LABOR & EMPLOYMENT

CALIFORNIA EMPLOYERS FREQUENTLY FIND THEMSELVES ON THE CUTTING EDGE OF labor and employment law, and this year has been no exception, but the field has been active on the federal level as well. The Ninth Circuit has issued a mix of rulings on arbitration, liability in class actions, and removal to federal court under California's Private Attorney General Act (PAGA) (Cal. Lab. Code §§ 2698-2699.5). And, with the National Labor Relations Board (NLRB) back to a full complement of members, notwithstanding likely continuing challenges, that agency is regaining traction.

For an update on these issues and a look at what's on the horizon for California employers, we met with Cathy Arias of Burnham Brown; Lisa Bertain of Keesal, Young & Logan; Garry G. Mathiason of Littler Mendelson; Jon D. Meer of Seyfarth Shaw; and James L. Morris of Rutan & Tucker. The roundtable was moderated by *California Lawyer* and reported by Cherree P. Peterson of Barkley Court Reporters.

EXECUTIVE SUMMARY

MODERATOR: What new strategies are you encountering in light of the conflicting rulings after *D.R. Horton*, which addressed the NLRB's stance against class arbitrations?

GARRY MATHIASON: In 1991, with the *Gilmer* decision (*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)), the concept of arbitration as a venue for litigating employment cases became possible. Its growth has taken much longer than expected, but when the Supreme Court issued *AT&T Mobility LLC v. Concepcion* (131 S.Ct. 1740 (2011)), making it clear that class actions could be waived by a written arbitration agreement, there was new interest in arbitration as a means of resolving disputes in the workplace.

Then the National Labor Relations Board stalled the momentum by holding in *D.R. Horton* (357 NLRB No. 184 (2012)) that a class action is a form of protected concerted activity under Section 7 of the National Labor Relations Act (29 U.S.C. § 157) that cannot be waived.

Subsequently, an avalanche of federal district courts, circuit courts, and state courts have almost unanimously refused to follow *D.R. Horton*. Never before have I witnessed such consistent rejection of an NLRB ruling, from liberal to conservative circuits and from liberal to conservative judges.

LISA BERTAIN: The Ninth Circuit recently weighed in on this issue in *Richards v. Ernst & Young* (2013 WL 4437601 (9th Cir.)), when it declined to follow *D.R. Horton* because it conflicts with the Supreme Court's policies concerning the Federal Arbitration Act (9 U.S.C. §§ 1-16) and with the Supreme Court's ruling in *American Exp. Co. v. Italian Colors Rest.* (133 S.Ct. 2304 (2013)). In *Italian Colors*, the Court confirmed its position that arbitration agreements will be rigorously enforced unless there's a contrary Congressional command. So the momentum will likely shift back in favor of including class action waivers in arbitration agreements.

JIM MORRIS: Yes, *Italian Colors* should just about finish off the NLRB's position in *D.R. Horton*. It's pretty clear from *Italian Colors* and subsequent case law that the NLRA does not override the command of the Federal Arbitration Act. The courts are almost uniform in rejecting the *D.R. Horton* analysis.

CATHY ARIAS: Even so, the NLRB is resolute. An NLRB administrative judge recently ruled against JPMorgan on a mandatory individual arbitration, saying that it was inconsistent with *D.R. Horton*. So we still need some certainty on this—and soon.

JON MEER: The big issue is what to do with existing arbitration agreements and how to get employees to sign new documents—and then what to do with class actions that are filed where some employees have signed an old arbitration agreement, some employees have signed a new arbitration agreement, and some employees have signed no arbitration agreement.

ARIAS: A lot of my clients are not fans of arbitration. They believe it's expensive, particularly where there are multiple arbitrators. They

also believe it's not as expedited as it once was. Of course, some clients with class action exposure are rethinking that.

MEER: I agree there has been mixed experience. With the employer having to pay all the expenses, is it really a less expensive way to resolve disputes? Are dispositive motions perhaps more likely to be granted in a court, rather than by an arbitrator, especially if a case is removable to federal court and you can take advantage of the quicker briefing periods for summary judgment and other dispositive motions?

ARIAS: Well, with the cutbacks, courts have become very efficient at moving things along. Courts have the benefit of volunteer programs like Contra Costa County's Discovery Facilitator Program, whereas arbitrators sometimes spend excessive time on issues that don't necessarily warrant it.

MEER: The privacy issue is another thing that's not resolved. Most employers are very enthusiastic about the idea that an arbitration is a private proceeding, especially in a messy case where there could be bad publicity. But it's sometimes unclear whether arbitration can be entirely private. I've seen people post awards on the Internet and employers have to get them taken down, or other groups will petition a private arbitration agency for copies of pleadings or depositions.

MORRIS: One of the interesting dynamics here is that we're all evidencing a strong preference for arbitration, but I think that preference would change dramatically if we thought our clients were going to be subject to class arbitrations or arbitration of representative actions. So the 90 percent of the iceberg that's lurking beneath the surface here is whether the Supreme Court's pronouncements about enforcing arbitration agreements the way they're written ultimately will result in class or representative claims being arbitrated on an individual basis.

MODERATOR: And what happens in the instances where agreements are silent on class arbitration?

MORRIS: Well, that's the *Stolt-Nielsen* issue (*Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010)), and the better reading of *Stolt-Nielsen* is that—unless the parties have expressly agreed to arbitrate on a class basis—no agreement to do that can be inferred. Nevertheless, in light of cases like *Oxford Health Plans*

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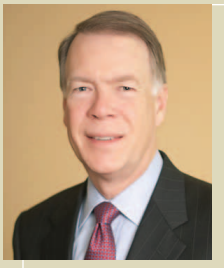

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LLC v. Sutter (133 S. Ct. 2064 (2013)), any drafter of arbitration agreements should now affirmatively state that there is no agreement to arbitrate on a class basis.

MODERATOR: Then we're back to Jon [Meer]'s question: How do you get employee agreements updated?

BERTAIN: That's fairly burdensome. So, before obtaining updated arbitration agreements from all employees, one thing employers can do is look at the language of their agreement in connection with some of the recent favorable California decisions construing *Stolt-Nielsen*. One case that's particularly helpful is *Nelsen v. Legacy Partners Residential, Inc.* (207 Cal.App.4th 1115 (2012)). In that case, the arbitration agreement said it only covers claims between "myself and the employer." The court said that doesn't include class claims. Most current arbitration agreements are written in this fashion so *Nelsen* is really good news for employers.

MATHIASON: But you shouldn't be too resistant to go back and get new agreements signed. I had a case recently where the Fifth Circuit, for other reasons, knocked down the arbitration agreement. A corrected agreement was circulated with a copy of the pending class action lawsuit, and employees were told that accepting the new agreement would waive membership in any class that might be certified, but 99 percent signed. When challenged, the district court rejected *D.R. Horton*, and confirmed that the new agreement's class action waiver was fully disclosed and enforceable under the FAA. The employees strongly preferred individual arbitration agreements over litigation, even as members of a putative class.

MORRIS: What does the group think is the best practice for getting current employees to sign amendments to, or rewrites of, arbitration agreements?

MEER: I've had good experience with employers who offer $100 as consideration for people signing a new arbitration agreement. And they also use that as a barometer of employee morale. If somebody won't sign an innocuous-looking arbitration agreement for $100, then you have a measure of how your workplace feels they're treated.

ARIAS: I've also had clients be very successful in offering up vacation time as consideration for the agreement. I think businesses are generally free to roll out arbitration agreements at any time. In California, with our ever-changing laws, it is common for businesses to regularly circulate new policies thereby providing an opportunity to also circulate new agreements.

MODERATOR: With now several rulings following *Wal-Mart Stores, Inc. v. Dukes* (131 S.Ct. 2541 (2011)), what's new in employment class certification?

MATHIASON: Well, *Comcast Corp. v. Behrend* (133 S.Ct. 1426 (2013)) does two things: One, it says that it's a requirement under Rule 23 that you be able to have a class-wide solution to the damage calculation; then, almost as important, it says if you have expert testimony from the plaintiff's side on a common damage solution, that is not automatically accepted as true at the class certification stage. Damages are an Achilles heel to many class actions.

BERTAIN: Here in the Ninth Circuit, we still have to focus on liability issues in addition to damages when opposing certification. In May, in *Leyva v. Medline Industries, Inc.* (716 F.3d 510 (9th Cir. 2013)), the Ninth Circuit reversed an order denying class certification in a wage-and-hour case finding that damage calculations standing alone would not defeat certification.

MORRIS: Some of the state courts also have not picked up the hint from *Comcast*. I have in mind the recent cases of *Bluford v. Safeway Inc.* (216 Cal. App. 4th 864 (2013)), and *Faulkinbury v. Boyd & Associates, Inc.* (216 Cal. App. 4th 220 (2013)). They're looking at whether a policy as worded, rather than as applied, appears to have a problem. Those courts seem to be saying we don't really care how the policy is applied, it's appropriate for certification because of the way it's written. Instead, the certification inquiry really requires a more rigorous analysis of whether the requirements of commonality are present.

ARIAS: That's why we're seeing such a rush to file employment class actions in California—and even more of an effort to make sure a case stays in a state court. We've seen some very interesting pleadings by plaintiffs attorneys to avoid reaching the amount in controversy requirement for removal under the Class Action Fairness Act (CAFA). It is surprising that the types of class action claims are not really different from a year ago. In the last 30 days, all but one employment class action filed in Alameda County included meal and rest-break claims, which tells you that the demise predicted after *Brinker Restaurant Corp. v. Superior Court* (53 Cal.4th 1004 (2012)) did not occur. This is likely a result of businesses reading *Brinker* much too broadly. I've seen companies that had great break practices pre-*Brinker* become a target for class actions due to their lax policies and procedures post-*Brinker*.

MODERATOR: Federal wage-and-hour cases are dropping in California this year, however. What do you see in terms of the volume of wage-and-hour cases in California in general?

MATHIASON: We track every state wage-and-hour case filed, and California has leveled off. It surprises me whenever there's a federal case filed in California because the advantages of litigation in state court are so great.

MORRIS: There's a recent Ninth Circuit decision, *Urbino v. Orkin Services of California* (2013 WL 4055615 (9th Cir.)), that I think will result in even fewer wage-and-hour cases being removed to federal court unless they can get there through CAFA. The Ninth Circuit now has said PAGA liability cannot be aggregated for removal purposes even if it's in the millions of dollars. So more cases that

start in state court will stay in state court following *Urbino*.

MODERATOR: Are there other areas of state law that are bringing forth new claims?

ARIAS: One of the most interesting issues is what employers and the law are going to do with the fact that employees are connected 24/7 with their smartphones and laptops. They're checking business emails at midnight because they can't sleep. How are we going to ensure that they're compensated for that time? Do we have to compensate them for it if they've been instructed not to work?

MATHIASON: These are not hypothetical questions. I just finished a case where an administrative assistant claimed payment for every minute of every day since she was hired—based on the employer's practice of contacting her during nonworking time—even though the company had a policy that all claimed overtime would be paid. Her counsel boldly asserted that the employee was on compensable on-call time 24/7. While this case was highly defensible, it illustrates the challenge of applying old laws to 21st-century technology.

MEER: These claims could create a conflict between the class representatives and the class because an employer might be required to discipline or maybe terminate somebody who is thinking about his or her job and trying to do a good job and prepare for the next day.

BERTAIN: In the meantime, employers should reiterate to nonexempt employees that any time they work should be recorded and will be paid.

MODERATOR: Lisa [Bertain], you defend a lot of whistleblower claims. Is Dodd-Frank changing that practice? Did it change the landscape with respect to Sarbanes-Oxley and what we had before?

BERTAIN: Sarbanes-Oxley (Pub. L. No. 107-204) has been around for more than ten years and provides certain protections for employees who make whistleblower complaints. In July of 2010, the Dodd-Frank Act (Pub. L. No. 111-203) was passed; it contains more favorable provisions for employees and has increased the number of claims we are seeing. For example, individuals filing lawsuits with Dodd-Frank claims can go direct to federal court rather than first filing with OSHA. The statute of limitations is longer under Dodd-Frank, and back pay is enhanced. And, financial incentives, known as bounties, are available under Dodd-Frank. Given the breadth of the Dodd-Frank provisions, a significant issue is whether an employee is covered by Dodd-Frank if they only make an internal complaint.

In *Asadi v. G.E. Energy (USA), LLC* (720 F.3d 620 (5th Cir 2013)), the Fifth Circuit recently ruled that, to be a whistleblower under Dodd-Frank, you have to have made a complaint to the SEC. We haven't really seen the impact of this case yet, but my feeling is that employees who have legitimate issues regarding what they are seeing in the workplace usually want to try to solve them internally if they can. So I don't think we will necessarily see employees just rushing straight to the SEC.

MORRIS: I was surprised to see there have been only two awards so far, one in August 2012, and the second one in June this year. Another factoid that surprised me was the report from the Office of the Whistleblower saying that it had received over 3,000 tips—I think the number was 3,001—in its first year of operation.

MODERATOR: Turning to the Equal Employment Opportunity Commission (EEOC)—which is, with limited success, trying to broaden the classes protected under federal law to include, for example, people with criminal backgrounds—have you run into related cases?

MORRIS: One interesting decision just starting to get a lot of publicity is the recent federal district court decision in Maryland, *EEOC v. Freeman* (2013 WL 446553 (D. Md.)). The judge issued a completely scathing opinion utterly destroying not only the EEOC's position but also the study by its expert witness. I think the EEOC will be almost compelled to appeal, rather than absorb the licking they've taken from the Maryland judge.

BERTAIN: Even the EEOC Enforcement Guidance on criminal records acknowledges that having a criminal record is not listed as a protected class under Title VII. So it really depends on whether or not it fits into a disparate impact or disparate treatment theory.

> ***"A 'protected category' on the horizon is family responsibility discrimination."*** —GARRY MATHIASON

MORRIS: Even assuming that the statistics establish a disparate impact, I think the theory will run headlong into business necessity: If you're hiring bank tellers, wouldn't you want to know whether your applicant had been convicted of some form of theft?

MATHIASON: While the bank teller example is clear, there is a strong tension between rehabilitation and negligent hiring. That is, do you set society's rules so rigidly that someone who successfully goes through the penal system comes out unemployable? Or do you adopt a policy that balances the nature of the conviction against legitimate business needs such that most people with criminal backgrounds can still be employed? We are seeing this issue brought up sua sponta by the EEOC in multiple investigations. Close to the issue of criminal backgrounds, a new area of concern is just beginning to surface. This is the disparate impact of long-term unemployment on hiring. The EEOC has observed that among the millions of people who now have been unemployed for more than six

months, a disproportionate number are minorities. Accordingly a policy of not considering long-term unemployed applicants could form the basis of a class action tied to a statutorily protected category such as race or age.

ARIAS: I've also heard the EEOC's position that the long-term unemployed are often disabled individuals, which raises another potential disparate impact.

MATHIASON: A "protected category" on the horizon is family responsibility discrimination. Apart from at least 17 different statutes protecting caregivers and others with family responsibility, disparate impact analysis and outright sex discrimination have been applied to employers who, for example, fail to promote a woman taking care of her children compared with a man also participating in the care of his children. Look for family responsibility discrimination to become a mainstream cause of action.

BERTAIN: Another one is homelessness. Rhode Island recently became the first state to put that concept into law as a protected class (see S-2052 (R.I.). In other states, it would have to fit within a disparate impact theory. I think most employers—to the extent they find out someone is homeless—want to help people to get into jobs if they're qualified. I don't know what kind of traction that issue is ultimately going to attract in terms of adding it as a protected class.

MEER: You hear a lot about, for instance, literacy or appearance protected classes as well. But, again, job-related factors are more likely motivating an employer's decision, rather than whether the employee is a member of the perceived protected class.

MODERATOR: What issues that we haven't addressed are on the horizon for California employers?

ARIAS: There's the California Supreme Court's ruling in *Harris v. City of Santa Monica* (56 Cal. 4th 203 (2013)), a pregnancy discrimination case, that plaintiffs must show discrimination was a "substantial" motivating factor in an employment decision. This very employer-friendly ruling is giving employers more freedom to manage their employees without fear that their decisions will be unfairly second-guessed.

MATHIASON: The cumulative effects of cloud computing, advances in sensor technology, digital analytics, software that learns, and greatly reduced costs will create more change in the next ten years than we experienced in 200 years transitioning from an agrarian to an industrial society. We need to start thinking about robotics in terms of employment—and about technological unemployment. There will be newly created replacement jobs, but there's going to be a group of people in our society that can't make that transition in such a terribly short time period. Employers need to follow the solutions being discussed in the U.S. Congressional Robotics Caucus as well as before the European Parliament.

Just one brief example highlights the explosive intersection of robotics and employment law. "Sophie" is a very cute, two-foot-tall interview robot created by NEC for use by HR departments worldwide. She can carry on a dialogue in an initial job interview, and her questions and comments can be scripted to conform to legal requirements, avoiding the inappropriate questions that humans occasionally ask. If that were all Sophie did, maybe employment law compliance would be easy, but Sophie can do much more. She reads your eye movement and your facial gestures and could potentially read heart rate and other bodily functions. And the data she collects can be matched against data for the 10 percent best performers.

The issues she raises are reminiscent of a law school exam. Does Sophie qualify as a lie detector subject to California's prohibition? What about California's two-party consent rules for voice recordings? Or requirements under the Americans with Disabilities Act (42 U.S.C. §§ 12101-12213) and the Genetic Information Nondiscrimination Act (42 USC §§ 2000ff-2000ff-11; see also 29 CFR Part 1635)) concerning health information? Disparate impacts based on accents or facial gestures need to be fully reviewed. This should spur the creation of robotics practice groups in law firms and corporate legal departments.

BERTAIN: Are they going to be able to program Sophie to testify at depositions?

ARIAS: Is Sophie going to be the new judge, too?

MATHIASON: Don't laugh. One "Watson," the super computer that won on *Jeopardy* and can play chess better than any human, can already replace 500 law firm associates doing complex document reviews.

MODERATOR: Any other rising issues to highlight?

BERTAIN: Disability claims, including claims for failure to accommodate and failure to grant leave are continuing to rise. To avoid these claims, it really benefits employers to take the extra step. Think about what else can be done to accommodate the employee because the time you spend now may save you later in a lawsuit.

MEER: Another thing that we're seeing is a new role for labor unions in filing civil litigation that never would have happened years ago, with claims related to wages, hours, and working conditions—outside of the collective bargaining process.

MORRIS: We haven't talked much about traditional labor issues, but an issue that's reemerging is the reassertion of NLRB initiatives in a variety of areas where they haven't had much traction over the last year or two, such as expedited elections, mandatory postings, employee use of social media, which is an ongoing issue, and issues about keeping investigations confidential. With the NLRB now at full strength, with five members, I think we're going to see a strong reassertion of the NLRB agenda to move into areas that traditionally have been thought of as nonunion workplace issues. ■