Labor & Employment Law:

A YEAR IN REVIEW

Panelists from left to right: Claudia Williams, Sidney Gold, John Morganstern, Michele Malloy, Chris Scalia, Jim Sullivan

MR. MORGENSTERN: Welcome to *The Legal Intelligencer*'s 2010 Labor & Employment Law Roundtable discussion. Today we will address a variety of issues currently affecting labor and employment practitioners, including social media in the workplace, electronically stored information (ESI), the use of social media in jury selection, work force reductions, wage and hour matters and finally, future trends in labor and employment litigation. I look forward to a lively and informative discussion.

Social Media in the Workplace

MR. MORGENSTERN: To begin this discussion, I'd like to pose a hypothetical scenario: Alice works for ABC Corp. as the administrative assistant to the company's president and CEO. In such capacity, she is privy to sensitive information, including trade secrets. Alice begins to feel that she is being sexually harassed by the president and CEO, James Boss, and she is probably correct. Sensing that Alice might be laying the groundwork to file a lawsuit, general counsel, in accordance with the company's computer use policy, views Alice's e-mail account. He discovers that: 1) Alice has sent e-mails from her company account to an attorney reporting allegedly harassing conduct by Mr. Boss; 2) Alice has a Facebook page on which she has posted information that is arguably protected intellectual property of the company; and 3) she has glorified marijuana use in e-mails and on her Facebook page.

Let's start by discussing this from the plaintiff's perspective. Sid, if you were the attorney to whom Alice sent those e-mails reporting harassment, how would you advise her regarding using her work e-mail account for personal purposes and, specifically, for communicating with her attorney?

MR. GOLD: This company does have a computer use policy, so I would instruct her to follow that policy and make sure nothing she has done is in violation of it. With respect to the e-mail she sent to her counsel, in the case of *Stengart v. Loving Care Agency Inc.*, 973 A.2d 390 (2009), the Supreme Court of New Jersey made clear that there is a reasonable expectation of privacy regarding e-mails sent to counsel, and that the attorney-client privilege outweighs an employer's interest in enforcing its computer policy. Also, I would advise that she follow the company's sexual harassment policy. Likely, she should register an internal complaint with the appropriate party, such as a human resources representative. I would caution her that any e-mail she sends in the future, or has sent in the past, could become subject to discovery should the case go into litigation, or a charge be filed with the Equal Employment Opportunity Commission. Therefore, she should immediately preserve all of her e-mails, regardless of whether they are stored in her company or personal account. Finally,

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I would caution her that if she were to delete those or in any way try to wipe her computer clean, that would give rise to an inference that the information would have negatively affected her case.

MR. MORGENSTERN: So, in essence, you would advise your client to put a litigation hold on her account?

MR. GOLD: Absolutely.

MR. MORGENSTERN: Chris, as in-house counsel, what's your take on whether the law in Pennsylvania would protect Alice's e-mail communications in the context of attorney-client privilege?

MR. SCALIA: Obviously *Stengart* is going to inform Pennsylvania judges. And I'll tell you candidly that I agreed with the court's reasoning in that particular case as it related to that very narrow issue of protecting the attorney-client privilege. I think Pennsylvania judges would look to protect the attorney-client privilege absent a showing of a knowing and intelligent waiver. But I have to say, as an in-house practitioner, my focus is on being pragmatic, saving resources and advancing the needs of the business. So the question that came to mind when I read *Stengart* was why did the company want that fight in the first place? There seemed to be other issues that were more important to the business that got lost in privilege debate. In our hypothetical, my inclination would be to stay away from what seem to be privileged communications and turn the company's focus to the Facebook account that appears to publish the organization's confidential business information.

MR. MORGENSTERN: Claudia, if you're advising one of your corporate clients regarding an e-discovery or Internet use policy, what kinds of provisions would protect their interests in this situation?

MS. WILLIAMS: The first question I would ask is whether the company has a policy regarding personal use of its electronic communication systems. And if so, what does the policy say? Does it prohibit the use of the Internet for personal reasons? Does it address the use of social media specifically? Companies need to understand that they can be held accountable for what employees publish from their work computers, and they also need to understand that they can take action, if necessary, in response to what employees say and do online with regard to comments about co-workers, supervisors and the business itself. It is easier to justify the action to unemployment compensation referees, though, if there is a specific policy in place, so long as the policy does not inhibit employees' rights to engage in protected activity.

Regarding the *Stengart* case, I have a different perspective than Sid's. I believe it is a narrow ruling addressing the employee's use of her personal, password-protected e-mail account, which was accessed from a company computer. That company had a policy in place, but the court determined that the attorney-client privilege trumped the policy in that particular case. But if a company has an explicit restriction on the personal use of computers, and the company utilizes a monitoring system and provides employees with advance notice that their e-mails will be monitored, it is debatable whether attorney-client privilege would still prevail. I would argue that sending that e-mail from the corporate system was no different than having someone sitting in the room with you when you're talking to your lawyer. It then becomes an issue of waiver once an e-mail is created and sent on the corporate system.

MR. SULLIVAN: Should the social media policy of the employer explicitly say you have no confidentiality or privacy interest in an e-mail you send, even on your password-protected account on the company server, to your accountant or attorney or other professional?

MS. WILLIAMS: Yes. I recommend that employers put employees on notice that any communication made via monitored, company property is not confidential, and the employee has no expectation of privacy in such communications, regardless of the recipient, including physicians, attorneys, accountants, family members, friends and the like.

MS. MALLOY: I agree with Claudia. The more informed the employees are as to what employers can view, the more room there is to argue for a different result than *Stengart* in a different jurisdiction. I think we can agree that New Jersey is fairly employee friendly, and we're talking about the attorney-client privilege, which is important. But there are other cases where the courts have examined whether employers were clear about what they were going to monitor. For example, there was a text messaging case involving police officers where the officers' supervisor indicated that text messages would not be viewed, even though the applicable policy said otherwise. In that case the court found the officers had a reasonable expectation of privacy because the supervisor affirmatively told them that their text messages would not be read. So I think that if a policy is tighter, it's something the court would consider. It's almost, as Claudia said, a waiver.

In our case, unlike *Stengart*, you're layering on another issue with the employee's use of the company e-mail. At the end of that e-mail you're going to get the company logos, and a statement about the communication being company property. I think that a different court may not find *Stengart* applicable if you had a tighter policy and it was the company e-mail.

MR. MORGENSTERN: Sid, do you agree that the e-mails in this scenario are company property?

MR. GOLD: I think in this case, another possible issue that might come into play is retaliation. Here, we have a young lady who is the administrative assistant to the company's president, who is sexually harassing her. Now, all of a sudden, the company is looking into her e-mails. If the company has an e-mail policy in place to monitor computers, it had better be doing that monitoring in accordance with the policy and pursuant to some protocol, rather than monitoring selectively against those employees who might have discrimination claims. As far as the Facebook account, I would ask what the company has done in terms of implementing a social media policy across the board and how often all employees' computers are monitored.

MS. MALLOY: I agree with Sid that there are additional concerns present in this fact pattern. The reason that this woman was monitored at all was because someone thought she was going to file a lawsuit. In this fact pattern there could be a finding that the company's attorney was looking for privileged information, which could affect a ruling on whether the e-mails were admissible. Also, whether she reported the harassment isn't in the fact pattern. But if you're looking at her e-mails and Facebook, you are arguably on notice of protected activity. At the same time, the employer now is aware of what I would consider a dischargeable offense in the posting of the confidential information and trade secrets. Here, the employer's review of the employee's e-mail account has complicated handling the matter.

MR. MORGENSTERN: Chris, admissibility aside, what is your take on securing these e-mails and social media postings?

MR. SCALIA: I go back to the point of why I, as the client, want that fight in the first place. Because you're absolutely right, Michele, the company can end the employment relationship because the employee posted the company's confidential information on a website.

MR. SULLIVAN: It depends on the content of the e-mail also. If it contains an admission of something that could be very valuable in your motion for summary judgment, you might want to have that fight. But the point that Sid made is the one that's most helpful to our clients: nobody really monitors e-mail effectively. As long as that's the case, we're always going to have that retaliation claim, which is the more dangerous claim.

MR. GOLD: I also think juries' perspectives on e-mail and expectations of privacy are completely different from ours as lawyers. Juries in particular are offended by a company going into someone's e-mail and attempting to intercept attorney-client communications.

MR. SULLIVAN: I think your point on juries' expectations is right on, because the jury in the unpublished Houston's restaurant case, *Pietrylo, et al. v. Hillstone Restaurant Group*, which was in the U.S. District Court for the District of New Jersey, really came down on the employer. In that case, employees were complaining about their restaurant employer in an invitation only discussion group on MySpace. The jury landed firmly on the side of the employees after the employer accessed that discussion, awarding compensatory and punitive damages.

MR. SCALIA: This discussion highlights the need for proactive training and a holistic understanding on the part of managers of exactly what they should do when they are presented with, for example, one employee pulling up another employee's social media postings and disclosing them to management. This need for training will grow after the National Labor Relations Board issues a few decisions regarding social media and the posting of information on those types of websites.

MR. SULLIVAN: And that training hasn't taken place for most employers yet, has it?

"From the labor law perspective, I think we'll see much more contentious collective bargaining between cities, municipalities, states and their unions in 2011."

Jim Sullivan

"If you're going to get rid of a long-term employee, treat him humanely and fairly, and you're probably going to avoid 60 or 70 percent of your single-plaintiff lawsuits."

Sidney Gold

MR. SCALIA: No, it hasn't. Our work as management lawyers has just begun in that arena. And I will tell you, social media and its impact on the American workplace is going to be the hottest issue for employment lawyers over the next five years and beyond. Social media touches every area of U.S. employment law, and makes it more difficult for employers to manage their workforces. There are new considerations that employers must pay attention to that previously never entered the employment relationship.

MS. MALLOY: To follow up, similar concerns arise when you have supervisors and employees friending each other on Facebook and discovering information they otherwise would not have known, such as a supervisor learning of an employee's disability. Problems may also arise when employers research applicants on Facebook or other social networking sites, then make hiring decisions. Although the hiring decision was made on the basis of a legitimate reason, the information that the employer learned from Facebook provides the applicant an argument that the hiring decision considered impermissible factors.

"A RIF policy that utilized performance evaluations may have worked in 1993, while a policy built around qualifications might work better today."

Michelle Malloy

MS. WILLIAMS: It extends beyond the boundaries of employment law, too, because we are dealing with copyright issues and trademark issues, because employees who post content from the work computer onto a website leave a stamp – the address for where that information came from, which is the company computer. If companies don't have a policy in place that prohibits employee use of copyright- or trademark-protected material, for example, an argument exists that the company authorized the improper use, and the company may be liable.

MR. SULLIVAN: I was going to talk about trade secrets because it seems like this is a recent phenomenon. But nine years ago when I was in-house at Comcast, I remember getting a call about an Internet forum for cable technicians. A Comcast cable technician had posted information about a product that Comcast had not yet rolled out, and Comcast was very upset about it because it was essentially a secret. This happens to companies all the time. They really have to monitor their employees' online activities, especially where confidential information is concerned, because even if you train employees and you train management, leaks are going to happen. Employees just can't resist talking about their latest developments, even though they're not for public disclosure.

MS. MALLOY: I agree. Years ago everybody spoke face-to-face or over the telephone, so information didn't get out to the mass public. But people don't communicate that way anymore. Everything is Facebook, MySpace, blogs and text messaging. This opens their discussions to the public. Companies have to come to terms with that reality and create policies and train employees accordingly.

MR. SCALIA: Social media brings a whole new challenge to managing the integrity of powerful brands. Similarly, our society's obsession with the instant dissemination of information is yet another challenge for employers in terms of regulation and monitoring. An unhappy employee could do considerable damage using social media to publicize whatever he or she doesn't like about his or her employer. And the truth or full circumstances behind the posting are not of foremost concern. We live in a world of burst communication. It's the sound bite that people remember, not the factual details that may exonerate alleged wrongdoing. The employer must react swiftly to confront the problem. No longer are companies able to say, "No comment." In fact, the best strategy now may be to confront the problem and win the battle of public opinion before you move on to the legal implications. Of course the two go hand-in-hand, but there are so many more factors to be considered in an abbreviated period of time.

MR. GOLD: In terms of social media, the use of chat rooms and message boards has also become quite prevalent. There is a cafepharma.com message board on which employees of pharmaceutical firms discuss their employers and their employers' products. Virtually every pharmaceutical company has employees who are posting on this site and disclosing information relative to either brand leaders or possibly management. This is information that would not otherwise be obtainable, even through discovery. From a lawyer's viewpoint, it's important to know that employees are engaging in the dissemination of that information.

MR. SCALIA: Of course the other side of this debate is the many positive aspects of social media. For example, almost every major corporation uses some sort of social medial interface to recruit prospective employees. And it is not just 21-year-olds coming out of college. It's people of all age groups. I read recently that the fastest growing segment of Facebook users is individuals over 35 years of age. Facebook has nearly 400 million users and

serves as a repository for all facets of consumer information, so it has incredible value as a tool to understand consumer insights. Gatorade®, you might have read, just launched a $10 million social media war room where it is paying employees to surf various social media websites like Facebook and Twitter and MySpace, and Digg and Glassdoor, and respond in real time to people who have posted things about their products or practices. Again, all of these things are incredibly valuable to an organization and can translate into profit.

MS. WILLIAMS: Only through the use of social media have companies been able to respond to customer and employee complaints in real time. The more global the company, the greater the expectation that it will provide real-time responses. Social media is a powerful tool. It is important for employers to understand why the use of social media is beneficial to their companies. With that understanding companies can begin to understand why improper and unmonitored employee use of social media or other electronic communications at work can be very destructive.

Electronically Stored Information

MR. MORGENSTERN: I'd like to change gears to address electronically stored information. What measures must corporations take to store and protect ESI?

MR. SCALIA: This is one of the issues about which I am most passionate. Because the reality is that corporations store almost all of their data electronically. And the data stored is so much more than e-mail. The volume of data stored is hard to fathom. But what I'm seeing now is a disturbing trend involving plaintiffs attorneys who will write a pre-litigation demand letter with one page of allegedly unlawful conduct by the employer, coupled with several pages outlining the ESI preservation requirements. The employer is at that point on notice of the need to preserve a substantial portion of that data and the plaintiffs attorney will use that ESI burden as leverage to drive a quick resolution. I think employers are struggling to understand the scope of their preservation duty so they err on the side of retaining everything, which creates an opportunity for errors and challenges to the ESI retention process. I think retaining all data is a mistake and in-house attorneys, along with outside counsel, need to work very hard at the beginning of litigation to craft an ESI agreement that will outline the scope of the employer's preservation duty. I'm very concerned about where this trend is heading, and I am not sure the courts are going to clarify the issues or generate any relief in the years ahead.

MR. MORGENSTERN: Claudia, what issues do you see facing public employers with regard to ESI and e-discovery?

MS. WILLIAMS: First, with regard to electronically stored information, the burden in the private sector is a bit different from what you see in the public sector. Public employers are subject to Right-to-Know requests and must maintain information accordingly. In 2008, the burden shifted so that the presumption lies in favor of producing records upon request, or you must be able to demonstrate – with legal authority – that a record is not subject to a Right-to-Know request. On the one hand, public employers are well-versed in dealing with issues related to the production of information. The question is whether the employer is counseled as to its obligation to preserve documentation at the appropriate time, and whether there is appropriate follow-up. The burden will also depend on the size and the level of sophistication of the public employer. Smaller municipalities, for example, may not have as much electronic information to store. They may rely more on face-to-face meetings with the occasional use of e-mail. But, as with all organizations, the larger the organization, the greater the burden may be, because more people are generating information.

MR. SULLIVAN: I have an interesting question for the group: if you think an employee is likely to sue you, but you haven't yet received a letter from the employee's lawyer, do you make a mirror image of the data on the employee's computer?

MR. SCALIA: It depends whether I'm on notice.

MR. SULLIVAN: You don't have notice. You just have an inkling.

MR. SCALIA: Yes, I likely would issue a litigation hold if I suspect that litigation is on the horizon. The challenge is the substance and scope of that litigation hold. It's a significant resources issue for companies.

MR. SULLIVAN: I have also seen and had a client use software that unbeknownst to

"There was a case in New Jersey where social media was allowed during the jury selection process. Is this an isolated incident or is this the wave of the future?"

John Morganstern

employees will record each instance of a flash drive being used to copy data.

MS. MALLOY: I have seen employers have success with that type of monitoring. The IT department is automatically notified when large numbers of files are downloaded. In those instances, I think you'd want to mirror image the whole computer to see if there have been e-mails to a new employer, so that you can have the timeline in place.

MS. WILLIAMS: I agree with Michele. That type of monitoring may be an employer's first hint that an employee is going to walk out the door and go work for a competitor, hoping to use the current employer's confidential, proprietary information or trade secrets to his or her advantage.

MS. MALLOY: Employers should also consider that the employees' e-mails may prove helpful to their defense of claims.

"Social media and its impact on the American workplace is going to be the hottest issue for employment lawyers over the next five years and beyond."

Chris Scalia

The information in those e-mails may contain admissions that can be used as leverage in litigation.

MS. WILLIAMS: One of the ESI issues that I'm concerned about is defense counsel's obligations arising out of detailed litigation holds. Recent court cases have established a burden on counsel to not only issue the standard "litigation hold notice," but also to follow up and ensure that the appropriate action is and continues to be taken. Chris, as in-house counsel, do you expect your outside counsel to check in with you periodically to make sure the appropriate information is being preserved and hard drives are being imaged?

MR. SCALIA: That is a great question. As someone who is sitting in-house, if I'm hiring your firm, my expectation is to get the entire scope of services, including ESI services. As you know, a lot of firms now have in-house ESI experts or affiliate organizations to handle this work. So the answer is absolutely. And frankly, this is one case of perhaps 30 or 40 that I might have under my management at any given time. I can't personally handle every ESI issue. I will say, however, that we have systems set up that make litigation holds run smoothly. If we receive anything that is even remotely close to the threat of litigation, a litigation hold is issued and we have systems and people that help us preserve the required data.

MR. MORGENSTERN: Sid, how far do the legal obligations extend to every employer, regardless of size, to back up and save all ESI?

MR. GOLD: First, what we're finding with respect to ESI is that in contrast to sophisticated larger corporations that are in tune with legal requirements, many smaller companies do not have policies in place with regard to electronic information. The smaller companies do not have retention policies or compliance policies. For the most part, they have never even heard of a litigation hold letter because they only consult a lawyer after they've been sued. At that point, it could be too late. I find that companies employing less than 100 employees are quite vulnerable.

Second, I think companies need to be more proactive when they image hard drives. For example, an employee potentially has a claim for discrimination or sexual harassment and registers an internal complaint. The matter has not yet reached the point where the employee has consulted a lawyer, and she wants to see the matter remedied and remain employed by the company. But, the company takes an aggressive approach in response to the employee's complaint and copies her hard drive without copying that of the alleged perpetrator of discrimination or harassment. What the company ought to do is take the opportunity to determine its potential vulnerability by copying the hard drive of the alleged perpetrator's computer as well. Rather than assuming the employee is looking to sue the company and reacting based on that assumption, the company should investigate the allegations in order to find out whether there is truth in the allegations and assess its exposure to liability. If a company has a manager sending e-mails containing inappropriate sexual content to an employee, those e-mails would be discovered during the course of an investigation. The company could then take appropriate action to cut its risk of liability.

MS. WILLIAMS: Sid, one of the issues I deal with is having plaintiffs identify each and every source of their electronic communications during a relevant period of time. For example, the plaintiff will respond, "I used my mom's computer, I used my dad's computer, I used my laptop in my own home, I used my BlackBerry, I used my boyfriend's phone. I sent text messages, I posted on Facebook, I sent e-mails, I forwarded information from my work computer to my home computer." Others may say they don't have a computer or they don't have a cell phone. From a defense perspective, I need to be creative. As a plaintiffs attorney, do you find that type of situation difficult from a preservation standpoint?

MR. GOLD: I'm very proactive in terms of sending a letter to every client explaining the scope of their duty to preserve their electronically stored communications. It is important for the client to know that hand-held devices, laptops, and desktops are all fair game when it comes to discovery, and that someone is going to copy every device they have. Of course, then the clients start looking at their Internet activity and become a little more realistic about whether they want to move forward with their cases. I encourage clients to look at their e-mails, social media pages and Internet usage, because those things are going to become subject to inquiry at the time of litigation.

MS. MALLOY: We encourage employers to be proactive with respect to plaintiffs' social media use. As soon as there is notice of a claim or the employer suspects a claim is coming, it makes sense to download and save Facebook pages, MySpace pages, etcetera, because a lot of times plaintiffs will shut down their sites to avoid having the employer see the content. Even LinkedIn, for example, can be revealing in terms of resumes and job descriptions. The employment history posted on LinkedIn may be quite different from what the employee listed on their employment application because they were terminated from several jobs. So now the employer has knowledge about employment history that it could not have gained from the personnel file alone.

MS. WILLIAMS: Thanks to *EEOC v. Simply Storage Management LLC*, which came out of the U.S. District Court for the Southern District of Indiana in May, we now have a basis for access to that information. For all intents and purposes, this was the leading case for granting access to a plaintiff's otherwise password-protected social media activity. The court ordered that the plaintiff's status updates, group information, blog entries, wall posts and photos from her Facebook pages be turned over to the employer to the extent they related to her emotional state.

MR. MORGENSTERN: Michele, in terms of electronic discovery, is it a level playing field between employers and employees filing suit, and, separately, what have you seen in your practice in terms of counterclaims against plaintiffs?

MS. MALLOY: I don't think it's a level playing field yet. Everybody knows that the company has e-mails and records. But it is incredibly expensive data to retrieve and produce. Culling that information may cost hundreds of thousands of dollars in a case that is worth $100,000 at the end of the day. So the cost of the electronic discovery really takes the case out of the merits and into the cost of defending the matter. On the other side, for employers, it's difficult to be sure you've received everything from a plaintiff. Everyone knows what the company's systems retain, but what about the plaintiff? An employee can say he only used one computer and unless you find evidence to suggest otherwise, you may miss a great deal of information contained on another computer. For these reasons, I was happy to see that the *Simply Storage* decision required the plaintiff to produce the social media data at issue in that case.

MR. MORGENSTERN: Chris, have you seen many employers file counterclaims against plaintiffs?

MR. SCALIA: Well, certainly the concept of counterclaims is entertained, but I'm skeptical about how successful such a claim would be and I have not seen many of them. At that state of the litigation, I am much more inclined to push for an ESI agreement, including costs.

MR. SULLIVAN: I would say potential spoliation by a plaintiff could merit a counterclaim. I have seen that come up frequently.

MS. MALLOY: I have also seen employers using the Computer Fraud and Abuse Act as the basis for a counterclaim, especially in trade secret cases.

MR. SCALIA: The cases I deal with wouldn't typically lend themselves to the Computer Fraud and Abuse Act, though I see circumstances where that would make sense. And Jim is absolutely right, potential spoliation is something we would pursue to the fullest extent possible. After-acquired evidence can also be used as an affirmative defense. It's very effective when reviewing things like employment applications, Web pages and resumes.

MR. MORGENSTERN: Sid, in your experience, how does e-discovery affect cases in terms of after-acquired evidence?

"If companies don't have a policy that prohibits employee use of copyright or trademark-protected material, an argument exists that the company authorized the improper use, and the company may be liable."

Claudia Williams

MR. GOLD: We are finding that after-acquired evidence issues are arising once an employee has separated from a company and the company decides to check into the employee's Internet use. Employers find that employees were using the company's Internet to engage in online dating, shopping, or fantasy football. This absolutely creates an issue for a plaintiff because it can cut off his or her back pay losses.

MR. MORGENSTERN: Claudia, recently there was a case in New Jersey where social media was allowed during the jury selection process. Is this an isolated incident or is this the wave of the future?

MS. WILLIAMS: I believe it's only the beginning. Apple, for instance, has come out with an application for the iPad called iJuror. Essentially it's touted as a replacement for bulletin boards and Post-its, or whatever method you currently use, to track potential jurors during jury selection. You can sit in the courtroom and use your iPad to monitor your jury selection. Frankly, I also think engaging associates and clerks to come to the courtroom and use Wi-Fi access to gather online information about potential jurors is a must. I think you may be remiss in your duties to your client if you fail to do that and information was available that went directly to the heart of potential bias on your jury. If you don't discover that information, it may cost your client.

MS. MALLOY: And I don't believe it is always wise to stop after juror selection. Once you've got your jury panel, you should be monitoring their social media activities. There have been situations in which jurors have posted polls asking whether they should vote for the plaintiff or the defendant, or made comments about the evidence that reflects bias. I think with all the available sources on jurors today, attorneys are not doing a service to their clients, and possibly bordering on malpractice, if that's going on and they are not doing anything to become aware of it.

MR. SULLIVAN: In cases where the employer has liability insurance for employment matters, how often do insurers pay for associates to research potential jurors or monitor jurors' online activities?

MS. MALLOY: They're probably not paying for it right now, but I think if you discuss the reasons why it is necessary and get it pre-approved you can usually convince them that it's necessary. And as this area evolves, I think that they will agree to pay for it, especially as it gets more media attention.

MR. SCALIA: I think in-house lawyers are willing to pay for that time. If we're at the jury selection phase of a case and the insurance company is not going to pay for it, I will because it's so important to the selection process. The cost is rather insignificant when compared to other trial preparation costs.

MS. WILLIAMS: As counsel for many claims with employment practices liability coverage, I have found that our carriers are willing to fight a good defense, and they are willing to expend the resources to gain every possible tactical advantage. I have yet to have a carrier say no to me when it comes to tracking social media activity. And as Michele said, as more and more cases of plaintiff or juror online misconduct surface, this question will become a non-issue.

Work Force Reductions

MR. MORGENSTERN: During the past couple of years, work force reductions have been a major issue in labor and employment law. Sid, do you see that trend continuing into 2011?

MR. GOLD: I do. The recession that allegedly just ended is quite different from previous recessions because the workplace has dramatically changed and the way we do business in this country has dramatically changed. For the first time, we're seeing a consolidation of companies in retreat, which renders certain jobs redundant. Outsourcing is also quite popular, especially in certain industries. We've had a contraction of all jobs, which creates issues relating to termination. Specifically, issues arise out of determining who to terminate and how the decision process should look. An employer must understand that the selection process will be scrutinized under a microscope if it impacts individuals in a protected class. What we find is that most of the litigation involves smaller companies that do not have reduction-in-force policies in place and do not know how to handle a RIF. If an employer is going to have a RIF, it should have a process in place that is insulated from attack and ensures consistency.

MR. MORGENSTERN: Jim, what challenges do you see facing employers reducing their work forces?

MR. SULLIVAN: I deal with organized labor quite a bit, and a host of National Labor Relations Act concerns arise in terms of the decision to lay off and whether there is any obligation to bargain with the union about the decision, as well as the results of the decision. I had an interesting case this year in which a client laid off approximately half of a bargaining unit because the client lost a large account. Six months prior to that, there had been a one-day strike when the contract expired, and that created a lot of animosity between the local management and the union. After the layoffs, the union filed a grievance claiming that the layoffs were in retaliation for their conducting a strike. They finally withdrew the grievance, but it was the first time in my 30-year career that I had a retaliation claim on the basis of layoffs following a strike. That said, I think the same RIF issues that I've dealt with over the years still arise today.

MR. MORGENSTERN: Michele, do you have similar experiences?

MS. MALLOY: I do. I find that in employment litigation, a major issue remains what criteria were used to select employees for termination. And today it can be difficult to put a standard RIF policy in place because of the changing economy and the changing needs of the business. A RIF policy that utilized performance evaluations may have worked in 1993, while a policy built around qualifications might work better today. This is especially true when one considers the consolidation we talked about earlier and the need for employees to serve multiple functions within a company.

MS. WILLIAMS: I've received a lot of phone calls from employers who need to do a RIF and ask how they can use it to eliminate dead weight. Generally my response is, if you have people who you need to let go for cause, then let them go for cause, whether it is documented performance issues or for misconduct, or whatever the reason may be. A RIF should be utilized to address the economic needs of the business at that time. Disciplinary action and termination should be used to address a failing employee. The key to a RIF is establishing legitimate criteria for the individuals selected.

MR. SCALIA: I've actually said to my clients: "Put this on my tombstone: A complex reduction in force will not serve as a substitute for a failed performance management system."

MR. GOLD: And if you're going to make a business decision that's going to impact even one employee, it should be well-thought-out and compassionate. Most employees are not looking to sue their employers. Employees appreciate assistance during transition, from career counseling to health benefits. This is particularly true for long-term employees who are in the later part of their working lives.

MR. SULLIVAN: In 1982, when I was an associate in Pepper Hamilton's labor and employment group, my father was demoted from salesman to assistant plant superintendent at a paper company on Delaware Avenue in South Philadelphia. He had worked there for 30 years. He brought an age discrimination suit against the company and received a sizable jury award. But he said that if the company had given him a token of appreciation for his 30 years of service and explained that they just couldn't afford to keep him as a salesman, he never would have called a lawyer. Instead, the company made him work for a person that he had hired as assistant plant superintendent five years earlier, who was much younger than he was. The bottom line is, if you're going to get rid of a long-term employee, treat him humanely and fairly, and you're probably going to avoid 60 or 70 percent of your single-plaintiff lawsuits.

MR. SCALIA: And that rule applies regardless of your circumstances, regardless of your timeline, and, frankly, regardless of the business necessity because that rule can be formatted to fit almost any circumstance that you have as an employer. It really is a simple concept.

Wage and Hour Developments

MR. MORGENSTERN: Recently we have been seeing new developments in wage and hour cases, especially relating to misclassification. Claudia, what can you tell us about that?

MS. WILLIAMS: Wage and hour cases are exploding right now. There isn't a blurb on the daily employment alerts these days that doesn't involve a misclassification issue and a wage claim. The problem is employers are conducting business as usual without really taking an in-depth look at what it is their employees do and where they fall in terms of classifications. To ward off wage and hour claims, employers need to proactively review job descriptions, compare the descriptions to actual job duties and conduct Fair Labor Standards Act reviews. Some of the specific issues we are seeing are whether the time employees spend logging onto their computers is compensable, and how to address instances in which workers get called away from their unpaid lunch breaks to work, but do not get compensated for that time. Frankly, employers need to address these kinds of issues before the Department of Labor or a plaintiffs attorney is brought in, because then you have not only the wage issues and back pay, but attorney fees and costs as well. And with regard to misclassification issues, Pennsylvania just joined 16 other states that now have specific laws addressing employee classifications either as a whole or in specific industries.

MR. MORGENSTERN: Sid, what is your take on these recent misclassification cases?

MR. GOLD: I think employers have a tendency to bury their heads in the sand when they know they have a classification problem to address. As Claudia said, employers need to actively address proper classification of their employees. Either a misclassification occurs because an employee is made answerable in the evenings by way of a BlackBerry, or by calling a salesperson a manager when that person has no managerial duties. Employers often receive a rude awakening when the DOL contacts them. Employers also fear taking necessary steps to address misclassification because they may owe employees back overtime as a result.

MR. SULLIVAN: I don't agree with Sid for the most part. Looking at nonexempt vs. exempt, or even the meal break issue, I don't think employers are being negligent or intentionally creating this situation. I think that when we started practicing in the early '80s, the FLSA was nothing but an occasional DOL investigation. And now, for some reason, plaintiffs lawyers have found a vulnerability and they're attacking it. Once employers get on board, I think the whole thing will go away. Independent contractor vs. employee is a different story. I agree that maybe in the independent contractor situation employers have been somewhat remiss in not really being honest.

MS. MALLOY: Following up on what Jim said, one of the reasons we're seeing a rise in off-the-clock cases is that they're easy for plaintiffs counsel to litigate. Plaintiffs can use the absence of records to shift the burden of proof. If you have an employee working off the clock, of course you're not going to have records of the hours they worked. Then it comes down to credibility and becomes challenging for employers to defend.

MR. GOLD: I think what we're seeing here is lawyers attacking every aspect of classification cases and cases where employees are working off the clock. Certainly there is merit to some of these claims, while others are simply testing the waters. At some point, it will be clear which employees are really entitled to overtime and which employees are not. The current legislation and court decisions in this area are too ambiguous. Particularly for smaller employers, it's very difficult to determine who is exempt and who is not.

MR. SCALIA: I think plaintiffs counsel and management counsel can agree that the rash of wage and hour litigation and the recent decisions coming out of the U.S. Court of Appeals for the Second Circuit and the U.S. Court of Appeals for the Seventh Circuit leave us all clamoring for the U.S. Supreme Court to get involved – or, better, the Congress – to more clearly define exemptions that are realistic and contemporaneous with American business today. The current exemptions were written at a time when the way we did business was vastly different than it is today. These cases are a wake-up call to everyone that we need reform in this area of the law or this vicious cycle is going to continue.

MS. WILLIAMS: And to tie it into what we previously discussed, the law in this area needs to become current in terms of employees' portable electronic devices, and until that happens, employers need to take a step back and say, "To whom are we providing BlackBerrys and laptops, and how are we keeping track of their portable device use?"

MS. MALLOY: Agreed. At the same time, I think the DOL is part of the reason we are seeing so many of these actions right now. They came in with a very aggressive stance and encouraged complaints so that they could launch investigations. The DOL is also writing amicus briefs, issuing administrative interpretations and revoking long-standing opinion letters, which in some cases appears to be impacting private litigation. In a way this is a good thing, because we may get some guidance in this area. But are they going about it in the right way? I'm not sure.

MR. SCALIA: What about reformation of the collective action provisions of the statute itself? Because let's face reality, these cases individually aren't worth that much money. It's when they are brought collectively that they become very attractive to plaintiffs firms. So maybe it's as simple as a small reformation of the actual collective action provisions, and then we go from there.

MS. MALLOY: Right. Nobody wants to take one of these cases to trial, so it's a bonanza for fees, and that does have to change.

MR. MORGENSTERN: Michelle, what advice would you offer to employers facing wage and hour matters?

MS. MALLOY: I think employers have to take action to stay ahead of the curve. Employers know we have an active DOL. They know that plaintiffs firms are filing massive class and collective actions. If they want to avoid the wage and hour lawsuits, they have to conduct a thorough audit. The audit should involve asking employees directly what they do and making sure policies regarding work hours are followed. Because of the potential liability that these cases carry, with fees and electronic discovery, and because trial of these cases is risky for all parties, employers really need to examine their practices and classify employees correctly and record time properly.

MR. SULLIVAN: Employers are afraid to do it, so we show them that it's not as difficult as they think it will be. Even with a company the size of Hershey Co., if you compress down the employees who are on the bubble of exempt vs. nonexempt, it's a small percentage. The others generally fall clearly into one category or the other. So you make a decision about the ones on the bubble and communicate that clearly to your employees.

MS. WILLIAMS: Then you update the job descriptions to accurately reflect the real job duties.

MR. MORGENSTERN: Sid, is there any further advice that you would offer to employers?

MR. GOLD: It's been simply stated here today: employers need to be more proactive about classification and not kid themselves. If they are unsure about a classification, they need to seek the advice of counsel.

Current and Future Trends in Employment Litigation

MR. MORGENSTERN: In this, our final segment of today's program, I would like to ask you, our panelists, to share your thoughts on current trends in employment and labor law, and what we might see in the coming year.

MR. GOLD: I expect to see a continuation of what we've seen in the past few years, particularly with respect to the growth of claims under the Americans with Disabilities Act. The amendments made to the ADA changed the way disability cases are litigated. In the past, the battlefront was determining what constituted a disability and whether an employee was disabled within the meaning of the ADA. With the recent amendments, that battle is virtually over in that the new ADA provides for an expansive, liberal interpretation of what is a disability within the meaning of the ADA. Now, the battle lines have shifted to determining what constitutes a reasonable accommodation for an individual with a disability and whether the employer engaged in good faith in an interactive process with the employee in terms of granting the accommodation. Additionally, as the work force gets older we're going to see increasing numbers of employees with medical issues. Unfortunately, with the economy in its current state, these individuals need to work. These individuals will require accommodations, whether it be a short leave of absence, an opportunity to get treatment, or, in certain cases, time to spend with a family member who is suffering from a catastrophic illness. Litigation will largely surround what an employer must do to comply with its obligations under the ADA in terms of working with an employee who is disabled and might need an accommodation.

MR. MORGENSTERN: Thank you, Sid. Chris?

MR. SCALIA: I think 2011 will be a very interesting year for labor and employment law. The topic that I'm most interested in is discriminatory pay practices litigation. With the passing of the Lilly Ledbetter Fair Pay Act of 2009, the equal pay amendments that are being proposed and assorted legislative measures that we've heard about, I think discriminatory pay practices litigation might be the next point of focus for the plaintiffs bar.

MR. MORGENSTERN: Claudia, what challenges do you see facing our field in 2011?

MS. WILLIAMS: I think one of the things we're going to continue to see is what I've noticed over the past 12 to 18 months: aggressive administrative agencies, such as the DOL, the EEOC and the NLRB, starting with the processing of administrative complaints. Gone are the days when a complaint would be filed with the EEOC and the employer would submit its response and sit back and wait for the right-to-sue letter. The EEOC is seeking documents and all but demanding fact-finding conferences. They are less likely to take "no" for an answer or accept objections to their requests. And the EEOC is now taking a more aggressive stance in terms of initiating litigation, as evidenced by a recent lawsuit it filed in which it claims that obesity is a disability. Employees filed more than 20,000 complaints last year based on disability discrimination alone. The EEOC requested a $385 million budget appropriation for fiscal year 2011, an $18 million increase from the appropriation for fiscal year 2010. In other words, employers may notice a difference in their communications with counsel when handling administrative complaints. They can expect to have to respond to specific and repeated demands for information, and they can expect the number of claims to continue to increase.

MR. MORGENSTERN: OK. Jim, what trends do you see on the horizon?

MR. SULLIVAN: From the labor law perspective, 2011 is going to look like 2010, but with interesting twists. For example, in the public sector, I think we'll see much more contentious collective bargaining between cities, municipalities, states and their unions. I think we might even see some state law changes simply because of the dire straits that the state budgets are in. School districts' budgets, local municipalities' budgets, they just don't have the tax revenue to support them. This will lead to increased binding arbitrations, less resolution at the table and more infighting both at the bargaining table and in the legislatures. On the private side, the battle over the rules governing union organizing will ramp up. The Employee Free Choice Act is pretty much dead at this point. However, the NLRB is making progress on changing the rules to make it easier for unions to organize employees. Another interesting aspect of the current political climate as it relates to unions is the use of union dues to support one political party. We may see some interesting battles over segregating union dues in that regard. The last thing I have is increased aggressiveness from the Occupational Safety and Health Administration. They are very interested in increasing penalties and garnering more publicity for their citations. So I think that greater OSHA enforcement is clearly going to be a big subject in 2011, along with more use of federal whistleblower provisions administered by OSHA.

MR. MORGENSTERN: Michele, what trends do you see coming in 2011?

MS. MALLOY: Just as you have the ADA amendments, you have the Family and Medical Leave Act revisions. I think we're going to see more litigation arising from employees who feel that they have not been given their FMLA leave. The issue that employers face here is that the FMLA has always been an incredibly technical statute. Employers don't mean to violate it, but violations happen frequently. And given the publicity that has come with the changes to the FMLA, employees are more aware of their rights to take leave. Notice requirements have also changed, individual liability for supervisors has become a hot issue and laws are taking aim to ensure that employees have time to spend with their families. So on the whole, I think we're going to see more FMLA claims.

MR. MORGENSTERN: We are now out of time. I'd like to thank our panel – Mr. Gold, Ms. Malloy, Mr. Scalia, Mr. Sullivan and Ms. Williams – for all of your valuable insights and for sharing such an incredible wealth of knowledge. This has been an excellent and an informative session.

Turn Page to See Panelist Bios

Labor & Employment: A Roundtable Discussion

Sidney L. Gold is a principal shareholder of the Philadelphia law firm, Sidney L. Gold & Associates PC. Mr. Gold's practice is exclusively concentrated in the representation of both employees and employers in all aspects of employment-related litigation, including claims under federal and state discrimination laws and federal civil rights laws. Mr. Gold possesses extensive experience counseling employers regarding Title VII, ADA, ADEA and FMLA compliance. He has written extensively on employment discrimination matters, including authoring many articles for *The Legal Intelligencer* and the *Pennsylvania Law Weekly*, and is a frequent lecturer for the Philadelphia Bar Association and the Philadelphia Bar Institute. He serves as an arbitrator and mediator for the U.S. District Court for the Eastern District of Pennsylvania, and is a member of the court's Employment Litigation Panel. Mr. Gold also serves as a Judge Pro Tem for the Philadelphia Court of Common Pleas. He is a past vice chairman of the Eastern Pennsylvania Chapter of the National Employment Lawyers Association.

Littler Mendelson Shareholder **Michele Malloy** focuses her litigation practice on the representation of employers in employment and labor matters before federal and state courts and administrative agencies. Her experience spans a wide spectrum of employment and labor law litigation in both class and collective actions and single plaintiff contexts, including wage and hour, discrimination, harassment, Family and Medical Leave Act, Fair Credit Reporting Act, retaliation, breach of contract and wrongful termination claims. Ms. Malloy also devotes a substantial portion of her practice to counseling employers regarding federal, state and local compliance in areas such as hiring, discipline, termination, medical leaves, accommodations and wage and hour issues. Employers frequently call on Ms. Malloy to conduct management training on a variety of matters, including FMLA compliance, wage and hour compliance, harassment prevention and positive employee relations.

John P. Morgenstern, a partner with Deasey Mahoney Valentini & North Ltd., represents governmental and private-sector clients before federal and state courts and administrative agencies throughout Pennsylvania and New Jersey. He has successfully defended and advised clients in matters involving all aspects of employment law, labor law and civil rights, as well as professional liability, product liability and general liability. Mr. Morgenstern has also been a captain on active duty with the U.S. Army Judge Advocate General's Corps. He deployed to Iraq during Operation Iraqi Freedom (Phase I), and to the Balkans in support of NATO peacekeeping operations. During his time with the JAG Corps, Mr. Morgenstern tried numerous jury trials to verdict and developed the Army's Uniformed Services Employment and Reemployment Rights Act training program, which was presented to all redeploying service members following the first phase of operations in Baghdad.

Chris Scalia is The Hershey Co.'s lead counsel, global labor and employment. He is responsible for all of Hershey's global labor and employment law matters, including those arising out of the company's $600-million Global Supply Chain Transformation, and its $250-million manufacturing realignment known as Project Next Century, which will result in the expansion of operations in Hershey, Pa. Mr. Scalia possesses significant experience in labor relations, the labor and employment law issues concerning mass transformation projects and complex employment litigation. He is often called upon to lecture employers, attorneys and professional groups concerning a wide array of labor and employment topics. Prior to joining The Hershey Co., Mr. Scalia was associated with the labor and employment practice group of Morgan Lewis & Bockius LLP.

For more than 28 years, Buchanan Ingersoll & Rooney PC Shareholder **James J. Sullivan, Jr.** has represented employers in federal and state courts and before administrative agencies in virtually all areas of labor, employment and safety and health-related litigation. Mr. Sullivan devotes a significant portion of his practice to representing employers in union-related conflicts, including active management of union election campaigns, unfair labor practice proceedings, collective bargaining negotiations and grievance/arbitration hearings. He has also represented major employers before federal and state OSHA and MSHA in significant citations and litigation, including cases involving fatalities, serious injuries and multi-employer work sites. Mr. Sullivan additionally serves as counsel to school districts and colleges and universities, representing them in matters such as labor relations, employee and student discipline, special education, student civil rights and staff training. He is an accomplished lecturer who frequently presents at conferences and seminars for attorneys, human resource professionals and employer associations.

Thomas Thomas & Hafer LLP Partner **Claudia Williams** represents public and private employers in the defense of litigation involving state and federal labor and employment law compliance. She also defends employers in matters arising from wage and hour, employee tort, wrongful discharge, non-compete and unemployment compensation disputes. Ms. Williams frequently drafts and reviews employee handbooks and policies, and provides client training regarding a variety of labor and employment-related topics. She also assists clients with traditional labor matters such as negotiations, grievance and interest arbitrations and unfair labor practice charges. A former adjunct faculty member at the Pennsylvania State University, Ms. Williams is the current secretary of the Pennsylvania Bar Association's Labor and Employment Law Section. She is also an active member of the PBA's Young Lawyers Division, currently serving as the division's at-large zone chair. This year, Ms. Williams was selected for membership in the American Inns of Court, James S. Bowman Chapter.