Labor and Employment

AS WORKPLACE CONVERSATIONS MOVE ONLINE, EMPLOYERS CONTINUE TO SEEK GUIDANCE FOR how best to craft their social media policies. Our panel of experts from northern and southern California discusses this issue as well as non-union employees, class action waivers in employment arbitration, and *Brinker*. They are Cathy Arias of Burnham Brown; Carol Gillam of Gillam Law Firm; Douglas Hart of Sidley Austin; Betsy Johnson of Ogletree, Deakins, Nash, Smoak & Stewart; Jim Morris of Rutan & Tucker; Joan Tucker Fife of Winston & Strawn; and Scott Witlin of Barnes & Thornburg. The roundtable was moderated by *California Lawyer* and reported by Laurie Schmidt of Barkley Court Reporters.

EXECUTIVE SUMMARY

MODERATOR: Can and should an employer attempt to control the social media use of its employees? How have recent National Labor Relations Board decisions influenced counsel's thinking?

MORRIS: In the recent *Costco* case (*Costco Wholesale Corp.*, 2012 WL 3903806 (NLRB)), the board held the employer committed a Section 8(a)(1) violation by maintaining a rule prohibiting employees from electronically posting statements that "damaged" the company or any person's reputation. The board seemed to stretch and strain to find that such a rule inherently would restrict people from being able to engage in protected concerted activity. The board's distinctions were not particularly useful when it said, in effect, "Employees can't engage in conduct that's malicious, abusive, or unlawful, but the employer also can't keep employees from being critical." The board didn't provide employers with meaningful guidance on where such rules really could draw the lines.

JOHNSON: *Costco* is yet another example of how the board is trying to influence non-unionized employer policies. In the past it was unusual for the board to get so involved with issues relating to non-union workforces, but under the Obama Administration that has changed. It started with social media policies. Now the board is questioning the validity of "at-will" disclaimers in handbooks in *American Red Cross Arizona Blood Services Region and Lois Hampton*, (2012 WL 311334 (NLRB Div. Judges)) and *Karl Knauz Motors* and *Robert Becker*, (2102 WL 4482841 (NLRB)) that essentially say that employers can't have a policy that requires employees to treat each other courteously. There's an undercurrent in the board's actions: Union membership is decreasing and the board is looking for other avenues to allow unions to recruit and organize employees. Organizers are not standing in company driveways anymore with signs and flyers. Instead, they're posting on Facebook, sending e-mails, and using technology to reach employees.

WITLIN: It's more insidious than that. If you look at the penetration for unions in the private sector, it's down below 7 percent. The board is fighting to save itself from complete irrelevance. Much of what the board has done is an attempt to assist unions in organizing, and to prevent employers from protecting themselves from union organization. Everything from the Facebook decisions and the social media policies, to the notice posting rules have made unsuspecting or poorly-advised companies subject to innocently violating the National Labor Relations Act and committing unfair legal practices, thereby giving unions second and third bites of the apple. It's designed to help the unions win elections. This is a push by the Obama Administration enact the so-called Employee Free Choice Act without getting the votes in Congress.

ARIAS: It begs the question, "What should we tell our clients who do not employ union workers about their social media policies?" They don't want to be the test case and don't want to be involved in litigation with the NLRB. They're asking a very simple question: "Should we have social media policies?" The answer has to be yes. The failure to implement a social media policy is equivalent to failing to implement an anti-harassment or anti-discrimination policy. If an employer is engaging in best practices, it must have one. The second question asked is: "What should this policy look like?" and "How do I avoid NLRB review? The NLRB recently approved Wal-Mart's social media policy, which can be found at the NLRB's website. It seems to me that other companies would be foolish not to refer to and mirror it to the extent possible.

FIFE: The practical challenge for employers is that most don't want to put policies in place if they think down the road the policy will be challenged. For companies that already have social media policies in place, they areconcerned about whether certain provisions of their policies might be unlawful due to new NLRB decisions.

Other companies might wait and let the law flush itself out, before they institute a social media policy. The current chairman of the NLRB has made it clear that he wants the NLRB to become a household word for all employers, not just unionized employers. Indeed, non-union concerted activity accounts for an increasingly larger percentage of the NLRB's recent caseload. In September alone, three significant cases came out on social media. Many companies want social media policies to ensure certain employees know what not to post on thecompany's social media site or the employee's personal site, for instance, confidential customer information, critical information about competitors, or critical comments about political candidates. The open question is how far a company is willing to go to advise the employees of their purported rights under the NLRA to post information that the NLRB has found to be protected conduct.

GILLAM: Protected concerted activity has always encompassed non-union employees. Nobody can dispute that. And the board was pretty moribund for a long time. There's a lot of catch-up to do in trying to become relevant. The remedies they have are not draconian, and the employers' side will have plenty of work to try and advise their clients about common sense policies. No one on the board's side or on the union side, for example, is trying to advocate for policies that go far beyond the reasonable bounds of what employers have allowed people to talk about around the watercooler. Now we have a worldwide watercooler, so to speak, with social media being so accessible. But still, good common sense should prevail.

WITLIN: People are surprised that the board's rules apply to non-unionized employers, but that's because the union movement has become so concentrated in a limited number of industries. It hasn't really attempted to organize the vast majority of unorganized employees. But what's missing with the board's new aggressiveness is common sense. For instance, you had the *Fresenius USA Manufacturing* decision (2012 WL 4165822 (NLRB)) where the employer conducted an investigation on a sexual harassment claim, and the board found that disciplining the employee for engaging in the conduct was a violation of the act. The employer is damned if they do and damned if they don't.

GILLAM: This has always been true in sexual harassment investigations. The employer knows they may face a lawsuit either from the alleged harasser who gets disciplined or fired, or from the employee who says that this person harassed them.

MORRIS: The rationale of *Costco* just seemed disingenuous. The rule that was struck down prohibited statements that damaged the company or any person's reputation. But ten years ago (in a decision it "distinguished"), the board upheld a broader rule prohibiting statements that were slanderous or "detrimental" to the company or any of the company's employees. When considering the difference between "damage" and "detrimental," detrimental is certainly a broader, looser term. Synonyms for "detrimental" include words like "disadvantageous" or "unfavorable." The board "reasoned" that the rule it upheld was contained in a laundry list of really egregious rules that employees have to avoid violating. It seems to be questionable and outcome-oriented jurisprudence when the board distinguishes a broader rule it had approved previously, and then strikes down a narrower rule.

HART: *Costco* is a bit disingenuous. It's difficult to advise employers after *Costco*, since it's not even reconcilable with the decisions it cites with approval. However, employers should not sit on the sidelines and see how the law evolves before implementing a social media policy. Many employers have legitimate reasons for social media policies and areas that they would like to protect, such as trade secrets, patient information, and health care information. If anything, *Costco* teaches that a one-size-fits all policy probably won't work. As practitioners, we have to discuss what it is our clients are trying to protect, and draft a policy that is understandable to employees and at the same time protective of the employer's interests. If anything, *Costco* and the board, and even the advice memoranda that has come out on the issues, have cautioned against broadly-worded prohibition of all watercooler-talk type policies. But they will uphold

CATHY ARIAS chairs Burnham Brown's employment practices group in Oakland. She advises and represents employers on a full range of matters including harassment and discrimination claims, trade secrets and unfair competition, and wage and hour compliance. At the request of her clients, Ms. Arias founded and operates a 24-hour advice hotline to assist over a thousand California restaurants in navigating complex employment laws. She is also an experienced trial attorney obtaining multiple defense verdicts for her clients.
carias@burnhambrown.com **www.burnhambrown.com**

JOAN FIFE is managing partner of Winston & Strawn's San Francisco office and head of the San Francisco labor and employment group. She represents employers nationwide in class action employment litigation, was named in 2009-2010 one of the *Daily Journal's* "Top Women Litigators in California," and 2010-2012 as one of the "Top Labor and Employment Lawyers," by the *San Francisco Daily Journal*. She was recently named to *The Recorder's* list of "2012 Women Leaders in Law."
jfife@winston.com **www.winston.com**

CAROL GILLAM heads an employee rights firm in Los Angeles. After stints at Irell and Manella and the U.S. Attorney's Office, Ms. Gillam opened the firm in 1994. She has obtained many large settlements and verdicts around the country, including in cases of religious and disability discrimination, age, FMLA, gender, harassment, sexual orientation, and whistleblower claims. She graduated from Northwestern University and Loyola of Chicago law school. The *Daily Journal* has named her a top labor and employment lawyer and top woman lawyer.
carol@gillamlaw.com **www.gillamlaw.com**

narrowly drawn specific policies that are tailored to protect an employer's legitimate interests. I would strongly advise all employers to have a policy.

ARIAS: Another way that employers will try to protect themselves from NLRB scrutiny will be to add disclaimers throughout their handbooks, a statement like, "this policy is not intended to prevent employees from engaging in protected concerted activity permitted by Section 7 of the NLRA." While such a disclaimer is not bulletproof, it could go a long way to help the employer establish that its reasonable policies are not an attempt to chill concerted activities.

DOUGLAS HART is a partner in Sidley Austin's Los Angeles office. Mr. Hart specializes in employment class actions and has represented employers in California and in venues across the country defending state and federal wage and hour and discrimination class actions and nationwide FLSA representative actions. Mr. Hart also specializes in traditional labor law. He has been named a Super Lawyer, an MVP, and a Leading Labor and Employment Lawyer many times.
dhart@sidley.com **www.sidley.com**

BETSY JOHNSON is the managing shareholder of the Los Angeles office of Ogletree, Deakins, Nash & Smoak & Stewart, PC. Ms. Johnson regularly defends employers in wage and hour, discrimination, harassment, and wrongful termination matters. She provides day-to-day advice and counsel to employers on issues including employee leaves, disability and reasonable accommodation, performance management, and drafting and implementing personnel policies and procedures. She frequently conducts seminars for human resource professionals, senior management, and in-house counsel.
betsy.johnson@ogletreedeakins.com **www.ogletreedeakins.com**

JIM MORRIS has been a partner in Rutan & Tucker's employment and labor law department for 27 years. He represents employers in a wide variety of employment and labor law matters, both litigation and non-litigation, and has defended employment cases in many venues throughout the country. A graduate of Duke University and Georgetown University Law Center, he has been selected repeatedly by Best Lawyers in America and by Super Lawyers in the field of labor and employment law.
jmorris@rutan.com **www.rutan.com**

SCOTT J. WITLIN is a labor and employment law partner in the Los Angeles office of Barnes & Thornburg. Mr. Witling's practice includes employment and traditional labor matters, including class actions, labor negotiations, arbitrations, and matters before the NLRB. He was lead counsel in the landmark victory in Doe v. Easy. Mr. Witlin earned his J.D. from Stanford Law School and his B.S. from Cornell University's School of Industrial and Labor Relations.
scott.witlin@btlaw.com **www.btlaw.com**

JOHNSON: You have to be careful using disclaimers. While a disclaimer might be helpful, clients should understand that it's not going to alleviate the need for a well-tailored policy that is customized for that particular employer. Even within the employer, there may be some departments where an even more detailed or different social media policy may be necessary to address the employer's particular concerns.

It behooves us as counselors to caution our clients that those general employee handbook policies may not suffice, not only on the social media issue, but also as far as the at-will policy, and, to some extent, the harassment policy and open door policy and the other types of policies that might be scrutinized by the board.

FIFE: On the savings clause, when drafting the policy, employers have to be careful about the type of language they use based on the NLRB decision in *EchoStar Techs., L.L.C.* (2012 WL 4321039 (NLRB Div. of Judges)) a case that came out in September. In that case, the handbook purported to have a savings clause that essentially said that if there was a conflict between the policy and law, the law should be applied. That wasn't sufficient to save the provision, and the ALJ found that there was still a violation of the NLRA.

MODERATOR: What is the future of class action waivers in employment arbitration given the NLRB's recent arguments, *Concepcion, Gentry, Iskanian*, etc.

FIFE: When *Discover Bank* (*Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005)) came out I wondered whether the entire wage and hour class action practice would go away, because I thought that most, if not all, employers would institute arbitration provisions with class action waivers. Employers that already had arbitration agreements in place could now press arbitration without much worry of class distribution, and then employers added a class action waiver if they didn't have one already. But employers that never had arbitration agreements, didn't suddenly adopt them simply because of *AT&T Mobility LLC v. Concepcion* (131 S. Ct. 1740 (2011). There are a number of cases where judges have enforced arbitration provisions, citing *Concepcion*. The recent *Iskanian v. CLS Transportation Los Angeles, LLC* (206 Cal. App. 4th 949 (2012)) decision is a great one for employers. *Iskanian* held that *Gentry v. Superior Court* (42 Cal. 4th 443 (2007)) was overruled by *Concepcion*, and held that PAGA (Private Attorney General Act) claims are subject to class action waivers. But the jury is still out because the California Supreme Court just granted review of *Iskanian*.

WITLIN: A lot of employers fear arbitration because, among other reasons, it will be easier for their employees to file claims. Also, if they get an oddball arbitration award, there's no appeal. Arbitration has always had pluses and minuses, and thus viewed historically as a fair method of resolving disputes. The hostility toward arbitration began because the plaintiffs bar's recoveries were not as high, which meant their contingent fees were not quite as great. But in terms of efficiency and speed, arbitration has always been a benefit to employees because it lowers the bar for entry into the arena to

challenge your employer's decision.

Besides *Iskanian* there have been a couple of other cases that have been favorable. But there's continuing hostility to arbitration in California state courts with oddball decisions from the courts of appeal. The first appellate district invalidated arbitration provisions because at the time the employee entered into the employment arrangement and signed the handbook with the arbitration provision, nobody gave the employee a copy of the AAA rules for employment arbitration. Somehow that was viewed as overreaching by the employer. I think the more interesting issue will be whether the *Armendariz* factors (*Armendariz v. Foundation Health Psychare Servs., Inc.* (2000) 24 Cal. 4th 83)) will go by the wayside in light of *Concepcion*.

GILLAM: Arbitration is a terrible deal for employees, putting aside arbitrations of grievances in a unionized setting. But in cases where an employee has been terminated and signed some compelled arbitration clause, it isn't fast, cheap, or fair because the awards are very much lower and more often in favor of the employer than is the case in court. That's why some employers want to use it. But it is also expensive for employers and so some don't want to continue arbitrating cases. Arbitrators can get fees of up to $200,000 for hearing a single employee arbitration. Which raises the repeat player effect where providers, such as JAMS and AAA, benefit from employers requiring the employees to go to arbitration. They use the same arbitrators over and over, who either find for the employer or award low damages to the employee. The hostility toward arbitration from the plaintiffs bar is *not* from receiving a reduced contingency fee, because when I win in arbitration my fee award is quite separate and apart from however much the employee gets. That's not the point. It's the unconscionability. The courts of appeal here are continuing to invalidate arbitration agreements after *Concepcion* on a lot of the same grounds that they have before. I think the Supreme Court will reverse the *Iskanian* decision.

JOHNSON: The two major points of discussion I have had with clients about this over the last year are how does FAA preemption affect the California Supreme Court's ruling in *Armendariz*. If the *Armendariz* factors are still in place, it's not easy to have a compliant arbitration agreement in California. And two, when employers have to foot the bill for the arbitration, it's not a level playing field, from our perspective. Additionally, will *Iskanian* settle whether class waivers apply to PAGA claims? Until then you're not going to see a lot of employers jumping on the arbitration bandwagon.

ARIAS: Again, employers prefer clear bright line rules and do not want to be a test case. Unfortunately, it may be quite a while before we get clarity on the issue. Prior to *Concepcion*, many employers were rethinking arbitration agreements because many found them to be inefficient and costly. Post *Concepcion*, employers will have to weigh the benefit of the potential that a class action waiver will be enforced versus what many consider the detriment of costly, and sometimes inefficient, arbitration. Because this is such an important issue for employers and employees, let's hope that the California Supreme Court rules on *Iskanian* in less time than it took to decide *Brinker*. In the meantime, expect that the courts will struggle with the issue and that some courts will enforce class action waivers and some won't.

MORRIS: My firm litigated the case of *Nelsen v. Legacy Partners Residential, Inc.* (207 Cal. App. 4th 1115), which pretty closely hews to *Iskanian*, and came out not too long after it. Review has been sought in *Nelsen*, too. But it was another strong endorsement of the same principles reflected in the *Iskanian* decision. Before the grant of review in *Iskanian* we were starting to see pretty strong appellate court decisions saying, "We recognize the primacy of *Concepcion*, and we're going to honor the law of the land as determined by the U.S. Supreme Court." We'll see whether that carries the day at the California Supreme Court. The PAGA issue perhaps is conceptually more difficult to resolve. It was interesting that both *Iskanian* and *Nelsen v. Legacy Partners* rejected the NLRB's effort in the *D.R. Horton* case (2012 WL 36274 (NLRB)) to reach out and extend its fingers into the issue of mandatory arbitration agreements. Both decisions unequivocally rejected the NLRB's efforts to meddle in that area of contract law between employer and employee.

HART: I recently saw a cartoon with two lawyers arguing in front of the judge, and the caption read, "We're here to litigate the arbitration agreement pursuant to which we agreed not to litigate." That's where we are with respect to the law about arbitration agreements and class action waivers. *Concepcion*, *DR Horton*, and *Stolt-Nielsen* (*Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1750 (2010)) just raised a whole host of issues. *Concepcion* foresaw the development of a federal body of common law in this area, which would say that *Armendariz* would no longer apply. However, several of the federal courts that have addressed the issue around the country have still applied state law regarding substantive and procedural unconscionability. I would therefore continue to follow *Armendariz* until there is some clarification in the Ninth Circuit.

With respect to class action arbitration, the defense generally does not want to be in a class action arbitration, given the lack of any real review of decisions such as class certifications. There are cases from other circuits in which class action waivers were held to be unenforceable and were severed from the agreement. As a result, the employer was left arbitrating a class action. If arbitration agreements have a class action waiver, that's fine. That will be litigated. But the agreement should say that the arbitrator does not have the authority to decide a case on a class basis. That's not necessarily a class action waiver, and that might mean that the case goes back to the court for class action treatment. But it could help to avoid the position that I don't think any of us want to be in, which is arbitrating a class action.

MODERATOR: In the post-*Brinker* world are meal and rest break class action suits dead, and if so what might replace them? How has the decision impacted class certification trends, appellate decisions, and employer responses?

HART: I briefed *Brinker* (*Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012)) to the court of appeals in one of the post-*Brinker* decisions—the *Lamps Plus* case, which came down on all fours with how the employer community would like to view *Brinker*. (See *In re Lamps Plus Overtime Cases*, 209 Cal.App.4th (2012).) That view is that *Brinker* should eliminate the vast majority of meal period class actions. I appreciate that plaintiffs counsel are looking to Justice Werdeger's concurrence for support to maintain a class action. However, as *Lamps Plus* stated, the concurrence is not binding, and it cannot be read in contradiction of the majority opinion, which made pretty clear that unless there is an unlawful policy applied to a group of employees or a systemic policy or systemic violation, that a class action simply would not be appropriate for meal or rest period cases. This approach is consistent not only with the court of appeals reading the decision in *Lamps Plus*, but the recent *Tenet* decision (*Tien v. Tenet Healthcare Corp*., 2012 WL 4712520). Saying that the data shows missed meal breaks and that therefore must mean employees were too busy to take a break, or that the employer must have had some reason for not allowing employees to take breaks, or that the managers must be doing something wrong, in contravention of the employer's lawful policy, is not sufficient for class certification. That's the practical import of *Brinker*: unless plaintiffs can point to some systemic violation, a class action simply is not maintainable.

WITLIN: *Brinker* really set clear boundaries, and it's hard to imagine notwithstanding Justice Werdegar's concurrence, that you can support a class action because the commonality factor becomes confounded by all of the individual circumstances that might cause people to miss meal breaks. Years ago when Governor Schwarzenegger's labor commissions proposed regulations to fix this problem there was testimony from numerous employees in the restaurant industry that said, "We don't want to take our breaks because we're paid in tips, and will lose out. We'd rather work through meal breaks." The *Brinker* decision embraced the idea that as long as the employee has the right to take the break, the employee doesn't have to take it.

FIFE: Most noteworthy is the idea that if an employer had employees working only a seven-hour shift without being entitled to two rest breaks, that might violate California law. Plaintiffs have argued that if the employer has a policy that provides a rest break for every four hours of work, there may be a violation of California law under *Brinker* because they argue that the second rest break must be made available when the employee works at least a major fraction of the second four-hour block, such as more than two hours. I was surprised that I didn't see a number of rest-break cases filed after *Brinker*.

After *Brinker*, companies called saying, "Our employees have been wanting to work through their meal breaks for years and go home early. Can we now let them do it?" My advice has been that because employers still have to show that employees can take their meal breaks, that there's no policy or practice that prohibits employees from taking their meal breaks, and that the employer relieves them of all duty if they want to take a meal break, employers should still require employees to take their meal breaks, and still build those into the schedules.

ARIAS: By no means are meal or rest-break class actions dead. The cautionary tale is that many employers will read *Brinker* too broadly and adopt policies and practices that will make it easy for employees to prevail in meal and rest-break lawsuits. For employers with a highly structured workplace, break claims will still exist. Fast food, retail, and manufacturing industries are particularly vulnerable to break class actions. We should also anticipate an increase or transition to lawsuits challenging on-duty meal period agreements, the timeliness of breaks, claims that scheduling and/or understaffing do not allow time for meal breaks, and that employees worked 'off-the-clock' during lunch and were not paid for that time. We will continue to see attacks on company bonus plans, commission arrangements, expense and mileage reimbursement policies, and salary classification decisions. It certainly will be a challenging time for employers.

GILLAM: *Brinker* obviously had lots of stuff for employers, but also for employees. It was a big win for employee rights in the workplace. It's not going to be the end of class actions. But employers get more clarity about what it is they have to provide, and employees in a number of workplaces will get more breaks than they were able to get earlier. There are still lots of employers who are not represented by people on this panel who have a policy or a practice—usually unwritten—that violates *Brinker*, so those cases can still be brought.

MORRIS: What's happening with employees who take meal periods after the completion of five hours of work? Is the employer practice now to pay the penalty because the meal period was taken late, or is it more nuanced, something like, "It was your choice to wait until after five hours to take the meal period, and since *Brinker* says we don't have to be the meal period police, we're not going to pay you the one hour penalty?"

JOHNSON: *Brinker* was sort of anti-climactic. It really didn't change the advice I give to clients; it's just more nuanced advice now. There are now situations where employers are allowed to give some flexibility back to their employees, particularly in the white-collar settings. The biggest challenge is coming up with a recordkeeping mechanism to allow employees to say that they chose to take their lunch break late, for whatever reason. It will always be the employer's burden to prove that the employee chose to take a late lunch or a short lunch or no lunch. ■