CUSTOM CONTENT

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LABOR & EMPLOYMENT

A Roundtable Discussion

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With the unique and uncharted scenarios that we have faced so far in 2020, businesses have been forced to face a whole new landscape in terms of labor and employment issues. This has left many executives struggling to find answers to crucial questions.

To address these issues and concerns, as well as many other issues pertaining the Los Angeles Business Journal has 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 in the wake of the current pandemic crisis.

Here are 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 2020 – from the perspectives of those in the trenches of our region today.

What are the most significant new employment laws taking effect in 2020?

LANE: Laws providing for leaves of absence related to and COVID-19, such as the federal Families First Coronavirus Response Act and the Los Angeles worker protection and emergency sick leave laws, have been prominent this year. In addition, California codified the "ABC Test" for independent contractors, which provides that an individual is presumed to be an employee unless the hiring entity can satisfy the rigorous "ABC Test" (including showing that the contractor is performing work outside the usual course of the hiring entity's business.) The new statute also exempts a number of professions and industries from the ABC test. California has also enacted laws and regulations expanding rights to lactation accommodation, protecting hair styles associated with race, and prohibiting certain pre-employment practices (e.g. applications, advertising and interviewing) which might enable employers to screen out applicants based on age, medical conditions, disability, and religion. Nationally, the United States Supreme Court held in Bostock v. Clayton County that Title VII of the Civil Rights Act forbids employers from taking adverse action against employees on the basis of their sexual orientation or transgender status.

SCHERWIN: By far the most significant and impactful employment law for 2020 is AB5, the independent contractor law. All businesses in California that employ independent contractors need to make sure that they understand the "ABC" independent contractor test that is outlined in AB5 as well as the exceptions and exemptions to the law. The state of California and lawyers representing employees are filing lawsuits or threatening lawsuits based on employee classification. While there are some measures on the ballot and discussions in the state assembly regarding changes to AB5 or additional exemptions, it is imperative that businesses understand its implications and possibly make changes accordingly.

SCOTT: The most significant new law for 2020 is AB 5, which codified the Dynamex decision, making the "ABC test" the standard under the Labor Code and Unemployment Insurance Code. Far more strict than the prior independent contractor test, the ABC test requires: a) that the purported contractor be free from the control and direction of the hiring company; b) that it perform work that is outside the course of the company's usual business; and c) that it have its own independently established trade, occupation or business that is the same as work performed. There are bills seeking to modify aspects of AB 5 that are pending, as are several court challenges. Another important law is AB 51, which banned mandatory employment arbitration agreements, but which has been enjoined during the pendency of a court challenge. Finally, AB 9 amended Government Code §12960 to extend the statute of limitations from one to three years for all Fair Employment and Housing Act discrimination, harassment and retaliation claims.

What implications will the COVID-19 situation have on employment law?

SCHERWIN: COVID-19 has wreaked havoc in this country and it has done the same to businesses regarding employment law compliance. Businesses need to understand what accommodations are required under the law as it relates to both federal and state sick and family leave laws. Businesses also need to understand the implications of safety and wage-hour laws on remote employees. Things to consider are providing a safe work environment at home, tracking and paying for time working remotely, and reimbursements for office related equipment and technology at home.

SCOTT: For employers, COVID-19 has been about workplace safety, layoffs and telework, a fact not lost on lawmakers. Governor Newsom signed an Executive Order creating a temporary rebuttable presumption of workers' compensation coverage if someone working contracts the virus, which the California Legislature is seeking to turn into law as SB 1159. Another bill, AB 196, goes a step further, creating a non-rebuttable presumption that essential workers who contract COVID-19 were infected while on the job. AB 1492 clarifies meal and rest break obligations for remote employees and reimbursement for expenses incurred performing work at home. Additionally, California proposed a unique protection for laid-off employees through AB 3216. This bill would require employers to offer laid-off employees information about job positions that become available for which the laid-off employees are qualified, and to offer positions to those former employees based on a specified preference system. SB 729 would require additional paid sick leave for food workers. On the national level, Joe Biden has made a 12-week paid leave a cornerstone of his campaign.

LANE: COVID-19 has affected employment law in so many different ways, large and small. For employers that continue to have employees working in their place of business or outside the home, employers have had to face the sometimes competing challenges of maintaining workplace safety and communicating about potential COVID-19 exposure while maintaining employees' privacy about their medical information. Other employers have faced challenges while allowing employees to work remotely due to office closures. Telework raises a wide range of issues: determining how much to reimburse employees for their use of home internet services; ensuring that employees have safe and ergonomic work environments at home; and confirming that employees are properly recording their time, taking meals and rest breaks, and working their regular hours while out of the office. And, of course, many employers have had to quickly become fluent in new laws regarding emergency leave and accommodating employees who are now juggling their work with providing care to children whose schools and/or child care facilities are closed due to COVID-19.

What feels different, if anything, about the types of legal questions and issues coming up during this pandemic?

SCHERWIN: The types of questions that have come up during the pandemic are more difficult because oftentimes there aren't perfect answers. What has been most challenging for businesses is that we are in unchartered territory. A lot of what employees need or are asking for is not necessarily outlined in the law. The questions and issues are fast and furious such as what leaves or accommodations should I, or do I need to make for this employee, how do I deal with a non-exempt work force

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that is now working from home without supervision, and how do I deal with employees who do not want to come into work because they do not feel safe or for other reasons? These questions require a deep analysis of the specific business with an eye toward consistency coupled with making sure the business is complying with the guidance that is out there.

SCOTT: I am getting a lot of questions about employees who do not want to return to work because of COVID-19 and are asking to stay home. These employers must first carefully consider whether some job duties can be performed at home and if so, make sure that this opportunity is offered. In addition, the employer needs to find out why these employees are asking to stay home. If they are saying they cannot work for any of the six reasons set forth in the Families First Coronavirus Response Act, then they may be eligible for Emergency Paid Sick Leave or Emergency Family and Medical Leave. Of course, employees not eligible for paid leave under the FFCRA can opt to use accrued available paid time off to stay home. In addition, all employers must consider the application of other unpaid leaves that might be available to these employees depending on the circumstances, such as a California Family Rights Act or standard FMLA leave, a pregnancy disability leave or a disability leave.

LANE: Providing legal counsel and addressing employment questions in the midst of a pandemic has been unusually challenging because the science and the laws and orders change so rapidly. I have answered more questions about furloughs this year than in all of my other years of practice combined. I have also had to provide medical-related and science-based counsel in a way I never experienced before. Perhaps most notably, during the pandemic there has been a constant sense that employers' decisions carry "life and death" consequences. Employees and employers are understandably scared to make decisions that could lead to serious illness or death. At the same time, employees are terrified that they will lose their jobs and be unable provide for their families, while employers fear that their businesses might not survive stay-at-home orders and economic downturns. I think both employers and employees are feeling that their COVID-19-related decisions carry a much greater weight than the kinds of decisions they are accustomed to making.

What can employers expect from the California legislature this year?

SCOTT: In addition to the COVID-related legislation discussed above, the following bills are pending:
1. SB 1399 - imposes liability on retailers contracting for garment manufacturing for wage/hour and working condition violations.
2. SB 1383 - amends the California Family Rights Act and the New Parent Leave Act to apply to employers with 5+ employees.
3. SB 973 - requires employers with 100+ employees to report pay data by race/ethnicity/sex.
4. AB 2992 - provides job-protected time off for certain crime victims and their immediate families.
5. AB 3075 - requires new corporation to attest to owner, director or officer judgments for wage/hour violations; permits local jurisdictions to enforce state wage standards; and imposes successor employer liability for wage/hour violations.
6. AB 3056 - excludes from warehouse/distribution center employee production quotas all rest, meal and recovery break or handwashing time.
7. There were numerous bills seeking to provide exemptions from or modifications to AB 5. The most important of these that remains active is AB 1850 which would, among other things, delete the prohibition on individual workers from the business-to-business exemption portion of the law, and AB 2257 exempts certain music industry workers.

What effect does the increasing number of millennials have on a company's approach to employee relations?

LANE: From what I have observed, millennial employees are more comfortable with technology and often prefer to work remotely or from home. Many have rejected the formalities that older generations have come to expect in the workplace. For example, millennials often prefer communicating in short sentence fragments and with abbreviations (as we see in text messages and instant message programs) and pay less attention to formal rules of grammar. However, this does not mean that millennials do not value communication. On the contrary, they crave specific and regular feedback about their job performance more than other employees. Millennials are also prone to employer-hopping more than other generations and may prefer "gig-economy" freelance jobs, so employers may have a more difficult time retaining talented employees of that generation as compared to prior generations. Millennials are a driving force for justice and change in and out of the workplace, including with the #metoo movement, and they are increasingly demanding transparency about their employers' efforts to address issues of systemic harassment and/or discrimination of protected classes of employees.

In today's social media environment, what recourse does a company have for employees who are publicly active in political or other causes that are inconsistent with the company's values?

SCOTT: California has legislation protecting political activism by workers. Labor Code § 1101 prohibits employers from making, adopting, or enforcing any rule, regulation or policy "forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office" or "controlling or directing or tending to control or direct the political activities or affiliations of employees." Labor Code § 1102 provides "[n]o employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity." Thus, employers cannot enact policies limiting employees' political activities or affiliations or otherwise attempt to force employees to follow the employer's political leanings. However, employers can certainly ban solicitations and political lobbying during non-break work hours.

How have the changes in marijuana laws affected your clients?

SCHERWIN: I think the biggest effect of the changes in marijuana laws is what decision the company chooses to make on deciding whether to test or not either before hiring an employee or when there is reasonable suspicion of drug use, such as after an accident. Many businesses that I speak to are foregoing drug testing that tests for marijuana altogether. While this is certainly permissible and acceptable, the challenge is whether that creates a safety issue or negligence claim down the line if an employee hurts someone or gets into an accident while under the influence of marijuana. It is a balancing act that needs to be discussed and understood before deciding how to move forward.

What should employers know about mediation in the context of employment disputes?

SCOTT: Mediation can be an effective, cost-saving option for resolution, but only if it takes place at the right time and only if the parties are committed to the process. Waiting too long to have the mediation (e.g., a few days or weeks before trial) can create disincentives for settlement because plaintiff's attorneys will want to recoup the time and effort they have put into the case which may make settlement too costly for the employer. This problem can be compounded by the fact that many California employment laws require employers to pay prevailing employees' attorneys' fees. To make the mediation productive, the parties must do adequate preparation work. Employers need to collect relevant information through document searches, site investigations, and witness interviews or depositions, as needed. Employers should also know that not every employment case merits the price of mediation. If the liability exposure is low or funds are limited, then the parties should try to reach settlement directly, thereby allowing the employer to allocate monies that would have gone towards mediation to settlement.

How do you advise clients regarding the implementation and enforcement of non-competes and other restrictive covenant agreements?

SCHERWIN: I think the biggest piece of advice to give clients in California regarding restrictive covenants is that you absolutely need to have a non-disclosure/confidentiality agreement that is narrowly tailored both to your business and the confidential information you are trying to keep under lock and key. If a business tries to overreach with a non-compete or restrictive covenant it will often be in a worse spot than not having one in the first place. You first need to understand what you are trying to protect and then make sure you are not overreaching in that protection since California law is very limited in what you can force an employee to refrain from doing once he/she/they leave your employment.

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

SCOTT: What employers should keep in mind is that plaintiffs' attorneys thrive on rash, impulsive decisions made by those in positions of power. Employers are in control, with the power to remove irritants. However, doing so following complaints or an employee's exercise of rights always exposes the employer to claims. Employers wishing to avoid these problems must take a longer view of the situation. Patience usually rewards employers with opportunities, as the employee who is a poor performer will likely not have the same impulse control and will usually make a mistake before the more aware employer. In addition, proper planning can avoid mistakes, such as establishing legally compliant policies on sources of frequent disciplinary issues (breaks, timekeeping, attendance, etc.), applying discipline consistently,

providing frequent performance feedback, and documenting employee reviews, issues and disciplinary actions. Employers may wish to use progressive discipline for routine issues, keeping in mind that a particular number of disciplinary steps is not always required, but may vary depending on circumstances.

LANE: Employers can unwittingly buy themselves trouble by making a number of different mistakes while disciplining employees. With the "me too" movement, many employers have taken prompt action to terminate or discipline employees accused of harassment, which is promising in many ways. However, employers should remember that there is more than one side to every story, and the accused have rights of their own. Employers who discipline employees for harassment without conducting a proper, unbiased and complete investigation risk facing a wrongful termination claim or other legal hurdles. Another common pitfall for employers is when they fail to consider the potential for disability claims when counseling an employee for attendance or tardiness issues. Supervisors should be trained to proceed with caution if an employee mentions a medical condition is contributing to a chronic tardiness or absence issue. Finally, many employers are unaware that they are likely violating an employee's right to discuss their pay and working conditions if they discipline an employee for discussing their pay information with co-workers.

SCHERWIN: Consistency and failure to document continue to be the most frequent mistakes. When deciding to terminate an employee it is of upmost importance to make sure you have reviewed how you have dealt with the situation before and what sort of discipline was given in a similar circumstance. One of the first questions you get from an opposing counsel, a government agency, or a court is "what have you done before" when someone else engaged in the same infraction? Additionally, documentation prior to the discipline and making sure that the rules are properly documented is key. Employers need to make sure that they have well written policies that outline the expectations and what happens when employees fail to live up to expectations. While we all know that California is an at-will state and that technically written warnings before termination aren't required, if you don't have this done properly, the employer will spend more time and effort defending itself, and the lack of documentation may create an allusion that the employer did not do what was right.

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

SCOTT: In the present AB 5 environment, a written independent contractor agreement should ensure that the relationship retains its independent contractor status. AB 5 can provide some guidance in this process. Beyond the obvious ABC test requirements, buried within this lengthy statute are other contractor requirements that pertain to various types of business relationships. These include licensing, separate business locations, setting of work hours, negotiation of rates, decision making and control, advertising of services, independent clientele for whom the same services are provided, insurance, and the supplying of tools and equipment. There is even a requirement that the contract be in writing. Employers of independent contractors must also be sure to update or amend contracts as new legislation passes, such as appears likely with AB 1850 and AB 2257. Finally, it is not enough to simply have a good written agreement as the conduct of the parties will always determine the nature of the relationship. Employers must therefore make sure that the parties live up to the terms of the contract.

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

SCHERWIN: Failing to provide proper wage-statements that are compliant under California law and failing to properly record meal periods when required to do so are still the most common causes of action in wage-hour class actions. Every employer would be doing themselves a huge favor to review their pay-stubs to ensure that they comply with the technicalities of the California labor code and that their meal/rest period policies are also compliant in writing and in practice.

LANE: A large number of the class actions that I handle continue to arise from allegations that employees are not afforded the ability to take a full, uninterrupted meal period no later than the end of their fifth hour of work and/or have not received premium pay. I have also noticed an uptick in class actions alleging that employees were not properly paid overtime because the employer failed to factor in non-discretionary bonuses into the regular rate of pay for the purpose of calculating overtime. And, of course, since the California Supreme Court held in 2018 that employees must record and be paid even for insubstantial or insignificant periods of time they work beyond the scheduled

working hours, California employers must take extra care to remind non-exempt employees to record and report all time worked. If employers fail to pay non-exempt employees for brief periods of time spent on phone calls, emails or other minor tasks (such as setting alarms or locking up the worksite), they could be the next to face a class action.

SCOTT: Any practice of rounding employees' time is practically an invitation for wage claims, regardless of its actual legality. It is easier to pay employees for actual time worked to avoid inquiries in the first place. Every employer should also make sure that all of the information listed in Labor Code § 226 is included on every wage statement and, above all, employers should apply commonsense in examining wage statements. If the statement does not make sense to the employer, it certainly will not make sense to the employee and may lead to claims. Additionally, employers with piece-rate workers frequently miss the Labor Code § 226.2 requirements to compensate those workers for rest breaks and non-productive time. Lastly, employers often do not realize that non-discretionary bonuses need to be paid when reasonably calculable (not based on a rigid monthly standard) and factored into the regular rate of pay for calculating overtime compensation for hourly workers. And employers need to check the math—do not assume that the payroll company has done this calculation correctly!

Does it make sense for businesses to combine their vacation and sick time into a single PTO policy?

LANE: Some employers like the convenience of being able to administer all kinds of paid time off from a single "bucket," while employees like the flexibility of taking their days as needed without having to classify it as sick or vacation time. However, under a single PTO policy, employees may begin to view all of their PTO as potential vacation and will come to work while sick to avoid "wasting" their PTO on illness. If employers are concerned about encouraging sick employees to stay home, they may prefer to keep vacation and sick leave as separate benefits. Employers should also remember that when vacation and sick leave are combined in a single PTO policy in California, all accrued and unused PTO must be paid out to an employee upon termination for any reason. In contrast, where vacation and sick leave are treated as separate benefits, the employee is not entitled to receive accrued and unused sick leave upon termination.

SCOTT: Combining vacation and sick time into a single PTO policy is attractive to employers wishing to streamline the time off process, but there are some drawbacks and pitfalls to consider. Combining vacation and sick time into a single policy may increase the amount of unused paid time off the employer must pay on termination, because unused sick time need not be paid on termination unless it is part of PTO. Employers should know that some local laws (e.g., Santa Monica) prohibit combining sick leave with vacation. Further, under sick leave laws, the employer must permit sick time usage upon employee request, whereas the employer has more discretion in scheduling vacation usage. Employers must also be aware of sick leave carry over requirements when creating a combined PTO policy that permits the pay out of time at year end. A problem can be avoided by excluding the minimum required carry over from the pay out policy. The bottom line is that employers should consider the practicalities before creating a combined vacation/sick leave policy.

How can employers remain current on the ever-evolving employment law trends?

LANE: Many employers subscribe to "legal update" e-mail alerts from employment lawyers and human resource organizations to try to keep on top of changes in the law. Seminars by human resource organizations and employment lawyers can also be an incredibly useful tool. However, many changes in the law are not intuitive or are difficult to apply in practice. I have found that employers who commit to working with their counsel annually to update their employee handbooks are in the best position to understand how changes in the law specifically apply to their organization and how their operations or practices might need to be modified to conform with those changes.

SCHERWIN: There is so much information out there and even as a full-time employment lawyer or HR professional, it is difficult to keep up. Staying involved in organizations like SHRM, PIHRA, and the California Chamber are helpful as well as subscribing to our newsletters and constant updates. We at Fisher Phillips have been providing free content and updates daily given this ever-evolving world of changes in the law related to COVID-19 or other changes. I encourage everyone who wants to stay up-to-date to subscribe to our newsletters and legal alerts to learn about key developments in California and elsewhere.

How does a law firm specializing in labor and employment differentiate itself from the competition in 2020?

LANE: Clients are overwhelmed with client alerts and webinars. I try to give personalized attention to clients to know and understand their particular business model, to discuss why and how changes in the law affect them, and to determine the most practical and cost-effective options for their specific needs. The importance of a prompt response also cannot be understated. Employment issues are often urgent. Clients need to be able to know they can reach their counsel on short notice and that there is a system in place where there is always a member of their firm's employment department ready to step in to assist.

SCHERWIN: I think in two main ways. First, is responsiveness. The past 6 months have seen us stuck in an evolving and changing stream of guidance and regulations and the team here at Fisher Phillips has been working non-stop to stay up to date and on the forefront of this pandemic. I know a lot of firms say it, but responsiveness is one of the keys to our success and the success of our lawyers. Number 2 is being an authority and hiring people that truly love what they do and enjoy providing the advice and work we do for our clients. There are a lot of firms out there that do employment law or say that they do employment law, but the way to differentiate yourself as a firm is to have lawyers and employees who are true leaders in their field and love to stay at the forefront of what is evolving and changing in employment law, particularly here in California.