

# LABOR LAW ROUNDTABLE

An Informative Q&A with OC's Top Labor Law Professionals



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*Regional Managing Partner, Irvine*  
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### What are the latest developments regarding employers' obligations where employees seek to form a union in their workforce?

**Nisha Verma, Dorsey & Whitney:** Last year, the National Labor Relations Board overturned decades of precedent and issued a new framework that would require an employer to recognize and bargain with a labor organization even without an election reflecting majority support for the union. Specifically, under the new rule, when an employer is presented with a demand for recognition by a union that asserts it has the support of a majority of employees, it must either: (1) affirmatively recognize the union as the exclusive representative of the subject workforce and therefore accept its obligation to bargain with the union before changing any terms and conditions of employment; or (2) file its own petition for the union election within two weeks to test the union's majority (which is the opposite of how elections typically proceeded before this rule, as most election petitions were filed by the union). Importantly, after the petition is filed, if an employer is accused by the union of engaging in an unfair labor practice and the NLRB agrees, the election could be cancelled, or the results set aside, and the employer would be ordered to bargain with the union as if the union had prevailed in the election.

### With improvements to predictive AI playing a more significant role in employee hiring will there be legal pitfalls for employers who elect to utilize this new technology.

**Jeffrey R. Thurrell, Fisher Phillips:** Predictive AI will undoubtedly play an integral part in the hiring process. The technology will allow an employer to shed unconscious biases and to identify team members that will be the best fit for the organization. With that said, predictive AI is being highly scrutinized by the EEOC to ensure that the use of the technology does not create a disparate impact on any particular race, gender or other protected category. Personality tests using predictive AI technology can uncover hidden traits and talents. Additionally, there are cognitive ability tests using predictive AI that can tell how well a worker can process information in the presence of distractions or under stress. The ACLU has taken issue with these tools and have filed suit alleging they are biased and create a disparate impact on certain groups such as Hispanics and Blacks. The ACLU further asserts that the cognitive tests lead to discrimination against individuals with mental disabilities. To guard against potential claims of discrimination employers should have a human oversight component over the technology and they should properly vet AI fueled vendors to ensure that the technology will not lead to discriminatory results.

**Nisha Verma, Dorsey & Whitney:** While employers are allowed to use AI in making hiring decisions, they may be unknowingly exposed to liability if their AI system has a discriminatory effect. The EEOC and DOL recently released guidelines clarifying that AI hiring processes that create a disparate impact violate Title VII. Similarly, California regulators proposed rules clarifying that civil rights protections extend to an employer's use of automated-decision systems. The proposed rule makes it unlawful for employers to use any hiring system that has a disparate impact on a class of applicants, unless the employer can show that the standards are

(1) job-related, (2) necessary, and (3) that no less discriminatory method exists. Employers should also be aware that laws are rapidly changing, and there may be additional legislative burdens placed on the use of AI. For example, California's AB-2930 would require employers that use automated-decision systems to conduct an impact assessment of the discriminatory effect of the system. Additionally, employers that use automated systems would be required to notify anyone subject to a consequential decision made by the automated system that the decision was not made by a person.

### What are the biggest wage and hour mistakes you continue to see California employers make that cost big bucks?

**Shane Criqui & Karla Kraft, Stradling:** The wage and hour litigation landscape in California is still dominated by Private Attorneys General Act ("PAGA") claims, largely because employers can mandate that employees sign Arbitration Agreements with class action waivers, but employers cannot prohibit employees from bringing PAGA actions. PAGA actions seek civil penalties for Labor Code violations – and invariably PAGA lawsuits will allege missing, short, or late meal and rest periods as a core violation. These violations can be extremely costly for employers.

The first line of defense is to have an Employee Handbook with an up-to-date, compliant meal and rest period policy. Second, employers must track employee time, including the time periods that employees punch in and out for meal periods. Third, employers may want to consider having employees sign meal period waiver agreements, although such agreements must be voluntary. Fourth, where possible, employers should have a written schedule showing times when employees should take their meal and rest periods. Fifth, it is important that a manager on site verify that hourly employees are in fact taking their meal and rest periods each day, and doing so in a manner that is compliant with the timing required by California law.

**Nisha Verma, Dorsey & Whitney:** First and foremost, organizations should understand the current landscape in California, in which class and representative action filings are significantly increasing year over year, with no sign of slowing down, and are affecting organizations that previously seldom saw disruptive employment litigation due to either careful and compliant practices, or cultural achievements that made litigation less likely. Unfortunately, it is becoming clear to those organizations targeted again and again by class action plaintiff-side firms, that maintaining high compliance and an excellent culture are not enough. Instead, organizations looking to invest resources in their own workplace – rather than expensive litigation—must guard against unfounded claims by implementing controls making them a less attractive target. Examples are daily certification processes that employees had the opportunity to take their meal and rest periods, timeclock tools to curb allegations of off the clock work, a system for paying both meal and rest period premiums, and individual arbitration agreements.

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*Mandatory arbitration agreements are permissible in California. Arbitration agreements should be drafted so as make clear that the Federal Arbitration Act (FAA) applies to the agreement and to the "enforcement" of the agreement.*

**Shane Criqui & Karla Kraft**  
**Partners**  
**Stradling**

### What are the pros/cons of utilizing mandatory arbitration agreements in California?

**Shane Criqui & Karla Kraft, Stradling:** Mandatory arbitration agreements are permissible in California. Arbitration agreements should be drafted so as make clear that the Federal Arbitration Act (FAA) applies to the agreement and to the "enforcement" of the agreement.

Arbitration agreements have two large benefits to employers: (1) prohibiting class actions; and (2) prohibiting jury trials. So long as the arbitration agreement is valid, state Courts will compel arbitration of employee claims so that they are heard before a private arbitrator and not in Court. The primary risk of allowing a single-plaintiff claim to advance in Court is the risk of a jury siding with the plaintiff and awarding a large emotional damages verdict.

However, arbitration agreements also have drawbacks, as an employer will generally need to bear the arbitrator's costs and fees. California law provides that an employee shall not be required to pay any cost, fee, or expense of the arbitration that an employee would not be required to pay if the matter had been heard in court. Arbitrator fees can be very expensive, especially if the case proceeds to a hearing on the merits. Arbitrator fees also must be timely paid, or the arbitrator loses jurisdiction and the case can be sent back to court.

### What are the most common mistakes you see employers make in responding to an employee's internal complaint of harassment or discrimination?

**Nisha Verma, Dorsey & Whitney:** The hardest but most critical aspect of managing an internal investigation is preventing an organization's leadership or HR department from seeking a predetermined outcome and influencing the course of the investigation accordingly. When an organization chooses to engage in an investigation, all stakeholders must be aligned that the purpose of the investigation is fact-finding and the determination of any reasonable conclusions that can be drawn from those facts, meaning that any judgments or predictions as to the outcome are inappropriate and should be avoided. If a later analysis of the investigation (by a court, regulatory agent, or other third party) reflects the outcome was subject to influence, the result is worse than an instance where there had been no investigation at all.

Further, whether an organization proceeds with an internal or external investigator, the participation of any in-house or outside counsel must be reviewed to determine which communications will ultimately be protected by the attorney-client privilege. Where an attorney conducts or participates in the investigation, the organization may need to engage separate counsel to advise on the matter to maintain the privileged nature of the advice provided.

**Jeffrey R. Thurrell, Fisher Phillips:** While not all complaints of harassment or discrimination have merit or can be substantiated, employers have an obligation under the law to thoroughly investigate all complaints. If litigation arises, the thoroughness of any investigation is put under a microscope. There are some common missteps in the investigation process that I have observed with regularity. First, oftentimes informal

complaints are not investigated. For example, an employee may make an off handed comment to a supervisor along the lines of "I am not making a complaint, but I wanted to just let you know that my co-worker has made a pass at me." This should trigger the manager to contact human resources but often times the manager will sit on the information. Another misstep I have observed is that the investigation is woefully incomplete. For example, key witnesses are not interviewed and/or supporting documents are not gathered. Finally, I have frequently observed that the investigator does not follow up with the complainant in writing to confirm the results of the investigation. It is paramount that the alleged victim receives notice of the closure of the investigation and the results of the same.

**Shane Criqui & Karla Kraft, Stradling:** The most common mistakes that we see are an inadequate investigation and a failure to properly document the nature of the complaint and the action taken in response.

Not all employee complaints are the same. Some employees may make formal demands in writing, and other complaints may be verbal. Some complaints may be offhand comments and some complaints may be lengthy and pre-planned. It may appear from the complaint that the employee is using legal language and has already talked to a plaintiff's lawyer.

If the employer is made aware of any complaint – be it regarding harassment, discrimination, or simply interpersonal conflict with another employee – that is a good time to consult employment counsel. We have handled multiple lawsuits which could have been avoided if the employer had simply consulted employment counsel before making an adverse employment decision regarding any employee.

Employers certainly may handle their own response to internal complaints of harassment or discrimination, but it is extremely important to solicit input from everyone involved and document everything that was said.

### What are the most common mistakes you see employers make in responding to disability accommodation requests?

**Jeffrey R. Thurrell, Fisher Phillips:** One of the most significant challenges employers face is properly handling situations when an employee may need an accommodation for a disability. Employers are required under the law to provide "reasonable" accommodations to employees who have a mental or physical impairment that limits a major life activity. Disabilities are broadly defined under the law and once an employer is on notice of an employee with a potential disability, it has an obligation to act to determine what accommodations might be available. The process the employer is required to go through is referred to as the interactive process. There are several mistakes I have observed over the years that occur with regularity. First, employers may not extend leaves of absences beyond a certain point because the employee's FMLA/CFRA has been exhausted. Employers still have an obligation to extend medical leaves of absence beyond the statutory leave if it would not create an undue burden. Second, oftentimes employers do not explore all accommodations that could be

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*The most challenging area for employers is managing leaves as accommodations, meaning leaves of absence that are not granted pursuant to timelines set out in a statute (i.e., FMLA, CFRA) but are rather granted outside of or in addition to those other leaves, pursuant to the ADA or FEHA.*

**Nisha Verma**  
Partner  
Dorsey & Whitney

available to the employee and rush to conclusion that there are no reasonable accommodations. For example, determining whether there are other positions available within the company that the employee is qualified to do should always be part of the interactive process. Finally, employers sometimes engage in an extensive dialogue with the employee, but they do not properly document all of the steps taken to determine whether an accommodation existed. Without written documentation summarizing the communications and confirming all of the steps the employer took can lead to liability.

**Shane Criqui & Karla Kraft, Stradling:** Disability accommodation requests can be tricky. In California, such requests are governed by the Fair Employment and Housing Act (“FEHA”). It should be noted that the FEHA does not prohibit an employer from terminating an employee with a disability where the employee, because of his or her disability, is unable to perform his or her essential duties even with reasonable accommodations.

However, an employer also has a duty to engage in the interactive process whenever an employee requests an accommodation due to a physical or mental disability. Typically it is the employee who must initiate the interactive process, but the employer may have a duty to initiate the interactive process if the disability and resulting limitations are known to the employer. The employer must engage in the interactive process in good faith. The employer should not only consider modified job duties, but also potentially reassignment if there is a vacant position for which the employee is qualified. Leave itself may also be a reasonable accommodation.

Again, documentation is key, and if the employer becomes aware of an employee’s disability which limits a major life activity, including working, it is probably a good time to contact an employment lawyer.

**Nisha Verma, Dorsey & Whitney:** The most challenging area for employers is managing leaves as accommodations, meaning leaves of absence that are not granted pursuant to timelines set out in a statute (i.e., FMLA, CFRA) but are rather granted outside of or in addition to those other leaves, pursuant to the ADA or FEHA. Employers should remember that the purpose of granting requests for leave as an accommodation is to allow the employee to recuperate so that they can return to work and perform the essential functions of their position, with or without a reasonable accommodation to facilitate their doing so. Accordingly, it is entirely appropriate to express to the employee the employer’s expectation that the employee will ultimately return, and the employer’s interest in supporting the return. Conversely, in the tragic circumstance where it appears no amount of leave would result in the employee ultimately being able to return to work, the employer should be forthright in stating so. Too often employees on leave are treated as potential plaintiffs before all else, and actions taken prospectively to defend in litigation take precedence over alternative options that might allow the employee to return to work, in which case litigation could be avoided altogether.

#### **Is rounding time (punch in and out) legal in California?**

**Shane Criqui & Karla Kraft, Stradling:** Time-punch rounding has been an acceptable practice

in California so long as the rounding system adopted by the employer is “facially neutral” and does not result, over a period of time, in the failure to compensate the employees properly for all the time they have actually worked. In the last five years, however, the practice of rounding has come under increasing scrutiny by California Courts. Rounding an employee’s time punches for meal periods, for instance, is now outright prohibited under California law.

It is also very hard in practice to have a time rounding system which does not result in the underpayment of employees. For instance, an employer might have a facially neutral rounding system (say, rounding 7 minutes either way, up or down), but if the majority of employees are clocking in a few minutes early for the beginning of their shift instead of a few minutes late, over time this practice will fail to compensate employees properly for all the time they have actually worked because more employees will be losing time than gaining time.

Our current recommendation is that employers do not round time at all – but pay to the minute based on actual punches.

**Jeffrey R. Thurrell, Fisher Phillips:** As we all remember, prior to automated timekeeping systems our employees punched in and out and the payroll department would have to painstakingly determine the time worked by each employee. It became an accepted and common practice to round to the nearest 15-minute increment so if an employee punched in for his/her shift at 9:05 am it would get round to 9:00 am. This made the payroll function much more manageable and years ago the California Supreme Court opined that it was an acceptable practice so long as the application was neutral (meaning sometimes to the employer’s benefit and sometimes to the employee’s benefit). Given the technological advancement in timekeeping systems, courts over the last several years have questioned the prior rulings that permitted rounding. One recent court of appeal rejected the employers rounding practice which was indisputably “neutral” in its application. The court surmised that since the employer had the ability to capture the exact amount of time worked it should have paid the employee based upon the same. While the issue will ultimately be resolved by the California Supreme Court it may be prudent to immediately cease from any rounding practices.

#### **Can employers still test for marijuana in California?**

**Jeffrey R. Thurrell, Fisher Phillips:** When recreational use of marijuana became legal in 2016 it was clear that employers still had the absolute right to maintain a drug free workplace. To that end, employers were permitted to drug test employees for marijuana and make adverse employment decisions related to termination or hiring if an employee tested positive for marijuana. As of January 1, 2024, California employers (with very few exceptions) are prohibited from using the results of hair or urine drug tests – which can detect traces of marijuana for days or weeks – in decisions to hire, fire, or penalize workers. Under the new requirements, employers need to adopt testing procedures that screen for active impairment and discontinue testing or non-psychoactive marijuana metabolites that do not indicate impairment. Additionally, employers are no longer permitted to discriminate against employees based upon past or current (off duty) marijuana use.

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## ROUNDTABLE PARTICIPANTS

### Shane Criqui, Partner, Stradling

Shane Criqui is a partner in Stradling's Employment and Litigation practice groups. He has litigated before the California Superior Court, the California Court of Appeal, the California Labor Commissioner, the U.S. District Courts for the Central and Southern Districts of California, the U.S. Court of Appeals for the Ninth Circuit, and has represented clients in many private arbitrations and mediations, including Department of Labor investigations.



### Karla Kraft, Partner, Stradling

Karla Kraft is a partner in Stradling's Employment and Litigation practice groups. While she represents clients across a broad range of complex commercial litigation matters, much of her work focuses on defending employment litigation, including both single plaintiff cases and wage-and-hour class actions. She also tries trade secret disputes for technology companies, and defends class action suits against large consumer product companies and financial services providers.



### Jeffrey R. Thurrell, Regional Managing Partner, Fischer Phillips

Jeffrey R. Thurrell is a regional managing partner in the firm's Irvine office. His practice is focused on defending employment related lawsuits and administrative complaints on a variety of issues, including harassment, retaliation, and discrimination. Thurrell represents employers in both state and federal courts as well as before state and federal agencies, such as the Equal Employment Opportunity Commission (EEOC), the California Department of Fair Employment and Housing (DFEH), and the Division of Labor Standards Enforcement (DLSE). He regularly represents employers in unlawful harassment and discrimination matters and also has extensive experience handling complex, multi-plaintiff wage & hour matters.

Thurrell also spends a significant portion of his time counseling employers on internal harassment and discrimination investigations, pay practices and workplace violence situations. He is a frequent lecturer before trade groups, associations and private employers. He regularly conducts in-house management seminars and training sessions for executives, supervisors, managers, and human resources professionals in all aspects of labor and employment law.



### Nisha Verma, Partner, Dorsey & Whitney LLP

Nisha Verma is a partner in Dorsey's Labor & Employment Group. Verma has a depth of experience in the most challenging issues employers face today, including sexual harassment or other sensitive investigations, employment terminations and severance negotiations, confidentiality, non-disparagement, and trade secret protections and limitations under state law, paid sick leave, kin care, and paid time off regulations, background check and drug testing requirements, regulatory filings including EEO-1, pay data, and affirmative action reports, leaves of absence including maternity and paternity leave, layoffs and closures, and several other complex matters.

Verma has managed all aspects of union relations for employers, including organizing campaigns, representation petitions and related objections, unfair labor practice and other proceedings before the National Labor Relations Board, grievance administration and labor arbitrations, collective bargaining agreement negotiations and implementation, labor management meetings, picketing and strike mobilization, and other critical labor matters.

Verma is a seasoned litigator who has obtained results for clients through trial, arbitration, dispositive motions, and mediation. She handles a wide variety of litigation including single-plaintiff actions and contractual disputes but specializes in managing complex wage and hour class actions and representative actions under the Private Attorneys General Act of 2004 (PAGA), including matters relating to the effect of arbitration agreements on these claims. In every case, Verma conducts a thorough and in-depth evaluation early on and presents her clients with the full range of possible strategy options in order to ensure the litigation is handled in the most efficient and cost-effective manner.

Prior to re-joining Dorsey, Verma served as senior legal counsel at a multistate healthcare employer, where she implemented solutions to wide array of labor and employment matters, handled healthcare and government contract negotiation and dispute resolution, and obtained certifications as a compliance and privacy officer.

