2015 Roundtable Series

Labor & Employment

Long a fertile practice area, the field of employment law in California may be hotter than ever. Several state laws related to employment are taking effect this year, including mandates for employers to offer paid sick leave and to provide training on abusive conduct in the workplace. Our panel of experts discussed those new laws and recent employment rulings, the sex discrimination case of Ellen Pao against Kleiner Perkins, the use of criminal background checks in hiring, and a variety of issues surrounding labor contractors.

The members of our panel were Cathy L. Arias of Burnham Brown; Laura S. Flynn of Low, Ball & Lynch; Jack W. Lee of Minami Tamaki; Mark J. Payne of Rutan & Tucker; and Jon D. Meer of Seyfarth Shaw. The roundtable was moderated by *California Lawyer* and reported by Balinda Dunlap of Barkley Court Reporters.

Participants

CATHY L. ARIAS
Burnham Brown

LAURA S. FLYNN
Low, Ball & Lynch

JACK W. LEE
Minami Tamaki

JON D. MEER
Seyfarth Shaw

MARK J. PAYNE
Rutan & Tucker

EXECUTIVE SUMMARY

MODERATOR: How are the major employment rulings from the last year playing out? In particular, what is the impact of the U.S. Supreme Court denying cert in *Iskanian* (*Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014))?

CATHY L. ARIAS: Many have predicted that we will see a drastic rise in Private Attorney General Act (PAGA) claims. But employers should not panic. I doubt that this is a done issue. There is another case that's currently in line for cert (*Bridgestone Retail Operations, LLC v. Brown,* No. 14-790). And the Supreme Court may also be waiting for the Ninth Circuit's decision in *Hopkins v. BCI Coca-Cola Bottling Company*. In addition, the federal district courts are overwhelmingly holding that PAGA claims can be subject to waiver, whereas the state courts are following *Iskanian* as they must. All of this suggests that it is very likely that the United States Supreme Court will ultimately review the holding of *Iskanian* which should provide reason for optimism for California employers.

MARK J. PAYNE: *Iskanian* does confirm the validity of class action waivers, and that removes the previous uncertainty and perceived risk that employers had to grapple with. It has green-lighted that practice. Now, whether the PAGA exception survives remains to be seen, but I have to say that given that the U.S. Supreme Court has already ruled for years now that the Federal Arbitration Act preempts state laws that invalidate arbitration agreements, I think it is just a matter of time before the High Court overturns that part of the *Iskanian* ruling.

One concern for everyone involved is that we can end up litigating in multiple forums, creating questions about which claims get litigated first—the PAGA representative action in court or the individual claims in arbitration—and then how the result of the arbitration will affect the PAGA claim, and vice versa. It just seems to create a lot of additional burden and expense for all parties.

ARIAS: The last few times we successfully enforced arbitration agreements, the plaintiffs did not move forward to arbitration. So we have not litigated in two different forums yet.

JACK W. LEE: Of course, we love *Iskanian*, as plaintiffs attorneys, and I think it is well-grounded in the private attorney general enforcement mechanism. But we also have seen that it is causing the trial courts to have some confusion about which goes first. And what some of the plaintiffs' lawyers are doing is bringing multiple cases in arbitration on the same issue with multiple plaintiffs. So what happens if an arbitrator finds liability? How is it going to be enforced or recognized in court?

JON D. MEER: I agree, and I am not sure there's consensus on either the plaintiff side or the defense side about which cases are going to go first, the arbitrations or the civil actions. It might be just based on the judge you end up with in the civil case and the arbitrator you're able to agree to.

MODERATOR: What's going to change with the advent of AB1897, which requires

employers and their labor contractors to share liability for workers' compensation and wage payments?

LAURA S. FLYNN: The statute is limited; it doesn't include entities that have less than 25 employees. However, that number includes labor contractor workers. In addition you have to have at least six labor-contractor workers in order to be subject to the statute. I think it makes the employer an insurer for the labor contractor. What's going to happen is the employers are going to add indemnification and duty-to-defend clauses to their contracts so that the labor contractors become the insurer. There are issues as to whether there's a conflict of interest in having one attorney represent both the employer and labor contractor. Does the labor contractor have to hire two separate attorneys, one to represent the client employer? Who gets to choose that attorney? Who controls the litigation? It will get very expensive for the labor contractor.

ARIAS: This statute will force companies to do their due diligence and conduct business with reputable contractors. It's going to put fly-by-night labor contractors out of business because you'd be foolish to contract with a company that won't be around to provide the defense and indemnity that was negotiated.

MODERATOR: Does it change outsourcing in general?

LEE: The law is a welcome restatement of what we consider to be already favorable law in terms of joint liability for wage payments, and the workers' comp piece is affirmed. If you want to work it out with indemnification, good for you, but you are both on the hook as a legal matter. I do think it prevents this whole practice of trying to subcontract out the services for security guards, custodial staff, and other services and then just say, we didn't know they were making them work 80 hours a week with no overtime.

FLYNN: I think companies will reevaluate and see if they can hire employees to fulfill the duties and responsibilities that they have used contract laborers for in the past. Presumably employers hire the labor contractors to save money, but if they're assuming this additional risk, it may not be worth it and they may want to have those services performed by their own employees.

MODERATOR: What other new concerns about employer-contractor relationships are coming up in the wake of the FedEx ruling (*Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014))?

LEE: This is a really hot issue, of course, and there's going to be a lot of pressure for not only FedEx, but the sharing-economy companies to look at their business models. Some of the state requirements that, for instance, taxicabs be accessible or drivers be subject to criminal checks are not being met in the Uber environment. That's going to be a hot issue that has different elements from *FedEx*, because they don't wear the same uniforms, don't have the same schedules. There are two issues: (1) are the sharing economy companies misclassifying employees as independent contractors and (2) are they vicariously liable for independent contractors? Two federal courts have ruled that the misclassification issue must be decided by a jury. (See *O'Connor v. Uber*, CV13-03826 (ND Cal Aug. 15, 2013); *Cotter v. Lyft*, CV13-04065 (ND Cal Sept 3, 2013).)

ARIAS: In the *FedEx* case, Judge William A. Fletcher said that the drivers must wear FedEx uniforms, drive approved FedEx vehicles, and groom themselves according to FedEx appearance standards. FedEx tells drivers what packages to deliver on what days and at what times. And although they may drive multiple delivery routes and hire third parties to help perform the work, they may do so only with FedEx's consent. Uber is a slightly different model, and it is going to be very interesting to watch those cases.

FLYNN: FedEx even did performance evaluations of its "independent contractors." By categorizing workers as "independent contractors," an employer avoids having to pay for workers' compensation and unemployment insurance, certain taxes and benefits, and isn't governed by anti-discrimination laws in some situations. If workers are determined to be employees, will the employer

"FedEx tells drivers what packages to deliver on what days and at what times. Uber is a slightly different model, and it is going to be very interesting to watch those cases."

—CATHY ARIAS

CATHY L. ARIAS is a partner in the San Francisco Bay Area office of Burnham Brown. She advises and represents employers on numerous matters including harassment and discrimination claims, trade secrets and unfair competition, and wage-and-hour compliance. Ms. Arias founded and operates a 24-hour advice hotline to assist more than 1,000 California businesses in navigating complex employment laws. She is also an experienced trial attorney and has obtained multiple defense verdicts.

carias@burnhambrown.com
burnhambrown.com

"What's tough with latent discrimination is how you prove it, and what is the burden of proof? It is difficult to prove why certain decisions were made."

—LAURA FLYNN

LAURA S. FLYNN is a shareholder in Low, Ball & Lynch's San Francisco office. She represents employers in civil litigation throughout California, specializing in the defense of wrongful termination and ADA claims. Within the past five years, Ms. Flynn has obtained defense verdicts in cases venued in San Francisco and Los Angeles. She is a member of the Association of Defense Trial Attorneys and past board member of the Association of Defense Counsel. She has been selected as a Northern California Super Lawyer for the past four years.

lflynn@lowball.com
lowball.com

be on the hook for liability purposes? I don't see too much liability associated with delivering a package, but can Uber be on the line if there's misconduct by one of its independent contractors?

MEER: In defending a potential class action case, we interviewed a lot of independent contractors, and they almost uniformly said, "I like the idea of not having deductions taken out of my pay. I like the idea of being able to take a tax deduction myself for my uniform and my car and everything else and that I don't know why these greedy plaintiffs' lawyers have filed this silly lawsuit that is taking away my financial advantages for the business relationship I negotiated."

MODERATOR: On another lively topic, how do you see the case of Ellen Pao against Kleiner Perkins changing the discussion about sex discrimination? What is going to be its lasting impact?

LEE: It is different because it is the venture capital industry, first of all. They are highly educated folks and quite articulate. They write well. And it is not the more overt kind of situation but a very subtle thing. The jurors focused on the gender disparity in the industry given the gross numbers, but it is classic in the sense it involves the typical defenses: "It didn't happen," "You consented to it," or, "It is more complicated than you say." But these are the kinds of discrimination issues that highly educated people have, where it is not a a matter of meeting a quota; it's not black and white. And the judge is applying trial techniques that have been in use in federal courts for years but are novel in the state court context, such as asking jurors after each witness's examination what else they you want to hear from thes witness before they start deliberating.

FLYNN: Normally, we think about gender discrimination in the context of sexual harassment, pregnancy discrimination or the right to equal pay. In this case, it is about latent discrimination that usually doesn't come to light for a variety of reasons. It occurs in the legal profession. On more than one occasion at the end of a mediation, the group of attorneys is handed the stipulation for settlement to fill in the blanks, and it comes to me, the female attorney, even though my handwriting is horrible. A number of times, I have walked into a room for a deposition and a male attorney will say, "Oh, are you the court reporter?" My response is, "No, they actually let us practice law now."

What's tough with latent discrimination is how you prove it, and what is the burden of proof? It is difficult to prove why certain decisions were made. Kleiner Perkins is saying she wasn't qualified. Ms. Pao is saying, "I tried to bring you Twitter, and you guys passed up that opportunity."

PAYNE: The case presents a very difficult issue in that she apparently involved herself in a consensual relationship with a junior partner, and then their breakup triggered all this controversy. What's the alleged discriminatory treatment attributable to? Is it attributable to his dissatisfaction with her breaking up? If so, does that fall within the ambit of what's protected under our gender discrimination or sexual harassment laws, or is it personal hostility from a failed relationship and not being driven by unlawful bias? Those are difficult questions to resolve.

ARIAS: My friends and I have been talking about this case for weeks. My lawyer friends are very focused on the trial procedure and strategy. Both sides are represented by excellent attorneys and we are interested in how they deal with the good and bad facts. For instance, I have read that this plaintiff is not very likable; on the other hand, tech is very dominated by men and the numbers don't look good when it comes to gender discrimination. When I talk with non-lawyers about this case, they want to know how much I think she's going to get. They are aware of how few women there are in tech and want a verdict in Pao's favor to indict that field. I have to remind them that this trial isn't about the industry or whether it should have more women. This trial is about whether this particular woman was subjected to discrimination. My friends' comments make me wonder if Kleiner Perkins can get a fair trial.

LEE: I find it really interesting, as a member of a racial minority I faced the same kinds of things. When I went into a court-

"It's an affirmative defense that we did everything we could to prevent this harassment, and if you can't show that you complied with this training requirement, then you can't use that defense."

—JACK LEE

JACK W. LEE is a partner with Minami Tamaki in San Francisco and leads the firm's consumer and employee rights group. Mr. Lee has extensive experience litigating plaintiffs' employment, consumer fraud, antitrust, and civil rights individual and class actions in state and federal courts throughout the U.S. He was named a Super Lawyer in *Law & Politics* magazine from 2004 to 2015. Mr. Lee has attained some of the largest monetary settlements in history under Title VII of the Civil Rights Act.

jlee@minamitamaki.com
minamitamaki.com

room when I was first starting to practice criminal law, other lawyers often thought I was a defendant. And I think that Pao was looked at differently from her colleagues because she was a woman. And it's great that he's got these evaluations of men who were criticized for the same things, having sharp elbows and not giving enough credit. But these guys advanced, so it is looked at through a different prism when a woman is being accused of the same thing.

MEER: Every single plaintiff discrimination case is about a relationship, first and foremost, before you get to the protected category of the plaintiff. Even the most coldhearted company would not disadvantage somebody if it made economic sense to reward them.

MODERATOR: What are you looking out for as mandatory sick leave takes effect statewide?

MEER: It will trigger issues of whether we are on notice that a person has a disability, and we have to start asking questions about reasonable accommodation, or do we have to designate this as a California Family Rights Leave Act? It really puts HR people in a maze where everywhere you turn you'll run into a wall and not know what to do. The law has a good intention, but it is going to be a problem for even companies with the most sophisticated human resources function that really are trying to do the right thing.

PAYNE: Another issue related to time off from work is how much time off is enough to satisfy the separate reasonable accommodation requirements of the disability discrimination laws. From the employer's perspective, it seems very difficult to know when and where to draw a line about how much time off an employer should allow an employee. Employers have been advised for years that it's up to 12 weeks for serious health conditions under the CFRA or FMLA, or four months under the PDA, for pregnancy-related disabilities. But employers also have this amorphous requirement under the ADA to provide "reasonable accommodations" for most medical conditions, and the way the courts have interpreted that is by starting with what sounds like a reasonable statement that if more time off, or some time off, will help an employee resume his or her job and be able to perform essential job functions, then time off should be considered as a reasonable accommodation. Often the request begins with a reasonably short period of time off and specifies a return to work date, and the employer grants the request. But then the employee often asks for an extension, and again provides a specific return to work date. The employer grants it, but it seems like the more the employer grants these requests, the harder it eventually becomes for the employer to draw a line and say that it's become unreasonable. What seems particularly troubling to employers is that the whole point of reasonable accommodation was to make some kind of job modification that would allow the employee to perform their essential job functions. But when they are out for more than four months or 12 weeks or up to a year or more, they are not performing any essential job functions. So the accommodation isn't allowing them to do anything other than stay off work.

FLYNN: It depends on the position that's not being filled. For example, if it is a secretary and there's an ability to get temporary staffing, that may be a situation where the employee can be out for a longer period of time as opposed to somebody who supervises employees or has certain obligations that have to be completed at a certain time of the year such as an accountant. But what if hiring a temp costs twice as much, does the employer have to assume that additional expense? Even the EEOC says that an employee can't be out for an indefinite period of time. An employee can't say, "I don't know when I am coming back."

PAYNE: My understanding of the reported decisions so far is that we are not seeing where to draw that line. Often employers wait until too late in the process to put limits up, and the employee may not have baked that into their expectations. So it does help if the employer can lay the groundwork up front as to what its needs and interests are and then to ask the employee about other possible accommodations besides time off that might get them back to work earlier.

MODERATOR: How has the sexual harassment training mandate worked in your experience, and how will it change with the new requirement to include the topics of abuse and bullying, as required by AB 2053 taking effect this year?

MEER: The parade of horribles that people predicted when this took effect never occurred—that it was going to give people a roadmap about how to sue or that there'd be an avalanche of new cases. From all sources of data, the training has not caused more lawsuits and has not made things more difficult for companies. There are three problems with the bullying statute. First, non-harassment laws are not supposed to be a civility code, and this training about bullying is really imposing a civility code. Second, the standard of what is considered to be improper behavior could reach anything that somebody doesn't like. It could be a bad performance evaluation that criticizes someone in harsh tones or a demotion that somebody thinks is unreasonable or somebody not getting a pay raise and they think that the CEO takes too much money in his or her pocket. The third problem with it is there aren't any legal consequences for violating "bullying" laws—only consequences for failing to provide training.

LEE: I think it's a great statute because it always comes up in the defense that "this guy is an equal-opportunity A-hole, and he does this to everyone." Now, you can't use that. It's an affirmative defense that we did everything we could to prevent this harassment, and if you can't show that you complied with this training requirement, then you can't use that defense.

MEER: Well, I understand that we have carved out protections for some very important categories such as gender and disability and age and things like that. But my father used to say, "If you hate your job, there's a support group for that, and it's called 'everyone,' and they're holding a meeting tonight at the bar."

ARIAS: I would agree this law is probably misguided, especially since this topic of avoiding abusive conduct was already contained in most prevention of harassment trainings from the beginning. A good trainer should provide examples of behavior to avoid and we certainly always have.

FLYNN: When I first heard about this statute, I thought it would create some type of liability for general harassment, as opposed to harassment related to a protected class. That doesn't appear to be the case. The only enforcement mechanism is an order to comply. There was a previous version in 2003 wherein the bill made it an unlawful employment practice to subject an employee to an abusive work environment. That version never passed. I think we are safe and this may actually provide an excuse for an HR person to sit down and say to a very difficult person, "You can't yell at the top of your lungs because someone made a typo."

MODERATOR: In other words, you're seeing some silver lining in the fact that there is not an enforcement mechanism?

FLYNN: If somehow this could be a basis for civil liability, everybody would be in trouble. Anybody that felt slighted in any way could bring a lawsuit. And if an abusive environment could be considered an unlawful employment practice, there would be the possibility of an award of attorney's fees.

LEE: My feeling is that this conduct is often related, that the sexual harassment, for example, as you're dealing with someone who is ultimately a bully, whether or not you can fit him into the box of being a sexist, a racist, or an ageist, but this person is a bully. So it gives you another tool to employers to counsel this person.

MODERATOR: Are there new issues arising with immigration-related claims?

LEE: The new issue is legislation that allows undocumented people to come to the DMV and obtain driver's licenses with a special designation. You can't ask an applicant for employment for that document unless they must have a driver's license to do the job.

PAYNE: What I'm concerned about, especially for employers in California, is cur-

"My father used to say, 'If you hate your job, there's a support group for that, and it's called 'everyone,' and they're holding a meeting tonight at the bar.'"

—JON MEER

JON D. MEER is a partner in the Los Angeles office of Seyfarth Shaw. He has extensive experience successfully defending employers in class and collective action lawsuits and other types of high-exposure claims. He is one of only a handful of lawyers in California with successful class action jury trial experience. He has also defeated class certification in numerous cases. Mr. Meer has been named to the list of Top Labor and Employment Lawyers in California by the *Daily Journal*.

jmeer@seyfarth.com
seyfarth.com

"An employer faced with a request to record a "new" Social Security number really can't even enforce its policies about honesty [under new Labor Code Section 1024.6]."

—MARK PAYNE

MARK J. PAYNE is a partner in Rutan & Tucker's Costa Mesa office and past chair of the firm's employment and labor section. **For the past 22 years, he has handled counseling, litigation, and dispute resolution for employers on matters including wrongful discharge, discrimination, harassment and retaliation claims; wage-and-hour compliance and class action defense; executive compensation; labor relations; workplace investigations, and trade secret protection and unfair competition.**

mpayne@rutan.com
rutan.com

rent employees providing one of those new licenses or making a request to change a Social Security number. That seems to put the employer squarely in the cross-hairs of federal immigration laws that prohibit an employer from knowingly employing someone who is not authorized to work in the United States. Employees cannot logically, legally have a "new" Social Security number. So just by presenting a new one, the employee is signaling very directly that they at least at one time were not authorized to work in the U.S. while they were working for this employer. Maybe their work authorization status changed because they eventually obtained a valid Social Security number, or maybe they acquired it illegally by just acquiring someone's identity.

Now employers are not allowed under Labor Code Section 1024.6 to take any adverse employment actions just because an employee has attempted to update a Social Security number or to change his or her name. An employer faced with a request to record a "new" Social Security number really can't even enforce its policies about dishonesty. Given these new laws, I think the employer has to accept the new Social Security number, and then complete a new Form I-9 and attach that to the original I-9. For those employers in the E-Verify program, they face another question about whether they can E-Verify a current employee without running afoul of yet another new California law and jeopardizing their ability, at least on a temporary basis, to continue doing business.

MODERATOR: A lot of jurisdictions have adopted ban-the-box laws, and the EEOC is challenging background checks. Can you talk about what uncertainty this creates for employers and job applicants?

ARIAS: Let me start with the EEOC because I continue to find their prosecution of employers fascinating because they have been shot down now a number of times, but they continue to file. The EEOC claims that employer use of criminal conviction background checks constitutes an unlawful employment practice in violation of Title VII because the policies have a disparate impact on people of color especially if not job-related.

Most recently, in a case called *EEOC v. Freeman*, the Fourth Circuit affirmed summary judgment in favor of the employer where the employer used a criminal background and credit history check (See No. 13-2365 (4th Cir. Feb. 20, 2015)). One of the issues is the EEOC needs to support this conclusion that these background checks have a disparate impact on people of color.

MEER: The California Penal Code Section 1203.4 already has a mechanism for expunging older crimes or crimes that were part of a youthful indiscretion or where somebody was on parole or there isn't a problem with recidivism. And the Labor Code in Section 432.7 has long made it unlawful to consider crimes that have been expunged. So there are protections already on the books. This just creates another administrative burden for companies.

LEE: There's a salutatory effect here. It is a fact that people of color get arrested more and convicted at highly disproportionate rates. It is happening now in Ferguson. We have the Department of Justice looking into uneven enforcement. It is not theoretical. This is a badge of dishonor they must live with for their whole lives. This is an automatic hiring disqualifier for most people, and most employers use that as a shorthand for no. Not only are you condemning them for an arrest, for something they may or may not have done, but it is precluding them from a life of employment. It is too harsh for smoking a joint ten years ago. ■