



What's **New** and What's **Next** in Employment Law for 2011

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Manpower®



Today's Agenda

- What's New?
- What's Next?
- What Are You Thinking?
- Text-o-rama
- Smartest Person in the Audience Quiz
- Tools & Tips
- Employment Law Sing-along



Official Disclaimer

The material presented herein should not be relied upon or construed as legal advice. For specific information on recent developments, particular factual situations or the effect of a particular law, the opinion of qualified legal counsel should be sought.

Please consult with your own Legal and HR Departments before making any major changes.






What's
NEW?

trends

trends


trends

Latest Employment Indicators

- **Employment Situation:**  36,000
- **Unemployment:**  9.0%
- **Labor Force Participation:**  64.2%
- **Employment/Population:**  58.4%
- **Employment Outlook**  9.0%
- **Economist Reaction:** “lousy,” “mysterious,” “confusing”


(Sources: Bureau of Labor Statistics, The Wall Street Journal, CNNMoney, Manpower Inc.)

Behind the Numbers

- **Employment Situation:**  36,000
 - Need 200,000 for sustained growth
 - Barely enough to make a dent in the 8M+ jobs lost
 - Up in manufacturing and retail
 - Down in construction, transportation and warehousing
 - Unchanged in everything else
 - Bad weather hurt: probably 100,000+ without
 - At this pace: 219 months – *mid-2029* – for full comeback

(Sources: Bureau of Labor Statistics, The Wall Street Journal, CNNMoney, Manpower Inc.)

Behind the Numbers

- **Unemployment:**  9.0%
 - Lowest in nearly two years
 - Largest two-month decline since 1950s
 - Still waaaaay beyond the 6% “full employment” rate

Non-traditional Numbers Up

- **More Miles:** leased car mileage up 17% = more people are commuting and more businesses are leasing
- **More Daycare:** daycare hiring exceeds the average = more people are heading back to work
- **Fewer Disability Claims:** disability claims down 20% = individuals with minor health issues are finding work again

(Sources: CNNMoney, LeaseTrader.com, Economic Outlook Group, Social Security Administration)

Is the U.S. Workforce STRESSSESSED Out?

- 81% of HR professionals: more fatigue than ever before
- 80% of medical expenses are stress-related
- 40% are sleep-deprived
- 33% are “chronically overworked”
- 32% increase in workweek in past 25 years
- 25% nap at work

(Sources: WorkForce Software, Harris Interactive, Workplace Power Outage Survey, Sage Software Survey, Urban Mobility Report, Business Week, Families and Work Institute, Centers for Disease Control and Prevention)

More Stress = More Lawsuits

- **The Bottom Line:** Companies lose between \$200-\$300 billion each year due to absenteeism, tardiness, burnout, decreased productivity, WC claims, turnover and insurance costs tied to work-related stress.
- **The Lesson:** Be nice to your employees.

(Source: National Safety Council)



Is the “Mancession” Over?

- 2010: Women outnumbered men in workforce for first time
- Recession: Men lost 2X as many jobs as women
- Post-Recession: Women only 1/10 of jobs added

(Sources: Bureau of Labor Statistics, New York Times, Catalyst Inc.)

laws

laws

laws



How much does it cost each year per employee for the average company to comply with federal regulations?

- A. \$105.85
- B. \$1,058.50
- C. \$10,585.00
- D. \$105,850.00
- E. It is impossible to comply with federal regulations

Health Care Reform: What's Up For 2011?

- **Comply + Watch:** Implement what's required and wait to see what happens next
- **FSAs:** can't be used for over-the-counter drugs unless a prescription
- **Young Adults:** can stay on until age 26
- **Pre-existing Conditions:** kids under 19 can't be denied
- **Preventive Care:** 100% coverage
- **Lifetime Limits:** none on essential care



Health Care Reform: What's Up With Congress?



- **Total Repeal Dead:** Senate voted down
- **Repealed 1099 Rule:** Dropped requirement to file 1099 for every vendor paid more than \$600
- **Next Targets:**
 - Funding
 - Individual mandate
 - Tougher medical malpractice lawsuit limits
 - States more flexibility (e.g., Medicaid)
 - Individuals more flexibility to keep plans they like and to cross state lines or form groups to buy insurance

Health Care Reform: What's Up With the Courts?

- **Florida:** Entire law is void
- **Virginia:** Individual mandate is void
- **Michigan:** Entire law is fine
- **Next stop:** Supremes
- **Until then:** Comply and watch





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(Source: Committee on Oversight and Government Reform)

New E-Verify Self Check



- Launching **March 18**
- Designed to “provide a vehicle for an individual to proactively check work authorization status prior to the employer conducting the E-Verify inquiry”
- Previously, only employers had access

H-1B Visa Update

- 64,550 H-1B max hit
- **Exceptions:**
 - 20,000 for foreign nationals with U.S. master's or higher degree
 - Extending period of stay
 - Changing terms of employment
 - Working concurrently under a new H-1B for another employer or changing employers
- **April 1:** filing period opens for next fiscal year (October 1)

New ADA Access Regulations

- **Effective March 15**
- **Greater access to “public accommodations”** (e.g., hotels, restaurants, stores, theaters, banks, health care and other service offices)
- Everything from amusement rides to miniature golf to restrooms -- new rules for ticketing, service animals, wheelchairs, Segways and communication
- **By March 15, 2012:** comply with 2010 Standards for Accessible Design for new construction and alterations (with limited exceptions)





What recently enacted law requires nearly 500 rulemakings by various federal agencies and is projected by some to impair U.S. growth and job creation by as much as 4%?

- A. Lilly Ledbetter Act
- B. Dodd-Frank Act
- C. Electronic Discovery Act
- D. Health Care Reform Act
- E. Business Is Illegal in U.S. Act

New Workplace Lactation Interpretation

- **Where?** “Place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public.”
- **When?** 2-3 breaks of 15-20 minutes per 8-hour shift.
Factors: (1) time to get to and from the space, (2) time to set up equipment, (3) pump efficiency, (4) clean-up time and (5) time to store the milk.
- **Paid?** Generally unpaid but covered by same rules as other breaks. If allow short breaks (e.g., 20 minutes or less) for other purposes, time will be considered compensable hours worked.
- **FMLA?** Can't be counted toward FMLA leave.
- **Penalties?** Injunction, reinstatement and lost wages.

New OSHA PPE Guidance

- New directive to help investigators determine whether employers are in compliance with Personal Protective Equipment (PPE) standards
- When employers are required – and not required – to pay for PPE, including PPE worn offsite or owned by employees
- Includes FAQs, decades of interpretations



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(Source: Assessing Regulatory Impediments to Job Creation)

Executive Order 13563

(January 21, 2011):

**Federal agencies directed to
“take into account . . . the cost of
cumulative regulations.”**

“Regulatory Impediments to Job Creation”

- February Hearings
- Study: *Assessing Regulatory Impediments to Job Creation*
- OSHA withdrew noise standards and MSD reporting
- Concerns about potentially negative impact of Dodd-Frank Act and other laws/regulations

New SEC Exec Comp Rules

- **Say-on-pay Vote**
 - At least once every 3 years
 - Disclose in Compensation Discussion and Analysis (CD&A) consideration the company gave the vote results
- **Vote on Frequency of Vote**
 - Every 6 years on how often shareholders want to conduct say-on-pay vote
 - Disclose the results in SEC Form 8-K no later than (1) 150 days after the vote and (2) 60 days prior to the deadline for submitting shareholder proposals for the next annual shareholder meeting
- **Small company exemption**
 - Companies with public floats of less than \$75 million are temporarily exempt
 - Exemption expires for annual meetings on or after January 21, 2013

New SEC Exec Comp Rules

- **Golden Parachutes**
 - Requires shareholder advisory vote to approve comp arrangements related to a merger, acquisition, consolidation, third-party tender, going-private transaction and/or proposed sale or other disposition of substantially all assets
 - Vote and disclosure compliance is required in all proxies and other documents filed on or after **April 25**

lawsuits

lawsuits

lawsuits



According to the latest data, what are an employer's odds of winning at trial?

- A. It is unlawful for employers to win
- B. 22%
- C. 42%
- D. 62%
- E. 82%



More, More, More

- **More Complaints:** Record # of EEOC complaints (99,922)
- **More \$\$\$:** Record \$404 million in EEOC recoveries
- **More Class Actions:** 2,000+
- **More Mediations:** 9,370
- **More Big Verdicts:** Median up 46% to \$317,032
- **More Big Settlements:** Median of \$95,000 is highest in decade



(Source: EEOC, Jury Verdict Research)

Why More, More, More?



- More unemployment = more complaints = more damages
- More government enforcement
- More EEOC outreach to employees
- More EEOC personnel
- More pro-employee changes to employment laws
- More layoffs, RIFs and terminations
- More poor treatment of employees



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(Source: Jury Verdict Research)



Big Factoids

- **Biggest increases:** wage & hour, unions and age
- **Biggest exposure:** wage & hour
- **Biggest verdicts:** disability
- **Biggest trial risk:** pregnancy
- **Biggest target:** government


(Sources: Fulbright & Jaworski, Jury Verdict Research)



KEY FOCUS Wage & Hour Trends

- **Hot Areas**
 - Overtime misclassifications (especially administrative)
 - Independent contractor misclassifications
 - Off-the-clock (pre-/post-shift work, computer logon/logoff, smart phone usage, calling in or checking e-mail to get assignments)
 - Tip-pooling
- **We Can Help Campaign:** PSAs encouraging claims
- **Right-to-know Initiative:** Employers may be required to analyze all independent contractors and explain to workers why they're classified that way
- **DOL-ABA Program:** connects employees with FLSA lawyers

KEY FOCUS Wage & Hour Solutions

- **Know the Law:**  Cheat Sheets
- **Train** managers and employees on time-keeping requirements
- **Implement complaint system:** investigate promptly and thoroughly
- **Audit** classifications and records
- **Address** any pay discrepancies immediately
- **Remote Device Policy**
 - Limit use during non-work hours, vacations and leaves of absence
 - Limit use to exempt employees or at express manager direction
 - Annual acknowledgment that recorded all time worked
 - Periodic audit of hours spent on company phones and computers



What is the #1 most common discrimination claim?

- A. Age
- B. Disability
- C. Race
- D. Retaliation
- E. Sex



What is the #1 most common discrimination claim?

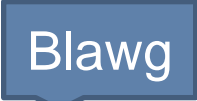
According to the latest EEOC data . . .

- A. Age (23,264)
- B. Disability (25,165)
- C. Race (35,890)
- D. Retaliation (36,258)**
- E. Sex (29,029)

KEY FOCUS Retaliation

- What is retaliation? “Adverse employment action”:
 - Negative performance evaluation
 - Discipline notice
 - Investigation that goes into character instead of complaint
 - Suspension
 - Assignment change
 - Transfer (even with one-time bonus and pay increase)
 - Denial of promotion
 - Threats
 - Termination
- What is not?
 - “Trivial” actions
 - Performance improvement plan
 - Rude (but not unlawful) comments

KEY FOCUS Retaliation Prevention

- Enforce policies consistently
- Train managers
- Beware suspicious timing
- Remember that retaliation applies to third parties
- Investigate, investigate, investigate (see )
- Review entire employee history before acting
- Take action if appropriate

What EEOC Claims Are Rising Fastest?

1. Disability (up 17.3%)
2. Religion (up 11.9%)
3. Equal pay (up 10.8%)
4. Retaliation (up 7.9%)
5. Race (up 6.9%)

Note: GINA charges went from 0 to 201 in its first year.

(Source: EEOC)

The Supremes



Third Parties Are Protected From Retaliation

Thompson v. North American Stainless

- Employee claimed he was fired because fiancée filed discrimination claim
- Fell within “zone of interests” protected by Title VII
- “We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancée would be fired.”
- “We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize.”

The Supremes



Employers May Ask Sensitive Job-related Questions

NASA v. Nelson

- Employers have broad latitude to probe past behavior, so long as (1) job-related and (2) confidential
- NASA's background checks of drug treatment and other negative "general behavior or conduct" appropriate because tailored to the government's legitimate interest of managing its workforce

Big Verdicts



- **\$175M for Sex Discrimination.** Pharmaceuticals company settled class action accusing it of discrimination against 5,000+ female sales reps in pay and promotions.
- **\$100M Sex Discrimination Suit.** A female senior HR manager filed a \$100M suit accusing a global electronics company of discriminating against women in pay and promotions.
- **20 Million Reasons to Investigate.** \$15M and \$5M verdicts in sex discrimination cases where the employer allegedly failed to investigate adequately and take corrective action.
- **18.5 Million Reasons Not to Retaliate.** The past year featured seven different million-plus retaliation verdicts totaling \$18.5M.
- **9.4 Million Reasons to Avoid “Reverse” Discrimination:** On the heels of the Supremes’ *Ricci* decision last year, juries awarded \$5.8M and \$2.6M in “it’s-OK-to-discriminate-against-them-they’re-only-white” cases.

Big Verdicts



- **\$8.7M for Wage & Hour Violations.** Telecommunications company settled 3 class actions for failure to pay for pre- and post-shift work (including computer logon/logoff) and work completed during unpaid meal breaks.
- **7.8 Million Reasons Not to Terminate Whistleblowers.** \$6.5M to police officer allegedly fired after blowing whistle on misconduct and \$1.3M for research scientist fired after contacting OSHA with safety complaints.
- **\$5.8M for Egregious Sex Discrimination.** Female assembly worker alleged harassment on a daily basis plus a transfer to a physically demanding job even though she was being treated for a cervical injury.
- **\$3.2M “Malicious” Wage & Hour Case.** A jury awarded a sportswear model \$3.2M when she was denied promised commissions and OT despite working 70+-hour weeks during 8 months on the job.

Big Verdicts



- **\$3.2M for Disability Discrimination.** Grocery chain allegedly fired disabled employees at the end of medical leaves rather than bringing them back to work with accommodations.
- **\$3M for Race Discrimination.** Use of subjective factors in the hiring process led to discrimination claims by minority janitorial candidates.
- **\$2.97M for Age Discrimination.** Disposal company allegedly targeted older employees in layoff decisions.
- **\$1.65M after Pay Audit.** Meat processor agreed to pay a class of 970 women for “systemic discrimination” discovered during a routine OFCCP audit.
- **\$1.6M for Pregnancy Discrimination.** Security company allegedly treated pregnant employees differently from others.
- **\$1.3M for Sex Harassment.** Female employees (including several teenagers) were subjected to a hostile work environment spanning more than 10 years by the store’s GM who was engaged to the store’s owner.

Other Key Rulings



- **Title VII Doesn't Protect Employees From "Generally Disagreeable Behavior."** General "bullying" and "unreasonable" conduct by a supervisor is not unlawful unless plaintiffs can prove they were targeted because of their protected class status.
- **Employers Can Discipline Substance Abuse Policy Violations.** Addicts and alcoholics (1) are not protected by the ADA unless they can prove their condition "substantially limits one or more major life activities" and (2) may be held to the same standards as other employees.

Not-so-key Rulings



- **Don't Destroy Evidence.** Court entered judgment against defendants who destroyed evidence by throwing a laptop off a building, running it over with a car and getting caught on videotaping saying “[if] this gets us into trouble, I hope we’re prison buddies.”
- **No Need to Yell “Fore.”** Court ruled that your co-worker can’t sue you if you forget to yell “fore” before hitting him/her with an errant golf shot.
- **Packer Discrimination?** Chicago car dealership sacked a used-car salesman for refusing to take off a Packer tie the day after the NFC Championship Game.

How to Get Sued and Lose Big



- Don't know the law
- Don't address potentially systemic discrimination
- Don't classify non-exempt employees and independent contractors correctly
- Don't address bad behavior by execs
- Don't adequately and promptly investigate complaints
- Don't accommodate disabilities
- Don't follow your own policies
- Don't refrain from retaliation

What I Learned From Jury Duty



- Never ever ever let a case go to a jury
- Never ever ever put a lawyer on a jury
- Don't lie (or even stretch the truth)
- Don't over-promise and under-deliver
- Don't hire an arrogant shark-ish lawyer
- Be very careful what you put in writing
- Be very careful whom you put on the stand
- Be nice to the jury
- Always always always be ethical



QUARTERLY LITIGATION INDEX:
**Are you seeing an increase in
employment law claims?**

- A. Yes, substantial increase
- B. Yes, modest increase
- C. No change
- D. No, modest decrease
- E. No, substantial decrease

lawyers

lawyers

lawyers



Death of the Billable Hour?

- The billable hour is “a relic of the past” that “perpetuates inefficiency” (Director of Litigation at a prominent law firm)
- Half believe the legal industry will “permanently change the way it does business”
- Alternative billing is more prevalent than ever before but only 1/6 have alternative billing for more than 50% of expenses
- **Bottom Line:** great time to negotiate with your lawyers

(Source: Fulbright & Jaworski)

The Problem

- 100s of firms
- Bills not reviewed by lawyers
- Hourly only
- No billing guidelines
- No settlement guidelines
- 99% “out-house”
- No external benchmarks
- No connection with business



The Solution

- Preferred providers
- Exhaustive bill review
- Fixed / flat fees
- Tough but fair billing guidelines
- Budgets for key matters
- Scorecards for major firms
- RFP process



The Solution

- Settlement decision trees
- ROI: out versus in
- Consider offshoring/inshoring
- External benchmarks
- Closer connection with business



The Results

- Saved \$2+ million first 2 years
- 0 trial losses
- Settlements down
- Fixed / flat fees and deep discounts
- Expenses far below external benchmarks
- True partnership with firms
- Business loves Legal



Resources

- Billing guidelines, budgets, scorecards, RFP process and other tools on the [Blawg](#)
- Need more? Available for consultation.

technology

technology

technology

Latest Techno Stats

- 90% of IT policies are out-of-date
- 90% surf the 'Net @ work
- 80% use social media to screen candidates
- 77% use Facebook @ work
- 70% have rejected applicants based on online info
- 70% text while driving (23 times more likely to crash)
- 54% ban use of social networking sites
- 50% ignore social media bans
- 47% spend more than 30 minutes on-line
- 25% change security settings to enhance socializing
- 21% would turn down a job if unsocial
- 111,262 companies on Glassdoor.com



(Sources: Consumer Reports, Vault.com, Wall Street Journal, Challenger, Gray & Christmas, Harris Interactive, ComputerWorld.com, Fulbright & Jaworski, Society of Corporate Compliance & Ethics, Cisco, Clearswift, Jobvite, Microsoft, Virginia Tech Driving Institute, Glassdoor.com)

“Facebook Firing” Case

- **The Facts**

- Employee posted highly critical remarks about her boss on her Facebook page
- Company fired the employee for violating its internet usage policy
- NLRB accused the company of interfering with the employee’s right to engage in protected concerted activity

- **The Settlement**

- Undisclosed terms
- NLRB (via Facebook): Company “agreed to revised its overly-broad rules to ensure they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work, and they would not discipline or discharge employees for engaging in such discussions.”

“Facebook Firing” Case

- **Can employees post whatever they want about me or my company online?** No. While employees have the right to discuss wages, hours and working conditions, employees do not have an absolute right to defame or disparage a company and/or its products, management or employees.
- **Should companies periodically review their social media policies to ensure that they’re not overly broad or out-of-date?** Yes. Visit the [Blawg](#) for a model policy.

Top 5 Worst Interview Questions Ever

- If you were shrunk to the size of a pencil and trapped in a blender, how would you get out? (Reportedly from Goldman Sachs)
- How many basketballs can fit in this room? (Reportedly from Google)
- On a scale of 1-10, how weird are you? (Reportedly from CapitalOne)
- A train leaves San Antonio for Houston at 60 mph. Another train leaves Houston for San Antonio at 80 mph. Houston and San Antonio are 300 miles apart. If a bird leaves San Antonio at 100 mph and turns around and flies back once it reaches the Houston train and continues to fly between the two, how far will it have flown when they collide? (Reportedly from USAA)
- If you were fired from this job, why would it be? (Unknown)

(Source: Careeroverview.com)

How Should Employers Deal with Technology?

- Implement reasonable policy
- Consistently enforce it
- Train employees
- Beware the profile
- Think hard before you hit “delete” or “send”
- Disclose if a blogger is selling
- Don't intercept communications while being made
- Don't steal social networking passwords
- Ignore purely personal communications
- Focus: job-related, job-related, job-related
- Visit the [Blawg](#)





Do you use a social networking tool?

- A. Yes
- B. No
- C. What's social networking?



If yes, what do you use most?

- A. Facebook
- B. Foursquare
- C. LinkedIn
- D. Tumblr
- E. Twitter

New Facebook Page (marktothmanpower)

unions

unions

unions

Latest Union Facts



- Membership at new low: 11.9%
- Only 6.9% of private sector is unionized
- Lost 1.4 million members since 2008
- Steady decline since the 1950s, when more than 1/3 workers were unionized

Drastic Changes?

- **NLRB Power.** “The NLRB has the ability to unduly increase union power and leverage without intervention by Congress.”
(U.S. Chamber of Commerce)
- **Union Rights Notice:** NLRB proposed rule making it mandatory for private employers to post notices informing employees of union rights
- **Facebook Firing:** NLRB sued employer for firing a union employee who criticized the company on Facebook
- **Increased Penalties:** NLRB announced new initiative to “systematically seek appropriate remedies” against employer ULPs in union elections
- **Easier Elections:** The National Mediation Board issued a rule changing votes needed to win a union election from majority of eligible voters to majority of those actually voting

Other NLRB Targets?

- **Back-door EFCA?**
 - Card check?
 - Fast-track elections?
 - Union access to company property?
 - Fast-track binding arbitration?
- **Other Bush-era Decisions**
 - E-mail organizing
 - “Salt” definition
 - “Supervisor” definition
 - Representation of non-union employees in disciplinary interview

NLRB Facing Political Challenges

- **Hearings** held by House Education and the Workforce Committee February 11 to discuss emerging trends and partisanship concerns at NLRB
- **Defund** attempt failed last week (250-176) but budget cuts could hit \$50M (about 1/5 of total budget)
- **Liebman and Becker terms expire** late 2011

Will There Be Football Next Year?

- **Contract Expires:** March 3
- **The Issues:**
 - How to divide the league's \$9 billion in annual revenue. The current deal gives the owners \$1 billion before players get their share. Owners are demanding \$2 billion.
 - Expanded 18-game schedule. Owners want to expand. Somewhat understandably, some players aren't fond of the idea of giving 350-pound people trying to maim them an additional two opportunities.
 - Other issues. A wage scale for rookies and benefits for retirees are also on the table.

Will There Be Football Next Year?

- **NFL ULP:** The NFL filed unfair labor practice charges against the union, alleging that the players are engaging in a “run out the clock” strategy in which they plan to decertify the union and then sue the league for antitrust violations.
- **Mediation:** The parties are now in nonbinding mediation overseen by the Federal Mediation Conciliation Service.
- **The Real Truth:** Clearly, this is all part of a vast conspiracy designed to keep the Packers from repeating as Super Bowl champions.

What's

NEXT?

More Enforcement, Enforcement, Enforcement

- **DOL:** 17,848 FTEs, \$12.8B budget authority
- **EEOC:** Increase of \$19M for “litigating systemic cases”
- **WHD:** Increase of \$15M + 107 FTEs to target independent contractor misclassifications
- **OFCCP:** \$109M + 786 FTEs to target affirmative action, systemic discrimination and federal contractor misclassifications
- **OSHA:** Increase of \$7.7M for Compliance Safety & Health Officers, \$6.4M to improve regulatory standards and \$6.0M for additional whistleblower investigators
- **EBSA:** \$41.4M + 179 FTE increase to target “egregious and persistent violators” as well as GINA and other new laws

The ICE Man Cometh Again?

- **New Audit:** targeting 1,000 companies suspected of hiring illegal immigrants
- **7 Million:** latest estimate of illegal workers in U.S.
- **Employment Compliance Inspection Center:** launched January 20 to pursue large-scale investigations
- **IMAGE:** ICE Mutual Agreement between Government and Employers is expanding
- **E-Verify:** push to make it mandatory for all companies + new self-check for individuals

(Source: Pew Hispanic Center)

How To Avoid the ICE Freeze

- **Follow the Law:** new online tools, FAQs, best practices to assist compliance
- **Audit Yourself:** inspect and take action on incomplete or defective I-9s
- **Train Managers:** not rocket science
- **Consider E-Verify:** ICE loves it
- **Visit the [Blawg](#):** IRCA Cheat Sheet and other tips
- **If ICE Comes Knocking:** Call a lawyer, don't tamper or destroy

Top 3 Projected Litigation Increases

- Discrimination
- Wage & Hour
- Union Issues

(Source: Fulbright & Jaworski)

New Laws?

- **WAGES Act:** FLSA Amendment to create minimum wage for tipped employees (\$3.75 and \$5.00 a year later).
Odds: Slim.
- **Worker Protection Against Combustible Dust Explosions and Fires Act:** OSHA is already drafting a proposed rule but proposed cost and burden is generating significant opposition.
Odds: Slim to None.
- **Ensuring Worker Safety Act:** Increased review process by U.S. Secretary of Labor of state OSH plans.
Odds: Slim to None.

New Laws?

- **Restoring Democracy in the Workplace Act:** Repeals National Mediation Board rule that changed union election process.
Odds: Slim.
- **Lifetime Income Disclosure Act:** Amends ERISA to require 401(k) sponsors to notify employees of the projected monthly income they can expect at retirement.
Odds: Slim.

New ADAAA Regs?

- ADAAA passed September 2008
- Proposed rules published September 2009
- EEOC approved December 2010 and released to Office of Management and Budget (OMB)
- Once OMB approves (could take several months), published in *Federal Register*
- Controversial provisions include list of impairments that are “presumed” to be disabilities without individual analysis

Unemployment Discrimination?

- **Public EEOC Meeting Last Week:** to “learn about the emerging practice of excluding unemployed persons from applicant pools.”
- **Testimony For:** Some claim that employers are systematically excluding the unemployed from the hiring process, which has a disproportionate effect on women, individuals with disabilities and other protected classes.
- **Testimony Against:** Others claim that the practice is uncommon, bad business and already addressed by other discrimination laws.

Other Hot Areas for 2011

- **Credit History Discrimination:** Nationwide action filed by EEOC.
- **“Reverse” Discrimination:** Don’t discriminate against non-minorities on the basis of diversity or out of fear of lawsuits from others.
- **Caregiver Responsibility Discrimination:** Kids and the elderly are important.
- **Generational Discrimination:** Avoid blanket statements like “all Baby Boomers are _____” unless you want to be sued.
- **Technology Struggles:** Can HR and lawyers keep up with ever-evolving technology?
- **Document Retention:** Courts continue to crack down on companies that fail to maintain documents and e-mails relevant to litigation.
- **Next EEOC Targets?** Criminal backgrounds, grooming, dress, bullying, baldness?

Next Up for the Supremes?

- **Cat's Paw Case**

- In *Staub v. Proctor Hospital*, the Court will answer: When is an employer liable for the unlawful intent of officials who caused or influenced -- but did not make -- an employment decision?
- The case deals with the so-called “Cat's Paw” theory of liability. Based on an ancient story in which a scheming monkey convinces a cat to steal nuts from a fire. The cat ends up with a burned paw and the monkey with a full stomach.

- **Health Care?**

OSHA's 2011 Docket

- **Publish 5 Final Rules**
 - Hazard Communications and Standards
 - Confined Spaces in Construction
 - General Working Conditions for Shipyards
 - Electric Power Transmission
 - Standards Improvement
- **Illness & Injury Prevention Program (I2P2):** “find and fix”
- **Anti-texting Educational Campaign:** don't text & drive

people

people

people



What are the top 3 words used to describe *Fortune's* Best Companies to Work For?

- A. Money, Money, Money
- B. Benefits, Perks, Vacation
- C. Values, Community, Fun
- D. People, Family, Time
- E. Anxiety, Nausea, Vomiting

The Dawn of the HUMAN AGE

Throughout history, the world occasionally experiences a change so transformational and all encompassing it redefines the epoch; we have experienced the Iron Age, the Industrial Age, the Information Age and now, we are entering a new age, the HUMAN AGE, where the true power of human potential will be fully realized.

*This is creating complexity and opportunity
in the marketplace*

Capitalism Talentism

The implication is that talent - as capital once was - is becoming the scarce resource in the economic world and a nation or corporation's means of attracting, mobilizing and liberating talent will be a key competitive differentiator.

Human potential will be the major agent of economic growth, and how to unleash then leverage that potential will be the key question organizations will need to answer

Talent is emerging as the new "IT"



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QUIZ



QUARTERLY EMPLOYMENT LAW THERMOMETER:

**Which employment law issue currently
gives you the most headaches?**

- A. Hiring
- B. Medical issues
- C. RIFs/Terminations
- D. Technology
- E. Wage and hour

Employment Law

SING-
ALONG

**Employment law can be easy
If you listen you surely won't fail
We wrote you this song
So please sing along
If you don't
You could end up in jail**



**There's plenty of new legislation
With new acronyms every day
If you visit our Blawg
You won't be in the fog
And big verdicts you
Won't have to pay**



**Remember this song
And you'll never go wrong
Yes we wish you the best
On your journeys
You'll stay out of court
And you won't have to
Pay no attorneys**



**Enforcement action's expanding
And so is the NLRA
And the ADAAA
Isn't going away
Get to know them now
Don't delay**



**Technology may give you headaches
The ICE Man may knock on your door
But if you prepare
Be consistent and fair
They won't ever bug you no more**



**Remember this song
And you'll never go wrong
Yes we wish you the best
On your journeys
You'll stay out of court
And you won't have to
Pay no attorneys**



**Be honest, respectful and fair now
Be ethical, trustworthy and true
Let your conscience be king
Yeah don't do anything
Your mom wouldn't want you to do**



**If you want the very best employees
I'll tell you just what you should do
Call **MANPOWER** today
Yeah, there's no better way
Without us you'll always be blue**



**Remember this song
And you'll never go wrong
Yes we wish you the best
On your journeys
You'll stay out of court
And you won't have to
Pay no attorneys**



THANK

YOU!