December 2018

Daily Journal • California LAWYER

Roundtable Series

LABOR & EMPLOYMENT

Experts round up this year's top employment law issues

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An update on legislation spurred by the "Me Too" movement and the California Supreme Court's ruling in *Dynamex*

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Labor & Employment

The "Me Too" movement is making waves in the labor and employment landscape as several new laws take effect in California on issues ranging from bans on confidentiality in sexual harassment-related settlement agreements to expanded harassment training requirements. Meanwhile, a new California law requiring a minimum number of women on boards of directors ignited a lively dialogue on how to foster diversity in corporate leadership. Our panel of experts discussed these issues as well as the California Supreme Court's recent ruling in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*.

Participating in this roundtable were Toni J. Jaramilla of Toni Jaramilla, A Professional Law Corporation; Wendy E. Lane of Greenberg Glusker; Jon D. Meer of Seyfarth Shaw; Mark J. Payne of Troutman Sanders; and Jack Schaedel of Scali Rasmussen.

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Moderated by
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DISCUSSION

MODERATOR: What are your thoughts on the slew of bills recently signed into law that appear to have grown out of the "Me Too" movement?

WENDY E. LANE: These new laws are designed to accomplish several things. Some are designed to prevent harassment through the education of more employees and employers about their rights and obligations. Several laws, such as those restricting confidentiality provisions in settlements of harassment cases, are specifically designed to remove the barriers that have historically prevented harassment victims from coming forward.

This is in response to a number of striking news reports in the past year which have asserted that a number of large, powerful companies entered into secret settlements which allowed certain high-powered individuals to repeatedly harass and target victims over time. Many of these laws are designed to prevent such institutional "cover-ups."

While that is an admirable goal, we need to remember that the media often highlights extreme cases, and these legislative responses to such extreme cases don't take into account the practicalities for the majority of smaller employers.

JON D. MEER: Ironically, SB 820—the bill prohibiting confidentiality in sexual harassment-related settlement agreements—may make life harder for victims of sexual harassment because there's often a benefit to entering into a confidential settlement. If there's no incentive to resolve a case because you can't keep it confidential, I'm not sure that many of these cases would be settled as efficiently as they usually are.

I also think that people like to talk about an avalanche of new cases whenever new legislation is passed. We've had mandatory training for over 10 years, and I don't think that it's caused an avalanche of new cases. It's probably been about the same or, in some cases, has curtailed litiga-

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tion because people become educated about what internal remedies they can explore short of a lawsuit.

That said, I wonder if this frustration of private confidential settlements might result in more civil litigation because an employer might try to prove itself correct or try to get the victim to back down during the rough-and-tumble of litigation, and that may not be good for anyone.

Finally, it seems strange and maybe just an overreaction to current events to place sexual harassment above all other forms of harassment in terms of these extra protections. There can be very severe acts of harassment involving disability or race or religion—including acts of violence. It's interesting that these new protections are so limited to sexual harassment.

TONI J. JARAMILLA: I had the benefit of actually working with CELA and women's rights organizations on several of these bills that were signed into law, including SB 820, the "secret settlement" bill, as well as SB 1300, the omnibus bill.

SB 820, introduced by Senator Leyva limits confidentiality and bans silencing victims. The ban on keeping sexual harassment settlements confidential applies only when there is a civil or administrative action. Therefore, a plaintiff has the choice to allow confidentiality by not filing a court, arbitration, DFEH, or EEOC action. Also, the settlement amount does not have to be disclosed nor the identity of the plaintiff whether an action is filed or not. SB 820 addresses the issues of secrecy in sexual harassment cases and public accountability. For plaintiffs' attorneys, it is hard to find witnesses in sexual harassment cases when such conduct often happens where there are no eye witnesses. It is even harder when past victims are bound by confidentiality provisions. A law that says we can't silence victims with confidential settlements anymore will deter harassers and the companies that enable them, thereby protecting potential victims.

While it is true that these bills were inspired by the "Me Too" movement and focus primarily on sexual harassment, if you look at the language of the bills, they have applicability beyond sexual harassment cases. For example, SB 1300 clarifies the severe or pervasive standard, which also applies to other forms of harassment, such as racial or religious harassment. That bill also expands protections by establishing that third-party harassment is not just limited to sexual harassment under FEHA, but all forms of harassment based on a protected category.

SB 1300 also bans sneaky releases and non-disparagement agreements that are often slipped into employee hiring documents, which has broad applicability. It ensures workers are free to speak out about what's happening to them in the workplace.

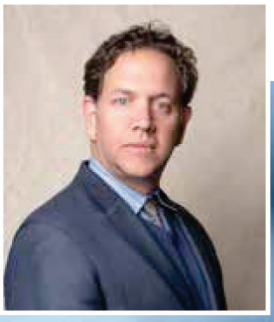
LANE: I absolutely believe that workers need to be protected and that companies need to take ownership and responsibility, but it would be incorrect to assume that *all* allegations of harassment are truthful or accurate. People sometimes exaggerate and sometimes even lie about being harassed for a variety of reasons. My concern with SB 820 is that there will be no way to maintain confidentiality in settlements involving false accusations.

I know the laws still allow for a defamation action if the claim is malicious, but the defamation standards are difficult to meet. Without confidentiality, I do have some concerns about what this may do to innocent people who are going to be held potentially liable in the public court, even if there's no proof that they truly engaged in that conduct.

MARK J. PAYNE: These new laws reveal a clash between well-intentioned public policy goals and the interest of alleged harassment victims. I can't think of any instance in which the complaining party objected to confidentiality. Employers sometimes object to confidentiality, but not plaintiff employees. Plaintiffs readily agree to confidentiality because they also want peace. They are not forced to agree to confidentiality; they do it because it helps to resolve disputes which would otherwise continue to be hotly contested, which involve events that may be painful, and which have an uncertain outcome. Money isn't always the only driving factor for either side in resolving the dispute—especially after the parties have been bloodied in the litigation process.

Scali Rasmussen

AHEAD OF THE CURVE



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> If somebody makes a remark that is not intended to be harassing, that can trigger a claim under SB 1300. It chills good workplace interaction, creative exchange of ideas, and post-work social events. The standard now is not just a civility code, it is an absolute perfection code, and that's a bad standard.
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The parties have spent money and time and taken risks; they've relived past events that were difficult to experience in the first place; and they and their conduct have endured scrutiny. Usually, they just want it over. The accused employee and employer are going to have a basket full of information to share with the world about what the plaintiff contended and what the defendant's positions were about those things, and what did or did not happen. When it becomes necessary to disclose that information, it can become something painful that the plaintiff has to relive all over again. Disclosure of these circumstances may sometimes serve a public policy goal to hold accused harassers more accountable, but these new laws also exact a price for that from the plaintiff employee.

JACK SCHAEDEL: When the "Me Too" movement started, I thought, as an employment lawyer, this is potentially an area of great opportunity for employers and for society. I thought that the fact that the powerful Harvey Weinstein was one of the first people to go down, was very important because when I give these presentations to employers, I can say to them, "Well, unless you think you're more powerful than Harvey Weinstein, more liberal than Al Franken, more cuddly than Matt Lauer, smarter than Charlie Rose, there's no immunity for you when the 'Me Too' movement comes." There was a new consciousness among people that it was no longer acceptable to sweep these things under the rug; that people who were getting away with this for some time were no longer going to be getting away with it. So, I felt that there was a moment of great promise.

Some of the bills are well-intentioned, but they carry unintended consequences, and there is almost no disincentive to file suits. Earlier, the concept of a defamation suit was mentioned as a form of recourse for employers involving meritless claims. Well, if an employer files a defamation suit against an individual who files a baseless lawsuit, it almost always triggers an anti-SLAPP motion, which, if granted, will come with attorney's fees for the plaintiff, but if defeated, usually does not come with attorney's fees for the employer. Similarly, when a harassment lawsuit gets filed, a winning plaintiff gets his or her attorney's fees; a winning employer doesn't.

It's already such an unfair and uneven playing field for employers, and so difficult to run a business, that each new law makes matters incrementally worse and increases the threat of ruinous litigation at all times.

That said, sexual harassment does exist. It's a good thing that people are being encouraged to come forward and that it's not being swept under the rug, but some of the laws appear to benefit lawyers more than victims.

PAYNE: In addition to these newest laws and the typical employment claims from both alleged victims and alleged harassers, the "Me Too" movement has inspired novel legal claims from company shareholders. We're now seeing shareholder derivative actions against directors and officers, alleging that company management didn't take these issues seriously enough, or that they oversaw or allowed workplace cultures that mistreated women or other protected groups. I'm not aware of these kinds of claims succeeding yet, but they present another risk and burden to employers from the "Me Too" movement.

MEER: We talk about two parties in this: the victim and the employer. But there's almost always a third party: the alleged perpetrator. That person is almost always named in the lawsuit, whether it's to destroy diversity or because the victim really does want the perpetrator to have to answer for this. In many of the cases where I'm representing the employer and the employee, the perpetrator says, "I want my day in court. There is now a civil complaint filed against me saying all these terrible things, and I want to be able to prove myself as not having committed any of those acts." And it is usually a persuasive conversation to say, "Well, we're going to settle this confidentially, and then, none of this will ever see the light of day again," and they usually will accept that as a better solution than litigating. But now, you may see the third-party perpetrator say, "It's fine if you want to settle with the employer, but I still want to pursue my defense." And I think we may see more of that happening if we can't have confidential settlement agreements.

LANE: In that vein, you will often see that when an employer and supervisor are jointly

named, they are represented by the same attorneys because it is economical and efficient and allows the co-defendants to develop a uniform defense strategy. I wonder if, as a result of this new law, we will now see more situations where an actual conflict of interest arises, and the employer and the supervisor can no longer be represented by the same counsel.

JARAMILLA: Many concerns being raised here are underpinned by the belief that targets of harassment bring weak or false claims. And that's simply not the case most of the time. Plaintiffs do not file lawsuits, and then, recant saying, "Oh, it didn't really happen. I wasn't sexually harassed."

MEER: You might be the only plaintiff's lawyer that has those types of clients.

JARAMILLA: Just hear me out. Plaintiff's attorneys will not take cases with weak, let alone false facts. Those cases will basically bankrupt our firms and damage our reputation. I'm not saying that those types of cases don't exist. But that's only a small percentage among a vast majority of righteous cases. Sure, it can be difficult to successfully pursue harassment cases because of the challenges in securing eye witnesses. But to imply that plaintiffs and their attorneys use confidential settlements for a shakedown is simply untrue.

MEER: Harassment cases are rarely about the underlying conduct itself; it's often about the response by human resources, the perceived retaliation that happens afterwards. It exposes the entire HR operation to scrutiny. Even if the claim of harassment is very weak, a case can still be pursued because somebody says, "Well, there was a mass layoff six months after I made my harassment claim, and I was included in the mass layoff," and then, it puts the whole layoff on trial; or HR didn't respond quickly enough or thoroughly enough; or the investigation was 10,000 pages, and it should have been a million pages. If something travels under the banner of a sexual harassment claim, then under SB 820, anything that flows from that can't be subject to a confidentiality clause in a settlement agreement. That's problematic because it's rare to have a single cause of action harassment lawsuit; it usually includes retaliation, wrongful termination, and violation of public policy aspects to it.

PAYNE: Toni [Jaramilla], in your own experience representing plaintiffs, is it normally in their interests to allow all parties to publish the allegations from a dispute that they are trying to resolve?

JARAMILLA: In my experience, confidentiality is a provision that defendants want in order to avoid public accountability and embarrassment for their own wrongdoing. But it hurts the plaintiff, because it exposes her to significant monetary penalties if she ever speaks about incidents that certainly impacted her life and emotional wellbeing. With the threat of financial ruin, she can't speak about the facts of her ordeal with family or friends, or even to warn other people of her harasser and the company that failed to protect her. She can't even post a "#MeToo" on social media without fear of a breach.

Banning confidentiality does protect future victims. It allows people who have been harassed—who would otherwise be bound by confidentiality—to come forward freely, without a subpoena, and talk to other victims and their counsel to provide corroborating evidence; I acknowledge that some plaintiffs want the choice of having a confidentiality provision. SB 820 gives them that option.

LANE: I think that there could have been a more thoughtful way for the Legislature to deal with the issue. For example, if the employer engages in an independent, neutral, thorough investigation and still can make no conclusive finding of harassment, it would be useful for the parties to still be able to confidentially resolve that dispute. If the Legislature had truly been concerned about the truth, I think that the Legislature could have built in such a mechanism. I hope that there will be a movement to amend and supplement this statute going forward.

PAYNE: One of the interesting things about the defamation protection in AB 2770, which now explicitly protects communications about complaints of sexual harassment, is that it cuts both ways. The employer could

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tell a prospective employer that the applicant had complained of sexual harassment, that we investigated it, we were unable to corroborate those allegations, or worse, that we found that he or she had ulterior or biased motives, or that the complaint was false. Communications about both the accused and the accuser are expressly protected against claims of defamation. Employees who report sexual harassment should consider that an employer can disclose its findings, even if the employee does not agree with those findings or those findings do not reflect well on the employee.

LANE: And the difference between AB 2770 and SB 820 is that the former still allows for defamation actions when there have been malicious and untruthful accusations. At least that was built into AB 2770. My real beef is with SB 820 because it doesn't provide that same level of protection in the instance of a false accusation.

JARAMILLA: AB 2770 does have the key words, "without malice." As long as a complaint of sexual harassment is made without malice, it is not defamation. It also allows a former employer to explain to future employers that the reason an employee was fired was because of sexual harassment, so long as the communication was without malice, it's not defamation. AB 2770 just declares existing law.

MEER: Malice is a very narrow standard, though. Few people act with malice, but they oftentimes act with sloppiness. And the protections in the new legislation let you talk about something that may have happened 25 years ago. You can make somebody almost unemployable by providing that information, and if the person making the inquiry doesn't ask enough questions about the investigation's scope and findings, then you can really smear somebody, and again, not have any malice, but just be part of office gossip that destroys somebody's life. The Legislature is stupid, and I hope you print that.

PAYNE: It is ironic that California law regulates and restricts employer inquiries and hiring decisions involving past criminal convictions of job applicants, while AB 2770 makes it easier for employers to acquire information about applicants who have merely been accused of sexual harassment. Even without any trial, and with no finding or judgment that they engaged in sexual harassment, employers can freely disclose these allegations to a prospective employer, but employers are restricted from inquiring about and basing employment decisions on criminal convictions, which have been proved beyond a reasonable doubt. In any event, employers who receive information about past sexual harassment complaints still have to consider how to use that information in hiring decisions without provoking a claim.

MODERATOR: Do you think AB 2770, which further protects employers from defamation liability for reference check responses concerning sexual harassment, will incentivize employers to be more candid with prospective employers?

LANE: As an attorney for employers, I cannot think of an instance where the employer was so certain that the alleged harassment occurred that they would want to discuss it with the accused's prospective employer. Again, I think this was a legislative response to some very extreme cases when, in reality, many of these cases are not as clear cut.

PAYNE: My view is that Section 47 already provided a privilege for employers to communicate this kind of information. This new provision clarifies it, but in my experience, employers often decide to provide only name, rank, and serial number in a job reference context, because they don't want to get dragged into some potential dispute with the former employee—if the employee believes he got smeared by the response or precluded from a hire—and then have to litigate whether it was malice or not. The employer can end up in the litigation soup, and they just don't want to be there. So, many of them make a judgment call that they'd rather just stick to dates of employment and position held and leave it at that, so they don't get carried into a potential dispute.

SCHAEDEL: Employers have had Civil Code Section 47(c) protection all along, and I can never get my employer clients to give

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more than dates of employment. Sometimes, they don't even want to give positions held because a former employee who embellishes his résumé later on might sue, claiming he lost an opportunity.

I imagine some people would like to see a mandatory report so that this follows a person around. The impetus could be to prevent the situation, like we saw many years ago in *Weeks v. Baker & McKenzie*, where the person went from office to office and harassed people, and the employer knew about it but didn't do anything about it. But as others have pointed out, cases are not always clear cut. The law is a very blunt instrument for a situation that needs surgical precision to solve individual problems, so that kind of report could unfairly tarnish a person for life.

LANE: I'm also concerned about the backlash. SHRM published a study in October finding that many men have confidentially admitted that, as a result of the "Me Too" climate, they are more reluctant to work with women, are refusing to travel alone with women for business, and are declining to mentor women one-on-one. That is troubling to me. These laws, which were developed with the noble intention of protecting women from overt harassment, may harm women further by leading to more covert forms of discrimination.

JARAMILLA: I'm troubled by that assessment. It takes us back to the faulty excuse of years ago when anti-discrimination laws were enacted: Well, we're not going to hire African Americans because now we've got these civil rights laws that say they can sue for race discrimination. So men are now uncomfortable to work or travel alone with women because of stronger harassment laws? Women have been feeling uncomfortable working with men for centuries. So we shouldn't pass stronger laws because men are going to start feeling uncomfortable? Of course not!

LANE: Fair or not, I fear that the backlash is happening, and it is a disservice to women to ignore or deny it. As a woman, of course I want the legitimately harassed to be protected. At the same time, I don't want women to be held back from having the same opportunities and experiences that men are having.

MEER: It can scare people so much because in SB 1300 where they say a single remark or a single incident is enough—

JARAMILLA: To go to a jury; to not be dismissed on summary judgment.

MEER: Sure. But a single incident that was severe enough could escape summary judgment under our previous standards. Now, it's a single incident. Everybody is so afraid, especially in multicultural, diverse workplaces. If somebody makes a remark that is not intended to be harassing, that can trigger a claim under SB 1300. It chills good workplace interaction, creative exchange of ideas, and post-work social events. The standard now is not just a civility code, it is an absolute perfection code, and that's a bad standard.

SCHAEDEL: I do think that that's a problem that we have to address. And I absolutely agree that part of that is training. But, we're working against human nature, in a sense. In fact, we had a humorous interaction at the beginning of this meeting about someone who is pregnant, and we're saying, "Oh, you're pregnant. Who knew? You look wonderful. That's phenomenal." Under the current regime, someone could take offense to that and claim the other person was making comments about her pregnancy and/or physical appearance.

MEER: Exactly. See you at your jury trial.

JARAMILLA: But no one is going to take a case like that. That's what I'm saying.

SCHAEDEL: I absolutely have seen cases where the allegations were, "He asked me about my plans to have children; he asked me what my plans were for the weekend"; "That was a nice person you brought to the holiday party. Is that your boyfriend?" These are otherwise normal human interactions that are potentially actionable in the workplace. I've heard some people will try to "play it safe" and not mentor any female associates or even hire them. Others are constantly self-censoring what non-lawyers would consider to be absolutely innocuous questions. I have longtime colleagues whom I don't even know if they're married or have kids. It can

make for a very sterile and cold environment. So, I don't know how we find a balance.

MODERATOR: Speaking of balance, what are your thoughts on SB 826, the bill that requires a minimum number of women on boards of directors?

MEER: Isn't it repulsive to women to assume that they all think alike? That having a woman on the board of directors is going to change the nature of decision-making?

SCHAEDEL: I understand it is intended to inject diversity into the power structure, but is that the best way to do it? I would come down and say no because it's the government imposing a solution on corporations.

LANE: I think a court is ultimately going to find the law imposes unlawful quotas. I do think it is important to continue to elevate women to executive, board, and partner-level positions because it does bring a different viewpoint, which benefits everyone. However, I don't think that a state-imposed quota is the way to go about it.

JARAMILLA: SB 826 was necessary because of the low representation of women on boards of directors. If companies are not valuing and promoting gender diversity, then laws should be enacted to ensure those opportunities are there for women.

MEER: It's assuming that just because somebody identifies as a woman, they're going to have a different business view on something, and that's wrong.

JARAMILLA: It's not just about identifying as a woman, but bringing our life and business experiences, viewpoints, unique vision, instincts and input to a board. Diverse viewpoints make companies successful. How is that wrong?

PAYNE: But why is a person's gender valued over and above a person's race or other diverse characteristics? Why single out women to get this preferential treatment, and not provide this opportunity to African Americans or Hispanics? Isn't this one of the problems inherent in mandatory quotas?

MEER: I get that white men have been creating and solving this country's problems for hundreds of years, but I think the evolution of diversity has been pretty strong, and I think boards do try and strive for diversity because it makes business sense.

JARAMILLA: Diversity should absolutely include race as well as gender. Not all boards strive for diversity. Some are perfectly happy being all male or all white. Diversity is still an issue.

MEER: If you have a rule that all boards have to do this, then it implies that just because someone identifies as a woman, it means that they have a more valuable viewpoint than somebody who isn't.

JARAMILLA: No. It is requiring that women's viewpoints are represented on the board. Not necessarily a *more* valuable viewpoint, but valuable nonetheless.

LANE: They have an *equally* valuable viewpoint.

SCHAEDEL: But has this created a tokenism concern? Five years from now, are people going to say, "Ah, you're the SB 826 board member," when there's a woman on a board?

JARAMILLA: That was the line of attack on affirmative action

LANE: We should not ignore reports from women in European countries that have had mandatory quotas in place for boards and public institutions for as long as 10 years. Many women are reporting that the quotas have actually been a detriment and have not resulted in the benefits that were intended.

JARAMILLA: But that operates on the presumption that there are no qualified women out there. It goes back to the conservative arguments against affirmative action, that there are no qualified minorities to matriculate to colleges, and that they are dragging down the quality of the schools. But it's simply not the reality. There are plenty of qualified women, so clearly there are barriers that are keeping them from being part of the board.

> The model used by the Ubers of the world might not survive an application of the "ABC" test in its current form. That's a shame, because my understanding of the employee versus independent contractor test was always focused on how much freedom the individual had.
>
> – **JACK SCHAEDEL**
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LANE: The reality is that certain fields do not have an equal number of trained men and women. For example, there has historically been a shortage of women in engineering and math. This is a cookie-cutter law which does not consider the logistical issues in implementing it. Instead, it could perpetuate even further the appearance and the belief that a woman or a person of another minority is not as qualified as the person who they replaced due to the quota.

MEER: Even if there are enough women, then they'll get on boards, and if they don't because they're a woman, then they could have a lawsuit. If women are being discriminated against for being placed in positions in the upper reaches of businesses, then they have a remedy of a claim for discrimination.

JARAMILLA: But you're assuming there are no glass ceilings, that there are no barriers at entry that still exist. Anti-discrimination laws are not enough. This bill fixes the lack of women on boards because companies are failing to fix the problem themselves.

MODERATOR: What do you all think about SB 1343, which expands the scope of sexual harassment training?

SCHAEDEL: I think that SB 1343 has the potential to be a good thing because most individuals work for smaller employers than 50. Under SB 1343, if you have five or more employees, you have to train each and every person. You also have to provide anti-bullying training. One of the new laws also permits bystander training, adopting an "if you see something, say something" approach to activity in the harassment context, which could be very helpful.

I was surprised to hear that many clients and potential clients and attorneys who represent very small businesses are very concerned about these training provisions—about the cost of paying a lawyer or other professional—to come in for two hours every other year to provide training for everybody. It seems a small price for employers to pay if it can help prevent claims from arising. There's good potential there.

LANE: Yes. And the DFEH will be publishing free videos to allow for the training.

JARAMILLA: Right. The DFEH has resources available on its website, and that could help satisfy the concern that this is going to be costly for small employers.

When these laws are being developed, the business community—including the Chamber of Commerce—is very involved in reviewing the language and giving their input. They make sure that the business community is represented and has a voice in the development of these laws.

I agree that training is helpful. Thus far, the requirement was that supervisors must be trained every two years on sexual harassment, discrimination, and bullying. But to be truly effective, harassment training should be given at the ground level. And they should also cover smaller employers. The cost of such training was considered, and that's why the DFEH will produce, distribute, and make available training materials on its website.

LANE: Additional training is a win-win. As a defense lawyer, the more that people are trained, the easier it is for me to sit in a deposition and say, "You received the training and knew what constituted harassment and how to report it. Why didn't you report it?" It gives me a way to show that employees have now all been put on notice, that they know their rights and obligations, and that the employer has done its part.

PAYNE: I, too, think the online training that's going to be made available should be helpful to employers, especially smaller employers. I get calls all the time from employers about how to get the training done cost-effectively. So, I see it as a positive thing to have online training available to them, which has been blessed by the state enforcement agency and may be one less thing for someone to try to pick apart in a harassment or discrimination case.

MEER: Another benefit of the training, if it has the correct content, is to explain to employees what constitutes a "hostile work environment." The term "hostile work environment" has now become so much a part of our popular culture: "We're short-staffed around the holidays; this is a hostile work en-

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> I still continue to advise clients, just as I did before the "ABC" test, that it's much harder to get in trouble by classifying a worker as an employee—even one with a flexible schedule—than it is to deem the worker a contractor and then face a misclassification case down the road. *Garcia* and *Dynamex* only make this clearer.
>
> – **WENDY E. LANE**
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vironment" or "My supervisor gave me a tight deadline; this is a hostile work environment." Through training, you could explain to employees, especially the non-supervisory ones, that there are situations in the workplace that are unlikable but are the nature of business and that actionable harassment is harassment based on a legally-protected category; not being asked to do hard work.

MODERATOR: Finally, the independent contractor issue is alive and well. What is the anticipated impact of *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal.5th 903 (2018)?

PAYNE: This issue is a real sore spot for the clients we advise. The California Supreme Court held that individuals are now presumed to be employees, unless the employer proves that the individual meets a three-prong "ABC" test. On the plus side, this test is arguably simpler than the 20-plus factors that have historically been applied, depending upon the context of this independent contractor analysis, and by which taxing authorities, and which state or federal agency. This new standard may provide more predictability, particularly for traditional occupations and employers. But the concern that so many of our clients have is where to draw the lines. Practically speaking, they now should assume, as the court has directed, that these individuals are going to be employees. What was already a highly-scrutinized classification just got even riskier if a company goes out on a limb and decides to classify somebody as an independent contractor.

LANE: I thought that the "ABC" test was already difficult and onerous enough for employers, but with the California Court of Appeal, Fourth Appellate District's recent ruling in *Jesus Cuitlahuac Garcia v. Border Transportation Group*, I'm extremely concerned as to whether anybody can really be an independent contractor anymore.

What's troubling about the *Garcia* case to me is the court's view on part "C" of the test, which is whether the worker independently has made the decision to go into business for him or herself. The *Garcia* court said the hiring company must show the worker is *actually* engaged in an independent business; not just that they *could* have become so engaged.

What does that mean? How does a hiring company know whether somebody is actually engaged in an independent business versus having the ability to do so, and why is that burden being placed on the hiring company?

Luckily, the *Garcia* case is just the Fourth Appellate District's opinion in California. I suspect that we're going to see some interesting dueling cases in other districts and that, ultimately, it will make its way up to the California Supreme Court for further clarification. Meanwhile, it's extremely difficult to advise clients what to do about part "C" of the test in light of the *Garcia* decision.

MEER: In the class action context, this standard just reeks of individualized issues. To say that you have to apply each of the three prongs of this test to every person and to every job duty, and whether you're doing that on a weekly, project, or annual basis, will not work in the class action sphere. That's why I don't think *Dynamex* is such an issue. These cases are not going to be classworthy, and entrepreneurial lawsuits are in class actions, not in single-plaintiff cases.

SCHAEDEL: But there *are* big class actions involving Uber and Lyft over whether or not their drivers are independent contractors. I don't know that you need to do an individual inquiry if each person is doing generally the same thing.

But I think overall your point is valid concerning unintended consequences. The model used by the Ubers of the world might not survive an application of the "ABC" test in its current form. That's a shame, because my understanding of the employee versus independent contractor test was always focused on how much freedom the individual had. Namely, was the worker really tied to the business, or could the worker do what he or she wanted? Under the "ABC" test, it's just a question of whether the entity is providing a service to the public, and whether the worker helps that entity provide that very service to the public. It blows away the entire theory of the gig economy, which is what neither society nor individuals want.

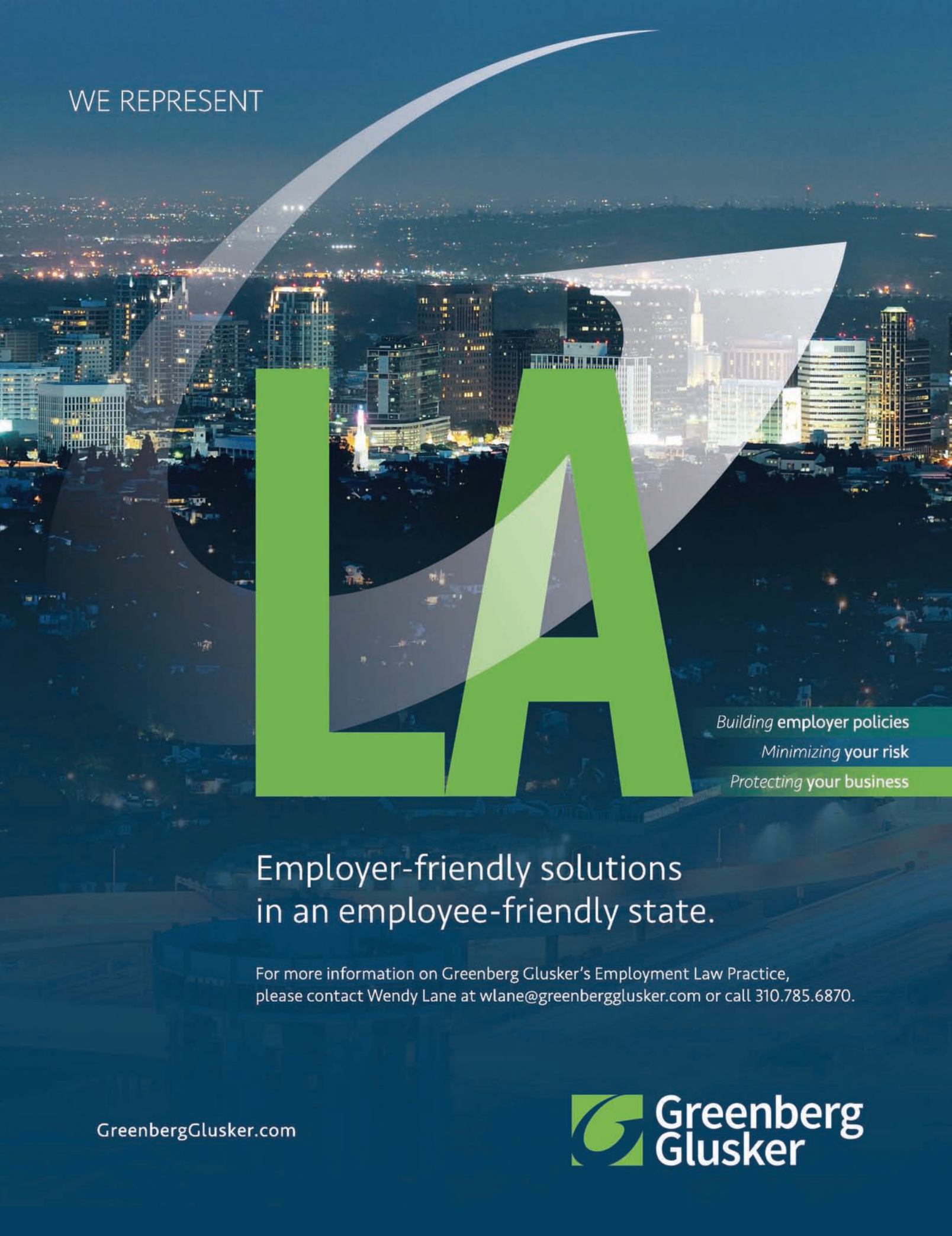
Every time I've been in an Uber, I like to

talk to the driver, and I turn the subject to the employer versus independent contractor issue. You know what? I've never had a single one who told me that they wished that Uber set their hours. No one ever asked for Uber to exert more control over them.

JARAMILLA: I also talk to Uber and Lyft drivers. These companies already exert a great deal of control over the drivers. They control and interfere with drivers' total earnings by imposing deductions on them. For example, the wait time for the passenger to get into their vehicle, which at times could be lengthy, is not accounted for because they're just paid by the ride. I believe Uber also deducts from their wages, fees for canceled rides. Then there are the maintenance expenses of their car that aren't accounted for. In the end, drivers make very little for the amount of hours and costs they spend.

PAYNE: As applied to these sharing-economy-type companies, like Uber and Lyft, this new legal standard presumes employee status might drive us toward a legislative fix that balances better the interests of all the parties—not just the company, but the individuals, those who prefer the freedom and flexibility that comes with less control by the company. Maybe we can devise some kind of hybrid-worker-type classification—a cross between employee and independent contractor—which can accommodate whatever we decide, from a public policy perspective, is appropriate protection. It could give protection to these hybrid workers, without fully imposing all the costs and burdens on the employer via employee status.

LANE: I try to remind my clients that they can still have a workforce of people with flexible schedules and call them employees. I still continue to advise clients, just as I did before the "ABC" test, that it's much harder to get in trouble by classifying a worker as an employee—even one with a flexible schedule—than it is to deem the worker a contractor and then face a misclassification case down the road. *Garcia* and *Dynamex* only make this clearer.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