain a signed acknowledgement from each employee of receipt of the policy.
- Conduct periodic reviews of policies to ensure that they adequately address company privacy and confidentiality concerns, the developing law, and all forms of company technology that are in use.
- Counsel managers and supervisors to avoid statements that might weaken or undermine such policies or create privacy expectations where they do not exist. Make sure that all policies include language stating that the policies can only be modified in writing by a designated representative, and only if the writing clearly states that it is a modification.
- Implement effective and practical security procedures to safeguard employee email accounts, access to confidential and private data, and to manage employee remote access to employer systems.
- Do not attempt to gain unauthorized access to password-protected sites or other areas that are intended to be private. Beware of the federal Stored Communications Act and state privacy rights.
- Consult counsel before accessing employee emails sent from personal accounts.
- Blogging and social networking policies demand particular care:
 - Consider a policy that prohibits employees from posting anything about the company, its products, or services, unless they provide a clear disclaimer stating their affiliation with the company.
 - Consider prohibiting employees from uploading work-related contacts or customer or employee lists to their LinkedIn or similar account.
 - Consider two blogging policies: One that applies only to employees engaged in blogging as part of their job duties, and another applicable to all employees regarding personal blogging.

- For job-related blogging: The policy should state that job-related blogging should be done for specific job-related purposes, that posts must not reveal private, confidential, or trade secret information, and that posts must not use harassing, bullying, discriminatory, defamatory or offensive language. Also, employers should review internal protocols for approving such blog posts before the posts are made public.
- For personal blogging: Consider prohibiting employees from visiting social networking sites while at work, and have a policy regarding employee endorsements of the company, as well as its products or services.

The need for such policies emphasizes just how prominently online communications fit into our daily lives, both within and beyond the workplace. The Internet affords employees, employers and lawyers a twenty-four-hour pipeline for promotion and commentary. Perhaps now more than ever before, lawyers must heed the hidden liabilities that surround their statements to the press.

III. Dealing with the Media

A. Background

Let's face it: The press loves a juicy story. Facing constant pressure to beat their competitors in this 24-hour news cycle, reporters are constantly searching for the next big scoop. They troll filings in state and federal courts, sit in courtrooms, or clamor for that choice sound bite at the courthouse steps. So long as it piques the public interest, a lawsuit can give rise to a story that is splashed across the front page of *The New York Times*, posted on a legal news web site devoted to legal news,⁵⁵ or picked apart by commentators on the news networks.

Stories driven by lawsuits can be compelling for any number of reasons.⁵⁶ The lawsuit on which a story is based may contain tawdry details about a high-profile divorce. It may chronicle an alleged course of workplace misconduct at the headquarters of a well-known

⁵⁵ See, e.g., The Wall Street Journal Law Blog, available at <http://blogs.wsj.com/law>

⁵⁶ See, e.g., Dareh Gregorian, *Manhattan judge says Prince of Brunei lawsuit 'is not about sex'; jury will not see life-size sex statues*, N.Y. Post, November 9, 2010.

employer. Or it may involve a multi-million dollar dispute between a professional athlete and his team.

But if the professional athlete, the well-known employer, or the spurned spouse happens to be your client, the media's discovery of the case can either be a blessing or a curse. It all depends on how you, the learned lawyer, deal with it.

B. Ethical Considerations

One of the lawyer's paramount concerns in dealing with the media is to stay on the right side of the ethics rules. Because they differ among jurisdictions, we'll rely on the ABA's Model Rules of Professional Conduct. The first ABA Model Rule potentially implicated by a case that generates significant media attention is 1.6(a):

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

In other words, although your instinct may be to respond to a reporter's telephone query with some variant of "my client categorically denies that she _____," you must first obtain authorization from your client to speak to the press. Written consent is definitely preferable; specific authorization to speak to the media on the client's behalf can even be embodied in your standard form of retainer (or added to the retainer if you anticipate at the outset that the case or client will attract media interest). Moreover, an answer to a seemingly innocuous question could entail a disclosure of information sealed by court order or private agreement, *i.e.*, "Ms. Lawyer, my sources tell me that three years ago your client was fired by Company X. Is that something you can confirm or deny?" Avoid this trap.

Aware of the potential for ethics violations caused by a media maelstrom, the ABA promulgated Model Rule 3.6, "Trial Publicity." It provides as follows:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

However, not all problems that arise from counsel's ill-advised comments to the media involve a violation of ethics or disciplinary rules. Consider the following case.

C. Ricciardi v. Weber⁵⁷

This decision from New Jersey's intermediate appellate court confronted the issue of whether a lawyer's statements about a case during a press conference can constitute defamation or slander. In a unanimous ruling, the panel held that it could.⁵⁸

The facts are simple. An employee (Brown) wanted to sue his employer and his supervisor (Ricciardi) for sexual harassment under Title VII of the Civil Rights Act of 1964⁵⁹ and the New Jersey Law Against Discrimination (LAD).⁶⁰ Brown's wife worked for an attorney (Weber), who ultimately agreed to represent Brown in the discrimination lawsuit.⁶¹

Days before the suit was filed, the United States Supreme Court decided *Oncale v. Sundowner Offshore Services, Inc.*,⁶² which dealt with male-on-male sexual harassment in the workplace.⁶³ As a result of *Oncale*, "Brown's suit became instant news when it was filed,

⁵⁷ 350 N.J. Super. 453 (App. Div. 2002).

⁵⁸ *Ricciardi*, 350 N.J. Super. at 460.

⁵⁹ 42 U.S.C. § 2000e.

⁶⁰ N.J.S.A. 10:5-1-42.

⁶¹ *Ricciardi*, 350 N.J. Super. at 462.

⁶² 523 U.S. 75 (1998)

⁶³ *Ricciardi*, 350 N.J. Super. at 462.

generating numerous newspaper articles and television reports. Weber's office fielded the calls from the media.⁶⁴

According to the Court, Weber told reporters that:

[t]he *Oncala* case 'made a good case better'; Ricciardi was 'constantly smearing [Brown's] sexuality' and 'constantly taunting [Brown] about sex'; Brown left the job because he could not stand the comments anymore; the unemployment compensation board determined that Brown left for good cause; Brown had asked Ricciardi several times to stop, but to no avail; Brown was 'constantly harassed and berated, and it was all of a sexual nature'; and Brown was asking for one million dollars in compensatory damages plus punitive damages. The articles also contained statements that the suit alleged that the employer secretly hung mirrors over the toilet bowls at work. Weber also gave an interview to ABC News, in which he said that Ricciardi asked Brown about his daughter's sex life.⁶⁵

The problem with Weber's assertions were that many of them were found to be untrue, and others did not appear in the original complaint. For example, although Brown told Weber that he had found a camera in the men's room ceiling tile at work, that allegation was not included in the complaint.⁶⁶ Also, Brown testified that Weber's comments to ABC News about Brown's daughter's sex life were inaccurate.⁶⁷

Brown's lawsuit against Ricciardi was settled before trial, but that did not end the matter. In fact, Ricciardi turned around and sued Weber for defamation and slander.⁶⁸ He alleged that Weber's comments to the press about Brown's lawsuit damaged his reputation and tarnished his

⁶⁴ *Id.*

⁶⁵ *Id.* at 462-63.

⁶⁶ *Ricciardi*, 350 N.J. Super. at 463.

⁶⁷ *Id.* at 464.

⁶⁸ *Ricciardi*, 350 N.J. Super. at 464-65.

good name.⁶⁹ The trial court granted Weber's motion for summary judgment, but the appellate court reversed.⁷⁰

The Court held that genuine issues of material fact warranted the denial of Weber's motion for summary judgment. In reaching this determination, the Court focused in part on the fact that Weber's statements to the press about Ricciardi's alleged inquiry about Brown's daughter's sex life was not grounded in the complaint.⁷¹ In other words, had this allegation of wrongdoing been presented in the complaint, a qualified privilege might have protected Weber's statements to the press. The lesson here is that the careful lawyer who chooses to interact with the press can potentially avoid adverse consequences by limiting her discussion of the case to facts or allegations pled in the complaint.

But that lesson should not be treated as a license to abuse the privilege that may attach in situations where an attorney merely discusses with the press what he or she has inserted in the complaint. The Court observed that Weber admitted that he filed complaints without investigating their underlying allegations, especially where he had no reason to believe Brown was lying. He also admitted that he did this in order to promote swift settlement negotiations with the insurance carrier, and that he encouraged Brown to give an interview to the press because it would help his case.⁷²

While in some circumstances there may be limited truth to Weber's belief – that statements to the press pressure the litigants and the insurance carrier to settle – it is manifestly

⁶⁹ *Ricciardi*, 350 N.J. Super. at 464-65.

⁷⁰ *Id.* at 460.

⁷¹ *Ricciardi*, 350 N.J. Super. at 472.

⁷² *Ricciardi*, 350 N.J. Super. at 472.

clear that the consequences of sloppy lawyering and ill-advised comments to the press must factor into any decision involving the media.

D. Best Practices

We present, in no particular order, a list of five best practices for dealing with the media:

1. Include in your retainer agreement a provision addressing press inquiries. Make sure your strategy is agreeable to the client, *i.e.*, the firm has a policy of not commenting to the press, the firm only responds to press inquiries after consultation with the client, the firm frequently holds press conferences in its conference.
2. If you are contacted by a reporter, ask him or her to submit a list of written questions. This will give you time to strategize with your client and to evaluate the risks of responding.
3. Don't be afraid to decline comment. The consequences of an ill-advised comment to the press (ethical troubles, defamation suits, angry client) are much worse than an inference of wrongdoing that may or may not stem from your decision to stay silent in the face of a salacious allegation.
4. If you are uncomfortable with a "no comment," tell the reporter that you will respond to the allegations in court or that your papers (answer, motion) speak for themselves.
5. If you engage the press, avoid taking a position that could come back to haunt you during the litigation or trial, *i.e.*, ("My client categorically denies that he was in the park at 10 p.m."). A court could take judicial notice of the statement, and/or your adversary could use it to impeach your client ("Mr. Smith, you testified at deposition that you were in the park at 10 p.m. – isn't it true that your lawyer told *The Daily Planet* that you were not in the park at 10 p.m.?").

Dangers do not confine themselves to technology and the media, however. Liabilities may lurk within the law itself, as we explore in Part IV.

IV. Avoiding Fair Labor Standards Act Collective Actions

A. Background

The federal Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in

Federal, State, and local governments.⁷³ For employers, an action brought under the FLSA can be a formidable enemy, especially when it takes the form of an FLSA collective action. Indeed, in November 2010, fast-food giant McDonalds Corporation settled an FLSA collective action for \$2.4 million. The action was brought by a class of assistant managers who accused the company of wrongly exempting them from FLSA protections.

An FLSA collective action permits the aggregation of hundreds or thousands of claims. The only requirement is that the employees be “similarly situated.”⁷⁴ Particularly troubling for employers is the fact that courts apply a “less stringent” standard for the initial “certification” of an FLSA collective action than the more rigorous standard used in Rule 23 class actions.⁷⁵ As demonstrated below, employee misclassification is the driving force behind an FLSA collective action.

B. *Ravenell v. Avis Budget Car Rental, LLC*⁷⁶

This case involves a group of Avis employees who “claim that Avis erroneously classified them as managerial employees to avoid paying for overtime work[.]”⁷⁷ It didn’t take much for this lawsuit to morph into an FLSA collective action. The Court observed that “[a]fter commencement of the lawsuit, seven current and former AVIS shift managers ... have filed consents to become parties to this action as similarly situated individuals.”⁷⁸

⁷³ See <http://www.dol.gov/whd/flsa/index.htm>

⁷⁴ See 29 U.S.C. §216(b).

⁷⁵ See *Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996), *cert. denied*, 519 U.S. 987 (1996).

⁷⁶ No. 08-CV-2113(SLT)(ALC), 2010 U.S. Dist LEXIS 72563 (E.D.N.Y. July 19, 2010).

⁷⁷ *Id.* at *3.

⁷⁸ *Id.*

Following limited discovery, the plaintiffs moved for conditional certification as a collective action.⁷⁹ In discussing the legal standards for certification, the Court cited precedent from district courts within the Second Circuit for the proposition that a group of plaintiffs can prevail on a motion for certification “by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the [FLSA].”⁸⁰ According to the Court’s opinion, the “modest factual showing” can be established with nothing more than “substantial allegations” of wrongdoing.⁸¹

As a practical matter, this means that in some circumstances a crafty plaintiffs lawyer with strong writing skills can tip the scales in her favor at the outset of the litigation even though the collective action may ultimately turn out to be meritless. However, it should be noted that in this case, the plaintiffs made their modest factual showing “through their allegations in the [c]omplaint, their deposition testimony, and the deposition testimony of the opt-ins, that there was a common policy of wrongfully depriving shift managers of overtime, which is enough to warrant conditional certification at this juncture.”⁸²

C. Best Practices to Avoid an FLSA Collective Action.

Because it does not take much – at least from an evidentiary standpoint – to create an FLSA collective action, employers need to be proactive in learning how to avoid them. To that end, we offer these five best practices:

1. Familiarize yourself with the FLSA and how it applies. The U.S. Department of Labor provides guidance and other helpful tools on its website, www.dol.gov/whd/flsa/index.htm.

⁷⁹ *Id.*

⁸⁰ *Id.* at *4 (alteration in original) (citations omitted).

⁸¹ *Id.* at *4-5 (citations omitted).

⁸² *Ravenell*, 2010 U.S. Dist. LEXIS at *12.

2. Stay abreast of Department of Labor opinion letters and administrator interpretations of the FLSA.
3. Understand the importance of employee job classification. Nonexempt workers are entitled to a minimum wage of \$7.25 per hour and overtime payment at a rate of not less than one and one-half times their regular rates of pay after 40 hours of work in a workweek.
4. Promulgate policies and guidelines for your company or organization that demonstrates your commitment to complying with the FLSA.
5. Become conversant with terms used in the FLSA. A “workweek”, for example, is a period of 168 hours during 7 consecutive 24-hour periods.

These measures will minimize the risks companies face after they have selected candidates for employment. But what about the hidden risks employers must contend with during the selection process itself? In Part V, we address another hot topic in employment law this year concerning the local backlash against employers who hire illegal immigrants.

V. Local Response to the Hiring of Illegal Aliens

A. Background

Local municipalities around the country are reacting to tensions created by mass unemployment and increased crime by implementing measures to restrict employers and landlords from hiring and renting to illegal aliens. Towns are willing to spend massive tax dollars preventing what they perceive as an immigration crisis. The National Employment Law Project reports that Farmers Branch, Texas, a population of 8,000 and the first city in the nation to prohibit landlords from renting to illegal immigrants,⁸³ “has spent \$3.2 million in legal fees defending itself since September 2006 in unsuccessful litigation purporting to prohibit landlords

⁸³ See *Villas at Parkside Partners v. City of Farmers Branch*, 496 F.Supp.2d 757 (N.D. Tex. 2007).

from renting to unauthorized immigrants. The ordinance was permanently enjoined in March 2010.”⁸⁴

B. Arizona

Perhaps most controversial is the passage of Arizona’s immigration laws. On June 28, 2010, the United States Supreme Court announced it would hear arguments by business, civil rights, and immigration groups against the “The Legal Arizona Workers Act,” adopted in 2007.⁸⁵ Also called the “Employers Sanctions Law,” the Act penalizes employers who knowingly or intentionally hire illegal aliens in Arizona by suspending or revoking their licenses to do business there, and requires employers to check the work-authorization status of all new employees through an “E-Verify” system offered by the Department of Homeland Security.⁸⁶

Going one step further, in April 2010, Arizona Governor Jan Brewer signed into law the “Support Our Law Enforcement and Safe Neighborhoods Act” (Senate Bill 1070, often referred to simply as SB1070).⁸⁷ This law instructs Arizona state and local law enforcement agencies to ask individuals they encounter for proof of legal U.S. residency and makes it a misdemeanor crime to be without proper immigration documentation.⁸⁸ The law also implicates employers who shelter, hire, and transport illegal aliens by criminalizing the act of hiring or being hired

⁸⁴ <http://www.nelp.org/page/-/Justice/2010/CostlyInEveryWay2010.pdf?nocdn=1>

⁸⁵ “Supreme Court to hear Arizona immigration law challenge,” June 28, 2010, <http://www.reuters.com/article/idUSTRE65R3CQ20100628>

⁸⁶ *See generally* <http://www.azag.gov/LegalAZWorkersAct/>. The full text of House Bill 2745 is available at www.azag.gov/LegalAZWorkersAct/hb2745h.pdf

⁸⁷ The full text of SB1070 is available at www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf

⁸⁸ *Id.*

from a vehicle which “blocks or impedes the normal movement of traffic” as a misdemeanor or felony, depending on the number of illegal aliens involved.⁸⁹

The law initially allowed police to ask anyone for proof of legal U.S. residency, “when practicable,”⁹⁰ based solely on a police officer’s reasonable suspicion that the person might be in the country illegally.⁹¹ The measure proved so controversial, however, that Arizona lawmakers tempered it seven days after its initial signing by the adoption of Arizona House Bill 2162, making it so that officers could only check a person’s immigration status if that person had been stopped or arrested for a different reason.⁹² The amendment also prevented law enforcement from investigating complaints based on “race, color or national origin.”⁹³

Critics include U.S. Attorney General Eric Holder, who expressed concern that the law would create “a situation where people are racially profiled, and that could lead to a wedge drawn between certain communities and law enforcement, which leads to the problem of people in those communities not willing to interact with people in law enforcement, not willing to share information, not willing to be witnesses where law enforcement needs them.”⁹⁴ On July 28, 2010, a District Court judge granted the Department of Justice’s request for a preliminary

⁸⁹ *Id.*

⁹⁰ *See* SB1070, Art. 8(B).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See* House Bill 2162 at Section 3, 11-1051(B), *available at* <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2162c.htm>

⁹⁴ “Holder: Feds may sue over Arizona immigration law,” May 9, 2010, http://articles.cnn.com/2010-05-09/politics/holder.arizona.immigration_1_immigration-law-illegal-immigrants-immigration-reform?_s=PM:POLITICS

injunction the day before the law was to take effect, blocking its most controversial provisions.⁹⁵ Attorneys for Governor Brewer appealed the decision, and the Ninth Circuit Court of Appeals began hearing oral arguments on November 1, 2010.⁹⁶

C. Pennsylvania

Drastic local measures such as those in Arizona are not confined to the border states. In 2006, officials in the city of Hazleton in northeastern Pennsylvania “took independent action to regulate the local effects of unlawful immigration” by enacting local ordinances that attempted to regulate employment and rental housing to illegal aliens of Hispanic origin.⁹⁷ The Third Circuit observed, “Hazleton’s mayor, as well as other local officials, subsequently concluded that aliens lacking lawful status were to blame for certain social problems in the City, (reference omitted), and that the federal government could not be relied upon to prevent such aliens from moving into the City, or to remove them.”⁹⁸

The ordinances authorized “public monitoring, prosecution, and sanctions,” and permitted the City to suspend the license of any business that failed to terminate an employee within three days of the City discovering the worker lacked authorization to work in the United States.⁹⁹ On September 9, 2010, the Third Circuit upheld a permanent injunction, ruling that

⁹⁵ “Legal Battle Looms Over Arizona Immigration Law,” July 28, 2010, <http://www.cnn.com/2010/US/07/28/arizona.immigration.law/index.html?hpt=T2>

⁹⁶ Jennifer Medina, *Federal Appeals Court Weighs Arizona Law on Immigrants*, N.Y. Times, November 2, 2010, at A16.

⁹⁷ *Lozano v. City of Hazleton*, No. 07-3531, *supra*, --- F.3d ---- at *1.

⁹⁸ *Id.* See also *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 522 n.44 (M.D. Pa. 2007).

⁹⁹ *Id.* at 2.

federal law pre-empted the ordinances.¹⁰⁰ The Court cited concerns that the local employment restrictions would lead to discriminatory hiring practices, noting:

By imposing additional sanctions on employers who hire unauthorized aliens, while not penalizing those who discriminate, Hazleton has elected to place all of its weight on one side of the regulatory scale. This creates the exact situation that Congress feared: a system under which employers might quite rationally choose to err on the side of discriminating against job applicants they perceive to be foreign.¹⁰¹

On November 5, 2010, a three-judge appeals panel upheld the lower's courts decision that Hazleton's insurance provider does not have to pay the plaintiffs' legal costs associated with their successful challenge to the constitutionality of the city's immigration statute.¹⁰²

D. Implications for the Future

These measures reflect local frustrations about perceived inaction by the federal government and fuel the greater debate of whether controlling immigration is a federal responsibility.¹⁰³ On a broader level, these legislative efforts mirror the trends in employment litigation this year, demonstrating heightened responses to epidemic unemployment which create new avenues of employer liability yet to be fully clarified by the courts. At least for now, the full extent of the danger remains hidden. The obvious goal is to prevent litigation by your employees. Part VI discusses proactive measures available to companies to discourage these suits.

¹⁰⁰ *Id.* at 40. The city plans to appeal to the United States Supreme Court. Julia Preston, "Court Rejects a City's Efforts to Restrict Immigrants," N.Y. Times, September 10, 2010, at A12.

¹⁰¹ *Id.* at 39.

¹⁰² "Panel: Hazleton insurer won't pay for plaintiffs," November 7, 2010, <http://thetimes-tribune.com/news/panel-hazleton-insurer-won-t-pay-for-plaintiffs-1.1060627>

¹⁰³ For more discussion about the expanding movement by states to combat employment of illegal immigrants, *see* <http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration-and-emigration/arizona-immigration-law-sb-1070/index.html?inline=nyt-classifier>

VI. Preventing Your Company From Being Sued

A. Background

One of the main issues that all companies have to deal with on a day-to-day basis is employee relations. One of the most effective ways to prevent problems with staff and employers is to maintain updated and properly drafted employment related documents. This begins with the offer letter, if appropriate, to be provided to prospective hires and includes the company's policies and procedures handbook. Another factor to consider is whether the employer should have an arbitration agreement to resolve employee disputes. It is clear that if a company invests the appropriate amount of time and resource in developing its employment related documents, a great deal of management strife and potential legal liability can be avoided.

B. Employee Handbooks

Every company, no matter how large or small, should have a written employee handbook. Although there is no need to be complex, it is an absolute necessity to ensure that the company is protected. In addition, an employee handbook should educate your employees as to the benefits of working for the company and articulate both the employee's and the employer's mutual expectations.

Every employee handbook should also contain an "employment-at-will" disclaimer. In most cases, an appropriate disclaimer is a clear and unambiguous statement in the handbook that the company's policy statements and personnel practices are not intended to form express or implied contracts regarding the duration of terms and conditions of employment and are not promises that the policies will be applied in every case.

Equally important to an "employment-at-will" disclaimer is an equal employment opportunity statement/anti-discrimination policy. This policy should state the company provides

equal employment opportunities to all employees and applicants without regard to race, creed, color, sex, national origin, etc. as federal and state law provide.

Some businesses or companies believe it beneficial to require employees to use arbitration as a means of dispute resolution. Inserting an arbitration provision in an employee handbook can be an effective way to keep discrimination claims out of the courts. However, a recent case from the United States Court of Appeals for the Third Circuit teaches that the mere promulgation or existence of a company-wide arbitration policy is not enough to make it binding on employees – they have to know about it.

C. Kirleis v. Dickie, McCamey & Chilcote, P.C.¹⁰⁴

This case came to the Third Circuit after the district court denied the employer’s motion to compel arbitration. The employee, an attorney and a partner in the defendant law firm, filed two complaints in the district court alleging sex discrimination, retaliation, and hostile work environment in violation of federal and state law.¹⁰⁵ The defendant moved to compel arbitration, “citing a mandatory arbitration provision in its bylaws.”¹⁰⁶ The operative bylaw was Section 9.01:

(a) General Rule: Any dispute arising under these By-Laws including disputes related to the right to indemnification, contribution or advancement of expenses as provided under these By-Laws, shall be decided ... in accordance with the commercial arbitration rules of the American Arbitration Association, before a panel of three arbitrators, one of whom shall be selected by the [law firm], the second of whom shall be selected by the shareholder, director, officer, or indemnified representative and the third of whom shall be selected by the other two arbitrators.¹⁰⁷

¹⁰⁴ 560 F.3d 156 (3d Cir. 2009).

¹⁰⁵ *Kirleis*, 560 F.3d at 158-59.

¹⁰⁶ *Id.* at 159.

¹⁰⁷ *Id.*

The employee did not dispute the existence of the mandatory arbitration provision or claim that it was ambiguous. Rather, she asserted that she had never been provided with a copy of the bylaws until the employer annexed it to its motion to compel arbitration.¹⁰⁸ This was dispositive. The Court held simply that “[b]ecause the bylaws were not distributed to [the employee], she could not have agreed to arbitrate her claims.”¹⁰⁹

It is thus absolutely critical that the handbook contain an acknowledgement provision that each employee must sign. Establishing with documentary proof that an employee read and understood the terms of an agreement to arbitrate – or an anti-discrimination policy or complaint procedure – contained in a handbook or promulgated elsewhere will avoid problems like the one encountered in *Kirleis*.

D. Best Practices

The following five best practices are useful tools to avoid your company from getting sued:

1. Create a comprehensive employee handbook that: (1) makes clear that the employment relationship is “at-will”; (2) articulates the anti-discrimination policy; and (3) sets forth an easy-to-understand complaint procedure.
2. Constantly revise the handbook to make sure it’s current with developments and trends in the law.
3. Make sure that your employees have read the handbook and familiarized themselves with its provisions. Require each employee to affirm in writing that they’ve read the handbook and agree to be bound by its terms.
4. Evaluate internally whether it’s advantageous or cost-effective to require arbitration as a means of dispute resolution. Private arbitration fees can eclipse the cost of litigation.
5. Make the handbook the sole source of policies and procedures to avoid ambiguity or conflicting policies.

¹⁰⁸ *Kirleis*, 560 F.3d at 159.

¹⁰⁹ *Kirleis*, 560 F.3d at 161.

VII. Conclusion

We witness advances in the law every day. The employment litigation landscape continues to evolve, creating both new opportunities and new challenges for employers. Taking advantage of these opportunities while anticipating and adapting proactively to the challenges will serve employers and attorneys well in this brave new world.