CUSTOM CONTENT

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LABOR & EMPLOYMENT

A Roundtable Discussion

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As the legal landscape continues to evolve in terms of labor and employment, the Los Angeles Business Journal once again turned to some of the leading employment attorneys and experts in the region to get their assessments regarding the current state of labor legislation, the new rules of hiring and firing, and the various trends that they have been observing, and in some cases, driving. Below is a series of questions the Business Journal posed to these experts and the unique responses they provided – offering a glimpse into the state of business employment in 2019 – from the perspectives of those in the trenches of our region today. Thanks to our superb panel for their expert insights.

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What are the most significant new laws taking effect that could be impactful to businesses?

REED SMITH TEAM: There are few significant new laws…
- **Assembly Bill 5** (discussed in greater detail below): codifies the California Supreme Court's 2018 decision in Dynamex Operations West, Inc. v. Superior Court on independent contractor worker status.
- **Assembly Bill 51:** Effective January 1, 2020, it severely limits (but does not outright ban) the use of arbitration agreements in the employment context in California to instances where the employee voluntarily and affirmatively elects to enter into such agreements. All mandatory agreements signed after January 1, 2020, and used as a condition of employment (or those requiring an opt-out) will be prohibited, as will threats, retaliation, or discrimination for an employee's failure to agree. AB 51 also makes it a criminal misdemeanor to require a waiver of rights to sue for violations of the Fair Employment and Housing Act (FEHA) or other employment statutes as a condition of employment. This law will surely be subject to challenge given the Federal Arbitration Act's (FAA) preemption of state laws that attempt to invalidate arbitration agreements.
- **Assembly Bill 9:** Extends the statute of limitations period from one to three years for complaints alleging unlawful workplace harassment, discrimination, or civil rights-related retaliation.
- **Senate Bill 83:** Extends California's Paid Family Leave benefit from six weeks to eight weeks of wage replacement benefits to workers who take time off work to care for a seriously ill family member or to bond with a minor child within one year of birth or placement. It also requires a task force from Governor Newsom's office to develop a proposal by November 2019 to extend the duration of paid family leave benefits to six months by 2021–2022.
- **Senate Bill 142:** Expands requirements for employer lactation rooms.
- **Senate Bill 188:** Expands the FEHA's definition of race to include traits historically associated with race, such as hair texture and "protective hairstyles."
- **Senate Bill 778:** Extends the deadline for nonsupervisory employee training from January 1, 2020, until January 1, 2021, and confirms that those supervisors who received 2018 training need not be trained again until 2020.

COLE: Assembly Bill 51 may prohibit California employers from requiring employees to sign new mandatory arbitration agreements concerning disputes arising under the California Fair Employment and Housing Act (FEHA) or California Labor Code, if the Federal Arbitration Act does not apply. Employers will no longer be able to condition employment on an employee's consent to waive rights, forums, or procedures for alleged violations of the FEHA or California Labor Code. It also prohibits employers from terminating, retaliating or discriminating against employees or applicants if they refuse to sign arbitration agreements for alleged FEHA or California Labor Code violations. Even voluntary opt-out clauses in mandatory arbitration agreements will not be enough to escape the new law's restrictions. Notably, however, the law will apply only to arbitration agreements entered into after January 1, 2020, carves out arbitration agreements that are enforceable under the Federal Arbitration Act (FAA), and is subject to FAA preemption. California employers will start seeing newly hired employees after January 1 refusing to sign arbitration agreements and compelling arbitration in the employment context will become more difficult.

What does the new AB 5 law mean for businesses in California?

REED SMITH TEAM: AB 5 is a landmark piece of legislation codifying the so-called ABC test adopted by the California Supreme Court in Dynamex. Under AB 5, the ABC test applies to the determination of whether an individual is an employee or independent contractor for most provisions of the Labor Code and Unemployment Insurance Code. In many instances, AB 5 will limit the ability of businesses to classify individuals as independent contractors. AB 5, however, has carve outs for many industries and relationships. For example, the business-to-business exception provides that certain "bona fide business-to-business contracting relationships" are exempt if they satisfy a 12-part test. In addition to the exemptions in the bill itself, in certain industries, portions of AB 5 may be preempted by federal law. These exceptions to AB 5 will be litigated for years to come. Given these facts, businesses that use independent contractors should review the bill and its exceptions with counsel to determine whether their independent contractors are still correctly classified. Because the ABC test originally came into being as court-created law, many employers have been reluctant to make changes to their practices as they have waited to see if courts would reverse or modify the rule. AB 5 ends that period of uncertainty, since it codifies the test as statute.

Which of California's newer employment laws are most likely to land employers in court?

COLE: Without question AB 5 and AB 9. Among other things, AB 5 adds section 2750.3 to the Labor Code making it substantially more difficult for California employers to classify workers as independent contractors. The plaintiffs' bar is keenly aware of how much California businesses rely on the use of independent contractors to remain profitable. As a result, we will undoubtedly see more litigation involving misclassification issues. Simultaneous with the increase in lawsuits, California businesses will see a sharp decrease in the available defenses to these lawsuits and, in many cases, will not be able to lawfully continue business models that depend on the use of independent contractors. Similarly, AB 9 will force employers into court on a larger scale because it allows employees to wait up to three years before filing an administrative complaint with the Department of Fair Employment and Housing. Existing law limiting the time to file a charge to one year prevented "stale" claims from being litigated. This legislation will extend the life of claims that, until the passage of AB9, would have been barred.

How do you advise clients regarding the implementation and enforcement of non-competes?

LANE: While most employers are now familiar with California's strict rules against the enforcement of non-compete agreements which would restrict an employee's future employment, many are unaware that overly broad agreements prohibiting the solicitation of customers are also not likely enforceable in California. Although many businesses headquartered in other states which allow non-competes think these California limitations should not apply to them, California courts have frequently held otherwise. Nevertheless, employers should not give up entirely on having non-compete/non-solicitation agreements. Labor Code § 925(e) contains a "carve-out" which allows an California employee who is individually represented by legal counsel to agree to a foreign venue or forum where non-competes are enforceable. Moreover, even under California law, it is still permissible to prohibit an employee's use of company trade secrets to unfairly compete or to solicit employees or customers both during and after employment. Controversy arising from the employment contract may be adjudicated or the choice of law to be applied.

REED SMITH TEAM: California's strong public policy against non-competes, enshrined in its statutory prohibition with narrow exceptions, means that California employers need to consider their business objectives when finding creative and legal approaches to their relationships with former employees. Where the employer's goal is to prevent its trade secrets and other confidential information from being used against it by a competitor, it can achieve that goal with well-crafted confidentiality and trade secret agreements, policies, and practices. Most important, employment agreements and policies should be part of a well-implemented set of information security policies and practices. Enforcement of trade secret and confidentiality agreements starts while those with access to that information are still employees. When post-employment litigation then arises, the employer will be able to demonstrate to the court that the case is genuinely about protecting that sensitive information, and not merely an effort to prevent former employees from pursuing their career with a competitor.

What are your views on using arbitration agreements as an alternative to employment litigation?

COLE: The question of whether an employment dispute should be arbitrated depends on the circumstances of the particular case. But one of the biggest potential advantages of arbitration agreements for employers is including a class action waiver provision requiring employees to arbitrate solely on an individual basis. This can protect employers from the increased expense and potential liabilities involved in defending claims involving multiple employees. However, AB 51 will have the effect of potentially prohibiting mandatory arbitration of employment disputes as a condition of employment as of January 1, 2020.

REED SMITH TEAM: Arbitration is not desirable in every employment case, but it is good to have as an option. It is not a golden ticket out of litigation or a guarantee of victory in a favorable forum; it still requires substantial litigation strategy and carries risk. If an employer has enforceable arbitration agreements in place, it can decide strategically in litigation to either demand arbitration or proceed in court, depending on the nature of the case. Careful strategic consideration is particularly important in wage and hour class actions and Private Attorneys General Act (PAGA) cases. In those cases, the choice of forum can have a far-reaching impact on each pretrial phase, on prospects for settlement, and on whether the ultimate resolution applies to an entire plaintiff class or to only a single plaintiff, leaving potential exposure as to the rest of a putative plaintiff class. Although it is tempting to assume that arbitration is favorable to the employer in every case, that is often not true. So, even if there is an enforceable arbitration agreement in a newly filed employment case, the employer should not demand arbitration until it first looks at all of the relevant factors to determine whether it will be the right move. When deciding whether to ask employees to sign arbitration agreements, employers should be mindful of the current employment climate, where many employees view

arbitration agreements as undesirable and respond negatively to such agreements. If arbitration agreements are presented to employees, then both the process and the agreements themselves should respect the importance of strong employee relations in preventing disputes from arising.

What are the most frequent mistakes made by employers when disciplining employees?

LANE: Employers often fail to document verbal and informal warnings. Documentation does not have to be overly detailed or formal. A supervisor or human resources can prepare an e-mail and sending it to themselves to create time-stamped evidence of a conversation or interaction. Employers should refrain from having a progressive discipline policy (e.g. requiring that milder forms of discipline precede the termination of an employee). Many times, it is not advisable to give an employee multiple warnings and/or immediate termination is warranted. A progressive discipline policy can defeat an employee's at-will status, which allows the employee or employer to terminate the employment relationship at any time. Employees also frequently fail to recognize that they can be at risk for claims of retaliation and/or discrimination if they issue discipline to an employee who has recently made workplace complaints, requested accommodation of a disability or medical condition, taken a protected leave or absence, or is otherwise in a protected class. In these cases, documentation is critical to help defend against any claims that the disciplinary action was fueled by discriminatory or retaliatory intent.

COLE: Some of the most frequent mistakes employers make involve the failure to document discipline and the failure to discipline immediately. A written record of disciplinary meetings and incidents creates key evidence of an employee's performance and behavior, and helps eliminate the potential for miscommunication between the employer and employee. But, if too much time passes before the issue is addressed, the incident gets stale. Subsequent discipline for stale issues creates a greater risk of retaliation or harassment claims and any documents created too far "after the fact" are viewed suspiciously and are less credible. Effective discipline for misconduct should happen as quickly after the event as possible and be reflected in documents maintained in the employee's personnel file and other secured locations, as necessary.

REED SMITH TEAM: Three key mistakes are…(1) Untimely discipline. Employers sometimes wait until long after an incident, or until repeated offenses occur, before issuing discipline. Juries (and employees) are typically suspicious of untimely discipline. Imposing employee discipline shortly after the act requiring discipline helps correct workplace problems and strengthens an employer's legal defenses if the disciplinary action (or subsequent termination) leads to litigation. (2) No documentation. Documentation is crucial to an employer's ability to show that the reason for taking adverse action, such as employment termination, is based on a lawful reason(s) (for example, poor performance or inappropriate conduct). It is similarly helpful to document verbal discipline (aka "coaching conversations"). Verbal discipline tip: Send an informal email to the employee reiterating the verbal coaching conversation. Alternatively, after speaking with the employee, document the conversation in notes or send yourself an email, accurately reiterating the discussion. (3) Too vague. Employers should avoid generalizations when imposing discipline and should premise employment decisions on the employee's specific conduct or performance. Tip: Be more specific than merely stating, "employee has had performance problems," "demonstrated poor work habits," or "violated rules" in order to adequately support the employer's position that the discipline was administered for legitimate reasons.

What are some of the most common mistakes that businesses make when it comes to employees and intellectual property?

LANE: Many companies— especially startups and closely-held companies— fail to require employees to sign work-for-hire and assignment agreements when they are first employed. The company should require employees to sign such agreements at the outset of the relationship to ensure that any copyright ownership or other intellectual property rights vest in the company and not in the employee. CA employers who require their employees to sign an assignment and work-for-hire agreement often make another critical mistake by failing to give their employees notice under California Labor Code §2870 that the employee is not required to assign inventions that they developed entirely on their own time and without using the employer's equipment, supplies, facilities, or trade secret information unless the inventions either: (1) relate at the time of conception or reduction to practice of the invention to the employer's business, or actual or demonstrably anticipated research or development of the employer; or (2) result from any work performed by the employee for the employer. Failure to include this notice may nullify the entire agreement.

What advice would you give to a new company with respect to the creation of an employee handbook?

COLE: Employee handbooks are still very important and once a company decides to issue and implement an employee handbook, it should remain vigilant in keeping it updated. Handbooks are "living documents" and should evolve as the laws, the times and the company itself changes. Second, employers should avoid relying too heavily on standardized, form handbooks and, instead, make sure the employee handbook accurately reflects the company's business values and cultures. Finally, employers should keep in mind that they have discretion in what is included in the handbook, there are some policies that should be considered essential. For example, any employee handbook issued to California employees, regardless of industry, should include policies against unlawful harassment and retaliation, an equal opportunity statement, and a commitment to engage in the interactive process under disability discrimination laws, as applicable.

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LANE: Employers of all sizes should have handbooks. Handbooks communicate essential information about a variety of topics: at-will employment, equal employment opportunities; harassment and discrimination, complaint procedures, leaves of absence, and meal and rest break policies, just to name a few. For example, detailed handbook policies are often a key defense against wage and hour claims. Handbooks that clearly instruct an employee to immediately notify human resources if a supervisor interferes with their ability to take a meal or rest break or asks them to work "off the clock" not only provide evidence of the Employer's intent to comply with the law, but they make it difficult for an employee to argue that their rights were violated if they never reported those violations. In some cases, the failure to have a written policy may destroy the employee's ability to defend itself from the outset. In fact, the Ninth Circuit Court of Appeals just asked California Supreme Court to clarify whether the absence of a formal policy on meal and rest breaks violates California law. Cole v. CRST Van Expedited, Inc.

Assuming employees actually qualify as independent contractors, are there any issues businesses need to be aware of in drafting agreements with them?

LANE: Under the "ABC" test, the contract should clearly provide that worker is free from control and direction of the hiring entity while performing the contracted work. Any contractual provisions requiring the worker to receive training from or follow the directions of the hiring entity may create misclassification liability. However, the agreement may still indicate incremental dates for the completion of segments of a large project or the essential elements of the scope of work without directing the contractor as to the methods and means of completing the tasks. Because the worker must be customarily engaged in an independently established trade, occupation, or business under the ABC test, a contractor agreement should not include exclusivity requirements that prevent the contractor from providing services to entities other than the hiring entity. Robust contracts also require contractors to have their own workers' compensation and/or general liability insurance, licenses, certification, and adequate training and/or skill for the tasks which the contractor will be providing. Hiring entities should contractually require contractors to keep confidential trade secrets which the contractor learns of while performing their services.

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

REED SMITH TEAM: Terminating a poor performer can be disruptive to the working environment, and there can be a tendency to rush to separate the employee. Before doing so, however, employers should consider the following to inoculate themselves from claims that the business reason for termination wasn't pretextual for illegal discrimination or harassment or other claims of liability: (1) Do we have clear policies for discipline up through termination, and have we consistently followed those policies with this employee? (2) How were similarly situated employees within and outside this person's protected class treated? Was a different form of discipline imposed on them for similar behavior or poor performance? (3) Do the employee's performance reviews support the reason for termination? Frequently supervisors aren't candid about poor performance in written reviews, and juries will be hesitant to believe a company's reason for termination if the performance reviews don't support that reason. (4) Have we provided a final paycheck on the date of termination for all wages, all accrued commissions, accrued vacation, reimbursements, and so forth?

COLE: Employers are often so focused on the business reason underlying the decision to conduct a mass layoff or reduction in force (RIF), that little attention is given to how the layoff is perceived by the affected employees. Close attention should be paid to the timing of layoffs in relation to recent protected leaves, workers' compensation claims, harassment allegations, or claims of discrimination. Employees may view their inclusion in a RIF as retaliation for engaging in rights protected under either federal or state law. With the assistance of legal

counsel, employers should conduct an overall statistical analysis of employees selected for a RIF, because a mass layoff that disproportionately affects a particular protected classification (e.g., age, race, sex, national origin, etc.), regardless of the legitimacy of the business reason for the selection, may make employers vulnerable to disparate impact allegations based upon employee comparators in similar jobs and classifications.

LANE: On numerous occasions, I have seen an employer terminate an employee for excessive absences and/or tardies without fully considering whether the employee might have had a protected medical reason for those attendance issues. When employees present medical certifications from doctors, employers are more likely to realize that they may have to consider accommodations regarding attendance in response to a medical disability or condition. However, when an employee casually mentions that they were late because they were having "stomach problems" or "anxiety," for example, many supervisors and employers do not recognize that the employee might later argue, if terminated, that the employee put the employer on notice that they had a medical condition which required the parties to go through the interactive process to see if accommodations could be made.

Which pay practices are most likely to result in a company being sued in a wage-hour class action?

REED SMITH TEAM: Clear written and verbal communication with employees regarding their pay is an indispensable element of wage and hour compliance. The most common starting point for employees suing in wage–hour class actions and PAGA actions is confusion over the information in their itemized wage statements. California law requires those statements to contain specific itemized information. But even if that information is technically present and is accurate, an overly complicated or confusing wage statement can prompt an employee to believe that they have not been paid correctly and that they are owed more than they have been paid. Similarly, an employer's policies and practices for time tracking, overtime, meal and rest breaks, bonuses, and other pay-related issues need to be well communicated and reflected in consistent and clear written policies. When employees have questions about pay, employers should be responsive and eager to resolve those concerns. Another practice that often leads to class action suits is when an employer uses complicated pay practices for hourly employees, such as alternative workweek schedules, multiple hourly rates for different types of work, complex bonus systems, and piece rate systems. The law on these practices changes regularly, so compliance is difficult. And, even if an employer stays technically compliant in every respect, complicated pay practices often lead to complicated written wage statements and employee confusion, which can lead to litigation.

LANE: Class-wide allegations of overtime pay and meal and rest break violations frequently arise from improper rounding practices for non-exempt employees (e.g. employers round employees' time punches in a way that always results in employees losing money for time worked.) Many class actions also result from misclassification of non-exempt employees as exempt. These employees most frequently allege they did not spend more than 50% of their time performing exempt duties, as required, and/or they failed to receive the minimum exempt annual salary. Giving an employee the title of "manager" and/or paying them on a salary basis is not, by itself, sufficient to make an employee exempt. Employers may also be liable for ignoring the changing minimum salary threshold, which is at least two times the state minimum wage for full-time employment. Because the California minimum wage has recently increased annually, the minimum salary for exempt employees has also necessary increased each year. There is also risk for employers who are unaware that, except in limited instances, employers may not reduce exempt employees' pay for partial hours worked.

Can an employer legally impose a rule barring the employment of job applicants with criminal records?

REED SMITH TEAM: Such a rule would run contrary to California law. California law requires employers with five or more employees to comply with numerous procedures regarding the use of the criminal history information of applicants. Under California's Ban the Box law, employers are, in most circumstances, prohibited from making an inquiry or seeking a background check until after a conditional offer of employment has been made. Employers also cannot consider certain offenses even after a conditional offer of employment is made, including a non-outstanding arrests not followed by a conviction and convictions that have been sealed or expunged. Even if a conviction history is found, employers must make an individualized assessment and consider certain factors to determine if the criminal history "has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position." Before an offer is revoked, the employer must provide written notice to the applicant of the conviction history and allow the applicant five business days to respond. After considering any response, the employer must then send a separate written notice to the applicant if it would like to revoke the offer. Some localities, including Los Angeles and San Francisco, have additional requirements.

What can employers do to remain current on the ever-evolving business and employment law trends?

COLE: Employers should invest resources to hire experienced, competent human resources professionals for their organization and retain experienced employment law counsel to work with their HR teams. It is important that counsel and HR are well versed and familiar with the nuances of California employment law, as opposed to simply a knowledge of general or federal employment regulations. California employment law differs greatly from the employment laws of other jurisdictions, so a specific awareness of the ways in which California law is different is critical. Employers should also take advantage of the educational resources offered by California employment counsel, such as onsite trainings on wage and hour and leave law compliance and annual updates on the changes in California employment law.