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LABOR & EMPLOYMENT

A Roundtable Discussion

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As the workplace continues to shift and change after the unpredictable events of the last couple years, the San Fernando Valley Business Journal has once again turned to some of the leading employment attorneys in the region to get their assessments regarding the current state of labor legislation, what changes have come to the workplace law landscape in light of new back-to-work policies pandemic, the new rules of hiring and firing, and the various trends that they have been observing, and in some cases, driving.

As more and more employees have come back to working in the office, what are some of the legal issues for employers to be aware of?

POMERANCE: As more employees come back to the office as the Pandemic subsides, I think that an important issue will be how to accommodate schedules. Employees will come back to the office, but will still want to work remotely some of the time. How will a business integrate this hybrid working arrangement? Clearly, some employees are needed onsite more than others, so it will be important for a business to develop rules and procedures that are fair and treat similarly situated employees in a like manner. The other obvious issue is that employees who have been working remotely – and therefore unsupervised – will have to get back into the swing of punching a clock, taking regular meal and rest breaks, and tracking potential overtime. Employers have to make sure they are up to speed on all of this, as I suspect that some of this has been ignored/forgotten when employees were working exclusively from home.

BENDAVID: One of the biggest issues employers now face is an unwillingness by employees to return to the office. They may be citing reasons such as improved productivity at home or the current cost of gas. Employers generally have discretion to designate where employees will work and when. However, if an employee cites medical reasons as a basis for the refusal, this likely triggers an obligation to have an interactive dialogue with the employee about whether continuing to work from home can be reasonably accommodated, or whether that will create an undue hardship for the employer. With a history of successfully working from home during the COVID-19 crisis, it may be harder for employers to justify a refusal to grant this request. Whatever employers decide regarding working on site vs. working from home, or a hybrid of the two, policies should be stated clearly and address issues such as job expectations; hours to be worked; reimbursement of necessary business expenses, etc.

GABLER: As we attempt to put the pandemic in the rear-view mirror and get back to "normal," a key issue to address is whether the company has complied with the still-relevant COVID-19 safety requirements. Does the company have its COVID-19 Mandatory Prevention Plan in place and appropriate safety equipment available to distribute to employees as needed? Have the employees been trained on current COVID-19 requirements? Once the workplace is prepared for the return of its workforce, the company also must address increased interpersonal issues amongst employees. Employees may not be used to working in a group environment, and the events of the last two and a half years have created substantial distress and emotional exhaustion. Hotly-contested debates over mask-wearing and vaccination status can lead to workplace strife. Remind employees that individual vaccination status and the decision to wear a mask (even if not required) are private and confidential medical decisions; employees may not question each other about their medical choices or opinions. Reiterate the company's anti-harassment, discrimination and retaliation policies, as well as the prohibition against bullying or abusive communications. Provide employees with the names of several members of the management team to whom they can raise complaints, and encourage employees to bring any issues to the attention of management rather than directly to each other. Remind employees that the pandemic has been difficult and stressful for everyone in a variety of ways, and has been deeply painful for those who were ill or have lost family and friends. Encourage employees to be gentle with themselves and with each other, and remind them to treat each other with respect and courtesy at all times.

Do you think the remote and hybrid practices that companies were at first forced to apply have become the new normal moving forward?

HREN: Yes, absolutely. Employees and employers have been dealing with remote work arrangements for more than two years and employees have been accustomed to it. Employers need to remain flexible in this regard in order to attract and retain talent. Many employers have already been faced with the challenges of attempting to get employees back to the pre-COVID arrangements. Employers needs to be proactive and work to develop policies and practices that address the needs of employees in this new environment, but also fulfill the operational needs of the workplace.

GABLER: Prior to the onset of the COVID-19 pandemic, numerous companies took the position that remote work would limit productivity and was an ineffective way to conduct business. After being forced to implement remote work options for emergency purposes, many companies have

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discovered that remote work is not only viable, but may even be desirable. Remote work can lead to greater productivity, foster positive employee morale, and improve employee satisfaction. It also can save substantial leasing and equipment costs for the company by allowing the company to downsize its physical space. When remote work is an option, companies also can expand their resources by recruiting out-of-area talent. Of course, remote work is not appropriate for all positions and may not be a success for all personnel. It should be evaluated on a case-by-case basis, and employers must document specific procedures and requirements to ensure its effectiveness. That said, however, it seems that the proverbial train has left the station and remote work options may not be easily revoked in a post-pandemic world. Employers and employees alike have learned that remote work may offer substantial mutual benefits and is worthy of serious consideration.

POMERANCE: Absolutely. Having said that, there are clearly certain types of businesses where it is more important for employees to be onsite, while others can function pretty well in a remote environment. But, given how technology continues to develop, there is no doubt that many businesses – especially those in more of a service-oriented function, as opposed to manufacturing or production – will maintain some sort of hybrid working arrangement for the foreseeable future.

BENDAVID: Flexible work schedules and telework opportunities are in demand and becoming more commonplace. During the recent "Great Resignation" many job applicants were able to dictate their own terms, including working remotely. However, if the economy continues to decline, the employment market may change yet again. Employers may soon be able to pick and choose candidates on their own terms. Many companies may still maintain hybrid or full teleworking environments, but those who want to go back to demanding workers come to a physical worksite may soon have more leverage.

Any suggestions for companies that want to become more proactive in terms of encouraging their employees to get vaccinated and/or routinely tested?

GABLER: Companies that want to encourage employee vaccinations should consider offering incentives to employees to do so. Monetary incentives (such as vaccination bonuses) typically are the most attractive to employees, followed by additional time off work (such as providing vaccinated employees with an extra day of vacation). For those employees who are willing to be vaccinated but do not wish to take time off work or haven't bothered to set up an appointment, coordinating vaccination clinics in the workplace can be an effective tool to increase vaccination rates, particularly when the employee is paid for the time spent being vaccinated. Similarly, offering to allow employees to be vaccinated off site during working hours and compensating employees for their vaccination time and mileage can be helpful. Employers should discuss their vaccination incentive plans with employment counsel to address related wage and hour issues. For example, monetary vaccination benefits likely would be considered non-discretionary bonuses and may increase the applicable rates for overtime, sick leave and meal and rest period premiums in the relevant pay period

HREN: Under the Cal-OSHA emergency temporary standards, employers are required to provide training to their employees on a variety of COVID-19 related topics, including encouraging employees to get vaccinated and educating them on the benefits of the vaccine. Many employers have gone much further than that and have provided monetary incentives to employees. Some incentives include bonuses or gift cards for those who receive the vaccine or creating a raffle with desirable prizes for those who get vaccinated. Alternatively, other employers have created policies mandating that employees either get vaccinated or become subjected to periodic testing. All of these measures have been effective in increasing the number of vaccinated employees in the workplace.

POMERANCE: Yes. I think companies can implement proactive COVID policies as part of an overall strategy to improve the health and well-being of their employees. I recommend that companies think about implementing programs to educate their workforce on the benefits of the COVID vaccine, as well as other vaccines, and provide access to vaccines on site, or provide paid time off for their employees to become vaccinated. A company can also provide routine testing on site for employees as an incentive to come to the office. Some combination of these ought to also improve morale and cut down on sick time.

What are some best practices for handling employee leave and accommodation requests related to COVID concerns?

BENDAVID: Federal, state, and local rules may overlap and often conflict. When the rules contradict, employers must comply with those that provide the most benefit to the employee. If an employee requires time off for COVID-19 reasons, the employer must determine whether the employee is eligible for compensation during the time off – whether it is Cal OSHA's exclusion pay, or sick pay under a variety of local and state sick leave laws. Also, determining whether a specific employee's COVID-19 is an actual disability under the Americans with Disabilities Act and California's Fair Employment and Housing Act requires an individualized assessment. Note that when the disability or need for accommodation is not obvious or already known, an employer may ask the employee to provide reasonable documentation about the disability and/or need for reasonable accommodation. Employers should document the time off and consider whether the time also qualifies under the FMLA/CFRA (family and medical leaves).

GABLER: California's current COVID-19 Supplemental Paid Sick Leave provides employees at companies with 26 or more employees with up to 80 hours of paid time off for a variety of personal COVID-19-related issues, often without requiring documentation of the employee's status. If the COVID-19 issue requiring isolation arose at the workplace, the employee may be entitled to Cal/OSHA's Exclusion Pay. The first step in addressing a COVID-19-related absence is to consider whether these benefits apply. After exhausting these benefits, and as with any other request for leave or accommodation, the next step is to request documentation regarding the employee's general condition, any workplace restrictions, and the anticipated duration of those restrictions (or, medical certification of caretaker status if applicable). This documentation is critical to the employee's health and safety as well as to the employer's legal protection. Next, hold an interactive discussion with the employee to review the nature of their request and brainstorm on possible accommodations or available leaves of absence. Document the request made, the relevant conditions and circumstances, and the leave rights or accommodation options available to the employee. Distribute any necessary materials on applicable benefits, including state brochures and notices of leave benefits. Provide clear instructions and detailed information to the employee, and maintain ongoing contact with the employee regarding their status and available options. Contact qualified employment law counsel to discuss any questions about applying appropriate leaves and providing all required compensation and benefits to the employee.

HREN: Employers are faced with a dizzying array of legislation concerning employee leave and accommodation requests related to COVID-19 concerns. We are seeing legislation at the federal, state, county, city and local leaves. Therefore, employers must first educate themselves on what laws apply to their workplace and to what extent they must provide leave or an accommodation. This is not an easy task and employers should consult with counsel to ensure they are up to speed on the ever changing laws in this arena. Additionally, employers need to keep in mind that accommodation requests (whether COVID related or not) need to be analyzed on a case by case basis and the inquiries involving each case are highly fact specific. The key is to make sure the employee remains an active part of the discussions concerning accommodations or leave requests, and that the employer properly documents the steps taken and conversations that have occurred on the topic.

How has the employee travel-for-work landscape changed? Any new rules or standards?

GABLER: The most significant change to employee travel is the exorbitant increase in fuel costs and the resulting financial impact to employers and employees alike. California law provides that employers must reimburse employees for all business travel outside of the employee's normal commute to and from work, and must compensate non-exempt employees for the time spent on business travel. Employers are entitled to reimburse travel expenses for employees who use a personal vehicle for business purposes at the standard IRS mileage reimbursement rate, which is deemed to be reasonable reimbursement for fuel, depreciation, insurance and other auto costs. In recognition of the surging fuel prices, the IRS recently increased its standard mileage rate from 58.5 cents per mile to 62.5 cents per mile, effective July 1, 2022 through the end of the year. This may be a relatively minor burden for employers, depending upon the extent to which employees are required to travel for a particular business. However, there is no question that the current fuel prices are putting a significant damper on most employees' ability and interest in commuting to distant work locations. This has led to increased requests to work remotely, excessive absenteeism, employee turnover and recruiting challenges for employers.

BENDAVID: Given the current costs of gas and its triggering effects on other costs like airfare, hotels, and dining out, many employers are cutting back on employee travel. But some employers simply can't do that. Two primary areas to consider: First, minimum wage recently increased in many key municipalities. Employees who work in those jurisdictions must be paid at least minimum wage for all hours work in those jurisdictions. When sending workers to cities (or counties) like San Francisco, Los Angeles, Santa Monica, etc. employers should review the local ordinances and ensure pay rates are high enough. Employers should also remember that the IRS recently increased mileage reimbursement rates by four cents per mile (to 62.5 cents per mile). If an employee uses a personal vehicle for business purposes, using the IRS rate to reimburse the employee is recommended. And as always, employers should reimburse those traveling for work promptly and correctly, to reduce the risk of potential wage and hour claims.

What can employers expect from the California legislature in the second half of 2022?

HREN: California legislators introduced a number of employment and labor law bills earlier this year that are making their way through the committee process. Several of the bills have been labeled as a "job killer" by the California Chamber of Commerce. For instance, SB 1162 (Reporting Salary and Wages), would make public any information employers are required to provide to the Department of Fair Employment and Housing (DFEH) with specified EEO-1 pay data. Additionally, SB 1162 would require that all employers provide, in a job posting for an open position, the pay scale for that position and provide to an existing employee, the pay scale for the position a person is currently employed in, upon request. Another "job killer" bill introduced is AB 2188 (Cannabis). This bill would prohibit discrimination against an individual for a positive cannabis test.

How has the workforce shortage affecting many industries impacted the legal landscape for employers?

BENDAVID: Many business owners are struggling with recruiting, hiring, and retaining quality employees. Some are hiring less qualified workers simply because they need "bodies" to fulfill job functions. When those employees (unsurprisingly) fail to perform, employers become frustrated and seek to take disciplinary action and or terminate employment. Employers should always review the facts and circumstances leading up to the decision to terminate and clearly document the reasons. Even though most employees are hired "at-will," employers should still consider whether a lawsuit will follow and be prepared to defend; meaning have clear documentation in order. If the economy continues to decline, many employers plan to tighten their belts rather than go through another round of layoffs. Or they may pay more to keep workers and put up with less than ideal employees; some with self-entitlement demands or attitudes. Employers should be careful about conceding too much. Increased pay and perks could set new precedents and become expected. Turning a blind eye to inappropriate comments, jokes or behavior could also trigger claims of harassment and discrimination.

GABLER: Shortages in the labor market have significantly altered employers' ability to be discerning about their applicants, forcing them to settle for hiring anyone who might be able to perform the essential job functions of an open position. They also have led employers to tolerate bad behavior and substandard work quality from existing employees to avoid further turnover. Applicants who previously would have been passed over have been offered substantial pay and benefits

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to encourage them to accept a position, and employees who might have been terminated under other circumstances have received pay increases and bonuses in an effort to keep them on board. This creates lasting liability risk for employers, as later disciplinary action or termination doesn't correspond to prior favorable reviews and raises. Rather than departing from quality standards and reasonable expectations, employers should remain focused on their mission, values, standards and culture as much as possible. Document performance issues, but work closely with employees to achieve necessary growth. Remind applicants and employees of the full scope of the advantages and perks of working in the company. Lower compensation may be offset by substantial health benefits, remote work options, retirement benefits, educational opportunities or increased paid time off. A challenging workload may be offset by a positive work culture and supportive team members. Look closely at what your workplace has to offer and think "outside the box" about what might entice a potential applicant to join you or an existing employee to remain with you. Remember to "sell" your workplace to your applicants and employees just as you would sell your goods and services to your clients.

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

POMERANCE: Certainly, the employee vs. independent contractor issue as passed in AB 5 and decided by Dynamex Operations v. Superior Court (2018) 4 Cal.5th 903, (now codified in Labor Code Section 2775), will continue to present difficulties for employers. For so many years, a substantial number of employers across all industries employed a hybrid type workforce, comprised of both traditional employees and other individuals who were classified (and paid) as independent contractors. Now, however, very few, if any, of those workers can be viewed as independent contractors going forward, and so this will continue to be a difficult adjustment for California businesses for several years. I also think that the new U.S. Supreme Court ruling in Viking River Cruises v. Moriana (6/15/22), will present some challenges for businesses as they seek to revise their arbitration agreements so as to wholly eliminate PAGA actions. But, because many businesses have current arbitration agreements that carve out PAGA, those claims will survive for some time until all arbitration agreements have been revised.

What trends are you seeing related to arbitration agreements in the employment context?

HREN: The enforceability of arbitration agreements in California has been in a state of flux over the last several years. Most recently, the U.S. Supreme Court issued its long awaited decision in the Viking River case which brought some good news to employers. Viking River clarified that an individual's claim under the Private Attorney General Act ("PAGA") may be subject to arbitration, even though a previous California Supreme Court decision held otherwise. While this was welcomed news for employers, it left open the door for California courts to rule differently on some of the nuanced legal issues. However, for the moment, employers who are utilizing arbitration agreements should have them reviewed by counsel to include language making clear that the agreement applies to individual PAGA claims.

POMERANCE: The other trend I am seeing is that most arbitration agreements these days pass muster under the unconscionability analysis. As recently as only a few years ago, many employers were still using one sided and onerous arbitration agreements, but in light of the California courts' clarity as to what will be deemed legal versus what will be tossed out, most employer these days seem to get it right, and are using fairly balanced arbitration agreements that manage to pass judicial scrutiny.

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

GABLER: The most significant error made by employers is neglecting to document performance issues and any resulting disciplinary action. Employers must remember that "if you can't prove it, it didn't happen!" When the employer fails to document its reasons for discipline or termination, the employer loses the chance to verify the circumstances and thus loses control of the situation. The employee is now able to tell the story of what the employer did to him, and the employer finds itself scrambling to defend against that story. Additional mistakes include: (1) being too nice, and (2) being too mean! Some employers fail to convey any negativity for fear of rocking the boat, hurting the employee or causing a fight, or simply to avoid confrontation. When employees are not given clear information about where they are falling short, they lose the opportunity to grow, improve, and progress in the job. Similarly, the employer who fails to convey its dissatisfaction to the employee loses the opportunity to train and support an existing employee and instead must invest additional resources in recruiting, hiring and training a new employee when the existing relationship doesn't work out. On the other hand, some employers express far too many personal opinions and far too much frustration, anger or other negative emotions, turning the disciplinary action into a personal attack rather than a productive discussion of areas of growth. When an employee is insulted or treated as incompetent, he becomes resentful and shuts down entirely. At that point, improvement is unlikely, and the relationship will continue to deteriorate.

BENDAVID: I have said it more than once and it bears repeating: "If it isn't documented, it didn't happen." Any disciplinary action or circumstances leading to a disciplinary action should be documented, either via email, memo, performance review, a Performance Improvement Plan or a report to the employee's file. Employee claims are often dropped when the plaintiff is faced with a written history of their own misbehavior or failure to perform. Documentation can also be used in depositions or trial to help prove an employer's defenses to a claim for wrongful termination or retaliation. However, it is important to consider the proper grounds for discipline. If, for example, an employee took protected time off, the employer should not consider that absence as a basis for discipline. Employers should ensure memos and emails demonstrate the legitimate and legal reasons for disciplinary actions. The more objectively verifiable the misconduct or performance problems, the better.

POMERANCE: The most frequent mistakes I see are the lack of consistency in imposing discipline, as well as the failure to treat similarly situated employees in a like manner. Employers all too often impose discipline based on their subjective views about the employee, as opposed to objectively evaluating the employee's conduct. This leads to bad results. A business does not have to have the same rules and practices for executives as it does for mid-level managers, which can also be different from frontline production workers. But it ought to treat all frontline production workers the same, just as it should treat all mid-level managers the same. The other problem I see is waiting too long to fire someone. Employers are naturally fearful of litigation, but waiting too long before pulling the trigger on an obviously unfit employee will only exacerbate the situation. If the employee's problems are well documented from the outset, and discipline up to that point has been appropriate and consistent, then the employer should not hesitate to make the final move of terminating a bad employee.

What additional policy or trends are you watching?

BENDAVID: As more employees are working from home (or their local coffee shop), we are seeing policies for teleworking or hybrid work situations. When employees are out of sight, they should not be out of mind – policies should reflect the employer's expectations for what employees should be doing when working off site. Employers should consider wage and hour, ergonomics, confidentiality, and other issues that arise when employees work outside the physical office.

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

POMERANCE: I am a big fan of including a requirement to mediate in any employment agreement. There is almost no downside that I can see. The employment or arbitration agreement should contain a provision requiring mediation as the initial step to resolve any employment related dispute, and the employer should happily pay for any mediation. Such an early mediation can flush out what is really going on, and can often end the dispute right there. Whatever is spent on the mediator pales in comparison to the amounts saved in attorneys' fees, as well as the company's time and resources once a case is in litigation.

HREN: Mediation is a frequently used and very effective forum for settling employment disputes. Mediation is a completely voluntarily process and provides an opportunity for each party to share their version of the events to a neutral third party, which can be a cathartic process for each side. However, it is sometimes a very frustrating process for employers because the initial offers from the plaintiff/employee are typically very high and often times do not appear to be tied to the actual damages or facts of the case. Nonetheless, a good mediator can be effective at pointing out the strengths and weaknesses of each side and getting the parties to reach a satisfactory resolution.

What recourse does a company have for employees who are publicly active in political or other potentially controversial viewpoints or causes that are inconsistent with the company's values?

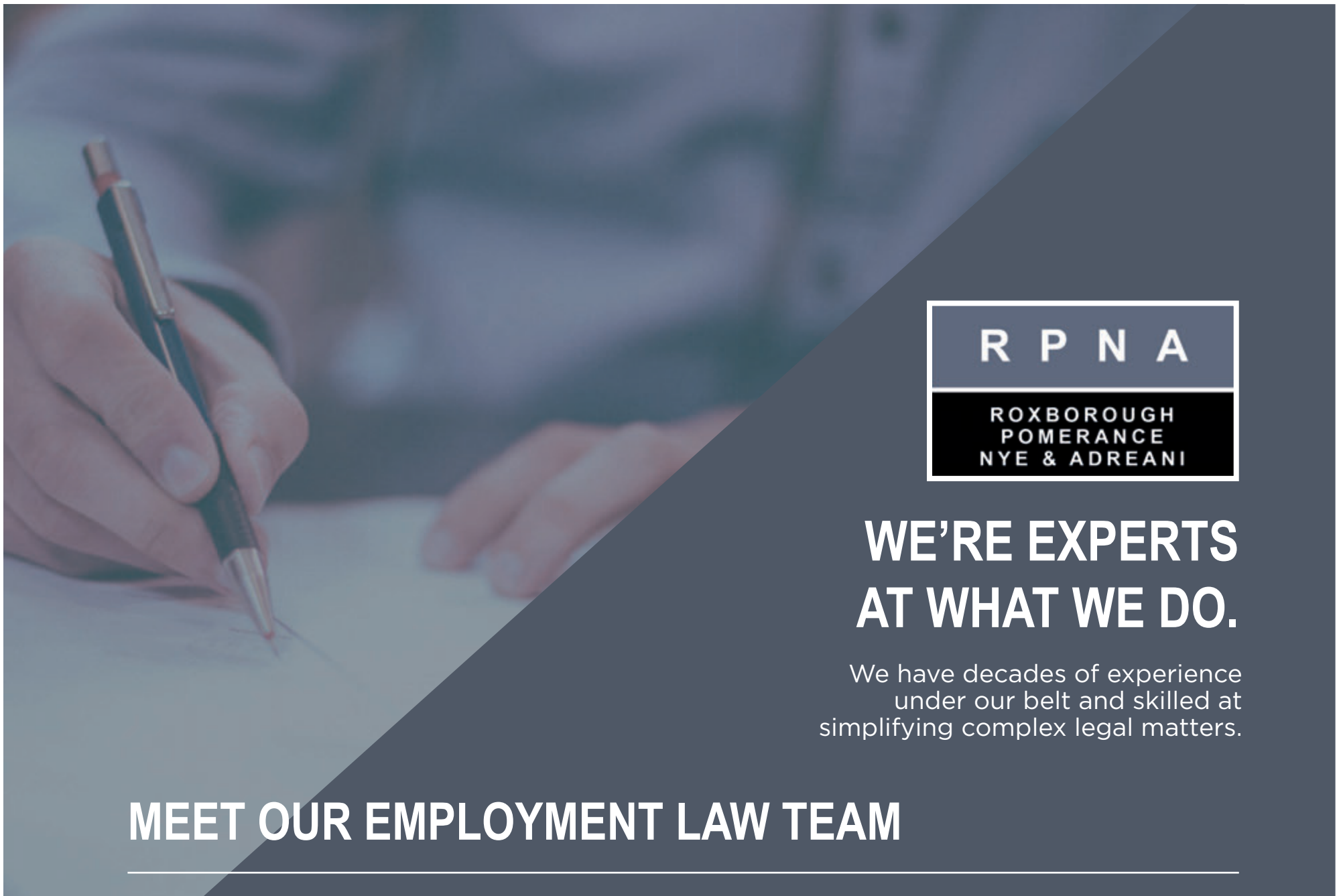
POMERANCE: This is a tricky area for employers, as it is constantly in flux. Social media continues to evolve, but is already so prevalent that it is likely that most, if not all employees, maintain some sort of presence on social media. When you factor that in with today's polarized and fractured political climate, it seems highly unlikely for a company of any decent size not to have some of its employees posting topics that are controversial or not in accord with company values. Thus, I think the best advice for a company in that position is to essentially do nothing as long as the employee is not using a company platform to post (in other words, the employee is using their own personal social media account), and does not identify the company in any way in connection with the content of what is posted. Having said that, if the employee is promoting violence or it appears reasonable that the employee is a threat to public safety, then the employer (assuming it is aware of this information) surely ought to alert the appropriate law enforcement authorities.

BENDAVID: Employers should be mindful that employees have certain rights to voice opinions on social media and engage in lawful conduct outside the workplace. This means that employers should be careful before taking adverse action against employees who engage in protected activity on social media. Employees are protected provided they are not engaging in criminal or other unlawful activity. But using social media to harass, libel, or disclose confidential information should never be tolerated.

GABLER: Despite the at-will nature of employment in California, employers are limited in their ability to control employees' use of social media and personal activities. California law protects an employee's right to engage in lawful, off-duty activities, and employers may not retaliate against an employee for engaging in such activities. Disagreement with the employee's point of view is not sufficient to support disciplinary action or termination, and when that point of view implicates a protected characteristic, taking action may result in discrimination or retaliation claims. That said, however, employers do have the right to address employee conduct that is defamatory, competes with the company, or creates a conflict of interest in the workplace. Being able to demonstrate actual damage to the company, or at least a strong likelihood of damage, will support an employer's efforts to prevent this conduct. Careful documentation of the employer's legitimate business reasons for making an adverse employment decision can help to protect the employer from a costly lawsuit. Employers also should monitor the workplace for conversations or behavior regarding controversial topics, and remind employees of the prohibition against harassing, discriminatory or bullying conduct. Directing employees to focus on work-related issues and refrain from sensitive commentary in the workplace is a far safer approach at all times, and particularly at times when hotly-contested values and concepts are highlighted in the media.

Is DEI awareness in management becoming more commonplace?

HREN: Yes. Diversity, equity and inclusion are becoming vital components in the workplace. Understanding these concepts is essential for the long term growth and sustainability of any organization. It is imperative that management is



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educated on these concepts and that they are actively working to enforce these principles in the workplace. Providing training on these topics will not only have the effect of increasing workplace morale and productivity, but will foster an environment where management and employees will be better able to obtain business and work with all different segments of the population.

BENDAVID: Diversity, equity and inclusion training could go a long way to preventing discrimination in the workplace. It helps employees at every level learn to function in a more diverse workforce, and to be more empathetic with, and fair to, each other. It also helps management to spot and deal with inappropriate behavior. As diversity increases, more employers are embracing such training. And, putting DEI training into place can help demonstrate that the employer takes steps to prevent harassment and discrimination, which can be helpful in defending employee litigation.

What accommodations must an employer offer to employees who are parents of school age children if there is a school closure due to a violent threat?

GABLER: For employers with 25 or more employees, California Labor Code 230.8 provides parents, guardians, stepparents, foster parents and grandparents with the right to take off up to 40 hours of unpaid time each year for a variety of school and child care issues, including the closure or unexpected unavailability of the school or child care provider. Employees can be required to apply their accrued vacation, paid time off or personal leave for this purpose in most cases. Where this protected leave has been exhausted or the employer falls outside of the eligibility requirements of the leave, employers should consider allowing the employee to use available vacation or paid time off despite the lack of advance notice of absence, as well as additional unpaid leave if necessary to address the aftermath of a serious incident when applicable. A violent threat or attack at a school could have lasting emotional and mental health effects, and employers should endeavor to support an impacted employee involved in these devastating events as much as possible without causing undue hardship to the company.

HREN: For employers with 25 or more employees, California law requires that an employer provide unpaid time off to employees to address a "child care provider or school emergency" which is defined to mean that the child cannot remain in a school or with a child care provider due to any one of the following: (1) The school or child care provider has requested that the child be picked up, or has an attendance policy, excluding planned holidays, that prohibits the child from attending or requires the child to be picked up from the school or childcare provider; (2) Behavioral or discipline problems; (3) Closure or unexpected unavailability of the school or child care provider, excluding planned holidays; or; (4) A natural disaster, including, but not limited to, fire, earthquake, or flood. The broad terms above would most certainly cover time off to attend to issues related to a violent threat against the school. In such a case, the employee would be entitled to 40 hours of unpaid time off each calendar year.

What are some of the hot-button issues relating to technology use in the workplace?

BENDAVID: Data security is a top issue for all businesses dealing with employee and customer information. And, insurance companies providing cybersecurity policies are requiring employee training regarding phishing and ransomware. It's important to establish policies to protect company data regarding apps and software that should be used, and those that shouldn't. Those policies could be incorporated into an employee handbook, or an acknowledgement signed by an employee when hired.

GABLER: Technology can offer tremendous efficiencies, but also may create substantial liability and business risk for employers. Providing employees with unfettered access to email and other network resources on mobile devices may cause the company to lose control of its proprietary information and confidential data when an employee leaves, particularly if the employee owns the device and data plan instead of the company. Allowing non-exempt employees to access company email on mobile devices means that they may be doing so after hours, creating wage and hour liability for the company because of this unreported off-the-clock work. Using electronic signatures on key documents may hamper enforcement of employee agreements when employees argue that their electronic acceptance was forged. Similarly, automated time records allow employees to argue that their hours were deleted or altered by someone else. Technological advancements such as biometric fingerprint access and eye scanning implicate employee privacy issues and risk identity theft, hacking and other personal exposure claims. Consulting with qualified employment law counsel can help employers to address the protection of both employer and employee information and avoid interference with California's sweeping employee privacy rights.

How does a law firm specializing in labor and employment differentiate itself from the competition in 2022?

POMERANCE: I think it is safe to say that most, if not all, law firms who specialize in labor and employment certainly know what the law is and are familiar with all the key cases and statutes. Thus, I think the best way for a firm to differentiate itself from the competition is to really learn and understand the client's business and to be aware of the business' short- and long-term goals. Only then can a law firm truly evaluate how a piece of litigation might affect the larger picture. Maybe an early settlement is essential even for a case that is defensible? Or, maybe taking a case to trial is in the company's best interest at that time. Accordingly, there is no substitute to fully understanding the clients' business. And finally, there are a lot of lawyers out there who are decent litigators and who can write good motions, but there are far fewer of us who can actually try a case. My advice is to pick a lawyer who has the ability and experience to take your case to trial and win it!