LABOR & EMPLOYMENT

The Labor & Employment panel is produced by the L.A. Times B2B Publishing team in conjunction with Ballard Rosenberg Golper & Savitt, LLP; Faegre Drinker; Fisher & Phillips LLP; and Michelman & Robinson, LLP.

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After the many unprecedented operational changes that businesses in every sector had to make last year, a whole new landscape has emerged in terms of labor and employment issues. This has left even the most seasoned human resources and C-suiters struggling to find answers to crucial questions.

Are the changes that have emerged over the last 14 months trend-driven or here to stay? What should management be focusing on in terms of new standards and laws pertaining to employee relations?

To address these issues and concerns, as well as many other topics pertaining to "the new normal," the Los Angeles Times B2B Publishing team turned to four uniquely knowledgeable experts for their thoughts about the most important "need to know" insights and to get their assessments regarding the current state of labor legislation, the new rules of hiring and firing in the wake of the pandemic crisis, and the various trends that they have been observing in general.

Q: WHAT WERE THE MOST MEANINGFUL CHANGES TO LABOR AND EMPLOYMENT LAW AND POLICY IN 2020?

A: Rosenberg

My top three: (1) Assembly Bill 5 completely changed the rules on who can be legitimately classified as an independent contractor in California; (2) the expansion of California's Family Rights Act to employers with just five or more employees (used to be 50); and (3) the new Pay Data Reporting law that requires larger employers (100+ employees) to furnish the government and the public with detailed pay data broken down by gender, age, ethnicity and race which can be used as evidence for discrimination lawsuits against the employer.

Q: AS WE MOVE DEEPER INTO 2021, WHAT ARE THE LABOR LAW HOT ISSUES TO BE AWARE OF?

A: Scherwin

Given the continued rise in litigation, particularly PAGA claims in California, wage-hour compliance continues to be the hottest issue and biggest challenge. Specifically, compliance with meal/rest period laws, providing compliant wage statements, and ensuring that employees are paid for all hours worked remain hot topics and the source of continued lawsuits.

Q: FOR ORGANIZATIONS WHO HAVE UNDERGONE FURLOUGHS AND LAYOFFS DUE TO COVID-19-RELATED CHALLENGES, WHAT ARE SOME OF THE LEGAL CHALLENGES TO CONSIDER?

A: Kravetz

Reintegrating employees can trigger significant legal challenges to the extent the process requires employers to determine who to bring back into the workforce and when. The concern is that this determination can lead to disparate treatment or impact claims brought by individuals in protected classes—think race, ancestry, religion, age, disability or sexual orientation, to name a few. To mitigate the potential for litigation, every employer contemplating reintegration should ask, "Will my rehiring decisions have a disproportionately negative impact on a protected class of employee?" If the answer is yes, the employer should certainly reconsider its proposed actions. Also, to combat these types of claims in a preventative fashion, employers need to document in writing their rationale for resuming operations and their particular employee selection criteria.

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–Todd B. Scherwin

A: Rosenberg

As companies plan for the resumption of more normalized operations, management must ensure that the company is fully compliant with the array of newly enacted worker protection laws that offer laid-off employees the legal right to be recalled to their former jobs or to any open position for which they could be trained. The City of Los Angeles law has cumbersome advance notice and paperwork requirements and allows workers to file suit for lost wages and benefits and their attorney's fees if the company does not comply.

A: Scherwin

There are many, but probably the biggest challenge is navigating the process of which employees you are asking to return to work, and if you aren't asking certain employees to return but instead hiring new ones, whether that creates the appearance of discrimination. As an organization, you should consider any of the local laws that have been enacted that may be relevant on recalling employees from furlough along with general discrimination laws like California's Fair Employment and Housing Act.

Q: WHAT ARE SOME CONSIDERATIONS FOR EMPLOYERS IN TERMS OF MANAGING AN INCREASINGLY REMOTE WORKFORCE?

A: Benyamini

An important consideration is the employer's compliance with onerous wage-and-hour laws in California for non-exempt/hourly employees, so employers should not be lax about ensuring that their hourly employees are accurately maintaining time records. In addition, to the extent employees are not meeting performance expectations, employers should be proactive and address performance deficiencies and not ignore them even when employees are working remotely.

A: Rosenberg

State rules about meal and rest periods apply, too. To ensure compliance, processes for tracking and monitoring should be implemented. Workers' Compensation laws also apply to injuries while working remotely.

A: Kravetz

For employers wishing to reopen with their entire workforces onsite, having remote workers may simply not be practical. Of course, even in this circumstance, there may be the ongoing need for management to be flexible in terms of existing leave and absenteeism policies given that some employees will inevitably be forced to grapple with sick family members or children learning remotely. Truth be told, employers across industries must understand that COVID-19 has changed workplace dynamics, including where employees need to be to get their jobs done right. And after such an extended period during which so many workers have functioned offsite, management should consider whether it makes sense to flip temporary remote working policies into permanent ones that reflect our changing times and the needs and desires of employees. No doubt, this is not just a legal analysis, but also one steeped in operational practicality.

Q: WHAT KEY MODIFICATIONS TO EMPLOYERS' POLICIES AND PROCEDURES ARE REQUIRED IN LIGHT OF COVID-19?

A: Rosenberg

A pair of COVID-19-related employment laws require substantial updates to employer sick pay policies. Just last month, Governor Newsom signed a law requiring COVID-19 Supplemental Sick Pay to be offered by every employer with just five or more employees. In addition, the California Occupational Safety and Health Standards Board passed emergency Cal/OSHA regulations late last year requiring most every employer to immediately implement a detailed written COVID-19 Prevention Program and follow stringent regulations that go far beyond those imposed by existing federal, state and local ordinances. In regard to sick pay, the Cal/OSHA Emergency Regulation requires virtually an unlimited so-called "exclusion pay" to be paid to any employee that must be excluded from the workplace because they have COVID-19 symptoms or a COVID exposure at work. The Cal/OSHA Regulation applies to all California employees except those working alone, those working from home and those working in workplaces (such as hospitals, medical offices and medical labs) which were already covered by existing regulations for the transmission of airborne diseases.

A: Scherwin

Employers should ensure that they have updated, modified, or created remote work policies that cover important items such as working hours, reimbursement for equipment, and maintenance of proprietary and confidential information. In order to ensure compliance, employers should continue to update and modify these policies as the environment and rules change on returning to work.

Q: WHAT ARE SOME BEST PRACTICES FOR HANDLING EMPLOYEE LEAVE AND ACCOMMODATION REQUESTS RELATED TO COVID CONCERNS?

A: Rosenberg

Know the law before you act and document all discussions with employees needing an accommodation. To avoid legal claims, it is recommended that companies be flexible and especially sensitive to the employee's heightened health and safety concerns due to COVID-19. Effective January 1, employers with just five or more employees must now follow the newly expanded California Family Rights Act. The Act allows employees up to 12 weeks of *job-protected* leave when ill or when caring for a covered family member who is ill. It also covers adverse vaccine reactions. The new Cal/OSHA Emergency Regulation, which went into effect right after Thanksgiving, obligates employers to grant virtually unlimited leave (paid in many circumstances) to affected employees. And the state's new COVID-19 Supplemental Paid Sick Leave law requires employers with five or more employees to pay up to 80 hours of Supplemental Paid Sick Leave (max. $511 per week) for any employee who has COVID-19 or been in close contact with someone suspected of having the virus. That law prohibits employers from taking adverse action against a worker because they took advantage of these rights. Notably, that law also requires employers to give up to 80 hours of paid leave to any employee age 65 or older who asks for the time off (since they are among the most vulnerable) or if the employee (any age) requesting time off has a specified health condition (such as heart, lung or kidney disease, diabetes, asthma, or a weakened immune system).

"While I believe employers can encourage their employees to get vaccinated against COVID-19, employers should carefully review the FAQs from the DFEH (March 2021) and the EEOC (December 2020) and consult with legal counsel before issuing a blanket directive"

–Pascal Benyamini

Q: AS VACCINES START TO BECOME MORE WIDELY AVAILABLE, WHAT IS YOUR ADVICE TO COMPANIES WHO WANT TO IMPLEMENT MANDATORY VACCINES FOR EMPLOYEES?

A: Kravetz

My advice to any employer contemplating a mandatory vaccine policy: Tread lightly and think this issue through. While legal, such a policy comes with definite pitfalls. For example, under the ADA, employers cannot make disability-related inquiries of their employees. Though simply requesting proof of vaccination is not likely to elicit information about a disability and is permissible under the ADA, asking why a worker was not immunized against COVID-19 may give rise to exposure under the law to the extent such an inquiry could seek disability-related information. There is more. Employees with sincerely held religious beliefs, practices, or observances that prevent them from receiving COVID-19 vaccines must receive reasonable accommodations from their employers under Title VII, unless such accommodations pose an undue hardship. As such, Title VII opens up another can of worms for businesses that want to impose COVID-19 vaccinations upon their workers.

A: Benyamini

Various polling has shown that a substantial number of employees are hesitant about getting available COVID-19 vaccines and some workers refuse to be vaccinated. There have also been lawsuits both in California and outside of California challenging employer directives for mandatory COVID-19 vaccines. While I believe employers can encourage their employees to get vaccinated against COVID-19, employers should carefully review the FAQs from the DFEH (March 2021) and the EEOC (December 2020) and consult with legal counsel before issuing a blanket directive mandating vaccines. Specifically, because both the EEOC and the DFEH have stated that employees can refuse to be vaccinated if they have a disability or a sincerely held religious belief or practice.

A: Scherwin

While the guidance from the EEOC and state agencies like the DFEH provides that vaccines can be mandatory for employees, companies must decide whether they will encourage vaccines or actually make them mandatory. If the company decides to implement a mandatory vaccine policy, it needs to ensure that it complies with the law when employees request accommodations for medical or religious reasons. Overall, I think the safer play is to strongly encourage vaccines rather than make them mandatory.

Q: WHAT ARE THE LEGAL ISSUES ADDRESSED BY RECENT WAGE-AND-HOUR LITIGATION AND COURT DECISIONS?

A: Benyamini

Employer timekeeping practices and claims under the California Private Attorneys General Act (PAGA) account for a significant amount of litigation in various industries that I focus on, including manufacturing, warehousing and retail. Earlier this year, the California Supreme Court in Donohue v. AMN Services, LLC (February 2021) held that employers cannot round time punches for meal periods. The court also held that noncompliant meal periods create a rebuttable presumption

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of liability for meal-period violations. In the PAGA context, the California Supreme Court's decision in *Kim v. Reins International California, Inc.* (March 2020) added additional wrinkles when employers have settled an individual wage-and-hour claim. The court held that an individual settlement does not prevent the employee from later pursuing a PAGA claim. Consulting with legal counsel is critical to ensure compliant wage-and-hour practices.

Q: WHAT TRENDS ARE YOU SEEING RELATED TO ARBITRATION AGREEMENTS IN THE EMPLOYMENT CONTEXT?

A: Scherwin

Arbitration agreements in California continue to be popular. At the beginning of 2020, the question was whether the legislature's enactment of AB 51, which banned mandatory arbitration agreements in employment, would be challenged in court. Because AB 51 was challenged and the court issued an injunction, the consensus remains that mandatory arbitration agreements in employment remain enforceable. And because they remain enforceable and can be used to prevent class actions from being filed if the agreement contains a class action waiver, most employers in California continue to use them.

A: Benyamini

This is really a "good news/bad news" scenario. On the one hand — the good news is that an injunction currently remains in place with regard to California's AB 51, which attempts to prohibit arbitration agreements in employment. We are awaiting a ruling by the Ninth Circuit Court of Appeals and, until then, employers can continue to enforce their arbitration agreements. On the other hand — the bad news is that several California state court decisions, including recent decisions, continue to refuse to compel a claim under PAGA to arbitration. Nevertheless, for now, employers continue to roll out and seek to enforce arbitration agreements. Whether this trend continues depends largely on the outcome of the court rulings on the legality of AB 51.

Q: WHICH OF CALIFORNIA'S NEW EMPLOYMENT LAWS ARE MOST LIKELY TO LAND EMPLOYERS IN COURT?

A: Scherwin

One new law that has flown under the radar a bit because of the focus on COVID-19-related legislation is the enactment of SB 1383 which amended the California Family Rights Act (CFRA) to apply to companies that have five or more employees rather than 50 or more employees. This law requires all employers in California that have five or more employees to provide up to 12 weeks of job-protected leave for any qualified employee/reason. There is already a fair amount of litigation related to the CFRA and, now that most employers in California have to comply with the CFRA, I see this as a future source of litigation for California employers.

A: Benyamini

One such law is the expansion of the California Family Rights Act (CFRA) under SB 1383, which requires employers to provide a job-protected unpaid leave of absence of up to 12 workweeks to eligible employees. Historically, the CFRA applied to employers with 50 or more employees and in large part tracked the federal FMLA. But as of January 1, 2021, the CFRA now deviates substantially from the FMLA since it applies to employers with just five or more employees and expands the definition of family members. Another development focuses on employee versus independent contractor classification under the ABC Test promulgated by the California Supreme Court in 2018 in *Dynamex* (and subsequent legislation in AB 5 and AB 2257). Employee classification remains a significant challenge especially since the California Supreme Court held earlier this year that the ABC Test applies retroactively.

A: Rosenberg

The January 1st expansion of the California Family Rights Act to employers with as few as five employees (before Jan. 1st, you had to have at least 50 employees) is likely to land many employers in court. The law requires covered employers to provide eligible employees (those that have been employed a year) with up to 12 weeks of job-protected leave annually for the employee's own serious health condition or when caring for specified family members

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facing medical issues. The law also permits new parents to use this time to care for/bond with a new baby in the home. The employees have one year to exercise these rights. Compliance requires new written policies, retooling handbooks, developing new paperwork packets to give employees who inquire about the leave and educating managers to avoid actions or statements that can be deemed illegal retaliation or mere "interference" with these rights. For employers with 100 or more employees, California's new Pay Data Reporting requirement (March 31 was the deadline) is very concerning. These employers are now required to furnish detailed annual reports setting out demographic, pay and position information to enable the government to engage in "targeted enforcement" of California's anti-discrimination, "pay equity" and wage and hour laws. Private lawsuits for pay equity discrimination are also likely. Finally, the new year brought a bevy of higher state and local minimum wage requirements. Along with that comes a new higher threshold for the salary needed to qualify for an overtime exemption.

Q: WHICH PAY PRACTICES ARE MOST LIKELY TO RESULT IN A COMPANY BEING SUED IN A WAGE-HOUR CLASS ACTION?

A: Rosenberg

California employers are beset by a dizzying array of wage-hour regulations. We continue to see these claims in wage-hour class actions: (1) failure to provide legally mandated meal and rest breaks; (2) overtime not being paid or miscalculated; (3) employees being asked to work "off the clock" or not being paid for all time worked (think security checks and uniform changing time); (4) employees not being properly reimbursed for business expenses; (5) recordkeeping and paystub violations; (6) not paying vacation pay and bonuses upon termination; (7) allowing supervisors to be part of a tip pool; and (8) the misclassification of workers as independent contractors. Also, California's Private Attorney General Act authorizes employees to collect multiple penalties that could add up to as much as $1800 per employee per pay period (12 months max.) and attorney's fees.

A: Benyamini

Employers' wage-and-hour practices account for a substantial portion of putative class action litigation. For instance, rounding practices in timekeeping records, where the employer adjusts (either increasing or decreasing to the nearest increment permitted) the hours an employee worked has been a strong focus of plaintiffs' attorneys. Other areas of focus by plaintiffs' attorneys include meal and rest period policies and practices, particularly where some employers do not require employees to punch in or out for meal periods. Nondiscretionary bonuses awarded

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> –Dana A. Kravetz

to nonexempt employees have led to putative class action litigation where the employer did not factor the amount of this bonus into the employee's hourly rate for purposes of the employee's overtime rate. I devote a significant amount of my practice to advising and counseling clients on wage-and-hour practices to reduce risk as much as possible.

Q: WHAT ARE SOME BASIC TIPS FOR BUSINESS OWNERS WHO WANT TO HANDLE PAY EQUITY ISSUES ACCORDINGLY?

A: Kravetz

Management should not be afraid to look under the hood. Employers are oftentimes reluctant to take a deep dive into their pay practices, and this reticence can absolutely come back to bite them. I have seen too many employers going down a path of establishing pay practices that are inherently inequitable, which I strongly advise against. That being said, a comprehensive audit is a necessity for most employers. Waiting until active litigation to conduct such an examination can be perilous and is ordinarily too little, too late. Instead, a sincere look at what has led to compensation decision-making is sure to be illuminating and can reveal a scattered approach to pay practices and a lack of evenhandedness. The takeaway: Do not wait and hope for the best. When it comes to pay equity, management should be proactive and make necessary adjustments.

Q: WHAT KEEPS YOU UP AT NIGHT?

A: Scherwin

Besides worrying about when my two elementary-aged children will return to school, it is making sure my clients understand the nuanced compliance issues associated with California's labor code. Employers in California can think they are doing everything correctly but forgetting to have your actual business name or address on your pay stub or omitting the overtime rate, for example, can lead to huge damages in a PAGA lawsuit. I recommend that all California employers audit their payroll practices and get a "check-up" from their favorite HR professional or employment lawyer.

Q: HOW DOES A LAW FIRM SPECIALIZING IN LABOR AND EMPLOYMENT DIFFERENTIATE ITSELF FROM THE COMPETITION IN 2021?

A: Kravetz

It is not enough for specialists in labor and employment to be proficient in the law and able to advise clients (in my case, management) accordingly. Employers need and deserve more from their trusted advisors, and by more, I mean a deep understanding of clients' particular industries and their place within those sectors. In my view, attorneys are most effective when they are entirely fluent in their clients' businesses so as to be able to predict areas of potential exposure and craft policies around those perceived risks. But without the necessary industry expertise, doing so is nearly impossible. My colleagues at M&R and I pride ourselves on knowing our clients' industries and business strategies from A to Z. And with that knowledge, we remain miles ahead of our competition and able to furnish unparalleled advice and counsel.

A: Scherwin

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