EMPLOYMENT & LABOR LAW ROUNDTABLE

Sue M. Bendavid
Chair, Employment Practice Group
Lewitt Hackman

Veronica M. Gray
Partner & Chair of the Employment Practice Group
Nossaman LLP

Nicky Jatana
Shareholder
Jackson Lewis P.C.

Richard S. Rosenberg
Founding Partner
Ballard Rosenberg Golper & Savitt, LLP

Jennifer B. Zargarof
Partner
Sidley Austin LLP

As the legal landscape continues to evolve in terms of labor and employment, the Los Angeles Business Journal once again turned to some of the leading employment attorneys and experts in the region to get their assessments regarding the current state of labor legislation, the new rules of hiring and firing, and the various trends that they have been observing, and in some cases, driving. Below is a series of questions the Business Journal posed to these experts and the unique responses they provided – offering a glimpse into the state of business employment law in 2014 – from the perspectives of those in the trenches of our region today.

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'Social media has raised and will continue to raise ongoing issues for employers and employees alike. Social media has expanded the workplace beyond the traditional four walls and company-sponsored functions with respect to employment issues. It also will continue to be an essential component of litigation even if the core issue of the litigation is not the use or misuse of social media itself.'

NICKY JATANA

◆ In your view, in what ways has the labor and employment law landscape changed over the past ten years in our state? Have these changes benefitted or hindered California businesses?

ROSENBERG: For employers, the changes of the past decade have surely hindered business. The legislature and courts have been adding significant new employer obligations, both operational and financial, at a time when a great many businesses are struggling to stay afloat. Perhaps of most concern is the exponential growth in the number of class action and class-like representative actions filed under the California Private Attorneys General Act. According to recent statistics for 2013, these cases were filed at a rate of nearly 60 new cases a week. Companies have spent literally billions in settlements and, it looks as though this trend is going to continue.

GRAY: The growing complexity of legal compliance for employers and the substantial increase in employee rights has made it extremely challenging for employers from a legal and business perspective to do business in California. Also, each year, more and more employment-related legislation is referred to as a "job killer bill." The trend has been for employees to prevail with a host of new case law and statutory rights, which place added restrictions on every aspect of the employer-employee relationship.

BENDAVID: In the past decade, we've seen a dramatic increase in wage and hour disputes – both civil lawsuits filed in court and claims filed at the Labor Commissioner's office. More recently, there seems to be an increased focus on classification issues, such as independent contractors, exempt/nonexempt and interns disputing the methods in which they are paid (or not paid in that case). We're also seeing more challenges for employers with regard to disabled employees and claims for disability discrimination arising out of a claimed failure to accommodate. We've seen more leeway with respect to meal and rest breaks which have benefited businesses and employees by giving some limited flexibility and provided strength to affirmative defenses for penalty claims.

◆ What trends to you anticipate in the world of labor law over the next five years?

GRAY: My crystal ball suggests that there will be more enforcement efforts by agencies such as the EEOC, DOL, NLRB and OSHA. We can expect that the EEOC will focus on systematic harassment/discrimination and human trafficking; the DOL will continue to focus on the misclassification of employees as independent contractors or as overtime exempt; the NLRB will focus on enforcing employee rights under Sections 7 & 8 of the NLRA; and OSHA will focus on workplace safety issues. We can also expect continued efforts regarding immigration and health care reform. We will also likely see continued expansion of employee rights regarding leave laws, increase of minimum wage at the federal, state, and local levels, fewer restrictive covenants such as non-competes and non-solicitations of customers and employees, efforts to expand "ban the box" to the private sector and limit criminal background and credit checks, continued expansion of LGBT rights. We can expect greater flexibility in work hours and benefits as well. Lastly, technology will continue to transform the workplace. This will continue to create a host of issues including (but not limited to) wage and hour, privacy, social media, data security, confidentiality, telecommuting, and safety issues.

ROSENBERG: One of the hottest issues to be resolved in the next five years is the extent to which employers can use mandatory workplace dispute arbitration policies to fend off class action litigation and collective action litigation under the California Private Attorney General Act. We also anticipate some reshaping of the wage and hour laws to take into consideration the proliferation of non-traditional work engagements such as employees working at home or from remote locations using technology. Most people these days would admit to being "tied" to their smart phones, often checking for messages during non-work hours. Should such activity be compensable? These are just the few of the types of questions that are likely to be addressed in the next five years.

◆ What are your clients most worried about in terms of emerging legislation?

BENDAVID: Complying with labor laws is becoming increasingly difficult for employers. With new penalties (both criminal and civil) there is more pressure than ever on business owners to ensure they're paying properly and have the records to prove it. Clients are also worried about being falsely accused of discriminating against employees based on the expanding list of protected categories in the Fair Employment and Housing Act (FEHA), or retaliating against employees in violation of Family and Medical Leave Act (FMLA), California Family Rights Act (CFRA), whistleblower, and other laws. Employers are devoting more resources on employee relations, hiring effective HR personnel and engaging labor counsel just to keep up.

ROSENBERG: Our clients are most concerned about any legislation that would add direct cost or administrative burden over and above what exists today. The list of the protected classes for anti-discrimination legislation has grown over the years and adding to that list creates potential liability and risk of lawsuits that have to be defended, regardless of their merit. With all of the discussion about income and equality, it seems that balance will continue to be tipped in favor of creating more employee protective legislation in the future.

GRAY: The continuation of "job killer" bills and the complexity of the new laws that make compliance unnecessary convoluted, complex and expensive is worrisome to employers in California.

◆ How serious a legal issue is social media in the workplace?

ZARGAROF: It ranks somewhere between serious to extremely serious, depending on the employer, but all employers should be paying attention to these issues. The focus on social media in the workplace is 100% well deserved and, if anything, more attention is warranted. There are few areas where so many laws and workplace policies intersect – employee privacy; employer confidentiality and trade secrets; advertising, publicity and Fair Trade Commission issues; harassment and discrimination; collective action rights and National Labor Relations Board; and so on. Employers have industry-specific concerns (patient privacy/HIPAA in healthcare, customer confidentiality issues in retail, securities regulation in financial services, to name just a few) but all employers have competing interests and legal rights/obligations to balance. In light of the frequent legislative, administrative and judicial action in this area, employers should be looking at their social media and all related policies on an annual basis.

JATANA: Social media has raised and will continue to raise ongoing issues for employers and employees alike. Social media has expanded the workplace beyond the traditional four walls and company-sponsored functions with respect to employment issues. It also will continue to be an essential component of litigation even if the core issue of the litigation is not the use or misuse of social media itself. Often times individuals involved in litigation will have engaged in some use of social media which provides evidence related to claims or damages involved in employment litigation.

BENDAVID: Social media and new technology raise many concerns. An employee's public remarks could seriously damage business and negatively impact your reputation. Additionally, employers are frustrated by how social media in the workplace affects productivity. It also impacts liability. We've defended harassment and discrimination cases where public postings are used both to support and defend claims. Going further, employers should be concerned with whether employees are using smart phones and devices when operating dangerous equipment or driving company vehicles. It's best to have a social media policy in place, and all employees should be aware of that policy. In preparing policy, consider a variety of legal issues, including employees' rights to engage in lawful conduct away from the workplace, and employees' rights to discuss the terms and conditions of their employment with co-workers, among others.

◆ How are technologies such as "find my device" applications, Google Glass and

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'Most employers already treat "bullying" behavior as serious under their harassment, code of conduct, workplace violence and other behavior rules. So, it is not truly new. However, there are new legislative proposals each cycle that suggest additional legislation is coming in this area. Employers who respond pro-actively to employee issues are ahead of the curve.'
JENNIFER B. ZARGAROF

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Blackphones going to impact the use of devices in the workplace? What issues must employers be aware of with employees using these and other devices?

ROSENBERG: With the advent of such new technology, the legal issue is the right to privacy and whether these technologies impermissibly invade that right. Years ago, California voters amended the state Constitution to add a specific right of privacy to protect all citizens. Since then, courts have been struggling to provide guidance as to when privacy rights are impermissibly implicated. We saw that some years ago in the cases involving workplace drug testing. We recommend that employers advise employees about the technology because a number of court cases have held that with such advance warning, employees cannot claim a privacy violation. It is also advisable from a morale perspective. Otherwise, the company is apt to develop a "big brother" mentality, which is sure to be a drag on employee morale.

BENDAVID: The right of an employer to control its workplace and protect its interests, and the right of an individual to privacy will always be at issue with new technology. Google Glass in particular raises questions about the wearer's ability to surreptitiously activate a camera. What happens if someone records an employee using foul language, or engaging in other activity that may be harmful to the company or other employees? Possibly worse, what if the wearer captures images of confidential employee files or the ingredients of a secret recipe? How do you protect against identity theft or trade secret misappropriation? These are all issues that must be taken into consideration when preparing policies and implementing company procedures.

JATANA: Emerging technologies will continue to challenge employers. The news has been buzzing with applications and devices that can be used as beneficial tools for a business. However, along with the benefits, employers must grapple with privacy related issues, data security, data retention and management issues these new devices and technologies bring to the workplace. For example, if an employee uses his or her own Blackphone for business as well as personal use, an employer may not be able to access company-related data or information when needed for business or litigation because of its encryption capabilities. Similarly, employers considering the use of "find my device" applications (with some bells and whistles) when employees fail to return company devices after their employment ends, may overstep when the application automatically takes a photograph of the person in possession of the device. Employers should carefully review the intended business purpose and use along with privacy, data security, and management issues these devices and other technologies present.

◆ Although there are no state laws specifically prohibiting workplace bullying, it's an issue that has received some media attention. Is this something that employers need to keep an eye on or is it much ado about nothing?

ZARGAROF: In a sense, it is a bit overblown while simultaneously worthy of attention. Most employers already treat "bullying" behavior as serious under their harassment, code of conduct, workplace violence and other behavior rules. So, it is not truly new. However, there are new legislative proposals each cycle that suggest additional legislation is coming in this area. Employers who respond pro-actively to employee issues are ahead of the curve. Therefore, all employers should make sure they have robust internal complaint procedures and follow up with employees who raise issues of mistreatment that could qualify as bullying.

BENDAVID: Bullying is a serious issue and can lead to a variety of claims, including workers compensation and unlawful harassment (hostile work environment). Not only does bullying impact productivity, it also leads to lawsuits. When workers are verbally abusing; threatening, humiliating or intimidating; and interfering with another employee's duties, you have a serious issue that needs to be resolved promptly. Previously, if someone gave an employee the silent treatment, or engaged in other nonverbal bullying tactics like hostile staring, sometimes the problem was ignored, and sometimes it lead to a visit with an HR rep. Now it leads to a trip to court.

JATANA: Employers absolutely should keep an eye on workplace bullying. Not only can workplace bullying be extremely disruptive to the work environment, more often than not, it has a negative impact on productivity, retention, recruitment, work quality and workplace stress related claims, to name a few. Additionally, depending on the type of conduct at issue, it has the potential to also escalate to unlawful harassment or discrimination.

GRAY: Although there is no current federal or state law expressly prohibiting workplace bullying, many states have introduced legislation that would make workplace bullying illegal. Bullying can be equal to or worse than unlawful harassment and discrimination; it can also lead to employer liability under claims of harassment, discrimination and retaliation. There is no bright line test when bullying becomes harassment or discrimination. Thus, employers should consider implementing anti-bully policies and identify "bullying" as prohibited conduct, which could lead to immediate termination. On the other hand, an employer also needs to keep in mind that the "bully" may suffer from psychological problems and has rights under state and/or federal disabilities laws.

◆ What can businesses do to remain up-to-date with ever-evolving employment law trends?

JATANA: We recommend employers partner with their employment counsel each step of the way much like they do with their human resources professionals. Keeping abreast of employment law developments that impact an employer's industry and business is key to compliance.

ZARGAROF: If resources were not an issue, in-house lawyers and human resources professionals would have all the time they needed to attend seminars, read articles, scour the blogs and stay on top of every development. Of course, resources are a major issue for most companies and the ideal is not often realistic. I have always found that a good handbook review once a year helps surface any developments that may have otherwise been missed. Most significant changes affect at least one policy and the overall discussion should be broader than just what is in black and white. This can be done inexpensively and is a great complement to attending at least one update seminar a year.

GRAY: Although there is no true replacement for hiring employees or outside consultants who are qualified and experienced in the field of human resources and engaging outside counsel when appropriate, there are many organizations that provide current information on employment laws. For example, the California Chamber of Commerce recently released two (2) free mobile apps that can help employers stay informed about changes to California employment law: Alert Mobile App which provides timely coverage of proposed California employment laws and regulations and updates on major court decisions, ballot measures, and legislative vote records; and HRWatchdog Mobile App which highlights changes to federal and California employment law, as well as HR trends and other news.

BENDAVID: It may seem impossible to keep up with California employment law, but there are some relatively easy ways to do so. First, many attorneys offer complimentary seminars at their own firms, bar associations, Chambers of Commerce, employers groups, or via webinar. Second, you can follow California employer attorneys on LinkedIn, Twitter, Facebook, etc. They'll often post updates on the latest court rulings, and changes in labor law. Third, subscribe to blog feeds regarding employment law, look for items in the business section of newspapers, or on human resources websites. Last, make sure you have a good HR team, and/or a good employment attorney. These are the people whose job it is to keep up.

◆ What is one of the most important things employers should do to prevent a lawsuit from occurring?

ZARGAROF: Focus on good separations. Even the wage and hour cases about meal periods, pay stubs, regular rate calculation and the like almost always start with an employee who felt mistreated on his or way out the door. Terminations are a normal part of business but employers can do a lot to soften the blow and avoid the lawsuit. Well-communicated and user-friendly procedures for raising concerns are key. Many issues get resolved through these procedures and leave the employee feeling positive and valued. Likewise, showing

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RICHARD S. ROSENBERG

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sensitivity and respect with the logistics (like allowing the separated employee some say with how and when to retrieve his/her personal items instead of an embarrassing escort out the building in front of the now former colleagues) can also go a long way. If all else fails, consider buying peace with a separation agreement and release when you know there is a potential problem.

JATANA: One of the most important things an employer can do is to embrace issues internally before an employee feels the need to seek outside legal assistance. An employer that faces few employment claims usually has a good human resources department and its management is trained and ready on how best to address day-to-day employment issues. Of course, this alone will not prevent a current or former employee from filing a lawsuit. Generally, however, if these practices are in place and there is good documentation of actions taken and issues that have been addressed, employers will position themselves to appropriately defend against litigation.

BENDAVID: Employers cannot "prevent" all lawsuits. They are an unfortunate reality in California and are often without merit. But an employer can certainly reduce the likelihood of being sued and to help defend if they are. Document everything. Before firing an employee, make sure you have legitimate (lawful) reasons for doing so, and that the reasons are on record. A good termination is one that does not come as a surprise to the employee. Make sure your company policies are clearly written and understood, whether you're outlining how commissions are to be paid, who is entitled to certain leaves of absences, or what the dress code is. If an employee makes a complaint, make sure to fully investigate the matter and record the findings. Properly worded emails, signed letters and interoffice memos are absolute musts.

ROSENBERG: Management training is key. The employment laws are complex and often counter intuitive. Additionally, California law holds a business responsible for the acts of its people managers, regardless of their intention. This is called "strict liability." If risk management is the objective, then training is the key. All persons with people management responsibility should be exposed to a wide array of employment law training so that these individuals do not inadvertently say or do things that violate the employment laws. Many a case has been made by simple mistakes by people managers who are not educated in how their behavior was at odds with the law. Since employment litigation can be very expensive, often costing several hundred thousand dollars, we recommend that employment termination decisions be reviewed with counsel.

◆ What are some legal issues that companies overlook during the hiring process?

BENDAVID: Don't let inexperienced personnel handle the hiring process. Your managers should know what questions can and can't be asked, how to investigate credentials without invading privacy, and the procedures necessary for criminal background checks, drug testing, etc. Have the manager focus on the "KSAs" – the "knowledge, skills and abilities" of the applicant. Once you have chosen a candidate, send her or him a well-written offer letter that confirms the terms of employment, including "at-will" (if hired at-will), job title, duties, pay and benefits. We often use offer letters to defend post-termination claims. They help establish what was promised, what was expected, and how the employee failed to meet expectations.

JATANA: While many employers conduct background checks of applicants, it is easy to run afoul of the technical requirements of the Fair Credit Reporting Act as well as California's and other states' requirements when doing so. Aside from specific notice and consent requirements, the type of information and the length of time during which information can be requested and then actually considered during the hiring process can vary from state to state and also under federal law as well as position to position. The information that one employer may obtain and consider for a particular position may not be the same for another employer or another position.

ZARGAROF: There are a number of easily overlooked issues and they are almost all found in the documents. As the saying goes, the devil is in the details, and I am seeing increased litigation over a single question or statement on a form. After the lawsuit comes, the company realizes no one has read the standard documents for compliance issues in years. It is critical to have a periodic review of hiring-process forms such as the application itself, background check disclosures, notices regarding drug testing or medical examinations and related paperwork. The legal landscape as to criminal records and background checks has changed most significantly with not only private suits but also investigations and enforcement actions by the Equal Employment Opportunity Commission (EEOC) and others. An hour or so of attorney time could spot an issue that is otherwise inviting a class action filing.

◆ What are some legal issues that companies often overlook during a layoff or termination process?

BENDAVID: When laying off employees, it's important to have a documented plan in place. Establish criteria for letting workers go: will layoffs be dependent on experience, job performance, disciplinary history, or for other reasons? Before proceeding, ensure documentation supports your decision for each individual. Avoid laying off an employee merely because of a manager's personal dislike for that person, if possible. Larger companies may need to comply with California and federal WARN Acts – providing at least 60 days' written notice to affected workers and certain governmental entities. Apply the same rules to terminating an employee: your criteria should already be established via a company handbook, and you should be able to demonstrate your reasons for firing someone with documented facts.

ZARGAROF: I most often see a "miss" in the context of employees who are terminated at the end of a leave of absence. Managers and human resources professionals are often on top of the various leave laws and related company policies but fail to consider whether additional leave is warranted as a reasonable accommodation under the disability laws. Missing that last step of the separation analysis can be a sure way to face a failure to accommodate claim.

ROSENBERG: If you are laying off more than 50 employees or closing a facility where more than 50 employees will be affected, then you must comply with applicable federal and state WARN regulations for providing 60 days advance notice (or pay in lieu thereof) to the affected employees. There are also notifications that must go out to the state employment agencies as well. If you are contemplating obtaining a separation agreement (with a release) then certain language must be included for older workers (including statistical information regarding the impact of the layoff where it is a group termination) or the release agreement will be invalid as to any claims of age discrimination under the Federal Age Discrimination and Employment Act. It is also very strongly recommended that you review this statistical impact that the contemplated layoff will have on the company's workforce EEO statistics.

JATANA: It is not uncommon for employers who are new to California or who predominantly have operations outside of California to unintentionally violate the California Labor Code requirement to provide an employee his or her final paycheck upon termination or within 72 hours of a voluntary termination. Notably, California considers accrued but unused vacation or paid time off (PTO) to be wages and thus, are also due upon termination. Failure to comply with these requirements could subject the employer to what is called waiting time penalties which is a day's pay for each day the employer did not timely pay the employee (upon termination or within 72 hours, as appropriate), up to a maximum of 30 days of pay.

◆ What kind of activity can we anticipate from the NLRB now that there is a full quorum?

GRAY: The National Labor Relations Board has made it clear (even without a full quorum) that policies that interfere with an employee's right to engage in concerted activity or could have a chilling effect on the exercise of those rights - whether or not the employees are represented by

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VERONICA M. GRAY

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SUE M. BENDAVID

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a union - will be found to violate the NLRA. In addition to scrutinizing social media policies, this has resulted in the Board reviewing employer handbooks, policies, procedures, and various types of agreements to determine if they violate Sections 7 & 8 of the Act. For example, it was recently held that an employer's confidentiality rule prohibiting the discussion of "financial information, including costs" and "personnel information" could be reasonably construed to include preclusions against employee wage discussions outside of the company. Likewise, civility, anti-harassment and abuse, and non-disparagement policies are targeted if they require respectful, courteous, or civil behavior. Another critical area is arbitration agreements. The Board is taking the position that employees cannot waive their rights to deal with matters on a class, collective or group basis, such as through a class action in court. Most courts disagree with the Board and a recent Fifth Circuit decision against the Board may trigger a request for review by the U.S. Supreme Court.

ROSENBERG: According to recent statistics from the US Department of Labor, fewer than 5% of the private sector employees in the US are union represented. That will change in all likelihood if new regulations promulgated by the Obama NLRB get passed. These rules will make it easier for union to organize and harder for employers to challenge those efforts. In addition, the NLRB is reviewing a number of its prior rulings seeking to expand union and employee rights.

◆ Is the NLRB really a threat/challenge for non-union California employers?

JATANA: Yes. The NLRB should not be taken lightly or simply ignored because an employer does not have a unionized workforce. Aside from traditional union organizing issues, employers should be mindful of issues related to social media and class action waivers in arbitration agreements. Both of these latter issues can greatly impact non-unionized employers to the extent they may chill an employee's right to engage in protected concerted activity as set forth in Section 7 of the National Labor Relations Act.

ROSENBERG: The National Labor Relations Board was created to administer the National Labor Relations Act in 1935. Most people understand that law to govern union-management relations. Few understand that the scope of the law goes far beyond that. Under the Obama administration, the NLRB has attempted to become increasingly relevant to the non-union workforce by making sweeping rulings having nothing whatsoever to do with the traditional union-management relations. The NLRB has issued rulings outlawing various employer policies and practices such as those dealing with social media, mandatory arbitration of workplace disputes and the right of employees to openly criticize their employer and management team through public media sources. In addition, the NLRB is considering rule changes that will make it far easier for unions to organize.

GRAY: The NLRB is using a very broad brush without taking into account the practical impact its decisions and approach is having in the employment arena. However, it is doubtful that the NLRB will be changing its approach in the near future. Employers with overly broad or ambiguous policies and agreements risk the scrutiny of the NLRB (as well California and federal laws). Employers should conduct a self-audit and decide which policies and agreements should be revised and clarified.

◆ With all of the wage and hour and class action cases being reviewed by the California Supreme Court, where is this type of litigation heading? What should employers focus on in terms of best practices to defend against these claims?

ZARGAROF: Predictions of the death (or at least the trickling away) of wage and hour class actions arise almost every year yet the cases keep coming. My view is that the end is still not in sight. For every question answered by an appellate court, there are dozens of lawyers (in California in particular) who come up with ten new questions and theories that keep these cases going. Employers should of course be in the best position to win by using wage/hour audits and compliance monitoring to have the best policies and practices in place. When they do get hit with a lawsuit, there is no substitute for out-thinking and out-working the other side. Know when to fight (nothing scares off a plaintiff's lawyer like a ruling already against them from a prior case) and know when to settle and fix the issue to avoid getting hit again.

GRAY: The California Supreme Court will address the issue of class actions when it renders its opinion in *Iskanian v. CLS Transportation*. Oral argument was in early April 2014 and a decision should be issued later this year. The Court will address whether another case [*Gentry v. Superior Court*] which discussed the unconscionability of mandatory, pre-dispute arbitration agreements with class action waivers, survived the United States Supreme Court's decision in *AT&T Mobility v.Concepcion*. *Iskanian* will also decide whether *Concepcion* trumps the California statutory right to bring representative claims under the Labor Code Private Attorneys General Act of 2004. The defense of wage and hour actions can be complicated and strategically sensitive. As a practical matter, the best defense is for employers to audit their wage and hour policies and procedures to ensure they are in compliance. This may be easier said than done but it is something every employer should put on its bucket list.

ROSENBERG: I don't really think class action wage and hour cases are going away any time soon. In fact, claims under the California Private Attorneys General Act (which do not require strict adherence to class action rules) are growing. Employers need to be proactive in reviewing company policies and practices, such as wage and hour practices that could be subject to a class action or collective action type claim. The time to do so is now before a claim is filed. However, employers have to be very strategic about how to implement changes.

◆ Are class actions/representative actions alive and well in California?

ROSENBERG: Yes. Even if California courts

approve the right of an employer to ban class allegation in a workplace arbitration agreement it is unlikely that representative claims under the Private Attorney General Act will suffer the same faith any time soon.

BENDAVID: In my experience, meal and rest break class actions as well as other class action litigation suits have been on the rise for the last decade. Trial courts are more readily granting class certifications when there is either a lack of policy or when there is a defective policy that is in violation with the law, regardless of the difficulty in establishing individual damages for employees. Many plaintiffs' attorneys are using company-wide policies and practices to argue for class certification of an entire group of affected employees. It's best for employers to retain an attorney to periodically review and revise workplace policy.

GRAY: Although many thought that the California Supreme Court's decision in *Brinker* (the infamous meal and rest break saga) would be the death knell for class action certification in California, that has not been the case based on recent California Court of Appeal decisions. Indeed, class action wage and hour complaints have proliferated and many are getting certified. However, others are being denied. Moreover, class action waivers in arbitration agreements also need to be taken into consideration. Thus, to some extent the tide has turned. *Concepcion* was a sea change for the California Supreme Court, which has been hostile to arbitration agreements that limit a plaintiff's ability to pursue a class action. Thus, arbitration agreements containing class action waivers have been upheld requiring plaintiff employees to proceed as a single plaintiff in arbitration instead of in court via a class action. However, earlier this year, the California Supreme Court reminded us that arbitration clauses may be invalidated if they are unconscionable. *Iskanian* will further address the viability of arbitration agreements waiving class and representative actions and how the U.S. Supreme Court precedent affects California's legal landscape.

◆ Do California employers need to be concerned about the EEOC and DOL enforcement initiatives?

BENDAVID: Employers are seeing more pressure at both the federal and state level. The Department of Labor increased investigations significantly over the past few years, even putting employers with no history of labor violations under the microscope. The DOL's conducting both unannounced and directed investigations, and asking

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Congress for a marked increase in budget and staff to do so, while cutting resources in employer compliance assistance departments. The Equal Employment Opportunity Commission approved a new Strategic Enforcement Plan last year, which actually set quotas for enforcement and litigation activity. California's governing agencies are also cracking down with criminal penalties, liens on property, and making it more difficult to recover attorney fees and court costs when an employer prevails in litigation.

ROSENBERG: Under the Obama administration the EEOC and the DOL are becoming increasingly aggressive. These agencies have wide ranging investigatory powers and the power to subpoena records. DOL can also seize goods and stop production where manufacturing is not conducted in compliance with the labor laws the agency enforces. Employers are wise to pay close attention to these agencies pronouncements because they show the enforcement priority of the agency.

◆ Are discrimination/harassment claims a "thing of the past?"

JATANA: No. We continue to see harassment and discrimination cases regularly. The state and federal agencies (California Department of Fair Employment and Housing and the Equal Employment Opportunity Commission) tasked with the administration of these claims also continue to report steady claims of discrimination and harassment. In our practice, we have seen an increase in disability and age-related discrimination and harassment claims and we also continue to see race, gender and sexual harassment as well as the other protected categories.

BENDAVID: Discrimination and harassment claims seemed to have taken a back seat to wage and hour litigation over the past several years, but it is not likely to last long. We're seeing more and more litigation in California regarding discrimination against workers with religious grooming or dress, and other claims. Now that bullying is forefront in the media, we're expecting to see more of that be presented as evidence.

ROSENBERG: The civil filing sheets demonstrate that discrimination and harassment claims are ever present and more and more of these cases are being filed each year. Employers need to stay proactive and take the necessary steps to ensure that both the management team and employees alike understand the employee's rights and the company's obligations under the federal and state anti-discrimination/harassment laws.

ZARGAROF: These claims are not a thing of the past for anyone with employees. Wage/hour class actions stole the headlines from individual claims of harassment but the cases never went away. To the contrary, I see more wage/hour cases (individual and proposed class) where the plaintiff alleges harassment/discrimination claims as well. Likewise, an increasing number of plaintiff-side firms are investing in class and pattern/practice claims on behalf of large groups of employees. A more recent development is the changing relationship between the accuser and the accused—more cases involve claims by men, claims by and against people of the same gender (regardless of the sexual orientations) and by employees at all levels of seniority in the organization. Having the right policies and procedures in place for preventing and correcting possible issues of harassment or discrimination remains critical for all employers.

◆ How about trade secret/confidential information protection in the employment arena – is that a thing of the past?

ZARGAROF: Clearly no. Since the old image of an employee leaving with a box full of documents has given way to thumb drives, clouds and other electronically stored information, the logistics for protecting information has changed. The interest in doing so, however, has not. Many of the legal principles have remained the same; only the practical implications have changed. Well-drafted agreements and a strategy for enforcing them still allow employers to protect their trade secrets and confidential information, even in California where employees are almost always free to defect to a competitor.

GRAY: This question raises several issues. First, employee mobility and the evolution of the digi-

tal and mobile world have increased exponentially the risk of employee trade secret/confidential information theft. Employees can steal/misappropriate company trade secrets simply by using a smart phone, their own mobile/personal devises, web-based personal email accounts, USB drives, or by uploading the data to a community or public cloud. Due to the lack of adequate security, all of this can be done without the employer being alerted. Given an employer's responsibility to be pro-active in protecting company trade secrets, some things an employer can/should do include: (1) implementing specific policies governing the use of personally owned devices, third-party applications, and private cloud computing systems; (2) having the right IT team to identify and implement the appropriate safeguards/software to permit the use of mobile devices while at the same time providing security measures to protect the data; (3) limiting access on an "as needed" basis; (4) investing in remote data-wiping technology to avoid inadvertent loss of data; (5) installing software applications to monitor/detect unauthorized computer traffic; (6) limiting the installation of third-party applications or devices; (7) implementing a "bring your own device to work" policy; (8) and developing a comprehensive on-boarding, off-boarding and exit interview to ensure all company data is returned. Second, due to technology, trade secrets can easily lose their protective status by employers not taking sufficient safeguards or due to the proliferation of the exchange of information on LinkedIn, Facebook, or other publicly available databases. Data that was once considered confidential inadvertently becomes part of the public domain. Thus, confidential information may easily be accessible by going to Google. Additionally, failing to require customers to sign software licensing agreements or confidentiality agreements and allowing the transfer of software freely from one computer to another one, or failing to change default passwords in the software can destroy trade secret status. Third, the climate in California creates substantial risk for employers who seek to utilize non-compete clauses as part of an employment agreement. Unless a covenant not to compete is covered by one of three statutory exceptions to protect good will in the sale or dissolution of a business, it is invalid. If a court concludes that such a clause is invalid, the employee may have a tort claim against the employer. Thus, the issue is whether the commonly used post-termination restraints on solicitation of customers and employees are enforceable as "trade secret exceptions" or invalid restraints on trade. Currently, state and federal courts in California are currently divided on whether the trade secret exception still exists. Thus, this is an area in which employers need to proceed with caution when drafting employment and confidentiality agreements and identifying and protecting their trade secrets.

ROSENBERG: Trade secret/confidential information protection is not at all a thing of the past. While California law vigorously protects the right of a former employee to compete with his or her former employer, the law also protects the right of a business owner to ensure that its trade secret and proprietary confidential information is not misused by existing or former employees. To that end, employers of all kinds with protectable intellectual property and other trade secret information should take aggressive action to take the step necessary to protect its valuable trade secret and proprietary information.

◆ How does a law firm specializing in labor and employment differentiate itself from the competition?

ZARGAROF: By using the lawyers' experience to be efficient but to throw away the cookie-cutters and see why every case is different. We have had to rescue cases after certification and other bad rulings under another firm's care. The diagnosis is always the same – failure to develop a truly case-specific (and employer-specific) strategy from the outset. As for advice and transactional work, the key is to look at the whole business context and provide sound practical guidance along with the legal advice.

GRAY: In addition to having the expertise in labor/employment law, law firms/attorneys must have an individual commitment to positioning themselves as strategic partners with the client, demonstrate an understanding of their business and appreciate the importance of working with clients to identify, understand and implement their goals. A law firm and its attorneys need to strive to consistently exceed their clients' expectations.