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From the Publisher

One subject we are sure to continue to hear about this summer—and for the foreseeable future—is the uncertain economy and high unemployment numbers. Labor and employment lawyers will need concise, clear guidance on how to handle the barrage of cases emerging from the downturn, and this edition of the BNA Books *Monitor* focuses on critical issues that will inevitably come up in every labor and employment practice. Inside you'll find informative features and new resources that you can put to use immediately.

To start, I want to let you know about new editions of two of our classic treatises set for publication in the coming months. One upcoming release I'm sure you will want to add to your collection is the new [Second Edition](#) of [The Fair Labor Standards Act](#). The [Second Edition](#) offers the latest updates regarding the Act, including detailed analysis, background and case law of the 2004 white-collar exemptions, and coverage of the 2008 SAFETEA-LU Technical Corrections Act. It also contains expanded discussion of collective action litigation brought under the Act by individual private plaintiffs and "hybrid" actions involving both state and federal law claims.

Another exceptional treatise also due for publication soon is [Reductions in Force in Employment Law, Second Edition](#). Attorneys can trust this treatise to provide a comprehensive understanding of the key employment and employee benefit considerations arising in a reduction in force. It's a soup-to-nuts guide starting with preliminary issues that arise when planning a workforce reduction, to its implementation, and the issues that follow in its wake. A highlight of this issue of the *Monitor* is an article covering hiring and rehiring after layoffs by the authors of this treatise.

Also, please take a look at our featured title—[NLRA Rights in the Nonunion Workplace](#)—a new treatise that is the only book on the market exclusively addressing the NLRA's potential reach in the nonunion workplace. The author profiled is Jeremy Glenn, who has great insight on labor and employment law. Mr. Glenn authored a chapter on age discrimination in BNA Books' [Employment Discrimination Law](#). He also served as editor-in-chief of the [2010 Cumulative Supplement](#) to [Age Discrimination in Employment Law](#) and as senior editor of [Wage and Hour Laws: A State-by-State Survey](#).

And finally, take a look at the enlightening article on the revised Patent Reform Act of 2010, written by Jim W. Ko, a contributor to our [Patent Litigation Strategies Handbook, Second Edition](#). Mr. Ko is with Howrey LLP.

In closing, I'd like to invite you to go to bnabooks.com to view and [download our new 2010–2011 BNA Books Legal Publications Catalog](#) in PDF format, and take advantage of the 20% discount you can now get on the treatises you need most. Use the discount coupon to complete your library today.

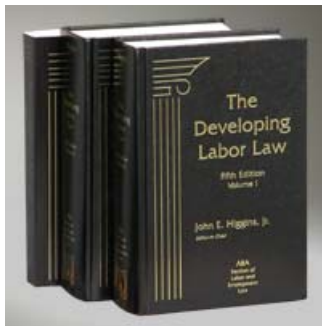
As always, don't hesitate to contact me at mhullinger@bna.com with any questions or suggestions you may have. I look forward to hearing from you.

Best regards,

Margret S. Hullinger
Vice President and Group Publisher
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Labor and Employment Law on the Line

Hiring and Rehiring After Layoffs: Considerations and Caveats

By [Ethan Lipsig](#), [Mary C. Dollarhide](#), and [Brit K. Seifert](#), co-authors, [Reductions in Force in Employment Law, Second Edition \(Forthcoming\)](#)

It is reasonable to assume employers forced by the recession to downsize someday will be in a position to expand their work forces. Hiring employees in the aftermath of layoffs presents some unique employment-related considerations for companies, some of which are potentially disadvantageous and some potentially advantageous. A few of these areas are discussed below.

Tax Exemption and Tax Credit for Businesses That Hire Qualified Unemployed Workers

An employer that hires workers who have been unemployed for at least the previous 60 days, including recalling employees that the employer previously laid off, may take advantage of tax benefits created by recent stimulus law.

On March 18, 2010, President Obama signed into law the Hiring Incentives to Restore Employment (HIRE) Act, aimed at stimulating hiring and helping smaller businesses.¹ Among the provisions impacting employers are a Social Security tax exemption and a tax credit. In general terms, the Social Security tax exemption allows an employer to save the 6.2% amount that it would otherwise pay to the government as the Social Security tax component of FICA taxes on wages paid to each newly-hired employee if certain conditions are met. Some of the key conditions are as follows: the exemption applies to wages paid during the March 19, 2010-December 31, 2010 period to individuals hired after February 3, 2010 who were previously unemployed for at least 60 days, and who do not exceed the \$106,800 Social Security wage base.² Based on HIRE Act information on the IRS website, the payroll tax exemption not only applies to newly hired individuals who meet the requirements outline above, but also to (i) previously laid-off employees rehired by the same (or a related) company, and (ii) new employees hired when business picked up after other employees were formerly laid off due to lack of work.³ Also, employers need not have previously laid off employees in order to invoke the payroll tax exemption as to new hires.⁴

In addition, if the newly-hired employee remains employed for at least one full year, and his or her pay does not decrease significantly during the second half of such year, then the HIRE Act provides a general business tax credit for the company's 2011 tax return. The amount of the credit is the lesser of \$1,000 or 6.2% of the employee's wages paid during the 52 consecutive week period.⁵

¹ Two New Tax Benefits Aid Employers Who Hire and Retain Unemployed Workers, I.R.S. News Release IR-2010-33 (Mar. 18, 2010), available at <http://www.irs.gov/newsroom/article/0,,id=220326,00.html>.

² *Id.*

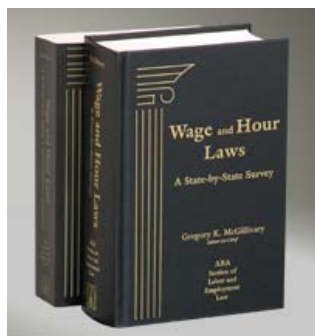
³ <http://www.irs.gov/businesses/small/article/0,,id=220745,00.html> (follow "Payroll Tax Exemption for Hiring Unemployed Workers" hyperlink under "Questions and Answers for" and then follow "FAQs About the Payroll Tax Exemption and Qualified Employees" hyperlink).

⁴ *Id.*

⁵ <http://www.irs.gov/businesses/small/article/0,,id=220745,00.html> (follow "Business Credit for Retention of Certain Newly Hired Individuals in 2010" hyperlink under "Questions and Answers for").

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No WARN Act Trigger Depending on the Timing and Number of Rehires

Hiring after relatively shorter-term layoffs can bear directly on whether the federal Worker Adjustment and Retraining Notification (WARN) Act⁶ will apply to the layoffs. The WARN Act generally requires employers to give affected employees (or their bargaining representatives) and local government officials 60 calendar days' advance notice of a "plant closing" or "mass layoff." If required WARN Act notices are not given, employees can recover pay and benefits for the notice short-fall period up to a maximum of 60 days.

Both of the events that trigger the WARN Act—a plant closing⁷ and a mass layoff⁸—require that a certain number of "employment losses" occur. An "employment loss" occurs if, among other things, an employee is "placed on a layoff exceeding six months."⁸ This means that employee layoffs lasting six months or less do not count as "employment losses" under the law. An employer poised to recall to work employees who were laid off less than or up to six months earlier may, by virtue of recalling such employees back to work, effectively not trigger the WARN Act depending upon the number of employees who are recalled versus laid off for longer than six months. For example, if an employer lays off 100 employees at a plant (who represent at least 1/3 of the employees) without giving proper WARN Act notice, but recalls 75 of them to work 5 months later, then insufficient employment losses occurred (here, only 25 people remained laid off after 6 months) to trigger the WARN Act.¹⁰

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⁶ 29 U.S.C. §§ 2101-2109.

⁷ A plant closing is "the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees." 29 U.S.C. § 2101(a)(2).

⁸ A "mass layoff" is "a reduction in force which - (A) is not the result of a plant closing; and (B) results in an employment loss at the single site of employment during any 30-day period for - (i)(I) at least 33 percent of the employees (excluding any part-time employees); and (II) at least 50 employees (excluding any part-time employees); or (ii) at least 500 employees (excluding any part-time employees)". 29 U.S.C. § 2101(a)(3).

⁹ 29 U.S.C. § 2101(a)(6).

¹⁰ This discussion addresses the federal WARN Act only. Numerous states have enacted similar state WARN Act laws that may or may not parallel the federal law's provisions. Also, the WARN Act can be technical and tricky, so the example is provided for illustrative purposes only.

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News from the IP World

The Revised Patent Reform Act of 2010

May Improve the Quality of Some Patents, But Not of Litigation

By **Jim W. Ko**

Mr. Ko is with [Howrey LLP](#) in Washington D.C., and is a co-author of the chapter on electronic discovery in the ABA/BNA [Patent Litigation Strategies Handbook](#) (Second Edition, 2009 Supplement).

I. Introduction

The latest version of the Patent Reform Act (a substitute amendment revising S. 515¹), published on March 4, and perhaps closer to passage than ever, is intended to strengthen the patent system, improve patent quality, and also mitigate against frivolous legal challenges and the abuse of the administrative process (79 PTCJ 560, 3/12/10).²

¹ Full text at <http://pub.bna.com/ptcj/PatentReformAmendmentMar5.pdf> (hereinafter “the revised S. 515”).

² See Press Release, Leahy, Sessions, Hatch, Schumer, Kyl, Kaufman Unveil Details of Patent Reform Agreement, and Senate “Manager’s Amendment,” March 4, 2010.

The root cause of the high costs of U.S. patent litigation is the issuance by the Patent and Trademark Office of patents of uncertain scope. This combines with and itself enhances two other driving forces for litigation costs: the threat of damages and injunctive costs often grossly disproportionate to the value of an invention; and the breathtaking scope of litigation discovery in the United States requiring the production and/or disclosure of all potentially relevant documents, information, and other materials.

The revised S. 515, if enacted, will directly or indirectly impact the patent quality and damages factors. Discovery, however, will continue to consume a disproportionate amount of litigation costs, because the rules of discovery for patent litigation remain untouched.

This article surveys the provisions of the revised S. 515 for their potential impact on patent litigation, and in particular on the costs of discovery.

II. Patent cases will be heard by courts that choose to hear them, and not solely in the forums chosen by plaintiffs.

The revised S. 515 will influence forum selection for patent suits by increasing defendants’ ability to change venue, and by initiating a district court pilot program for patent cases.

A. Defendants’ ability to change venue will increase.

Although the impact of revised S. 515 on the issue of forum shopping will not be as great as proposed in earlier versions of the legislation,³ it will still provide patent defendants with at least the possibility of relief from a patent plaintiff’s choice of forum.⁴ The revised S. 515 states that district courts *shall* transfer any patent action “upon a showing that the transferee venue is clearly more convenient than the venue in which the civil action is pending.” This provision will codify recent Fifth Circuit and Federal Circuit opinions.⁵

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³ An earlier version of S. 515 would have limited plaintiffs to filing suit only in jurisdictions where the primary plaintiff resides, or in a defendant's principal place of business or place of substantial operations and infringing activities, but that language was struck in April 2009. See Patent Reform Act of 2009, April 2, 2009, Section 8 (Venue and jurisdiction), available at <http://www.govtrack.us/congress/billtext.xpd?bill=s111-515> (last visited March 20, 2010) (77 PTCJ 593, 4/3/09)

⁴ Section 8 (Venue) of the revised S. 515.

⁵ *In re Volkswagen of America Inc.*, 545 F.3d 304, 89 USPQ2d 1501 (5th Cir. 2008) (76 PTCJ 865, 10/17/08); *In re TS Tech USA Corp.*, 551 F.3d 1315, 89 USPQ2d 1567 (Fed. Cir. 2008) (77 PTCJ 243, 1/9/09).

B. A district court pilot program for patent cases will be initiated.

The patent reform act will establish a pilot program under which patent cases are assigned or transferred to only district courts that want to hear them.⁶ This should result in the development of additional pockets of patent expertise within each circuit and increase the number of patent cases heard by courts that are more willing and capable of hearing them.

⁶ Section 16 of the revised S. 515 (District court pilot program).

III. Increased third-party participation in PTO proceedings will improve patent quality for some patents, but will have a varying impact on patent suits depending on timing.

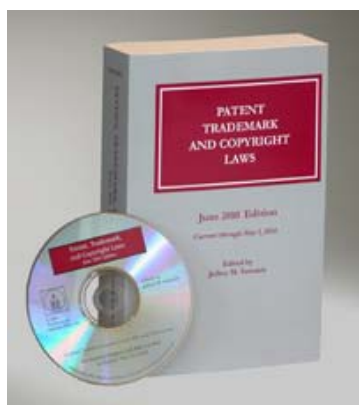
The revised S. 515 encourages additional third-party participation in the PTO review of patents. The current right of third parties to request ex parte reexaminations, a PTO review that proceeds after initiation without any additional participation by the requester, remains unchanged. Should third parties desire ongoing participation, inter partes reexamination will continue to be available against patents filed after Nov. 29, 1999,⁷ and a new post-grant review proceeding will also be made available during the first nine months after a patent's issuance.⁸ The revised S. 515 also provides third parties the opportunity to submit patents or printed publications relevant to a patent application before it issues.⁹

⁷ The inter partes reexamination procedure was created in the American Inventor's Protection Act of 1999, and is available only for patents issued from applications filed after Nov. 29, 1999. Under the revised S. 515, inter partes reexaminations, when available, can be requested only after nine months after a patent's issuance or after the termination of any post-grant review.

⁸ Chapter 32 (Post-grant review), Sections 321-29 of the revised S. 515.

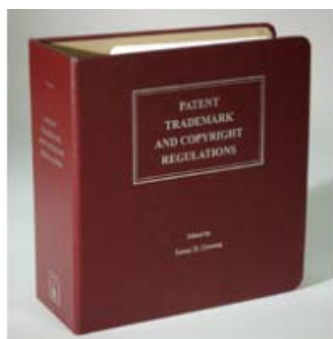
⁹ Section 7 of the revised S. 515 (Preissuance Submissions by Third Parties).

Ex parte reexamination, inter partes reexamination, and the prospective post-grant review all have significant procedural advantages over litigation for contesting the validity of a patent. PTO examiners are far more equipped and have more time to conduct an in-depth analysis of a contested patent and the prior art than jurors. And the burden of proof to invalidate a patent during reexamination is the preponderance of the evidence standard, as opposed to the higher clear and convincing evidence required to overturn a patent during litigation.¹⁰ In inter partes reexaminations, petitioners may challenge the validity of a patent based only on 35 U.S.C. §102 anticipation or Section 103 obviousness grounds and only on the basis of prior art patents or printer publications.¹¹ For the prospective post-grant review procedure, however, any grounds for invalidity will be available that could be raised under Paragraphs (2) or (3) of 35 U.S.C. § 282.¹² Notably, this will include the opportunity to invalidate or limit the scope of claims based on insufficient written



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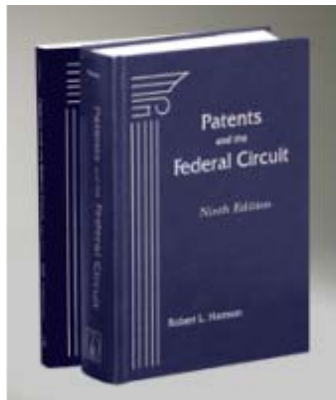


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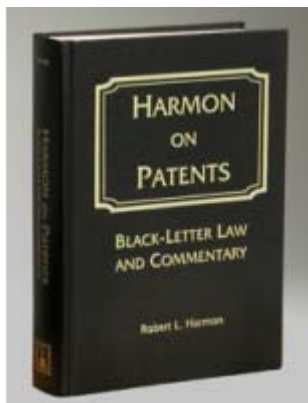
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description in the patent specification, under 35 U.S.C. §112, par. 1.

¹⁰ The common understanding that reexaminations proceed under a preponderance of evidence standard will be codified by the revised S. 515 for inter partes reexaminations. Section 316(e). The same preponderance of evidence standard will apply for post-grant review proceedings as well. Section 326(e).

¹¹ Section 311(b) of the revised S. 515 (Scope).

¹² Section 321(b) of the revised S. 515 (Scope).

A full discussion of these administrative proceedings is beyond the scope of this paper. They, however, will continue to significantly impact patent litigations when initiated. In some cases, reexaminations make litigation more efficient through clarifying the scope of certain patents in advance of litigation and streamlining claim construction and infringement analyses. ¹³ More often, however, their impact will continue to be felt by running concurrent with litigation, after reexaminations or post-grant reviews are requested by patent defendants. Concurrent proceedings complicate the procedural and settlement postures of litigation, in particular in the many jurisdictions that are not inclined to stay litigation until PTO review is complete.

¹³ A provision in an earlier version of S. 515 that would have required the Federal Circuit to accept interlocutory appeals of claim construction determinations has been removed from the revised S. 515.

IV. Invalidation analyses will be simplified, and the discovery burdens of patentees will be reduced significantly.

Perhaps the most significant changes in the revised S. 515 with respect to litigation will be on the invalidity analysis. Changing to a first-to-file system and removing best mode as a basis for invalidity will render irrelevant much of the more subjective and scier-based discovery of patent plaintiffs and/or the inventors, as well as such discovery of the defendant or any third party that claims or is portrayed as having gotten there first.

The burdens of both complying with discovery obligations and of the taking of discovery of party-opponents and third parties will decrease for both parties, but far more so for patent plaintiffs.

A. *A first-to-file system will remove disputes over and discovery concerning the time of invention.*

Under the revised S. 515, the U.S. patent system will change from a first-to-invent to a first-to-file priority system, bringing the United States in line with most of the rest of the world. ¹⁴ Patentees no longer need be concerned with the possibility of having their patents invalidated by or even transferred to another should it be later established that the patentee was in fact not the first to conceive of or know about the patented subject matter. As such, patent plaintiffs will no longer feel compelled wherever possible to assert or try to establish a time of invention earlier than the date of filing.

¹⁴ Section 2 of the revised S. 515 (First inventor to file).

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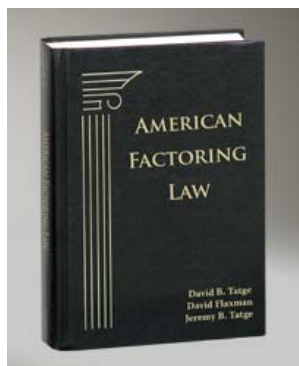
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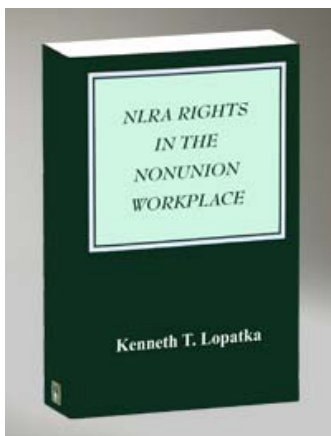
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[NLRA Rights In The Nonunion Workplace](#)

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A resource devoted to exploring the NLRA's application in the nonunion workplace and the varying decisions of the NLRB regarding private sector employment issues.

Most treatises on the National Labor Relations Act (NLRA) concentrate primarily on union-related activity. But the NLRA is applicable in some respects in the nonunion workplace as well. Since so many private-sector employees in the United States are nonunion, a huge vacuum exists for a resource that addresses the NLRA's potential reach in the nonunion workplace. **NLRA Rights in the Nonunion Workplace** expertly fills this gap, concentrating exclusively on the NLRA's broad application outside the union workplace in order to prepare attorneys representing employees or employers, as well as human resources professionals, to spot potential NLRA issues, help them understand the options and associated risks, and provide them with a head start in rendering sound advice to their clients.

With a full five-member board and possible revisiting of the issue of *Weingarten* rights and other employee protections on the horizon, the release of this resource is truly fortuitous. The book's issue-by-issue examination of the Board's changing position on various issues will enable lawyers to analyze any new decisions or initiatives by the NLRB in order to pinpoint potential new areas of liability and formulate effective strategies.

With the contours of NLRA protections subject to reexamination under a new Board, **NLRA Rights in the Nonunion Workplace** is sure to be a helpful resource both for attorneys less familiar with labor law and for traditional labor lawyers and labor professionals alike. This is the only treatise that is completely focused on this highly prevalent, and timely, topic, and it is one every employment law attorney should have on a nearby bookshelf. [Continued.](#)

About the Author

Kenneth T. Lopatka graduated from the Harvard Law School *magna cum laude* in 1971, and while there served as an editor of the *Harvard Law Review*. Following a clerkship with the late Judge Walter J. Cummings of the United States Court of Appeals for the Seventh Circuit, he joined the faculty of the University of Illinois College of Law in 1973 as an assistant professor of law, subsequently earning tenure and the rank of associate professor in 1976 and teaching all the courses in the college's labor and employment law curriculum as well as conflict of laws and estates and trusts.

Mr. Lopatka left teaching in 1977 for private practice with Foley, Hoag & Eliot in Boston, Massachusetts and became partner there in 1978. In 1983 he joined Jenner & Block in Chicago as a partner and became the head of the firm's labor and employment law group; he left that firm to establish Lopatka, Nohlgren and Martin in 1989. From 1992 to May 2004, he was a partner at Matkov, Salzman, Madoff & Gunn, and from May 2004 to May 2007 was a partner in the Chicago office of a major Seattle law firm. Before beginning his appointment in the Senior Executive Service at the NLRB, he served as of counsel at Baker Donelson's Washington, DC office in July 2007. From August 1, 2007 until January 2009, he was Chief Counsel to Robert J. Battista, then Chairman of the National Labor Relations Board, and also served on then Chairman Peter Schaumber's staff.

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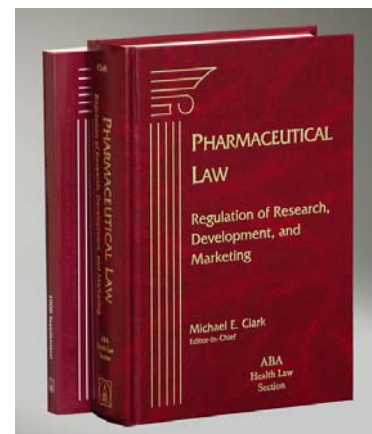
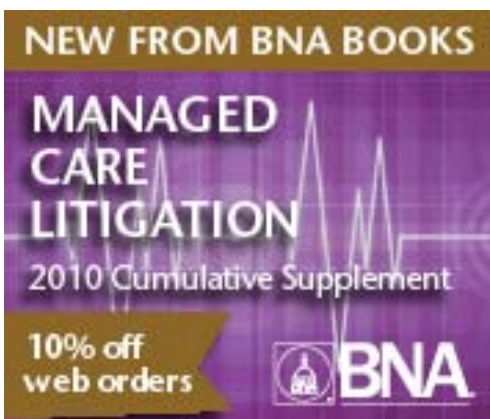
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OTHER BNA CONTRIBUTIONS: Senior Editor, Midwestern States, [Wage and Hour Laws: A State-by-State Survey](#) (2004-2010), Chapter Author, [Employment Discrimination Law](#) (2009, 2010 Supplements)

POSITION: Partner, Labor & Employment Group, [Meckler Bulger Tilson Marick & Pearson LLP](#) in Chicago, Illinois.

ABOUT MY PRACTICE: I represent management in all facets of labor & employment law. Whether it is wage and hour compliance, EEO practices, restrictive covenants or collective bargaining, I urge my clients to take a proactive approach to human resources management to reduce the threat of litigation. Without question, staying abreast of the latest developments is crucial to providing sound legal and practical business advice. Contributing to BNA Books and writing and speaking for bar and industry associations definitely keep me informed. My trial practice, though based in Chicago, has taken me to the Texas panhandle, the Great Plains and both coasts. I am the product of a small-business owning family and even though my clients now include companies with nationwide locations I still apply the basic principles of identifying and resolving issues through attention to detail and direct communication.

FAVORITE PART OF THE JOB: My favorite aspect of advising employers is developing a strategy to address a legal issue, watching it take shape and then seeing a positive bottom-line impact for the company. Wage and hour law presents frequent opportunities to do this as companies strive to increase productivity, motivate employees and manage labor costs. Those goals do not have to be at odds with each other and working with clients to develop a plan to achieve them simultaneously is a rewarding experience.

MOST MEANINGFUL PROJECT: A business client who devoted hundreds hours of volunteer service to assist Hurricane Katrina victims faced lawsuits by individuals who, in the aftermath, lost sight of the intrinsic value of their service. Those who once willingly volunteered sought to capitalize financially from the efforts of others. By working with opposing counsel and several administrative agencies, we resolved the dispute in a way that honored the service of everyone who contributed. It did not require a no-holds-barred trial, which seemed inevitable, but there were tense moments before the final outcome was achieved.

ENJOYS: I love the travel and relationship-building that comes with the practice of law, especially when it involves the mid-winter meetings of the ABA FLSL committee. Spending time with my wife and daughters, the occasional round of golf, taking in Iowa Hawkeye sporting events and patronizing Chicago's summer street festivals all contribute to what feels like a truly fortunate life.