The Ever-Changing Landscape of Employment Law: 2014 and Beyond

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Veronica Gray recently participated in a virtual roundtable discussion with other leading employment attorneys and experts in the region to provide commentary regarding the current state of labor legislation, the new rules of hiring and firing, and the various trends in employment and labor law in the *Los Angeles Business Journal*'s Employment & Labor Law Roundtable.

Below Veronica shares her perspective on such issues as the changing landscape of labor and employment law in California, bullying in the workplace, anticipated activities of the NLRB, and the future of wage and hour and class action litigation.

Q: In your view, in what ways has the labor and employment law landscape changed over the past ten years in our state? Have these changes benefitted or hindered California businesses?

A: The growing complexity of legal compliance for employers and the substantial increase in employee rights has made it extremely challenging for employers from a legal and business perspective to do business in California. Also, each year, more and more employment-related legislation is referred to as a "job killer bill." The trend has been for employees to prevail with a host of new case law and statutory rights, which place added restrictions on every aspect of the employer-employee relationship.

Q: What trends to you anticipate in the world of labor law over the next five years?

A: My crystal ball suggests that there will be more enforcement efforts by agencies such as the EEOC, DOL, NLRB and OSHA. We can expect that the EEOC will focus on systematic harassment/discrimination and human trafficking; the DOL will continue to focus on the misclassification of employees as independent contractors or as overtime exempt; the NLRB will focus on enforcing employee rights under Sections 7 & 8 of the NLRA; and OSHA will focus on workplace safety issues. We can also expect continued efforts

regarding immigration and health care reform. We will also likely see continued expansion of employee rights regarding leave laws, increase of minimum wage at the federal, state, and local levels, fewer restrictive covenants such as non-competes and non-solicitations of customers and employees, efforts to expand "ban the box" to the private sector and limit criminal background and credit checks, continued expansion of LGBT rights. We can expect greater flexibility in work hours and benefits as well. Lastly, technology will continue to transform the workplace. This will continue to create a host of issues including (but not limited to) wage and hour, privacy, social media, data security, confidentiality, telecommuting, and safety issues.

Q: What are your clients most worried about in terms of emerging legislation?

A: The continuation of "job killer" bills and the complexity of the new laws that make compliance unnecessary convoluted, complex and expensive is worrisome to employers in California.

Q: Although there are no state laws specifically prohibiting workplace bullying, it's an issue that has received some media attention. Is this something that employers need to keep an eye on or is it much ado about nothing?

A: Although there is no current federal or state law expressly prohibiting workplace bullying, many states have introduced legislation that would make workplace bullying illegal. Bullying can be equal to or worse than unlawful harassment and discrimination; it can also lead to employer liability under claims of harassment, discrimination and retaliation. There is no bright line test when bullying becomes harassment or discrimination. Thus, employers should consider implementing anti-bully policies and identify "bullying" as prohibited conduct, which could lead to immediate termination. On the other hand, an employer also needs to keep in mind that the "bully" may suffer from psychological problems and has rights under state and/or federal disabilities laws.

Q: What can businesses do to remain up-to-date with ever-evolving employment law trends?

A: Although there is no true replacement for hiring employees or outside consultants who are qualified and experienced in the field of human resources and engaging outside counsel when appropriate, there are many organizations that provide current information on employment laws. For example, the California Chamber of Commerce recently released two (2) free mobile apps that can help employers stay informed about changes to California employment law: Alert Mobile App which provides timely coverage of proposed California employment laws and regulations and updates on major court decisions, ballot measures, and legislative vote records; and HRWatchdog Mobile App which highlights changes to federal and California employment law, as well as HR trends and other news.

Q: What kind of activity can we anticipate from the NLRB now that there is a full quorum?

A: The National Labor Relations Board has made it clear (even without a full quorum) that policies that interfere with an employee's right to engage in concerted activity or could have a chilling effect on the exercise of those rights - whether or not the employees are represented by a union - will be found to violate the NLRA. In addition to scrutinizing social media policies, this has resulted in the Board reviewing employer handbooks, policies, procedures, and various types of agreements to determine if they violate Sections 7 & 8 of the Act. For example, it was recently held that an employer's confidentiality rule prohibiting the discussion of "financial information, including costs" and "personnel information" could be reasonably

construed to include preclusions against employee wage discussions outside of the company. Likewise, civility, anti-harassment and abuse, and non-disparagement policies are targeted if they require respectful, courteous, or civil behavior. Another critical area is arbitration agreements. The Board is taking the position that employees cannot waive their rights to deal with matters on a class, collective or group basis, such as through a class action in court. Most courts disagree with the Board and a recent Fifth Circuit decision against the Board may trigger a request for review by the U.S. Supreme Court.

Q: Is the NLRB really a threat/challenge for non-union California employers?

A: The NLRB is using a very broad brush without taking into account the practical impact its decisions and approach is having in the employment arena. However, it is doubtful that the NLRB will be changing its approach in the near future. Employers with overly broad or ambiguous policies and agreements risk the scrutiny of the NLRB (as well California and federal laws). Employers should conduct a self-audit and decide which policies and agreements should be revised and clarified.

Q: With all of the wage and hour and class action cases being reviewed by the California Supreme Court, where is this type of litigation heading? What should employers focus on in terms of best practices to defend against these claims?

A: The California Supreme Court will address the issue of class actions when it renders its opinion in *Iskanian v. CLS Transportation*. Oral argument was in early April 2014 and a decision should be issued later this year. The Court will address whether another case [*Gentry v. Superior Court*] which discussed the unconscionability of mandatory, pre-dispute arbitration agreements with class action waivers, survived the United States Supreme Court's decision in *AT&T Mobility v.Concepcion*. *Iskanian* will also decide whether *Concepcion* trumps the California statutory right to bring representative claims under the Labor Code Private Attorneys General Act of 2004. The defense of wage and hour actions can be complicated and strategically sensitive. As a practical matter, the best defense is for employers to audit their wage and hour policies and procedures to ensure they are in compliance. This may be easier said than done but it is something every employer should put on its bucket list.

Q: Are class actions/representative actions alive and well in California?

A: Although many thought that the California Supreme Court's decision in *Brinker* (the infamous meal and rest break saga) would be the death knell for class action certification in California, that has not been the case based on recent California Court of Appeal decisions. Indeed, class action wage and hour complaints have proliferated and many are getting certified. However, others are being denied. Moreover, class action waivers in arbitration agreements also need to be taken into consideration. Thus, to some extent the tide has turned. *Concepcion* was a sea change for the California Supreme Court, which has been hostile to arbitration agreements that limit a plaintiff's ability to pursue a class action. Thus, arbitration agreements containing class action waivers have been upheld requiring plaintiff employees to proceed as a single plaintiff in arbitration instead of in court via a class action. However, earlier this year, the California Supreme Court reminded us that arbitration clauses may be invalidated if they are unconscionable. *Iskanian* will further address the viability of arbitration agreements waiving class and representative actions and how the U.S. Supreme Court precedent affects California's legal landscape.

Q: How about trade secret/confidential information protection in the employment arena – is that a thing of the past?

A: This question raises several issues. First, employee mobility and the evolution of the digital and mobile world have increased exponentially the risk of employee trade secret/confidential information theft. Employees can steal/misappropriate company trade secrets simply by using a smart phone, their own mobile/personal devises, web-based personal email accounts, USB drives, or by uploading the data to a community or public cloud. Due to the lack of adequate security, all of this can be done without the employer being alerted. Given an employer's responsibility to be pro-active in protecting company trade secrets, some things an employer can/should do include: (1) implementing specific policies governing the use of personally owned devices, third-party applications, and private cloud computing systems; (2) having the right IT team to identify and implement the appropriate safeguards/software to permit the use of mobile devices while at the same time providing security measures to protect the data; (3) limiting access on an "as needed" basis; (4) investing in remote data-wiping technology to avoid inadvertent loss of data; (5) installing software applications to monitor/detect unauthorized computer traffic; (6) limiting the installation of third-party applications or devices; (7) implementing a "bring your own device to work" policy; (8) and developing a comprehensive on-boarding, off-boarding and exit interview to ensure all company data is returned. Second, due to technology, trade secrets can easily lose their protective status by employers not taking sufficient safeguards or due to the proliferation of the exchange of information on LinkedIn, Facebook, or other publicly available databases. Data that was once considered confidential inadvertently becomes part of the public domain. Thus, confidential information may easily be accessible by going to Google. Additionally, failing to require customers to sign software licensing agreements or confidentiality agreements and allowing the transfer of software freely from one computer to another one, or failing to change default passwords in the software can destroy trade secret status. Third, the climate in California creates substantial risk for employers who seek to utilize non-compete clauses as part of an employment agreement. Unless a covenant not to compete is covered by one of three statutory exceptions to protect good will in the sale or dissolution of a business, it is invalid. If a court concludes that such a clause is invalid, the employee may have a tort claim against the employer. Thus, the issue is whether the commonly used post-termination restraints on solicitation of customers and employees are enforceable as "trade secret exceptions" or invalid restraints on trade. Currently, state and federal courts in California are currently divided on whether the trade secret exception still exists. Thus, this is an area in which employers need to proceed with caution when drafting employment and confidentiality agreements and identifying and protecting their trade secrets.

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

A: In addition to having the expertise in labor/employment law, law firms/attorneys must have an individual commitment to positioning themselves as strategic partners with the client, demonstrate an understanding of their business and appreciate the importance of working with clients to identify, understand and implement their goals. A law firm and its attorneys need to strive to consistently exceed their clients' expectations.