Candid Job Talk

Attorney Karen Gabler discusses harassment, hiring protocols and the shady practices of some plaintiff lawyers.

By AMY STULICK *Staff Reporter*

***Karen Gabler** has been practicing law for 27 years, and employment law for 22 years. She founded **LightGabler** with **Jonathan Fraser Light** in 2011. The Camarillo firm provides advice and counsel to employers on day-to-day employment issues. Gabler specializes in employment training for managers and staff; she handles litigation when there is an administrative or civil charge, as well as investigations and audits related to employment. The firm, which started with seven people, now employs more than 20. LightGabler ranks No. 24 on the Business Journal's list of law firms.*

PHOTO BY DAVID SPRAGUE

Negotiator: Karen Gabler of LightGabler, No. 24 on the Business Journal's list of law firms, at the company's offices in Camarillo.

Question: What is the most challenging aspect of your job?
Answer: California law. California employment law is really complicated and restrictive for employers. It's just so challenging for any business, particularly smaller businesses, to know what they need to do, how they should do it. What I find most of the time is the majority of my clients are actually trying to treat people well and to take care of their employees, and they're being hit with minor errors and little gotchas just because they did it really well but happened to do it wrong.

Can you provide some hypotheticals on what California employers are running up against right now?
I would say that the two biggest issues – they have been for a while and continue to be even more so now – are harassment and wage and hour issues. In the harassment arena, we have a lot of fallout from the MeToo movement. On the one hand, as a society, it's good to have these issues come to light and make people feel comfortable raising complaints. But what we're finding is there is any number of workplace complaints that can turn into a harassment complaint. It could be something simple. As one employee said to me in a training, "If my manager tells me I'm doing a bad job, isn't he bullying me and harassing me?"

How does this play out for employers?
It's challenging for employers to know what kind of complaint is something that humans should be able to resolve in a professional environment, and what kind of complaint requires an in-depth investigation, processing and training, and everything else that goes with harassment. We're seeing a lot of issues related to complaints coming up that have been simmering for a long period of time because it is so prevalent in the news today. There is so much discussion about how people have been treated in the past, and where we've gone wrong in the harassment arena, so now we're seeing this come to light and we're getting more and more harassment complaints. Somebody's upset with the way they're being spoken to, the way they're being treated, etc.

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How do you differentiate between a serious problem and something that can be handled within a company?
When I'm doing training or advising managers, my recommendation is always to follow up on every complaint. The question isn't really does this need action, but more what level of action does it need. Any time an employee expresses that they are unhappy, we're not looking for buzz words, we're looking for things like "You hear what he said this morning?" "What she did in that meeting?" "I'm really frustrated today." Things that would be normal, human conversations should warrant at least an extra question, because it may be a very minor frustration, but it could also be a frustration that has been brewing over time with this particular person. Any time someone is unhappy, I would ask a few extra questions. You may find that it's an issue you can resolve just by discussing it and resolving it in the moment, or it may be something where we need to speak with a few more witnesses and look into past history to do a little bit more of a formal process. Either way, we always want to document what was done, even if it was just a simple email to the manager saying employees had a dispute this morning and we talked to both of them (and) we worked it out.

What are the new requirements for employers to follow in job interviews?
There is always the question of, are you asking questions about protected categories, and do you need to stay away from those? That's been true for quite some time. The biggest landmines right now are asking about salary history and asking about prior criminal convictions. Both, within the last year, have been removed from the application process.

What is the thinking behind these rules?
The concept behind the salary question is really to address past discrimination. Managers who are looking to get an employee at the best possible rate they can, a typical past negotiation would have been: "What are you making now and if I give you a little bit more than that, am I enticing you to come?" Our legislature has taken the position that women and minorities have been paid less in the past, therefore if we're basing a job offer, a salary offer, on what they were making before, we're perpetuating that discrimination. The solution they've created is, you're not allowed to ask about past salary at all. It makes it a little more challenging to have a negotiation. Some would say that's really the employee's responsibility to negotiate for themselves properly. But what we have – and this is very typical of California legislation – is a problem that has been abused in certain scenarios, and they implement wide-ranging legislation to address that problem, and it captures hundreds of employers who aren't trying to abuse anyone when they're just trying to get through the day running a business.

What about the past conviction question?
In the criminal conviction issue, same kind of concern. More minorities have had prior criminal convictions, historically, they have not received the same advantages and favors and benefits in the criminal justice system as, for instance a Caucasian male might have received, so the concept is you cannot ask about prior criminal convictions in the application process, because that may cause the employer not to give a second look to somebody who had a prior mistake. What you can do is you can make a job offer that is contingent upon a background check, look at the background check and look at whether there's an issue. If there is an issue, we then have to look at does it relate to the job. If somebody has a conviction for a DUI but they will never drive for this job, it's not relevant. If they're applying for an accounting position and they have an embezzlement conviction, that would certainly be relevant.

So how do employers calculate offers?
There are a variety of resources available; there are salary surveys for some industries. A lot of employers will just look at posted positions for competitors in the industry. There are certainly differences in geographic location, and that's still valid. You could say you're going to pay someone in Ventura less than someone in the city of Los Angeles. However, you couldn't say I'm recruiting somebody from Los Angeles so I'm going to offer them $75,000, and I'm also recruiting somebody from Ventura, so I'm going to offer them $50,000. You would still need to have a standardized scale for the position. You could certainly make distinctions based

on education, what they're bringing to the table, how much experience they have, are they bringing a book of business and other factors that you might consider.

Where are employers getting hit with frivolous or shakedown lawsuits?
I don't know if I would go so far as to call it a shakedown lawsuit, but where I'm seeing the greatest abuse is in our legal standard in the State of California. If you bring a wage claim and you win any amount at all, you can recover your attorney fees. So what we're seeing are cases where there might be the most minor of abuses – there may be a situation where somebody misses a couple hours of overtime or meal and rest periods. If they can show that they even missed a couple of them due to work, then the attorneys can come forward and bring lawsuits, or maybe win $1,000 for their client, but recover a couple hundred thousand in attorney fees for themselves.

You've actually seen this?
I've had attorneys say things in settlement negotiations such as: "I don't care what my client gets as long as I get my fees back," or "I'm not going to settle this case because I'm building a firm and I need to show that I have trial experience." So we're stepping away from a real reimbursement for the employees for damages they've actually suffered, and it has become more of a game for the legal profession to pursue minor wage and hour mistakes to get a windfall.

Are certain industries or issues targeted for these lawsuits?
Not really. Certainly mid-size to larger employers are being targeted more often because if there are widespread violations – widespread errors more likely than violations – there are class actions being filed all the time, and Private Attorney General Act actions. You have the potential of grabbing 200 employees rather than eight employees; certainly that's going to be more lucrative for the plaintiff attorneys that are bringing these cases.

How would you suggest employers handle these lawsuits?
Get legal counsel immediately to discuss options, and in a wage claim where there are likely to be errors, they would want to immediately work with counsel to analyze what could actually be due, what violations do we truly have. There is often a thought among attorneys of, "Let's get into a case, let's do some discovery, let's spend some time fleshing this out before we start settlement negotiations." When you have wage and hour violations, $5,000 of damages to one employee can turn into $25,000 to $50,000 in related penalties and fees within a matter of weeks. The primary thing to consider in a wage claim is do we actually have violations and let's analyze what that could cost us. We can make a realistic judgment about, should we try to mediate it, should we try to settle it, should we fight this.

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What do you think of PAGA (the Private Attorney General Act)?
I do think it's unfair to employers. We don't have enough reported case law discussing a variety of issues related to how it plays out. What happens is, because there are such extraordinary damages and attorneys fees for these types of claims, 99.9 percent of these cases will settle before they ever see a courtroom and that means we don't have any reported case law, so that leaves it open to argument on all sides and it makes for much more costly litigation because you don't have the opportunity to say this is what the law requires.

What strategy should employers take when met with a PAGA lawsuit?
The PAGA lawsuit starts with a letter to the state, and there is a 60-day prerequisite requirement with that letter. The first notice that an employer should get of a pending PAGA lawsuit would be that letter to the state, and they've got 60 days at that point to get themselves ready to deal with the case before it can actually be filed – assuming the state doesn't take it on, and frankly the state never does. So that 60-day window is a good period of time in which the employer needs to talk with counsel, analyze whether or not there is potential liability and what that might look like, talk with the opposing attorney about whether there's an opportunity to discuss the case before it is filed.

One of the key issues with the PAGA lawsuit is once it's actually filed: you cannot settle the case without court approval of that settlement. So that 60-day window, when you know a case is coming but it hasn't actually been filed, is a good time for both sides to have conversations about how we want this to go and what is the best way to work this out most productively for everybody involved.

What's the strategy for the employer's legal team?
What they're trying to avoid is plaintiff attorneys making PAGA claims to try to ramp up the settlement offer to their individual client, getting more money for that individual and dismissing the claim, so the court's going to take a look at that and say you claim to be representing everybody, you're not going to settle just for one person, you're going to settle for everybody. You need to make sure that if you claim to represent everybody impacted at the workplace, that you're actually going to serve their interest and just use this as a leverage option.

Is there a common end goal tied back to the state's legislative changes?
I think that assumes a level of forethought that just isn't there. What I typically see with legislation – and this year is no exception – is that our legislature is very reactive. We see that there is a problem, so we debate legislation to address that problem and we throw it out there, and then let the chips fall where they may. Let the attorneys and the parties and the courts and the arbitrators work out how that's actually going to be handled in real time. What I don't ever see in the legislative process is a plan for what is the actual problem: "How can we solve the issues that lead to the problem?" "How can we address abuses without unfairly targeting employers who really are doing the best they possibly can?"

What changes in the legal system would you like to see?
Consideration for not rewarding attorneys for pursuing even minor issues. What we see are a lot of benefits to attorneys, a lot less benefits to business owners. It puts a very serious damper on business in the state. We have seen numerous businesses moving out of state, choosing to not move into the state, less employment opportunities for the individual employees involved, because it is so burdensome and so restrictive to run a business here.

Collaborative: Gabler meets with firm's Executive Director Jody Toerner.