2014 Roundtable Series

Labor & Employment

Rain may not be reliable in California but changes in employment law are hardy perennials. This year's crop includes a new state law that mandates near-universal sick leave, another that makes employers liable for actions by their labor contractors, multiple court decisions on determining whether an independent contractor is really an employee, and provocative initiatives by the National Labor Relations Board against nonunion employers.

California Lawyer discussed these issues with James R. Evans of Alston & Bird; Molly L. Kaban of Hanson Bridgett; Wendy E. Lane of Greenberg Glusker Fields Claman & Machtinger; Chaya M. Mandelbaum of Rudy, Exelrod, Zieff & Lowe; and Sandra L. Rappaport of Hanson Bridgett. The roundtable was moderated by *California Lawyer* and reported by Cherree P. Peterson of Barkley Court Reporters.

Participants

JAMES R. EVANS
Alston & Bird

MOLLY L. KABAN
Hanson Bridgett

WENDY E. LANE
Greenberg Glusker Fields Claman & Machtinger

CHAYA M. MANDELBAUM
Rudy, Exelrod, Zieff & Lowe

SANDRA L. RAPPAPORT
Hanson Bridgett

EXECUTIVE SUMMARY

MODERATOR: As of July 1, 2015, a new law will require nearly all California employers to provide some paid sick leave to their employees. What are the specifics and what impact do you expect from this?

CHAYA MANDELBAUM: The new law is the Healthy Workplaces, Healthy Families Act of 2014, which mandates that employers provide up to three paid sick days per year for California employees. Employees accrue sick days at a rate of no less than one hour for every 30 hours worked. The sick days can be used for the employee's own health condition or that of a family member, which is broadly defined under the new law. It includes children, spouses, parents, guardians, siblings, grandchildren, grandparents, and registered domestic partners. It can also be used by victims of domestic violence, sexual assault, or stalking.

There are anti-retaliation prohibitions as well. You can't retaliate against the employee for seeking to use leave or for using the leave. Enforcement is by the Labor Commissioner or the Attorney General, and administrative penalties and damages are available.

SANDRA RAPPAPORT: One thing many employers are asking is whether they are automatically in compliance if their policies provide at least three days of paid time off. While some policies may be sufficient, many might not be. For example, if a PTO policy doesn't meet the new accrual requirements, doesn't allow the same carryover, or doesn't apply to part-time employees, then it needs modifications.

Employers will have to provide sick leave to every employee who works at least 30 days in a year. Although an employer can limit employees' use of paid sick leave to three days a year, employees can carry over unused leave and the cap on accrual cannot be less than six days.

WENDY LANE: Also, while employers don't have to pay out accrued sick time at termination, they do have to keep a record. If an employee is rehired in less than a year, the accrued sick time has to be reinstated. That's a significant change for many employers.

RAPPAPORT: It really impacts employers with seasonal employees.

MANDELBAUM: The Act's coverage is also much more expansive than the California Family Rights Act and the federal Family and Medical Leave Act. Those statutes only apply to employers with 50 or more employees. This law applies—with very limited exceptions—to all employers in the state.

JAMES EVANS: Given the breadth of the law's coverage, not only should employers be reviewing their policies and updating them, they also need to train their managers. And they need to update their pay records so employees are kept abreast of how many days they have and of their right to use those days.

One interesting thing about this law is that the employee need not provide much, if any, substantiation. My read of the statute is that if an employee calls in and says, "I need a sick day for myself or for a family member," that's it. The employer is obligated to give it to him. That is such a departure from current practice for many employers who aren't covered by the FMLA, and it's going to require a lot of training at the management level.

MOLLY KABAN: I foresee a lot of consternation on the part of employers on how to deal with suspected sick leave abuse. As you said, there's no provision allowing an employer to ask for documentation when they suspect the leave is being misused, and the anti-retaliation provision is written so that employers arguably can't discipline an employee for using paid sick leave under the statute regardless of the circumstances.

But what if you suspect the employee is lying? What if you have an occurrence-based attendance policy where, after a certain number of absences, you automatically get discipline? Can you count sick days taken pursuant to this statute as occurrences, or is that considered unlawful discipline? These kinds of attendance policies are going to be called into question and probably challenged by employees.

EVANS: What if the employer sees the employee at the Giants game on the day he called in sick? Does the employer have any right to criticize or discipline the employee?

KABAN: As written, there isn't any recourse for the employer in that situation. But I think once interpretive regulations are issued or the statute is reviewed by the courts, there is going to be some interpretation that allows for discipline when the employees are clearly lying or misusing their sick leave.

RAPPAPORT: As Molly [Kaban] noted, the statute may pose a risk for employers who have no-fault attendance policies. Labor Code Section 234 specifically provides that employers cannot count a "kin care" absence against an employee, even under a no-fault attendance policy, and this new statute *doesn't* say that. But I'm not sure an employer will want to test that given the very broad anti-retaliation provision.

LANE: I believe there's going to be confusion about reconciling the kin care requirements with the sick leave [Healthy Workplaces] requirements. The sick leave definition of family member is broader, but the kin care law arguably provides more time to care for certain family members. If an employee works a 40-hour week for a full year, by halfway through, they've accrued 4.2 days of kin care leave. So do you have to give them that fourth day under the kin care law, even though the sick leave law that allowed them to accrue the time says you only have to allow three days?

EVANS: And overlay the San Francisco sick leave laws, and now you really start to wrestle with reconciliation of the various requirements.

I have a question for Chaya [Mandelbaum]. Given the rights of enforcement that are given to the state, do you foresee this statute being used by the plaintiffs' bar as a piggyback statute for claims under Business & Professions Code Section 17200?

MANDELBAUM: Well, it certainly would seem to be covered by the underpinnings of 17200. Also, while there's obviously not directly a private right of action for the violation, it's going to be codified in the Labor Code, so the Private Attorney General Act is implicated.

MODERATOR: Speaking of enforcement, aren't we seeing an increase in actions by the National Labor Relations Board against companies that don't have labor unions?

KABAN: Yes, the NLRB has been increasingly asserting itself in the nonunion setting.. Many nonunion employers don't understand that they're subject to the National Labor Relations Act, just like a union employer. In recent years, the NLRB has turned towards nonunion employers in a variety of ways, including increased scrutiny of confidentiality policies.

The NLRB looks to see if employers have policies that chill Section 7 rights under the NRLA. Section 7 gives employees the right to complain about their working conditions not only to each other, but also to people outside of the workplace. Thus, confidentiality policies are ripe for NLRB action because employers tend to prohibit employees from discussing all kinds of things with people outside of their companies.

The NLRB has been invalidating confidentiality policies when they use generic terms, such as barring employees from talking about "personnel information" or "finances." An employer has to be more specific, because these terms could be inter-

> "My read of the statute is that if an employee calls in and says, 'I need a sick day for myself or for a family member,' that's it."
> —JAMES R. EVANS

JAMES EVANS is partner in Alston & Bird's Labor & Employment Practice Group. As a highly skilled trial attorney with nearly thirty years of experience, Jim's clients rely on him to solve their most complex disputes. He focuses his practice on class action matters, including claims of wage and hour violations and employee misclassification, unfair competition, consumer claims, advertising and marketing claims, privacy violations, violations of the ADA, intentional torts and violations of the California Franchise Investment Act.

james.evans@alston.com
alston.com

> "In recent years, the NLRB has turned towards nonunion employers in a variety of ways, including increased scrutiny of confidentiality policies."
>
> —MOLLY L. KABAN

MOLLY KABAN is a partner in the San Francisco office of Hanson Bridgett. She represents both public and private employers in all phases of litigation in federal, state and administrative proceedings. Molly regularly defends employers against allegations of harassment, discrimination, retaliation, wage-and-hour noncompliance and more. Molly also represents employers in proceedings before the National Labor Relations Board and the California Public Employment Relations Board, and she regularly serves as Chief Negotiator for employers in collective bargaining negotiations.

mkaban@hansonbridgett.com
hansonbridgett.com

preted as prohibiting employees from talking about wage, salary, benefits, discipline—and they have to be allowed to talk about these topics.

LANE: What's troubling is the NLRB has been voiding the entire confidentiality agreement if one area is overbroad. So even with clearly protectable categories, the employee is not bound by the confidentiality agreement.

KABAN: Another really hot area is employer social media policies. Employers that prohibit their employees from making disparaging comments or divulging confidential information on sites like Facebook have come under increasing scrutiny. There's a series of cases now in which an employee goes on Facebook and complains about a supervisor or working conditions, and other employees chime in or press the "like" button. The NLRB has found that "liking" a comment makes the activity concerted: It's not just a personal grievance; it's a complaint about working conditions that is protected under Section 7.

MANDELBAUM: Leaving aside the NLRA prohibition for a moment, it's worth noting that in California, employers are directly prohibited under the Labor Code from requiring employees to refrain from disclosing the amount of their wages or retaliating against them from doing so.

RAPPAPORT: But the policies criticized by the NLRB aren't ones that say employees can't discuss wages. They usually address disclosure of other types of proprietary information *Flex Frac Logistics, et al. v. NLRB*, (No. 12-60752, March 25, 2014) involved a policy that prohibited disclosures related to customers, suppliers, distributors, business plans, and the like. But it also referred to "financial information" and "personnel information." So the Fifth Circuit Court of Appeals agreed with the NLRB that the policy was overbroad, even though the employee at issue had disclosed a customer's contract prices.

LANE: My concern is that if an employer learns that a former employee is stealing truly confidential information, such as sales presentations, the employee's lawyer will use these cases to void the whole confidentiality agreement and argue, "you don't have a claim against my client." Hopefully, courts will not follow the NLRB's lead in invalidating the entire agreement.

MANDELBAUM: Well, it's within the judge's discretion whether to sever provisions or to invalidate the whole agreement. While some employers are unintentionally drafting overbroad agreements, we also don't want to incentivize employers to exceed the bounds of the law knowing that, in the worst-case scenario, those excessive provisions are simply stricken and they get the maximum allowed by the law.

EVANS: I don't believe that employers set out intentionally to be overly aggressive. I think the limits of human communication are such that sometimes we have to describe things broadly to ensure that we capture them.

Turning back to the NLRB, the franchisor world is very much aware of its stated intention to become more aggressive outside of the union context. The NLRB's general counsel made an unequivocal statement that he found a fast-food franchisor to be, as a matter of law, a joint employer with its franchisee. How do you square that statement with a franchisor's legitimate interest in protecting trademarks, protecting its business processes, and ensuring quality and ensuring a good customer experience? I don't believe that you can.

And we know that courts have readily disagreed with the NLRB's attempts to invalidate class action waivers. The NLRB's decision against D.R. Horton has been knocked down by every court that has looked at it, including California courts. Yet we have recent decisions by the NLRB saying, "An employment class action waiver is unenforceable."

KABAN: The NLRB is taking a hard-line view of what Section 7 rights are and enforcing them regardless of context. Yes, circuit courts have dismissed the D.R. Horton ruling, but the NLRB's position is they're going to go with it anyway because the Fifth Circuit, for example, doesn't control them. They won't change their policy of enforcement until the DC Circuit or the U.S. Supreme Court overturns that decision.

LANE: What does this fight over confidentiality mean for settlement agreements with terminated employees? One incentive for avoiding litigation and compromising early on is that the parties can enter into a confidential settlement agreement. I'm not sure which way the NLRB is going, but earlier this year the Equal Employment Opportunity Commission filed a case against CVS alleging that a confidential settlement agreement violated the right to discuss wages. The case was later dismissed on a technicality, but we've seen what the EEOC wishes to do.

KABAN: Another nuance is the recent decision on Banner Health Systems, where the NLRB held that employers can't routinely prohibit employees from talking about ongoing internal human resources investigations. Instead, there must be specific, legitimate business reasons to justify a confidentiality admonishment. Employers typically try to insulate their investigation from witnesses corroborating each other's stories by routinely requiring confidentiality, but in this case, the NLRB found that such blanket confidentiality admonishments violate the employees' Section 7 rights because employees are entitled to talk about their working conditions.

LANE: I can think of plenty of situations where an employee alleges something that is embarrassing to him or her, such as sexual harassment or sexual assault, and now they have no confidence that the investigation can be confidential because the employer's hands are tied. This is one of those situations where the intent may be to protect employees, but the law ends up hurting the employee instead.

KABAN: Yes, the NLRB seems to be enforcing Section 7 regardless of the practical realities of a situation. It should be noted that none of this law is new; it's just the NLRB's recent efforts to go after nonunion employers that has put these issues in the spotlight.

MODERATOR: Turning back to new California statutes, Labor Code Section 2810.3 goes into effect January 1. What will it do?

RAPPAPORT: It says that an employer will share all civil legal responsibility and liability for workers supplied by a labor contractor, for both the payment of wages and the failure to secure valid workers' compensation coverage. A labor contractor is defined as an individual or entity that provides workers to perform labor within the client employer's usual course of business.

The statute does not impose liability for the use of an independent contractor other than a labor contractor. And if you're a business with fewer than 25 workers, including those obtained from a labor contractor, or you use five or fewer workers supplied by a labor contractor, then you're not covered by the Act. But a company with 25 workers, at least five of whom are temps, is covered.

MANDELBAUM: This act is timely, in that it gets to an increasingly common employment dynamic. I'm seeing an increasing prevalence of people who work at the physical location of a large employer, they're there all the time, they have their email addresses, they wear their badges, but their contract is with a labor contractor, oftentimes one that physically resides on the other employer's premises permanently. It obviously intersects with issues like joint employment and whether someone's classified as an independent contractor. But it's getting at an increasingly common dynamic.

LANE: Yes, we were already seeing situations where both the contractor and the company for which the contractor's employees provided services were sued as joint employers. This statute just makes a joint employer claim easier. So I don't know if this statute will increase litigation.

It's worth noting that there was already a Labor Code provision saying companies couldn't enter contract labor agreements for construction, farm labor, garment, janitorial, security guard, or warehouse services if the company knew, or should have known, the agreement included insufficient funds to pay the workers. So this is a logical result of statutes that have been in effect for some time.

EVANS: I agree. I saw it as a codification of arguments we've been wrestling with for a long time in the context of companies that routinely employ contract laborers. It removes the hurdle for an employee assert-

> "There have been a number of cases where delivery people who did have multiple routes for multiple companies were still held to be employees."
> —WENDY E. LANE

WENDY LANE is a partner in the Employment Department at Greenberg Glusker. Wendy defends employers in harassment, discrimination, wrongful termination, and wage and hour claims, including class actions. Wendy also specializes in preventing current and former employees from stealing her clients' intellectual property and trade secrets. As an expert on employment policies, Wendy has been quoted in the *Los Angeles Times*, *USA Today*, and *The New York Times*, among other publications.

wlane@greenbergglusker.com
greenbergglusker.com

> "I'm seeing an increasing prevalence of people who work at the physical location of a large employer; they wear their badges, but their contract is with a labor contractor."
>
> —CHAYA M. MANDELBAUM

CHAYA M. MANDELBAUM is a partner at Rudy, Exelrod, Zieff & Lowe, LLP where he represents employees in individual and class action litigation and negotiations across the spectrum of employment law. He has extensive experience in wage and hour, discrimination, retaliation, and leave of absence matters. Chaya also serves as Chair of the California Fair Employment and Housing Council. The Council promulgates regulations related to employment, housing, and public accommodation discrimination and hate violence.

cmm@rezlaw.com
rezlaw.com

ing joint employer liability. It's now the law. It has long been the plaintiffs' argument.

RAPPAPORT: There are a lot of questions as to how broadly the term "labor contractor" will be interpreted in this new statute. Say your company manufactures widgets, and you contract with a security company for security guards who also work on your premises every day.

Are they performing work in your "usual course of business"? I would argue they are not, but I think we will see arguments that they are covered.

EVANS: I would counsel a company to make sure that it doesn't control the manner and method of delivery of the labor contractor's services. Make sure that the guards are wearing the security company's uniform. Make sure that there is a clear delineation between your employees and theirs.

RAPPAPORT: Also, the law does not prohibit any company from contracting for any lawful remedies against liability created by the labor contractor's acts. So you can still have contractual indemnification provisions in your contracts.

LANE: Which, of course, is only as good as the financial viability of the temp agency or the contractor.

MANDELBAUM: Which is exactly why, as someone who represents employees, I think these things are necessary. There's a readily acknowledged fact that oftentimes these are unviable companies.

KABAN: I think the bottom line for employers is that they must carefully scrutinize the companies that they enter into labor contracts with, making sure they have the resources available to pay their employees, and that they are complying with the wage and hour laws.

LANE: The advice that we've long given employers is if you're using a true contractor, you want to be as hands off as possible. But if you want to protect yourself under this law, don't you want to see how they're getting paid because if there's a problem, you're on the hook for it?

EVANS: Which suggests control.

KABAN: This statute does away with the control test. That's the purpose, to take that argument away from employers so they know that they're on the hook regardless of the amount of control they exercise.

LANE: Well we may be getting away from the control test anyhow, because of recent cases on the issue of employee classification.

MODERATOR: So what is the state of the law now on employee classification?

LANE: In *Dynamex Operations West v. Lee* (No. B249546, 2nd Dist. Div. 7, Oct. 15, 2014), the California Court of Appeal did away with the common control test and looked to the wage order from the now-defunct state Industrial Welfare Commission to say, at least for a wage claim, an independent contractor was an employee.

KABAN: But then in *Alexander v. FedEx Ground Package System, Inc.* (No. 12-17458, Aug. 27, 2014), the Ninth Circuit said the right of control test is paramount.

RAPPAPORT: It's interesting that *Dynamex* said, yes, the common control test is paramount – for everything except a violation of wage order. But if you're alleging a violation of a wage order, then you have to use the definition of employee as defined in the wage order, which is really broad—essentially anybody someone engages, suffers or permits to work.

EVANS: I don't think the state of the law has changed. I just tried a two-week case involving taxicab drivers who claimed they were misclassified as independent contractors. The court ruled against the drivers, finding that the control exercised by the taxi company was a product of statutory and regulatory requirements.

So I think the independent contractor test from *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (48 Cal.3d 341, 1989) is alive and well. Employers should make sure the training they provide to independent contractors is minimal, and they should not impose so many requirements on them that they become employees.

MANDELBAUM: I would agree that the underlying law hasn't changed. But when you talk about a test like the right to control, you have to look at recent decisions and how they play out in the facts. In that regard, the *FedEx* decision is of significance.

Just to recap, FedEx delivered packages utilizing contracts with its drivers rather than treating them as employees. And although the drivers could operate multiple delivery routes and hire third parties and had certain other entrepreneurial opportunities, they had to get FedEx's consent for these endeavors. They had to wear FedEx uniforms, drive FedEx-approved vehicles, groom themselves according to FedEx standards, deliver packages on the days and times that FedEx required, things of that nature.

So some drivers brought a class action alleging that they were misclassified. The District Court in this multi-district litigation granted summary judgment for FedEx. The Ninth Circuit not only reversed that, but also found that, utilizing the *S.G. Borello* right to control test, the workers were employees as a matter of law.

EVANS: The *FedEx* facts were tough for FedEx, down to the color of the Sherwin Williams paint that the truck had. It went to that place where the indicia of control were impossible to overcome. So I think there is still a bright line to be drawn between independent contractors and employees.

Going back to the NLRB, that's an area they are interested in—looking at independent contractor relationships as being misclassified.

KABAN: I'm sure that FedEx would express the facts differently, but the court's opinion made me wonder how the company got away with this for so long. I agree that the state of the law hasn't changed much and independent contractor status in California is always difficult to prove. So you always have to be careful.

LANE: And the facts don't have to be stacked that high against the alleged employer. There have been a number of cases where delivery people who did have their own trucks of various colors and did have multiple routes for multiple companies were still held to be employees rather than contractors.

EVANS: One distinction employers should know is that if you're following what the law requires, that doesn't make a person your employee for purposes of this test.

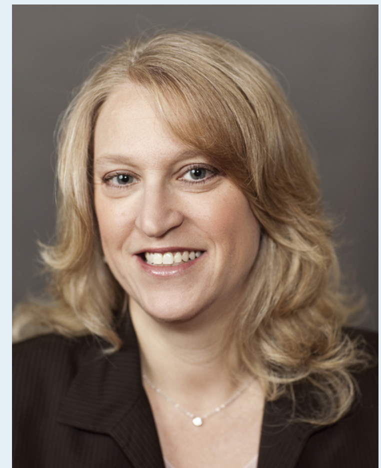
In another case I had involving 900 taxi drivers in San Diego who asserted that they were employees and sought certification of a class, they pointed to *Borello* and *FedEx*, saying, "Look, our cabs are yellow, you make us present a well-groomed appearance, you tell us where we can and can't park, and we have to advise the radio dispatcher when we're going off line." Almost all of those requirements were imposed by agencies like the Department of Transportation, and the Department of Airports. Those cannot be considered employer control.

RAPPAPORT: So other factors become a lot more important for a company in that situation. Are they hands off? FedEx argued for the application of the entrepreneurial opportunities test in *Alexander*, and in other jurisdictions the company prevailed with that test: That a driver has his/her own business and has the opportunity to make profit or loss as he/she runs the business. That would play a larger role in cases where regulators mandate more control factors.

LANE: Well, I think we can all agree on this: We're not sure now whether we have to train independent contractors, or oversee their pay stubs, but don't invite them to the holiday party. ■

"FedEx argued for the application of the entrepreneurial opportunities test in *Alexander*, and in other jurisdictions the company prevailed with that test."

—SANDRA L. RAPPAPORT



SANDY RAPPAPORT is a partner with Hanson Bridgett. For over 20 years, she has advised and counseled employers on managing human resources issues. She leads teams in employment compliance audits, negotiates employment-related agreements, and helps clients develop effective personnel practices. Much of Sandy's ability to advise effectively stems from extensive litigation experience. She regularly defends employers in cases involving employees, before courts, arbitrators, and government agencies, including leading many successful teams in complex class actions.

srappaport@hansonbridgett.com
hansonbridgett.com

Serving law firms, corporate counsel, and the entertainment industry for 40 years, **Barkley Court Reporters** is California's largest privately held court reporting company and the first Government Certified Green court reporting company in the U.S. With 10 Barkley offices in California to complement its national and international line-up of facilities in Chicago, New York, Las Vegas, Paris, Hong Kong, and Dubai, Barkley is adept at providing deposition and trial technology services globally. Additionally, Barkley offers videoconferencing, video synchronization, Internet streaming, electronic repository service, and remote, secure online access to documents and transcripts from any PC or handheld device. **www.barkley.com | (800) 222-1231**