2011 Labor & Employment Roundtable

An in-depth discussion on current labor & employment trends and their impact on the workplace as presented by leading practitioners

Topics Include:
Social Media
Class Action Employment Litigation
Fair Labor Standards ACT
Employee Misclassification & Discrimination

Presented By:
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Presented by *The Legal Intelligencer*

Panelists from left to right: Timothy Kolman, John Romeo, Michael Homans, Marjorie Obod, Caroline Austin

MS. AUSTIN: Good morning. My name is Caroline Austin and it is a privilege to be here to moderate this labor and employment roundtable. Our goals today will be to discuss some of the hot topics in labor and employment law, including social media and employee monitoring, class action employment litigation, the Fair Labor Standards Act (FLSA), employee misclassification, the ADA Amendments Act of 2008, the Age Discrimination in Employment Act (ADEA), criminal background checks and finally, retaliation claims. Our outstanding panel will analyze recent trends in these areas and provide practical insight for employers, employees and defense and plaintiffs' attorneys.

SOCIAL MEDIA AND EMPLOYEE MONITORING

MS. AUSTIN: Let's begin with social media and employee monitoring. This topic has received significant media attention both locally and nationally. Let's start with Michael: Should employers use social media in the hiring process? What are some of the benefits and risks to using social media in hiring?

MR. HOMANS: Employers today really should do some basic Internet and social media searching before they hire someone, in my opinion. The benefit being they may learn things about the person, that are publicly available with minimal cost, that can assist in the hiring decision. However, I think it needs to be done by someone who has been trained in proper hiring criteria to make sure they don't consider protected characteristics such as race or religion. Failing to properly utilize the Internet and social media could run the risk of a negligent hiring claim. So, I advise employers to use social media, but coordinate it through human resources. And I don't think you want to keep a big paper trail of that search. I think it's something you do and then deal with the results if you find something of concern.

MS. AUSTIN: Tim, I want to get your opinions on this. Is there any advice that you are providing to your clients with respect to their use of social media, whether they have existing claims or whether they are contemplating bringing claims against their employers?

MR. KOLMAN: We warn our clients that if you have a Facebook or a Myspace page, these can be accessed by your employer, not just prior to hiring but also during your employment. The employee needs to be careful, especially in Pennsylvania, where an employee can be terminated for any reason or no reason. With respect to what Michael said, I think employers are taking a big risk by reviewing potential employees' social media participation because once the employer has viewed that information, there really is no going back. And if there is a problem with that employee later on, and the plaintiff's lawyer finds out about the employer's social media review, there is always the chance that the employee will claim unlawful discrimination on the basis that the employer discovered, through access to that media, the employee's age or race or disability and has now discriminated on that basis. I absolutely agree that if employers are going to look at employee social media, they must make sure that the individual doing so is properly trained. I'm not sure that the person doing that review should even be an HR employee from inside the company.

MS. AUSTIN: Let's get one more perspective. Marjorie, what is your advice to employers on whether they should be viewing social media sites with respect to hiring?

MS. OBOD: Certainly employers are concerned about potential hires who have badmouthed their current employers online. Inappropriate behavior and excessive partying are also concerns. Essentially, I would mirror Tim and Michael in terms of advising employers to distance themselves from that review and ensure that the person conducting the review is not going to take a protected characteristic into account. I would avoid using HR to conduct the review. I would also add that a lot of employers aren't asking us whether they should be looking at sites: they're already doing it.

MS. AUSTIN: John, I would like to turn our attention to "friending:" Do you think it is a good idea to permit subordinates and supervisors to "friend" each other?

MR. ROMEO: I personally don't think it's a good idea, I wouldn't do it myself and I certainly would caution my clients not to do it. That said, however, I wouldn't go so far as to have a global prohibition on it. In many respects, my advice to clients on issues involving social media actually originates outside the context of social media. That's because while the backdrop of social media is newer, most of the underlying legal issues we are seeing have occurred time and again outside of the social media spectrum. So to take your question for example, the issue about "friending" on Facebook isn't really much different than an issue involving a supervisor and his or her subordinate going to a party together after work. Most companies don't have policies that say you can never have a drink with your subordinate after work; rather, they expect employees to act appropriately and with common sense. So I'd be more inclined to advise my clients to ensure that supervisory and managerial employees understand that they shouldn't be saying or doing inappropriate things, or sending the wrong messages about the company in any setting.

MS. AUSTIN: Staying with you, John, as a follow-up to that issue, do you recommend that employers implement social media policies restricting or limiting employees' use of social media?

MR. ROMEO: Absolutely. The policy needs to exist and needs to be well-rounded. It needs to include statements on whether the use of social media at work is acceptable, and, if so, what the limitations are. It also should address expectations about employees talking about the company, i.e., making it clear whether you're acting in your individual capacity or acting as an employee of the company. You want to talk about parameters of what's good judgment and what's not good judgment. But you really need to use caution in how far you take your policy in light of the National Labor Relations Board's approach to social media and concerted activity. Because the NLRB has made it very clear that if that policy is too broad, they are going to say it's a restriction on employees' rights under the National Labor Relations Act. Other considerations include addressing employees' expectations of privacy when using computers provided by the employer, employee interactions, as we discussed earlier, and the use of copyrighted and confidential information.

MS. AUSTIN: Michael, how will recent NLRB decisions affect existing and future social media policies?

MR. HOMANS: The NLRB certainly has taken the position that in social media, as in all other communications, employees' concerted activity and expression of grievances or concerns about the terms and conditions of employment to fellow co-workers, and even at times to their supervisors, can be protected activity. And through its recent decisions and even going back some years, the NLRB has taken the position that having a general policy that is consistent with overall confidential information policies, and to a lesser extent non-disparagement provisions and duty of loyalty provisions, is OK, as long as the policy is not written or enforced such that it would chill protected conduct. For employers, it's a delicate balance. But I don't think employers should just give up the ship and say, "OK, I'm not going to have anything in my social media policy that says employees can't disparage the company." You can still have those policies. You just have to be careful they are not written or interpreted in a way that prohibits employees from expressing concerns or disagreements with the way the company manages employees.

MS. AUSTIN: John, how are employers using the discovery process to gain access to social media information, and what types of information can they actually obtain?

MR. ROMEO: Coming from the management side, I would like to be able to get everything, but the courts don't agree. As with other areas of discovery, the courts don't typically allow a social media fishing expedition. But the courts have made it very clear that where there is publically available social media content indicating that there may be information relevant to a claim, access will be granted to private portions of the social media site. And I think that's very dangerous for plaintiffs because a lot of people do put information out there publically, even though they fully expect other messages and private pages will remain private forever. That is simply not the case. If I were a plaintiff, I'd be very careful about how much information I put online, especially after a case is filed. As an employer, I would aggressively go after that information, because that's where people are putting information that they don't think will ultimately be public and that definitely, in many ways, can help defend a discrimination case.

MS. AUSTIN: So, Tim, from the plaintiffs' side, what are you doing to try to prevent the discovery of social media information?

MR. KOLMAN: Well, we are seeing more requests in discovery for social media information and we object to it on the basis that it's irrelevant, it's not going to lead to the discovery of admissible evidence, et cetera. But John has properly articulated the standard that the courts apply, so provided the employer does have information that would lead a court to think that, yes, there is discoverable information there, we are powerless to prevent its discovery. And it can absolutely be devastating to the plaintiff in many ways, including psychologically — the plaintiff thought the information would be private and now suddenly it's public. That's traumatic. Of course, that same weapon can be used against defendants. For individuals who have been sued, let's say in a Family and Medical Leave Act (FMLA) context, we can request their social media information. In fact, I was at a seminar where a very good employment lawyer said that if you don't ask for social media information, you have probably committed malpractice. That's how significant he thought it was.

MS. AUSTIN: This may be a rare instance where we have total consensus from the plaintiffs' side and defendants' side that social media information is valuable, useful and forever there and accessible.

CLASS ACTION EMPLOYMENT LITIGATION

MS. AUSTIN: As I'm sure everyone knows, the U.S. Supreme Court issued its ruling in Wal-Mart Stores Inc. v. Dukes et al. in June. The Court determined that a gender discrimination claim filed on behalf of 1.5 million female employees at 3,400 Wal-Mart stores across the nation could not be pursued as a class action. This ruling significantly changed the standards for class action certification in employment litigation. Michael, how will Wal-Mart v. Dukes affect future class action employment litigation?

MR. HOMANS: Certainly one giant monster has been killed, but it's probably just going to spawn a lot of smaller monsters trying to do the same thing. I think the plaintiffs' bar, class action bar and the law had really gotten out of whack as the Supreme Court noted. There was

no longer any glue linking the claims. These class actions were allowed to go forward in the absence of a consistent policy and, in the Wal-Mart case, with more than 3,000 stores and 1.5 million people. It really strains credulity to believe that everyone was affected by the same thing without establishing some true policy or rule that was affecting every single one of the class members. So, I think what this will do is to properly refocus these class actions probably at the state level to involve common managers, common policies within that store or region, those kinds of things where it is possible to establish the commonality you need for a class action. And I think this may be productive in getting back to finding individuals with real grievances and real facts that they can establish to show liability, as opposed to just letting someone file a class action and then try to collect and fit together a class action.

MS. AUSTIN: Tim, let's get your opinion on how the Wal-Mart decision may change the way plaintiffs approach class action employment litigation.

MR. KOLMAN: I'd like to begin by stating that this was a travesty of a decision by five male members of the Supreme Court. They used a technicality to dismiss the claims of 1,500,000 women. Here we are, talking in technicalities about the case, but don't let's forget that there were women in that class action who alleged that they were paid less than men and what is going to happen to them now? To answer your question, in my view it would be extremely difficult in a case like this for any class action law firm to find an overall policy that would satisfy the Supreme Court. You're dealing with Wal-Mart. It's an enormous organization. The only way, it seems to me, that you can show an overall policy is by statistical information. And if you can show that statistically the women across the board are paid less than men, then it seems to me that you should be permitted to impute the policy. In other words, you could impute it from the empirical evidence and say it's clear there is a policy, because this is what is happening in the field. And that was not allowed by the Supreme Court. It was a major, major blow.

MS. AUSTIN: So, Tim, how do you think plaintiffs are going to change their approach to be able to fit within the confines of the Wal-Mart decision?

MR. KOLMAN: The plaintiffs are going to have to argue that there is an overall policy directed at a protected class that somehow affects the class and has affected it such that the members of that class have a claim. And that's going to be very, very difficult. If such a policy exists, won't it exist behind closed doors and not on paper? There won't be a paper trail. The only way you can identify that policy is through statistical data. But it appears that door has been shut by the Supreme Court.

Retaliation claims have always been difficult claims for employers to deal with... they are usually more difficult than straight discrimination claims.

Caroline Austin

MS. AUSTIN: John, let's go forward from this and think about whether employers should do anything differently in terms of managing their operations to maximize their ability to defeat class certification and minimize class action exposure.

MR. ROMEO: First, I don't think employers sit behind closed doors and put together policies to discriminate against folks — written or otherwise. But I do think this decision actually puts national employers in a little bit of a conundrum. On the one hand, they are trying to do the right thing by disseminating consistent policies across the business, but, on the other hand, doing that might give the class action plaintiffs' firm just enough of a hook to latch their class action on to. So, how do employers deal with it? I personally don't think employers should back away from efforts being made to drive consistency across the organization. But to the extent you can have a high-level policy that is implemented with some level of discretion within each underlying business unit, you may be able to look to that discretion to hopefully defend these global class actions.

THE FAIR LABOR STANDARDS ACT AND WAGE AND HOUR CLAIMS

MS. AUSTIN: Let's move to our next topic, which is the FLSA and wage and hour claims. I think we can all agree that nationwide, this is probably one of the fastest growing areas of employment litigation. Marjorie, what are employers doing to reduce their exposure to wage and hour claims?

MS. OBOD: We are actively getting involved with employers to make sure that workers are being properly classified and that these issues are being addressed on a policy basis. So we actually look at the employer's staff members and counsel runs through all of the categories, making sure that everyone is properly classified. Personally, I've done this four times during the last three months. Employees are aware of this issue, so companies must be proactive.

MS. AUSTIN: Tim, can you give us some insight into why wage and hour claims have been increasing at such a dramatic rate?

MR. KOLMAN: I think that these claims were put into sharp focus by the 2005 U.S. Supreme Court decision in IBP Inc. v. Alvarez. In IBP, the Court determined that

meat packing workers were due compensation for the time they spent changing clothes. The plaintiffs' bar realized that these cases were highly lucrative because they included unpaid wages, related damages and attorneys' fees. Beyond the economic incentive driving these cases, as Marjorie correctly said, this is a very complicated area of the law for employers. It's easy to run afoul of not just federal law but state law, which in some cases provides more employee protection than federal law. We are also seeing a high unemployment rate, stagnant wages and employers who are asking much more of their employees as a result of downsizing. With more stressful work conditions, employees are looking for a way to ensure they are fairly compensated.

MS. AUSTIN: John, just to round out the issue with the FLSA and wage and hour claims, what about the flexible workplace? Employees can and often are permitted to work from home or otherwise work remotely. How are these flexible work arrangements impacting wage and hour claims, if at all?

MR. ROMEO: I think they are definitely impacting wage and hour claims. Just look at the U.S. Department of Labor (DOL) coming out with a smartphone application that keeps track of your hours. Why has that been made available? Because employees are working in the office, outside the office, at home, at other locations, and this allows them to easily track their time regardless of where they are. I'm sure many employees will keep "better" track of their hours on their personal handhelds than they might on the company's system. What I recommend is that employers have a very clear policy addressing the issue, which helps to educate employees, and can be used to address difficult issues like travel time, meal breaks and on-call time. At the end of the day, employers can't be allowing employees to perform duties for which they are not being paid regardless of where that work is performed.

MS. AUSTIN: Let's move on to misclassification in terms of independent contractor vs. employee, which is a hot area for the DOL. Michael, how should employers determine whether a worker is an independent contractor or an employee?

MR. HOMANS: A lot of this law is complex, detailed and counterintuitive. Employers can look at the six factors that the Internal Revenue Service and DOL now consider, as well as state law. In instances where the determination is particularly difficult, I often recommend an employment law audit. We will review any borderline positions with the employer, even to the point of talking to the supervisor or the worker about what they are doing on a daily basis, how they are doing it and what kind of supervision they receive. We then make a joint evaluation. There are a lot of gray areas and positions that could probably go either way. In those cases, you can look at tweaking the job description and the actual job duties to push the classification more to one side or the other. The IRS, the DOL and the majority of states are now really going after this issue. They want the added tax revenue of an employee vs. an independent contractor.

I tell all of my clients that retaliation claims are the most dangerous claims. Juries are very receptive to them.

Michael Homans

MS. AUSTIN: And Marjorie, what are some of the employers' best practices to avoid misclassifying workers as independent contractors rather than employees?

MS. OBOD: A lot of employers aren't even aware of the standards. When you sit down with HR and go through a pretty clear list of what you need to have, to have an independent contractor vs. an employee, you find they misunderstood the classifications. The recent issue I'm seeing with independent contractors is employers who laid people off, didn't want to hire people back, and subsequently took them on as independent contractors. Well, they are only working part time, or we're only keeping them for six months. It's not knowing the law and assuming common sense applies. Employers are trying to cut costs without understanding the implications of their cost-cutting measures.

MS. AUSTIN: What, then, are some recommendations that you can give to employers regarding responding to DOL inquiries about employee misclassifications?

MS. OBOD: I've had a few of these cases recently. I think the main things employers have to do are make sure they understand what the DOL is asking for and be cooperative. When the DOL is knocking on the door, you can't change the facts at that point, they are what they are. I can try to help the employer deal with the facts — maybe I can explain something better or identify relevant facts that they overlooked, but mainly what I can do is help the employer make changes going forward.

MR. ROMEO: Marjorie is right. Employers are hamstrung once the DOL knocks on the door. What I've seen is that once the DOL comes knocking, they are a lot less interested in what the employer and the managers have to say than they are in what the employees have to say. You can't sit in there and dictate what those employees are going to say to the DOL or IRS.

I think the main things employers have to do are make sure they understand what the DOL is asking for and be cooperative.

Marjorie Obod

MS. AUSTIN: How can employers ensure that if the DOL does come knocking, they will find records that are consistent with the applicable law?

MS. OBOD: That gets back to the issue of conducting classification audits. As attorneys, we have been working to educate our clients about this issue and encourage them to have employment law audits. For example, we might host a construction law seminar for our clients and address worker classification as part of that. We also send out e-alerts to keep them informed and thinking about this issue.

MR. HOMANS: I agree with everything that's been said. I do find that, with these investigations and others, if you cooperate (and that doesn't mean giving them every single thing they are asking for but rather exhibiting a cooperative spirit and sharing information), especially if it's a first violation, you can avoid being hit with penalties and fees, which can mean considerable savings. In addition to that, if it is a distressed company and this audit may push them over the edge in terms of going out of business or firing employees, I've found that investigators are very open to knocking down the penalties and even the back wages that are going to be paid because, even though it's not part of the law, they are sensitive to not being responsible for lost jobs, or for a letter to an elected official saying, look, this over-aggressive enforcement has really damaged our business.

MR. KOLMAN: I would like to address how these issues come about as far as the plaintiffs' bar is concerned. Very often, misclassification remains under the radar until there is discrimination because obviously as an independent contractor, you don't benefit from Title VII of the Civil Rights Act (Title VII), the Americans with Disabilities Act (ADA) or the FMLA. So, we may get a case where someone alleges discrimination and then we find that the plaintiff is apparently paid as an independent contractor and at that point, the issue of whether they really are an independent contractor is brought into focus. The same is true when an employee is discharged and applies for unemployment. You really don't want a plaintiff's lawyer to get that issue and start to dissect whether the worker is an independent contractor, because once that happens, there will be other employees presumably similarly situated. It will be the thin end of the wedge and before you know it you've got yourself a collective action and that could be the kiss of death for the employer.

MS. AUSTIN: John, when an employer realizes that an employee is misclassified, how does the employer go about reclassifying the individual so as to minimize its exposure and risk?

MR. ROMEO: It is always very difficult because with independent contractor vs. employee status, you're dealing with benefits, taxes and other significant added costs if you go back and reclassify workers as employees. But when you look at the test to determine independent contractor status, you get into a pretty big gray area that provides many arguments for maintaining the status quo — at least until the current contract expires. The employer's risk tolerance is going to dictate whether you sway toward keeping the workers as independent contractors or making the change to hire them as employees.

THE ADA AMENDMENTS ACT OF 2008

MS. AUSTIN: I'd like to turn our attention to the ADA Amendments Act of 2008, otherwise known as the ADAAA. The ADA Amendments Act of 2008 became effective on Jan. 1, 2009. In May 2011, the Equal Employment Opportunity Commission (EEOC) issued its final resolutions regarding implementation of the ADAAA. Certainly this will change the landscape of ADA claims, so what I'd like to do is propose a few hypotheticals and have you respond as to how you might advise employers or employees. Michael, let's start with you: An employee advises his supervisor that due to a back condition he cannot lift anything exceeding 30 pounds. This employee's position requires that, 40 percent of the time, he lift and move company product. How would you advise the employer to respond to this employee's request that he not be required to lift product weighing more than 30 pounds? Is the back condition a disability under the new ADA regulations, and is the employer required to agree to the employee's limitations?

MR. HOMANS: This would be much easier if we were pre-amendments, as that would not be a disability. I haven't specifically had to address the issue of lifting impairments under the new amendments, but I still would not think that an inability to lift more than 30 pounds on a consistent basis would by itself be a disability. But the new regulations stress that the emphasis should not be on whether the person has an actual disability, but rather on whether the employer is discriminating against the employee on the basis of a perceived or actual disability. So, putting aside whether this person would qualify as disabled, I think the safe tack is to engage in an interactive exchange

with the employee, try to find out what the employee can and cannot do and explore possible accommodations for the employee. Even if accommodation is not possible, it would be a plus to have the record that you at least went through the process of trying.

MS. AUSTIN: Marjorie, a new hypo for you: An employee takes a leave of absence to treat his anxiety, initially the leave is for 10 weeks. After 10 weeks the employee, through his doctor, says that he needs another eight weeks of leave, which would take him beyond the FMLA-provided 12 weeks of leave. The employee is a historically poor performer so the employer has had enough and says that it wants to terminate the employee. How would you advise the employer in this situation? Is the employee entitled to the additional leave time and what facts might be relevant to the resolution of this issue?

MS. OBOD: The first thing you need to look at is whether there are any other employer policies that provide for additional time. If this is a union employee, for example, and the employee could be offered up to two years of leave, you have to consider that. Because the consideration is whether the employer is facing undue hardship, and I think it's hard to argue that it's an undue hardship to provide someone additional time unpaid if you have a policy that allows for unpaid leave to other employees. I also think that the interactive dialogue is still significant. You want to make sure, as Michael was saying, that the HR person is engaging in a dialogue with the employee, and that that dialogue has been recorded. If, on the other hand, the employer doesn't have other policies that provide for additional time and they have never given anyone else additional time, you would look at undue hardship before you even get into the question of whether the employee is disabled. Under the ADAAA, mental illnesses are a particularly difficult issue. Certainly anxiety could be a disability, but I think the easier approach is to look at undue hardship.

MS. AUSTIN: What about the employee's history of poor performance? Should that factor into the employer's analysis of the situation?

MS. OBOD: If the poor performance hadn't previously resulted in discipline, the employer really couldn't use it. They are two separate issues.

MS. AUSTIN: This hypothetical also raises issues regarding maximum leave policies. The EEOC has come down fairly negatively on maximum leave policies. Tim, do you want to add anything on that?

MR. KOLMAN: I'd like to add a few things about the two hypotheticals. First, this is not a case that we would ever take. When the employee has exhausted the FMLA and has anxiety that is generalized, we would obviously ask the employee, what's the source of the anxiety? We can ask that because we're the plaintiff's lawyers. And then we may discover that the employee was a poor employee. I don't think that we could possibly prevail in that case if there's no policy in place providing for leave beyond the 12 weeks, especially with anxiety being the reason for the employee's absence. Maybe the anxiety is caused by the employee's apprehension at the very fact of coming back to work and being a poor employee. Who knows? And a poor employee makes a poor plaintiff as well. So, that's that.

Now, with regard to the other hypothetical that Michael addressed, lifting is covered under the new regulations. And presumably if it wasn't lifting, then the employee would say it was sleeping or walking or something else. The fact that 40 percent of the employee's job requires lifting doesn't necessarily mean that lifting is not an essential part of the job. We'd have to look at that. And then we would look at whether other people similarly situated may have been given an accommodation. We sometimes find that employers think they should accommodate an injury that happened at work, a workers' comp injury, and not accommodate an injury that occurred outside of work. I haven't seen any legal basis for that. If there is one, I'd be pleased to know what it is. But very often, the employer will say you weren't injured at work so we're not accommodating you.

MR. ROMEO: I agree. Many employers have a tendency to reduce their workers' comp. costs by finding some type of light duty work for someone on workers' comp. leave. And then somebody says, "I slipped in my driveway getting in my car this morning," and the answer is "sorry, we can't accommodate you." This could be a problem when a co-employee who slipped in the parking lot was given some form of light duty or other accommodation. That goes to Marjorie's point. What policies do we have? In my opinion, big picture if you're accommodating the workers' comp. injury, you've potentially created a reasonable accommodation in the ADA setting. Employers need to be careful and consistent in that process.

MS. AUSTIN: Tim, this next hypothetical is for you. An employee was diagnosed with a visual impairment that created difficulties with depth perception in low-light situations.

If you're going to make a decision on the basis of a criminal conviction, you must be able to articulate why the conviction precludes the applicant from being hired.

— ✦ —

John Romeo

In the fall, as sunlight is diminishing, the employee requested a modified work schedule so that she could commute into work during daylight hours. The employer granted her request. The following year in the fall, as sunlight was diminishing, she again made a similar request after having gone back to her regular schedule for the spring and summer months, and this time the employer said it would be a hardship and denied her request. The employee then refused to come in during her regular non-modified work schedule and she was fired for that. If this case were to come into your office, how would you respond?

MR. KOLMAN: It looks promising because the employer first accommodated her, meaning that they acknowledged that she had a disability and took action to accommodate her and that was fine. And then the next year suddenly there's no accommodation. I would need to know why. I'm not suggesting that the employer couldn't choose a different form of accommodation, because the employer can do that. Failing some other accommodation, I think the employer has really put itself in an impossible position from a liability standpoint. I just don't know how the employer would explain accommodating the employee one year and then failing to do so the next year. That's worse than never accommodating the employee in the first place.

MS. AUSTIN: What about the visual impairment? Under the new ADA regulations, do you think that the visual impairment in low-light situations would be a disability?

MR. KOLMAN: It could be if it's backed up by medical evidence such as cataracts that are developing. It could be accommodated and it affects a major life activity, so I think definitely it would come under the new regs.

MS. AUSTIN: Let's consider another hypothetical, and this is for you, John. A supervisor comes to HR and says that due to her treatments for cancer, she needs to be able to work part time for at least six months and will also need to be able to work from home for a few days each week. How would you advise an employer faced with this situation?

MR. ROMEO: That's a very difficult situation. But, I think we are far beyond the question of whether there's a disability in this circumstance. Under the new regulations, that's not going to be an issue here. So the question becomes, are the accommodations requested reasonable? Let's deal with the part-time accommodation first. That's going to go back to our earlier discussion about whether there is a policy that addresses the situation, and how other employees have been treated in the past. If we have created a situation where employees can go part-time for non-disability reasons, we need to consider that. Then you get to the question of whether the employee can work part time and still perform the essential functions of her job. That's going to depend on the specific job. But I certainly don't think you can out of hand say "no." The analysis would be similar for the working-from-home accommodation. Whether the accommodation is temporary or long-term, I think is somewhat immaterial. In these situations, I often err on the side of providing the accommodation. But more importantly, if you are going to deny the request, then we also should be very clear in articulating why.

MR. KOLMAN: And we might suggest to that employee, if she came to see us, that she go on short-term disability for six months before committing to working even part time. It may turn out that long-term disability would be preferable. It might be better for everyone rather than having an employee who is worried about her health, can't do her job and is trying to work part time. She's a supervisor. Who knows what would happen to the people she supervises when she's not on site.

MS. AUSTIN: I have one final hypo, in which an employee raises a potential disability issue in the context of a performance counseling session with his employer. In this case, the employee discloses the existence of an alcohol problem in response to receiving a final written warning for poor performance. The next step after the final written warning would be termination. What effect does the disclosure have on the final written warning? Is the employer able to keep that final written warning in place?

MS. OBOD: I think the final warning stands and, separately, the employer engages in a discussion with the employee about whether an accommodation is possible. Maybe the employee needs to take time off for entering a rehabilitation facility. Regardless, the final warning is in place and the employee needs to be aware of that and there needs to be a record of that. To me the main point is that the two items need to be dealt with separately.

MR. ROMEO: I agree, you keep the final warning as it stands, but you immediately engage in the interactive process. You have the conversation about what will or won't work for the employee going forward. You take care of the accommodation issue, as Marjorie said, but, in any event, that warning is on the table and hopefully with whatever accommodation you have provided, he'll become a better employee going forward. What you wouldn't want to do is terminate him the next day because of the performance problem that was a day earlier the subject of the counseling session. In that case, the termination might appear to be a result of a disability that you were aware of but did not accommodate.

MR. KOLMAN: That's right. I also think the employer needs to consider what the employee does. If the employee is in charge of equipment or driving or flying, he isn't going back to work until he completes rehab, and then the employer is duty bound to occasionally screen the employee. The employee would have to be warned that he could be screened without notice and that any alcohol found in his system would be grounds for immediate termination.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT

MS. AUSTIN: Our next topic is the ADEA. As everyone is aware, in Gross v. FBL Financial Services Inc., 129 S.Ct. 2343 (2009), the Supreme Court held that a plaintiff must prove by a preponderance of the evidence that age was the but-for cause of a challenged employer decision. Marjorie, what has been the practical impact of the Gross decision?

MS. OBOD: I don't know that I have seen an impact in terms of cases being filed, but certainly in terms of defending a case, the Gross decision has highlighted the importance of looking at factors other than age when making employment decisions. This issue particularly comes up as technology continues to advance: older workers may not be as familiar with some of the technology that they need to use in their work. I think in light of Gross it's more significant now to make sure you're articulating in an internal document factors other than age that have entered into your employment decision.

MS. AUSTIN: Tim, with respect to the ADEA and this heightened but-for standard, if an employee comes to you and says she is being terminated because she is too old and isn't familiar with new technology, how do you balance the employer's legitimate right

I think employers are taking a big risk by reviewing potential employees' social media participation because once the employer has viewed that information, there really is no going back.

Timothy Kolman

to have an employee capable of using current technology with the employee's age being a factor in her inability to do so?

MR. KOLMAN: It's much harder now because the but-for analysis goes primarily to the mixed motive cases, and it's not like Title VII, where the plaintiff alleges race discrimination, the defendant proffers a legitimate reason and the plaintiff shows that the so-called legitimate reason does not hold up. Here the plaintiff has to show that age was the but-for cause of the termination and the employer in the hypothetical obviously has a legitimate reason. We don't have a chance to show pretext, we have to go forward on the but-for analysis. That may be why you haven't seen as many age cases as you would expect.

MR. HOMANS: Certainly this makes it almost impossible and very dangerous for a plaintiff to allege multiple bases of discrimination in the complaint. It almost has to be age or nothing — the courts find it inconsistent now for an employee to allege he would not have been terminated "but for" his age, and then to also say, it was because of his race, or gender, or something else. As far as at the summary judgment stage, the 3rd U.S. Circuit Court of Appeals has ruled that it will still apply the McDonnell-Douglas burden shifting analysis. But at trial the instruction is going to be for the but-for analysis. The other thing I want to point out is that this is federal law. I think this makes it much more important for plaintiffs to have a state law claim. I think there's a good argument for plaintiffs to make, maybe we should keep this quiet, that in most of the state statutes, all of the prohibited criteria are listed, age, race, sex. There would not seem to be a logical reason to apply a different standard to age under the state law than you apply to race, sex or any other characteristic.

CRIMINAL BACKGROUND CHECKS

MS. AUSTIN: In Philadelphia, Mayor Michael Nutter recently signed the Fair Criminal Record Screening Standards ordinance into law. This ordinance establishes criminal records screening restrictions for certain employers within the City of Philadelphia and limits an employer's ability to consider job applicants' arrests and convictions. The EEOC is also very focused on the use of criminal background checks in employment decisions. In light of the City of Philadelphia and the EEOC being very vigilant about the use of criminal background checks, what do these restrictions mean for employers? How are employers able to continue to conduct appropriate checks of their applicant pool, but avoid claims? Michael, let's start with you.

MR. HOMANS: This is a big issue now at the federal level and obviously with the City of Philadelphia. To my knowledge, none of the rules say you cannot make a criminal background check part of the final stage of the hiring process. What you cannot do is just have a per se rule that you won't hire anyone with a criminal record, and under Philadelphia's ordinance you cannot inquire as to criminal convictions in an employment application or at any time during the first interview. In any event, if you do make an employment decision based on a criminal record, you have to show a nexus between the conviction and the job. For example if you have a job that requires working with people and the applicant was convicted of a violent crime, that's a pretty good nexus. On the flip side, I think if you don't conduct a criminal background check, you run the risk of a negligent hiring and retention claim.

MS. OBOD: The Philadelphia ordinance prohibits you from even having a box that says that you have been convicted of a crime. It's important to make sure your clients are aware of these changes and alter their job applications and hiring techniques accordingly. Failure to do so can result in a fine of $2,000 per violation.

MR. ROMEO: It seems the goal here is we don't want to just discard an applicant because he's been convicted. We're going to bring him in, look at his application, get him through the first interview and see if he's a good candidate. Then if there's a conviction, we'll consider it at that point. It doesn't knock the person out of contention without even having the person come in and show us who they are and what they can do. So, in that regard, it does help people get through the first level. But I think to Michael's point, at the end of the day, it doesn't prohibit you from looking at a conviction and determining whether it would affect the job. But going back to the EEOC issue, you need to be able to articulate why this conviction makes it such that this applicant can't have this job.

MR. KOLMAN: I think the motive for banning the box was a good one. I do think it's a Band-Aid to staunch a hemorrhage, because it does not stop the employer from reviewing that person's criminal record after the first interview or application. It just prevents them from asking about it initially. I suppose there is the hope that after the initial application, as John indicated, there's an interactive process and if the person seems likeable and a good fit they can go to the next step of the hiring process. In my experience, however, that has

never stopped an employer from drop kicking a potential employee on the basis of a criminal record. We litigated a case on this issue, and at the end of the day, the courts and the juries are unsympathetic. These cases are also expensive. They have to be financed by the law firm and in reality, they are almost never brought because they are so difficult.

MS. AUSTIN: John, do you think that the heightened focus on criminal background checks makes it more important for employers to completely and accurately describe jobs for which a criminal background check might be conducted?

MR. ROMEO: If you're going to make a decision on the basis of a criminal conviction, you must be able to articulate why the conviction precludes the applicant from being hired. That will be harder to do if you don't have a clear job description that articulates what the job duties are. I recommend employers retain outside companies to do full-fledged background checks, and then have them provide only the information the employer needs to know. A lot of companies now are very smart about disposing of information that an employer doesn't need to know and passing on only the relevant, non-discriminatory information.

MR. KOLMAN: It's interesting you say that. They are very rare, but we have had one or two cases of mistaken identity in which the company conducting the background check actually investigated the wrong person. You might have a common name and then someone is terminated because it appears they have a criminal record which, in fact, they don't have. And then the action is not against the employer who relied on that information, it's directly against the company that did the investigation. And that can go forward as a straight negligence case. The employer has no liability under those circumstances, having justifiably relied on the information that was given and no reason to think that that information wasn't accurate.

RETALIATION CLAIMS

MS. AUSTIN: Retaliation claims have always been difficult claims for employers to deal with, or at least in my experience, they are usually more difficult than straight discrimination claims. I would like to look at the recent U.S. Supreme Court decision in Thompson v. North American Stainless LP, 131 S.Ct. 863 (2011), in which the Court broadened the scope of Title VII's anti-retaliation provision to include employees with close relationships to other employees engaging in protected activity. Marjorie, has this decision changed anything for employers?

MS. OBOD: It has, because employers need to be aware that protection from retaliation extends farther than it did previously. Everyone knows that you can't take action, or must be very careful doing so, against an employee who has filed a charge, but now that extends beyond that employee alone, and this may be difficult for employers who are not aware of their employees' relationships. And again, you want to have a thorough record of why an employee is being disciplined or terminated.

MS. AUSTIN: Tim, when clients come into your office, are you exploring whether there is a potential claim using the zones of interest analysis that the Thompson case employed?

MR. KOLMAN: Yes. I don't think in all honesty that this is really a game changer. Retaliation is an incredibly flexible concept that varies from job to job, from employee to employee and from employer to employer. If an employee was going to a lot of meetings and now is going to no meetings, that could be retaliation. If they went to no meetings and now must attend every meeting, that could be retaliation. If they have no work and are given more work, or vice versa, that could be retaliation. I think the Supreme Court is just acknowledging that this is another area that the employee can make out a case for retaliation.

MR. ROMEO: I agree — this is not a game changer at least insofar as how we advise our clients. It has impact on potential defenses once you are in litigation. But in terms of advising clients, my advice has not changed. I have had clients who have had spouses or cousins or siblings working together, and I always advised them not to retaliate against any employee for any reason. I always tell people that after someone engages in protected activity, you need to treat everybody the same as you did before learning of the protected activity, assuming, of course, that you weren't retaliating or discriminating in the past.

MR. HOMANS: The Supreme Court during the past 10 years has continued to expand these claims to include almost any type of activity that would dissuade an employee from engaging in protected conduct. I tell all of my clients that retaliation claims are the most dangerous claims. Juries are very receptive to them. I think everybody relates to the idea of wanting to get even. This is where I think the employer really has to be on its toes and be careful once somebody has engaged in protected conduct and, as Marjorie said, have their ducks lined up and their paperwork in order before going through with an adverse action.

MR. ROMEO: I think we've probably all advised our clients that we'd much rather defend the underlying discrimination claim than the follow-up retaliation claim. Much more difficult.

MR. KOLMAN: At the end of the day, it's a game the employer can't really win. Addressing or ignoring the underlying claim could be viewed as retaliation.

MS. AUSTIN: And with that I would like to conclude today's roundtable. Both the plaintiffs' and the defense practitioners have done a very good job of sharing some of their strategies for defending and prosecuting employment claims, and so I thank you for your insights.

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