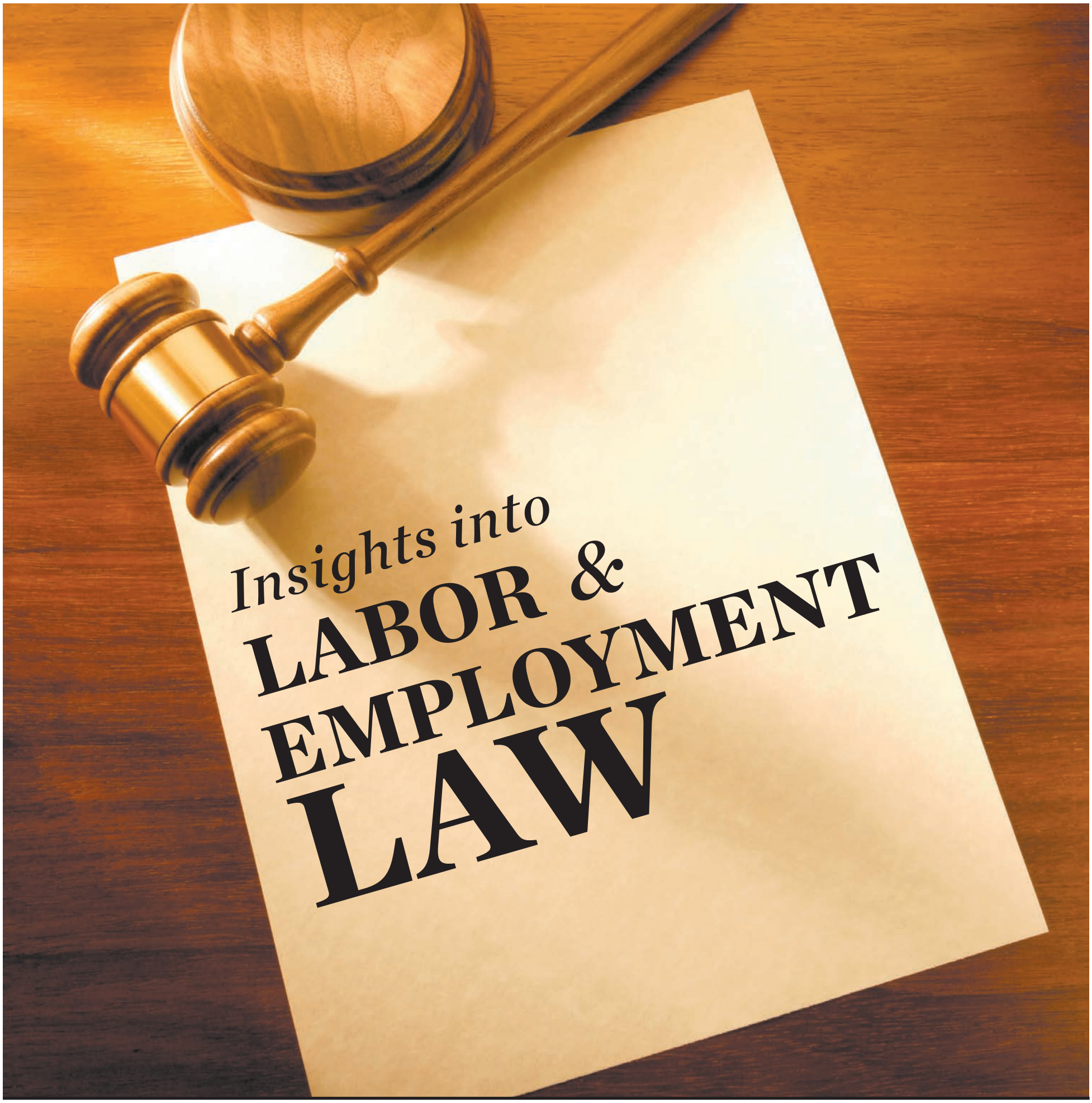
BIRMINGHAM BUSINESS JOURNAL

TABLE of EXPERTS Series



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Stephen A. Brown

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A seasoned and veteran Labor and Employment law attorney, Steve Brown represents, defends and counsels management and employers in every phase of labor and employment law. His experience ranges from the drafting and enforcement of employment contracts, to the defense of discrimination, harassment, retaliation and other employment law claims, including class and collective action suits. In addition, his practice regularly includes all areas of traditional labor law, representing management in the maintenance of a union free workforce, unfair labor practice charges, collective bargaining, labor arbitrations and strikes and other labor disputes. Steve also stays at the forefront of and advises clients on cutting edge and emerging employment law issues such as employee arbitration agreements, non-compete agreements, management and employee training and affirmative action and diversity in the workplace.

Richard I. Lehr

Lehr Middlebrooks Vreeland & Thompson

RICHARD I. LEHR is a member of the Alabama-based national labor, employment and benefits firm of Lehr, Middlebrooks, Vreeland & Thompson, P.C. The LMVT team includes lawyers who previously worked for the Equal Employment Opportunity Commission and National Labor Relations Board and regulators who worked for the Occupational Safety and Health Administration and the U.S. Department of Labor, Wage and Hour Division. Richard and his colleagues have been recognized by U.S. News and World Report, The Chambers U.S.A. Guide to America's Leading Lawyers for Business, Super Lawyers (Top Ten of all Lawyers in Alabama for 2015), Best Lawyers and The Client's Choice Award for 2014. The firm's clients range geographically from Alaska to Miami to London and the firm's client base covers the full range of private and public sector employers. Richard is a frequent national speaker to employers and attorneys regarding labor and employment trends and employer strategies for anticipating and responding to those trends.

Warren B. Lightfoot Jr.

Maynard Cooper & Gale P.C.

Warren Lightfoot is a Shareholder in Maynard Cooper & Gale's Birmingham office and a member of the firm's Labor & Employment practice group. He has more than 24 years of experience representing clients in all aspects of labor and employment matters, including significant wage and hour and federal discrimination litigation. He also focuses on non-compete and trade secret litigation where he has successfully litigated dozens of such cases obtaining or defending against injunctions nationwide. Mr. Lightfoot is Immediate Past Chair of the Labor & Employment Section of the Alabama State Bar, is AV-rated by Martindale-Hubbell and has been recognized in Alabama Super Lawyers and The Best Lawyers in America for many years.

Bryance Metheny

Burr & Forman LLP

Bryance is Chair of the firm's Labor and Employment practice group and serves on Burr & Forman's Executive Committee. He focuses his practice on representing employers and management in all aspects of Labor & Employment law. He defends employers in litigation in both state and federal courts and before state and federal administrative agencies. Bryance also advises and assists employers in developing employment policies and procedures to govern the workplace. His practice embraces all matters involving employees in the workplace, including wage and hour issues, wrongful discharge, sexual harassment, invasion of privacy, employment discrimination and labor relations. Bryance has extensive experience handling litigation in all these areas, in addition to allegations of violations of the Americans with Disabilities Act, the Family and Medical Leave Act, enforcement of non-compete and non-solicitation agreements, OSHA violations, and matters within the jurisdiction of the Office of Federal Contract Compliance Programs.

Trip Umbach

Starnes Davis Florie

Trip Umbach chairs the firm's labor and employment law practice group. He represents both public and private employers in all types of labor and employment disputes, from defending discrimination claims to handling traditional union labor relations matters. In response to the recent surge in overtime litigation, he has developed extensive experience in wage and hour matters. He regularly advises clients concerning non-competition agreements and litigates cases arising from the interpretation of such agreements. A significant aspect of his practice is helping clients make employment decisions and develop policies that reduce the risk of being sued by employees or becoming unionized.
Trip has served as Vice President of Legal and Legislative Affairs for the Birmingham Society for Human Resource Management. He is involved in Boy Scouts at the Council and Troop levels. He and his wife are members of Covenant Presbyterian Church. He also enjoys all sports and outdoor activities.

TABLE of EXPERTS Series

The Discussion

Q: What are some of the most common employment and labor law situations that affect employers?

Warren B. Lightfoot Jr.: The most common issues we see are federal discrimination claims. We see a lot of race discrimination, gender discrimination, sexual harassment, and wage-and-hour lawsuits. Recently it seems there's an uptick in age discrimination claims, and I think that's only going to increase with an aging workforce. It's the protected category that all of us eventually will be in and it's something a jury can really relate to, because everyone is aging. Perceived mistreatment of employees based on their age is obviously a particularly sensitive subject.

Bryance Metheny: The most consistent calls I get are about leave issues – attendance problems that are related to medical conditions, and how to deal with the overlap between the Americans with Disabilities Act, the Family and Medical Leave Act, and sometimes the workers' compensation statutes. We see a lot of employers struggling with how to manage absenteeism and all the legal and logistical issues involved with that. The second trend we've seen recently is increased union activity in the state. We represent auto manufacturers and their suppliers and many other heavy manufacturers across the southeast, and the industry is seeing increased activity from the UAW (United Auto Workers) and other unions desperate to build their roster after years in decline. And that leads to difficulties in managing a workforce that is distracted and often results in unique legal issues many employers have never faced.

Richard I. Lehr: Everything relating to employee pay, including exempt or non-exempt status; deductions and incentives; terminations, which are the decisions most likely to provoke an employment dispute; and workplace conflict, whether it's harassment, threats or turmoil arising out of the work environment.

Stephen E. Brown: One employment law issue that our clients deal with quite often is how to best manage, discipline or terminate an employee when there is a potential for discrimination or retaliation claims or consequences. Many of our clients also deal with a variety of complex Family Medical Leave situations and compliance issues on a regular basis. More recently we've seen a trend in worker classification issues, specifically the proper classification of workers as employees versus independent contractors or as overtime-exempt salaried employees under the Fair Labor Standards Act.

Trip Umbach: Discrimination and retaliation claims, overtime lawsuits, on-the-job injuries, non-compete agreement disputes, and union activity are the most common problems employers encounter.

Q: What questions should an employer ask when trying to choose a labor and employment law firm?

Metheny: The question that would be most relevant to me is whether the firm has depth in its labor and employment practice. There are a lot of folks out there who are general litigators who will represent to employers that they can handle employment lawsuits or day-to-day labor issues, and they really can't. So if I were an employer

I would want to know that the lawyers I have representing me in this complex area have experience and knowledge that goes beyond just traditional litigation, even if the current problem is fairly straightforward. For example, can the firm handle an OSHA investigation or a union campaign or a wage-and-hour class action or create affirmative action programs, and how many have they handled? These issues go beyond the average general litigators' skill set, and they're not going to be able to advise the employer in a lawsuit or adequately address issues that stem from it without the deep knowledge base an experienced employment lawyer has. Do you have the depth and expertise in your practice area to serve all my needs? Ask this basic question, pay attention to the answers, and do a little research on your own. You can go to almost any firm's website and discover whether its lawyers have experience in very precise, specific, critical areas. This is not general litigation. It's not even just defending an employment discrimination lawsuit. The smallest dispute could – and often does – also lead to OSHA claims and union campaigns and wage-and-hour class actions. Those kinds of things are easily discoverable through targeted questions and also through a little bit of basic research on the firm and the lawyer.

"Overall, federal lawsuit filings regarding employment matters have declined during the past several years."

- Richard Lehr

Lehr: Who will handle my matter? In some firms, the initial client attorney is not the attorney the client actually works with, so find out who will handle the matter and be sure you are comfortable with her or him. What is that attorney's expertise in the industry? Is the firm one of strategic thinkers implementing problem solving strategies to help the employer fulfill its objectives? Does the firm tailor its advice to our goals and risk tolerance? What are the firm's billing practices?

Brown: First and foremost, the employer should make certain that the law firm has a group of attorneys who truly specialize in labor and employment law as opposed to a firm that occasionally dabbles in labor and employment work as part of a larger general litigation or general business practice. When you are in the middle of a sticky employment issue, you really need an expert in employment law. The employer should determine whether the firm's labor and employment law practice covers all aspects of labor and employment law (such as traditional labor law, employment litigation, regulatory compliance and day-to-day employment counseling) as opposed to a limited employment litigation practice. At the same time, the employer will want to know the extent of the firm's litigation and trial experience in L&E matters, including the variety of L&E matters the firm has handled and litigated. An additional item that the employer should determine is the bench strength of the firm's L&E practice group, meaning whether the firm has a substantial number of partners and associates dedicated to and focusing on L&E work. Finally, it is always helpful for the L&E attorney to have knowledge and experience in the employer's particular industry.

Umbach: How available are you? Employment issues often arise unexpectedly and at various times of the day. Employers need someone who can respond and provide advice immediately.

Lightfoot: I would recommend asking not only about depth of knowledge and experience, but also about breadth. What kind of range of different issues and claims have your lawyers handled such as safety, union organizing, union contract negotiation and administration, ERISA (Employee Retirement Income Security Act) and benefits, etc? Breadth goes across not just labor and employment, but also all the issues that touch on labor and employment now because labor and employment is no longer just a specialty area in and of itself. It is starting to touch more and more areas, whether it's benefits, intellectual property, contract interpretation or succession planning. More is now asked of us as L&E practitioners. It's a more complex world now than it was just 10 years ago. Employers need to be careful to consider if they are hiring an experienced L&E lawyer as compared to just a general practitioner who does a little bit of employment work. Another crucial issue for employers to consider is the responsiveness of the firm or lawyer they are considering hiring. That is the key. Our clients demand responsiveness, and they should. We are in a service business. And if we are not hyper-responsive, we are not serving our clients well.

Metheny: When we talk about depth and breadth, we don't mean that one individual has to have it all. Few do. If I get a question and I don't know the answer to it or haven't had substantial experience in the area, I know I have a partner who is an expert my client can call or visit. If I'm an employer looking for a lawyer with a particular skill and require immediate responsiveness, I want to know that my law firm has multiple people who can service me instantly with the experience and knowledge I need.

Q: Is employment-related litigation becoming more or less common these days? What is driving the trend?

Lehr: Overall, federal lawsuit filings regarding employment matters have declined during the past several years. Until last year, EEOC (Equal Employment Opportunity Commission) charges declined each year for five consecutive years. They increased slightly last year to a total of approximately 90,000. The principal reason for the decline in employment litigation is that employers have adopted practices that create an environment in which employees do not see the need to take a workplace issue off the premises to a regulatory agency or an attorney. Second, over half of all employment cases arise upon termination, and most of the litigation we see is pursued by individuals unable to find equivalent replacement work. When the job market is strong, individuals are less likely to litigate.

Brown: Over the last couple of years, we have seen a significant increase in retaliation claims, both at the EEOC and in litigation. And in light of recent developments at the EEOC, which will make these claims easier to prove, we expect to continue to see a heavy dose of retaliation claims. Likewise, we have seen an increase in pregnancy discrimination and accommodation claims, fueled in part by the U.S. Supreme Court's decision in Young v. UPS. FLSA claims and class actions continue to be prevalent, both concerning alleged misclassification of salaried employees as overtime exempt and with regard to off-the-clock claims. Various sorts of whistleblower claims are also on the rise. We continue to see a steady stream of more traditional employment claims such as sexual harassment claims or discrimination claims based an employee's race, sex, age, religion or disability. Finally, in light of recent developments at the EEOC, we expect to see a significant increase in sexual orientation, gender identity and similar sorts of discrimination claims.

Umbach: Lawsuits filed by employees are down slightly. Conversely, activity on the part of government agencie – such as the EEOC, the Department of Labor, and the National Labor Relations Board – is up. Employment claims are largely affected by the economy and politics. If the economy is down and jobs are hard to come by, terminated employees are more likely to consider litigation. In contrast, if terminated employees are able to quickly find replacement employment, they are less likely to sue. Politics are also a factor. Generally, if Democrats are in the majority, legislation providing additional rights to employees is more likely to be passed. Moreover, a Democratic administration will more robustly fund the government agencies responsible for enforcement. The opposite is true when Republicans are in office.

Lightfoot: Certainly in the Northern District of Alabama and Birmingham area it is increasing. There's no question about it. For starters, we have a very active and talented plaintiffs' employment bar here who know what they're doing and are aggressive. That drives a lot of EEOC charges and employment lawsuits in this area. Interestingly, the national trends are not necessarily that way. For instance, the EEOC says that charges as a whole across the country are down a little bit. But we are in a hotspot here. In particular, the statistics continue to show an increase in retaliation suits. I saw a statistic recently that 40 percent of employment claims involve retaliation issues, and that's consistent with what I see in my practice. It usually means employees raising complaints of mistreatment with their employer, and their employer allegedly punishing them for raising those issues. That continues to be a challenge, and it's an important area where employers need our help and training.

Metheny: The primary changes we see driving that trend are new regulations and interpretations of existing law that have given the plaintiffs' bar more opportunities to be creative, and more avenues to pursue disputes, whether it's traditional litigation or claims before a federal agency. For example, the National Labor Relations Board has become much more active in disputes involving non-unionized workforces. Historically, it didn't mess with the non-unionized workforces very much. It focused its resources almost exclusively on unionized employers. And now we see it really aggressively challenging routine social media policies in all workforces. We see it attacking handbooks and arbitration agreements and ordinary employment practices that didn't generate much activity until about 5 or 10 years ago. And now

it's exploded. The other significant trend is wage-and-hour class actions, which continue to increase. We keep thinking that the wave is going to crest, but it hasn't yet, and it may just keep growing. That's not good for employers. These are challenging and frustrating lawsuits. They're complex and expensive to defend. And a lot of times even the most minor technical violation can lead to substantial exposure. The activity in this area in the last 5 to 7 years has been staggering.

Lightfoot: The NLRB reaching into the non-unionized workforce is really unprecedented, and that has changed the way we practice law. You have to have expertise in more areas to advise your clients of all the new landmines that didn't exist until just the last few years.

Metheny: It's caused me to spend more time educating myself. For a good stretch when I started my career, the law was the law and it didn't change much. You developed strategies differently for every case, but the legal issues were fairly static. I was at a seminar not too long ago and heard a lawyer who was not a regular employment lawyer speaking about employment law, and he told the group they should never let their employees talk with each other about their wages because it might lead to complaints and lawsuits. And that's just plain wrong in 2016. I wanted to say, "Do not listen to this guy. He hasn't learned anything new since the late '90s." It's the sort of the issue where, if the lawyer doesn't consistently practice in this field and fails to stay up to date, he or she could miss these important substantive changes. It's easy to overlook these developments. So it's changed the way I practice, because I probably spend a lot more time on education than I would have 8 to 10 years ago.

Q: What are some legal concerns employers should keep in mind when hiring or terminating workers?

Brown: In the hiring process, employers should make certain that their recruiting, application and interviewing processes are legally compliant and that all Human Resources and management employees participating in those processes are well trained in the dos-and-don'ts of hiring. Likewise, employers should take extra care to make sure that hiring standards are consistently applied and that no hiring decision is based on or influenced by an applicant's protected characteristics such as race, age, gender, pregnancy or disability. When it comes to disciplining and terminating employees, employers should ensure that the circumstances leading to discipline and/or termination – including prior discipline – are fully and accurately documented and that the employer's rules and policies are being consistently applied. In other words, that other employees in similar circumstances have been treated the same.

"Likewise, employers should take extra care to make sure that hiring standards are consistently applied and that no hiring decision is based on or influenced by an applicant's protected characteristics..."

- Stephen A. Brown

Umbach: Consistency solves a lot of problems. An employer's best defense to any kind of discrimination claim is that it treated all similarly situated employees consistently without regard to race, gender, age or other protected category. The decision to hire someone is often an employer's best – and sometimes only – opportunity to prevent an employment claim. Thorough and diligent consideration of job candidates can reduce risk down the road.

Metheny: I agree that the most important consideration for both is consistency. Is the way the employer is approaching this hiring decision consistent with the way it's approached other hiring decisions? The same analysis applies with terminations. Are the managers implementing the employer's decision-making policies and procedures using a consistent script? Have they been trained? Do they know what is expected of them so they are acting in a way that is similar to decisions the company has made before? Because that's where we run into real problems, when the employer has one decision with one set of criteria applied to one employee, and a different decision-maker faced with a similar decision uses different criteria for another employee. It may or may not be related to a protected characteristic like race or age or sex, but it doesn't look fair when they're treated differently. And when it doesn't look fair, we have a problem. I end up trying to explain to an opposing lawyer or a judge or a jury about the reasons why my client didn't treat its employee fairly, and how it really wasn't about these other protected characteristics. That puts us in a box. So I tell clients first to make sure what they're doing is similar to what they've done before or, if they're going to make a change, tell everyone about the change and then do it that way consistently as they move forward.

Lightfoot: The way I analyze problems with clients is first and foremost to ask, is the decision we're about to make legal? But then you have to go one step further and ask, even if it's legal, is it fair? Because at the end of the day, that's what juries and judges care about. They are instructed to follow the law, but a lot of times they are going to make a decision based upon basic concepts of fairness. So it comes back to consistency. That is what we preach to our clients. It's by far the most important factor in how an employer treats its employees. What we see a lot of – even with sophisticated employers – is a lack of internal controls to make sure that consistency occurs. That's the challenge for all employers, and that's where we can help them make sure those internal controls are in place. Because at the end of the day most employers want to get it right. They really do. But without that set of controls, things can go off the rails.

Lehr: Regarding hiring, be sure to comply with background check requirements: the FCRA as well as state or local restrictions that may exist for private employers. Employers in all industries are seeking

information about individuals' criminal and credit histories, which they generally have a right to do, but there are compliance requirements. Also, be sure that pre-employment inquiries are consistent with employer rights under the Americans with Disabilities Act. Furthermore, be sure that for certain classes of employees such as sales or research, that the company's intellectual property interests are protected. When terminating someone, the number one question to ask is, did the employee know their job was at risk? A termination should not be a surprise. Relatedly, the employer should consider if the termination is consistent with its policies and – even more importantly – if termination is consistent with how it has treated employees in similar situations. Also, did the employee recently engage in protected activity? If the employee is terminated, she or he may say it was in retaliation for engaging in that protected activity. When making a termination decision, ask, "What is the best business decision for the organization, and how to do we implement it?" Disputes often arise where employers do not give careful consideration to the "how" aspect of the decision.

Metheny: A specific legal concern is the trend toward the ban-the-box statutes around the country, where an employer can't ask about criminal background. Ten or 15 years ago, many employers never would have considered hiring employees with any criminal background even if the crime didn't relate to the job. Employers are not prepared for these new laws and they don't like them. Many employers are trying to find ways around them. They want to know what they can ask to get the information without directly violating the law. What we're struggling with is trying to satisfy our clients' desire to know if their employees have a criminal background with the fact you often just can't. There are just so many different ways now that it can run you into trouble. The EEOC has some pretty strong opinions about criminal background questions in interviews and applications. The really unfortunate consequence is that hiring criminals can expose an employer to different liabilities. An employer who doesn't ask questions about criminal background can be exposed if the employee then engages in criminal conduct that affects other employees or customers. It's a pick-your-poison problem. So employers are struggling with the ban-the-box laws, and every employer needs to consider them and come up with a specific plan for their organization.

"A specific legal concern is the trend toward the ban-the-box statutes around the country, where an employer can't ask about criminal background."

- Bryance Metheny

Q: When it comes to preventing employment law problems, has technology been a benefit, a hindrance or both?

Umbach: Technology has caused problems but also offered solutions. The ease and informality of email creates employment law problems. Employees say things in email they would never say in more personal or formal contexts that often get employers in trouble. Also, email is hard to get rid of. You can delete it but it is still there. Technology has also enabled employees to work outside of the traditional office environment, which makes it hard for employers to make sure they are paying employees for all hours they work. On the positive side, technology can make it easier for employers to train and educate employees on policies that prohibit employment discrimination and harassment. Remote training is an available and useful tool. GPS technology can help with the accuracy of timekeeping. And Twitter can be a useful tool for communication with employees.

Lightfoot: I'd largely say it's been a benefit. There is more information available to employers about employees. And I think the more information, the better. Employers now have the use of more data, and smarter, better and more efficient ways of using that data. So just on the surface, technology has been a benefit more than a hindrance. The downside of access to more information is the risk of becoming overwhelmed with too much information.

Metheny: The employees who work for my clients seem to have taken 21st-century technology and thought of all the different and creative ways they can harass each other with it. I see so frequently harassment and discrimination complaints that arise from email, text messages and social media interaction. In particular, social media has become a really opportunistic avenue for harassing co-workers and making abusive and profane complaints and criticizing supervisors and criticizing the employer. There are just a lot of different ways employees can act out that result in the employer having to take action, and it puts employers in more difficult positions than were possible 15 years ago when the employees couldn't have communicated with their co-workers anywhere close to the same way they're communicating now. At least once a week, I get a call about an employee who has complained because a co-worker sent a suggestive picture or inappropriate email or made a hostile Facebook post that the employer has to investigate and address. I agree that technology is a benefit in many ways. But to me, the technology has just created so many more ways for employees to act badly and get in trouble. It's a headache for my clients.

Lightfoot: We see a lot of that as well. There are lots of problem employees out there and management wants to get rid of them, and rightly so. In dealing with a problem employee, management needs to be savvy about what to put in writing. But the real lesson is, if you are in doubt, call your lawyer and ask.

Lehr: Technology has been a help and a hindrance for basically the same reason. That is, employers are able to find out more about applicants and employees, much of which they may consider in evaluating

employment decisions. Employees are becoming more knowledgeable about their legal rights and their employer's responsibilities. This means employers must stay on top of their obligations, because employees are more likely to call out those employers that are not complying.

Brown: When used correctly, technology can be a great benefit to employers. For example, swipe card and computer login programs can make the tracking of employee's work time both easier and more accurate. Likewise, electronic communications can be used to quickly and effectively document performance deficiencies and deal with other employment matters. Having said that, sloppy or inconsistent email communications regarding employee performance or discipline can be an employer's worst nightmare. And how an employer deals with and reacts to social media can be an employment law minefield. In addition, when it comes to technology in the employment context, it is critical that employers have comprehensive and well-disseminated policies regarding employee access to and use of social media, the Internet, emails and other technology. In addition, the employer needs to have a good understanding of the employment law risks and liabilities that may attach to technology in the workplace.

Metheny: There didn't used to be a record (of complaints and negative comments). It wasn't saved forever, and the employee couldn't do it en masse. The employee might stand off in a corner and talk to two or three other people, but he or she couldn't talk to 200 people at one time. That's where we see the difference. I agree that technology provides opportunities to expose and identify problem spots and deal with them. My frustration has been with clients who have insufficiently trained management and who just simply react after the fact and aren't proactive about dealing with those kinds of problems. Every single employee in 2016 can sit at his or her desk or workstation and access the Internet in about five different ways and get on Facebook and send instant messages with attachments to each other all day long. And if you don't have policies, and you don't have managers who are prepared for preventing the behavioral problems that freedom can create, it gets messy. And unfortunately most don't.

"There is more information available to employers about employees. And I think the more information, the better."

- Warren B. Lightfoot Jr.

Q: What are some of the under-the-radar trouble spots that can cause legal issues for employers?

Metheny: The one that is probably the most important to me is the National Labor Relations Board jumping into non-unionized workforces, and the reality that they're not likely to jump back out anytime soon. Employers don't sufficiently understand that this is a real thing that is happening now. Whether or not you have a union, if your employees are engaging in protected concerted activity in any form or fashion – and they are – then they're protected under the National Labor Relations Act. And talking about social media again, one of the ways employees can engage in protected concerted activity is, for example, if they make a negative comment about the company or their supervisor in a Facebook post, and one other employee hits the Like button. Well, now they've engaged in protected concerted activity, and whatever they were saying about the company or their pay or their work terms or conditions or their supervisor is potentially protected under the National Labor Relations Act. We often get supervisors who instinctively react to those negative comments – like any human being would – and take some sort of disciplinary action, and that puts both the supervisor and the company in a position where they can be exposed to liability in multiple ways. Employers think that as long as it's not about race or gender, etc., then they can do anything they want with at-will employees. And that's not the law. The National Labor Relations Board has always had the ability to control employer's actions in this way, but it just hasn't actively engaged in enforcement like it has in recent years. I see that as a huge under-the-radar trouble spot, because employers just aren't aware of it. The other one that is growing in significance is joint-employment issues. Under both the National Labor Relations Act and wage-and-hour law, those issues have become more critical in recent years. Employers who use a large temporary workforce believe they are somehow insulated. They think, "These are not my employees, they're someone else's employees." But they're not. They're often joint employers over that entire workforce. That's become less under-the-radar in recent years because it's been heavily publicized, but it's still something a lot of employers don't necessarily understand.

Lehr: Some of the trouble spots include the potential liability for the use of temporary employees and the risk assumed in taking on the role of joint-employment with business partners; benefit, wage and tax liability for employees misclassified as independent contractors; the use of micro-units in union organizing to gain a foothold in the workforce; and managing employee communications on social media about workplace issues.

Umbach: The Fair Labor Standards Act applies to virtually all employers, no matter how few employees they have. This law is almost impossible to comply with fully. It is not new, but many employers are still in the dark about what it requires.

Brown: Many employers still have misconceptions that can set them up for significant employment law liability. For example, many employers still believe that a worker can be deemed an independent contractor simply by designating him or her as such or by having a simple contract saying that is the case. Nothing could be further from the truth. Likewise, many

employers still have the misconception that an employee can be classified as overtime-exempt under the FLSA simply by giving that employee a title and by paying him or her a salary. Again, that is simply not the case. Another misconception we see from time to time is the mindset that, just because Alabama is an at-will state, and an employee is an at-will employee, he or she can be terminated without concern or consequences. That misconception can be very costly and needs to be dispelled. Also, many employers fail to take proactive, preventive measures such as regular and meaningful supervisor training and HR audits, which can go a long way in avoiding employment law violations and limiting legal liability.

Lightfoot: A lot of employers fall short of protecting their confidential and proprietary information and methods. It is so key to their business and often what sets them apart. It is what they have spent years developing and investing in and training their employees in. And yet, you see a lot of them without good confidentiality agreements and non-compete agreements in place. They don't have all the tools we could give them to protect that information. The other one that comes to mind is basic, but I see it time and time again, and that's deficiencies in the annual evaluation process. What you see a lot are supervisors not being willing to make the hard decisions and give tough, accurate and consistent evaluations. They give positive evaluations to employees who are not meeting expectations or are having some performance problems. Then a subsequent problem occurs, and the employee is terminated and next thing you know you have an EEOC charge or a lawsuit, and we have to explain the reason but have poor documentation to support it. Supervisors have to be willing and able to do the tough thing. Believe me, as a supervisor myself, I get it. It's hard. That's one of those under-the-radar things that hasn't changed over time. I've seen that since I started practicing 25 years ago and we still see it today.

Q: What are some of the benefits of hiring a specialized labor and employment firm?

Lehr: If you had heart disease, you would not go to a dentist for an opinion. Labor and employment is a unique area in which the lessons an attorney has learned in handling matters for other industries and clients can be a significant benefit when dealing with a current employment matter.

Brown: An experienced labor and employment attorney and the attorneys in that firm's labor and employment law practice group should have significant experience in all aspects of labor and employment law and, as such, will likely have encountered most every issue arising in the workplace. Not only will those L&E attorneys know the law but they will also know how the hundreds of different labor and employment laws interact one with the other and affect each particular employment scenario. In addition, an experienced labor and employment law practice group should have quick access to and be able to provide the most current and up-to-date employment forms and policies, employee and supervisor training, prompt and effective counseling and expert compliance advice. Finally, because labor and employment law is precisely what they do, good L&E attorneys stay abreast of all legislative, regulatory and case law developments and trends that impact employers and businesses. And in turn, they can keep their clients current and up-to-speed on those matters.

Umbach: Labor and employment attorneys are both litigators and counselors. An experienced attorney who has defended employers before juries is better able to advise employers on how to avoid litigation. He or she can also advise clients so they have a stronger defense when litigation cannot be avoided. My definition of a good lawyer is one who can find a way to help clients do what is best for their business with an acceptable amount of legal risk. Just telling your client the law, which they can often find on the internet, is not very helpful. A good lawyer is an asset in the decision-making process.

Lightfoot: It is an increasingly complex world, and labor and employment is not as compartmentalized as it used to be. You could say that labor and employment used to operate more in a silo or in a vacuum, and you just needed to get it right according to that discreet area of the law. Now labor and employment is touching on more and more related areas of the law. It requires specialized knowledge and expertise across many areas.

Metheny: There is a tremendous benefit in hiring a full-service law firm that has a specialized labor and employment practice group. We see boutiques cropping up that are exclusively labor and employment. That's all they do, and some of them do it very well. But I think there's a benefit in hiring a law firm that has an employment practice in it that operates like a boutique – that has a depth and breadth of knowledge among the labor and employment practitioners in the group – but that can also call on the corporate/transactional lawyers and the intellectual property lawyers and the bankruptcy lawyers and the ERISA benefits lawyers. These are lawyers we have access to in full-service firms but who are not found in boutiques. That's a huge benefit to a business. It gives our clients a well-rounded, full-service solution to every problem they have because employment problems are not just employment problems anymore. Often they impact how the business fundamentally operates, and impacts whether the corporate model the business has in place is effective or needs to be changed. What are the profitability issues that are related? How does it affect loss prevention? Risk management? Do we need different types of financing/insurance? Big, structural issues often begin as just a simple employment problem.

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- Tripp Umbach

Lightfoot: Every week I am on the phone with my partners outside of the labor and employment group. The client calls with a labor and employment problem, and I am addressing the problem, but the tentacles reach elsewhere. So I'm able to get on the phone with my partners and get that quick, specialized advice and bring it back immediately to my client. It's a one-stop shop, and that is an incredible value to our clients.

Metheny: One of the things we do is focus on industries, and we operate in industry teams like, for example, an Automobile Manufacturing Team. So it's not so much the legal practice area that's deployed to solve a problem, it's the industry team. We'll have a tax, transactional, bankruptcy, IP, labor and employment, and a commercial litigator, for example, on the industry team that can service the client's needs quickly and efficiently. They're already prepared and have expertise in that particular industry and, with existing clients, the company itself.

Lightfoot: We give our clients the best service when we know and anticipate their needs. On our client-service teams, we already know that client and the way they do business, and we're able to immediately give them the right person in the right area. It creates efficiency for our clients.

Q: How can employers work with their labor and employment attorneys to prevent future problems?

Brown: There are many pro-active steps that employers can take to avoid or minimize future employment issues. For example, employers who invest in employee and supervisor training regarding labor and employment law compliance tend to have fewer employment law issues and disputes and, when they do, find themselves in a much better position to defend against those claims. Another recommended area of preventive labor and employment law is for employers to have periodic human resources audits during which various compliance issues are reviewed, such as handbooks, policies, pay classifications and practices, termination data, etc. Finally, and perhaps most importantly, employers should reach out to their labor and employment law counsel as problematic employment situations arise and develop, and not just after the EEOC charge or the lawsuit has been filed. A good and experienced labor and employment attorney can almost always provide effective guidance and counseling to an employer trying to deal with a difficult or potentially dangerous employment situation.

Umbach: Closely partnering with labor and employment counsel allows an employer's lawyer to be more proactive in helping the employer avoid legal problems. Smart clients realize that this sort of partnership can be a weekly or even day-to-day relationship.

Metheny: Prevention and litigation avoidance is an area our firm has really emphasized recently. We want our clients to understand how to avoid disputes that nobody wins. Because if an employment lawsuit is filed, an employer never feels like it won. That's just the way it goes. Even if the employer is successful in a jury trial, it wasn't good for the business to spend its time and resources on that unproductive issue. So we encourage regular training and audits. We emphasize front-line supervisor coaching on a consistent basis, whether it's monthly or quarterly or every six months. We want our clients to put real, practical information into the hands of their supervisors who interact with the workforce so that, number one, we know that the managers know the law, and know what they're supposed to be doing. And number two, if the instruction is regular enough, then it's always on their minds and they're thinking about it in every decision they make. If they're thinking about the topics they've been trained to handle and at least giving them real consideration, that's half the battle right there. Whether they get the final result exactly right, at least they approach the decision cautiously. And regular audits in this current climate are crucial. One of the anticipated changes in the law that is now imminent is the minimum salary threshold for the Fair Labor Standards Act exemptions. Employers who are not giving serious attention to this issue are going to be in real trouble when that regulation is implemented and they haven't left themselves time to make the changes. Because properly exempt or not right now, if the employer is not paying an employee $50,000 a year, that employee is almost certainly not going to be exempt from overtime in the very near future. And employers need to be conducting audits right now to determine whether they have problems that they will need time to address before the regulation becomes effective.

Lightfoot: I think our clients are best served when they call us more on the front end. Because in very stark terms, a few calls to and discussions with us may cost $1,000 at most, but one suit over that same issue where there was no call may cost $50,000 or $100,000. We can help them think through the issues – often in a short phone call – that can avoid the costs of litigation and the soft costs of one or two years of distraction from running your business. So it all comes back to the training and audits that expose and correct those problems. Often employers get busy building their business, and put their head down and forget about the value of putting preventative strategies and controls in place. And then they look up and are facing an expensive employment problem that could have been avoided with just minimal attention on the front end. Get a good handbook, a good evaluation process, good termination controls, train your managers on discrimination and consistency and make sure your hiring processes are good. Then, if you are uncertain, don't hesitate to get some legal advice before you act.

Lehr: Employers should periodically review with counsel their business direction and dynamics, so counsel can think strategically about the potential workplace implications. Will the business expand? Will it contract? Participate in a joint venture? Will there be a change within the leadership team and perhaps a change in culture? All these business decisions have potential labor and employment implications.

Q: How have changing employment regulations (ACA, etc.) impacted employers?

Lightfoot: The ACA has impacted employers greatly, and probably the biggest changes have occurred in how employers utilize and manage a temporary workforce. We represent many staffing firms and PEOs (Professional Employer Organizations) and employers who use such firms. That is creating many complex issues in the area of joint employment. Whose employee are they? It is a challenge to stay up to speed on all the regulations and developing law in

that area.

Umbach: It's had a negative impact. The next regulatory change will be an increase in the minimum salary an employee must be paid to be exempt from overtime. It is about to double, which is going to cause a problem for many employers.

Metheny: I represent a lot of food service franchisees that have employees all over the place, a number of lower-wage earners. One of the things I've seen is the ACA has impacted the way employers schedule their workforce. We have a lot more part-time and temporary employers than we used to. It has scared employers away from permanent full-time relationships when they can avoid it. That's unfortunate. We wish that wasn't the case; it's not good for society as a whole. But employers are trying to protect themselves from exposure that is unpredictable and expensive. With these part-time relationships, they end up putting themselves in a better position to extricate quicker and easier than they might otherwise be able to. And they don't have some of the additional costs with part-time employees that they would with full-time employees. That's not a good thing for the workforce economy overall, though, so hopefully we can find a balance in the next few years and give small-to-midsized employers a little bit more security to create more permanent employment relationships.

Lehr: Employers overall are adaptable to a changing regulatory climate, whether under the Affordable Care Act or the soon to be published changes under the Fair Labor Standards Act. The ACA, more than other changes, has resulted in a steady stream of confusion at the workplace, which employers must manage. Also, employee rights under the Family and Medical Leave Act have had a significant impact on staffing decisions and how internally to structure compliance.

Brown: Recent and potential changes in employment laws and regulations are having a tremendous impact on employers. For example, the new FLSA salary requirements for exempt employees will more than double the requisite salary level to over $50,000, resulting in substantial employment costs to employers. Likewise, the push to raise minimum wage levels in both the federal sector and at the state and local level may substantially affect the labor costs of many employers. The same is true for the push in many jurisdictions for paid sick leave for employees. On a different note, the NLRB's so-called quickie-election rules have resulted in an increase in union election petitions, a much shorter period of time – a little over 3 weeks – between the filing of a union petition and the time the election is held, a noticeable increase in union success in those elections, and a commensurate increase in unfair labor practice charges and labor litigation associate with those elections. Finally, we expect that the EEOC's new requirement that EEO-1 reports include not only race and gender statistics for different job groups but also comparative compensation data within those job groups will almost certainly result in a substantial increase in compensation discrimination litigation going forward.

Q: What are some questions companies should ask their labor and employment attorneys, but often don't?

Metheny: The first thing I would ask is, "Am I going to be able to call you without worrying that every single five-minute conversation shows up on a bill? What sort of programs and fee arrangements do you have that would enable me to direct my human resource personnel to call you whenever they have a problem." If I were an employer, I would want to know that I have full access to my labor employment lawyer, and that I can afford to involve my lawyer as a partner. "What can you do to help me make you a partner in my business?" We should be incentivizing our clients to call us as much as possible, because it's going to be better for them in the long run, and it's going to build a better relationship for us as their service provider. So I would encourage employers to ask about alternative arrangements. Then, "What value can you add to my business? You're going to defend my lawsuits. I'm going to have you conducting audits. You'll do my training. What else can you add to my business?" I want clients to consider the big-picture value in a one-stop shop for all their legal needs with a lawyer and law firm that understands their business. And I want clients to ask me what I'll do to learn their business top-to-bottom so they don't have to think of questions to ask me or worry they're asking me the wrong questions. I'll already know what they need.

Umbach: What can we do to manage legal risk? There is no way to completely eliminate it, but you cannot successfully operate your business if you are constantly in fear of it.

Lehr: What should we be thinking of strategically regarding HR going forward? In other words, where are the storm clouds that we should anticipate? How can the attorney as a relationship partner enhance the value of the service to the client without the client incurring an increase in legal fees? What distinguishes you and your firm from your competitors throughout the state and nationally? And tell us how your firm is run as a business? What is your firm's culture?

Brown: In my judgment, one of the biggest mistakes many employers make is not contacting their labor and employment lawyer up front. They should be asking that attorney the questions in advance and using their labor and employment attorneys as proactive, preventative counsel during the decision-making process, rather than after the particular employment decision has been made. Employers who use their employment attorneys to review policies and procedures in advance of their implementation, and to provide input and guidance in the midst of problematic employment decisions, end up making much better decisions and saving a lot of money in the long run. On a different note, employers should engage with their attorneys about the potential for using alternative fee arrangements that may work well for that particular employer or for particular matters. For example, an alternative fee arrangement that is different than the traditional hourly rate sometimes works well for employee and supervisor training, preparation and review of employee handbooks, preparation of annual affirmative action plans and I-9 audits. With some clients, alternative fee arrangements work well even in the litigation context and in areas such as EEOC responses, discovery and trial. A client should never hesitate to discuss with its L&E attorneys how the company will be billed for the attorney's services or to search for better and more effective ways to manage litigation and L&E costs.

Lightfoot: I would say the most important inquiry for an employer is, "Tell me about your expertise, your responsiveness and your results." Certainly our rates matter but I think most employers are more concerned about the value they are getting for those rates. They want a lawyer who knows what they're doing and has a track record of good results. We tell our clients all the time that we are in it with them for the long term and care about the relationship first and foremost. That's why we want to have the lunch and learns and why we are willing to invest the time to really learn their business and their needs, whether it's on the clock or off.