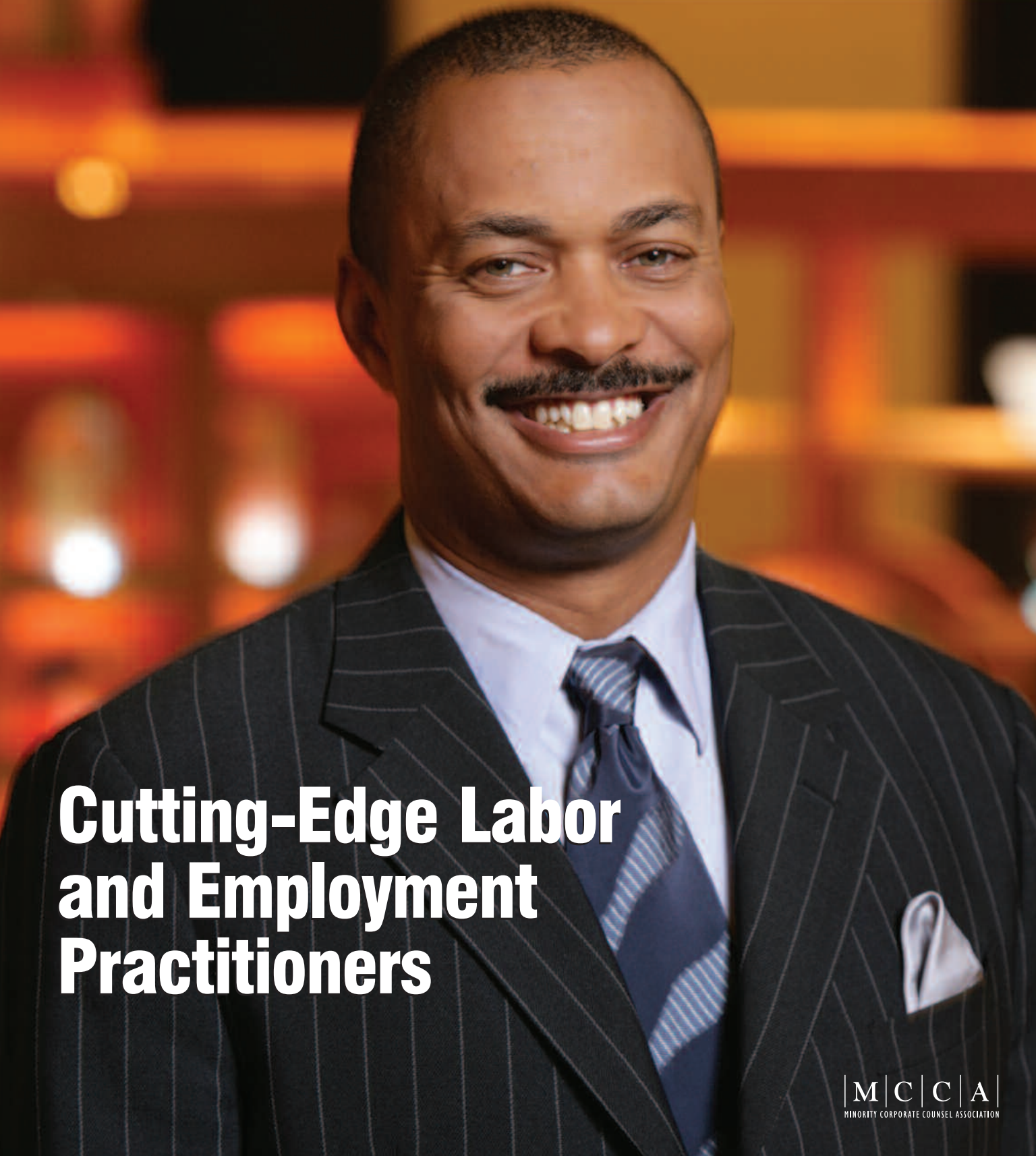


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# DIVERSITY & the Bar<sup>®</sup>



## Cutting-Edge Labor and Employment Practitioners

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MINORITY CORPORATE COUNSEL ASSOCIATION

# Cutting-Edge Labor and Employment Practitioners

By Lloyd M. Johnson, Jr.

**F**ifteen years ago, the landscape for labor and employment law specialists appeared very different than it does today. Labor and employment was not on the radar screen of anybody other than human resources professionals. Such cases were not on the front pages of newspapers or the topic of water-cooler chatter. Few in the legal community associated exciting, cutting-edge legal theories with labor and employment. As it pertains to risk, labor and employment did not represent a huge one in terms of legal liability or expense.

Today, all that has changed dramatically. State and federal regulations involving civil rights, whistleblowing, and wage-and-hour compensation have had dramatic effects on the types of lawsuits that are being filed. Labor and employment law is now of great concern to investor relations, corporate communications, and, therefore, the general counsel of all companies. An employment case involving alleged sexual harassment, age bias, or racial discrimination can adversely tarnish a corporation's image with the public, threatening to put a huge dent in a company's profits and in its corporate reputation. Today, the number of lawsuits has skyrocketed. Specifically, class action cases have the potential to seriously impact any company's bottom line. In fact, several high-profile alleged incidents have riveted the country, including the lawsuit that could include more than 1.5 million women alleging gender discrimination against Wal-Mart, which was certified last year.

With all these new issues, in-house counsel are more concerned than ever about finding those specialists who can make all the difference in a case that is going to trial—or, even better, stave off a lawsuit before it happens.

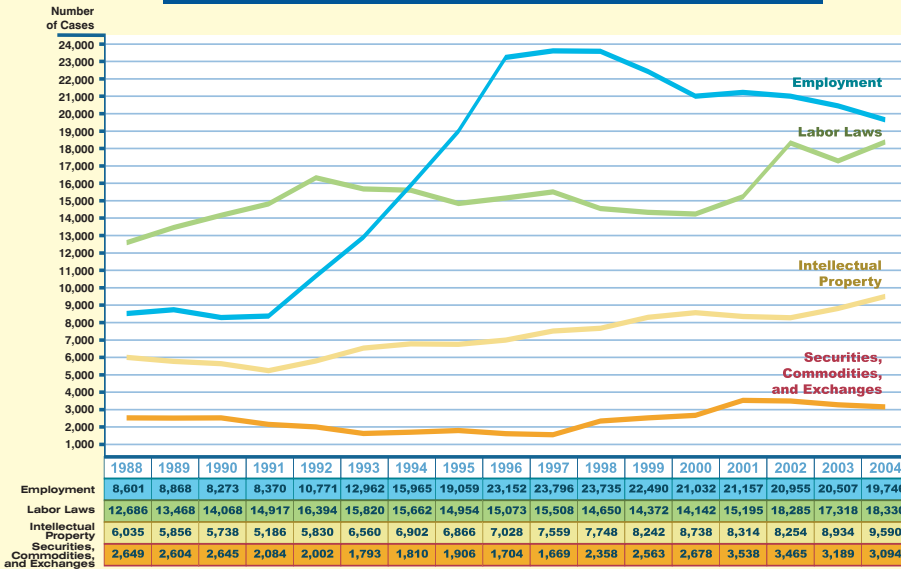
To identify the labor and employment lawyers who are today's superstars, the author reached out to those who know them best: the in-house counsel who call on them when they are in crisis mode and when they are looking to prevent lawsuits.



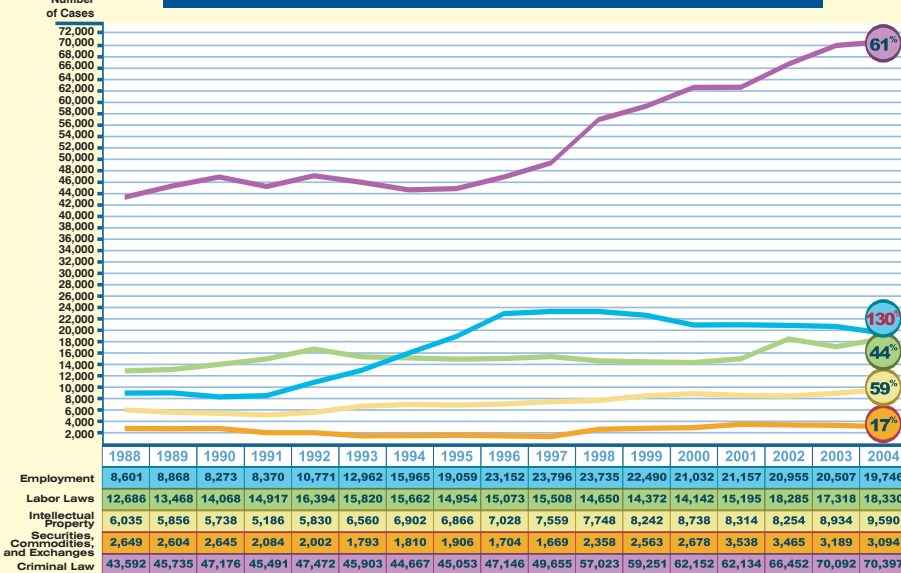


*(L to R): Lisa E. Chang of Beard & Chang LLC;  
Christopher P. Reynolds of Morgan, Lewis & Bockius  
LLP; and Elena R. Baca of Paul, Hastings, Janofsky &  
Walker LLP.*

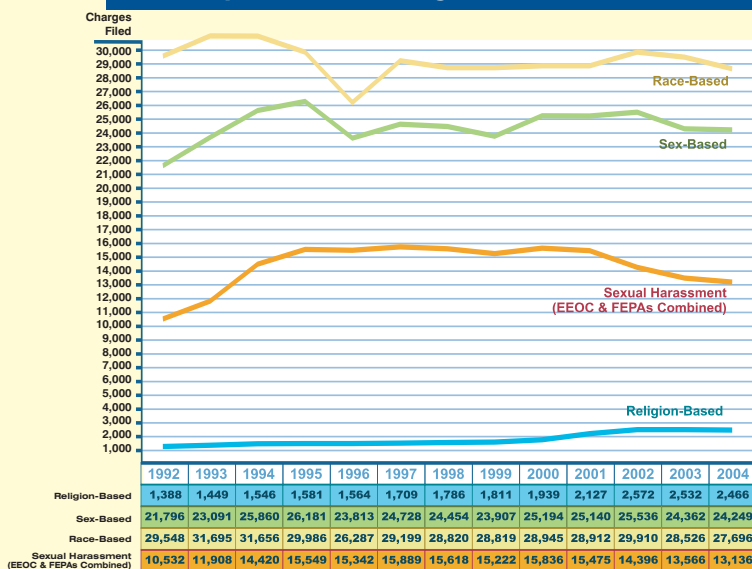
## Comparison of Civil Trends, 1988–2004



## Comparison of Percentage Increase, 1988–2004



## Comparison of Charges Filed, 1992–2004



## The New Drivers

A number of drivers have helped vault labor and employment closer to the top of the list of hot litigation areas for corporations around the country.

## The Influx of the Plaintiffs' Bar and the Growing Business of Class Action Lawsuits

After tobacco and asbestos cases slowed down, plaintiffs' attorneys began seeking new avenues and new potentially wronged clients. And following the approval of the Americans with Disabilities Act of 1990, Title VII of the Civil Rights Act in 1991, widely publicized sexual harassment allegations, the U.S. Department of Labor's new exemptions for white-collar employees and other federal regulations, plaintiffs' lawyers began to turn their attention to clients who had been wronged in the workplace.

"[A] tremendous uptick in employment cases coincides with two things that hit at about the same time, 1990–1992," says Christopher P. Reynolds, a partner in the New York office of Morgan, Lewis & Bockius LLP. "The Clarence Thomas/Anita Hill hearings made sexual harassment a part of the American lexicon, and the amendments to the Civil Rights Act allowed discrimination claims to go to the jury," explains Reynolds.

And as plaintiffs' attorneys began to consider more labor and employment cases, those lawyers brought a penchant for class action lawsuits with them.

"Various published studies show that in the last 10 years, the number of labor and employment cases being filed has increased. We have seen a dramatic increase in the number of traditional employment discrimination as well as

◀ Diagrams were created by Diversity & the Bar® using data provided by the Equal Employment Opportunity Commission. For supporting files, go to <http://www.eeoc.gov/stats/harass.html>, <http://www.eeoc.gov/stats/race.html>, <http://www.eeoc.gov/stats/religion.html>, and <http://www.eeoc.gov/stats/sex.html>.

In addition, statistics were excerpted from "Judicial Facts and Figures, Multi-Year Statistical Compilations of Federal Court Caseload Through Fiscal Year 2004."

wage-and-hour class actions,” says Elena R. Baca, chair, Los Angeles office of Paul, Hastings, Janofsky & Walker LLP. An active plaintiffs’ bar has also discovered new laws and regulations that many petitioners may not have known about before. “A number of plaintiffs’ firms that previously litigated securities or products liability class actions have moved into the labor and employment arena, taking those same large-scale litigation methods to employment claims. In addition, you find claims based on a variety of statutes, such as wage-and-hour statutes and unfair competition legislation that were not as actively litigated in the past,” says Baca.

Not coincidentally, settlement demands have skyrocketed as well. “It’s rare these days to have a plaintiff file an employment lawsuit and demand a ‘nuisance value’ settlement,” says Lu Pham, a partner at Lynn Pham Moore & Ross LLP in Fort Worth, Texas. Pham also conveyed that many plaintiffs’ lawyers have also brought their skill for personalizing cases to the jury, meaning those who defend employers must work harder to personalize their clients, the corporation.

## Sarbanes-Oxley and the Fine Art of Whistleblowing

The Sarbanes-Oxley Act of 2002 has had wide-ranging repercussions for corporate America. In the labor and employment field, Section 806, which deals with whistleblowing, offers protection to employees who file complaints with a “reasonable belief” that their employer has violated securities law. Employees who have filed complaints, and, subsequently, were laid off or suffered some other workplace dispute, have an added weapon in litigation against employers.

“Almost immediately, we began seeing Sarbanes-Oxley whistleblower claims, and they seemed to arise nearly every fiscal quarter,” says Baca, who points out that employers need to promptly take several steps in a whistleblower situation. That includes an immediate investigation of both the allegation of fiscal impropriety as well as the challenged employment decision, ensuring that managers and supervisors are sensitive to concerns of retaliation and placing the employer in the best possible position to avoid or defend against a claim.

Reynolds has also seen an increase in this area, but mostly in the form of tandem actions. “It has not been a huge gusher, but it has given the plaintiffs’ bar another cause of action,” he says.

## An Aging Population

As the baby boomers get older, many companies are bracing themselves for an increase in age-related disputes. A March 2005 U.S. Supreme Court decision helped both employees and employers in that regard. In *Smith v. City of Jackson, Mississippi*, the Supreme Court held that employees over 40 do not need to prove intentional discrimination to establish a claim. But while the Court held that the “disparate impact,” or unintentional discrimination, theory of recovery for cases brought under Title VII is also available under the Age Discrimination in Employment Act, it did note the scope of lia-

## Christopher P. Reynolds— Morgan, Lewis & Bockius LLP



“The Clarence Thomas/Anita Hill hearings made sexual harassment a part of the American lexicon, and the amendments to the Civil Rights Act allowed discrimination claims to go to the jury. And as plaintiffs’ attorneys began to consider more labor and employment cases, those lawyers brought a penchant for class action lawsuits with them.”

bility is narrower under the Age Discrimination in Employment Act than under Title VII.

“The demographics of the U.S. population reflect an increasingly older workforce,” says Andrew T. Hahn, Sr., a partner in the New York office of Seyfarth Shaw LLP. “Age discrimination cases are generally more difficult to handle because there are many competing interests, such as an employer’s desire to reduce salaries by hiring younger employees who would command a much lower salary.”

## Increased Scrutiny of the Hiring Process

When a class of about 1.6 million current and former female employees of Wal-Mart Stores Inc. was certified for sex discrimination in 2004, the court pointed to the “excessive subjectivity” of the hiring process, concluding that Wal-Mart had few requirements for hiring, evaluations, and promotions, allowing its managers considerable discretion with few objective standards on which to base their decisions. The sheer size of the potential class in *Dukes v. Wal-Mart* made many employers swallow hard, sit up, and take notice.

However, Reynolds sees several problems with this “theory of the year” for Title VII claims, as he dubs the excessive-subjectivity theory. In part, he says, the plaintiffs’ bar has yet to define what type of subjectivity is appropriate, rather than excessive.

The idea behind the excessive-subjectivity claim also operates on its own unpleasant bias, one Reynolds dubs as implying that white men cannot jump or hire, promote, or evaluate objectively. “It’s ironic it rests on its own stereotypes,” he points out. After all, the entire premise rests on the idea that white, male managers can only hire, promote, and evaluate other white men fairly; that hiring, promoting, or evaluating

### Elena R. Baca— Paul, Hastings, Janofsky & Walker LLP

“A number of plaintiffs’ firms that previously litigated securities or products liability class actions have moved into the labor and employment arena, taking those same large-scale litigation methods to employment claims. In addition, you find claims based on a variety of statutes, such as wage-and-hour statutes and unfair competition legislation that were not as actively litigated in the past.”



someone of a different race or gender is beyond the skills of that manager.

### When It’s Personal—and It’s Always Personal

Most people involved in litigation have trouble remaining dispassionate when they are on trial. “It’s true in all kinds of litigation that when people are challenged on the decisions they make, it’s personal,” says Baca.

But that can be especially true in labor and employment cases. “If you want to change someone’s life right away, fire them,” says Joseph J. Centeno of Obermayer Rebmann Maxwell & Hippel LLP in Philadelphia. For most people, their job is an inherent part of who they are. “When someone is let go, it changes their whole sense of self,” he says.

Lisa E. Chang, a partner at Beard & Chang LLC, Atlanta, recalls a situation where a potential client approached her to see about suing an employer for \$400 in commission that the employee felt she had been denied. Chang had to explain that the small amount of money involved was not worth the time or emotional expenditure for anyone, despite the employee’s belief that it was not about the money but the principle. “It can be difficult to manage on the plaintiff’s side,” Chang says of the emotions often involved in these types of cases. “People feel outraged.”

Juries also frequently empathize with plaintiffs in employment cases, however, feelings of empathy do not always carry through in, say, intellectual property cases. Most jurors, after all, have been employees and may have experienced or know of an individual who experienced some form of discrimination.

Pham agrees that sexual harassment cases are particularly emotional.

With all these factors coming to the fore, it is more important than ever for corporations to hire good outside counsel who can not only litigate employment cases, but can also advise companies on how to stay out of the courtroom.

### The New Core Competencies

As a new age of labor and employment dawns, new skills are required to meet the demands of the 21st Century. The best labor and employment lawyers have mastered all of the following skills:

- **Distill the Complex Into the Crisp and Clear—Quickly**  
In-house counsel seek outside counsel who can take a tangled issue and boil it down to the essence. Such a skill not only saves time for sophisticated legal experts such as in-house counsel, but it is an immeasurably valuable skill when dealing with the clients of in-house counsel: the business people. Business people are not interested in fine legal points and unnecessarily complicated theories—they need good, credible advice, and they need it sooner rather than later. “You cannot hide behind lawyerly mumbo-jumbo,” says Reynolds.
- **Avoid Litigation when Possible, But Be Willing to Fight the Good Fight**

Many labor and employment attorneys are attracted to the field because of the chance to litigate. But the best labor and employment attorneys know that many times, just offering an opening argument means they have failed their clients. “Most corporate clients want these cases over cheaply and soon,” says Hahn.

continued on page 29

### Lisa E. Chang— Beard & Chang LLC

Since launching her own practice, Chang has also found that representing plaintiffs as well as corporations has been good for her practice...

“I’ve been pleasantly surprised. They think, ‘You must know the enemy.’...I’m not committed to one side. I’m open to the merits of a case.”



But at the same time, a good labor and employment lawyer must be willing to go to the mat in a case, if necessary. “You really have to be ready to try it,” says Chang.

- **Know How to Peer Around Corners**

“I don’t always have my tough-guy litigation hat on,” says Centeno. “I’m also a counselor.” This job requires real, strategic, proactive thinking to head off lawsuits before they are even a blip on the radar. Unlike some litigators, labor and employment attorneys do not just ride in to save the day when a company is hammered with a lawsuit. More so than many other legal areas, labor and employment attorneys need to be able to think three or four steps ahead of any potential problems because these issues can be so tangled and sensitive. When contemplating a merger, companies need outside counsel who can advise them on the best ways to mesh benefits plans; when skyrocketing healthcare costs demand that a company’s benefits be reconfigured and there are collective bargaining agreements in place, those attorneys need to be able to help guide the company to a solution that is reasonable, fair...and will stand up to the legal challenges that are almost sure to follow.

- **Get a Life**

Since labor and employment is so personal, juries do not necessarily respond well to cold, calculating counsel—and neither does the opposing side. Peering deeply into human nature requires someone with life experience, who can relate to those who had to do the firing as well as those who were fired.

Since launching her own practice, Chang has also found that representing plaintiffs as well as corporations has been good for her practice—despite those warnings from some people who said corporations would not want her if she initiated lawsuits, rather than strictly defending them. “I’ve been pleasantly surprised,” says Chang. “They think, ‘You must know the enemy.’” Chang believes that it has also broadened her view of labor and employment. “I’m not committed to one side,” says Chang. “I’m open to the merits of a case.”

Labor and employment lawyers must be both tacticians and strategists—and they must understand the difference, says Gerald L. Pauling, II, a partner in the Chicago office of Seyfarth Shaw LLP. A tactician can brilliantly navigate the courtroom battle, planning a case with military precision. But a strategist keeps the client out of the courtroom by avoiding disputes before they ever happen. “Strategic thinking is something broader than, ‘What are we going to do in this particular case?’ It’s not focusing on which play to run next, but instead, on putting together a team and a staff and an overall game plan that puts us in the best position to win.” **DE**

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*Lloyd M. Johnson, Jr. is currently the vice president of national sales at Areté Legal in San Francisco, Calif.*

## The Best of the Best

At the request of *Diversity & the Bar*,<sup>®</sup> the author grilled in-house counsel from his personal network to find the labor and employment lawyers with a proven record for getting and keeping labor and employment issues where they belong—off the balance sheets and out of the spotlight. These practitioners were highly recommended by leading general counsel who seek their services in times of desperate need.

**Elena R. Baca**

Chair, Los Angeles office of Paul, Hastings, Janofsky & Walker LLP

**Joseph J. Centeno**

Partner, Obermayer Rebmann Maxwell & Hippel LLP, Philadelphia

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Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart P.C., Houston

**Curtis L. Mack**

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