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Roundtable Series

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Labor & Employment

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Roundtable Series

Labor & Employment

As the U.S. Women's National Soccer Team shines a light on the gender wage gap, California's newly amended Fair Pay Act is taking front and center in the minds of practitioners. Meanwhile, the California Supreme Court took a stand on seating in *Kilby v. CVS Pharmacy*, sparking a spirited discussion on what industries the decision might impact. Our panel of experts discussed these issues as well as recent trends in class action litigation and minimum wage increases.

The members of our panel were Cathy L. Arias of Burnham Brown, James R. Evans of Alston & Bird, Gay Grunfeld of Rosen Bien Galvan & Grunfeld, Wendy Lane of Greenberg Glusker, Mark J. Payne of Rutan & Tucker, and Jeffrey S. Horton Thomas of Thomas Employment Law Advocates. The roundtable was moderated by California Lawyer and reported by Vivian Lane of Barkley Court Reporters.

Participants

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Moderated by
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DISCUSSION

MODERATOR: Farmers Insurance recently settled a pay bias suit brought by 300 of its former and current female attorneys for $4 million. What are the takeaways from this settlement?

GAY GRUNFELD: It's interesting to me that the complaint was amended after the California Fair Pay Act came into effect. Just inferring from the timing, it looks like perhaps that law could have helped lead to a settlement.

I also want to point out the settlement is more than the $4 million reported amount because that doesn't include the costs of a consultant to help Farmers Insurance address these issues. There is significant injunctive relief in this settlement as well as the attorneys' fees that are on the top of the $4 million that will go to the claimants. It's an exciting, promising development in terms of finally starting to address this long-held pay equity gap we've had both nationally and in the state of California.

WENDY LANE: Although this particular case did not get much mainstream media attention, the topic of equal pay really is becoming a hot social media issue. That kind of awareness is powerful. It is going to educate employees and give them their own ideas about what kinds of claims they may have even before they go out and see counsel. The publicity, coupled with the amended Fair Pay Act, is also going to encourage more litigation in this area, even though this is not a new statute. There was always a remedy for gender-based pay disparities. But now, with the social media presence and the amendments, I think we're going to see more legal activity.

JEFFREY THOMAS: I don't think that *Coates vs. Farmers*, Case No. 5:15-cv-

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01913 (N.D. Cal.), tells us anything directly about the amended Fair Pay Act. The motion for preliminary approval of the settlement does not make an argument that the amendments to the Fair Pay Act are retroactive. And the period of time covered by that suit almost exclusively covers a time period before the amendments became effective.

I do agree, though, that the publicity around the amendments to the Fair Pay Act and the women's U.S. Soccer case and even just the fact that Hillary Clinton is running for president is bringing much greater attention to the apparent inequity in pay. I expect to see many more Fair Pay Act cases as a result of the amendments. I think it's an easy case for plaintiffs' counsel. The facts are out there, and the law is now so heavily slanted in plaintiffs' favor, but I don't think that *Coates* necessarily tells us much about the future of the Fair Pay Act.

CATHY L. ARIAS: The position that women should be paid the same as men is not controversial. It's a fairly well accepted concept that there should be pay equity. Hillary Clinton and other politicians have made that a cornerstone of their campaigns, and no one is arguing against it.

The question is whether this law has gone too far and whether it will result in unintended consequences. Our economic system relies on competition and it is not clear whether or not this law has taken the flexibility away from employers to offer extremely qualified candidates or highly valued employees a higher wage than somebody else. This Act may be encouraging employers to set very rigid pay scales to eliminate any risk of litigation. That can impact an employer's ability to compete for talent—a cornerstone of American business.

JAMES R. EVANS: I think the *Coates* case is going to have a positive impact on employers. There are many institutional changes that are required as a part of the settlement, which to me is much more interesting than the monetary aspect of the case.

As for the amended equal pay law, will there be more litigation? Yes. Is it skewed in favor of employees? Yes. With that said, again, the exciting part of it is that employers—at least, many of my clients who are employers—are saying, "Hey, let's look at this now before there's litigation," and they are asking, "What do the numbers look like, how do our people fare?"

While nobody disagrees with the notion that people of equivalent skill levels and experience should be paid the same regardless of gender, the reality is that they are not. This is now an opportunity for companies to take a careful look at whether there are disparities in pay that are not justified and, where required, level the playing field.

LANE: The key issue is that employers many times do not even realize that there is a disparity. So many compensation decisions are made in a piecemeal fashion that it's very easy-- with no ill intent-- for employers to end up having a skewed representation. So for me, the biggest takeaway is that employers need to find out what they don't know. They need to start collecting the information, preferably with counsel involved from the beginning to try to maintain some attorney-client work product protection).

As an employer, you don't want to find out about pay disparities when it's too late, after one good employee complaint has been made to the DFEH is made. If we can get employers to get interested in going through that exercise, I think it's going to make some really positive changes. It's exciting.

GRUNFELD: To that point, we must mention what Marc Benioff did in the Salesforce equal pay initiative where the company spent $3 million to equalize pay after they hired experts who determined that there was a disparity. Some men got a raise, too. Cindy Robbins describes in her blog how Salesforce did a comprehensive analysis of their 17,000 global employees and found that six percent of those needed an adjustment. That's the kind of proactive approach that all companies that do business in California should be emulating right now.

MARK J. PAYNE: It is interesting that the

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women's U.S. Soccer team filed a wage discrimination charge with the EEOC, but that charge apparently arises in the context of a preexisting labor dispute over the terms of their collective bargaining agreement. Their equal pay complaint is getting a lot of air time in the media because the pay disparity as they describe it is large, and they're notable figures.

But it involves federal labor law, not the Equal Pay Act. These female soccer players, just like the men, have a union, which negotiated a collective bargaining agreement covering their pay and other terms. Some say this discrimination charge was a response to the U.S. Soccer Federation's recent federal lawsuit filed against the women's team's union to declare that their collective bargaining agreement will stay in effect until after the Rio Olympics and through the end of this year.

The pay disparity described in the women's soccer case sounds pretty egregious, but it doesn't tell the whole story. There's another side in terms of what they bargained for and why they bargained for it and what was important to them versus what was important to the men at the bargaining table.

ARIAS: One of the interesting things about the women's soccer complaint with the EEOC is that the women were able to attach to their complaint evidence that the revenues that they generated or anticipate to generate in 2016 or 2017 are more than the revenues that the men are anticipated to generate. For many years, revenue disparity was held up as a reason why women athletes would not earn the same as male athletes: that they generate less money. In this case, the women finally have that critical piece of evidence that's been missing.

The U.S. Soccer Federation may disagree with those numbers, but it is their budget that they will have to explain. The Federation will also have to explain that despite those revenue projections, the men are expected to earn almost two times the amount that the women expect going to earn.

I anticipate that the Federation will argue that this goes back to the CBA and what was negotiated. But if you take out the salary component and talk about non-salary earnings, there's about a $200,000 difference between the two top women compared to the two top men. That's a pretty significant difference.

EVANS: I don't know that the government has an appropriate role in deciding pay equality for professional athletes. If you've been around professional sports at all, you would know that the players' unions are incredibly aggressive and protective of their members' rights. In my opinion, our country's workforce—the people that keep the economy ticking and families in a position where they can pay their bills and save for their futures—should be a higher pay equality priority for the government than athletes.

To me, the only interesting thing about the women's soccer claim is that it shines a bright light of publicity on the issue and I think that's good. But when you start dicing the thing too finely, it becomes problematic to say conclusively that it's some intentional act by the Soccer Federation to pay players differently. The athletes are going to get what they can command in the marketplace.

THOMAS: Even as a fellow defense lawyer, I need to disagree with that. The Fair Pay Act as amended, which is really the issue here, does more than bar a disparity in pay motivated by sex. It *mandates pay equality*, with which I have some conceptual problems. But I take issue with saying that female athletes are represented in collective bargaining as vigorously as male athletes and they should get only what they bargained for. I see no reason other than implicit gender discrimination in the women's soccer team being paid less than the men. They are performing substantially similar work, they are working hard, and they are fully committed to their professions. I believe that they are not as strongly represented as the men, and I think the reason is gender. Male professional athletes command greater power than female professional athletes first and foremost because they are men.

EVANS: So would you then say all male

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athletes should be paid the same even though there are disparities in talent?

THOMAS: No. We are not saying compare Bob to Joe. We're saying compare June to John.

EVANS: But how are you going to do that without looking at statistics, such as attendance, product sales, fan interest, etc.? When an agent comes in to negotiate a contract on behalf of a player or a player's union negotiates on behalf of a group, they point to statistics.

THOMAS: But as Cathy [Arias] pointed out, this case was filed for athletes at a point in time when they are commanding revenue and attendance.

ARIAS: The U.S. women have also performed better than the men.

LANE: What you're both pointing out is a problem that we're not only seeing in this case, but that we're going to see in other cases under this amended Fair Pay Act: how do you define "substantially similar" work, particularly when dealing with something as unique as a professional athlete and their skills and talents.

For example, from a marketing standpoint, an attractive, athlete with a positive public persona might not be "substantially similar" to another player who is behaving badly and getting bad press. They may have the same athletic skills and hold the same positions, but are they "substantially similar"?

THOMAS: But it is substantially similar *work*. It is not about a substantially similar *employee*.

LANE: But when you're an athlete, isn't part of your work representing the team in public? What we're illustrating is, we are several defense-minded attorneys who all seem to be having difficulty in stating where the line in the sand is. This is just a microcosm of what we're going to see in the business world and in litigation. It is going to be very difficult for some employers to know what they can and cannot compensate employees above and beyond their rote skills. It is going to be interesting to see how this plays out, particularly since it is getting so much more media attention. One has to wonder, what is this going to mean for employers in the private sector?

THOMAS: An additional issue is this: what are going to be the high target industries or workforces under the amended Fair Pay Act? In the Los Angeles area, the entertainment industry is at the top of the list. Women behind the camera—editors, sound editors, and postproduction people—historically are paid less than men. Silicon Beach is also ripe for the picking. I anticipate the plaintiffs' bar will roll through Silicon Beach and zero in on early phase tech companies, which are infamous for paying men more than women.

GRUNFELD: Much of the amended Fair Pay Act codifies existing law. Employers could show there was a reason for the disparate pay based on seniority or merit or quantity of production. And now if they're relying on a bona fide factor other than the employee's sex, then they need to show that this is a business necessity. And it is those provisions that are going to put the meat into enforcement efforts by the plaintiffs' bar to help change these companies and industries that everyone knows are contributing to the gender pay gap.

MODERATOR: What does the U.S. Supreme Court's recent decision in *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, mean for the use of statistical evidence in class actions going forward?

PAYNE: This case involved the use of statistics in a wage and hour class action under the FLSA. It keeps the door open for the use of what the court would agree is competent, representative statistical evidence where the employer did not keep records of the disputed time worked.

But, it's fairly limited. It merely says that we're not going to bar the use of statistical evidence in all class actions. It doesn't go so far as to say what kind of statistical evidence can be used. We're going to see more attempted use of statistical evidence, but

what statistical evidence the courts actually allow is still going to be hotly litigated and probably limited.

GRUNFELD: I think it's an excellent decision that really makes clear that this kind of evidence can and should be used to certify these classes. This was a good result.

LANE: With all due respect to present company, I think that the plaintiffs' lawyers' declarations of victory are a little overstated regarding this case. Justice Kennedy noted in the opinion that the ruling in a certain sense isn't anything new, that statistical evidence has been allowed in these kinds of cases since 1946, and that the applicability of statistical evidence in a wage and hour action is going to be fact-specific depending on the facts in any given case. Some pundits are claiming that this is a change in the overall landscape, but I think that goes too far, especially considering the case left open big questions on damages.

EVANS: In its majority opinion, the Court took care to say that it is not making a broad pronouncement of how statistics can be used in class actions and proving up damages. It's specific to the facts, and it's very specific to the FLSA. I agree with Wendy [Lane]. It's not yet time for the plaintiff's bar to take a victory lap based on this opinion. We've all litigated, defended and tried class actions in an employment context, and we often face statistical experts who offer methods for proving damages suffered by individual class members. This case does not really change the landscape much.

ARIAS: This was a donning and doffing case where the experts actually relied on video observations: over 700 video observations where, according to Plaintiff's expert, they could determine how long it took to dawn and doff on average. You could understand why the trial court found it compelling and said that that evidence has some reliability.

GRUNFELD: Yes. And the Court said the defense did not move for a *Daubert* hearing on that evidence. They did not attempt to discredit it. The case reaffirms the inference under *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946), that when an employer does not keep records, the burden shifts to the employer. And here, the plaintiff had evidence that they were donning and doffing for a certain amount of time.

The reason you are hearing some enthusiasm from the plaintiffs' bar is because the Court also said that *Wal-Mart Stores, Inc. v. Dukes*, 564 US _ (2011), does not stand for the proposition that a representative sample is an impermissible means of establishing class liability. That is what the defendant in the case wanted the court to hold and the Court declined to do so. It's a good ruling for plaintiffs who have lost wages to donning and doffing time.

ARIAS: It's a good ruling because it also provided the defense with a roadmap of how to challenge the statistical evidence going forward.

MODERATOR: On the state level, what industries will be impacted by the California Supreme Court's recent decision in *Kilby v. CVS Pharmacy, Inc.*, No. S215614 (April 4, 2015), about providing suitable seating to employees?

ARIAS: Every industry! In the short time since this case was published, I can't help but notice when employees are standing. You see it all the time. I was at a concert recently and I found myself watching the ushers. It just struck me: at the beginning, when they're showing people to their seat, it probably is appropriate and lawful for them to be required to stand. But once the concert started, they stood for almost 3 hours. So one would have to ask, why isn't a seat being provided for them? This seating issue has an impact on all industries and you would be foolish not to survey your workforce to determine if there are circumstances where a seat isn't being provided.

PAYNE: I can't help thinking about the headlines in the last couple of years about how too much sitting can kill you, and that it's worse for your health than smoking.

Unfortunately, the seating rule is buried

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> **– JEFFREY S. HORTON THOMAS**

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in the Wage Orders. It's been largely ignored for many years, and this case opens a new front line for workplace compliance battles. I expect to see a lot of litigation over it. I would suggest that employers that don't provide seating to groups of employees evaluate why they don't have seating and whether they can reasonably provide it. I agree with the observation that it's not limited to any one or several industries. I would focus on groups of employees where the potential liability is greatest under PAGA.

GRUNFELD: Justice Corrigan did a great job of trying to articulate a standard in a particular context, which was a certification of a question of California law from the Ninth Circuit. We will have to wait and see how the standard of an objectively reasonable "totality of circumstances" is going to play out.

But the Wage Order as the Supreme Court described it is meant to protect employees. It says that a seat shall be provided to an employee if the work "reasonably permits" it. The decision is going to make us all more conscious when we walk into a store or another business with people who have been on their feet for eight to ten hours, and help us recognize that there may be some steps that can be taken to relieve that.

EVANS: The legal standard that the court gave us, "reasonably permits" given the "totality of circumstances," is not particularly clear. That could mean anything. I hoped for a clearer standard that provides some reasonable guidance to employers—and predictability. Maybe it will come in the form of regulations hopefully from the DIR. But as the decision stands, we are mostly throwing darts.

GRUNFELD: The court did say that the analysis begins with an examination of the relevant tasks grouped by location and whether the tasks can be performed while seated or require standing. So we may get some regulations related to that guidance.

MODERATOR: *Castro-Ramirez vs. Dependable Highway*, Cal. App. 2d (April 4, 2016) is another interesting case. How far do you think this decision concerning "associational discrimination" will go?

EVANS: Bad facts make bad law. At some point the California Supreme Court will conclude that this case took a step too far. I understand that the Second District was offended by the facts of the case, and who wouldn't be? But it is an untenable decision in terms of good law applicable to employers who are trying to make day-to-day decisions with regard to their employees who may have disabled relatives.

LANE: Talk about a sympathetic set of facts: a delivery truck driver who had a schedule for years that permitted him to begin early in the morning and be home at night so he could care for a child who needed dialysis. Things were fine until there was a change in supervisors. And it truly seemed that on a dime, the new supervisor decided to not accommodate his schedule anymore. It seems the employee essentially had to choose between keeping his child alive or taking the early schedule. So he went home and declined that shift, but requested the earlier shift—and then the supervisor fired him.

I don't want to lose my management defense card here but the opinion as applied to these facts is not that onerous on employers going forward because what the court said was, if somebody is claiming that they have a family member that they need to care for, have a conversation about whether they can have an accommodation—just have the conversation.

It's not requiring accommodations that suddenly alter the entire scope of the job. It's just saying that if there is no reason why you cannot accommodate, at least have the interactive process with the person.

EVANS: I read it differently. I think it imposes an affirmative duty on the employer to reasonably accommodate an applicant or employee who's associated with a disabled person, not just discuss whether you can accommodate or not.

GRUNFELD: The opinion stands for the

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proposition that the employer doesn't get summary judgment under these circumstances. It's also interesting that the court parsed the language of FEHA and once again found that FEHA is more protective than the ADA. That is an important point for California employers.

EVANS: What I find strange—and Justice Grimes pointed this out in her dissent—is that it is not even an accommodation case. The plaintiff had withdrawn the accommodation claim, yet the District Court of Appeal reached the accommodation issue.

LANE: Yes, that is a little weird.

EVANS: Justice Grimes also noted that the majority's opinion went so far as to make a nondisabled employee disabled by association, and that's what's really kind of novel about the decision. I do not expect this case law to remain in place for too long.

THOMAS: My problem with the opinion is that it went beyond the statutory language. The discrimination provisions of FEHA bar discrimination against an employee associated with a disabled person. The accommodation provisions are not written in such a way as to require reasonable accommodation of an employee who has no disability and is merely associated with a disabled person who's not an employee.

The majority went beyond the statutory language to reach a result it wanted. It is an unsound decision, though for now it's binding on employers in the Second District and we have to advise our clients accordingly. It places a significant new burden on our clients in this district.

ARIAS: The term "associated" has no definition. We've been talking about family members, but could it be a neighbor? How far this will go is yet to be seen. I'm not as confident as James [Thomas] and Jim [Evans] that this is going to be overturned anytime soon.

MODERATOR: What are some of the latest developments in minimum wage increases?

THOMAS: A patchwork of different municipal ordinances is developing. This is a particular problem for restaurants and other employers with operations in different municipalities. Compliance with a growing number of cities' different minimum wage ordinances can get very complex.

LANE: I agree. In my experience, knowing where they have to comply with those ordinances is half the battle. Many cities in California now have their own ordinances. It's challenging for employers that have multi-city locales or who have employees who are telecommuting to make sure they are complying with all of these different requirements. And that's in addition to the state requirements.

GRUNFELD: This movement is growing out of the disparity in wages across the country and the income inequality that is mounting every year. I'm really pleased that Governor Brown signed the bill in April to raise the statewide minimum wage to $15.00 in the next five years. I think that may help solve the patchwork problem for employers in California. I also applaud companies like Target that are taking initiative and starting to raise their wages because wages have been too low for the lowest paid workers for too long.

PAYNE: Unfortunately, I'm not sure it will resolve the patchwork issue. Just as an example, the California increase tops out in 2022 at $15.00. San Francisco is just one of the cities here in play, but theirs tops out in July of 2018 at $15.00.

For employers, the challenge is compliance. Putting aside the policy behind all of this, just to comply is enormously burdensome. It creates issues for employers that have employees traveling from work in one city to work in another city with a different minimum wage.

For example, an employee in San Francisco is entitled to these higher wages if they work two hours within the city. How does an employer track that? How do they report that properly on the paycheck stub? How do they give proper notice that's required by law to the employees about what

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they will be paid? It's very complex and burdensome for employers.

THOMAS: The minimum wage movement in this state does not solve any alleged sort of pay inequity problem. We are not using a total compensation model here simply by raising the minimum wage. For example, with no other modifications in a hospitality context, front-of-the-house tipped employees are still going to make several multiples of what the back-of-the-house employees are going to make.

ARIAS: That is why much of the restaurant community is reexamining the tipping model. More restaurants are eliminating tipping and either charging a surcharge and giving that money to the employees or increasing the price of their food and their alcohol, and using that to provide increases to the front and back of the house so they are more equal.

What the restaurants are finding is these changes are not working out particularly well because they are subject to higher payroll taxes. They're also getting hit with higher workers' compensation premiums because that's typically based on the amount of payroll.

They've also found that they're losing some pretty good front-house employees who believe that they can earn more at a different restaurant that is still following a traditional tipping model.

GRUNFELD: We're going back to where we started. If you look at the statistics, six out of ten minimum wage workers are women and among that group, they are disproportionately women of color. This kind of legislation can work hand-in-hand with the new amendments to the Fair Pay Act to start eliminating this unfair and longstanding wage gap we've had both in California and nationally.

EVANS: If we were in a public policy debate, I'm certain I would come out in strong agreement with Gay [Grunfeld]. But as an employer's attorney, my biggest issue is how are national employers supposed to figure out how to comply? How will they maintain morale in the face of disparate pay due to local legislation that mandates higher pay for one area and not in the other?

I'm a trial lawyer, but it seems like I'm spending more and more of my days counseling because in-house legal teams are overwhelmed just trying to keep up with the changing landscape. It's changing so fast, often I don't feel like I'm keeping up.

So how do we adjust this compliance climate to make it less onerous for employers but also improve people's quality of life and make a positive impact on society? That's where I'm stuck. I don't know what the right answer is.

MODERATOR: What are the biggest issues we will see in the next year?

ARIAS: We will continue to see litigation over workers in the sharing economy. Uber recently reached a settlement between $84 and $100 million, but it failed to resolve the core issue of whether or not those drivers were independent contractors or employees. The lack of an answer to that question is only going to encourage further litigation, especially against early stage startups that don't have the resources of an Uber.

Uber has a new and improved arbitration agreement, so I can only assume that Uber declined to take on that misclassification question because they feel that they're going to be in a better position down the road to defend such a case.

EVANS: I agree. The two-headed monster—the gig economy and joint employer liability—are the two hottest issues. I think the reason the Uber case didn't resolve the independent contractor issue is that there is too much money involved in the settlement. For the plaintiffs, there was a risk of losing the class certification issue on appeal because Judge Chen had rewritten the arbitration agreement and then declared that very arbitration agreement to be invalid and unenforceable. And the Ninth Circuit is clearly interested in the case. They weren't obligated to take the case, but they took an interlocutory appeal. So there were good reasons that drove that settlement. We'll see if the trial court approves of it.

On a broader note, employers need to take a careful look at how they're classifying employees. If they look like employees, treat them like employees. If you're exercis-

ing control over them, you ought to treat them as employees. I'm not suggesting some nefarious motive by those who treat independent contractors the way in which they do. It's just that you have to use a commonsense approach to the issue.

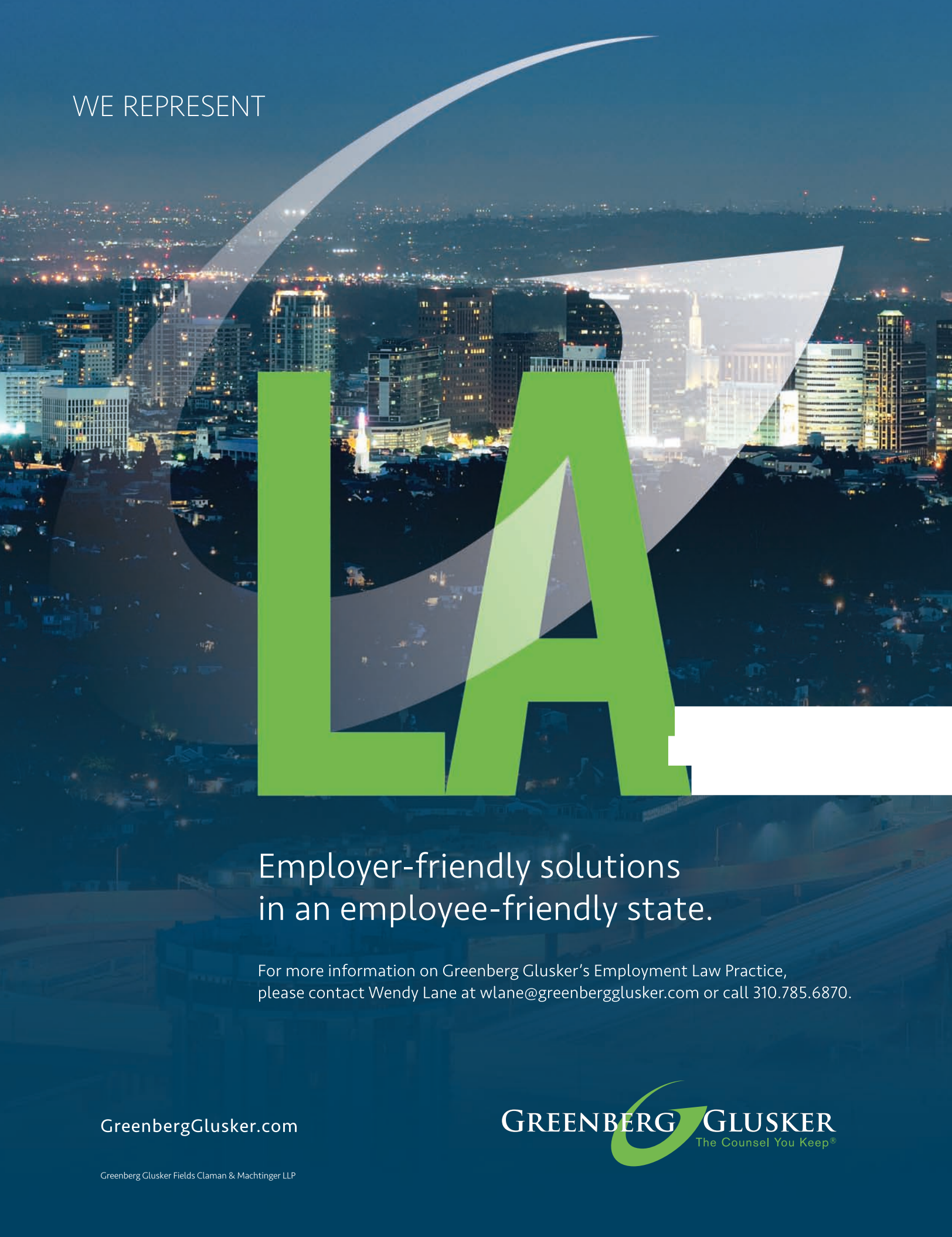
LANE: I have seen a considerable increase in Private Attorney General Act litigation in the last year, and I don't think it's any coincidence that this follows the rulings that said that employers could have arbitration agreements where employees waive their right to a class action but they can't waive their right to a PAGA claim, which has its own statutory scheme for penalties for a variety of labor code violations.

I've seen a number of plaintiffs' firms decrease their class action work and significantly increase their PAGA cases. That has led to the Wild West because there's so much under the Act that has yet to be decided. So we are going to see many more PAGA actions until there are some cases and opinions that give us a clear roadmap of how those PAGA issues will be decided.

THOMAS: I anticipate another year of the monsoon of wage and hour litigation in all of its forms: PAGA claims, class actions, and both wage and hour claims by people classified as employees and claims of misclassifications as independent contractors. I'm also interested to see whether we'll see a significant uptick in Fair Pay Act suits.

GRUNFELD: As long as we have the gender wage gap and such a dearth of women in C-level offices and in law firm equity partnerships and in other high-level and mid-level executive roles, we're going to see gender discrimination litigation, whether it's pregnancy, childcare leave, equal pay, or other kinds under Title VII, the Fair Pay Act, and FEHA. Litigation will continue until those issues are resolved.

PAYNE: I think that unions will be fighting to stay relevant. We will probably see more campaigning and organizing efforts to take full advantage of recent rule changes that may make it easier for unions to win elections, including the Persuader Rule that now requires employers to disclose in government filings any consultants they hire—including attorneys—to develop plans or policies for the company when the company is attempting to communicate with workers about the advisability of having a union or not.



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