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Labor & Employment: A Roundtable Discussion 2023

BY STAFF-AUTHOR

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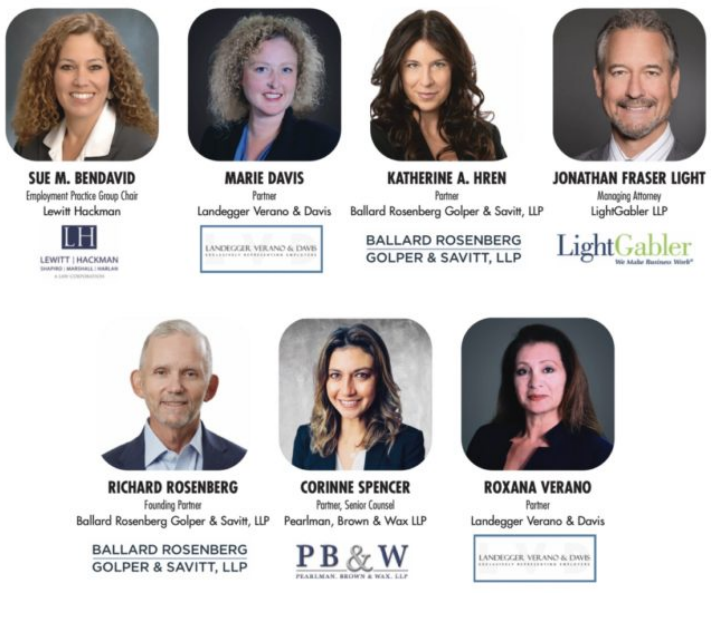

What are your views on using arbitration agreements as an alternative to employment litigation?

SPENCER: Arbitration is a great alternative to employment litigation. Both parties can benefit from an expedited legal process, despite the increase in costs for the employer. Most, though not all, lawyers recognize that the extremes are less likely in arbitration. Seven or eight figure verdicts in favor of the employee are far less common, but so are dispositive motions being granted in favor of the employer. Notably, while less common, dispositive motions are not entirely off the table. I have prevailed on a motion for summary judgment in arbitration, so it is not an impossibility. However, eliminating the threats of these extremes between the parties helps narrow the issues, reduces posturing, and focuses the process toward resolution or award.

VERANO: Arbitration agreements can be a very powerful and useful tool in employment litigation, especially since the United State Supreme Court's Viking River Cruise decision. Since the ruling came down, State courts have been flooded with defense motions to compel arbitration of individual PAGA claims. PAGA claims have become the "poor man's mini class action" over the past five years, able to be litigated outside of the complex court system, and Plaintiffs' attorneys have used the PAGA case as a weapon to force employers into costly settlements, even when the employer has an arbitration agreement with the named employee that requires arbitration of the employee's individual claims. Now, if an employer's arbitration agreement includes a voluntary agreement to submit individual representative and class claims to arbitration, the employer has a better chance of settling these claims on an individual basis, outside of court, for much less than it would cost to litigate a class and/or PAGA claim. The downside of having arbitration agreements, however, is that the employer must pay all of the costs associated with arbitration, including the arbitrator's fees—which could reach $15,000 or more, per day. Given the high cost, including the cost of defense, many employers cannot afford to arbitrate their claims. Finally, some Plaintiffs' firms will submit several individual claims to arbitration in order to force an employer back into a posture to settle on a class-wide or PAGA basis.

BENDAVID: At least for now, arbitration can help prevent class action claims – if the employer and employee agree to resolve claims individually, and not collectively on behalf of other employees. Until our legislature changes the rules, and depending on the wording of the arbitration agreement, employers and employees can also agree to privately arbitrate PAGA claims on an individual basis – based on the U.S. Supreme Court's decision in Viking River Cruises, Inc. v. Moriana. Arbitration can be expensive. The employer pays for its own defense costs and must also pay the arbitrator's fees. If the employer loses, the employer may be forced to pay for the plaintiff's attorneys' fees as well. The costs to litigate should be weighed against the benefits of arbitration (no jury; timely, etc.). Many smaller companies with less resources find it more efficient to litigate in court.

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

DAVIS: Employment litigation is an expensive enterprise. Even if an employer has EPLI insurance coverage, typically those policies come with very high deductibles, and we have many small employer clients who are essentially self-insured. The cost of completing the necessary discovery to prepare a case for a Motion for Summary Judgment can easily reach $50,000 to $75,000 or more, and most employment related complaints are very fact-specific, making the success rate of a motion for summary judgment very low. Moreover, the cost to take a case to trial can reach $250,000 in defense costs alone. And, more importantly, for a case brough under the FEHA, if a Plaintiff receives only a $1 award in damages from a jury, the Defendant employer must pay all of the Plaintiff's attorneys fees, which have no connection to the amount awarded to the Plaintiff. Mediation, on the other hand, costs between $10,000 and $15,000 for one day, is confidential, and gives both parties the opportunity to resolve their dispute with the help of an experienced, professional neutral who can honestly evaluate the strengths and weaknesses of both sides' case. Our firm has had great success in resolving claims through private mediation, which ultimately saves our clients the time, expense and stress of litigation.

> **In most cases, mediation proves to be a much better method of conflict resolution than going to court or arbitration."**
> **-KATHERINE A. HREN**

HREN: In most cases, mediation proves to be a much better method of conflict resolution than going to court or arbitration. Mediation is a voluntary process that will enable parties to explore resolution confidentially before they have run up a drawer full of legal bills. Legal claims are costly to defend and time consuming. And, with court statistics showing that fewer than 5% of all employment cases actually go to trial, it only makes sense to put most cases behind the company as soon as the situation will allow.

LIGHT: That it's a good thing and should be used 99% of the time, both before and after litigation ensues (especially before!). In most situations the facts are fairly straightforward and so it's just a question of how much to resolve it without spending a fortune on depositions, etc. This is especially true in class action and PAGA cases. In single-plaintiff wrongful termination/harassment/discrimination cases, some limited discovery may be needed, such as depositions of one or two key people, but then there is usually no reason not to go to mediation asap. Even with insurance and $1million in coverage, clients shouldn't be cavalier about pushing a case to trial. The risks are just too great for employers, especially if it's a jury trial and not arbitration.

Do you think remote and hybrid workplace practices that companies were at first forced to apply will continue to make an impact in 2023?

ROSENBERG: Most definitely. After nearly three years, remote work in some form is here to stay. Since it will be impossible to put that genie back in the bottle, employers need to remain flexible to attract and retain talent in this

tight labor market. These arrangements implicate a host of labor law compliance challenges (think workers compensation, wage hour compliance, trade secret confidentiality, to name a few). Smart employers will be proactive to ensure compliance and address the needs of employees in this new environment with a well worded remote work agreement covering these matters.

DAVIS: More and more office employees have begun to realize that working from home offers them more flexibility to attend to their personal affairs, as well as cuts down the costs traditionally associated with their commute such as gas, vehicle expenses, increased insurance rates and time. We believe that employers will be forced to accept a new remote workforce since one of the first questions a job applicants asks in the current market is whether the job is remote or in-person. Moreover, if a company has previously allowed its employees to work from home, then the precedent is there to continue to permit remote work as a possible accommodation for an employee's disability. It is no longer easy for an employer to simply say that remote work "doesn't work" when in fact, the evidence is to the contrary. Employers may still establish rules for remote workers, such as installing monitoring software on an employee's computer to ensure that they are in fact working when they say they are, as well as mandating that employees keep track of their meal and rest breaks. Other issues for employers to consider are reimbursement to employees for use of their cell phone, internet costs, electricity costs. Finally, employers should not permit employees to use their personal computers, but the employers should provide company equipment in order to prevent claims of inadvertent or direct invasions of privacy.

LIGHT: There has been a sea change in employers' perceptions of remote work. In most cases, it has been surprisingly successful. Employers have fine-tuned some of their requirements and a hybrid model seems to be very popular with employers (and mandatory in many cases) and at least accepted by employees who might prefer fully remote work. Employers' primary concern seems to be productivity and especially ways to track productivity when that's in issue. But that's very doable in most cases. Although one client's requirement that a camera be on the employee while working seemed a bit much.

BENDAVID: We see more employers requiring employees to return to the physical worksite, eliminating full time remote work. Other employers are enacting a more gradual plan, with only one to four days per week in the office. However, some employers opted to relinquish expensive leases and office expenses, by making remote work available on a permanent and full time basis. Additionally, they're leveraging remote work to attract workers who prefer more flexibility, even at lower wages. Whatever works best for an individual business, all employers should recall that an employee is entitled to be reimbursed for necessary business expenses, which could include home office expenses for the remote worker.

Documentation helps corroborate and substantiate the actions taken, or not taken, by the employer."
-CORINNE SPENCER

How will the new wage transparency law SB1162 affect businesses?

HREN: SB 1162 significantly amends and expands California's pay transparency and pay disclosure requirements. Employers with 15 or more employees must establish pay scales (i.e., the salary or hourly wage range the employer reasonably expects to pay for each position) and provide it to job applicants and employees upon reasonable request. The data must be included in all job postings. For each employee, the wage range for the position and wage history must be retained for 3 years after the employee leaves the employment. Employers should consider the impact of transparent pay scales on morale and be prepared to defend wage disparities with objective criteria if someone claims pay discrimination. Employers should review job classifications and have clear and identifiable wage ranges for every position. Employers with 100 or more employees must submit a California Pay Data Report on or before the second Wednesday in May 2023 (and every year thereafter). This is a California-specific report. Employers can

no longer submit the Federal EEO-1 report to the State. The Pay Data Report must include the number of employees broken down by race, ethnicity, and sex in specified job categories, median and mean hourly rates for each combination of race, ethnicity, and sex within each job category. This reporting also apples to employers with 100 or more employees hired through labor contractors during the prior calendar year. Consider requesting this data from labor contractors early to ensure timely filing.

BENDAVID: Under SB 1162 businesses with 15 or more employees must post pay scales when advertising job openings, even when using a third party to publish the job opening. This new rule applies if the position “may ever be filled in California, either in-person or remotely.” The term “Pay Scale” means the salary or hourly wage range or set amount the employer reasonably expects to pay for a position. In addition to providing pay scales to applicants, employers must also provide them to employees on request. Employers ask how they should respond when employees request pay scales and question why they are paid less than co-workers. Employers would be well- advised to review positions and compensation immediately, and to consider whether there are nondiscriminatory reasons explaining discrepancies (e.g., seniority, levels of production, or other bona fide factors), Pay discrepancies should not be based on gender, race, ethnicity, etc.

What are some of the latest developments in minimum wage?

ROSENBERG: Figuring out the minimum wage is no longer a matter of simply checking the applicable federal and state rule. There are now over 20 cities and counties in California that have their own unique local minimum wage ordinance mandating higher minimum wages, and often on a different timetable than the state and federal minimums. Some of these regulations are even industry specific, like the ordinances in Los Angeles and Santa Monica mandating an even higher minimum wage for certain employees working in the hospitality industry. Also, many of these local ordinances now carry criminal penalties for non-compliance.

Will there be changes on how time keeping and rounding up is calculated for employees and the impacts of that in 2023?

DAVIS: In California, keeping accurate track of an employee’s compensable work time is of paramount importance. Many employers continue to make the mistake of “rounding” time that does not account for all hours the employee actually, including, for example, the time an employee waits in line to clock in and out. If an employer desires to round time, the only safe way to do so is to ensure that the rounding is 100% always in the favor of the employee.

BENDAVID: Based on recent court decisions, employers with electronic timekeeping systems should eliminate rounding altogether and pay employees to the precise minute. The time records should match the hours worked on employee paystubs. Though there is authority permitting rounding, courts are becoming more hostile to the rounding of work hours, especially when employers have the ability to accurately track time electronically. The same is true for meal breaks. Because of the 30 minute rule (i.e., duty free 30 minute meal break before the fifth hour of work), employers should refrain from rounding the start or end of employee meal breaks.

HREN: Because of recent adverse changes in the law from the California Supreme Court, owed meal and/or rest break premiums can now trigger additional statutory penalties for inaccurate wage statements and waiting time penalties that can dwarf the actual amount of unpaid premiums. The court also ruled that where employee time records fail to show a compliant

meal or rest break, employers bear the burden of proving that employees nevertheless received a compliant break. Missing, short, or late meal periods now give rise to a rebuttable presumption of a violation. If employees are paid more than one rate during the pay period, any owed meal/rest break premiums must be paid at the "regular rate of pay" including all nondiscretionary payments received. Also, you must ensure that employees are paid for all time "worked" such as time spent waiting for COVID screenings, waiting for an employer's required entry or exit security search, waiting to be let out of the workplace, time spent setting the alarm or walking co-workers to their car. For employees that clock in/out on their computer, a recent case holds employers liable for paying employees for the time spent turning on, waking up, and/or logging on to computers. We also recommend staying away from time clock rounding. Though not, per se, illegal, rounding opens the company up to unnecessary risk if it turns out years later that employees do not come out ahead, or at least even, with what they would have been paid had the employer not used rounding.

Moving forward, what are some best practices for handling employee leave and accommodation requests related to COVID concerns?

BENDAVID: Employers are required to provide a safe and healthy workplace, which includes taking measures to prevent COVID-19 exposure. Employers must have an Injury and Illness Prevention Program (IIPP) which addresses measures to prevent COVID transmission, provide training, and respond to workplace infections.
Employers are obligated to comply with Cal OSHA's rules in terms of isolation, quarantine, and testing if an employee tests positive for COVID, has symptoms, or has come in "close contact" with an infected individual. Testing must be available at no cost and on paid time. Some individuals with COVID will also be eligible for a leave under the FMLA/CFRA, or as a "reasonable accommodation" under the ADA/Fair Employment and Housing Act. Employers should consider other potentially overlapping laws that may apply and ensure time off is documented to prove compliance.

DAVIS: Given that the Supplemental Paid Sick Leave law will most likely expire in February, 2023, employers should still act with compassion and understanding when approached by an employee regarding exposure to COVID. If an employee informs an employer that they have tested positive or COVID, the best practice is for the employer to permit the employee to take unpaid leave until they test negative. Or the employer can allow the employee to use whatever sick or vacation time they have available. In California, a leave of absence is considered a "reasonable accommodation," for an employee's disability. If the employee cannot work due to COVID, that would qualify as a "disability," and trigger the employer's responsibility to engage in the interactive process, and provide a reasonable accommodation.

> **Employers have even less ability to restrict employees' activities online, unless the employee specifically posts a statement purporting to be coming from the company itself."**
> **-ROXANA VERANO**

Which of California's new employment laws are most likely to lead to legal action?

ROSENBERG: Three primarily come to mind: 1) Emergency Conditions (SB 1044). Effective January 1, California law prohibits an employer, in the event of an "emergency condition," from taking or threatening adverse action against the employee (i.e., retaliation) for refusing to report to, or leaving, a workplace because the employee has a "reasonable belief that the workplace is unsafe." With some exceptions, Employers are also prohibited from

preventing an employee from accessing their mobile device to get emergency assistance, assess a situation's safety or communicate with someone to verify their safety. 2) Restroom Access to Members of Public with Certain Medical Conditions (AB 1632). Effective January 1, businesses open to the public that provide restrooms for their employees must allow members of the public to use these bathrooms if they have Crohn's disease, ulcerative colitis, irritable bowel syndrome, or any other similar medical condition. Employers that don't comply can be fined and employees that allow this use cannot suffer adverse consequences for doing so. 3) Motor Vehicle Tracking (AB 984). This law prohibits employers from using vehicle tracking devices to monitor employees, except during work hours ,and then only if strictly necessary for the performance of an employee's duties. Employers that install the tracking devices must provide written notice of the monitoring that includes information about employees' right to disable the devices during non-work hours.

Open, guided discussions as part of DEI and regular interactions around the worksite can help reduce stigma and isolation."
-JONATHAN FRASER LIGHT

BENDAVID: Effective January 1, 2023, California's minimum wage rose to $15.50/hour. Several cities and counties have higher minimums. For example, the City of Los Angeles' minimum wage is currently $16.04, and likely to increase in July 2023, based on the Consumer Price Index. An employee is entitled to the City's minimum wage if the employee works two or more hours in a particular workweek within the City's geographical boundaries. Other cities have different (and higher) minimums (e.g., Emeryville is $17.68/hour based on CPI). As California's minimum wage increases, so too does the minimum salary an exempt employee must earn. As of January 2023, salaried exempt employees (executive, administrative, professional) must generally earn $5,373.33/month (annualized $64,480). Contrary to popular belief, the exempt salary is based on the State's minimum wage, not the City's. Some professions have higher minimum wages (e.g., Santa Monica's Hotel Workers Living Wage Ordinance).

What effect does the increasing number of millennials have on a company's approach to employee relations?

VERANO: The current workplace is a blend of Gen X and Millennials/Gen Z employees. Like all generational gaps there are differences in how members of each generation react to work. For example, Gen Xers had to adjust to an office where everyone used word processors or typewriters and communicated via telephone or mail, to a working environment where in fact a significant amount of work is conducted remotely, in a coffee shop, and on an employee's phone, laptop or tablet. Millennials are efficient at working and communicating remotely, and companies need to make concessions for the new remote workplace, over the traditional office work environment, and be sensitive and open to the ideas, innovations and investment millennials offer in contrast to the societal norms that were observed by the Gen X workers. The challenge for Millennials/Gen Z employees is how to develop a sense of culture and team work while working remotely.

ROSENBERG: Millennials currently represent the largest group of US workers. Their opinions and approach to the work and the workplace matter. With labor shortages and employee turnover being so expensive, it is critical for businesses to understand and be responsive to the needs of this generation. Employers saw that big time with the rapidity by which this generation embraced (and caused employers to react to) the "Me Too" movement, issues of gender equity, LBGTQ rights, parental and family leave and racial justice issues. It's quite common for Millennials to have a number of jobs lasting just a year or two, rather than stay with a company for the long term. Also, a very high percentage of Millennials look favorably on unions and shared responsibility for management of the business. They also value time off and work life balance more than the corner office or a new title.

How do you advise clients regarding the implementation and enforcement of non-competes and other restrictive covenant agreements?

HREN: California law is very protective of employee mobility, so most "non-compete" agreements are unenforceable. The law also permits employers to vigorously protect proprietary and trade secret information by having employees sign agreements which prohibit them from taking, using or making unauthorized disclosure of the employer's confidential or trade secret information. The key is taking a proactive approach to identify what information is legally protectable, having employees sign an agreement that properly protects that information and consistently enforcing information secrecy rules.

LIGHT: Such agreements are very difficult to enforce in California and generally are totally unenforceable for California-based employees. Exceptions exist for sellers of businesses. Out-of-state workers may be subject to more employer-friendly restrictions. Employers bringing on someone from another state should carefully scrutinize any applicable confidentiality agreement to ensure that terms don't prevent the employer from engaging that worker in that other state. I also caution employers to be very, very firm, in writing, about their expectation that a new hire has taken nothing from their prior employer that might subject employer and employee to litigation by the prior employer. It's too easy to track computer usage with forensics these days, and employees sometimes do dumb things when they leave.

Employers are required to provide a safe and healthy workplace, which includes taking measures to prevent COVID-19 exposure."
-SUE M. BENDAVID

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

DAVIS: Failing to document! Documentation is the single most important thing when it comes to disciplining employees. We recommend keeping a written records of every communication had with an employee regarding the employee's performance issues. We also recommend employing a "progressive discipline" policy where employees receive one, two or more, written write-ups, then a last and final warning before preparing a termination document. Finally, we recommend that termination documents be clear and detailed, containing a timeline of past issues that led up to the decision to ultimately terminate. Too many times, we have seen employers make the mistake of wanting to be nice to an employee they are terminating, and therefore, say

things like “you’re just not a good fit” as the reason for separation, and then when the separated employee makes a claim, the employer says “well, the reason for the termination was x, y, z.” This can create difficulty for the defense as it appears that the employer was not communicating with the employee properly about their performance issues.

LIGHT: Failure to document discipline. Failure to discipline at all until the employee senses they’re in trouble and, cough-cough, they go on disability. Any discipline after that looks retaliatory. Not providing reasons for the termination in writing. Not providing specific examples of the objectionable behavior or performance: “Not a team player,” “Makes mistakes,” “Interacts poorly with co-workers or customers,” all require examples. Failure to alert employees early on of problems and then providing meaningful input on how they might improve, and giving them a reasonable opportunity to turn it around.

SPENCER: One of the most frequent mistakes made by employers is failing to document the discipline. Documentation helps corroborate and substantiate the actions taken, or not taken, by the employer. When employers come to us wanting to terminate an employee for poor performance or bad attitude, but there is no documentation in the personnel file, it is riskier to proceed with the action. If the personnel file is empty, that gives the employee, but more so their attorneys, the ability to paint a very different picture for why the termination took place. Another frequent mistake is failing to be consistent with documentation and the actions taken. Some employers believe they are being lenient with their employees, but if, for example, you allow an employee to violate the attendance policy ten times and then suddenly terminate them for tardiness, it calls the legitimacy of the action into question.

ROSENBERG: The biggies are: (a) not documenting performance problems in real time; (b) not giving the employee a fair chance to succeed before being fired; (c) not understanding that an employee’s testimony is “evidence” that a jury can rely upon when making an award; (d) not being consistent when meting out discipline (i.e., not treating likes alike); and (e) failing to understand that in certain cases (such as disability or religious accommodation), an employer must bend the rules to accommodate the employee’s needs and that treating everyone the same can get them in trouble.

What are the key differences to consider when a potential team-member is either an employee or an independent contractor?

VERANO: California recently adopted the ABC test for determining whether an individual who provides services for a company can be classified as an employee or an independent contractor. Under this test, the company bears the sole burden of proving each and every one of the three elements. If even one element cannot be established, then the individual will be deemed an independent contractor. The elements of the test are the following:

• The worker must be free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

• The worker must perform work that is outside the usual course of the hiring entity’s business; and

• The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

This is an incredibly tough burden to meet. Our firm handles dozens of audits conducted by the EDD related to this very issue and almost always, the alleged worker has been misclassified. The key mistake that employers make is believing that an independent contractor agreement, or the workers’ opinion of their independence, or “industry standards” rule the day. Sadly, none of those factors mean anything in the analysis. The easiest explanation is that if you hire a plumber to come to your office to unclog a toilet, and the plumber gives you an invoice, then he is an independent contractor. However, the plumber that works for the plumbing company is an employee of that company because the plumbing company can only provide services by hiring and employing plumbers. Our best recommendation is to review your company’s current practices with respect to the utilization of independent contractors and reach out to our firm to assist you in evaluating whether you are properly classifying those individuals under the ABC test.

LIGHT: It's as simple as ABC. Will they control their own work? Are they doing something that is distinct from the business of the company? Do they have their own distinct business and, hopefully, other clients/customers? That's the ABC independent contractor test in a nutshell. The latter two questions are usually the problem, and especially whether they are doing something that the company otherwise doesn't do.

Figuring out the minimum wage is no longer a matter of simply checking the applicable federal and state rule."
-RICHARD ROSENBERG

SPENCER: The key factor to consider is control. Though the laws to determine employment status in California have become more stringent over recent years, the ultimate question is the level of control an entity has over the potential team-member. If the team-member reports to the same location, uses the company equipment, and performs work in the usual course of the hiring entity's business, that person most likely should be treated as an employee. Comparably, if the team-member has specialized skills, services other hiring entities, holds their own license, and maintains their own place of business, that person most likely will meet the requirements of an independent contractor.

HREN: By law, most workers in California may not be treated as independent contractors. The law also requires that you have a written agreement with every independent contractor. The agreement will be valuable evidence if the worker ever challenges their contractor status if it lays out the facts demonstrating why the individual qualifies to be treated as an independent contractor under the law. Employers also should add tight protections for the trade secrets that the contractor may encounter when doing the contracted-for work. Finally, be sure there is strong indemnity language that protects the company if the company is sued on account of something the contractor does or doesn't do.

How important is sensitivity training in the workplace in 2023?

LIGHT: DEI (diversity, equity and inclusion for those living under a rock) is still one of the hottest topics in employment law. It's a tricky area for training because of the hot button issues that DEI represents. One side or the other is going to be offended if it isn't handled carefully by trainers. Without being flippant, yes there is another "side" that believes DEI is unnecessarily bowing down to political "woke" pressure, etc. Trainers (and employers) need to be sensitive to all "sides," which is a delicate balance not easily achieved. If we are going to break through to those resistant to DEI and get their attention in a positive way, we must approach these issues in a way that creates some measure of understanding and compassion, rather than polarity (the latter seemingly the norm in all aspects of life these days).

In today's social media environment, what recourse does a company have for employees who are publicly active in political or other potentially controversial viewpoints or causes that are inconsistent with the company's values?

VERANO: In California, there's not much an employer can do to legally prevent an employee from expressing their personal political or religious viewpoints on social media. The employer can limit an employee's freedom of speech in the workplace by invoking a policy that restricts all employees from mentioning or posting any political propaganda in working areas, but cannot, for example, prohibit an employee from wearing a "I voted" sticker, or offering them time off to vote. Employers have even less ability to restrict employees' activities online, unless the employee specifically posts a statement purporting to be coming from the company itself. Even in that case, however, unless the employee has thousands of followers and the employer can prove some kind of actual harm to the company as a result of the employee's posts, the employer cannot take an adverse employment action against the employee for them sharing their personal thoughts on social media. If an employee notifies an employer that a co-worker, customer or supervisor has been "bullying" them online, however, the employer does need to conduct an internal investigation to determine whether any of the company's anti-harassment policies have been violated. Finally, employees have a right of privacy as to how they spend their time "off the clock," and employers should tread very carefully when it comes to monitoring their employee's social media platforms.

How can employers (especially those with smaller companies and facilities) meet the needs of, or accommodate, a growing transgender workforce?

LIGHT: As the parent of a non-binary adult, I struggle to get the pronouns straight. Gender-neutral single-stall restrooms; gender neutral references in handbooks and other documents. DEI training. Whatever you think of Caitlin Jenner, she has raised the profile on this issue. The more we see and hear people like Jenner and work alongside people who are "different," we become more accepting. Open, guided discussions as part of DEI and regular interactions around the worksite can help reduce the stigma and isolation. Being gay is a now a non-issue in most workplaces, which certainly wasn't the norm 20 years ago. As Joe Biden said, "We can thank Will & Grace." Familiarity breeds acceptance.

How have employee handbooks evolved over the last five years?

BENDAVID: Employee handbooks have dramatically increased in size. Many are now over 80 pages and single spaced. This is because the legislature passed numerous laws expanding employee rights. For example, many more laws are now in effect, like: COVID-19 rules, time off and testing procedures; updated Family and Medical Leave, Pregnancy Disability Leave, and Paid Sick Leave; Vacation or PTO, and Holidays; Bereavement Leave (including a new law as of January 2023); Organ and Bone Marrow Donor Leave; Crime and Abuse Victim's Leave; Jury and Witness Duty; Military Service Leave; School Appearance or Activity Leave; Volunteer Civil Service Leave; and Voting time off. An Employee Handbook is ideal if you want one centralized document to answer employee questions. It can also be used to support an employer's decision to discipline or terminate if employees violate company rules.

LIGHT: I'm not really sure they have evolved. Same old, same old, in most situations. That's not necessarily a bad thing. They are a repository for pretty much everything an employee needs to know, so where else should all that information be placed?

> **In California, keeping accurate track of an employee's compensable work time is of paramount importance."**
> **-MARIE DAVIS**

SPENCER: They've gotten longer. In all seriousness, employee handbooks continue to evolve to include more policies, which naturally translates to more pages. For example, lactation accommodation was mandated in January 2020, so employee handbooks needed to be updated to reflect this change in law. Sick pay policies have also changed and the types of leaves of absences employees are eligible for continue to increase. Further, the California Family Rights Act (CFRA) was expanded in 2021 and 2022 to cover employers with

five or more employees, rather than 50 employees. This required smaller businesses to get up to speed on CFRA leave and the obligations that follow. It really is a best practice to review your employee handbook on an annual basis, with updated versions scheduled for distribution in January of each year.

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

HREN: For employers with 25 or more employees, California law requires that an employer provide up to 40 hours of unpaid time off each year to address what the law calls a "child care provider or school emergency." This is defined to mean that the child cannot remain in a school or with a child care provider because the school or child care provider has requested that the child be picked up. The broad terms of the law would most certainly include a violent threat against the school.

VERANO: The California Labor Code section 230.8 requires all employers to provide up to 40 hours of unpaid time off for a parent to attend school events and meetings. Although that particular law has not been amended to include instances of school closure, we would recommend that employers permit their employees to use their entitlement under this law if they need to leave work to pick up their child in an emergency situation. Moreover, California's new law, SB1044, effective January 1, 2023, amended the Labor Code to make it unlawful for an employer to retaliate or take any adverse action against an employee who refuses to stay at work in the event of an "emergency condition." "Emergency Condition" is defined to specifically include an order to evacuate a workplace, a worksite, a worker's home or the school of a worker's child due to natural disaster or a criminal act. "Emergency Condition" does NOT include a health pandemic. Accordingly, we would recommend permitting employees to leave the worksite and attend to their child's needs in the event of a school closure. Finally, if the school closure lasts for several weeks and/or months, and the employee has no access to day care, we would recommend offering the employee to work remotely, if possible, or offering unpaid leave, though not necessarily job-protected leave, as an accommodation due to their situation.

How have the changes in marijuana laws over the last few years affected your clients?

SPENCER: Many of my clients are already moving away from testing for marijuana use, offsite and during off-work hours, as a basis for disciplinary action, and almost all will need to by January 1, 2024, with the passing of California Assembly Bill 2188. Additionally, many employers are removing marijuana from their pre-employment drug screen tests in anticipation of this law coming into effect. However, employers are still allowed to discipline for marijuana use or intoxication on the job. The challenge is (and will be) how to gauge impairment by marijuana in the workplace. Currently, objective laboratory testing for marijuana impairment is not yet widely available or reliable. As such, it is imperative that employers have clear drug testing policies in place, and that management knows how to implement said policies consistently and fairly.

LIGHT: Businesses are way more mellow. Many don't bother testing for marijuana at pre-employment. Others have asked the lab to designate 50 NL of THC instead of 20 as the threshold for a positive test. Beginning in 2024 most California employers won't be able to test for metabolites of THC, which only shows use that would not suggest current impairment (the body breaks down THC over time into these metabolites). I have suggested that clients treat marijuana more like alcohol, with on-the-job impairment, usage or possession at work the standard for discipline.

ROSENBERG: California law now protects the off work use of cannabis and prohibits discrimination against those that chose this activity off work. Also, California law specifically preserves the right of a company to insure that employees
do not come to work under the influence and are not using, possessing or distributing the drug on company premises. There is no uniform drug testing standard for evaluating whether a person is impaired. And, since cannabis remains in a user's system and is detectable in a drug test weeks even after its ingestion, employers will have to work with their drug testing labs to develop defensible standards for
measuring impairment.

**How can a law firm specializing in labor and employment differentiate itself from
the competition in 2023?**

LIGHT: Be responsive. Give useful concise answers. Most HR professionals aren't looking for a long discussion of "why" on day-to-day legal issues, they just want the "how." "How do I stay out of trouble?" "How do I tweak this new policy we want?" "How do I comply with this new law?" Be practical. "Yes, it's a risk to do x, but it's so small of a risk that if it were me, I'd just do it." Clients really don't like it when their lawyer lays out two or three options and says, "Pick." Give them the reasons why one is better than other, and why you would do it that way.

BENDAVID: We are a full service law firm which means that in addition to handling your employment needs, we can also easily get answers from our colleagues regarding your corporate structure, real estate, franchise, tax, health law and other concerns. These resources are available to us, and therefore to our employment clients, without having to 'shop around' for counsel.