Strategic Initiatives for the Changing Workforce

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Corporate Diversity:
An Organizational Necessity, Not an Organizational Option

The Knowledge Workforce:
20 Solutions for Overcoming the Coming Skilled Worker Shortage

The Flexible Workforce:
Changing Hiring Patterns and the Rise of the Contingent Worker

The Legally Compliant Workplace:
Establishing Standards for a Changing Workforce

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IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. This white paper is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues which inevitably arise in any employment-related dispute.

Introduction

In 2050, half of the United States will be composed of people of color, a quarter of whom will be Hispanic.[1] A majority of the workforce is now in a protected age group, and in just eight years 20% of all workers will be 55 and over. Asians are the fastest growing minority, and women are closing in on becoming 50% of the workforce. In 2010 it is projected that America will have over 10 million more jobs than workers, and U.S. computer science and engineering graduates will be an endangered species.[2] Profound changes are occurring in the workplace and in the composition of the workforce.

Employers have entered the first decade of a new century, and we are well on the way to a post-industrial, information and service-based economy. These changes are remaking the American workforce. In 2004, we now can better see, understand and analyze the forces that are dramatically reshaping both the reality and expectations of the American workforce. And with this understanding comes the ability to build responsive programs while anticipating and complying with legal requirements.

Four Strategic Initiatives

Presented in this paper are four strategic initiatives involving the changing workplace, one or more of which will be undertaken by most employers in the United States during the next two years. Although these undertakings seem isolated, they are interrelated in that they involve the changing workforce and the need for legal compliance. First, diversity initiatives have evolved from goodwill gestures to serious business necessities. Second, a monumental skilled worker shortage is approaching and cannot be stopped. Hiring and retention initiatives will be mandatory, including reaching deep into minority communities for future workers. Third, another initiative is in response to the shortage: the increased use of contingent workers. This movement is also representative of a shift to multiple employers and flexibility as the preferred arrangement from employers as well as employees. Fourth, all of these strategic initiatives are tied together and reviewed through the need for legal compliance and ethical standards in the workplace.

Each of the above initiatives is multidisciplinary and multidepartmental. They are not the exclusive domains of corporate counsel and human resources professionals, but critical to each is an expert understanding of employment and labor law as well as the ability to use legal compliance as a tool to create new opportunities rather than as an excuse for being unable to act. The focus on the positive force of law in the workplace weaves its way throughout this study and distinguishes it from other reports.

Overview of Selected Legal Challenges

The development of the above initiatives is broad and preliminary. If interest is attracted in one or more of the initiatives, significant additional work will be required before a program can be launched. To facilitate this, far greater detail is provided in Littler's The National Employer® 2004/2005 Edition and the chapters that closely coordinate with the topics summarized in this report. This is especially true of the 20 solutions suggested for the coming skilled worker shortage which can be found in Appendix A. The goal is to stimulate a dialogue and creative approaches to addressing the shortage by listing a score of potential answers. Again, detailed legal analysis and substantial additional planning would be required to actually take advantage of one or more of the suggested solutions. Littler is committed to providing such detailed legal analysis and program review, as it is believed that the coming skill shortage will be perhaps the most difficult challenge faced by corporate employment counsel and human resources professionals.

Littler Joins Open Compliance and Ethics Group (OCEG)

Another major objective of this communication is to announce Littler's participation in the Open Compliance and Ethics Group (OCEG) as a founding member. OCEG is a nonprofit organization made up of some of the most

[1] U. S. Census Bureau Publication (Mar. 18, 2004).

[2] These statistical references are supported by Bureau of Labor Statistics, Computing Research Association, and National Science Foundation research cited later in this publication.

important and committed business leaders of the 21st century. Over 200 such individuals from over 100 entities have been involved in its formation. Its mission is developing a Framework of Foundational Guidelines for corporate compliance and ethics programs. This will be followed by core standards and advanced practices for each of 12 domains, including employment law. Littler will participate in the drafting and development of employment law standards through its newly organized Legal Compliance Practice Group. While this group is only now being structured, Littler has had a commitment to legal compliance and preventive employment law for decades. In many ways Littler's Legal Compliance Practice Group is both its newest and in many ways its most mature vehicle for meeting the needs of a changing workplace. Details about the Group and the OCEG will be posted at www.littler.com during the fall of 2004.

In transitioning to the four initiatives comprising this report, it is appropriate to again stress that, contrary to many of Littler's other publications, this is not a comprehensive treatment of the employment and labor law issues encountered with each initiative or the 20 potential solutions for the skilled worker shortage. In many ways such a treatment is only now being written in statutes, regulations and case law.[3]

[3] For the latest reports on major employment and labor law developments, see www.littler.com for ASAPs, Insights, White Papers, and published articles, and consult The National Employer® 2004/2005 Edition (online, CD-ROM, or in print).

PART I

Corporate Diversity: An Organizational Necessity, Not an Organizational Option

The workforce of the United States is among the most diverse in the world, and it grows increasingly more diverse with each passing year. A company that has implemented a well-managed diversity program throughout all levels of the organization is better able to embrace the diverse workforce and meet the major business challenge of this century – the need to adapt. Adaptability is necessary for success in the current environment.

A diverse workforce opens boundless opportunities to an employer as it competes for an advantage in the global marketplace. It enables the company to better identify changes in market forces that directly and indirectly affect its business, and provides it with a broader base of talent from which to capitalize on ideas, seize market share and resolve problems, and improve overall productivity. Diversity can positively affect a company's bottom line, as it creates corporate opportunity in markets that consist of a melting pot of consumers, suppliers and all other participants in the economic chain. Consequently, companies are rapidly embracing diversity, as without it they cannot compete. It is simply good business.

The changed workplace is not, however, without its legal challenges. A diverse workforce means more and more workers have, and will continue to have, different beliefs, traditions, needs and desires than in the past. Understanding and reconciling these differences, while simultaneously promoting diversity, is a daunting task for employers that must be addressed to minimize exposure to liability for workplace discrimination. The solution of choice today is a diversity program. In the 21st century, developing a legally compliant diversity program is an organizational necessity, not an organizational option.[1]

Even the most well-intended diversity programs can, however, create or otherwise expose an employer to liability. Such programs are quintessential targets for discrimination lawsuits that are based on claims that one group received preferential treatment over members of a protected class (e.g., race, national origin and gender), or even reverse discrimination claims. While there is limited, if any, case law guidance addressing the viability of corporate diversity programs, the United States Supreme Court recently had the opportunity to decide the constitutionality of the University of Michigan's admissions policy, and the considerations given by the University to an applicant's background, including race and national origin, to achieve its diversity objectives.[2] The Court found that such considerations are constitutional, if they are not the sole factors in the decision making process.[3] The same analysis can be applied to diversity programs. Legal lessons can be gleaned from the Supreme Court's decision to help a corporate diversity program withstand legal scrutiny and better protect the employer in its commitment to embrace its diverse workforce.

A. What is Diversity?

Diversity is not affirmative action. It is much more than just striving to hire minority workers based upon a moral and social responsibility. Diversity means acknowledging, understanding, accepting, valuing and celebrating differences among people. This of course includes differences with respect to legally protected characteristics such as race, ethnicity, age, religion, disability, and gender, but it also includes much more. A broader (and more appropriate) definition of diversity includes differences in personality, lifestyle, workstyle, education, work experience, or any number of items that are not as easily placed into categories. Diversity is about influencing and/or changing the culture of a company, not just about focusing on who performs a particular job

[1] Diversity is an extremely broad and complex subject. By no means can the subject be adequately covered in a short discussion such as this one. The point of this section is merely to introduce a few selected areas related to corporate diversity, to stimulate ideas and discussion, and to strongly encourage every employer to take action.

[2] *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

[3] *Grutter,* 539 U.S. 306.

or group of jobs. Understanding this difference is crucial in implementing an effective diversity program and/or improving upon one that already exists.

That being said, what diversity means to one company may be entirely different from what it means to another. A small company in New Hampshire is likely to have different diversity needs and goals than a multinational corporation with operations in or near major U.S. cities. Ultimately, what is key to a company's definition of diversity is that the organization's current and potential employees and customers see themselves in the definition. For example, Procter & Gamble explains diversity as follows: "Everyone at P&G is united by the commonality of the Company's values and goals. We see diversity as the uniqueness each of us brings to fulfilling these values and achieving these goals. Our diversity covers a broad range of personal attributes and characteristics such as race, sex, age, cultural heritage, personal background and sexual orientation. By building on our common values and goals, we are able to create an advantage from our differences."[4]

B. How Did We Get Here?

There is no doubt that corporate diversity has been driven in large part by the rising tide of employment laws and litigation. Each decade has added a new challenge for employers. The 1960s saw the passage of the Equal Pay Act of 1963; Title VII of the Civil Rights Act of 1964, which is the landmark legislation in the field of employment law; the Age Discrimination in Employment Act of 1967; and Executive Order 11246, relating to affirmative action in government contracting. The 1970s saw amendments that expanded the scope of those protected by the civil rights acts, and saw the affirmative action debate introduced into mainstream corporate culture. The 1980s saw an explosion of litigation over existing employment laws and forced the concept of corporate diversity into the discussion. The 1990s saw the passage of the Americans with Disabilities Act and the Civil Rights Act of 1991, which amended Title VII to, among other things, provide for jury trials and expand the types of damages available to plaintiffs. By 2000, the class action had become a mainstay mechanism for attempts to enforce various employment laws, and a staggering source of economic strain for any company faced with such an action (settlements of class action employment lawsuits for a hundred million dollars or more seemed almost a regular occurrence by this time).

Diversity has also been driven by the dramatic change in "faces" of the employees. Statistics confirm that an employer has no choice but to diversify. As part of its mandate under Title VII, the Equal Employment Opportunity Commission requires employers to submit reports regarding the composition of their workforces' sex, race and ethnicities. The EEOC collects annually the EEO-1, the primary report from private employers with 100 or more employees or federal contractors with 50 or more employees. An analysis of data from EEO-1 reports submitted by over 39,000 employers in 2001 provides a compelling snapshot of the evolving workforce.[5] Non-whites represented 30% of the workforce, and white males represented only 38% of the workforce. These figures would be even more compelling if public employers and small businesses were included into the data (because such entities are historically even more diverse). The diversity train is moving faster and faster, as the Census Bureau estimates that non-whites will represent more than one-third of the United States population by 2010, and close to half of the United States population by 2050. An employer who does not account for the differences in its workforce is almost certain to face liability.

The tide will continue to rise, and thus so will the burden on employers to protect against getting flooded. Accordingly, from a legal perspective, a diversity program is now an organizational necessity for any company. While the existence of an effective corporate diversity program could never foreclose potential liability, it can be used as a method to limit potential exposure, or to defend against allegations made in employment litigation. The presence of an effective corporate diversity program could be used as a shield, in the form of an affirmative defense designed to limit liability or damages, or perhaps more importantly as a sword, working towards goals such as breaking the glass ceiling, avoiding a statistical inference of discrimination or influencing a jury's decision regarding whether a discriminatory atmosphere exists at the company.

C. Who is Launching Diversity Initiatives?

[4] http://www.pg.com/jobs/corpinfo/diversity.jhtml.

[5] http://www.eeoc.gov/stats/jobpat/2001/national.html.

The next time you are on the Internet, head to the website of any Fortune 500 company that you can identify. The odds are that somewhere on that website, you can find links to that company's diversity initiative in one form or another. Why is this the case? While the reasons vary, it is clear that companies recognize the impact that diversity initiatives could have on their corporate culture, their profitability and their litigation risks. If you review some of these websites, you will see that these companies view corporate diversity initiatives as much more than just about who they are hiring. Current diversity programs are business initiatives designed to influence all aspects of a company's operations, including retention, promotion, community relations and bottom line profitability. For a sampling of such programs, review the diversity program descriptions on the websites of Intel, Eastman Kodak, Citigroup, PepsiCo, BellSouth, and/or Merck.[6] All of these companies were recognized by DiversityInc magazine as some of the "Top 50 Companies for Diversity." Even just a few minutes reviewing these websites (or those of other companies with diversity programs) will paint a picture of the kind of commitment many companies are making to improve corporate diversity.

A snapshot of one company's program may offer an idea of some of the items that can be included in a broad-ranging diversity initiative. Lockheed Martin includes the following as part of its diversity initiative: (1) a mission statement; (2) changes in non-discrimination policies to include ancestry, sexual orientation, marital status, and family structure; (3) diversity training of all 13,799 managers of the company; (4) an Executive Diversity Council; (5) local diversity councils; (6) quarterly reviews and reports of the company's hiring, promotion, and attrition data; (7) endorsing diversity within the bonus system for corporate executives; (8) setting and working towards goals of supplier diversity; (9) a mentoring program; (10) employee networks within different business units; and (11) clear support from the CEO of the company (through such things as chairing the Executive Diversity Council, participating in the mentor program, giving diversity speeches, attending internal and external diversity events, meeting with business unit leaders to discuss diversity issues, and participating in public philanthropic events geared towards diversity issues).[7]

Companies with effective diversity programs can achieve a wide range of results. Home Depot believes that since implementing its corporate diversity program, it has seen a huge drop in employee turnover.[8] The Boeing Co. believes that its diversity program has helped it improve relationships with government agencies such as the Labor Department's Office of Federal Contract Compliance Programs.[9] Salomon Smith Barney credited its diversity program with helping it triple the number of females in the company's broker training program in just a short period of time.[10] It is definitely the right time to take a proactive approach towards working for diversity in the workplace.

D. What Role Does Language Play in the Diversity Landscape?

One of the biggest changes in emphasis for corporate diversity in recent years relates to the cultural impact of the new face of the nation's workforce. When diversity was viewed more narrowly as encompassing race or gender issues, language was not a crucial part of the discussion. That has changed. The globalization of the workforce and the changing demographics of minority groups in America have brought new cultures and new communication issues to the forefront. The 2000 Census revealed that Hispanics, who represent 12.5% of the U.S. population, are now the largest minority group in the country.[11] Spanish is now the second most widely spoken language after English in the Western Hemisphere. This has had a significant impact on corporate diversity, as employers must rise to the challenge of reconciling their legitimate goal of maintaining efficient business communications with their legal obligation to refrain from discriminating against employees in an ethnically diverse workforce. The rising challenge is obvious at the Equal Employment Opportunity Commission, where there was over a 20%

[6] http://www.intel.com/jobs/Diversity/index.htm; http://www.kodak.com/global/en/corp/diversity; http://www.citigroup.com/citigroup/citizen/diversity; http://www.pepsico.com/diversitywork/default.shtml; http://bellsouthcorp.com/policy/diversity/?abtus_dd=div; http://www.merck.com/about/diversity.

[7] 2003 Functional Diversity Primer, published by Diversity Best Practices.

[8] *Employers Who Faced Major Bias Suits Suggest Proaction, More Data Collection*, Daily Lab. Rep. (BNA), Mar. 30, 2001.

[9] Id.

[10] *Smith Barney Issues Settlement Offers to Resolve 2,000 Sexual Harassment Claims*, Daily Lab. Rep. (BNA), Nov. 24, 1999.

[11] http://www.census.gov/population/cen2000/phc-t1/tab01.pdf.

increase in the number of national origin charges filed in 2002, as compared to 1992.[12] It would be no surprise if that number continued to grow.

One area that has been a flash point of debate and controversy is the implementation by some employers of "English-only" rules, which are policies that prohibit or restrict the use of languages other than English in the workplace. EEOC regulations on "English-only" rules state that requiring employees to speak only English at all times during the work day is typically an impermissible burden, but an employer can require employees to speak only English at certain times if the employer can show that the rule is justified by business necessity.[13] Several states, including Florida and Arizona, introduced constitutional amendments or statutes that designated English as the state's official language. The Arizona constitutional amendment was challenged in court, and the Ninth Circuit Court of Appeals ruled that it was unconstitutional[14] (although the U.S. Supreme Court subsequently vacated the decision as moot because the employee who had challenged the amendment resigned while the case was pending).[15] California has a new statute that prohibits employers from adopting or enforcing policies that limit the use of any language in the workplace, except in very limited circumstances (a business necessity exception that is extremely narrow).[16] English-only campaigns are likely to continue to cause a great deal of controversy. An employer considering an English-only policy should decide whether the language skills are an integral part of the position being restricted, and the employer should precisely define the need for the policy.

This is just one example of how the changing workforce has impacted language. There are obviously many more. The point is that for most employers, particularly those with operations in ethnically diverse states or in ethnically diverse industries, leaving language out of the diversity discussion is not an option.

E. Where is this All Heading?

As the workforce continues to evolve, so will the laws and guidelines within which employers must make diversity decisions. As a result, diversity programs must always be flexible and adaptable to the changing landscape. As we discussed earlier in this paper, the United States Supreme Court recently jumpstarted the diversity discussion again with long-awaited decisions in two affirmative action cases involving admissions policies of the University of Michigan.[17] The Supreme Court stated that the affirmative action policies of the undergraduate school were unconstitutional because the policies were formulaic, and made race a determining factor in admissions.[18] In contrast, the Supreme Court found that the law school's affirmative action policies were constitutional, because the policies involved a case-by-case approach that made race merely a plus factor, as opposed to a determining factor.[19]

The University of Michigan cases involved government action, and so the specific constitutional analysis is not directly applicable to private employers. The case is also about affirmative action programs, not diversity programs. Nonetheless, the decisions are likely to impact future decisions by courts relating to affirmative action programs and/or corporate diversity programs because it would not be surprising if courts relied on the rationale of the Supreme Court and applied it to private employers as well. Corporate America will certainly use these cases as a guideline for diversity, even though the decisions deal with affirmative action. Corporations clearly agree, as 69 Fortune 500 companies submitted "friend of the court" briefs in support of the Michigan cases. Employers will attempt to use the University of Michigan cases to argue in favor of decisions designed to increase the diversity of their workforce. For example, an employer with two qualified applicants might argue that it could lawfully take race into account, as long as the decision to consider race was not part of a quota, and as long as race was merely just one factor in making the particular hiring decision.

The changing workforce will also have a dramatic

[12] http://www.eeoc.gov/stats/charges.html.

[13] 29 C.F.R. § 1606.7.

[14] *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), *vacated and remanded*, 520 U.S. 43 (1997).

[15] *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

[16] Cal. Gov't Code § 12951.

[17] *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

[18] *Gratz*, 539 U.S. 244.

[19] *Grutter*, 539 U.S. 306.

effect on the types of charges and lawsuits that employers face. In 2002, the largest increases in charge filings at the EEOC from the prior year were in the areas of religious discrimination, age bias, and national origin discrimination. Religious discrimination charges filed with the EEOC have increased by nearly 40% in the past decade, and national origin discrimination charges have *tripled* since 1986. As diversity increases, so do the types of charges that employers face.

The aging of the population will have a significant impact on the diversity discussion. Just this year, the Supreme Court denied a challenge by a group of employees between 40 and 50 years old who claimed age discrimination because they were not eligible to receive certain retirement benefits that their employer gave to employees over the age of 50.[20] The Supreme Court stated that the ADEA is intended to protect employees over the age of 40 from discrimination in favor of younger workers, not older workers. While the employer was successful in that instance, the case serves as a timely reminder that the changing workforce will bring new challenges in employment law. This case is an example of an employer trying to take age into account as part of diversity efforts. Corporate diversity must include a discussion of the needs of workers in the age-protected category, who will no doubt search for new ways to protect their interests.

Even the semantics of the discussion may change. Some companies have moved away from using the term "diversity" and instead try to label their initiatives as programs of "inclusiveness." Because perception is often reality, these companies fear that employees may view inclusiveness as a less divisive concept than diversity. We bring this up because "what about me" cases are going to take up more and more of the employment litigation landscape as the workforce continues to evolve. White males are already attempting to use employment laws to their advantage in increasing numbers, a trend that will no doubt continue. For example, a company was recently faced with a religious discrimination lawsuit filed by a white male employee who was terminated for posting Bible verses intended to denounce the company's diversity program, to the extent that it related to homosexual workers.[21] The Ninth Circuit Court of Appeals upheld the employer's termination decision.

F. Case Studies: What Sorts of Problems Have Arisen Relating to Diversity Programs?

While a diversity initiative is intended to offer nothing but positive results for a company, there are many land mines that could create potential legal challenges or make the program less effective because of concerns about legal challenges (that could be avoided with good planning and advice). During the Executive Employer Program, a roundtable of corporate diversity officers will present and explore various diversity initiatives in more detail. The following are just five hypothetical problems drawn from real diversity initiatives that highlight the need for proper legal engineering.

Company A wanted to hand out a survey to all of its employees so that it could gather information about the current state of affairs. The information proved invaluable to understanding the diversity issues that faced the company. However, Company A took no efforts to run the survey through outside counsel, nor any actions that could have attempted to protect the survey results from future discovery in litigation. As a result, despite good intentions, the survey results proved to be incredibly damaging evidence against the company in several subsequently filed lawsuits. Needless to say, the irony of the situation was not something that brought any joy to this company. Some companies recognize this potential dilemma and altogether avoid using any written method to assess the state of affairs. Other companies choose to run the risk because they feel the long-term benefits outweigh the short-term costs. We would advise that if your company wants to use surveys, care must be taken to design the process so that a future argument can be made that the results are privileged from disclosure to third parties. Smaller companies, for example, can use an active lawsuit as a good excuse to assess the current climate of the company and perhaps argue that survey results should be privileged.

Company B used surveys but wanted to keep each survey anonymous to encourage open and honest communication and to eliminate any potential claims of retaliation. Company B also felt that an anonymous survey

[20] *General Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236 (2004).

[21] *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004).

that could not be traced back to specific employees would not be particularly useful as potential evidence in a lawsuit if the company ever had to disclose the surveys. Unfortunately, Company B eventually learned that the survey was not truly anonymous, because the data was coded in such a way that the IT department could easily determine who had filled out each survey. This caused a problem with employees who learned that in fact the company had the ability to trace back who had filled out particular surveys. The company learned about the coding issue during a retaliation lawsuit filed by one of these employees. It is essential to speak with the IT department (or any other department involved) to make sure that true anonymity is being achieved if that is the intended goal.

Company C spent countless resources designing a diversity initiative, and then shipped non-diverse corporate personnel from West Virginia to an extremely diverse facility in South Florida to roll out the program. These same personnel were also supposed to oversee the program from afar. Not surprisingly, until Company C figured out that local diverse personnel had to be included in the diversity initiative process, the program struggled to have any effective impact. The non-diverse corporate personnel had difficulty relating to and understanding the diverse culture of their facility in South Florida, which was entirely different than where the corporate personnel came from. This only served to increase employee hostility towards the company, and thus increased the likelihood of future exposure. In companies with multiple locations, a diversity program must contain methods by which employees at the local level feel connected to the process. An effective diversity program has to infiltrate the company at all levels. This can be accomplished in various ways, including, but not limited to, employee networks, employee councils, diversity meetings or mentoring programs.

Company D created a series of training programs to take place at its facilities throughout the country. A group of diversity trainers went from facility to facility and conducted seminars and roundtables for groups of employees. One of methods trainers used was to get "real" examples from the employees of issues relating to the need for more diversity in the workplace. The trainers found it very helpful because they used these examples as a teaching tool to explain how the company could improve and how it intended to improve. In theory, this was a great idea, but from a legal perspective, the company was creating witnesses for any future lawsuits filed by employees who were in the room. Even the trainers could have become trial witnesses depending upon the advice given or information received during the sessions. Training the trainers is extremely important in light of situations like this. Trainers can use various tools to avoid the evidence gathering problem, such as limiting the discussions to hypothetical situations (cast in the aura of confidentiality), or asking to speak to employees individually after a training session is over, rather than doing so in a group setting.

Company E rolled out a diversity program, only to be faced with an immediate onslaught of "what about me" complaints, issues, and concerns from groups that felt excluded by the diversity initiative. This company's problems stemmed in part from the problem of perception discussed in section E above. As with any corporate program, the success of a diversity initiative hinges upon the ability to obtain consensus. The entire workforce must embrace the program if it is to achieve the results intended. Company E learned that the initial introduction of the program is key. The company did not focus enough on the fact that diversity was supposed to be a concept of inclusion, not one of exclusion. It is extremely difficult to balance the needs of all employee groups with preconceived biases regarding what diversity is all about. While this problem cannot be eliminated, it can be minimized by making sure that the rollout plan includes carefully crafted messages about how diversity is intended to impact, benefit and include all employees.

G. What are Some of the Key Elements to Implementing and/or Improving Upon a Corporate Diversity Program?

As already stated, there is no "one size fits all" method of implementing and/or improving upon a diversity plan for your company. Diversity means different things to different companies. Diversity in Los Angeles is different than diversity in Buffalo. Diversity for IBM is different than diversity for a small or mid-sized company with only one facility. The specific methods by which your company can achieve its diversity goals cannot be summed up without any individual assessment. Nonetheless, there are a few universal elements that most "successful" diversity programs contain. If your company

plans to create a diversity program, or if it already has one, the following items are a crucial part of making such a program effective (or keeping it that way):

- visible and meaningful commitment from top company executives (**NO SINGLE FACTOR IS MORE IMPORTANT**);
- honest assessment of the current climate of your company;
- goals for the diversity program that are clearly articulated;
- open channels of communication for management and non-management employees to participate in and give feedback on diversity issues;
- creation of a diversity taskforce and a diversity infrastructure;
- strategic business plans that include diversity issues;
- funding of the diversity program to the extent necessary to meet goals;
- manager and high-level executive accountability (e.g., some companies make achieving diversity goals a part of management bonus packages);
- the selection, promotion, and retention of "qualified" individuals;
- training and education of the corporate ranks;
- the evaluation and measurement of the diversity program on a continuous basis; and
- partnership with the General Counsel in the creation, implementation, and maintenance of the diversity program.

Diversity is a moving target, and in reality it is not a conclusory goal that can be reached, like crossing a finish line. Nonetheless, a corporation in the current marketplace that does not take substantial steps to incorporate diversity into its institutional structure will struggle. It will face increased exposure to lawsuits, find it harder to recruit and retain employees, and find it harder to keep up with and understand the needs of its diverse consumers, suppliers, employees, or any other group integral to running the corporate engine. Such a company will also find it difficult to match the skill sets of competitor companies who take full advantage of what the global marketplace and more diversified workforce have to offer. Failure to work towards diversity is no longer an option any company can afford.

PART II

The Knowledge Workforce: 20 Solutions for Overcoming the Skilled Worker Shortage

A. An Introductory Story

William Watkins (age 58) and Bill Mallory (age 61) are engineers who were laid off at the same time their employer was seeking other knowledge workers with more current expertise. Their story foreshadows the legal battlefield that awaits employers as a monumental 21st century skill shortage arrives. Even though the coming shortage promises to be the greatest in the history of the United States, its size and meaning is camouflaged by continuing outsourcing, reductions in force, and unemployment. It is likely that groups of employees will continue to receive pink slips and have difficulty locating comparable employment long after the skilled worker shortage becomes an indisputable crisis. It is in this seemingly contradictory economy that claims like discrimination, wrongful discharge, and retaliation will test corporate legal compliance and human resource planning. Such economic conditions and even war with Iraq are not events of first impression. The last recession and recovery as well as the first war with Iraq are instructive of the legal challenges likely to greet employers as they develop initiatives to address the coming skilled labor crisis. It is in this context that Watkins and Mallory hurled age discrimination charges at their employer when younger alleged "replacements" were hired.

Watkins and Mallory worked as "seeker/sensor" engineers designing laser radar and infrared weapon targeting systems in the defense industry. After the first Iraqi war, the Air Force concluded that infrared technology did not do well at night and in a desert environment. If the United States was going to be prepared for a second such war, inertial and satellite guided weapons were needed. Contracts for the old guidance system were terminated in favor of the latest technology. Accordingly, well before bombs again fell on Baghdad, Watkins and Mallory received layoff notices at the exact same time the company was feverishly searching for hard to find engineers skilled in the newly emerging technologies.

Watkins and Mallory saw themselves as victims of age discrimination. The reduction in force (RIF) impacted six engineers besides Watkins and Mallory. Those laid off were between 43 and 67 years old. At the same time following an intense search, 10 engineers were hired into the same department, one of whom was 55, with the remainder between 24 and 35. The resulting litigation forced the Company to defend itself through administrative charges, depositions, motions and a full trial where the jurors deadlocked. The trial court then granted judgment as a matter of law in favor of the Company holding that the Watkins and Mallory failed to prove that the new hires were "replacements." The Eleventh Circuit Court of Appeals agreed, finding that the skills of the two groups of engineers were "distinct." Watkins, Mallory and the other terminated engineers were identified as having "obsolete and outdated skills."[1] While the employer eventually prevailed, the cost in management time, attorneys' fees, and experts likely totaled several hundred thousand dollars.

The above story highlights how workforce changes are reviewed and tested through a network of employment and labor laws. When layoffs and hiring take place at the same time, the skill requirements, training programs, and motivations of the employer are put under an employment law microscope. The fast approaching 21st century skilled worker shortage crisis will put out of business employers who have ignored its inevitable arrival, while leaving other employers to navigate between legal landmines in developing and implementing their hiring, retention and replacement strategies. It is the discipline of avoiding such landmines and disarming those that cannot be avoided, that has resulted in the need for a legal overview of possible responses to the coming storm.

[1] *Watkins v. Sverdrup Technology, Inc.*, 153 F.3d 1308, 1321 (11th Cir. 1998).

B. The Coming Skill Shortage and Urgent Call to Action

The purpose of this section is to establish beyond a reasonable doubt the impending skilled worker shortage and highlight a sample of the legal challenges associated with twenty (20) solutions to the coming crisis. These 20 solutions are listed in Appendix A. Many of these potential solutions are not achievable unless they are designed with an understanding of employment and labor law requirements. This is an urgent call to action for corporate legal and human resources professionals who are responsible for their organizations' changing workforce. There is only about a two-year window for individual employers to prepare for the coming crisis or face catastrophic consequences. Utilizing this publication as a beginning, and drawing on multidisciplinary expertise, the employer should be able to develop one or more unique strategic initiatives to address the coming crisis and potentially turn it into a competitive advantage.

C. The Scarcity of Qualified Knowledge and Skilled Workers is Certain

Prerequisite to building a strategic initiative to address the knowledge and skilled worker shortage is verifying that such a crisis exists. This shortage in the U.S. is real, imminent and well documented. By 2010, there will be approximately 10,033,000 more jobs available than there are people in the labor force.[2] The Department of Labor, Bureau of Labor Statistics indicates that the number of jobs needed to support anticipated growth will increase from 144 million to 165 million. Jobs in technology, healthcare and the science fields will be particularly in demand through 2012.[3] So clear is the coming crisis that three of the nation's top human resources consultants, including Roger Herman, published a 320-page treatise in 2003 entitled, *Impending Crisis: Too Many Jobs Too Few People.* They document the coming crisis and warn that if an employer does not recognize and respond in advance to the coming shortage, the consequences will be "corporately life-threatening."[4] Littler Mendelson shares this admonition!

D. A Convergence of Forces Guarantees the Skilled Worker Shortage

Four separate forces are converging on the workplace guaranteeing that this shortage is certain, with only the exact time of its arrival remaining for speculation.

1. Demographics: The Aging Workforce and the Lack of Replacements

The demographics of the U.S. population show the coming retirement of the baby boomers in the workforce and a reduced number of younger replacements. At the same time the baby boomers are living longer and have substantial buying power to stimulate economic demand. Economists predict that this wealth of spending will fuel the economy for years to come.[5]

Existing jobs will be unfilled and new positions created; yet, the number of workers available from the current population will be insufficient. A review of the "Age Waves" working their way through the U.S. population solidly supports the above conclusions.[6] Predicted job creation compared with available workers will result in over 10 million unfilled jobs by 2010. Even with adjustments for older workers staying in the workforce longer than their predecessors, the consensus is that the unemployment rate in 2010 will be 4% or less. "An unemployment rate this low, combined with a shortage of younger workers creates an incredibly challenging environment for employers to recruit, hire, and retain skilled workers."[7]

On February 11, 2004 the Bureau of Labor Statistics (BLS) issued its employment projections for 2002-2012.[8]

[2] Roger Herman, Tom Olivio & Joyce Gioia, Impending Crisis: Too Many Jobs Too Few People, p. 46 (Oakhill Press 2003).

[3] Michael Horrigan, *Office of Occupational Statistics and Employment Projections*, Monthly Lab. Rev., Feb. 2004.

[4] *Id*. at 28-29,

[5] Herman, et al., supra, at 36.

[6] *Id*. at 43-46 (citing Dept. of Labor, Bureau of Labor Statistics 1994, 2002 and 2010 "Workforce Age Wave" data).

[7] *Id*. at 50.

[8] http://www.bls.gov/new.release/ecopro.nr0.htm.

The inevitable consequences of the aging baby-boomer generation continue to be confirmed, fully supporting the Roger Herman forecast of a 10 million-plus workers shortage.[9]

The number of 55-and-older workers is "projected to grow by 49.3 percent, 4 times the 12-percent growth projected for the overall labor force."[10] Over the next 10 years, job replacement exceeds new job creation in the vast majority of occupational classifications. As the baby boomers move to higher age brackets, the replacement workforce (Generation-Xers) is increasingly unable to support the same high level of participation. Fundamentally, as older workers increasingly leave the workforce, far fewer younger workers are in the labor force to replace them. Moreover, baby boomers are the most competitive generation with "workaholism" being a badge of honor, while Gen-Xers place greater priority on home, family, and individual accomplishments over that of the organization. Hours worked by exempt employees and willingness to accept overtime suggests that Gen-Xers are not one-for-one replacements of their older counterparts.

The demographic and attitudinal factors described above by themselves support the existence of a worker shortage apart from the acute shortages that are increasingly building in skilled worker classifications.[11] During the recent recession "some 57 percent of companies with 100 or more employees have had difficulty hiring workers with the required skills…."[12] In the most current BLS survey, out of the 30 fastest growing occupations, 21 "generally require a postsecondary vocational award or a degree."[13] Meanwhile out of the 30 occupations with the largest numerical declines, "none were in a degree category."[14] Carl Van Horn of the Rutgers Center for Workforce Development, citing the long-term trend for skills outstripping supply stated, "I don't think the recession changed things that much." Another author concluded: "Long-term economic and demographic trends make the recession look like a mere blip on the 21st-century labor market's radar screen."[15]

2. The Failure of Education and Training to Meet Future Demand

Apart from the absolute lack of workers to meet projected job openings, available current and future employees are not receiving needed education and training. Even the most conservative forecasts show a skilled worker shortage. Monster.com's featured report on *The Skills Gap and the American Workforce* explains, "As the information economy requires more and more of us to become knowledge workers, the skill gap grows ever wider and deeper."[16] The Employment Policy Foundation predicts "persistent shortages of qualified employees" over the next 30 years announcing that American will need 18 million new college graduates by 2012, but will produce only 12 million during the period.[17] Putting this into perspective, China in 2003 boasted 2 million new college graduates compared with 1.3 million U.S. college graduates.[18] Meanwhile "India produces 3.1 million college graduates a year," and this is expected to reach 6.2 million by 2010.[19]

Not only is the total number of U.S. college graduates inadequate to meet the needs of the job market, when the

[9] Many commentators mistakenly define the coming job shortage as between 3 and 5 million using the historical difference between the Bureau of Labor Statistics' (BLS) civilian labor force projection and the projected employment count. This is a flawed analysis since the BLS projection assumes that that workers will be available and the employment count does not take into consideration multiple job holders and dozens of factor such as the skill gap that can affect the real number of available future workers. Michael W. Horrigan, a BLS Assistant Commissioner, explains: "Essentially, the BLS projections are based on an examination of the labor required to produce project levels of output by industry. How industries manage their human resource requirements is influenced by a great many factors: the available labor supply (including immigration), the skill levels of prospective jobseekers, the use of technology in the production process, the required capital-labor ratio consistent with the technology used for production, how work is organized, the use of employees from the personnel supply services industry, the hiring of self-employed contractors, the use of flextime and flexiplace, the use of overtime or mandatory shift coverage, and the hiring of offshore labor in foreign countries, among others. Although the projections do not attempt to explicitly model these various possible management options that firms may exercise, a perspective on their potential importance is certainly necessary to consider in building any set of projections and, in particular, detailed descriptions of the outlook for occupations." Monthly Lab. Rev., Feb. 2004, at 10.

[10] http://www.bls.gov/new.release/ecopro.nr0.htm.

[11] John Rossheim, *The Skills Gap and the American Workforce*, at http://featuredreports.monster.com/laborshortage/skills (Mar. 26, 2004).

[12] *Id*. (citing Heldrich Work Trends Study).

[13] Daniel E. Hecker, *Occupational Employment Projections to 2012*, Monthly Lab. Rev., Feb. 2004, at 102.

[14] *Id*. at 104.

[15] Rossheim, *The Skills Gap and the American Workforce*, at http://featuredreports.monster.com/laborshortage/skills (Mar. 26, 2004).

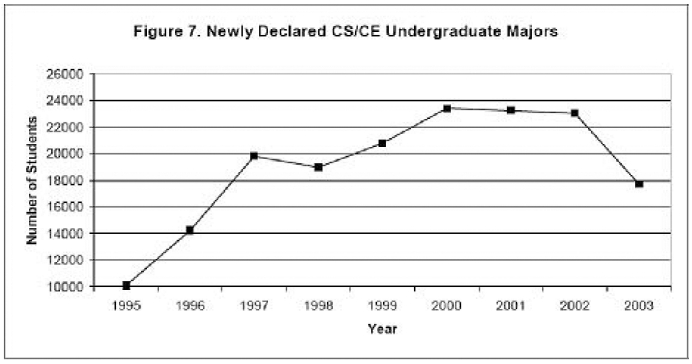
[16] *Id*.

[17] Does the Future Hold a Job Boom or Bust, at http://featuredreports.monster.com/laborshortage/boomorbust.

[18] Michael J. Mandel, So Where Are The Jobs?, Business Week, Jan. 26, 2004.

[19] Manjeet Kripalani and Pete Engardio, The Rise of India, Business Week, Dec. 8, 2003, at 66.

areas of greatest need are examined, the results are shocking. In 1975 the United States was the world leader in science and engineering education. The only nation with a higher percentage of its population receiving such degrees was Japan. In 1999 the U.S. was sixteenth behind Ireland and Spain.[20] Since then the situation has become much more threatening. The BLS's most recent jobs forecast shows that computer science occupations make up six out of the 10 fastest growing job classifications, adding a projected 1.1 million positions by 2012.[21] Notwithstanding this clear need, Computing Research Association reports the number of new undergraduate majors in computer science and computer engineering "dropped significantly from 23,033 to 17,706 (23%)."[22]



A major reason given for this "striking new trend" was a negative image generated by the dot-com meltdown and the perception jobs were moving offshore. Such commonly held views of technology-based employment apparently are having the impact of a self-fulfilling prophecy, as one of the forces behind outsourcing is the projected lack of qualified computer science and engineering graduates.

The availability of science and engineering degree holders to be employed in the U.S. may actually be far worse than suggested by the reduced number of graduates. Of the electrical engineering and computer science doctoral degrees granted by U.S. institutions in 2003, 63% went to foreign nationals, as did 57% of 15,906 master's degrees in those fields.[23] More than 90% of these foreign nationals are on temporary visas without work permission. John W. Steadman, U.S. President of Institute of Electrical & Electronics Engineers Inc., recently warned that the U.S. could lose its leading role in innovation if the 60% of U.S. science grads who are foreigners do not work in the U.S.[24] As detailed below, the difficulty of foreign nationals to obtain required work visas has greatly increased in response to security concerns following 9/11.

It is beyond the scope of this paper to offer a full analysis of why U.S. students are less attracted to science and engineering than Asian and European counterparts. It is well established that young men are graduating from high school and going to college in lesser numbers than young women, and young women are enrolling in fewer science, engineering, and information technology programs than their male peers.[25] The cost of a college education has increased consistently from year to year at a rate of about 7%, so that the annual cost is now approaching $21,000 per year for a private college degree.[26] This prices many potential workers out of jobs requiring higher skills and education. Additionally, there is intense concern over the quality of the primary and secondary education in the U.S. Roger Herman reports: "Our public schools are not doing an adequate job of preparing young people for work. Employers are dissatisfied with the level of capability of today's high school graduates. Some young people are graduating without even the basic literacy and numeracy skills."[27] While this may be true, a substantial number of U.S. citizens do receive a college education, but in liberal arts and other fields deemed more interesting than science and engineering. This should not be a surprise since television and the movies have rarely glamorized the role of the scientist and engineer. Moreover, the charisma that surrounds the promise of

[20] National Science Foundation, at nsf.gov/sbe/srs/seind02/c2/fig02-27.htm

[21] Hecker, *supra*, at 98.

[22] www.cra.org/reports/taulbee/0203.extract

[23] Eric Chabrow and Marianne Kolbasuk McGee, Immigration & Innovation, InformationWeek Feb. 23, 2004, at 20.

[24] Kripalani and Engardio, *The Rise of India*, Business Week, Dec. 8, 2003, at 66.

[25] Eckelbecker, *Men Not Working: Examining Men in the Workforce*, Telegram and Gazette (Mass.), Dec. 18, 2003, at A-1.

[26] Herman, et al., *supra*, at 101.

[27] *Id*. at 91-116.

technology was badly eroded by the recent economic downturn. Now the politicization of outsourcing and the surrounding sensationalism in the popular media creates the impression that profit obsessed employers are sending every technical position to either India or China. In reality 89% of all jobs in the U.S. face no risk of being sent abroad. It is estimated that by 2015 only 3.3 million jobs will leave the country.[28] This is less than 2% of the available jobs and does not take into account additional U.S. jobs created by outsourcing.[29] Recently the RAND Corporation issued a 300-page report – *The 21st Century at Work: Forces Shaping the Future Workforce and Workplace in the United States*, produced for the Labor Department. Lynn Karoly, one of the report's authors and a RAND senior economist, explained the working going offshore was primarily the more routine technical tasks and production work. She predicted that there will be a "sizable number of relatively high-paid, creative jobs added in U.S. workplaces as firms seek to compete [globally] with new products and services."[30]

The conclusion is inescapable that education and training gaps in the U.S. workforce will and are contributing to a skilled worker shortage. The recent economic slowdown may be the only reason that this crisis has been delayed or at least placed on the back page behind stories on layoffs, dislocated workers, and more recently outsourcing. If the widens as forecasted, it is likely that the feature web pages of news sites will carry the twin headlines of unemployment and a monumental skilled worker shortage.

3. Post-September 11th Policy Limits Immigration

Another powerful force contributing to the impending crisis is post-9/11 immigration policy. New statutes, regulations and enforcement procedures have dramatically limited access of qualified foreign nationals to the United States. While immigration policy could change, it is highly unlikely that this will occur anytime soon. Security concerns will continue to override economic and mobility needs into the foreseeable future. The current September 11th oversight hearings are merely one reminder to politicians of how their voting records and actions will be judged when the inevitable second terrorist attacks take place on U.S. soil.

Severe restrictions are being placed on those who seek entry into the United States. The H-1B program providing access for foreign professional workers had a cap of 195,000 per year in 2001. As of October 2003, the cap was allowed to revert to 65,000 and was reached within five months into the fiscal year.[31] The American Immigration Lawyers Association (AILA) reports that "many industries continue to need highly educated professionals and turn to the H-1B program to fill these specialized positions that would otherwise remain vacant. There are still not enough U.S. students graduating with advanced degrees in science-related fields to fill these highly specialized positions. In other fields, such as education, there are shortages in specific areas of the country and positions continue to go unfilled."[32] AILA forecasts that in the long run, without programs like the H-1B, the economic vitality of the United States could be compromised such that American jobs would be lost as well American projects losing out to foreign competition.

Apart from the cap on H-1B visas, the processing time for applications has substantially expanded. This is directly related to 9/11 as government efforts to more closely examine backgrounds of visa holders has more than doubled the waiting time for such visas. Entertainers seeking such visas have seen the waiting time go from weeks to four or five months.[33] This waiting period has also been expanded further by the personal interview requirement for applicants from certain countries.[34]

The J-1 visa waiver program for physicians needed in rural areas is a case study of the impact of the heightened security restrictions and their impact. The United States Department of Agriculture (USDA) motivated by the severe physician shortages in rural areas operated this program. The USDA sent seven random pending applica-

[28] Jyoti Thottam, *Is Your Job Going Abroad?*, Time, Mar. 1, 2004 at 26.

[29] In the 1990's the IT hardware production outsourced returned less expensive computer components thus increasing demand for computers and resulting in more jobs for workers with IT skills. Id. (citing Catherine Mann, Senior Fellow, Institute for International Economics).

[30] Daily Lab. Rep. (BNA), Feb. 18, 2004, at A-8.

[31] American Immigration Lawyers Association, *H-1B Visa Issue Packet: Highly Educated Foreign Professionals*, AILA Doc. No. 04022376 (Feb. 23, 2004).

[32] *Id*.

[33] Scott Van Voorhis, *9/11: One Year Later; Stricter Rules Slow Visa OK's*, Boston Herald, Sept. 11, 2002, at 031.

[34] *See* The National Employer©, 2004/2005 Edition, Chapter 33.

tions to the Department of Justice for screening, and three applicants were considered to be security risks. The program was shut down. This occurred at a time when "30% of rural countries have a physician shortage." Recently, "the American Medical Association acknowledged that we have a nationwide physician shortage that could grow to a gap as much as 150,000 over the next decade, particularly for specialists. There are only about 800,000 physicians in this country." The experience with the J-1 visa program and the severe shortage of physicians, is representative of the priority on security now reflected in Department of Homeland Security policy and a part of revised immigration statutes and regulations.

On May 14, 2002, President Bush signed into law the Enhanced Border Security and Visa Entry Reform Act of 2002 (Public Law 107-173). While several of the provisions are designed to increase the flow of information between government entities, several visa restrictions have been implemented. "Discussing the impact of visa reforms on prospective international visitors, Senate Foreign Relations Committee Chairman Richard Lugar told the officials, 'Wave after wave of new travel requirements, paint a big picture that the United States is becoming a destination that's too difficult to enter, too expensive to visit, and simply not worth the effort.' In response the State Department's Deputy Assistant Secretary for Visa Services Janice Jacobs told the lawmakers, 'Secure borders, open doors remains our goal.'"[35] Regarding the personal interview, the President of the American Chamber of Commerce of Korea reported that the lack of any additional resources resulted in the waiting time increasing from 2-5 days to more than 60 days.[36] Jacobs concluded by telling the Committee that protecting the security of the United States was the "primary goal" of the visa process.[37] There has been a titanic shift from global mobility to addressing the need for security. While future economic requirements will impact Congress, changes in immigration restrictions will be slow to impossible in a political environment supercharged with security concerns.

4. Government Health and Safety and Nondiscrimination Programs Impact the Shortage

Government health and safety requirements (such as for health care professions) and non-discrimination programs (such as support by the Office of Federal Contract Compliance Programs) impact the availability of skilled workers. Increasingly government, especially state government, is legislating not only safety standards, but staffing requirements. This is promoted by public concerns about inadequate and untrained health care personnel. Even those elected on conservative platforms can rationalize government's role in protecting the public. Moreover, this can often be done without raising taxes or violating a campaign pledge. Without a doubt many of these programs are necessary and a proper use of government to address common problems. However, it must also be understood that these programs come with costs and obligations beyond the increased private sector budgets required for their implementation. They materially add to the coming skilled worker shortage.

For example, more Americans than ever are visiting hospital emergency rooms, at the same time rising costs, financial cuts and nursing shortages make care harder to provide.[38] Tens of thousands of hospital deaths every year are blamed on alleged inadequate staffing, according to a report released by the Joint Commission on Accreditation of Healthcare Organizations.[39] Under pressure from the California Nurses Association and public concern, the California Legislature responded with the first law of its kind requiring minimum nursing staff in hospitals.[40] Final regulations were released January 1, 2004, mandating a one-to-six ratio for medical-surgical units, with the ratio becoming one-to-five in 2005.[41] Additional ratios become effective in subsequent years. Clearly, such requirements exasperate an already existing nursing shortage regardless of the merits of the requirement. The new ratios will result in additional hiring by over half of hospitals having medical-surgical units. The California Employment

[35] U.S. Mission to the European Union, *US Urged to Consider Impact of Visa Requirements on Travel, Tourism*, at useu.be/Categories/Justice%20and%20Affairs/Oct2303USVisaPolicy, (Oct. 23, 2003).

[36] *Id.*

[37] *Id.*

[38] Christy Feig, *AHA: Nurse Shortage, Budget Cuts Hamper ER Care*, available at http://www.cnn.com, Mar. 16, 2001.

[39] Alexa Pozniak, *Nurses Wanted: Data Highlights Problem of Nursing Shortage*, available at http://www.abcnews.com.

[40] Cal. Health & Safety Code § 1276.4

[41] 22 Cal. Code Regs. §70217(a)(11) (2004).

Development Department estimated that almost 100,000 job openings for registered nurses would be created in the state by 2010. Very likely many of these positions are in addition to the BLS projections of needing over 1 million new nurses by 2010, and the current nationwide shortage of over 100,000 nurses.[42]

Almost every legislature directly or indirectly impacts the need for skilled workers by enacting health and safety requirements. Building codes, training requirements, certifications, earthquake, flood, and fire prevention mandates, hazardous waste programs, and disability accommodation standards are illustrative of typical legislative and administrative actions that translate into a greater need for skilled workers. Indeed such hiring is expected by the public and government.

A very different form of positive government inspired leadership is also adding to the coming skill shortage. In the enforcement of the nation's laws against discrimination, government has encouraged employers to value diversity. While many employers undertake such initiatives out of commitment without government encouragement (and sometimes resent such encouragement as unnecessary), others are at least partially motivated by the legal benefits of compliance. To the extent there is a serious recognition of the vital importance of having a workforce that looks like and reflects the values of the community and consumers, employers will be seeking skilled workers who are also diverse. Even in categories where adequate staffing is available, a diverse pool of qualified applications may be hard to locate.

The above phenomenon is illustrated by a recent report published by the UCLA School of Medicine through its Center for the Study of Latino Health. The study showed that the ratio of non-Latino physicians in California to the population is 335:1; however, for every Latino physician in the state, there are 2,893 Latino Californians. While some of the resulting challenges can be addressed by cultural effectiveness training for non-Latino physicians, the ratio is so dismal that the only real solution is an increase in the supply of Latino physicians.[43]

In a different context the lack of diverse managers actually limits the ability of business to expand and still meet its commitment to diversity. Since educated and skilled workers are predicted to be in short supply, it is reasonable to assume that qualified minority workers will be in even greater demand. On a hopeful note, providing education, training and experience in such a way that they reach minorities, offers a partial solution to the coming shortage.

E. Age Discrimination Claims Will Increase with the Arrival of the Skill Shortage

Before turning to the solutions for the coming skilled worker crisis, it is essential to recognize that increased age discrimination claims will be a parallel and closely-related challenge. The baby boomers will remain in the workforce both to meet the need for skilled workers and because many of them are financially unprepared for retirement. In 1982, the average worker was 34.6 years old, yet by 2012 the average age is projected to be 41.4.[44] However, this is only a part of the story. Currently the most serious claims of age discrimination normally do not come from workers 40 to 49. In Littler Mendelson's experience the major concern for most reductions-in-force and benefit programs has been the impact on those 50 and older. Indeed, it is this part of the workforce that will experience the greatest growth. By 2012 the 55-and-older group is expected to total 19.1% of the labor force, having increased four times faster than the overall growth of the workforce.[45] In *General Dynamics Land Systems Inc. v. Cline*,[46] the U.S. Supreme Court recently confirmed that the purpose of the ADEA was to protect "older" workers from discrimination, not to protect younger workers (such as those 40 to 49 who are covered by the statute) alleging that older workers were getting preferential treatment.

Between fiscal year 2001 and 2002, ADEA claims filed with the EEOC increased by nearly 15% and grew faster than any other claim of discrimination.[47] The high pro-

[42] http://featuredreports.monster.com/laborshortage/degrees.

[43] www.cesla.med.ucla.edu/shortage.htm.

[44] Miltra Toossi, *Labor Force Projections to 2012: The Graying of the U.S. Workforce*, Monthly Lab. Rep., Feb. 2004, at 54.

[45] Michael Horrigan, *Office of Occupational Statistics and Employment Projections*, Monthly Lab. Rev., Feb. 2004.

[46] 124 S. Ct. 1236 (2004). Employers must be cautious to also review state age discrimination statutes before concluding that reverse age discrimination is unprotected.

[47] http://www.eeoc.gov/stats/adea/htm (Mar. 26, 2004).

portion of age discrimination charges was largely sustained in fiscal year 2003 as total charges declined by nearly 4%.[48] Likely the leveling off of charges in 2003 reflected fewer layoffs and the increasing use of company-sponsored ADR programs including binding arbitration. Also, a majority of claims are processed by state agencies rather than the EEOC. In the last three years Littler Mendelson has experienced a significant increase in requests for advice, benefit inquires, administrative complaints, and lawsuits involving age-related claims. These have been commonly focused on age 50+ workers. With the demographic shift putting the spotlight on workers 55 and older, it is almost certain that age related personnel issues will increase. Employers will need to be on the lookout for issues surrounding FMLA and other leave laws, as the aging workforce population will seek time off to care for aging parents, spouses, and themselves. Businesses may face increased risk and costs associated with ensuring safety and health. The rise of the average age in the workforce can also be expected to impact–at great cost to employers–health care and workers' compensation premiums.

At the same time the group of protected workers is increasing, the legal standards for age discrimination is in a state of potential change, or at least conflicting interpretations. A divided U.S. Court of Appeals for the Sixth Circuit issued a decision February 12, 2004, examining what was required to prove age discrimination in the context of a reduction-in-force.[49] Overturning summary judgment for the employer, the court held that it was not necessary to show replacement by a younger worker, and that a pattern of targeting older individuals for discharge was sufficient. It was undisputed that the laid-off worker was qualified. The majority opinion noted that management gave inconsistent reasons for the reduction-in-force, yet the dissenting judge pointed to the lack of any statistically significant evidence of a pattern of age discrimination. This decision is unpublished and will not make new law; however, it demonstrates an increased willingness of courts to allow weakly supported claims to proceed to trial. As even larger numbers of older workers face the uncertainty of changing skill requirements, the volume of age discrimination claims knocking at the courthouse door is likely to increase.

F. Simultaneous Hiring and Reductions in Force

The ever-constant change in competitive demands will require agility as well as cost-competitiveness. This means that while some skills that are in short supply–such as skills in technology or health care–other skills will not be needed. While companies are actively searching for and hiring the desired skills, they will be struggling to manage the departure of those employees whose skills are obsolete. As a result, employees may become confused on why, for example, *they* are being laid off, while the company continues to seek and hire employees, often from far-reaching locations or from temporary staffing companies or independent contractors. Mystified and confused, and unable to find work elsewhere due to lack of relevant skills, these older employees may turn to the plaintiff attorney's bar for answers.

It was not without purpose that the discussion of the coming skill shortage commenced with the story of Watkins and Mallory and their belief that they were targets of age discrimination when they were laid off at the ages of 58 and 61 respectively. Employers are on notice that one of the major challenges of addressing the coming skill shortage will be the internal realignment of skill needs, the opportunity for training, and the ability to define in job descriptions the types of training, education and skills essential for doing business in a global economy.

G. The Skill Shortage Case Study

The following case study is based on real events and breaking scientific developments although still in the future. The events take place using the story-line and characters developed by Employment Law Learning Technologies (ELT) for its on-line employment law learning programs. The purpose of the case study is to illustrate how employment law issues will be interrelated with the coming crisis and its ultimate solution.

Working People Magazine's owner and publisher, Margaret Chen, invested in a biotechnology company, Biodetect, which produces a test for the West Nile virus based on nanotechnology. A modified gold molecule is conditioned to combine only with the unique biological signature of the West Nile virus. When this happens, a test liquid changes color in less then 10 seconds. To mass pro-

[48] http://www.eeoc.gov/stats/charges (Mar. 8, 2004).

[49] Case No. 02-1831, 36 Daily Lab. Rep. (BNA) Feb. 25, 2004 at A-9.

duce this product, several middle level biotechnologists are needed. Senior management had been reluctant to hire due to uncertainty about market demand and the general economy. Corporate Counsel has been focused on an ethics compliance program, a whistleblower lawsuit, and an OSHA investigation. Human Resources is concerned but believes that in an urgent situation, it can retain contingent workers to meet immediate needs.

Unexpectedly, the World Health Organization issued an urgent notice warning of the potential of a major outbreak of the virus. Several orders for the test are received by Biodetect's CEO, who has assured everyone that an adequate supply of the test will be ready. The CEO, Donald Truman, is now furious after learning that it will take weeks and perhaps months to hire and train the biotechnologists needed for the expanded production. The third-party supplier of professional personnel has two candidates, but they are both on H-1B visas and worried if they change employers they will have to start all over on the waiting period for their green cards (and they do not have that much time remaining on their current visas). Truman gave the VP of HR and the General Counsel a directive to solve the problem or he would find others who would.

In response to the urgent need, Biodetect is now offering a large bonus as part of its hiring package, has quickly retained three outside search agencies, and a laboratory in India has been identified as having some of the personnel needed. A conference call has been set up, and you are being asked to join the General Counsel and the VP of HR regarding any employment law issues associated with the hiring plan. What is your advice?

1. Hiring H-1B visa holders from another company. Currently, federal regulations allow an employer to hire another employer's H-1B solely on the basis of proof that the second employer filed an H-1B petition. This "portability" provision increases an employer's immediate access to degreed talent, but not the overall numbers of such persons.

2. The bonus should be one-time and not based on profitability. Generally, a discretionary bonus can be used in the hiring process. Two special problems are present in this case. First, to the extent that Biodetect has other employees in the same job classification, an ongoing bonus could create an equal pay problem as well as lower morale. A one-time hiring bonus due to tight market conditions would likely solve any discrimination complaints under the Equal Pay Act (assuming someone was in a protected category and raised such a concern). It may not solve the morale concerns if the bonus becomes known. This is a classic challenge employers face in seeking to retain key talent. Second, if Biodetect is in California, the bonus needs to be reviewed for compliance with the California Court of Appeal's recent decision in *Ralphs Grocery Co. v. Superior Court.*[50] If it is based on profitability – subtracting costs such as workers' compensation – it could be subject to challenge. Moreover, the biotechnologist's job description needs to be reviewed as to whether these employees would be exempt. If not, then a non-discretionary bonus might impact the base wage rate affecting overtime (something that is clearly going to be happening at Biodetect).

3. The search firms need appropriate agreements with the employer. It is likely that the urgent need for people has resulted in a verbal solicitation of agency help. Normally, the agencies would send their standard written agreement to Biodetect. Ideally, Biodetect would have a standard letter establishing that the agencies are expected to operate under applicable legal standards, are not being asked to make any representation that is unlawful or untrue, and that they will provide indemnity at least with regard to their actions. Several of the major agencies have developed balanced language used with their accounts. However, some of the agencies have either not focused on this need or intentionally attempted to have the indemnification come solely from the employer.

4. Can the biotechnologists in India be part of the solution? This option is one of the most attractive given the needs of the situation. It is unlikely that with post-9/11 requirements, Biodetect can move these biotechnologists to the U.S. fast enough to meet the immediate need. The serious decrease in

[50] 112 Cal. App. 4th 1090 (2003), *review denied*, 2004 Cal. LEXIS 1311 (Cal. 2004).

H-1B numbers just when the economy is both heating up and expanding into new areas means importing educated labor from abroad is not a realistic immediate option in any significant numbers. The more likely solution is to retain the Indian company that currently employs these individuals to perform services in India. This will depend upon whether the needed services require being at a physical location or could be entirely performed over the Web. It is also possible that a manager from the U.S. could be immediately sent to India to provide supervision and instruction.

The implications of this case study could continue, but it would depend on assumptions and facts not yet provided. While this case study is hypothetical, it is composed entirely of situations that have occurred. Moreover, even the technology is based on scientific developments that are closer to fact than fiction. The best advice for Biodetect would have been to prepare for the challenges of a quick ramp-up well before being called into the office of the CEO. Littler predicts that thousands of businesses in 2004 and beyond will be encountering the consequences of the skilled worker shortage. As the number of employers facing this situation increases, the complexity of the solutions will become greater. Recognition of the challenges now and advanced initiatives and preparation will pay for themselves several times over. You are invited to be part of the solution, not the problem.

PART III

The Flexible Workforce: Changing Hiring Patterns and the Rise of the Contingent Worker

A. The Increase in Contingent Employment

Despite hopeful signs the economy is finally improving, new jobs are not being created at the expected rate, resulting in many coining this a "jobless" recovery.[1] This situation has been created by a number of factors, including an emerging change in the American workforce, evidenced by an increased reliance on a contingent workforce – non-permanent employees (i.e. consultants or temporary workers). For example, in contrast to the mere 1,000 new jobs created in December 2003, the demand for temporary workers rose nearly 9% from April through November 2003.[2] As of January 2004, the Labor Department estimated there were over 2.3 million employees in temporary positions.[3] According to various studies, this trend will continue during 2004.[4]

A number of factors have contributed to this larger demand for contingent workers. Chief among them are: (1) the increasing acceptance of contingent workers, even for professional positions; and (2) a collective reluctance by employers – during these uncertain times of anticipated, but not yet fully realized, economic recovery – to hire permanent employees until there is more concrete evidence of a lasting economic recovery.

The growing acceptance of a non-traditional workforce has not been driven solely by employers; many employees are affirmatively seeking alternative work arrangements. Numerous sociological studies attribute this trend to the rise in the number of women in the American workforce and all employees desiring to balance work and family responsibilities, particularly as the American workforce ages.[5] Whatever its genesis, one fact is clear: based on a February 2003 study, 22% of the workforce in 2002 was comprised of free agents, temporary employees or self-employed workers; by February 2003, that number increased to 28%, and the expected rate by 2010 is 36%.[6]

Employees' growing interest in alternative work arrangements has resulted in the rise of a new type of contingent worker – the highly-skilled contingent workforce. Traditionally, temporary employees were hired to fill lower skill non-exempt positions. However, as more employees seek flexible schedules, professional employees with specialized skills also have sought temporary or contingent employment, resulting in the use of professional consultants or independent contractors for positions that traditionally would have gone to full-time employees. Although the traditional temporary non-exempt worker model remains, the increase in reliance on professional temporary employees is a trend that will likely continue increasing beyond historic levels, even after the economy stabilizes.

B. How Companies Have Come Back — Who Are They Hiring?

Employees' rising desire for alternative work arrangements has dovetailed well with many employers' business goals. During the recent recession – as has been evident in each preceding recession – employers seeking to "cut costs" during difficult economic times, select worker

[1] *Nonfarm Payrolls Rise 21,000 in February as Unemployment Rate Stays at 5.6 Percent*, Daily Lab. Rep. (BNA), Mar. 8, 2004, at. D-1 (stating that U.S. payrolls grew by just 21,000 in February 2001, and the total of new jobs created in January 2004 was decreased from 112,000 to 97,000).

[2] Joseph Weber, *Not Just a Temporary Lift?*, Business Week Online, January 8, 2004, at http://www.businessweek.com/smallbiz/content/jan2004/sb2004018_8339_sb014.htm.; Lisa Y. Taylor, *Temp Firms Get Boost as Job Growth Lags*, Baltimore Bus. J., Jan. 2, 2004, http://sanjose.bizjournals.com/baltimore/stories/2004/01/05/focus1.html?=1.

[3] Christina Wise, *Riding High In "Jobless Recovery"; Temps Thrive As Benefit Costs Make Employers Hesitant to Hire Full-Time*, Investor's Bus. Daily, Feb. 17, 2004, at A13.

[4] Weber, *Not Just a Temporary Lift?, supra*; Lisa Y. Taylor, *Temp Firms Get Boost as Job Growth Lags, supra*; Press Release, RemedyTemp, Inc., *New Labor Forecast Predicts Strong Jump in Demand for Temporary Workers in 2004 First Quarter* (Jan. 6, 2004).

[5] Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 1 Berkeley J. Emp. & Lab. L. 153, 161 (2003); Dan Rafter, *Retirement Shadow Looms Over Part-Time Employees*, Chicago Tribune, Feb. 24, 2004, C4.

[6] Mike Hudson, *Fewer Want Permanent Jobs*, Detroit Free Press, Feb. 7, 2003.

wages and healthcare costs as a way to reduce overall labor costs (often one of the largest expenditures in any company's budget). Because laying off permanent employees results in significant emotional and financial costs (transition packages, for example), employers are electing to hire contingent workers as an alternative to hiring additional permanent employees until it becomes more apparent that the economic recovery can be sustained. This option is attractive to many employers, particularly because hiring contingent workers also can result in wage and benefit savings. Because more employees also are seeking contingent work arrangements, employers have been able to take advantage of these benefits while also meeting employees' desires.

Of course, some industries are more amenable to reliance on temporary workers. For example, in the technology industry, workers are often needed to complete discrete projects or to install new infrastructure. For this reason, temporary agencies supplying workers with technical training have seen a rise in demand. Similarly, temporary agencies supplying those trained in other industries that often have a short-term need for highly-trained individuals, such as nursing, substitute teaching, and legal work, also have seen a heightened demand for temporary help.[7]

C. What is Happening to the Old Stigma Regarding Temporary Workers and Unionization, the MIT Prediction, and Estimated Growth of the Contingent Worker Sector

During the 1950's, employees expected to remain with the same employer throughout their careers. This expectation (both on the part of the employer and the employee) created a stigma against those who switched jobs frequently – creating the impression that such employees were either disloyal or unable to perform. Many employers also feared that temporary employees would not be as productive as permanent employees.[8] However, since most employees now change employers several times during the course of their careers,[9] this stigma has been eroding, resulting in increased hiring of independent contractors, use of staffing agencies, and the creation of other non-traditional work arrangements such as telecommuting.

Despite its rising acceptance, employers should consider some of the potential problems with relying heavily on a contingent workforce. For example, although many employees are increasingly seeking these positions, the evidence also shows that many temporary employees still would prefer permanent positions.[10] According to some commentators, temporary employees have a weak affiliation with their workplace, precisely because of the reduced pay and benefits offered. Because these employees are likely to leave their positions in higher numbers than those hired on a permanent basis, an employer risks losing substantial institutional knowledge and dollars invested in training these employees.

Despite these concerns, a fascinating study from the Massachusetts Institute of Technology predicts that a paradigm shift is well underway in how we envision and structure the American workforce.[11] The authors of the study predict that the traditional workplace model of employees working for a single corporate entity to complete a project is being displaced by a model where groups of independent employees will come together (either from different entities or as independent contractors) to complete projects based on each person's expertise. The authors cite to a contemporary example, the entertainment industry, to demonstrate how the predicted economic model would function. In the modern entertainment industry, movies are staffed by a number of independent contractors brought together for the purpose of completing a single project, the movie. The studio (or other coordinating entity) generally does not have permanent employment relationships with most of those who create the movie, instead hiring directors, actors, producers, and others based on their experience and cost for each discrete project. As the authors of this study note,

[7] Wise, *supra*.

[8] Befort, *supra* at 156.

[9] As of January 2002, the Department of Labor found that the average American will change employers every 3.7 years. *Employee Tenure in 2002*, United States Department of Labor, September 19, 2002, http://stats.bls.gov/news.release/tenure.nr0.htm.

[10] Befort, *supra* at 157.

[11] Robert J. Laubacher, *Two Scenarios for 21st Century Organizations: Shifting Networks of Small Firms or All-Encompassing "Virtual Countries"?*, available at: http://ccs.mit.edu/21c/21CWP001.html

this model is well-suited to innovative and rapidly changing markets. As the workplace continues to evolve, companies retaining traditional employment models may eventually become less able to compete with the lean operations of those relying on independent contractors.

D. Legal Challenges, New Cases & Issues

Although a boost in contingent work has substantial benefits for employers, including the flexibility to respond quickly to a rapidly changing marketplace and, in some instances, significant savings on benefits costs, it also creates numerous legal challenges. First, would certain industries be less inclined to take on "freelance workers" than others? For example, in this world of competitive business trade secrets and practices where employers are regulating departing employees' post-employment conduct via various restrictive covenants (restricting use of customer information, intellectual property and ability to hire former colleagues, for example) is it likely that employees could work for companies within the same industry without potential liability? Would the second company simply "bear the cost" of dealing with the temporary employee's existing restrictive covenant?

Second, the employer's legal responsibilities to the contingent worker are often unclear. Much of the United States' employment regulation applies only to "employees." However, the definition of an employee changes depending on the law being applied. For example, the Internal Revenue Service applies its own 20-factor test to distinguish employees from independent contractors for federal taxation purposes, but this test is not universally applied.[12] Different standards apply when considering liability under federal and state discrimination statutes, ERISA, or workers' compensation statutes. Therefore, ensuring that an independent contractor will be considered "independent" in all circumstances (consider, for example, the multi-state located employer) can be difficult, and even the most diligent employer can find itself defending a lawsuit filed by persons who were thought of as independent contractors.

This concern is not limited to independent contractors. Even when workers are hired through a third party staffing agency, the client company may be considered a *joint employer*, liable for problems arising in the workplace. In such circumstances, both the employer and the leasing agency are considered the employer for liability purposes. As the Ninth Circuit held in the widely discussed *Microsoft* class action,[13] based on the circumstances of the case, a leased employee may be considered an employee of the leasing company, the employer, both, or neither. To avoid this uncertainty and as a service to their clients, many staffing agencies now offer their clients indemnification if joint liability is found.

These indemnification agreements from staffing agencies are also an emerging legal issue. Although staffing agencies can offer to indemnify employers for every possible action raised by the contingent workers it supplies, the enforceability of these agreements is questionable. For example, an employer could demand that its staffing agencies engage in intentionally discriminatory activity – such as demanding that no females be hired for a particular project. However, even if the staffing agency acquiesced to this request and also offered full and complete indemnity to the employer, it is unlikely the employer would escape liability for this intentionally discriminatory request. At least one Circuit Court has held that federal public policy prohibits contractual indemnity where there is a factual finding of discriminatory conduct by the indemnitee or a set or circumstances that strongly suggests discriminatory conduct by the indemnitee.[14] Therefore, an employer cannot rely entirely upon an indemnification agreement from a staffing agency to relieve it of all potential liability.

For all these reasons, employers should consider whether or not the worker's status as a "non-employee" is critical. As a practical matter, when a worker reports to the workplace every day, certain standards must be upheld, even if the worker is not technically an employee. Also, despite the best efforts of the independent contractor, staffing agency, and employer, the employment relationship may develop in such a way that over time, the worker becomes an "employee." The difficulty of maintaining an arm's length relationship with independent contractors or temporary workers may prove more costly and difficult than simply

[12] The Internal Revenue Service Manual, 4600 *Employment Tax Procedures*, Exhibit 46401.

[13] *Vizcaino v. United States District Court*, 173 F.3d 713 (9th Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000).

[14] *Gibbs-Alfano v. Burton*, 281 F.3d 12, 24 (2d Cir. 2002). The Second Circuit includes Connecticut, New York and Vermont.

accepting potential liability for the worker as an employee.

E. Case Study

The difficulties of maintaining an arm's length relationship with temporary employees can be best illustrated by example.

After determining that retention of a temporary workforce was the best means for completing a project, Company Alpha retains the services of a third party staffing agency, Beta. Beta agrees to select the employees for the job, discipline them, and terminate their employment if necessary. Also, to protect Alpha from potential "joint employer" liability, Beta has agreed to indemnify Alpha against any discrimination or other employment lawsuits. Alpha then provides Beta with a description of the project, which includes the requirement that workers hired be available to work between 8:00 a.m. and 5:00 p.m., Monday through Friday. Using Alpha's guidelines, Beta begins interviewing applicants. Beta rejects applicants unavailable to work between 8:00 a.m. and 5:00 p.m. Monday through Friday.

A number of the applicants for the positions at Alpha are members of the Delta religion, which requires worship between 2:00 and 3:00 p.m. on Friday afternoons. As these applicants are unavailable for work between 2:00 and 3:00 p.m. on Fridays, Beta universally rejects their applications. Learning of this repeated rejection, some Deltas begin to indicate on their job applications that they are available to work all day on Friday. Based on this misrepresentation, several Deltas are hired by Beta to complete the project at Alpha. When the Delta workers report for work at Alpha, they stop working between 2:00 and 3:00 p.m. on Fridays to engage in worship. Although Alpha appreciates and respects the Delta workers' desire to worship during these times, this work stoppage proves extremely disruptive to the completion of the project.

In this scenario, can Alpha insist that Beta replace all the Delta workers? Can Beta lawfully honor this request? If such a request is illegal, who is responsible for the consequences of refusing to keep the Delta workers on the job at Alpha? The answer, unfortunately, is not entirely clear. Although Alpha made what it believed to be a legitimate, non-discriminatory request for workers who could report for duty between 8:00 a.m. and 5:00 p.m. Monday through Friday, it has turned out that these requirements prevent persons of the Delta religion from accepting the positions. Although Beta was responsible for hiring the employees, and will also be responsible for firing them, this alone may be insufficient to insulate Alpha from liability for religious discrimination.

Some courts have found that the application of federal employment discrimination statutes should expand beyond the traditional employment relationship. For example, in *Sibley Memorial Hospital v. Wilson*,[15] the District of Columbia Court of Appeals held that, despite the lack of a direct employment relationship between the plaintiff male nurse and the hospital, the hospital was liable for limiting the nurse's employment opportunities by prohibiting him from treating female patients. Similarly, the Northern District of Iowa has held that a company's Title VII liability can extend to non-employees if that company somehow interferes with that person's employment.[16] For example, in *Moland v. Bil-Mar Foods*, the court held that the defendant could be held liable under Title VII for its request that the plaintiff no longer be staffed at its facility, even though the defendant was not her employer. In fact, liability can be imposed even when the alleged harasser has no affiliation with the employer whatsoever. In *Folkerson v. Circus Enterprises*,[17] the Ninth Circuit held that an employer can be liable for sexual harassment by a non-employee if the employer ratifies or acquiesces to the harassment.[18]

For these reasons, it is unlikely that Beta's indemnification agreement will extend to cover Alpha's potential liability for its arguably discriminatory staffing request. Despite the company's effort to hire these workers as "non-employees," Alpha will likely have to accommodate the Delta workers or risk a discrimination suit. Of course, if Beta complies with Alpha's request and refuses to send Deltas to work for Alpha, it would also open itself up to

[15] 488 F.2d 1338 (D.C. Cir. 1973).

[16] *Moland v. Bil-Mar Foods*, 994 F.Supp. 1061 (N.D. Iowa 1998).

[17] 107 F.3d 754 (9th Cir. 1997).

[18] In *Folkerson*, the court opined that an employer could be held liable for the alleged sexual harassment of a customer if it was in some way ratified by the employer (e.g., if the reported harassment was not addressed). By analogy, then, employers are exposed to additional liability under Title VII in instances where independent contractors or temporary workers engage in sexually inappropriate conduct against its employees. Future litigation may require "reciprocity in exposure," however, meaning consultants and temporary workers could one day have standing to sue the employer when its employees sexually harass (or discriminate in other ways) against them.

potential liability for acquiescing to Alpha's allegedly discriminatory request.[19]

F. Role of Legislation and Regulation

Numerous commentators believe the burgeoning contingent worker force should be protected more thoroughly by law. In addition to concerns about the applicability of civil rights statutes such as Title VII and Section 1981 to contingent workers, many fear that withholding benefits from a portion of these workers will result in social problems far outweighing benefits that the employers and employees may enjoy with more flexible work arrangements.[20] Because of these concerns, legislators have proposed various laws that would broaden the definition of an employee under civil rights statutes or offer benefits to more of these workers. Although these measures have largely failed to date, various government agencies, including the Equal Employment Opportunity Commission, the National Labor Relations Board, and others have expressed interest in increasing regulatory authority over the contingent workforce. These expressions of interest are likely to result in more regulation regarding temporary workers.

In light of this ongoing interest in developing additional regulation and the predicted rise in the contingent workforce, it is likely that regulation of independent contractors and temporary employees will continue to grow. Although it is impossible to predict what legislation will eventually come to pass, perhaps legislation considering what "percentage" of an employer's workforce is comprised of contingent workers and/or the hours of work or length of service provided by that contingent worker could be a basis for expanding the definition of *employee* to include contingent workers. For example, a new definition of *employee* under various statutes could be expanded to include contingent workers: (a) comprising greater than "x" percentage of the employer's total workforce, (b) working more than "y" hours in a given time period, or (c) working for a specified time period – for "z" days or months. Also, it is likely that such legislation will initially focus on "traditional" issues of importance to employees: the availability of benefits, protection from discriminatory decision-making, and the right to organize. For example, unions often express interest in including contingent workers into established (or proposed) bargaining units to increase their influence with the employer (and to prevent the employer from avoiding substantial involvement with any unions by hiring a large contingent workforce). Because expanding the *employee* base may be beneficial to unions, increased lobbying efforts to expand the scope of existing legislation should be expected. As such laws are instituted, employers will likely see the economic incentives for employing contingent workers decline. In addition, it will be important for employers with contingent workers to monitor proposed legislation to prepare adequately for changes.

G. Elements of a Strategic Initiative Regarding Contingent Workers

Given the ongoing development of a larger contingent workforce, more employers will be faced with evaluating the most desirable ways of incorporating them into the workforce. To assist with this evaluation and direct the relationship with these workers, employers should consider drafting policies to guide how the employer interacts with its contingent workforce. Not only will this establish reliable guidelines for the contingent workers, but the employer will also undertake less risk that managers will use contingent workers in an inappropriate manner. When drafting policies, the employer should carefully consider its goals for the contingent workforce.

After evaluating these goals, the employer should consider whether it wishes to hire these employees directly or use a staffing agency. While not all encompassing, if the employer decides to hire employees directly, the following factors for independent contractors should be considered:

- Whether a written employment contract should be executed with the contingent worker. If so, ensuring that terms and conditions explaining expectations and responsibilities – employed throughout the agreement – are consistent with those of an independent contractor – and not an employee – under various state and federal laws.
- Whether the employer will require the worker to be trained, and, if so, the type of training involved.

[19] *Kudatzky v. Galbreath Co.*, 1997 U.S. Dist. LEXIS 14445 (S.D.N.Y. Sept. 22, 1997) (holding an employer liable for the alleged harassment at a client's place of business).

[20] Befort, *supra*; Kevin J. Doyle, *The Shifting Legal Landscape of Contingent Employment: A Proposal to Reform Work*, 33 Seton Hall L. Rev. 641 (2003).

- Where the work will be performed.
- Whether restrictive covenants (including confidentiality, trade secret, and non-compete agreements) should be executed.
- How the contingent worker's work will be supervised and managed.
- How the contingent worker will be paid (per project, per hour, etc.).
- What benefits, if any, will be offered to the contingent worker.
- Whether the independent contractor will be covered under workplace rules and policies, required to comply, and terminated for violations.
- If a staffing service will be used to supply the contingent workers, the following factors for temporary workers also should be considered:
  - Whether or not an indemnification agreement from the staffing agency is desired. If so, what should the indemnification agreement cover? (i.e., should it cover all potential employment claims by contingent workers, or only omissions and claims arising out of the staffing agency's role in the project?)
  - How the contingent work force will be supervised and managed. That is, will the employer supervise the work, or will the staffing agency supply supervisors?
  - Which entity will be responsible for recruiting and selecting workers.
  - Which entity will determine the pay rate for the workers.
  - Which entity will pay the workers.
  - Which entity will be responsible for taxes.
  - What benefits, if any, will be offered to the workers.
  - Whether restrictive covenants (including confidentiality, trade secret, and non-compete agreements) are necessary.

H. Other Factors Influencing the Workforce

Of course, factors other than the economy and the combined incentives of employers and workers to create more flexible schedules have impacted the changing workforce. Although a full discussion of these other elements is beyond the scope of this paper, the following are of course other factors that will continue to change the workforce:

Technology. The widespread use of the Internet and email have made it possible for employees to work at home (or from other remote locations). Employers can even retain employees forced to relocate to other areas of the country. In addition, employers can save on rent costs and fees. Of course, when making these arrangements, it is important for employers to consider if they are losing more than is gained. Factors such as camaraderie, institutional knowledge, mentoring, productivity, client satisfaction and other factors should be considered when implementing technology policies.

Safety. Employers are increasingly being held responsible for keeping their employees safe at work – not only from the work processes themselves (e.g. machinery, chemicals, etc.) but from fellow workers. When a substantial number of contingent workers come into the workplace, it may be more difficult for the employer to maintain a safe and secure work environment due to high turnover and the resulting lack of consistent training and evaluation of contingent workers.

Security. Companies may be compelled to provide sensitive information about employees to the government or other agencies purportedly seeking to make the workplace (and our country) safer. Rather than be responsible for reporting this information, employers may seek to reduce the number of employees through contingent hiring domestically. In instances where American policy – whether perceived or true – is deemed unpopular in areas where American companies are located internationally, could American companies become more vulnerable to work stoppages or terrorist attacks than they might otherwise be domestically? It is likely that American companies located abroad will be required to bear the costs of implementing extra security measures for their international workforces and, in such instances, be required to monitor the developing laws in the countries and provinces in which they operate.

Privacy. As private information is made more available, privacy of employee information will become an

even greater concern. For example, employers may fail to maintain medical records as required (or employees may simply be tempted to examine medical files of other employees), resulting in potential HIPAA violations. Again, if workers are contingent, the employer will have substantially less private information about employees in its possession, reducing the likelihood of embarrassing lapses in privacy protection.

Globalization. As companies increase both their provision of services and their use of employees in other countries, the efficacy of maintaining a workforce during "traditional" Monday-Friday work hours becomes less compelling and, perhaps, less manageable.

The Aging Workforce. As baby boomers begin retiring, availability of experienced workers will decrease, resulting perhaps in an increase in non-traditional work schedules to facilitate the transfer of institutional knowledge. In addition, demand for workers in industries that will serve the aging workforce (e.g., nursing care facilities, technology, medical, pharmaceutical and transportation companies, etc.) will rise. In addition, given the rapidly rising cost of providing medical benefits to employees, there may be additional incentives to reduce medical benefits to all employees to avoid higher medical costs presumed to occur with an older employee workforce.

Increased Emphasis on Developing New Skills. As demand for domestic industrial production decreases, employees will be forced to move into areas of employment where they lack substantial experience and/or skills. To gain experience, workers may seek more contingent positions.

The "New Frontier" for Ethical, Compliance and Diversity Considerations. It is possible that employers will face eventually (as regulation evolves) more sophisticated – and nontraditional "class action" discrimination claims – if the composition of the contingent workforce (to whom they are offering decreased benefits and pay) is a larger percentage of aged and ethnically diverse employees than its permanent employee pool. Perhaps the challenge for employers seeking to become "more trusted" will be countering – through dialogue, policies or otherwise – employee suspicion about the motives for maintaining a two-tiered worker system (contingent workforce vs. permanent employees), especially when the composition of the contingent workforce may be dominated by a particular protected category. One way for employers to be proactive is to ensure that their contingent workforce is diverse by monitoring the composition of its workers, and paying particular attention to the traditional, protected categories.

The "Great Sucking Sound" and the Employees' Potential Labor Organizing Response. As certain employers replace domestic with foreign workers, domestic workers may be forced to accept short-term assignments and other contingent work arrangements simply to remain employed at all. As demonstrated by the recent presidential candidate debates, this subject is on the minds of many American workers, especially those dependent on the manufacturing industry for their livelihoods, making them more vulnerable to labor organizing attempts. Labor unions can be expected to increase their organizing efforts by leveraging employees' fear of "permanent" joblessness and employers' fear of exposure to economic boycotts of products. As shown in recent history, union organizing campaigns – threatening economic boycotts against targeted employers – have become increasingly more sophisticated and well orchestrated. These efforts include partnering with traditional civil rights organizations; lobbying politicians (and campaigning for them) with promises of votes in exchange for union-friendly laws and policies; using computers and websites to gain greater access to employees, and publishing information regarding an employer's "record" of jobs, salary, financial profits, etc.

PART IV

The Legally Compliant Workplace: Establishing Standards for a Changing Workforce

The 21st century workplace is undergoing profound change, and this is no longer happening behind closed doors. It is taking place at a time of great public interest in the legal and ethical behavior or employers. There is real concern over having a diverse workforce, the treatment and future of older workers, temporary employment, outsourcing, and the need for education and training. While each of these topics has its own history and set of rules, they share the common bond of being part of a changing workplace that is currently under scrutiny for its compliance with all legal standards, not just those related to employment and labor law. It is in this context that organizations are undertaking broad workplace compliance programs initiated at the highest levels. It will be the exception that by 2005 an employer does not have a risk management or legal compliance program overseen by the Board of Directors and its audit committee. Employment and labor law compliance must receive expert attention and treatment within the corporation such that its special needs are integrated with and become a part of the larger corporate initiative. The following legal compliance analysis has been developed with that purpose in mind.

A. The Breakdown of Public Trust and the Overall Demand for Legal Compliance

Highly visible events have shaken the trust of the public, employees, and government in the legal compliance of corporate America. In response, corporate compliance (and noncompliance) has become increasingly transparent to the general public, regulators, and the courts. As more individuals have invested in the stock market, the public has become increasingly touched by corporate wrongdoing. The media has picked up on this trend and, now, corporate actors play out scandals on the pages of the popular press. As a result of this newfound interest in corporate events, Enron, Tyco, WorldCom, Parmalat, Sarbanes, Oxley, and Eliot Spitzer have become household names.

The consequences of corporate governance failures have become severe. Corporate scandal can topple an entire organization, often at the hands of only a few actors. Notorious examples are Nick Leeson and his disastrous impact on Barings Bank; Sunbeam, accused of manipulating financial reports under the watch of former CEO Albert "Chain-Saw Al" Dunlap; Arthur Anderson, accused of facilitating the wrongdoing of Enron executives; and Martha Stewart Living Omnimedia Inc.

This surge in public scrutiny has spawned a new development of legal requirements. The most notable development is the Sarbanes-Oxley Act of 2002. Employment lawyers are well aware, nearly two years after enactment of Sarbanes-Oxley, of the extensive protections the Act creates for whistleblowers who report a reasonable belief of a violation of a SEC rule or federal law relating to fraud against shareholders. A whistleblower has the right to file suit in federal court if the Department of Labor does not resolve the claim within 180 days.[1] The steep penalties under Sarbanes-Oxley make it a more attractive cause of action than many other state and federal whistleblower protections.

States, in response to the public outcry, have also contributed to the flurry of regulatory activity. California's Private Attorneys General Act of 2004 grants every employee of every California employer the authorization to bring a class action lawsuit seeking monetary penalties based on any violation of the California Labor Code, without any need to show that the employee was actually harmed or suffered any damage. Additionally, for every provision in the California Labor Code for which no civil penalty currently exists, the Act establishes a penalty of $100 for the first violation and $200 for each subsequent violation, assessed on a per employee, per pay period basis. The magnitude of risk is substantial, given the potential penalties and the fact that California's wage and hour laws, discrimination laws, safety, and other employ-

[1] Daily Lab. Rep. (BNA) (Mar. 19, 2003).

ment law provisions fall within its reach.

The increased public and regulatory attention has created new fuel for plaintiffs' attorneys. The costs of settlement of employment law litigation can be devastating, even for the largest of corporations. The average jury award for wrongful termination claims is $1,800,000.[2] One-fifth of all jury awards exceed $1,000,000.[3] As class action litigation becomes more prevalent in the employment law arena, multi-million dollar settlements have become the norm. In early 2004, a $10 million settlement was approved by the San Bernardino Superior Court to resolve claims of unpaid overtime for managers. In 2001, PacBell agreed to a $35 million settlement where 1,500 engineers claimed that they should have been classified as non-exempt and therefore were entitled to overtime.[4] Georgia-Pacific Corp. settled a class action lawsuit alleging underpayments to retirement plan participants for a total amount of $67 million.[5] Given the dollar cost of these cases, it is essential that proactive steps be taken to reduce the risk of employment law litigation.

B. Legal Compliance Programs are Being Broadly Initiated in 2004 and 2005

Given the increased transparency of corporate compliance, many companies have already increased the quantity of resources dedicated to reducing legal risk. The Business Roundtable reports that, after significant corporate governance measures in 2003, companies are planning further steps for 2004.[6] The Conference Board reports that U.S. companies are taking a closer look at ethics and compliance programs, primarily due to legal developments.[7] These corporate governance and compliance programs often encompass review of numerous compliance issues, departments, and geographies throughout the organization.

MCI and Tyco, recovering from ethical and compliance disaster, have created comprehensive compliance and ethics programs. MCI, formerly known as WorldCom, implemented a program led by a newly appointed executive vice president for ethics and business conduct. The company has established a new set of behavioral guidelines communicated to employees in a variety of means, including signs posted throughout the workplace. More than 55,000 employees have received training through online and video training programs, and have the opportunity to communicate with the Board through electronic "town hall" meetings.[8] Another company recovering from near-disaster, Tyco, established a "Guide to Ethical Conduct," which addresses a wide range of compliance issues including equal employment opportunity; harassment-free workplace; substance-free workplace; health, safety, and the environment; political activities; gifts; fraud; antitrust; proprietary and confidential information; and insider trading.[9]

In a February 12, 2004 report, the closely followed Wall Street & Technology portal issued *Outlook 2004: Compliance Tops the Charts.* The report explains that compliance-related issues dominated CIOs' plans for 2004. Sixty-five percent of senior executives of Wall Street firms are gearing up to spend more time on compliance this year with compliance remaining "in the spotlight throughout 2004."[10] The editors of WS&T identified 14 issues that would be 2004's top priorities and five of these issues focused on compliance-related topics.

C. The Demand For Compliance: Strategic Initiatives Relating to the Changing Workforce

Employers faced with new challenges of the coming decade will be forced to develop innovative strategies to compete and succeed in tomorrow's marketplace. Innovative strategies for handling new business challenges will call into play undeveloped areas of the law. As such, employers must have the foresight to predict the litigation that will arise from today's actions. Employers, as

[2] Reed Abelson, *Surge in Bias Cases Punishes Insurers, and Premiums Rise*, N.Y. Times, Jan. 9, 2002.

[3] *Id.*

[4] Alexi Oreskovic, *Pacific Bell Settles Overtime Case*, The Recorder, Dec. 6, 2001.

[5] *Georgia-Pacific Settles Pension Lawsuit*, www.biz.yahoo.com, Feb. 3, 2004.

[6] *New Business Roundtable CEO Survey Shows Continuing Improvements in Corporate Governance Practices*, at www.businessroundtable.org, Mar. 9, 2004.

[7] *Board of Directors Getting More Involved in Companies' Ethics Programs*, www.conference-board.org, March 4, 2004. *See also Outlook 2004: Compliance Tops the Charts*, at www.wallstreetandtech.com, reporting that 65% of senior executives on Wall Street plan to spend more on compliance in 2004.

[8] Financial Times, Jan. 16, 2004, p. 2.

[9] *The Tyco Guide to Ethical Conduct*, www.tyco.com.

[10] *See* www.wallstreetandtech.com/showArticlejhtml?articleID=17603335.

an integral part of strategic planning, must thoroughly consider and identify legal issues that are embedded in their business strategies. Actions must be taken to mitigate risk to ensure that the company reaps the benefits it desires, as well as to ensure that innovative strategies do not create devastating legal consequences.

For example, a host of new legal challenges will arise as employers apply innovative strategies for sourcing talent. Issues may span all areas of employment law, including new discrimination claims, challenges relating to restrictions on immigration, lack of control over workplace safety, and increased need for effective protection of intellectual property. For one, employers seeking to expand operations into foreign countries must be aware of the complexities of foreign law as well as the extraterritorial reach of U.S. law. One employer discovered the reach of U.S. health and safety laws after an unfortunate accident involving a company bus injured or killed 26 Mexican employees. The employer in that case agreed to settle for $30 million.[11] Similarly, a Mexican subsidiary of a U.S. corporation settled for an undisclosed amount after 118 workers in Mexico claimed sexual harassment in violation of U.S. law.[12]

New legal challenges will arise from new technologies. As a result of the increased use of Internet-based recruiting tools, proposed regulations now require employers, in many instances, to count some individuals who apply for jobs online as "applicants" for equal employment opportunity recordkeeping purposes.[13]

Greater reliance on the contingent workforce also brings increased risk. Individuals classified as independent contractors may later stake claim to retirement and health benefits. Providers and users of talent face joint and several liability for employment law issues. In order to avoid these risks, close monitoring these relationships and contractual protections such as indemnification are essential.

Diversity, as a strategic objective, will also create newfound legal issues and ramifications. Employers acting under outdated norms relating to discrimination, harassment, and other legal issues must turn their attention to new varieties of employment law claims. One employer, for example, found that its facially-neutral grooming policy was problematic because accommodations to this policy were applied inconsistently. In that case, the employer enforced its grooming policy against a Rastafarian employee who wished to wear dreadlocks; however, the employer's refusal to provide accommodation to this employee was unreasonable, because it allowed a Jewish employee to wear a long beard and sideburns and a Sikh employee to wear a turban and long beard.[14] Employers must be sensitive to these new and complex issues of diversity and be prepared to have their decisions reviewed in hindsight by the public as well as the courts.

D. Development of Employment and Labor Law Standards in the Context of Overall Legal Standards: The Announcement of the Formation of the Open Compliance and Ethics Group and Its Framework for Legal Compliance

One of the most challenging obligations of legal departments and human resources groups has been deciding how much legal compliance is enough. This may seem like an elementary inquiry, but it is actually one of the most complex areas of judgment required of employers. Imagine being called into a meeting with the audit committee of the Board of Directors, the CEO and the General Counsel. You are told that the Company wants to be fully compliant with all applicable employment and labor laws and it is your responsibility to see that measures are taken to ensure that this is the case. What do you do?

First, identifying all of the federal, state, and local statutes, regulations and case law that cover a given employer and/or a particular industry is a challenging undertaking. The California Labor Code, for example, has thousands of provisions and requirements. Clearly an inventory of applicable laws is necessary with a prioritizing of critical compliance requirements. Over time and with sufficient recourses, employers will approach maximum compliance but probably never fully attain it.

Second, once the applicable laws have been identified, they need to be interpreted and applied to the

[11] *Rodriguez-Olvera v. Salant Corp.*, No. 97-07-14605-CV (Dist. Ct. Texas 1999).

[12] *Aguirre v. American United Global Inc.*, No. BC 118159 (Ca. Super. Ct. filed Dec. 15, 1994).

[13] 69 Fed. Reg. 10152 (March 4, 2004).

[14] *Booth v. Maryland*, 327 F.3d 377 (4th Cir. 2003).

employer's operations. While some of the primary applications are easily identified, many of the applications are at best unclear. Since not every situation is tested before the United States Supreme Court or states' high courts, judgments are needed concerning tens of thousands of situations that are not clearly wrong but subject to interpretation. These key judgments need to be made.

Third, following the above assessment, the legal standards need to be implemented and applied. This requires policies, procedures, training, complaint procedures, investigations and compliance teams. Typically in the workplace, these duties fall on the human resources department with the oversight and involvement of the corporate legal department. When Employment Law Learning Technologies (ELT) was originally formed, Littler Mendelson identified 240 core standards that need to be implemented in most workplaces. These standards were then divided into functions such as hiring, terminations, and managing performance. The legal learning points were then embedded in a highly interactive and entertaining format using contemporary learning theory and old fashioned common sense.

Currently the demands for legal compliance and an ethical workplace are so intense that they have promoted the growth of a new group of "CEOs." These are Chief Ethics Officers of organizations entrusted with the challenge of legal compliance and the creation of an ethical workplace. Several professional associations have done valuable work in better defining the meaning of "ethics" in the workplace and what is required achieve legal compliance. In this regard, Littler has elected to become a founding member of the Open Compliance & Ethics Group (OCEG), a nonprofit, multi-industry, multi-disciplinary coalition of business leaders assembled to develop and promote effective compliance and ethics program guidelines. These guidelines are intended to help organizations translate good compliance, ethics, and governance principles into the actual operations of the business. Over 100 organizations from the accounting, insurance and finance industries, academia, and government have joined together for this task.

Specific OCEG goals include:

- codifying and standardizing the way organizations approach ethics, conduct, and compliance training;
- to educating the business community about those guidelines and the benefits that flow from embracing them;

and

- providing a benchmark so that organizations can measure the effectiveness of compliance programs.

Comparing OCEG with other groups doing excellent work in the area of corporate compliance, OCEG approached the task by building an operational framework establishing a foundation of guidelines addressing key components of planning, operations and evaluating a compliance and ethics program. It then identified domain supplements to add guidelines that relate to specific topics in which compliance and ethics issues arise. One of the OCEG domains is employment, which contains guideline addressing many key topics that compliance and ethics managers must cover. Initially these topics include:

- hiring
- performance appraisal/promotion
- discipline/termination
- investigations
- leaves of absence/FMLA
- Americans with Disabilities Act
- discrimination
- harassment
- wage and hour law
- workplace violence
- affirmative action
- reductions in force
- independent contractors

The employment supplement addresses the key components of the OCEG foundation, highlighting and adding guidance specific to employment topics. For example, among other items, the foundation guidelines address:

- establishment of policies
- determination of training
- performance of investigations
- selection of technology
- use and management of vendors

The employment supplement builds on the foundation by adding specific employment related guidelines for each of these components. These guidelines add additional relevant detail to the general foundation guidance, or identify recommended employment practices that may differ from the basic guidance. When a custom report is generated by a user of the guideline database, all of the relevant founda-

tion guidance and the additional employment-specific guidance are integrated into a cohesive set of guidelines that an entity may apply to its employment practices.

OCEG's mission statement, structure, and organizational plan are included in the Appendix. Within a few weeks, OCEG will make its first public announcement of its framework and foundation guidelines. These will be open for public comment and then adopted by a 30-member steering committee composed of professionals, senior managers, and leaders from a broad section of business and government.

Shortly thereafter, OCEG will announce the process for establishing its draft employment domain guidelines. These guidelines will be made public at a working conference held on the East Coast in the fall. It is anticipated that as many as 100 corporate counsel and senior human resources professionals will participate in the conference to accomplish at least two objectives. First, they will ensure that the specific standards properly reflect core standards (legally necessary policies and programs), and then outline advanced practices on at least five increasing levels of excellence. The higher levels of such employment law compliance programs would be examples of best practices and model systems. Second, they will incorporate core standards and advanced practices into individual corporate programs or to use them as guidelines to benchmark existing programs.

Littler strongly believes that one of the best value added services it can perform for employers is to participate in the construction of OCEG standards and advanced practices. The better and more workable these standards, the greater success employers will have in implementing unique programs and taking advantage of attorney-client privileged advice. Without these standards, even excellent advice offers no more than an educated guess of what is a reasonable level of compliance and in what direction the law is evolving. By joining together with the greater community, industry-wide standards and practices can be established providing more reliable guidance and excellent benchmarking through a common set of references. Since this is a long-needed and positive value creating service, it should enable Littler and other employment and labor attorneys to be of greater benefit to their clients in preventing litigation and successfully handling litigation, including class actions, when it unavoidably occurs.

E. Essential Components of a Corporate Compliance Program

Most companies have yet to face the devastating consequences of corporate governance failures. However, in order to avoid such misfortune, the following are commonly implemented as elements of a corporate compliance program. Set forth below are some obvious elements of such a program recognizing that OCEG standards have not yet been issued. When those standards are issued, Littler will modify its compliance recommendations accordingly.

1. Employee Surveys

An employee survey is an important tool in establishing a baseline measurement of employee knowledge of compliance and ethical issues and, thereafter, for measuring the return on investment of corporate governance efforts. Additionally, employee surveys can familiarize employees with compliance issues and communicate the company's commitment to compliance and ethics. However, managers and corporate counsel should be aware that these surveys and their results may be discoverable in future litigation. These surveys, if conducted improperly, can create a trail of evidence against the company and provide the basis for a disparate impact claim or a claim that the employer knew, or should have known, of wrongdoing within the organization. The surveys must be carefully crafted to avoid creating evidence that could be used against the company and to increase the likelihood that the survey will be protected by either the self-critical analysis privilege or attorney-client privilege.

2. Internal Audits

Company executives, legal counsel and senior managers should work together to conduct a due diligence investigation to identify and resolve significant compliance issues. A list of laws, regulations, and other obligations that apply to the company can serve as a basis for the legal review. Products such as Littler Mendelson's *Auditing Your Organization's Compliance with the California Labor Code* may be used as a guide in the due diligence process. The audit may involve interviews with officers, managers, and employees in locations throughout the company and review of processes,

documents, and records.[15] Again, it is essential that companies undertake the audit knowing that results may be discoverable.

3. Code of Conduct

Many companies have implemented a code of conduct as part of their employment policies, which describes important compliance issues that employees confront and explains how to properly address them. Tyco's "Guide to Ethical Conduct," described above, provides an example of items that may be addressed in a code of conduct.

4. Training

Training is essential to communicate the meaning and intent of the code of conduct, to illustrate how to identify ethical and compliance problems, and to teach employees how to seek assistance (internally) to resolve issues. Ongoing training of employees will be needed as legal developments occur.

5. Internal Whistleblower Programs

An internal whistleblower program can be valuable in bringing significant issues to light before they are reported to authorities or become generally known. Companies often provide multiple avenues for reporting issues, such as through a "hotline," through senior managers, through a designated compliance officer, and even through the board of directors.

6. Background Checks

Employers should conduct pre-hire background checks of employees, at least for individuals whose actions have or could have a significant impact on shareholder value. These checks minimize the possibility of compliance breaches, and also provide evidence that the company took reasonable means to prevent violations of law from occurring within its organization.

7. Monitoring Through Technology

Technologies, which are now available to monitor activities worldwide, can be used to automate processes that are susceptible to fraud, and to detect and report activities that suggest misappropriation or other wrongdoing. These technologies are an important tool in compliance activities as business occurs in remote geographic locations with increasingly decentralized management structure. As noted above, it is essential to review the function of these technologies to ensure that they do not create a trail of potentially devastating evidence.

8. Senior Management Involvement

The activities of the company's leaders will easily trump any written policy. As such, managers must be trained to – and actually – "walk the talk" to reinforce the company's values as stated in the code of ethics. Any breach of the code of ethics must result in appropriate discipline. Corporate systems, including incentive or bonus programs, must be analyzed to ensure that they reward commitment to compliance and ethics (and not unethical behavior) rather than focus solely on numerical results.[16] Board members must be willing to support disciplinary action against senior managers and communicate with employees as needed. Some companies are going so far as to reward extraordinary acts of ethics compliance. For example, Lockheed Martin awarded an employee for turning down a bribe and reporting the incident to management, despite the fact that his action cost the company a multimillion-dollar business opportunity.[17]

F. Demonstrated Return on Investment

Multiple studies have demonstrated that comprehensive corporate compliance programs achieve significant returns on investment. The first reason for this return on investment is that the risk of litigation is reduced. At least one study has shown that employees of companies with compliance programs feel less pressure to violate compliance standards in the jobs.[18] Human resources professionals agree that even one component of a corporate compliance program – training – can reduce litigation. Specifically, 82% of human resources professionals surveyed reported that employment law training is effective

[15] *Carrots, Sticks and Criminal Penalties: Arizona Incentives for Corporate Compliance Planning*, 37 Ariz. Attorney 30, Feb. 2001.

[16] *Five Questions that Corporate Directors Should Ask*, W. Maurice Young Center for Applied Ethics, at www.ethics.ubc.ca. A 1990 study by Columbia University found that nearly half of 1,000 business executives surveyed admitted to being rewarded for taking action on the job that they considered to be unethical, and one in three reported that refusing to take unethical action resulted in penalties.

[17] *Lockheed is Doing Right and Doing Well*, www.workforce.com, Mar. 2004.

[18] *Ethical Culture*, abcnews.com, Feb. 21, 2004. Specifically, the Ethics Resource Center found that only 13% of employees from companies with ethics programs felt pressure to compromise their companies' standards, compared to 23% of employees who worked for employers that had no ethics program.

to extremely effective in reducing litigation.[19] One employer, the State of Washington, quantified the return on its investment in training in millions of dollars. That employer, after implementing a comprehensive employment law training program run by Littler Mendelson, realized a 37% decrease in employment-related claims, saving it an estimated $2 million per year.[20] Insurance companies recognize and validate these findings. At least one insurance company offering employment practices liability insurance (EPLI) promises a discount to employers who implement certain legal compliance programs.[21] As the cost of each lawsuit averages thousands, if not millions, of dollars, the prevention of even a handful of lawsuits can provide a high level of return.

Employers also reap other benefits from corporate compliance programs. Organizations with dedication to corporate governance programs have developed better and more profitable relations with customers, competitors, and the general public.[22] In one survey, more than one-third of consumers reported that high ethical standards are essential for large corporations, and 40% were willing to boycott a company if it behaved unethically.[23] Johnson & Johnson provides a prime example of the long-term value of ethical behavior. In 1982, in response to concerns of tampering with its Tylenol product, the company pulled $100 million of its product from the shelves. More than 20 years later, the company is reaping the benefits of its public image as a company in which consumers can have confidence.[24]

Overall financial success has also been linked to strong corporate governance programs. A direct correlation between corporate governance and financial performance has been proven in multiple studies. GovernanceMetrics International, an independent corporate governance agency in New York, found that one, three, and five-year returns of companies that it ranked highly in corporate governance outperformed companies that ranked lower. Top-ranked companies also outperformed their peers in measures including return on assets, return on investment and return on capital.[25] GMI's corporate governance ranking study was based on over 600 measures, including labor practices, environmental activities, workplace safety and litigation history. In another study, Georgia State University and Institutional Shareholder Services (ISS) concluded that companies with stronger corporate governance perform better on measurements of total return, profitability, risk, volatility and dividend payout, are more profitable and have higher volatility than firms with stronger corporate governance. Top-ranked companies outperformed bottom-ranked companies by 18.7% on return on investment and 23.8% on return on equity.[26]

Because the returns available to employers with effective corporate compliance programs are substantial and demonstrated, and because the risk of catastrophic litigation is great, corporate compliance is an essential tool for preserving the long-term viability of any company.

[19] Daily Lab. Rep. (BNA), June 12, 2001.

[20] The National Employer©, 2004/2005 Edition, Chapter 15.

[21] *Compli Added by the Chubb Group as Preferred Compliance and Risk Management Solution Provider*, www.hr.com, May 27, 2003.

[22] Marvin Bower, *Company Philosophy: "The Way We Do Things Around Here,"* McKinsey Quarterly 2003.

[23] *The ROI of and Effective Ethics Program*, www.hr.com.

[24] *Closing the Behavior-Standards Gap,* WorkingValues, 2003.

[25] *Shares of Corporate Nice Guys Can Finish First,* N.Y. Times, Apr. 27, 2003.

[26] *Corporate Governance Study Links Bad Boards to Higher Risk and Increased Volatility*, Institutional Shareholder Services, www.issproxy.com, Feb. 3, 2004. Rankings on corporate governance were based on board of directors, audit, charter and bylaw provisions, takeover practices, executive and director compensation, progressive practices, ownership, and director education.

APPENDICES

APPENDIX A

Legally Enabled Initiatives for the Coming Crisis: The First 20 Solutions

The opening section of this analysis focuses on defining the coming crisis and identifying its causes. This is a task of demographers, human resources specialists and sociologists. What does it have to do with employment and labor law? The answer is: EVERYTHING. A changing workforce means that the laws that define workplace conduct are also likely to evolve and be applied in different ways. Each initiative designed to address the coming crisis requires legal enablement and risks failure from unseen or ignored legal landmines. Understanding the power of employment law is essential to building an overall plan to successfully address the coming skilled workers shortage. Summarized below are 20 initiatives that will be used in part or collectively by employers in hiring, retaining and supplementing their workforces during the coming storm. The initiatives are presented as concepts and require detailed development. Coupled with each initiative is a sampling of one or two major legal challenges that will enable the initiative and/or threaten to prevent the initiative from accomplishing its objective. For each solution, Littler is in the process of preparing a more comprehensive legal treatment that will periodically become available. Please consult www.littler.com for the latest Littler publications.

#1 Internet Hiring and Recruiting of Skilled Workers. Aggressive hiring will become the standard, not the exception, when the coming crisis fully arrives. Littler and Employment Law Learning Technologies (ELT) have for years defined and refined the process of lawful hiring.[1] Traditional hiring processes are quickly migrating to the Web. From job postings, resume downloading, and on line video introductions to Internet application forms, automatic background screening, and application evaluation software, employment law challenges permeate every aspect of the digital recruiting and hiring process.

One of the most dramatic challenges to on line applications and hiring is the "digital divide." If Internet hiring is too heavily relied upon, then an adverse impact on protected classes may potentially be shown. Females and racial subgroups are less likely to have computer access to job postings. Alternatively, Internet hiring can spotlight minority applications and seek out web locations more likely to attract women and minority applicants. Littler recently revised for a client an on line hiring software package, making 184 substantive changes to the program to meet 50-state compliance requirements. Once this task was completed, the Internet form was superior to many of the paper applications and certainly made updates much easier to implement.

A review of other legal issues such as the Immigration Reform Control Act (IRCA) requirements (undocumented workers), reporting requirements (Executive Order No. 11246), fraud and misrepresentation, and negligent hiring are reviewed at the section entitled Internet Hiring & Recruiting in Chapter 20 (The Digital Workplace in 2004) of The National Employer.®

#2 Mobilizing Recruiting Services. As hiring skilled workers becomes increasingly competitive, it is certain that many employers will turn to experienced recruiters who have extensive contacts among skilled workers (such as software engineers). Many of the legal challenges associated with such recruiting are outlined in the contingent worker session of this paper and its correlating chapter in the 2004 National Employer.[2] Many pages of appellate legal reports are filled with discussions of the legal relationship between the employer and the recruiter.[3] Whether or not joint employer status can be established, actions taken by the employer to restrict the selection process of the recruiter, or statements of the recruiter, are often the legal responsibility of both parties. If the decision is made to use a non-employee recruiter, three simple rules can avoid 80% of the challenges: (1) Retain reputable recruiters with strong reputations; (2) Obtain appropriate indemnification language from recruiters with the economic capacity to honor contractual commitments; and (3) Pre-identify the intellectual property of the recruiter and who has ownership rights to the information that is developed regarding applicants for your positions.

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[1] *See* The National Employer® 2004/2005 Edition, Chapters 11 and 15.

[2] Chapter 23 of The National Employer® 2004/2005 Edition.

[3] *Baystate Alternate Staffing v. Herman*, 163 F.3d 668 (1st Cir. 1998); *Catani v. Chiodi*, 2001 U.S. Dist. LEXIS 17023 (D. Minn. Aug. 13, 2001).

#3 Use of Contract Employers. Without question, one of the dominant trends of the first decade is the use of contingency workers. The scores of legal issues are identified and reviewed in other parts of this paper and in The National Employer©, Chapter 23. The above advice regarding recruiters applies also to the selection of third-party employers. Many employers are overly concerned about avoiding joint employer status in these situations when such a result is often hard to accomplish.[4] Often selecting third-party employers with excellent employment law compliance systems and training provides even greater protection to the underlying employers. Of course, the indemnification language and economic strength of the third-party employer are critical. Increasingly, the benefits and policies of the third-party employer will be essential for attracting employees with the necessary skills to meet the project's requirements. See the contingency worker section of this report, The Rise in Flexible Hiring and Contingent Worker Population for key legal issues and suggestions.

#4 The Rise of the Independent Contractor. In the new world of skill shortages, many individuals will soon learn that their economic value is best recognized if they can hold the role of "consultant" as opposed to "employee." Likewise, uncertain employers perceive that they can meet immediate needs better with an independent contractor (IC) as opposed to hiring a regular employee. In the coming skill shortage, IC's may be one of the only ways to quickly access certain technical skills and expertise. Many key engineers and scientists are committed to this model, as in a tight economy they will have multiple offers. The 2004 Employer provides a chapter outlining the many legal issues and recommendations regarding independent contractor relationships.[5] Some of the mystery associated with ICs can be quickly overcome by using a professional organization that evaluates the relationship and assists the IC in meeting legal requirements. (ABE, part of the Nelson family of companies, is one of the largest such organizations with a sophisticated IC classification process.) If such an outside contracting agency is not used, then the employer must make the initial determination on whether the individual or business qualifies as an IC. Employers need to review their standards regarding such relationships as they could jeopardize benefit programs or create unexpected tax liability. Many high-profile worker misclassification lawsuits, whose staggering costs to employers made national headlines include *Vizcaino v. Microsoft* (settled for $97 million in June, 2001), *Herner v. Time Warner*, (settled for $5.5 million in November, 2000), *Clark v. King* County, (settled for $18.6 million settlement in June, 2000) and *Logan v. King County* (settled for $24 million in December, 1997). These settlements were based on courts' findings that plaintiffs were common law employees. Increasingly, state laws are extending many of the employee discrimination protections to ICs, yet few employers are recognizing their increasing vulnerability to such discrimination claims.

#5 Global Outsourcing. Unquestioningly one of the most common solutions to a skill shortage is the use of outsourcing. Global outsourcing has become a political issue, since there is a perception that it transfers employment to other nations. While many reasons for outsourcing exist, the coming skill shortage will likely become a primary motivation. Many functions are necessary for a product to be produced or a service rendered. Those that are less related to the core expertise of the entity are prime candidates for outsourcing, especially if unique skills are involved. Additionally, many functions are carried out over the Internet such that the service can be performed virtually anywhere. If the needed engineers and scientists are not available in the U.S., outsourcing production or programming to India or another nation may become the only effective option. Regardless of the political debate, in a global economy outsourcing in its various forms is an economic necessity.

The legal issues are very similar to those associated with the reductions in force of 2001-2003.[6] In the short-run, legislative and legal challenges to outsourcing are inevitable, but as the impact of the worker shortage is experienced, such resistance will decline. Employers may find the need to send one or more key managers to the foreign country to oversee a satellite operation or liaison with a contractor receiving the outsourced work. Apart from the challenges of outbound immigration, it should be recognized that such managers may have contract

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[4] *See Piano v. Ameritech/SBC*, 2003 U.S. Dist. LEXIS 1696 (N.D. Ill. Feb. 5, 2003).

[5] *See* Chapter 23 of The National Employer® 2004/2005 Edition.

[6] *See* Chapter 16 of The National Employer® 2004/2005 Edition.

rights under company policies and statutory rights under extraterritorial application of certain U.S. employment laws (such as Title VII, the ADEA, and ADA).[7]

Two less commonly considered legal issues represent the beginning of globalized employment and labor law. First, serious efforts exist to pressure employers into accepting global employment standards that can be contractually enforced in U.S. courts.[8] While certain U.S. employment laws have extra-territorial application, contractual agreements can be enforced even if the control by the U.S. corporation fails to rise to the level necessary for these statutes. However, the "foreign laws defense" would likely apply to both statutory and contractual obligations.[9] A sharp distinction should be drawn between model codes of conduct and ethics such as the "U.S. Model Business Principles," which have no enforcement consequences, and various standards (such as the Declaration on Fundamental Principles and Rights at Work from the ILO and Social Accountability 8000 standard issued by Social Accountability International) that can be written to include contractual enforcement mechanisms. While legislative application of global standards has not been successful, it is likely that new efforts will be undertaken under the umbrella of allegedly creating "a level playing field" for outsourced jobs.

A second legal challenge includes compliance with restrictions established by treaty, such as the NAFTA North American Agreement on Labor Cooperation (NAALC).[10] These mechanisms are slow and underutilized but can cause substantial public attention. On the positive side, the NAFTA-TAA Program can provide benefits to workers laid off when their jobs are outsourced to Canada or Mexico.[11] Again, with the outsourcing debate gaining more attention, it is likely that the successes and failures of the enforcement mechanisms under NAFTA will also receive more viability. A key part of any corporate compliance program will be the exploration of NAFTA requirements (if applicable) along with the Corrupt Foreign Practices Act.[12]

#6 Inbound Immigration. One of the classic answers to the skilled worker shortage has been inbound immigration. This changed after September 11, 2001. While some of this change is due to the weakened economy, security compliance procedures now clearly take priority over mobility requirements. Expert and creative legal assistance in the managing of H-1B programs and other immigration programs is essential. Already vast differences have occurred between employers. While some of this is due to creative immigration practices, a key part of the difference is the active management of current visa holders. Using the H-1B program as an example, Congress decreased the annual number of H-1B visas from 195,000 to 65,000, but the change had a three year "notice." Smart employers planned ahead and arranged alternative visa categories to ensure labor continuity, but many employers lack the resources to maneuver deftly in an out of temporary work visas, all of which are, at best, short-term solutions for a chronic labor issue. Expert immigration law and mobility advice is now mandatory. For example, when it became a requirement that each foreign national application be personally interviewed, Littler Mendelson Bacon & Dear produced within days a video preparing applicants for the interview. This was immediately accessible by Internet throughout the world and greatly facilitated successful interviews.

#7 Outbound Immigration. After 9/11, outbound immigration has become an essential element in planning for the coming skill shortage. If it is increasingly difficult to bring talent into the United States, an alternative strategy is to go to countries having such skills and employ the workers locally. This requires the use of technology and management. Today's global employer must be able to move managers throughout the world. This requires an additional set of resources including outbound capability. Immigration counsel must have a network of current relationships around the world and in key foreign embassies to make this happen.

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[7] *See* Chapter 32 of The National Employer® 2004/2005 Edition, Employment Issues Affecting Multinational Employers.

[8] *See* Scott J. Wenner and Kenneth J. Rose, *International Employment Standards and Corporate Codes of Conduct*, N.Y. Law Journal, Aug. 6, 2001. Mr. Wenner is a shareholder in Littler Mendelson's New York office, and Mr. Rose is a shareholder in the San Diego office.

[9] For a discussion of the "foreign laws defense," see Chapter 32 of The National Employer® 2004/2005 Edition.

[10] *See* http://www.dol.gov/dol/ilab/public/programs/nao/submiss.htm.

[11] *See* Employment Issues Affecting Multinational Employers, Chapter 32 of The National Employer® 2004/2005 Edition.

[12] *See* U.S. Department of Justice's official website for a discussion of the Corrupt Foreign Practices Act requirements, including a lay-person's guide to the Act at http://usdoj.gov/criminal/fraud/fcpa/fcpa.html.

#8 Virtual Employment. Increasingly, the workplace is defined by the Internet and can be physically moved throughout the world. One of the most common examples is telecommuting. For several years, Littler has extensively covered the unique legal issues associated with such employment.[13] At first it was necessary to speculate on how new technology would be interpreted under laws written decades earlier. Now, more cases are being decided and some trends are emerging. For example, one case recently held that a virtual employee (one who performed all of her work in cyberspace) could not claim unemployment benefits in the state where the employer's headquarters were located merely because the server was located in that state. The employee was physically in the state of her residence from which she performed eight hours of work a day on the company's intranet. Reading language common to many states' unemployment statutes, the court held that employment was in the state where the employee was physically located.[14]

#9 Retention Wars. A key part of developing a plan to address the coming shortage of skilled workers is to ensure that current workers are retained. As the retention war becomes more fierce, the legal issues associated with retention programs will become more challenging. In this regard, compensation and benefit programs must be carefully examined under both federal and state law. Many bonus programs are intended to retain workers but are worded such that part or all of the bonus becomes vested. Some bonus programs are tied back into the economic success of the employer. If this includes subtracting the cost of workers' compensation claims and insurance payments because they are operating expenses, the bonus could be unlawful.[15] Stock options and restricted stock grants likewise require careful drafting and state-by-state review.[16] A more comprehensive treatment of the legal issues involved in the retention battle is found in The National Employer®, Chapter 11, Innovative Hiring Strategies, section 261. While it is recognized that retention efforts can create isolated legal issues, most of the employment and labor law concerns are applicable to the entire existing workforce. Accordingly, the legal issues are discussed throughout The National Employer® 2004/2005 Edition.

#10 Flexible Retirement Initiatives. One of the core causes of the coming skill shortage is the upcoming retirement of the baby boomer generation and inadequate numbers of replacements. It follows that one of the key solutions is to change the concept of retirement such that key workers remain in the workforce longer. Normal economic forces have been cooperating along with poor savings habits. Age-weighted profit-sharing plans and targeted-group defined benefit plans could be designed to help these baby boomers shore up retirement savings and simultaneously provide retention incentives. Low-cost, high-deductible health plans that offer a bridge to Medicare or post-retirement group health plan availability for older essential workers may present a reasonable cost retention benefit. The recent U.S. Supreme Court decision on the ADEA facilitates existing and new plans that discriminate in favor of older workers.[17] One such program is an enhanced retirement package for key employees working much like a completion bonus. Such programs should be explored, but at the same time state laws and ERISA preemption must be considered in assessing whether application of a state age discrimination statute would render a result different from the federal statute.[18]

#11 Hiring the Retired. Recently, a major national retailer initiated a program with AARP to recruit older workers at its 1,700 stores. Clearly, the national pool of retirees is a largely untapped source of labor with some member having superb skills, experience, knowledge and training. A recent Tower Perrin poll of 2000 workers showed that 78% wanted to continue working in some capacity well into their retirement years. This represented a change from prior decades with 64% expecting to work part-time, 57% in different occupations, and 43% just because they want to be involved.[19]

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[13] *See* Chapter 20 of The National Employer® 2004/2005 Edition.

[14] *In re Allen*, 100 N.Y.2d 282 (2003).

[15] *See Ralphs Grocery Co. v. Superior Ct.*, 112 Cal. App. 4th 1090 (2003), review denied, 2004 Cal. LEXIS 1311 (2004) and J. Kevin Lilly, *Ralphs Grocery v. Superior Court: Does This Signal the End of Incentive Compensation Plans for Employees?*, Littler's ASAP (Nov. 2003).

[16] *International Business Machs. Corp. v. Bajorek*, 191 F.3d 1033 (9th Cir. 1999).

[17] *General Dynamics Land Sys.*,124 S. Ct. 1236.

[18] *See id*.

[19] San Diego Union Tribune, Feb. 8, 2004.

The legal issues associated with retiree retention and recruitment are numerous. Can retirees be given a different benefits plan? How can such a benefit package be best integrated with Medicare? Do retirees qualify to return to work for a former employer as independent contractors? Can medial examinations be required? Is it appropriate to create light duty positions, and what special problems would this cause? Do employers with larger groups of retired workers face a higher or lower probability of age discrimination claims? Can a retiree be hired as an employee with a preset termination date? What impact does the average age of the workforce have on workers' compensation rates? Does the heavy hiring of retirees potential create a claim of discrimination from minority groups not proportionately represented by retirees? Clearly these and other key questions are necessary in constructing an effective plan to involve retirees in meeting the coming skilled worker labor shortage.

#12 Work/Life Balance Programs. Clearly, expanding the labor supply helps address the skilled worker shortage. To the extent that workers are leaving the workforce for family-related issues, addressing those issues can potentially increase the workforce. It is projected that during the next eight years significant numbers of women will enter or return to the workforce. Between 2002 and 2012 it is projected that the number of working women will increase by 14.3% compared with 10% for men. The result will be a workforce with 47.5% women.[20] Creating work/life balance programs also has the potential of retaining key employees and making one employer more attractive than another.[21] While these programs are highly valued and long overdue, they merit careful legal review, and a detailed review of leave laws and related company policies.[22] A new area of discrimination law is potentially in development with reverse gender claims. If special accommodation is made for working mothers to have reduced hours and extended leaves, such programs must be open to all employees with similar responsibilities.

#13 Intern/Apprentice and Child Labor Programs. Intern programs have been in existence for several years, and many of them are in violation of federal and state requirements. If the intern is not receiving compensation in compliance with the Fair Labor Standards Act and any applicable state statute, compliance with educational intern standards is required. It is normally required that the program be associated with an educational institution and that no productive work is performed. Rarely would corporate programs meet these standards. Also, it would be rare that interns could be classified as exempt employees. Accordingly FLSA compliance review is appropriate.[23]

Apprentice programs often function under special rules that should be reviewed. Meanwhile, the number of workers under age 18 will increase as the general worker shortage is experienced. This should trigger a review of necessary work permit requirements and applicable restrictions on working conditions. One less commonly known restriction also applies. If a regular employee unexpectedly has supervision responsibilities regarding minors, the employer may face special background checking requirements, including the need to access arrest records.[24]

#14 University Sharing Programs. When the demand for knowledge workers substantially exceeds supply, it is inevitable that universities and colleges will be called upon to be part of the solution. Apart from the traditional role of higher education, it is reasonable to expect recruiting competition for qualified students prior to graduation and employment opportunities for faculty members. With the closer integration of roles, employers will need to anticipate the employment law challenges of having employees who are also students and faculty members. This is far more involved than the obvious joint employer and wage and hour considerations associated with student interns. For example, during the height of the dot-com expansion Cisco Systems developed a program allowing students to earn credit toward stock options, overcoming several challenging benefit law

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[20] http://www.bls.gov/emp/empocc1.htm.

[21] Roger Herman and Joyce Gioia, How to Become an Employer of Choice (Oak Hill 2000).

[22] *See* Chapter 26 of The National Employer® 2004/2005 Edition.

[23] Under the FLSA, "trainees" are not considered employees and thus need not be paid only if all of the outlined requirements are met. U.S. Dept. of Labor, Wage and Hour Div., Field Operations Handbook §10b11(b).

[24] *See* Cal. Penal Code § 11105.3.

requirements.[25] Additional issues include loan and loan forgiveness benefits post-Sarbanes-Oxley, statutory leave eligibility, intellectual property ownership, telecommuting, immigration status, independent contractor status, and workers' compensation requirements. Many major universities have basic policies and practices regarding employment of faculty and students, but it is likely that these programs will become much more robust and defined. Such sharing programs may be essential to keep and attract qualified faculty and students.

#15 Growing the Skilled Workforce Through Corporate Educational Programs. Over half of the skills and knowledge used in employment will be learned while employed. With a shortage of skilled workers the trend toward internal corporate education will accelerate. This is not only because of the need for the skills being taught. It is also recognized that in tight labor markets the opportunity to learn valuable skills is rated above compensation by job applicants in accepting employment.[26] Additionally the availability of on line educational opportunities is changing everything. In 2004, Littler observed that employers were using more on line education, but in a focused manner stressing the quality of the programs rather than a library with many titles.

Many of the legal issues that are involved with training are detailed in The National Employer® 2004/2005 Edition Chapter 15, The Law of Training. In developing corporate learning programs, key questions must be answered, such as:

- Can older workers be excluded because the training investment cannot be recovered over the anticipated remaining years in the workforce?
- Can part of the education costs be charged to the employee?
- Does it matter if the education is specific to the employer or general?
- What is the role of the corporate legal department concerning the educational program and the content being presented?
- Can the employer reduce costs and legal liability by outsourcing some or all of the educational programs?
- Clearly, many more employment law related questions should be part of any corporate educational program. Through Littler's Knowledge Management system, many of the answers will be available without the cost of redoing the research and with the benefit of practical experience.

#16 Growing the Skilled Workforce Through Funding Outside Education. In December 2003, Jill Sinclair started as a surgical technologist at St. Francis Hospital in Milwaukee. She was an entry-level healthcare worker who just completed an intense nine-month training course (condensing and accelerating what is normally covered in two years of education). Sinclair, 41, was selected for the program by her employer, continued to receive benefits, was paid $10 an hour during training, agreed to stay two years, and had a guaranteed job waiting after graduation. The program was sponsored by the Private Industry Council of Milwaukee County and archrival hospital systems Covenant Healthcare and Aurora Health Care.[27]

This is just one example of dozens of initiatives responding to the current and coming skill shortage. Such programs need to be constructed consistent with employment law requirements and anticipating potential challenges. Representative questions include: Is the student an employee during training? Who can apply and how are candidates selected? If the "student/employee" fails, can they return to their former position? If the employee is represented in a collective bargaining unit, is implementation of a program a mandatory subject of bargaining? What type of written agreement is required? Do wage and hour laws apply? How is a promise-to-stay requirement enforced? Is federal support for such programs available, and if so what employment-related legal limitations does this entail? Is negligent training an issue? These initiatives expand on the university and col-

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[25] Bob Weinstein, *Many Businesses Courting Interns with Pay and Perks*, The Boston Globe, Oct. 15, 2000, at K6 and Edward Iwata, *Tech Firms Lure Young Prospects with Stock Options, Sports Cars, Bonuses Not Enough for College Talent*, USA Today, Aug. 2, 2000, at 1B (CEO announced to an audience of interns that they would each receive 500 stock options if they returned to work at the company after they graduated).

[26] Herman, Impending Crisis, at 91 (citing survey conducted in 1999 by the Washington Post).

[27] Joel Dresant, *Solving a Skill Shortage*, Milwaukee Journal Sentinel, posted Dec. 20, 2003, at www.jsonline.com/com/bym/news/dec03/194166.asp.

lege sharing programs and add to the host of employment law challenges corporate legal and HR departments will be called upon to resolve.

#17 Growing the Skilled Workforce Through Government Sponsored Programs. Several retraining programs have been sponsored by federal, state and local government largely as a response to unemployment, downsizing, and displacement that occurs when jobs are transferred outside the country (such as NAFTA-related unemployment). Employers are generally aware of such programs and their legal requirements. Outplacement employment agencies are also an excellent source of information and guidance regarding such programs. When the impact of the skill shortage becomes more intense, a primary focus of government programs is likely to be in the form of retraining and education incentives more than grants. This in turn raises several legal questions? What reporting requirements do such programs demand? Is a prevailing wage requirement associated with taking advantage of the government program? Will the employer become a government contractor and subject to new requirements? What government audit requirements apply? Does such a program increase compliance risk for the Board of Directors and company officers? Is the Board of Directors' approval needed? Does the recipient need to comply with the Federal Drug Free Workplace Act? Many of these questions are focused on employment law concerns and demand that corporate counsel be closely involved in opening legal doors that facilitate such programs as well as monitoring and minimizing risk.

#18 Using the Military to Increase the Supply of Skilled Workers. One of the largest educational institutions is the U.S. military. From military academies and government-paid tuition to basic training programs, the military is acutely impacted by the need for skilled personnel. Increasingly, it is anticipated that the needs of the military and private employers will overlap and potentially compete. This requires close attention to the Uniformed Services Employment and Reemployment Rights Act (USERRA)[28] and any applicable state military leave protections.[29] One of the most common forms of leave is active and inactive duty for training. Can a private employer provide additional compensation to an employee on military leave if the training has special relevance to the employer, while denying such payment to an employee who does not receive such training? Benefit rights, seniority rights, and various kinds of vesting are classic questions associated with military leave. Reinstatement rights can become complex when associated with training-related service. If an employee undertakes military training and fails, resulting in his/her discharge, are reinstatement rights still required? What if the employee returns from military duty and his/her counterparts have been trained for more advanced positions – does the employee qualify for such a position even though no training has occurred? Very likely the employer would be required to provide the returning employee with the upgraded position following employer-paid training to meet the job's additional requirements.[30] If a private employer coordinates with a military training program and benefits from the program, do returning employees receive additional protection from discharge or discrimination?

Littler anticipates that many joint training programs will be offered through the military service, providing significant advantages to both the employer and the military. At the same time, special legislative and regulatory employment-related protections will also apply. Understanding the employment law issues and responsibilities should be made a part of establishing any programs to take advantage of military-supported education.

#19 Industry Association Solutions for the Skilled Worker Shortage. Certain industries have far greater needs for skilled workers than others. Nursing, biotechnology, and safety engineering are a few examples. Each of these industries has developed trade associations dedicated to advancing the interests of their members. High on this list is the creation of a greater supply of skilled workers. Narrowly focused vocational training, often in association with local educational institutions, is increasingly common. Often, organized labor has attempted to become active in such groups promoting educational opportunities for union members. While this may be very positive, it is also important that non-union employers carefully evaluate whether their participation creates

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[28] 38 U.S.C. §§ 4301, et seq. (1994).

[29] *See* The National Employer® 2004/2005 Edition, Chapter 26 on Leaves of Absence.

[30] *See Fink v. City of New York*, 129 F. Supp. 2d 511, 519 (E.D.N.Y. 2001).

unexpected contractual obligations (such as financially supporting a program where nearly all the graduates go to employers having collective bargaining agreements). Traditional labor law places some non-discrimination requirements on such programs.[31] On the other hand, certain unions have been supportive of efforts to upgrade employee skills and training, as well as overcome out-of-date contract language that would limit productivity. The Communications Workers of America (CWA) has agreed to site councils in some of their collective bargaining agreements. These councils can, by agreement, bypass contract requirements if it is determined by the local participants to be in the best interest of the employer and local unionized workforce.

#20 Technological Replacement Solutions for the Skilled Worker Shortage. The science of robotics has made monumental advances in the last two decade, and groundbreaking work is taking place regarding human-robot interaction.[32] Without question the coming skilled worker shortage will be partially offset by technological solutions. Automation has been part of the labor supply formula and debate for decades. When the cost of labor becomes very high or human resources are generally unavailable, technology-facilitated solutions should be expected. While these developments have not resulted in employment laws for androids (a possible future Littler project), several employment law statutes (such as the WARN Act) and legal standards apply to the use of technology in the workplace. For example, when the newspaper industry went through a technological revolution, automation clauses were commonly negotiated into collective bargaining agreements. Generally these clauses allowed the changes to be made, but provided protections, training (where appropriate), and transition payments for employees who were no longer needed because of the change in skill requirements.

The shortage of skilled workers will increase the use of smart technology to, in part, offset the growing demand. While this may seem ironic in that one of the areas of greatest shortage is for scientists and engineers, the productivity of existing scientists and engineers can be enhanced by technological innovation. Software programs now write codes that previously required software programmers. While many of the current applications for technology involve less skilled work, intelligent robots are being planned and used in fields ranging from space exploration to medicine. AutoMed and McKesson, for example, have developed pharmacy robots. A recent posting, entitled, Robots Replacing Human Pharmacists explains: "Pharmacy schools aren't graduating enough new pharmacists to keep pace with the rising number of prescriptions, now estimated at more than 4 billion a year. A shortage of pharmacists causes delays at drug counters and raises concerns about drug errors. Robot technology may help fill a human gap to meet a spiraling demand for prescription drugs." The VA pharmacy in San Francisco forecasts that, with robots, a 30% increase in demand can be met with only a 6% increase in pharmacists.[33]

This inevitable development raises a number of employment law issues covered in Chapter 20 – The Digital Workplace – of The National Employer® 2004/2005 Edition. If a unionized labor force is involved, the issue is likely to already be covered by contract language. For other employers, policies need to be reviewed to make sure they are consistent with the transfer of work through automation. Significant age discrimination issues are presented by the change in employment skills that can come from technology. Much of the risk associated with such conversions is offset with significant severance programs requiring a valid release. It is essential that employers perform an audit of their policies, procedures, and training programs to ensure they are consistent with technological solutions for the coming skill shortage. Observing the complex number of legal issues associated with ground breaking technological changes in the workplace, Littler first developed in 1994 a nine step process for introducing such technology. In the current Digital Workplace Chapter, "Nine Practical Recommendations For Working With The Internet While Meeting Employment Law Requirements" is presented. This template is designed to be modified to cover a wide range of technological improvements, including automation aimed at addressing the coming skill shortage.

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[31] The National Employer® 2004/2005 Edition, Chapter 31, on Collective Bargaining.

[32] *See* CHI2004 Workshop, at www.bartneck.de/workshop/chi2004/.

[33] www.techtv.com/news/print/0,23102,3408633,00.html

APPENDIX B

A Checklist of Preventive Legal Measures For Addressing the Coming Skill Shortage

Littler's role is to review and advise on the legal issues associated with the coming skill shortage. The general challenges of adequate staffing is a human resources responsibility. Regarding the legal issues created consider the following steps:

1. Recognize that a serious worker shortage and skill shortage are combining to create a crisis for U.S. employers and the entire economy. If there is any doubt about this development, you are urged to review Roger Herman, et al., Impending Crisis: Too Many Jobs Too Few People, (Oakhill Press 2003). The fundamentals of baby boomer retirements, a smaller labor supply, immigration restrictions, educational shortfalls, and strong consumer demand make this an inevitable development. The only question is when it will be realized and how severe it will become. Our best thinking is 2006, but the future can take longer to reach than is first estimated. Nonetheless, when it actually arrives, it is likely to be with greater impact than predicted.

2. Organize a response team and review hiring options. Responding to the skilled worker shortage requires a multidisciplinary solution. This means that HR and Legal have key roles along with almost every other part of the organization. Additionally, outside resources such as third party employers, recruiters, and legal counsel (including immigration counsel) may also be important members of the team. Depending upon the organization's mission, current workforce, current and future skill requirements, and outsourcing options, a contingency set of hiring options and alternatives should be generated. The 20 potential solutions presented in Appendix A are a starting point for designing initiatives (or set of initiatives). Once the likely solutions are identified, then more detailed planning is needed, often involving employment and labor law issues and challenges. Please refer to The National Employer® 2004/2005 Edition Chapter 11, Innovative Hiring Strategies: Building a Winning Team for some of the legal fundamentals including prescreening and interviewing.

3. Review your retention history and planning. Once there is a team in place and an understanding of the likely future needs of the organization, the first step in building the needed workforce is reviewing the composition and stability of the current workforce. It is entirely likely that skill needs will develop at a time when the current workforce is in a surplus condition. To the extent that the skill levels of the current employees cannot reasonably be upgraded, planning for reductions may need to occur at the same time as planning for new employees. The key to this "contradictory condition" is being able to establish that the new hires are not replacements for those leaving. If skills are obsolete, then the incoming employee is meeting a new requirement, not replacing an existing employee. Littler's recommendations on Reductions in Force: Issues & Strategies for the Downsizing Employer are included in Chapter 16 of The National Employer® 2004/2005 Edition. One of the most helpful steps the employer can take regarding a skill imbalance in the workforce is to show that existing workers were offered training to upgrade skills and such training was rejected. Very likely the outgoing employees will be older than the incoming employees, since new skills are often associated with recent education. If existing employees could be trained, but reject that training, the employer is in a strong position. To the extent that such training was not offered and could have been effectively made available, the transition process is more difficult. An outstanding severance program and strong release of claims agreement has saved many organizations from serious legal challenges.

Once a determination is made regarding key employees in the current workforce, a review of retention incentives is vital. There are hundreds of books, programs, and philosophies on successful retention programs that are far beyond the scope of this paper. Training, benefits, compensation, and an environment of personal dignity are vital to retention. Each of these requirements is associated with a list of legal requirements and challenges.

The National Employer® provides chapters on each of these subjects providing a good review of current policies, programs, and practices. Also, a self-audit of personnel programs and policies is included in Chapter 14. Be aware that enhanced economic incentives for new hires, apart from upsetting current employees when they are inevitably discovered, create legal landmines because of the lack of consistency. If an African-American employee with five years of experience is paid $50,000 annually and a Hispanic employee is hired for the same job at $60,000, a potential Equal Pay Act violation is in the making. Depending upon the size of the organization, a compensation study might be appropriate along with a benefits review.

4. Experience the advantages of contingency employment and outsourcing. Fundamental change is occurring in the workforce and the structure of organizations will be very different in the near future. Very likely, companies will be smaller, with the ability to put together highly-skilled teams for particular projects. Components of the production and planning process will be outsourced through a network of organizations attracting and retaining the most skilled employees in their particular areas of focus and expertise. While currently some of the heavy use of contingent employees is due to concerns over the economy, this reflects a much deeper trend reflecting the importance of the contingent worker. Many skilled workers are discovering that they can command better compensation on a project-by-project basis, and their "contingent" employer can offer benefits comparable to a traditional employer. Moreover, turnover actually declines because the same "contract employer" moves with the employee from project to project. A detailed review of the legal issues is set forth in Chapter 23 of The National Employer® - Contingent Workers: Independent Contractors and Leased Employees, as well as in section III of this paper.

5. Keep top management informed of the shifting labor supply. One of the major problems of 21st century employers is a lack of internal communication regarding the interacting needs of the organization. Regarding the coming shortage of skilled workers, most organizations wrongly assume that human capital is as available as financing. Several companies that grew during the dot-com boom found their growth limited by the labor supply and later learned about the poor quality of many new hires. When reductions took place, hiring mistakes and quality control problems became very apparent. Those employers with good preventive employment law policies and practices were able to downsize based on worker quality, while many other organizations attempted this model at their peril. If good communications are taking place, senior management will have an understanding of the importance of proper hiring processes and can pace the growth of the organization. Such information can also be essential in planning technological changes that impact the need for labor. The goal becomes one of achieving the organization's mission through a balanced organization that uses regular employees, contingent workers, outsourcing, training, and global resources all in proportion to overall needs. This is also the process that will eventually build a unified and diverse team.

Your communications program may result in a decision to not expand if adequate human capital cannot be located and employed. While this seems like a horrible outcome, it may be one of the best decisions a company can make under certain circumstances. If waiting allows for better recruiting and a more trained workforce, it could be that this is a highly superior decision to hiring warm bodies and having to go through extensive turnover and customer disappointment before reaching an efficient condition. Several sophisticated employers learned this lesson the hard way during the great economic expansion of the late 1990s. It is unlikely that they will make the same mistake a second time. Inevitably, hiring mistakes create the potential for employment and labor law challenges that are far better to avoid from the beginning.

6. The legal department is an essential partner in solving the skilled worker shortage. For many organizations, corporate legal will have been involved in human resource planning at every level. This recognizes that legal compliance is essential for success in the 21st century. With the rise of class actions and the growth in pri-

vate attorney-general statutes and litigation, hiring systems need to be planned consistent with legal requirements and built to withstand legal challenges. Not all attorneys or human resources professionals see the role of law in such a constructive fashion. Many times a hiring or outsourcing option is abandoned because of the mistaken belief that it cannot be accomplished because of legal restrictions. The more positive way to review the situation is to determine what legal solutions are available to make the option functional and at what degree of legal risk. Good legal planning can provide alternatives to options that accomplish the same objective but greatly reduce legal risk. It is not a coincidence that more human resources professionals are becoming attorneys and that employment lawyers often become human resources professionals.

7. Coordinate your planning for the skilled worker shortage with your overall legal compliance programs. Almost every major corporation is in the midst of a legal compliance program ranging from Sarbanes-Oxley compliance to adoption of a separate code of ethics. A key part of this process deals with employment law policies and practices, including hiring. The same corporate compliance systems that ensure proper review of personnel policies should also apply to the initiatives described above. This ranges from advanced approval of on-line hiring applications to compliance with new immigration requirements. For example, preapproval of a standard agreement with an outside personnel agency allows for the quick involvement of a specialized outside recruiter for a hard-to-fill position.

8. Place a priority on your planned solutions for the coming skill shortage. All of the above will be of little impact if the organization does not recognize the importance of the coming shortage and the even greater importance of having planned responses. The CEO, CFO, General Counsel, CIO, and CHRO (Chief Human Resources Officer) need to approve and endorse the program. While the Board of Directors probably should not formally approve the contingent plans, they should be aware of the options. Planning for the coming skilled worker shortage is so central to accomplishing the corporate mission, its importance cannot be overstated. Those entities that place this issue on a lower priority will put their organizations in jeopardy of failure. The coming crisis will arrive; it cannot be stopped or avoided. Your task is to recognize this certainty, plan for it, and minimize the negative impact on your organization, turning it into a relative advantage compared to your competitor.

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