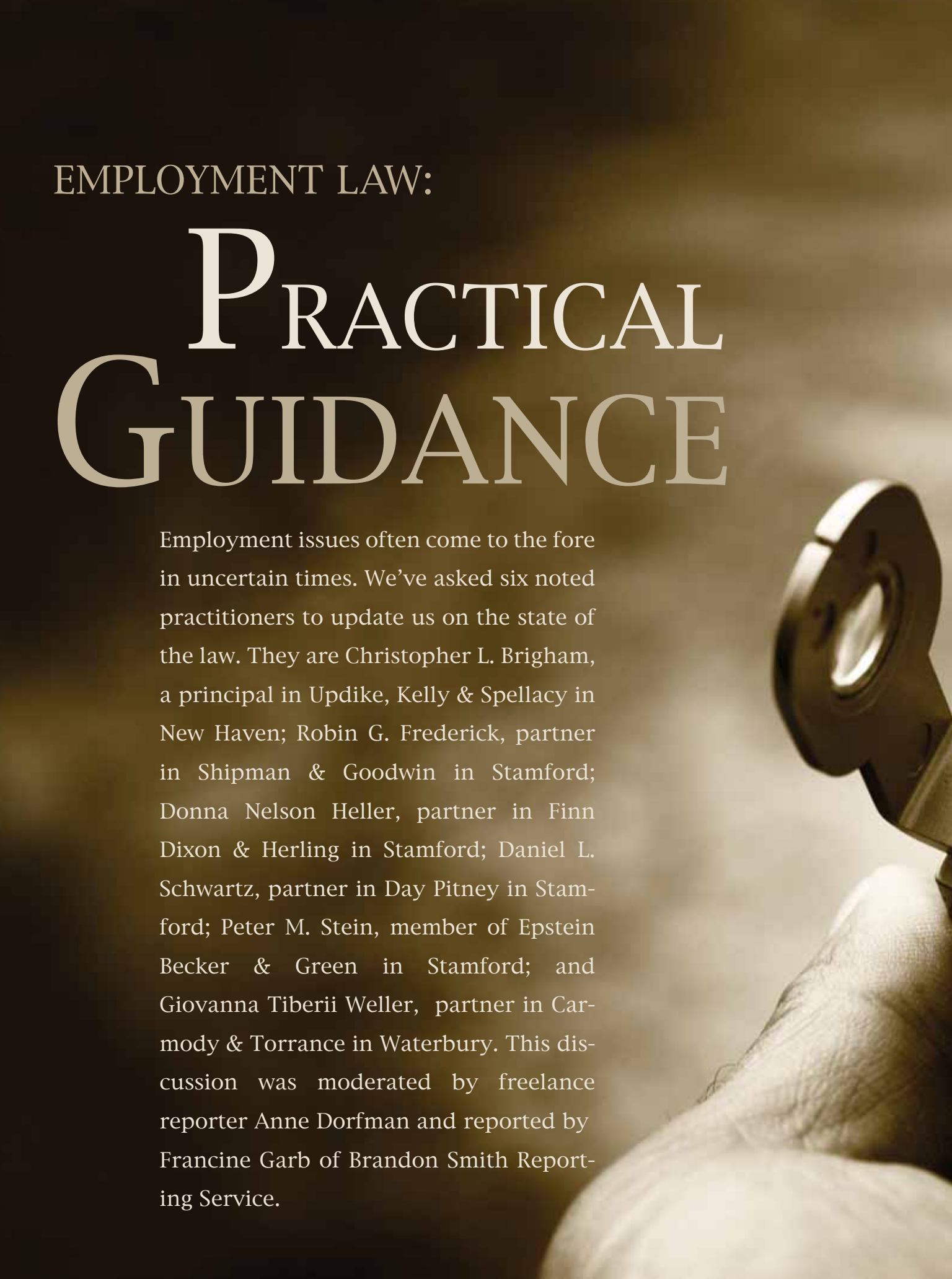
EMPLOYMENT LAW: PRACTICAL GUIDANCE

Employment issues often come to the fore in uncertain times. We've asked six noted practitioners to update us on the state of the law. They are Christopher L. Brigham, a principal in Updike, Kelly & Spellacy in New Haven; Robin G. Frederick, partner in Shipman & Goodwin in Stamford; Donna Nelson Heller, partner in Finn Dixon & Herling in Stamford; Daniel L. Schwartz, partner in Day Pitney in Stamford; Peter M. Stein, member of Epstein Becker & Green in Stamford; and Giovanna Tiberii Weller, partner in Carmody & Torrance in Waterbury. This discussion was moderated by freelance reporter Anne Dorfman and reported by Francine Garb of Brandon Smith Reporting Service.



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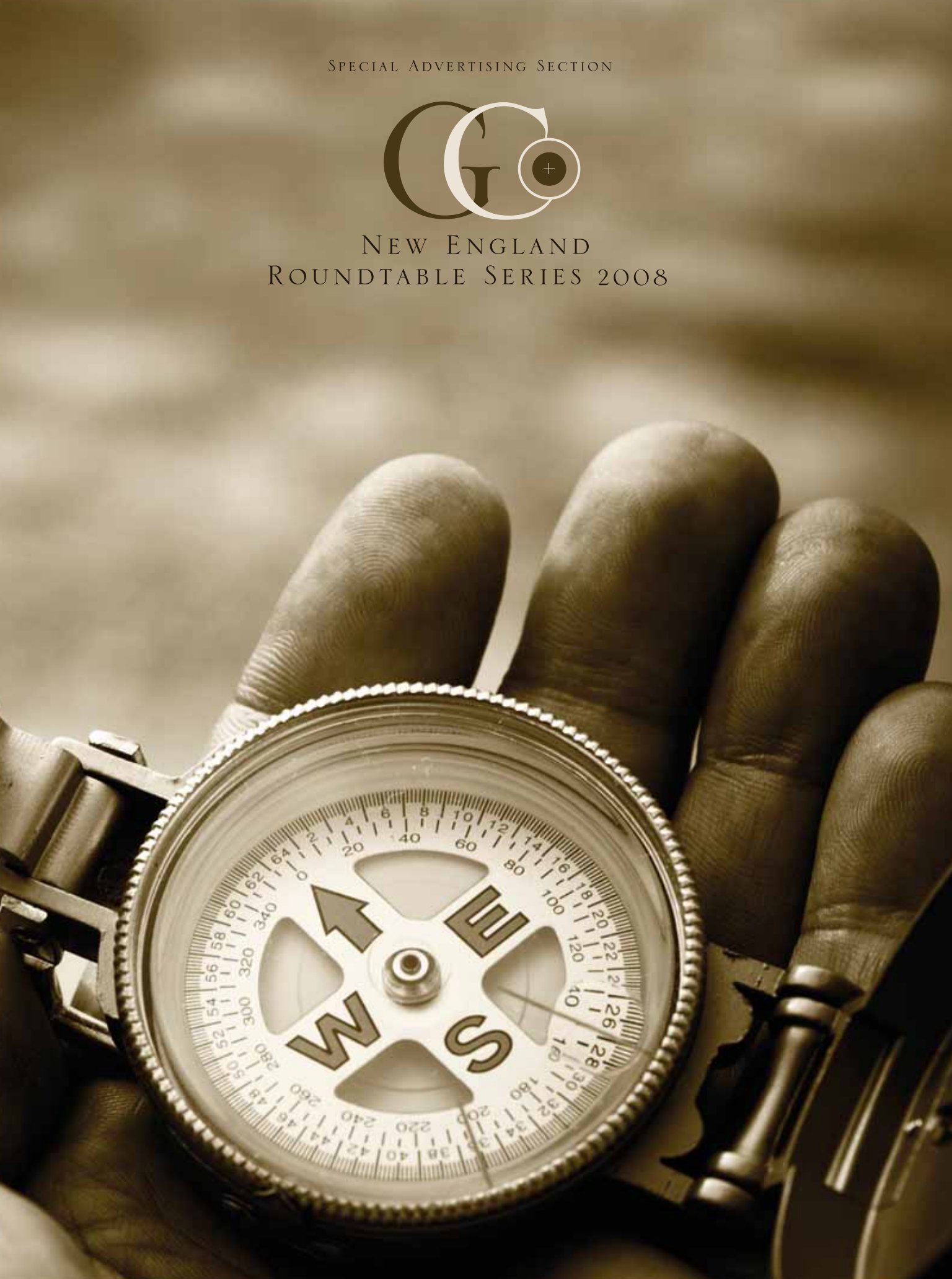

EMPLOYMENT LAW
Practical Guidance

If clients want to be very careful, they should consider having those documents reviewed and analyzed by outside counsel so that decisions can be made with the privilege attached.

-Peter M. Stein

MODERATOR: What does the Worker Adjustment and Retraining Notification Act require of employers during a reduction-in-force -- that is, when it decides to let a number of people go?

SCHWARTZ: The federal WARN Act requires employers to provide employees and certain elected officials with at least 60 days' notice of a plant closing or mass layoff. The WARN Act has a number of specific definitions and technical requirements, so employers considering a reduction-in-force need to be familiar with the act and to comply with it. From a planning perspective, the key issue in a reduction-in-force is the rationale behind how it will be conducted. The employer needs to decide early on who will be affected. Will it be certain divisions, certain types of employees, certain positions? Who will decide? The critical decision in planning is the procedure for making these decisions. Is it seniority? Is it performance-based? If so, what standards or documents are you going to look at? The most important advice that I give to employers for a reduction-in-force is to answer these questions ahead of time. Don't do it on the fly. Have a procedure in place. Write it down and then, most importantly, follow it, because there is nothing worse than having a written procedure in place and not following it.

FREDERICK: You should also be looking at the demographics of who you are going to be letting go, because even when you have a business justification, you should be looking out for disparate impact claims. Generally the HR people, or whoever is creating these demographics, puts them together by organization and doesn't look at the demographic analysis by manager. So when you are sued, nobody has looked at what this particular manager has done. That can get you in a lot of trouble. Very often people are allowed to apply for other jobs within the company. I find that no one thinks about how that is going to shake out. If you have 20 people in a group who are being job eliminated, and 17 of them find jobs within the organization but three don't, and those three happen to be the minority, the woman, and the disabled person, you have a problem.

STEIN: The demographic information may not be privileged if it's done by the HR staff or even, perhaps, by in-house counsel. If clients want to be very careful, they should consider having those documents reviewed and analyzed by outside counsel so that decisions can be made with the privilege attached.

SCHWARTZ: At some point you want to have documents that are not privileged that you can show to a jury or a judge to demonstrate that the company did perform a disparate impact analysis.

FREDERICK: The beauty of using outside counsel is that you can protect the drafts, and make a determination when the disparate impact analysis is a final product that it's not privileged.

STEIN: A privileged and a non-privileged review.

HELLER: If you are planning a layoff that will trigger obligations under the WARN Act, you must advise the local government and the state's displaced workers unit in advance. Under the Older Workers Benefit Protection Act, older employees included in a mass layoff are also entitled to information, such as the class of employees involved, the ages and job titles of employees being downsized, and the ages of employees in the class who were not selected.

BRIGHAM: Often with larger layoffs the employers and counsel are aware of their WARN Act obligations, but in smaller yet still substantial layoffs notice requirements can be overlooked. By its very nature a reduction-in-force is a crisis situation where everyone feels as though they need to act quickly. Often companies do the appropriate preplanning but then forget to review their existing notice obligations, whether they are in a collective bargaining agreement or an employment contract. If consulted prior to the layoff, we advise clients to provide assistantance to their soon-to-be-former employees — which may lead to less litigation. For instance, employers can involve the state Department of Labor's Rapid Response Unit, which will provide the employees with outplacement services.

WELLER: I had a situation where the client gave the proper WARN Act notice. The problem, though, was that the performance review's normal cycle occurred during the 60-day notice period, so that when the managers reviewed their subordinates they knew there was going to be a layoff. Those reviews may arguably be viewed as skewed. If an employer is going to use performance reviews as the criterion, it should consider more than one year of performance reviews.

SCHWARTZ: Problems often arise if the employer fails to go back into the personnel files. The manager says, "We had to let Joe go because Joe was an underperformer." Joe's

attorney then asks for his personnel file, where you have five years of performance reviews that say, "Joe is above average." It's very important to tell the managers, "Don't just rely on your memory. Look at the files."

FREDERICK: You have to be careful about that because managers might encourage people who are older to take the voluntary package, and that is always dangerous. We never want a manager to say, "Well, you are ready to retire, aren't you?"

HELLER: If at all possible, you should consider your organization's morale as well. You are still going to have a company to run following the reduction-in-force, and to the extent that you can make the RIF voluntary, provide some benefits or offer outplacement services, it can make a huge difference as to whether or not you are going to end up getting sued. Even just the manner in which the reduction-in-force is done can make a difference.

FREDERICK: When you don't treat people exactly the same way, it causes problems. I had two very sticky litigations where HR was trying to be nice to people who were on vacation by waiting until they came back to tell them about the job eliminations. The employees couldn't scurry around looking for a job as quickly as everyone else, and they viewed that as putting them at a disadvantage. Instead of it being a goodwill gesture, it was used against the company.

STEIN: Then you have the classic situation of a person who is on disability or in the hospital. I absolutely agree that if you don't tell them at that time, they may come back later saying, "I would have had an opportunity to network more, to get my resumé out there." On the other hand, is it right to tell someone who went into the hospital two days ago that they have lost their job?

BRIGHAM: Train the individuals that are doing the terminations and make sure they have a script in mind that explains the reason for the layoff. Often a company has a clear and well-documented plan for the reduction-in-force, but then all sorts of problems arise based on representations that were made by the individuals that are actually conducting the terminations.

STEIN: I like the idea of a very firm outline, so that everyone communicating the message is providing the same message. When you don't give them that firm outline or script, people tend to ad lib, and whenever they ad lib …

SCHWARTZ: … they always ad lib in a bad way.

FREDERICK: That outline should be cleared with counsel. Sometimes it's when the HR people draft it and it's not reviewed by counsel that it becomes Exhibit A in the lawsuit.

MODERATOR: What are the pitfalls of offering severance in exchange for a waiver not to sue?

STEIN: I don't think there are any pitfalls. I always start off by telling my clients that they have no obligation, unless their policy provides otherwise, to offer severance. If they do, the question is whether that offer is to be conditioned upon the execution of a release of claims. If the answer is yes, clients should be careful to craft that release correctly and, particularly where the employee is over the age of 40, to comply with the requirements of the Older Workers Benefit Protection Act.

SCHWARTZ: One of the trends I'm seeing is that some companies are offering a baseline severance package to all employees who are laid off involuntarily, and an enhanced severance package to those who are willing to sign a release and waiver of all claims. Typically the enhanced package is significantly better than the baseline package, and that can help demonstrate that signing the release truly was a voluntary decision.

FREDERICK: I think that there are a lot of pitfalls in severance agreements. In fact, you can't waive many claims. For example, you can't waive your ability to bring a discrimination case to the Equal Employment Opportunities Commission or to many state human rights agencies. I explain in the release that this does not prevent you from bringing a discrimination case, but it does prevent you from being awarded damages if you do.

SCHWARTZ: Which tends to greatly reduce the number of cases.

STEIN: I agree that there are certain types of claims that may not be waivable, such as Fair Labor Standards Act claims or workers' compensation claims. But I think most

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- Robin G. Frederick

of us would agree that if you are going to give considerable severance over and above the baseline Dan mentioned, you generally want to obtain a release.

HELLER: It used to be that a client would be absolutely horrified if you suggested that if they were going to pay severance, they should obtain a release. The response would be, "But we haven't done anything wrong. Why should we ask for a release? It makes us look guilty — like we're suggesting to a former employee that he find a reason to sue us." Today it's considered standard procedure, and I have not had a client question this for a long time. What we're seeing now, however, is employees walking away, not taking severance, not agreeing to sign a release, and going right to the EEOC. There has been a huge increase in EEOC filings. I don't know if it's because the severance offers are perceived as inadequate, or because employees have read about huge verdicts in discrimination cases. But I find it an interesting phenomenon that more people don't want severance and are filing charges instead.

STEIN: There has also been an absolute avalanche, a tsunami, of both federal and state wage/hour claims brought by individuals claiming they were not paid properly. Many of these claims are being brought as class actions. I've been practicing in this area for almost 30 years, and I've never seen anything like it. In the last five years, and particularly in the last two years, we have seen an enormous increase in these cases.

WELLER: A plaintiffs lawyer recently described these claims as "like shooting fish in a barrel." I now see some plaintiffs boutiques file a discrimination claim with the Connecticut Commission on Human Rights and Opportunities and the EEOC and, on the same day, a federal court complaint for some alleged violation of the FLSA. If the position is exempt, the claim is that the employer improperly classified the position and overtime is due; if the position is not exempt, the claim is that the employee worked overtime hours and was not paid. Once the attorney gets the release to sue on the discrimination case, that claim is collapsed into the pending federal lawsuit. More importantly, the FLSA claim may be more difficult to defend than the underlying discrimination claim. I can see why the plantiffs lawyers are at the feeding trough.

BRIGHAM: The amazing thing is that it only takes one complaint to trigger an expansive investigation. It is usually triggered by one disgruntled employee who has been terminated. The Department of Labor will automatically investigate not only that complaint, but also all of the company's employees, and will look back two and possibly three years. These cases are devastating because of the penalties involved, especially here in Connecticut with its small- to medium-sized employers. It's $1,000 per violation, with double damages available if they prove bad faith. Worse yet, individual liability can be imposed.

FREDERICK: And possible criminal penalties.

BRIGHAM: If the small- to medium-sized employer gets an adverse finding, that could put them out of business. The real problem for employers is that it is completely counterintuitive. Many employers want, for payroll purposes, to pay their employees a salary. Employees seem to think that being paid hourly and clocking their time is somehow less prestigious, and want to be treated as exempt. This is usually the case until they realize that for all these months they were actually in a nonexempt position and therefore entitled to overtime.

If you have written job descriptions, make sure that when you classify a position as exempt you provide justification for that decision in the job description.

-Giovanna Tiberii Weller

SCHWARTZ: The law at issue here, the Fair Labor Standards Act, has had a few updates but is still based primarily in the industrial culture of the 1930s. So what most people think should be treated as a salaried position actually should not, because it doesn't fall into one of the FLSA's narrow exceptions.

HELLER: You have no time records because you have treated the employee as exempt, but, unfortunately, your employee has kept a daily record — a log of arrival and departure times, copies of their parking receipts showing when they came in, when they went out. It's the employer's burden to establish the hours that the employee worked, and you are in serious trouble because you can't document anything.

STEIN: This goes to the importance of doing a wage/hour self-audit. It takes time and considerable effort, but when you weigh the effort of performing those audits and correcting any problems that might be discovered against

the risks of facing one or more of these lawsuits, the calculus becomes fairly simple: do the audit.

SCHWARTZ: When you conclude that a position should be reclassified as nonexempt, what procedures have you recommended that clients follow to inform employees of the reclassification, while avoiding a lawsuit for two or three years of past overtime?

BRIGHAM: You have to analyze who you are dealing with and reach some kind of middle ground.

WELLER: If you have written job descriptions, make sure that when you classify a position as exempt you provide justification for that decision in the job description. For example, it should describe the job responsibilities in a way that clearly establishes that the position calls for the exercise of discretion and independent judgment on matters of significance. So even if the person that's suing you didn't do what he was supposed to do — which is why you fired him in the first place — you can use the job description to argue that his position is justifiably classified as exempt.

FREDERICK: Actually, the Department of Labor takes a different view. If that person is not doing that job and you fire the employee, and then she brings a wage claim, you should have been paying her for the job she was doing, even though the job description used the word "discretion."

WELLER: Your point is well taken, but the written job description is a safety net for the employer's decision to classify the position as exempt in the first instance. It needs to be carefully drafted because if it's not, you know the plaintiffs lawyers are going to use it to support their claim that the position itself does not warrant exempt-level classification. As for the employee who is not doing exempt-level work, he or she should not be allowed to continue in that position, or the position needs to be reclassified as nonexempt.

FREDERICK: The in-house counsel or HR people should really make sure that if they are doing the audit, they are prepared to make changes. Because if they don't, the case for a willful violation becomes stronger, bringing with it three years of penalties instead of two.

HELLER: That points out another good reason to do an audit: If you discover that you have a problem, then you can fix it and the statute will run — or at least you can minimize your exposure.

BRIGHAM: The FLSA also has an underutilized safe harbor provision, whereby if you are deducting wages improperly from an exempt employee, you will not lose the employee's exempt status if you have a complaint mechanism and a clearly communicated policy prohibiting such deductions.

FREDERICK: We should mention the avalanche of cases dealing with independent contractor misclassification. These cases are increasingly brought as class actions. They are often based not only on the misclassification itself, but also on things such as improper denial of participation in 401(k) plans, which has huge implications — including the possible disqualification of your entire 401(k) plan. And almost every other area of law can be implicated in a misclassification case. It's important for employers to take this issue seriously and review their workforce, especially in a bad economy where people tend not to want to hire or to increase headcount. It's a potential minefield.

STEIN: It can be part of a wage/hour audit to look at the individuals performing services to make sure that those who are not classified as employees are truly independent contractors. When the search for additional tax revenue is paramount, as it is today, the government has recognized that a significant amount of tax revenue is lost when employees are misclassified as independent contractors.

BRIGHAM: It has been said that no other issue is so fundamental, yet so complex. The question, who is an employee? is so fundamental. It is so complex in the sense that a number of administrative agencies are enforcing a myriad of tests. You have IRS tests, FLSA tests, various state Department of Labor tests. It can happen the same way as a wage complaint. For example, one disgruntled former worker claims unemployment compensation and the employer says, "You are an independent contractor, not an employee." Typically the Department of Labor will do a full-blown investigation, looking at two years of your records. Then they will expand that to your industry, the rationale being, "If we're going hold your feet to the fire, we're going to make it industry-wide and not give your competitors an unfair advantage."

HELLER: You know what happens with that, though. I have seen it with clients who are trying to do the right thing, but not succeeding, by hiring undocumented aliens — whom they cannot hire legally — as independent contractors. It seems that it isn't just the disgruntled

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-Christopher L. Brigham

law about retaliation is very clear, and management must take steps to assure that the individual who made the complaint does not become a victim of retaliation. Counseling supervisors and monitoring the situation are steps that should be undertaken by management.

SCHWARTZ: Let me share an anecdote about the importance of *proper* counseling and monitoring. The employee in a case that I once defended had filed four different discrimination complaints with the CHRO over a five or six year period, all of which were found to be without merit. The employee was a poor performer, and the employer wanted to terminate the employee. Without my knowledge, the employer instructed the employee's manager, "Be sure you have good documentation on Employee X." The employee was fired and sued for discrimination and retaliation. In discovery, the plaintiff's attorney got approximately 90 pages of single-spaced notes about everything concerning this employee: "Employee came in two minutes late. Employee left early for lunch. Employees's memo had three typos." Then the plaintiff's attorney requested discovery of the manager's notes on the other 10 employees he supervised, but the manager didn't have notes on any of them. The plaintiff's attorney used that extreme disparity to argue that the employer was picking on and retaliating against her client based on his past discrimination complaints.

FREDERICK: You need to look fair, you need to be fair, and you need to document to show how fair you are.

HELLER: It's difficult to avoid the possibility of retaliation if the people involved are still working together. It makes sense to have a protocol for how you will deal with a situation where there is a complaint, perhaps a company policy that there will be a lateral move or a change in reporting.

WELLER: If somebody has to make an unwelcome lateral move, it should not be the person who made the complaint.

HELLER: Our clients need to understand that you can be the target of a completely meritless discrimination claim, and because of the way you deal with it turn it into an excellent retaliation claim. Often what happens is that the client is so outraged that somebody would file a charge with no basis whatsoever that they retaliate. It's simply human nature.

MODERATOR: What are the wage and hour implications of contacting your nonexempt paralegal on their BlackBerry at 3:00 a.m. on a Sunday?

HELLER: The question is, is this work time? Is it a condition of the job that the BlackBerry stay on at all times? One recommendation would be that nonexempt paralegals, for example, be instructed to turn their BlackBerries off when they leave the office — but I don't know how feasible this really is. I think employers are somehow going to have to keep track of the time, otherwise it will be difficult to comply with the wage and hour laws.

SCHWARTZ: This is a lot like dealing with employees who are required to be on call or to wear a beeper. Typically they only receive pay for that time if there is actually a call and they have to do something which is a significant disruption of their leisure time.

STEIN: If they are working, they have to be paid. The only defense is the de minimis rule. If it is two or three minutes, it is not likely to be considered working time. But if it is 12 or 15 minutes, it is likely to be considered as time worked.

WELLER: I have a BlackBerry, and I can say that it is very hard to walk by that blinking red light at home and not check it. And to expect your paralegal not to do so …

STEIN: In fact, you probably expect your paralegal to do so.

WELLER: It also goes to text messaging and all the ways that we communicate in this 24/7 society. People are going to bring these claims and say, "If you want me all of the time, you have to pay for me."

STEIN: This is the problem you get when you try to marry the workplace of the new millennium to a law that was crafted in the 1930s. In many instances the marriage just doesn't work. The only solution is to completely rewrite the Fair Labor Standards Act. Unfortunately, politically this is not going to happen. ■

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-Donna Nelson Heller

employee who is triggering these investigations, but that the state is looking for new sources of revenue by randomly auditing companies in industries where you might find a lot of underreporting of so-called independent contractors.

WELLER: Every statute has its own language, and every agency charged with interpreting that language will follow its own test. The tests are different enough to make things very complicated, but they all have a common thread, which is whether this person is being treated as an employee. If it walks like a duck and it quacks like a duck, you can call it a duck, but you can't call it an independent contractor.

SCHWARTZ: The DOL will call it a duck even if you have a written agreement that says it's something else.

BRIGHAM: Often an independent contractor is doing such a great job that you provide them with more and more work to the point that they are working exclusively for you. All of a sudden the relationship doesn't satisfy one of the common requirements of all the tests, which is that the worker has to have an independent trade or business that will survive termination of the employment.

FREDERICK: Employers who use independent contractors also need to understand that, even though they are real independent contractors, they may still count towards the 50-employee minimum required to implicate the Family Medical Leave Act. Even though you consider your workforce to be 30 people, if you are leasing 20 employees, you may be required to provide family medical leave to your 30 employees.

MODERATOR: What steps can employers take to prevent a retaliation claim by an employee who has lodged a complaint?

FREDERICK: Retaliation has gotten a lot easier to prove, and it can be based on things that might seem counterintuitive. Prior to the 2006 decision in *Burlington Northern v. White*, we thought that retaliation needed to be an actual adverse job action — a demotion, a reduction in pay, a termination or something of the sort. Now an adverse job action in a retaliation claim can be anything that dissuades a reasonable employee from bringing a claim, including, under certain circumstances, not being asked to lunch. I predict that we're going to see an increase in the number of retaliation claims, which have always been harder to defend than discrimination claims.

BRIGHAM: Because the definition of retaliation is potentially so broad, what was a very defensible discrimination claim becomes a very difficult-to-defend retaliation claim.

SCHWARTZ: The one thing about retaliation that is intuitive is that if a manager or a person in a position of authority has someone complain about them, they tend not to like the person who is complaining and to want to get revenge or penalize that person. You understand that, jurors understand that, and judges understand that. It is important to train managers that retaliation is not permitted, that retaliation can be very broadly defined, and that it causes more problems than the initial complaint.

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BRIGHAM: My concern, though, is with the pendulum shifting too far in the other direction, so that all of a sudden management is absolutely paralyzed in their dealings with that employee. It becomes very complex for employers to deal with.

WELLER: Even though the *Burlington Northern* test purports to be objective — you look at whether the "reasonable employee" would be dissuaded from making or supporting a claim — it really is subjective because it looks to see whether the challenged action was "materially adverse." The materially adverse component is analyzed on a case-by-case basis. So, for example, a change from flex hours to regular hours may not be materially adverse to many employees, but to a single parent it may be. I would venture to say that the threshold is even lower regarding alleged retaliation for supporting a claim of discrimination, because it probably takes less to dissuade someone from supporting another person's claim than to dissuade them from making their own claim. If that's right, then the fear is that a court will say that just about anything may dissuade a reasonable employee from supporting a claim of discrimination.

STEIN: It is extremely difficult for any manager – or any person — to ignore the fact that their subordinate or coworker has accused them of discrimination. But the

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