LABOR LAW ROUNDTABLE

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

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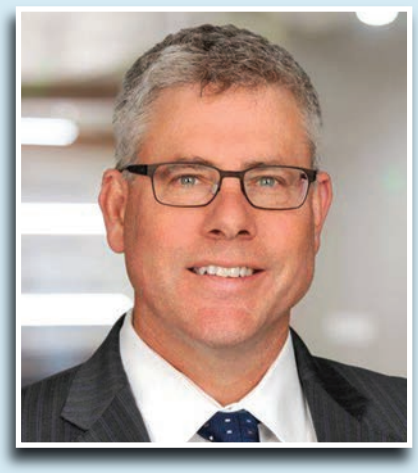

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What are the latest developments regarding employers' obligations where employees seek to form a union in their workforce?

Karla Kraft, Stradling: At present, there is a lack of clarity in this area of law. The end of the Biden administration heralded several significant pro-union developments including the National Labor Relations Board's ("NLRB") 2023 decision in Cemex Construction Materials Pacific, LLC v. National Labor Relations Board, which tossed out employer-favorable election results, and condensed election timelines established by new NLRB rules. Under the second Trump administration, however, the NLRB's work has largely ground to a halt. The NLRB currently lacks a quorum and cannot issue decisions or draft new rules. The acting general counsel appointed by President Trump rescinded multiple key memoranda of law directing the NLRB's efforts and setting its enforcement priorities. These shifts portend a more pro-employer NLRB, but no specifics are known.

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

Jeffrey 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 available to the employee and rush the 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.

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?

Karla Kraft, Stradling: Predictive AI tools present employers with equal parts opportunity and potential pitfall. A concern that exists with any use of AI also exists in employee hiring: the work product needs to be double checked. The AI product may appear polished and complete, but it may not accurately follow applicable anti-discrimination laws. Additionally, many states and some cities are requiring audits or bias assessments for tools employers use in the hiring process. Because AI tools can magnify already-existing biases, AI can disproportionately exclude or disadvantage protected groups, thereby creating liability under existing anti-discrimination laws. In particular, California and New York City have introduced regulations affirmatively identifying specific risks created by AI tools in the context of workplace discrimination.

Jeffrey Thurrell, Fisher & Phillips: Predictive AI will undoubtably play an integral part in the hiring process. The technology will allow an employer to shed unconscious biases and identify team members that will be the best fit for the organization. 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.

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

Jeffrey 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 oftentimes 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 along with the results.

Karla Kraft, Stradling: California law establishes requirements in relation to prevention and correction of discrimination and harassment in the workplace. These necessary steps include establishing clear policies, conducting training, setting up a process for submission of complaints that includes any complaint being made to someone who is not the employee's supervisor, and conducting a timely and impartial investigation of complaints. See Cal. Code Regs. Tit. 2, § 11023. The most challenging step in this process usually is the investigation. Many decisions need to be made: who to interview, are there documents to review, should the investigation be conducted internally or by a third party, and so forth. Consulting with counsel regarding investigations

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that need to be performed often is useful.

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

Karla Kraft, Stradling: Meal break violations can lead to significant wage and hour damages. Non-exempt California employees are entitled to a 30 minute break for each five hours of work. A meal break is noncompliant if it commences after the start of the fifth hour of work, or if the break is shorter than 30 minutes. Some employers schedule a break of 30 minutes at exactly five hours into the work day. While such a break is compliant, employees often wait in line to punch time cards, causing employees further back in the line to clock out late and, if they clock back in on time, to have a break shorter than 30 minutes. By scheduling earlier and slightly longer meal breaks, these violations can be avoided.

Jeffrey Thurrell, Fisher & Phillips: California is home to some of this country's most complex and technical wage and hours laws. Believe it or not, ensuring all of the mandated information is contained on an employee's paystub is a significant hurdle for scores of employers. In the aggregate, this could be hundreds of thousands of dollars of liability in the form of penalties. Another common hiccup for employers is to ensure that the calculation for the regular rate of pay is formulated correctly for purposes of paying overtime and mandated premium pay for missed meal or rest breaks. Non-discretionary bonuses need to be included into the calculation for the regular rate and this can be very complex. Wage and hour compliance audits on a yearly basis are strongly encouraged. Typically, this would consist of having a wage and hour expert review all of the core written policies and review a sampling of wage and hour records to identify any issues that need to be remedied.

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

Jeffrey Thurrell, Fisher & Phillips: Arbitration agreements remain a widely used tool for employers, but their application has evolved due to recent legal developments. One of the main benefits to having an individualized pre-dispute arbitration agreement is an employer might not have to face a class action lawsuit which could drastically minimize potential exposure for such things as wage and hour violations in the aggregate. The merits of employment matters are typically heard by a retired judge versus a jury and there is a perception by many that the risk of a potential "runaway" verdict is minimized. Additionally, arbitration is perceived to be more efficient from a timing perspective, and the process, unlike being in court, is typically kept out of the public eye. Employers in California are required to pay 100% of the arbitrator's fees which can dramatically increase the litigation costs. Additionally, the rights to appeal an arbitration decision are fairly narrow compared to an appeal of a jury verdict.

Karla Kraft, Stradling: Arbitration often tends to benefit both employers and employees. Reasons why arbitration can be desirable for all parties include prompt adjudication of a dispute and privacy. The superior courts continue to handle very heavy case loads, frequently resulting in trials occurring years after a lawsuit is filed. Arbitration allows for a more timely resolution, often in less than 12 months for a single plaintiff matter. Further, the subject matter addressed in employment disputes often involves confidential information and sensitive topics that all parties would prefer to keep more private. A con for an employer is that it must pay all costs unique to the arbitration, such as the arbitrator's fees, and the hourly rates charged by arbitrators have increased significantly over the last several years.

LABOR LAW ROUNDTABLE PARTICIPANTS

Karla Kraft
Karla Kraft is known for her robust expertise across a wide spectrum of litigation. With a career characterized by enduring professional relationships, Karla is consistently sought after to litigate diverse matters, showcasing her adaptability and competence in tackling new challenges. She specializes in complex commercial litigation and has a significant focus on class action defense and employment-related issues, including defending against single plaintiff lawsuits, wage-and-hour class actions, and PAGA actions. Additionally, she guides clients through pre-litigation disputes and strategic policy decisions.

Karla's proficiency extends to various business litigation matters, encompassing defense of consumer matters, restrictive covenants, trade secrets, unfair competition, and more. Clients appreciate her intuitive ability to synergize legal strategy with business considerations, allowing her to tailor her approach based on the unique objectives of each case. This client-centric strategy results in efficient, business-savvy resolutions delivered through streamlined teams and judicious research. Her clients include Johnson & Johnson, Kofax, Ringler Associates, and Specialty Enzymes and Biotechnologies.

Her accolades reflect her notable contributions to the legal field, including the Anti-Defamation League's Marcus Kaufman Jurisprudence Award, the Segerstrom Center for the Arts' Arts and Business Leadership Award, and recognition as a Best Lawyer in America from 2019-2025. Beyond her practice, Karla is actively involved in community service, serving on the Boards of Directors of the Public Law Center and the Segerstrom Center for the arts and the Board of Trustees for Harbor Day School, further affirming her commitment to both her profession and community.

Jeffrey Thurrell
Jeff 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. Jeff 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. Jeff 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. While in law school, Jeff served as a member of the University of San Diego Law Review.

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