

# What's **New** & What's **Next** in Employment Law for 2012

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Chief Legal Officer, ManpowerGroup North America



ManpowerGroup™



Thursday, January 26, 2012

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# What's **New** & What's **Next** in Employment Law for 2012

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# Today's Agenda

**What Are YOU Thinking?**

**What's New?**

**What's Next?**

**2012 "Stay Out of Jail" Action Items**

**Smartest Person in Our Audience Quiz**

**2012 Employment Law Tool Box**

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Please consult with your own Legal and/or HR departments before making any major changes.

You have been warned.

WHAT ARE  
**YOU**  
THINKING?

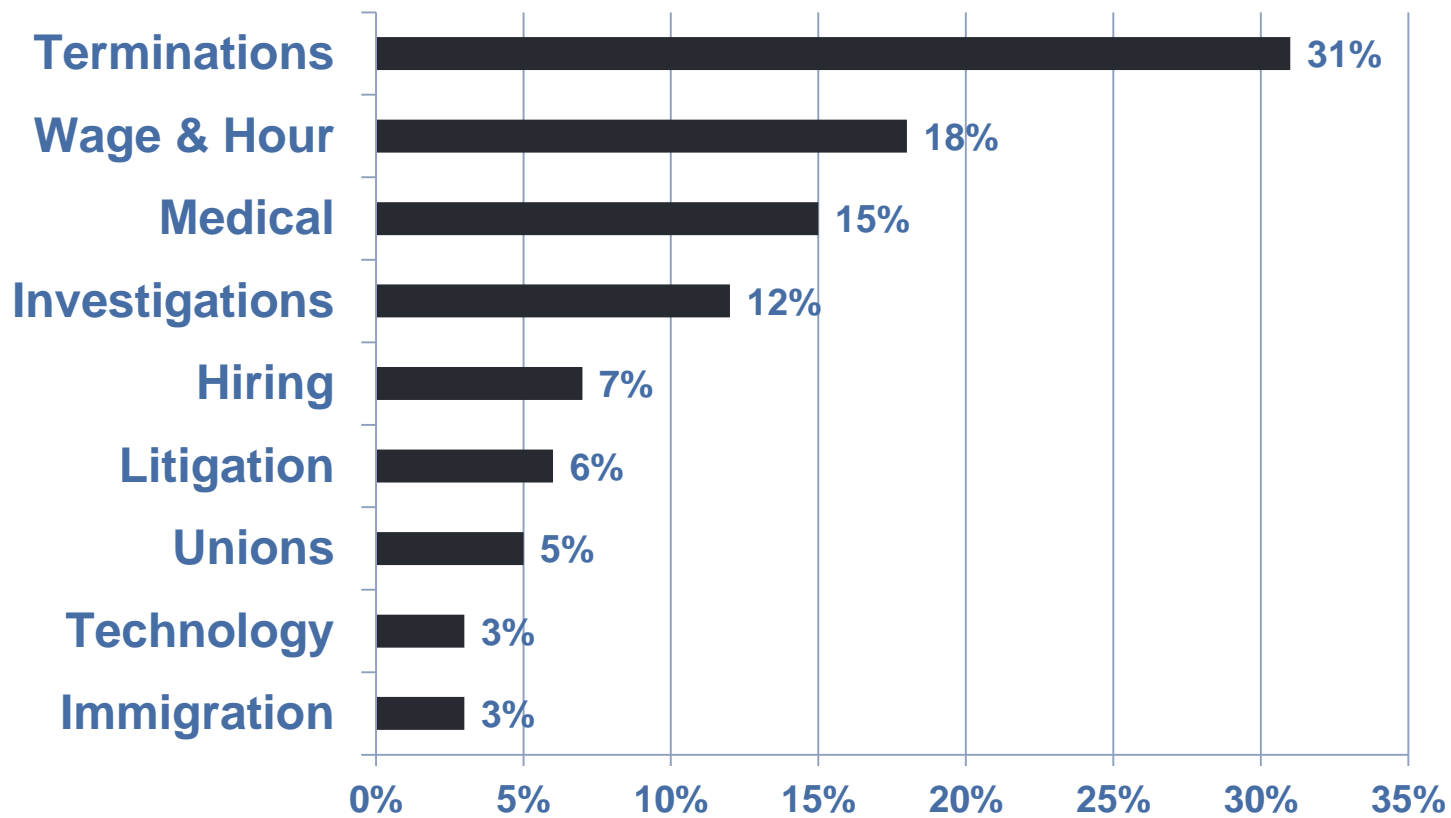




Question  
01

**Which area of employment law gives you the most headaches?**

**Which area of employment law gives you the most headaches?**





**What one workplace issue concerns you most heading into 2012?**

**Everything.**



ADA ADEA Audits Benefits  
Diversity EEOC Engagement  
FLSA FMLA Harassment Hiring  
I9s 1099s ICE Investigations  
NLRB OFCCP OSHA Privacy  
Retaliation Retention RIFs SSA  
Talent Technology Terminations  
UC USERRA Wage & Hour WC

What's New  
& What's Next

# SUITS



**Question: Which of these are true?**

**A. Employment disputes are the #1 legal headache**

**B. Discrimination claims are at an all-time high**

**C. Employers win < 50% of employment suits**

**D. 1 / 4 companies spend > \$5M / year on litigation**

**E. All of the above and much much more**

## Question: Which of these are true?

A. Employment disputes are the #1 legal headache

B. Discrimination claims are at an all-time high

C. Employers win < 50% of employment suits

D. 1 / 4 companies spend > \$5M / year on litigation

E. All of the above and much much more

# More More

**More Enforcement: up for third straight year**

**More Suits: 1 / 5 has 50+**

**More Big Suits: 4 / 10 have suit seeking \$20M+**

**More Investigations: 91% expect increase or stay same**

**More Costs: median spend up 40% to \$1.4M**

# What's New? Supremes' Greatest Hits

## Pro-employee

- Retaliation Expanded
- Beware the “Cat’s Paw”

## Pro-employer

- Nationwide Class Action Restricted
- Churches Don't Have to Hire Atheists
- Class Waivers Are OK (Or Are They?)

## **Quarterly Litigation Index: Are you seeing an increase in employment law claims?**

**A. Yes, substantial increase**

**B. Yes, moderate increase**

**C. No change**

**D. No, moderate decrease**

**E. No, substantial decrease**

# What's Next? More More More

**Even More Enforcement**

**Even More Class Actions**

**Even More \$\$\$**

# What's Next? The Supremes

**Health Care Reform**

**Outside Sales Exemption**

**ERISA Denial of Benefits Standard**

What's New  
& What's Next

# WAGE & HOUR



# TWEET-O-RAMA

What celebrity was recently sued for a plethora of wage and hour violations?

**@manpowerblawg**



# What's New? The Latest

**"Class Action Crescendo" Continues**

**Violations in 73% of Actions**

**DOL Timesheet App**

**IC "Amnesty"**

**Jail for Violators**

**Don't Mess with HR**

# What's Next? Hot Spots

**IC Classifications**

**OT Classifications (especially Administrative)**

**Work @ Home**

**Pre-shift “Work” (Donning/Doffing, Logon/Logoff)**

# What's Next? Hot States

**California**

**Illinois**

**Massachusetts**

**Minnesota**

**New Jersey**

**New York**

**Pennsylvania**

**Washington**

**TWEET-O-RAMA**

**Lady Gaga**



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What's New  
& What's Next

# TERMINATIONS



# TEXT-O-RAMA

In one word, what's the absolute #1 thing you can do to get fired fast?

414/899-0126



# Top Ten Termination Troubles

10. Not telling real reasons
9. Poorly planned termination meeting
8. Ignoring policies and contracts
7. Bad post-termination communication
6. Ignoring past practice
5. Emotion instead of facts
4. Not getting a release
3. Inadequate documentation
2. Not treating with dignity and respect
1. NOT firing someone who should be fired

# Termination Test

**Notice**: Reasonable notice of consequences?

**Proof**: Sufficient evidence that guilty as charged?

**Rule**: Related to (a) efficient and safe operations and (b) performance company should reasonably expect?

**Consistency**: Rule consistently applied to all?

**Investigation**: Full, fair and timely?

**Penalty**: Punishment fit the crime, considering (a) seriousness of offense and (b) service record?

**Don't do this.**

# TEXT-O-RAMA ANSWER

Lie



What's New  
& What's Next

# Ethics



# What's New?

**70% Violate IT Policies**

**Record 65% Reported Bad Workplace Behavior**

**13% Pressured to Break the Rules (up 63%)**

**22% Faced Retaliation (up 47%)**

**“You’re Fired”: CEOs, HR, Even Legends**

**Question: Are we getting more or less ethical?**

**A. More**

**B. Same**

**C. Less**

What's New  
& What's Next

# TECHNOLOGY





## Latest Stats: Employees

**62% “couldn’t live without the Internet”**

**53% would rather lose nose than Facebook**

**45% would swap pay for SM access**

**32% rate Internet as important as water, food, air & shelter**

**29% access X-rated sites**

**28% have posted work-related photos**

**22% have posted / tweeted about a co-worker**

**21% would turn down a job if unsocial**

**Question: How do those about to enter the workforce rank the following in order of importance?**

**A. Social Activities, Romance, Music, Internet**

**B. Internet, Social Activities, Romance, Music**

**C. Music, Social Activities, Internet, Romance**

**D. Romance, Internet, Music, Social Activities**

**Question: How do those about to enter the workforce rank the following in order of importance?**

**A. Social Activities, Romance, Music, Internet**

**B. Internet, Social Activities, Romance, Music**

**C. Music, Social Activities, Internet, Romance**

**D. Romance, Internet, Music, Social Activities**



# Latest Stats: Employers

**73% do no SM training**

**68% monitor internet activity**

**58% say SM benefits outweigh risks**

**56% block access to some sites**

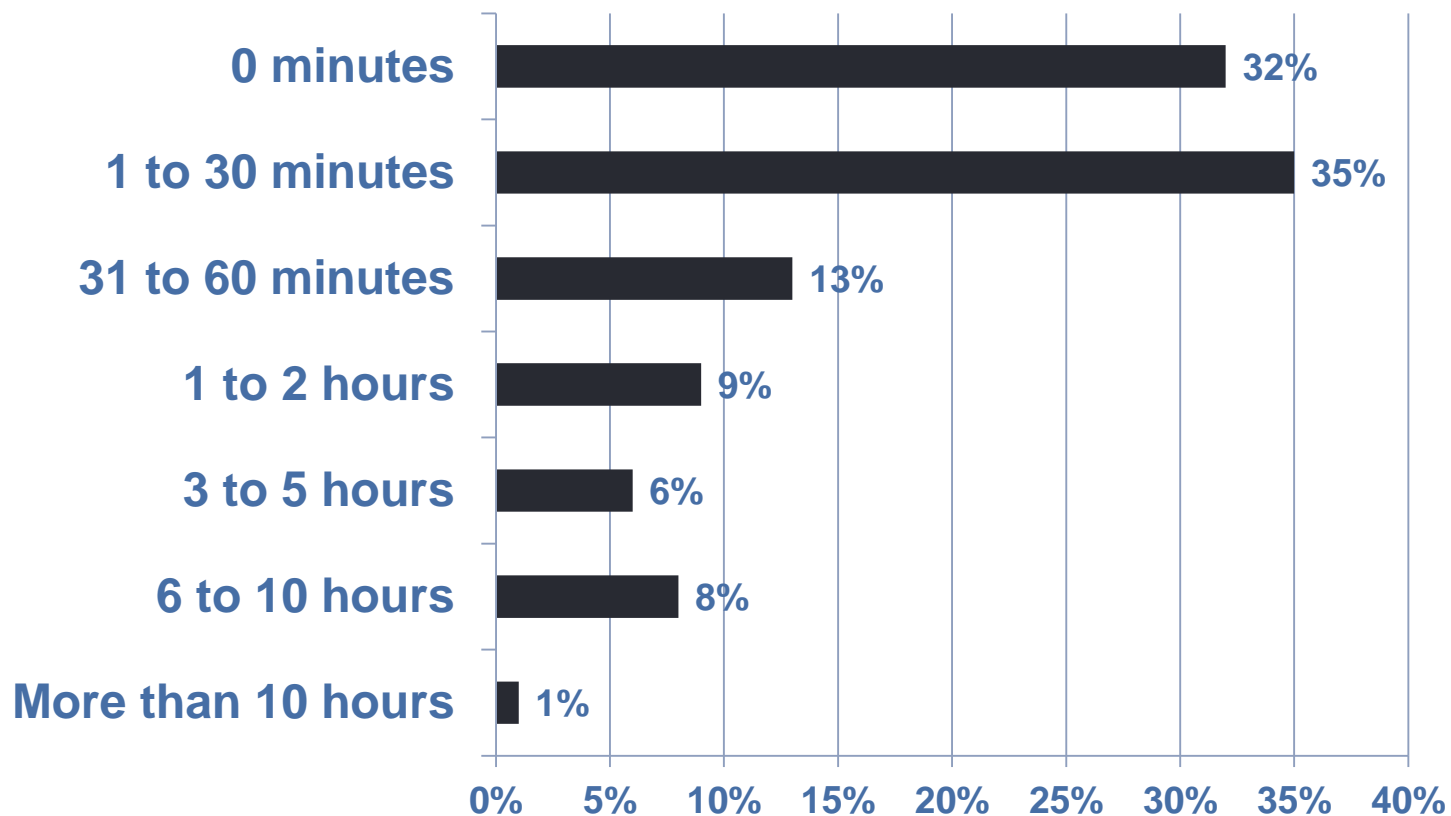
**45% use SM to screen**

**31% have disciplined for postings about employer**

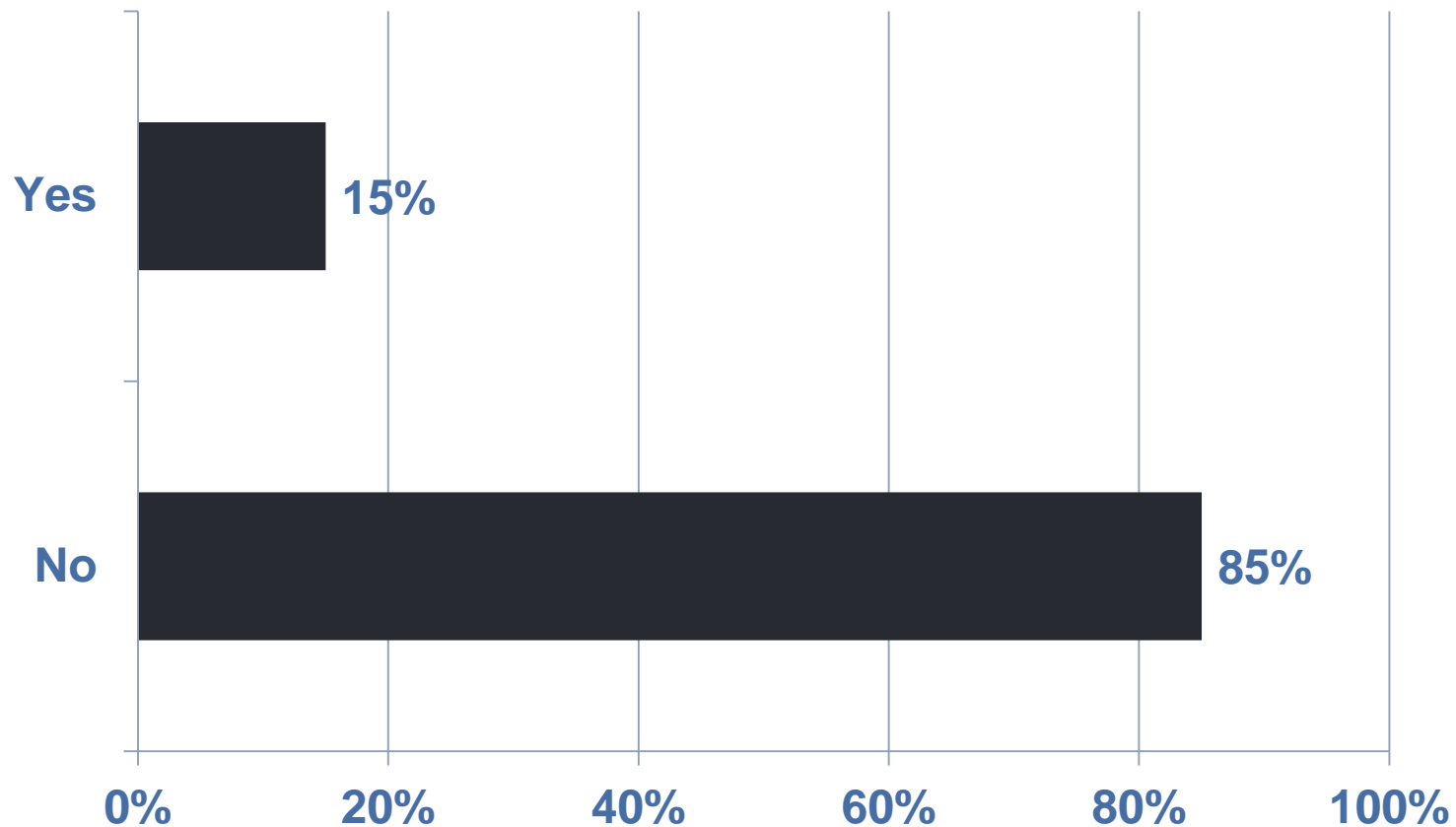
**25% have disciplined for excessive SM use**

**19% ban SM**

**How much time do you spend using social media @ work each week?**



## Has your company had a SM-related legal issue in the past year?



# Tech Tips



**Reasonable policy + consistent enforcement**

**Consider SM agreements**

**Train employees**

**Don't "friend," intercept, steal passwords or deceive**

**Consistent screening process: job-related**

**Monitor SM but don't overreact**

## QUARTERLY INDEX

Do you currently use a social networking tool?

A. Yes

B. No

C. What's social networking?

## QUARTERLY INDEX

What do you use most @ work?

A. Facebook

B. Google+

C. LinkedIn

D. Twitter

E. YouTube

# TEXT-O-RAMA

What one word would you use to describe SM in today's workplace?

414/899-0126



What's New  
& What's Next

**NLRB**



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# What's New?

**Recess Appointments**

**"Ambush" Election Rules**

**Bigger Than the Supremes?**

**Union Rights Posting (Or Not)?**

**Fun with Facebook**

# Facebook Firings

**Don't discipline for  
comments about wages  
or work conditions**

**Be especially wary of  
group comments**

**OK (maybe) to discipline  
for comments unrelated  
to work conditions**

**Review policy to make  
sure not overbroad  
or out-of-date**

What's New  
& What's Next

**ADA**



# What's New?

**Record # of Claims**

**Final ADA Rules**

**Leave Policy Scrutiny**

**OFCCP 7% Proposal**

# Big Suits

**\$20M for Inflexible Leave**

**\$8M for No Accommodation, Retaliation**

**\$3M for No Accommodation, Retaliation**

**\$2.6M for No Accommodation, Retaliation**

**A \$1.39 Bag of Chips is Cheaper Than a Lawsuit**

# What's Next?

**More Claims**

**“Presumed” Disabilities**

**Interact, Interact, Interact**

**Accommodate, Accommodate, Accommodate**

# Job Accommodation Network

[jan.wvu.edu](http://jan.wvu.edu)



What's New  
& What's Next

**AGE**



# What's New?

**Record # of Claims**

**Nearly 1/2 are in the age-protected class**

**63% have faced discrimination**

**Toughest for employers to win**

**"Business Necessity Test" Eliminated**

# Big Suits

**\$18M: Not What the Doctor Ordered**

**\$3M for 3M**

**Age Claimant Says Judge "Too Old"?**

**Just Say No to Speedo?**

# What's Next?

**"Graying" Workforce = More Claims**

**New Regs = More Claims**

What's New  
& What's Next

# DISCRIMINATION



# What's New?

**Is the “Mancession” Over?**

**GINA's Here (But Has Anyone Noticed?)**

**VOW to Hire Heroes Act**

**DOL Retaliation Fact Sheets**

# Big Suits

**\$6M for "Reverse" Discrimination**

**\$4M (x3) for Race Discrimination and Retaliation**

**\$3M for Arrest Record Discrimination**

**Most Ironic Case of 2011**

**Signs of the Apocalypse?**

**\$2.6M for EEOC's "Sue First, Ask Questions Later"**

# What's Next?

**Unemployment Discrimination?**

**State Background Check Restrictions?**

**Paid Sick Leave?**

**Sexual Orientation / Gender Identity?**

**Bullying?**

What's New  
& What's Next

# HARASSMENT



# What's New?

**Claims Down 26%**

**64% Say It's a Problem (down from 85%)**

**69% of Women Say It's a Problem (59% of Men)**

**24% of Women Have Been Harassed (down from 32%)**

**10% of Men Have Been Harassed**

**41% Report Harassment (up from 33%)**

# What's Next?

**Big Verdicts Continue?**

**Execs = Big \$\$\$**

**Cain Effect?**

What's New  
& What's Next

**OSHA**



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# What's New?

**Injuries / Illnesses Down for 8th Straight Year**

**Restricted Cell Phone Use by CMV Drivers**

**Winter Storms Web Page**

# What's Next?

**"Knowing Violations" = Record Fines, Jail Time**

**Post Annual Summary by February 1**

Official 2012 Stay Out Of Jail

# **ACTION ITEMS**



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# 2012 ACTION ITEMS

## KNOW THE LAW

## FOCUS ON KEY PRIORITIES

- Known violations
- Systemic issues
- Wage & hour (especially pre-/post-shift, donning/doffing, work @ home)
- Medical leave (especially inflexible policies)
- Technology (policy, training, consistent enforcement)

## INVESTIGATE & DOCUMENT ALL CLAIMS

## BEWARE RETALIATION

## USE THE TOOL BOX

**Love.**

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