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## Lawyer Limelight: David Riewald

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**By Nancy Stein**

Corporate America is facing many challenges in these tough economic times. Employment issues and concerns abound. What are the rights and responsibilities when layoffs become necessary? Where do employers face the greatest potential liability? How about the new legislation? And what we can expect now that President Obama has taken office? Lawdragon discussed these and other topics with David Riewald, a partner with the boutique labor and employment law firm Bullard Smith Jernstedt Wilson, in Portland, Ore.

Riewald focuses his practice on advising employers and management personnel on how to avoid employment lawsuits and on defending them when litigation is unavoidable. He's represented such clients as Rite Aid, Kmart and S.C. Johnson & Sons, among others. Additionally, he is the president of Worklaw Network, a group of boutique employer-side labor and employment law firms throughout the U.S. and beyond, which provides a creative, collaborative approach when representing employer clients.

**Lawdragon:** Tell me about Worklaw Network—its goals, the types of cases it handles and how the members work together.

**David Riewald:** The Worklaw Network is all about sharing resources, information and expertise to provide better service to the employers we represent. Currently there are 28 member law firms located in 27 states and 1 Canadian province, and those member firms have well over 350 lawyers who do nothing but represent employers on employment, labor law and benefits issues. The Network's U.S. lawyers are licensed to practice in 38 states plus the District of Columbia. We also have 5 associate members in Canada and Europe and in the near future we hope to have two more in Puerto Rico and India. The admission criteria are very strict, and admission serves as a virtual "seal of approval."

We have a very rigid vetting process and we only allow one firm for each state or province, with the exception of Texas and California where we have two member firms. Some of the benefits of membership are that we share information very liberally through email list serves, a document database, and our semi-annual meetings. So, for example, if a court, the EEOC or the NLRB is doing something

new on the East Coast, Worklaw member firms like mine on the West Coast will hear about it through our East Coast members before the ruling or practice becomes commonplace out here. Or if any attorney in a Worklaw firm has a thorny question about some labor or employment law issue, that attorney can send out an email using one of the Worklaw® list serves and get help from other specialists who have faced that issue before.

**LD:** How do the Worklaw® Network firms work together and what would be the advantage of using one of the Network's firms?

**DR:** With the world shrinking the way it is, most businesses are not located in just one place anymore. Through the Worklaw® Network, we can get quick answers to labor and employment issues in other parts of the United States or the world. A lot of times a client will not want to pay to fly a lawyer cross country to do something in another jurisdiction and so we often refer clients within the Network to skilled labor and employment law lawyers who are in that other jurisdiction and who know the local court system and the local laws. We can make very quick referrals to the highest quality lawyers in just about any location in North America and Europe.

**LD:** What got you interested in labor and employment law in the first place?

**DR:** When I was in law school, I took a labor law class and really enjoyed it. My father had been an industrial psychologist, so he worked on the people side of workplace issues. Hearing him talk about issues that he was facing and clients he was consulting with may have helped draw me into the labor and employment law field. It's a fascinating area. The issues that come up in the workplace are just so interesting and so real life that you often find yourself involved in soap opera-type settings.

**LD:** What do you consider the greatest employment-related challenges facing corporate America?

**DR:** I think there are a couple of areas. First, there is the increased confidence and aggressiveness of unions flowing from the election results last November. Unions are really pushing one bill that is of paramount importance to employers, and that's the Employee Free Choice Act. That act is an attempt to radically change the balance of power that has existed for decades in the labor law area. Second, employers need to undertake more and better training of their supervisors and managers on how to handle workplace issues.

More often than not, lawsuits arise out of mid-level supervisors' mistakes in their dealings with employees. So helping those managers and supervisors stay up to date on what they can and can't do in the workplace is crucial now more than ever before. The same managers who are expected to run a business also have to do it without violating the ever growing tangled web of workplace laws. We basically help employers walk through this mine field.

**LD:** Where do employers face the greatest potential liability?

**DR:** There are so many, it's tough to pick one out that is really the greatest liability. In these tough economic times, I think an employer's ability to downsize properly and legally is going to be very important so it doesn't incur liability. A company that is already struggling financially can't afford to incur additional liability by taking missteps in the layoff process.

**LD:** What steps should the employer take to downsize properly and legally?

**DR:** The first thing an employer should do is to clearly articulate its legitimate reasons for the layoffs. Then create a committee or group to oversee the entire layoff process so that you have one group of people in the know with all the information. The third step is separating out the temporary workers and the independent contractors from the regular employees. The temp workers and

independent contractors should be the first ones laid off. That helps to legitimize the reasons for the layoffs in the first place. Plus those people usually don't get any kind of severance pay or termination benefits.

Another step is implementing a hiring freeze. It usually makes no sense to keep hiring people when you are laying others off. Another thing employers can do is see if any of the existing employees want to volunteer to be laid off. Determine the limitations you will impose on volunteers because if you get too many volunteering from the same department that's really going to hurt your business.

**LD:** Where do employers tend to get into trouble when laying off workers?

**DR:** In determining the selection criteria. Employers need to establish the criteria they will use to decide who stays and who goes. Usually it is better to use objective criteria than subjective criteria because objective criteria are harder to challenge. You also have to factor in when someone is on a protected leave. Determine what kind of a severance package you're going to give and make sure it complies with the Older Workers' Benefit Protection Act.

Once you determine who you are going to lay off, you may want to perform a disparate impact analysis to decide if the planned layoffs can be challenged on a disparate impact basis. You also have to make sure you comply with the federal and state WARN Acts. Basically, if enough employees are affected by the layoffs, the WARN Acts require an employer to give a 60-day advance notice of the layoffs. The final step is to announce the layoffs.

**LD:** What can we expect to happen to employee benefits, pensions and deferred compensation in these trying economic times, especially if an employer goes bankrupt?

**DR:** The short answer is that employee benefit plans can generate significant and unexpected liabilities for which employers and fiduciaries need to plan in advance so they avoid unpleasant surprises for themselves and the plan participants. Plans that are funded with a "spendthrift" trust, such as tax-qualified pension or 401(k) plans, may not be directly affected by the employer's bankruptcy because the trust generally won't be reachable by the employer's creditors, but there can be questions about decisions made regarding funding and investments, which could result in personal liability to the plan fiduciaries, in addition to ongoing plan responsibilities, despite the employer's bankruptcy.

Participants in plans without a spendthrift trust (such as many nonqualified deferred compensation plans or self-insured health plans) may lose benefits in the event of the employer's bankruptcy. Finally, if the employer declaring bankruptcy is a member of a "controlled group" with other employers, the other members of the group may have liability, even if they never jointly maintained plans with the bankrupt employer.

**LD:** What can we expect under the Obama administration?

**DR:** When President Obama was in the Senate, he sponsored of a number of employee protective bills that were considered but didn't pass by close margins. These will probably pass now that he's in office. One example is the Employee Free Choice Act that we've already talked about.

**LD:** What are your thoughts on the ADA Amendments Act's expanded definition of who is disabled?

**DR:** When the ADA was first passed, the joke was that virtually everyone in the United States fell within the definition of a disabled person. Now that they've broadened who qualifies as a disabled person that might water down the protections for those who most of us really think of as disabled. Also now there are provisions that say that you cannot consider mitigating measures like eyeglasses

and contact lenses in deciding whether someone has a disability. The ADA makes some pretty significant changes and it definitely will broaden the number of people who fall into the category of disabled as defined by the statute.

**LD:** What are your thoughts about the Lilly Ledbetter Fair Pay Act and the potential liability of employers for unfair pay decisions?

**DR:** In the *Ledbetter* lawsuit, the Supreme Court held that the statute of limitations on a pay discrimination claim starts running when an employer makes its pay-related decision, not when the employee receives a paycheck reflecting that decision. The Lilly Ledbetter Fair Pay Act basically reverses the Supreme Court's decision and says that the statute of limitations on a pay discrimination claim begins to run every time an employee receives a paycheck. The Act also provides that "an individual" who is "affected by" illegal pay discrimination can sue, and that phrase could conceivably open the door to claims not only by employees but also by their family members.

**LD:** Is there anything from the employer's perspective that is good about all these employment laws?

**DR:** One positive effect of the employment laws is that most managers and supervisors are much more attuned to what they can and cannot do in the workplace. That's partly because of the exposure the media gives to lawsuits that involved alleged harassment or other misconduct.