Employment Law

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What's New in the Workplace?

A Recorder *Roundtable looks at disabilities, arbitration, class actions and other employment issues*

THE RECORDER
ROUNDTABLE

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A Recorder *Roundtable covers the latest developments in disabilities, arbitration, class actions and other employment issues*

Photos by Christine Jegan

As part of its ongoing Roundtable series of MCLE programs, The Recorder *recently invited an expert group of Bay Area labor and employment practitioners to discuss various issues of concern to attorneys who represent employers and employees. What follows is an edited transcript of the May 16 Roundtable discussion. A complete version of this Employment Law Roundtable is available on either audiotape or CD and can be obtained by calling* The Recorder *at (800) 587-9288 or visiting our Web site at www.therecorder.com/roundtable.html. Those ordering the recorded version of the Roundtable will also receive a 175-page coursebook and 2.0 hours of self-study MCLE credit.*

around the table

Richard Frank is a partner in the litigation department at Cooley Godward. His practice focuses on employment law and general business litigation. He formerly served as employment counsel for the National Broadcasting Co. and also previously worked as a trial counsel in the San Francisco city attorney's office.

Roberta Hayashi is a partner in the employment law and litigation groups at Skjerven Morrill. Before joining the firm, she was a partner at Berliner Cohen. She serves as an arbitrator with the American Arbitration Association, and is a former president of the Santa Clara County Bar Association.

Jody LeWitter is a partner at Oakland's Siegel & LeWitter, which represents plaintiffs and labor unions in employment matters. She served as lead counsel in *Behne v. MicroTouch Inc.*, an employment fraud case that resulted in a $2.6 million award, which was upheld in 2001.

David Oppenheimer (moderator) is a professor and associate dean for academic affairs at Golden Gate University School of Law in San Francisco. A former clerk for California Chief Justice Rose Bird, Oppenheimer later worked as a staff attorney at the California Department of Fair Employment and Housing.

Michael Rubin is a partner in the San Francisco firm of Altshuler, Berzon, Nussbaum, Rubin & Demain, where he specializes in civil rights, labor and employment disputes and class action litigation. He has represented plaintiffs in such cases as *Circuit City v. Adams* and *Duffield v. Robertson Stephens*.

David Oppenheimer: Let's start with the disability rights law cases and the impact of the recent decisions from the U.S. Supreme Court that involve the Americans with Disabilities Act.

Jody LeWitter: The Supreme Court basically keeps hammering away at disability claims, making them harder to bring for plaintiffs. At the same time, the California Legislature and the state courts have widened the door in terms of what you can bring. The two main U.S. Supreme Court cases that have come down this term, *Toyota Motors v. Williams* (02 C.D.O.S. 149) and *US Airways v. Barnett* (02 C.D.O.S. 3671), both make those claims hard to bring on two main fronts. Under Toyota Motors, the question of who's disabled becomes more and more difficult. The trend started a few years ago with the *Sutton v. United Air Lines* case (527 U.S. 471), and the Supreme Court keeps looking at the question of what is a substantial limitation of a major life function and finds that it's got to be something really big. The actual language is a complete mouthful, which I wrote down because I can't remember it: "Severely restrict the individual from doing a variety of activities of central importance to most people's lives." That's a very exacting standard you have to use, and that's to prove that you are substantially limited when it comes to carrying out manual tasks.

Oppenheimer: Can you give us some examples of people who were not found to be substantially limited under these new tests?

LeWitter: Looking at *Toyota Motors*, for example, if the person there had carpal tunnel syndrome, and really they didn't address the work function, but they have to show if you have carpal tunnel, you can't maybe button your clothes and at the same time you can't get yourself breakfast, you can't read the paper, you're going to have to go to a lot of broad things that are important, and I think maybe in carpal tunnel, they've been signaling in every court that carpal tunnel isn't going to do it, I think. Although on an individual basis I think you could prove that carpal tunnel is disabling on a manual test, in addition you can go look at whether they're disabled in a work environment or anything else. But I think they're saying the bar is something very, very substantial.

Roberta Hayashi: Employers have always been looking to find some certainty and some ability to say, in answering Jody's question, who's disabled? If an employee comes in and says they need a certain accommodation, how do I decide whether that person is, in fact, disabled, which creates an obligation to reasonably accommodate? Taking the next step — and this is where we get a little bit of guidance in the *Barnett* case — when is an accommodation reasonable or unreasonable? Those of us who advise employers are always looking for some bright lines. Unfortunately, we don't get bright lines out of *Barnett*. I think what we walk away with is a holding that, in general, an established seniority system will trump the request for accommodation or the obligation to accommodate. But the language then gets very wishy-washy by saying there may be "special exceptions" in which the general rule does not apply. The court gives examples of where the employer has deviated from the seniority system on a voluntary basis or has created exceptions to the seniority system.

Oppenheimer: So maybe there will be more litigation now over whether a seniority system fits into the exception?

Hayashi: I think you're going to find that there's going to be litigation over those special exceptions. Justice Scalia in his opinion said that what we were looking for was a determination so that employers could say with certainty the seniority system will trump the reasonable accommodation obligation, and therefore these cases won't get filed because they'll be eliminated on a summary judgment motion. We didn't get that. What we got is a situation where plaintiffs, I think, now are going to have to plead and bring forward some evidence that the employer has created exceptions to that, which would make the particular accommodations that were sought reasonable under this set of facts. As you said, David, it leads to more litigation.

Oppenheimer: In *Barnett* we had a Scalia dissent and we also had a dissent from the left side of the court. What do

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you make of all this? Where is the Supreme Court heading with disability discrimination law?

LeWitter: Looking at it from the plaintiff's perspective, it's an employer-friendly forum. If there's doubt in the equation, I read *Barnett* as leaning toward the doctrine that says if it's a bona fide seniority system it's going to trump a reasonable accommodation. But there is wiggle room to argue otherwise.

Hayashi: Jody's comment that if you follow it, it will trump, is really key here. The question in the *US Airways* case was whether Mr. Barnett was entitled to reassignment from being a baggage handler into a mailroom job. When it comes to issues involving reassignments and transfers, a lot of employers both in union and nonunion settings have policies and procedures that give preference to people based on seniority or certain skill ratings and things of that nature. If an employer consistently follows that, then yes, I think they get the certainty they want. It's when employers deviate from it, and historically they have, that I think they expose themselves to risk of litigation over that issue. I agree with Jody that the Supreme Court is heading towards a very pro-employer view, and I think they have two more decisions this year on the ADA issue, so we'll see where they head this term.

The problem for employers in California is different because we've got two bodies of law. We've got the federal ADA but we're also governed by the state Fair Employment and Housing Act.

Oppenheimer: Under FEHA, the approach to disability law is dramatically different, isn't that right?

Hayashi: I think it is.

LeWitter: It's completely different. The Legislature, looking at where the U.S. Supreme Court was heading, basically said a couple of years ago, "Not for us. We're not going to do it this way." They amended the statute and they amended a number of things that had been judicially determined, just wiped them out. For example, whereas the Supreme Court said in the *Sutton* case that you have to be limited in a number of jobs, the Legislature said no, you can be limited in one job. You could certainly argue that it isn't an undue hardship under California law to ignore the seniority system.

Richard Frank: Let me expand on one point that Roberta made. As fuzzy as the *US Airways* decision is, in a way it was an easy case because it involved a seniority system where there was a lot of precedent and a lot of certainty. Looking down the road, we can anticipate that the next battlefront will involve situations where the systems at issue are not as clear, the standards may not be as objective, and will focus on practices like merit-based promotions and merit-based filling of open positions. Based on what type of systems employers have in place, and how consistently they've used them, we'll have the same battlefield again, but it'll be more difficult because seniority is so much easier to implement and track.

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— Roberta Hayashi

Michael Rubin: One of the reasons future cases may be difficult, and one of the reasons the Supreme Court is not adopting bright line rules, is that the ADA incorporates a series of legislative compromises. Congress couldn't agree on any bright lines either. However, when you have a state like California that responds to the U.S. Supreme Court's decisions through new legislation, you're bound to have greater certainty because the Legislature's new rule responds to a specific set of issues. But until the Legislature steps in and provides additional clarity, we are destined to continue to litigate over these difficult issues.

Oppenheimer: In the meantime California employers and employees should be paying attention to California law, not simply federal law in this area.

Rubin: That's true in virtually every area of employment law. There are differences between the California rules and the federal rules in many areas.

Hayashi: The Third District Court of Appeal's decision in *Bagatti v. Department of Rehabilitation* (02 C.D.O.S. 2911), for example, deals right on its face with the differences between the EEOC regulations relating to reasonable accommodation and the California statute, as amended a couple of years ago. The court says the obligation to reasonably accommodate is triggered at a much lower threshold under the California statute than it is under federal law, and the court invited the Department of Fair Employment and Housing to issue some further guidance on that.

Oppenheimer: Let's move on to the very vexing question of when employees can be required to arbitrate their employment-related claims. Michael, you've litigated a number of the major cases in this area, and Roberta, you serve as an arbitrator on employment law cases. Where do we stand today?

Rubin: No place certain, that's for sure. The law of mandatory arbitration is still evolving, and will continue to be in flux for quite some time. Arbitration is a procedure that originally held out the promise of efficiency, certainty and speed. But when employers started making pre-dispute arbitration agreements mandatory, removing the critical core element of voluntariness, they opened themselves up to litigation over enforceability and fairness issues. Had more than lip service been paid to the bedrock principle that arbitration should be a matter of consent not coercion, we wouldn't have all this uncertainty. But once employers started to abuse their superior economic power by stacking the deck in their own favor, plaintiffs counsel started challenging the enforceability of those agreements far more frequently.

There are many different claims that a worker can now assert to challenge a mandatory arbitration agreement. The worker can claim, as in *Duffield v. Robertson Stephens & Co.* (144 F.3d 1182), that mandatory arbitration violates a statutory right – in that case, Title VII and FEHA rights. Or the worker can claim that the mandatory arbitration system is unconstitutional, because it compels a waiver of Article III or Seventh Amendment jury trial rights, or the California right to trial by jury.

Or most commonly, the worker can claim that the arbitration agreement is unconscionable. That's the claim that the Ninth Circuit accepted in the *Circuit City v. Adams* remand case (02 C.D.O.S. 1043), and that the California Supreme Court accepted in *Armendariz v. Foundation Health Psychcare Services* (24 Cal. 4th 83), in striking down the mandatory arbitration agreements at issue. *Armendariz* itemizes a whole series of minimum requirements that a pre-dispute arbitration agreement, if it is mandatory, must satisfy. There are cases all over the country that analyze agreements under similar factors.

Let me make one point about where unconscionability analysis may be going, in light of two recent California Supreme Court cases that, read together, may signal the beginning of the end of mandatory arbitration in this state. One is the 1999 decision in *California Teachers Association v. State of California* (20 Cal. 4th 327), which the court in *Armendariz* later relied upon in holding that the stronger party may not impose the costs of arbitration upon the weaker party. The second is the May 6 decision in *Haas v. County of San Bernardino* (02 C.D.O.S. 3888), which holds that due process is violated by an administrative hearing procedure run by hearing officers who are hired and paid by one party — the county — to that procedure. The court in *Haas* found a due process violation based on the appearance of impropriety resulting from having a decision-maker that is paid only by one repeat player in the procedure. But that is precisely what happens in post-*Armendariz* employment arbitration where the repeat player employer is required to pay all costs for the arbitrators on its panels.

The court's analysis should lead to a successful unconscionability challenge under the principles discussed in *Mercuro v. Superior Court* (02 C.D.O.S. 1491) and a number of other cases.

Oppenheimer: Michael, it sounds like you think we have a system that can't be fixed.

Rubin: Sure it can be fixed. It can be fixed by making arbitration voluntary. Then the parties can select whatever procedures they want to resolve their disputes and no one can object. Let me be clear. I am a very strong advocate of all sorts of alternative dispute resolution procedures. I love mediation. I've had great success with arbitration and sometimes act as an arbitrator myself. I also have a lot of labor union clients, and in the labor context, arbitration is a terrific alternative to litigation because it involves two parties of equal bargaining power who have equal access to the dispute resolution system.

But that is not the typical employment arbitration case. Certainly mandatory arbitration procedures can be fairly drafted and fairly applied. But whenever you have a procedure that is imposed by a powerful party upon a less powerful party, there is a potential for abuse. Unfortunately, some employers have taken advantage of their economic might to abuse the system, and that has led courts to create many of the rules we now litigate over.

Oppenheimer: Roberta, can you give us a different perspective on this?

Hayashi: As someone who advises clients in trying to draft enforceable arbitration agreements, I can tell you that employers have not abandoned the idea that arbitration can be an effective way of resolving disputes. What they got from *Armendariz* were some guidelines of what

'When arbitration agreements were made mandatory, when the element of voluntariness was removed, it necessarily triggered the sort of litigation and court decisions that we're facing.'
— Michael Rubin

the courts would look at to say what constitutes a valid employment agreement. The more recent decision in *Circuit City v. Ahmed* (02 C.D.O.S. 2590), where there was an opt-out provision, added a whole other wrinkle.

Rubin: So we don't disagree. We agree that if arbitration is voluntary, if the worker can opt out after the dispute arises, the parties should be entitled to negotiate their own fair and efficient way of resolving their dispute.

Hayashi: Let me put it this way. I don't agree that an opt-out provision per se is the only way that happens. I think that what has to happen is that the court looks for some indicia that there was procedural fairness. I don't know that voluntariness becomes the *sine qua non* of all of that, and I would have to say that I don't agree with that part of the decision.

From an arbitrator's perspective, I'm actually glad to see a lot of these cases come down. What was happening three or four years ago was that someone would come to me and say, "I have to arbitrate this dispute, but I don't think I should be here because this arbitration agreement is so one-sided. And I want you, Madam Arbitrator, to rewrite the arbitration clause." That's not within my power to do. I can decide the arbitrability of the dispute before me, but I cannot rewrite the party's arbitration agreement.

The American Arbitration Association has taken the position that, with regard to their employment arbitrations, they will enforce employment agreements that contain the elements required under *Armendariz* here in California. Furthermore, their employment dispute arbitration rules have been rewritten to provide for the kind of procedural protections and fee shifting that was required in *Armendariz*. So now, when these cases come before me as an arbitrator, particularly under the AAA rules and in light of these decisions, I can at least say "Okay, I'm going to look at these as guidelines," and then just determine the issues of what's arbitrable and finally get to the merits of the dispute, which is what the parties want me to do.

Rubin: In light of the *Armendariz* rules that Roberta is talking about, where is the system of employment arbitration heading? The California Supreme Court and others have decided that you cannot impose the costs of arbitration on a worker and that there must be what they call a "modicum of bilaterality." That means if the employee has to arbitrate all workplace disputes, then the employer, too, has to arbitrate all workplace disputes. Trade secret and confidentiality claims, for example, cannot be excluded. So if you have broad, all-encompassing arbitration clauses and a requirement that all costs must be picked up by the employer, why isn't this going to lead to a system of arbitration that is more like the industrial arbitration model where employees will begin to challenge even more minor workplace grievances? It becomes the employer's obligation under these bilateral agreements to arbitrate virtually everything, at the employer's cost. Sure, employers will be able to get some mega-cases away from the jury. But they will find themselves arbitrating lots of lower level grievances that would never have been the basis of a claim before, more like in the union context.

Oppenheimer: So we'd be moving from a discharge resolution system to a grievance resolution system.

Rubin: That's what I think is likely to happen with these rules, based on the experience we've had in the labor union context.

LeWitter: We're seeing some of that in our office right now. We see an airtight arbitration agreement that we don't think we can challenge under *Armendariz*. We have started filing a few cases that we would not have litigated, such as a demotion case or a hostile environment case where there aren't really enough damages. I think at this point people view this as something they still need lawyers for, so the lawyers are going to have to get educated. It seems obvious that it's going to go somewhere in that direction.

Frank: It's interesting to hear Jody mention cases that she's now bringing that she otherwise wouldn't have brought. We have clients who have said, "We don't want arbitration because we think that makes it too easy for plaintiffs to bring claims. We want plaintiffs to face the tougher decision of whether to go to litigation and not have an easier forum."

I don't necessarily agree with that. But coming back to Michael's point with respect to voluntariness, the question that's difficult to answer involves the matter of forcing an employee or giving the employee the option — depending on which side of the table you're sitting on — to sign a piece of paper with an arbitration clause when they start employment. You can't make the assumption that the employer has greater bargaining power at that moment. We saw that a couple of years ago when employers were going through extraordinary lengths to hire employees when the market was so overheated. You don't know, when the employee sits down to sign that agreement, whether that person has bought into the advantages of arbitration or truly is being coerced. It's an important consideration, but it would be a mistake to assume that agreeing to arbitration as a condition of employment is not a voluntary act on the part of the employee.

Rubin: That's an interesting point. But in analyzing a voluntariness question, you should apply a constitutional waiver standard, and there are probably not many employers who could show that their workers made a truly knowing and voluntary waiver of rights. But you're right, this is another issue that is likely to be litigated, and a case by case fact-specific inquiry will have to be made.

Frank: Let me also address the modicum-of-bilaterality point. Michael mentioned the *Mercuro* decision, which is of great concern to employers because it raises the vexing question of what do employers do about the question of arbitration of their intellectual property rights. The arbitration agreement in *Mercuro* had a number of serious problems and the court struck it down. I think *Armendariz* struck the appropriate balance, both pro-

cedurally and substantively, in advancing the benefits of arbitration but also protecting both procedural and substantive rights of employees. The arbitration clause at issue in *Mercuro* did not satisfy those standards.

Most troubling was what the court said about the bilaterality issue involving the employers carving out, for mandatory arbitration, claims for injunctive or equitable relief, notably the IP rights claims. This forces employers drafting arbitration clauses to make a tough decision. If the employer excludes that carve-out, and is silent on IP rights, in the arbitration clause the employer risks having those valuable IP rights decided in arbitration where they have no appellate rights. If, on the other hand, the employer includes the carve-out, then the risk is that the arbitration clause won't be enforced.

Rubin: And, of course, some employees feel the exact opposite. They don't want to be forced to adjudicate their important anti-discrimination rights before an arbitrator rather than a jury any more than the company may not want its important IP rights adjudicated before an arbitrator.

Oppenheimer: With this explosion in arbitration, many more lawyers are working either part time or full time as arbitrators. But there are now new rules that govern the obligations of an arbitrator. Roberta, I know you're familiar with those.

Hayashi: Painfully familiar. As of July 1, the new Judicial Council rules, which are going to be embodied in the California Rules of Court, will take effect. They deal with consumer arbitration, but if you look at how the rules define consumer arbitration, it's a contract with a consumer party that can include an employee or potential employee. This will be an interesting question because it comes back to the question of voluntariness.

I think there are clearly situations where we see that something may be an arbitration clause in a contract between an employer and an employee, but the question is whether the employee was required to accept the arbitration provision in the contract. Clearly in an executive contract between the president or vice president of a company and the board, this is not going to apply. But the position that a lot of us on the arbitrator's side are taking is that a large number of the employment arbitrations that we get, either as private arbitrators or through services such as AAA or JAMS, are going to fall within these disclosure regulations.

The new rules are going to require us to make disclosures beyond the usual "is your sister in-law related to one of the parties?" or something of that nature. They will also now extend to things such as whether the arbitrator is serving, or has served within the past five years, as a neutral arbitrator in another arbitration involving one of the current parties or a lawyer for any party. For example, if I have within the last five years served as an arbitrator in a case in which Richard's firm or anyone in Richard's firm, whether they are currently there or were there in the past, was involved, I need to disclose that. One of the early versions of the rules was going to be limited simply to employee versus employer, no disclosure of the name, nature of the dispute, and the outcome. Where this rule, as now embodied, causes me concern, is that as an arbitrator, I can keep the employee's name anonymous, but I am required in my disclosure to disclose the name of the non-consumer parties to that arbitration. One of the reasons employers have liked arbitration is because it provides some modicum of confidentiality. Now, with these disclosure rules, I'm going to have to disclose information that, for example, includes the fact that a certain employer was hit with a $500,000 arbitration award that included punitive damages. And that may be the kind of information that employers specifically went into arbitration in order to avoid having to disclose.

We all know that members of the plaintiffs bar discuss among themselves information about arbitrators. There's a balance here because people obviously are entitled to know if the arbitrator has certain biases when they're selecting the arbitrator. But putting on my employment lawyer hat for a moment, I'm very concerned about these rules.

'If you're going to require an arbitration, which frankly I and most plaintiffs lawyers and employees go to kicking and screaming, I think we're entitled to know ... something about the biases of the arbitrator.'
— Jody LeWitter

LeWitter: In collective bargaining situations there are some disclosures that are required. In fact, everybody knows because they've usually been on the same side of the issues before. And if you're going to require an arbitration, which frankly I and most plaintiffs lawyers and most employees go to kicking and screaming, I think we're entitled to know about the repeat player issue and something about the biases of the arbitrator. I know it creates issues for Roberta and her clients. But I think they're only fair, they come with the territory, and if we're going to have an arbitration it needs to happen that way.

Oppenheimer: Let's move on from arbitration. Over the past few years we've seen an explosion in class action wage and hour claims here in California. We now have a new decision in that area from the California Court of Appeal — *Sav-On Drug Stores v. Superior Court* (02 C.D.O.S. 3470).

Rubin: Let me start by explaining how we got here and why wage and hour class action work is exploding in California.

The *Bell v. Farmers Insurance* case (01 C.D.O.S. 1846) opened many litigants' eyes to the availability of overtime class actions as a way to obtain substantial relief for a large number of workers who were misclassified as exempt employees under the state labor code. Under the federal Fair Labor Standards Act, each individual who is denied overtime has to affirmatively opt into the case to get relief. However, under the state labor code, you can bring a class action for overtime violations and you can couple that claim with a Section 17200 unfair business practice claim, extending the statute of limitations four years, which is either one or two years longer than the federal statute of limitations. In *Bell v. Farmers*, where I've been co-counsel for plaintiffs the past year or so, these provisions resulted in a jury verdict plus interest of about $124 million. That opened a lot of people's eyes — not only the class-wide relief part, but also the fact that in many misclassification cases, the employers don't have the evidence to dispute their workers' testimony because they usually don't maintain time records if they treat the workers as exempt. And if the workers keep records, the Supreme Court has said that there is a presumption that those records are accurate, and the burden shifts to the employer to defend.

So there has been an explosion of these cases, and the question is whether the *Sav-On* decision marks a turning point. *Sav-On* is a case where, first of all, there was fairly rigorous review of the trial court class certification decision under what's supposed to be an abuse-of-discretion standard. But if you read the facts as set forth in the Court of Appeal's decision, the final result wasn't that surprising. *Sav-On* was a case involving 300 different stores, 1,400 different managers, and the question of whether those managers were exempt or not. The defendant presented testimony from its chief human resources officer and 51 of those managers, each of whom testified that he or she had different jobs and performed different functions at different times of the day than the other managers.

According to the court's opinion, there was virtually no response to this evidence by the plaintiffs — no contrary declarations, no full-fledged statistical analysis, nothing more than an argument that the policy to treat managers as exempt was itself an across-the-board policy that permitted class-wide treatment. The Court of Appeal concluded that it is not enough to say that there is an across-the-board poli-

cy of treating all managers as exempt. Instead, you have to look to see what the managers actually do before concluding whether to proceed as a class.

In the *Bell* case, along with a half-dozen cases like this that I've litigated, we did look to see what the class members actually did, and then we presented that evidence. *Sav-On* may not have been a strong case to begin with; it's impossible to tell from the opinion. But if you read the facts as the Court of Appeal presented them, it's not that surprising a decision. You have to establish the prerequisites for class certification in California. You always have, you always will. And while *Sav-On* may send a message that not every overtime case is automatically a multi-million dollar case, that's not an inappropriate message.

Employers should be liable only when they have violated the law. They should only be liable for the damages that they are legally responsible for, and *Sav-On* is consistent with that.

Oppenheimer: Roberta or Richard, how can employers protect themselves from multi-million dollar verdicts, or is this going to be a continuing explosion?

Hayashi: I took some small solace in *Sav-On* because I know there will be plaintiffs attorneys who will try to keep it very limited. I thought the one thing that was good here was that there are a lot of companies that have common policies and common procedures. And just because they promulgate those policies and procedures, that doesn't become the criteria for establishing a class of employees.

I may sound like a broken record here, but those of us who advise employers are trying to get some consistency and predictability. We've always suggested to employers that if you have a set of policies and procedures and you follow them, that's a good thing to do. It's kind of nice to hear that it's not going to be a bad thing for them.

Rubin: But it depends on what the policies and procedures are and how they affect the classification decision. In *Chao v. Perdue Farms, Inc.*, M.D. Tenn. No. 2:02-CV-0033, there was recently a $9 million Department of Labor settlement because the company had a uniform policy of not paying workers for donning or doffing their uniforms. In *Gerke v. Waterhouse Securities, Inc.*, No. C-98-4081-CAL (N.D. Cal.), there was a uniform policy of not paying workers for work performed during the lunch period.

Hayashi: I agree with you, and I think the idea is that you do get policies that are written that comply with the law. But merely the fact that you have the policies shouldn't be used to rap you on the knuckles or expose you to risk of a class action.

Rubin: Except if you have a policy of treating someone as exempt when that person's job functions are non-exempt. Having policies is a good thing. Promoting uniformity is a good thing. Bright line rules are a good thing. But if a company's policies aren't carefully scrutinized by able counsel such as yourself, they can create problems for the employer.

Hayashi: Thank you, and let the record note that Mr. Rubin is smiling as he says that.

Frank: What Michael said in his opening remarks about *Sav-On* are what I expected to hear from the plaintiffs bar — that this case is not significant and won't deter plaintiffs and the plaintiffs bar in this area. It also should not change the employer's approach to these issues because it doesn't give sufficient levels of comfort to employers to deter them from, as we've said, focusing on these issues, getting good counsel and making sure there's consistency in application.

The problem that we see more often is employers not paying enough attention to classification issues, rather than making a careful analysis and winding up in a place that the court disagrees with.

Rubin: In particular, that's been a problem with national employers who aren't aware of some of the differences between state law in California and federal law.

Oppenheimer: Is there an underlying problem in California or nationally that employers are classifying employees as exempt from the wage and hour laws or hiring employees who are called managers but who really aren't managers? Is this a broad labor employment social problem, and is that why we're seeing all this litigation? Or are we seeing some kind of hyper-technical attempt by plaintiff lawyers to take advantage of errors that occur from time to time and place to place?

Frank: This was a significant problem with young, fast-growing companies in the last few years.

LeWitter: Even beyond that, I think that the law that covers whether someone is exempt or not is not crystal clear. But there is a lot of law that is pretty clear, and a lot of employers have just been dissatisfied because it's so expensive to pay people overtime. I'm not there in the boardrooms to listen to this, but there is a calculated risk taken that companies are not going to pay overtime, and therefore they're going to risk it. Before it was a modest risk. Now it's becoming a real big risk. There's a lot of litigation going on, and I think that a lot of employers will have to step in line with that.

Oppenheimer: So this is an example of where litigation may affect social policy?

LeWitter: Absolutely. It is good public policy that people work 40 hours a week in general. It makes for more employment all over. It makes for a sane work life for the rest of the world.

Oppenheimer: We wouldn't want to apply that to lawyers though, would we?

LeWitter: We should, but we don't. The law doesn't let us go that far.

Hayashi: I have to disagree a little bit with Jody. I don't think that we got to the situation where all of these cases were being filed necessarily because of calculated decisions in the boardroom. I think a lot of it goes back to what Rich said about a lot of fast-growing companies. People were focused, particularly in Silicon Valley, on the startup, and the whole view of startups, as you know, is that you work around the clock and you work for maybe what aren't minimum wages because you're getting stock options and everything else.

That's where you get a lot of problems. It's not calculated. It's just that employers don't think of the issue of whether someone's exempt or non-exempt by nature of their duties and therefore whether records have to be kept or overtime has to paid.

Rubin: But you also have instances where someone brings the issue to the employer's attention after the employer has made the initial decision, to the extent that it's a decision at all, not to pay overtime. Often after an employee asks, "Do I get overtime?" the employer evaluates the situation, looks at the cost of paying overtime to a large group of employees that the employer perceived as exempt, and rejects or ignores the grievance, which can be a very expensive decision for the employer in the long run.

Oppenheimer: Let's turn briefly to the question of non-compete clauses. Now many employers require employees to sign agreements that, if and when they leave employment, they won't go to work for a competitor employer. In California, I think the law's pretty clear that these clauses are unenforceable. But what about contracts with out-of-state employers? Are they enforceable then?

Frank: The flip answer is it depends on which court you're in — the California court or the out-of-state court. The serious answer is this is a bona fide quagmire, and might not get sorted out anytime soon because you've got competing jurisdictional interests and competing courts hearing these issues.

There are two lines of cases, to touch on them briefly, both involving a Minnesota medical devices company called Medtronic. Last year we saw litigation in both a Minnesota court and a California court over whether a non-compete agreement in a contract with an employee in Minnesota, under Minnesota law, could be enforced in California when the California employer tried to hire that person.

The California court said no, it's not enforceable, and enjoined the Minnesota company, which had the effect of enjoining the Minnesota court from preventing this person from working. The Minnesota court did the exact opposite, ruling that the non-competition clause is enforceable and enjoining the California court from acting to the contrary. That employee is now sitting on the sidelines somewhere.

The Ninth Circuit, in its March 27 ruling in *Bennett v. Medtronic* (02 C.D.O.S. 2748), held that where a case is brought in California — and it doesn't matter whether that's the first case filed or the second case filed — and it's removed to federal court, as many of these cases will be because of diversity, that the district court, under the anti-injunction act, cannot issue an injunction that would have the effect of stopping the out-of-state case from proceeding.

The California state court action, *Advanced Bionics v. Medtronic*, is now pending before the California Supreme Court, and we're watching to see whether the court does one of several things. First, is it going to substantively water down what we've presumed in California is the virtually inviolable public policy that these non-competes are not enforceable, with limited statutory exceptions? Will the Supreme Court provide a procedure for adjudicating these types of cases in parallel forums? Then we'll need to see whether the out-of-state court follows what the California Supreme Court does?

There are several lessons here for California employers who historically have not worried much about this issue. First, employers must be even more diligent to make sure that when they're hiring people from out of state, that in every instance they take steps to find out whether the person has a non-compete agreement, and get counsel as to whether it may be enforceable. In most jurisdictions, outside of California, those agreements are going to be enforceable. Then the employer has to sit down with the employee and decide who's going to take the risk of enforcement. In many cases, the California employer is just not extending that offer. It's being chilled by this type of litigation. But in other cases where the employer is willing to take the chance, it has to allocate the risks with the employee regarding what happens when there's an injunction. Does that mean the offer is rescinded? Does the company provide a defense or indemnification to the employee for legal costs? Until we get some clarity, employers, at a minimum, need to address those

issues.

Rubin: When you're negotiating to hire a new employee from another state, are you going through those procedures and writing down the extent to which you'll offer protection? What happens if a court goes one way or another?

Frank: With executives, yes. We're having those discussions with clients. In some cases the agreements explicitly address those issues, in other cases no. But we are raising those issues.

Hayashi: A lot of offer letters that we're preparing now specifically require a disclosure from the employee that they are not subject to any agreement that would prevent them from performing work for this company. And that if there are any agreements, non-disclosure agreements or things of that nature, that they fully disclose them to the employer.

Oppenheimer: Let's move on. On March 27, the U.S. Supreme Court handed down its decision in *Hoffman Plastics v. NLRB* (02 C.D.O.S. 2731). The court held that the National Labor Relations Board may not award back pay to an undocumented non-citizen who lacks work authorization. Michael, you filed a brief in that case and you've handled other cases involving this issue. What does this ruling portend?

Rubin: We don't know. You asked before about social policy in the overtime context, and I think that one of the reasons that each of us practices in the labor and employment law field is that every issue we face has a significant impact on social policy.

The *Hoffman Plastics* case deals with immigration rights and labor law rights and how they fit together. These are hugely important social issues. There are estimated to be 2 to 3 million undocumented aliens working in California, maybe 10 million throughout the country. The Supreme Court in *Hoffman*, which rejected the position of the Ninth Circuit, Second Circuit, D.C. Circuit, Department of Labor, Department of Justice, the Equal Employment Opportunity Commission and several state courts, held that at least some type of back pay is not available to an undocumented alien worker.

Legislation has already been introduced in Congress and in California either to limit the scope or to define the scope of existing rights in the wake of *Hoffman Plastics*. The question is: What monetary remedies are available for periods of time someone who is undocumented either was prevented from working or was unlawfully underpaid? For example, in the Fair Labor Standards Act context, can a court award the difference between the wages paid and the wages that were lawfully earned for someone who was on the job? Everyone seems to say, post *Hoffman*, that the answer to that is still yes, and that *Hoffman* has nothing to do with underpayment for time actually worked. The Department of Labor, for example, issued a statement very soon after *Hoffman* saying that the case has no impact on FLSA remedial rights.

Similarly in the Title VII and anti-discrimination statutes, the consensus seems to be that *Hoffman Plastics* does not affect undocumented workers' right to compensatory damages or to punitive damages. It affects only potential back pay for persons who were wrongfully terminated, but does not affect the back pay for persons who were discriminatorily underpaid.

It is difficult to predict what is going to happen to this doctrine because it is hard to identify the precise analysis that the Supreme Court applied. There is some very broad language in the opinion, and some very broad statements of policy, as well as a number of factors identified but not explained. But talk about lack of a bright line. *Hoffman* is a very difficult decision to follow.

'Employers must be even more diligent to make sure that when they're hiring people from out of state, they take steps to find out whether the person has a non-compete agreement and get counsel as to whether it may be enforceable.'
— Richard Frank

Somewhat surprisingly, the Bush administration has come fairly close to the position taken by those who advocate for immigrants' rights, which is to construe *Hoffman Plastics* narrowly. Many advocates fear, for example, that the practical impact of a case like *Hoffman Plastics* may be precisely the opposite of what we're trying to accomplish through federal immigration policy. That is, by permitting employers to hire workers who lack protections, it gives those employers an incentive to hire undocumented workers rather than documented workers because they can exploit them by not paying legally required wages, especially because the risks of employer sanctions under the 1986 immigration act is so small. If employers can profit by hiring undocumented workers, this creates a magnet for unlawful immigration.

Most advocates believe that Congress was concerned about this impact, and that it made clear in 1986 that its policy choice was to grant full remedial rights, except for reinstatement, to undocumented workers because that would promote federal immigration policy as well as federal employment policy. The Supreme Court has now said no. So we have to evaluate the fallout and watch for legislative as well as judicial and administrative developments in the area.

Hayashi: If an employer thinks that they can now somehow make distinctions in pay and conditions of employment with regard to someone who they know is an undocumented alien, I think they're making a huge mistake. As Michael has pointed out, the Title VII prohibitions on discrimination on the basis of race and national origin still apply, and discrimination can occur in such things as compensation and conditions of employment.

There may be some who read *Hoffman Plastics* exactly the way that Michael was saying employers might tend to read it. They might think this gives them sort of a loophole to treat certain people differently. But I think they run a real risk in terms of the discrimination liability.

Oppenheimer: Title VII doesn't protect employees from discrimination based on their being undocumented or not having work papers.

Hayashi: No, but Title VII prohibits discrimination on the basis of race or national origin. And when it comes to national origin, let's face it, we're in California, where a number of the people who come here are from either Asian or Hispanic backgrounds. I agree that if there was any desire for clarity, we're not finding it in the *Hoffman Plastics* decision. But I also think that if there were employers out there who thought that this is opening up some other kind of loophole, I disagree with that.

Rubin: Two quick points to add to that. First of all, the Supreme Court, both in *Hoffman Plastics* and in the 1984 decision in *Sure-Tan v. NLRB* (467 U.S. 883), made very plain that undocumented alien workers are still covered by the federal employment law. So some remedies are available. There is no argument that coverage is absent.

Second, because of the confusion in the Supreme Court's analysis, there is also confusion over the extent to which state law might be preempted. Some might read *Hoffman Plastics* as a construction of federal immigration law, which would have preemptive effect. But if you look at the opinion, it's actually just a construction of the National Labor Relations Act. Indeed, here in California, the state has taken a position in various *amicus* briefs, and other states have as well, that *Hoffman Plastics* has no impact on state law because it is a construction of the remedial breath of the National Labor Relations Act only. It is not a construction of what federal immigration law permits or does not permit any state to do. So there is a very good argument that *Hoffman Plastics* has no impact on any individual's right under state labor law.

Oppenheimer: Let's turn to new developments in sexual harassment law. In 1998, the United States Supreme Court created a new affirmative defense in sexual harassment cases in its holdings in *Burlington Industries v. Ellerth* (524 U.S. 742) and *Faragher v. City of Boca Raton* (524 U.S. 775). Now the California Supreme Court has the same issue pending in the case of *Department of Health v. Superior Court (McGinnis)*, which was decided by the Third District Court of Appeal last November (01 C.D.O.S. 9999).

LeWitter: I think it's unclear what's go-

ing to happen in this area. The Court of Appeal's *McGinnis* decision held that the *Ellerth* and *Faragher* defense should not apply, and, of course, I think that's the best reasoning. But I'll go through both sides of it for you. Again, as we've talked about in other contexts, the statutory language is simply different in the state versus the federal act, and that's basically what *McGinnis* said.

The court said this is a defense which assumes that employers are not strictly liable. You have to have a basis for liability so we're going to give employers a defense. However, under the state statute, employers are strictly liable — that's right there in the language of the statute — if the conduct involves an agent or supervisor. And so the *Ellerth/Faragher* defense doesn't apply.

On the other hand there is a Ninth Circuit case, *Kohler v. Inter-Tel Technologies* (244 E3d 1167), that looked at the issue in terms of what they thought the California Supreme Court is going to say. The Ninth Circuit held that the California Supreme court is going to say that the *Ellerth/Faragher* defense applies. In terms of what's going to happen, I think it's a complete toss-up.

Oppenheimer: Let's talk about the significance for a moment. The federal defense, the defense available in the Title VII action, what does that mean for employees and employers?

Hayashi: Ever since *Ellerth* and *Faragher* came down, there have been a lot of us saying that the defense established in those cases should apply in cases that allege acts of sexual harassment on the part of supervisors. That argument is now the subject of the pending California Supreme Court decision. I don't think we've taken much solace in the Ninth Circuit's prognostication of what the California Supreme Court will ultimately do. When it comes to the definition of employer under the state Fair Employment and Housing Act and under federal court rulings, those two courts have differed over the years when dealing with the issue of supervisorial liability for sexual harassment.

Oppenheimer: That's because the California Legislature made this change in the Fair Employment and Housing Act back in the early 1990s, right? That legislation provided that, if the harassment was by a supervisor, then the employer was responsible.

Rubin: One more instance where a legislative response to a murky decision has led to a brighter line rule.

Oppenheimer: Turning to another issue, let's see if we can make sense of the U.S. Supreme Court's March 19 decision in *Ragsdale v. Wolverine Worldwide* (02 C.D.O.S. 2475). This was a case involving the federal Family Medical Leave Act in which the court struck down one of the Department of Labor's regulations.

Hayashi: Ever since the Family Medical Leave Act was enacted, along with the regulations, we have struggled with this issue involving the employer's burden of designating the leave. In other words, formally saying to the employee, "The time off you are taking is leave under the Family Medical Leave Act and will count against your 12-week allotment." The Department of Labor regulations in this area were very clear that, if the employer failed to designate the leave, they could not designate any leave retroactively and they could not then fail to reinstate the employee at the end of a 12-week absence because the employee had not been properly informed and notified that their time off was counting against the leave.

In the *Ragsdale* case, the individual was off of work for 30 weeks and the issue was whether the employer could have liability for the failure to reinstate because they had failed to perform that ministerial task of formally designating the leave under the terms of the FMLA.

There are much broader issues here about what the courts happen to think of the Department of Labor regulations, which can apply to a lot of other circumstances. But from a practical point of view, this is one of the instances where the court has come down and said that the designation, within the strict meaning of the regulations, is not going to control the situation of whether or not the employers discharge their obligations to provide the 12 work weeks of leave. It's a decision that actually looks at the practical sense of what's going on.

LeWitter: I think the employer still needs to designate under this case. You're just not automatically liable for damages if you don't.

Hayashi: That's a good point.

LeWitter: They need to designate and try to designate because it gives the employee clarity. The only thing the court said is that if you don't designate you aren't automatically dinged to reinstate the employee or give them more leave. We're going to look at whether the employee was prejudiced and whether the employee might have taken leave in a different manner.

Hayashi: Jody, that's a great point because I don't want people to now automatically disband their entire process of having employees request leave and get the certification. They need to do those things and they still need to designate and inform employees. I think the thing that struck me here, and strikes a lot of people in a practical matter, is that there are a lot of employers who have not been great about following those policies. Again, I think it goes back to being able to give the employer a little bit more ability to actually look at the facts of the situation and say, "Are we doing the right thing?"

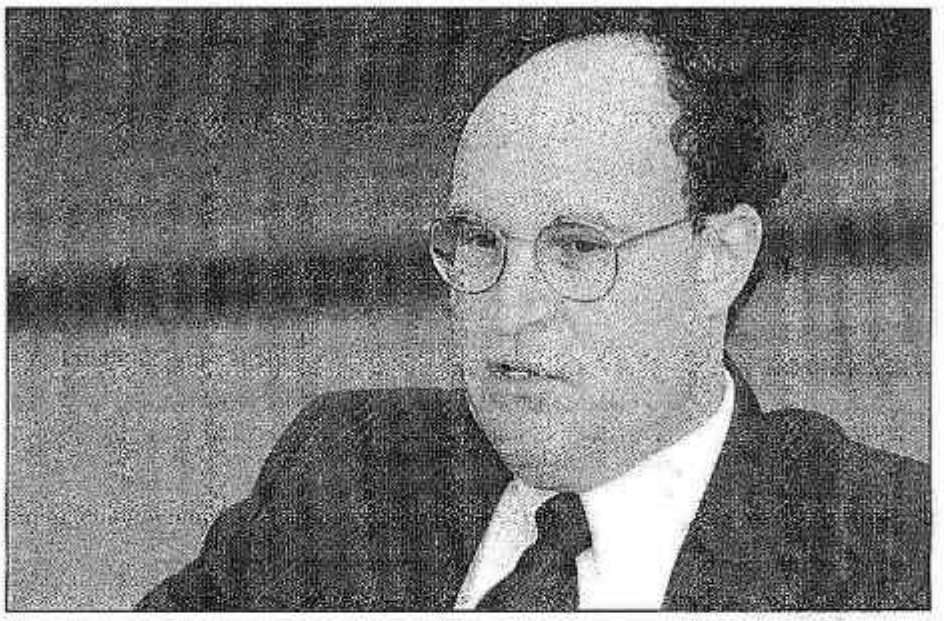
LeWitter: Sure, it gives the employer a little more leeway on that.

Oppenheimer: This is yet another area where we have this interaction between state and federal law that can confuse things quite a bit. We have a state law that provides, for example, for pregnancy disability leave under the FEHA. How does that get coordinated with the leave that's available under the Family Medical Leave Act?

Hayashi: The Family Medical Leave Act, on its face, says that any state, and any employer for that matter, can grant more leave than is required under federal law. In California, most employers are in a situation where they have to give an employee the maximum amount of available leave, including four months of pregnancy disability leave. After the pregnancy disability leave, which is usually six or eight weeks after the child is born, an employee can then take the additional twelve weeks to care for the newborn child. Now, all of these leaves are unpaid, except to the extent that an employee might receive some disability benefits. So you're not going to find that every employee avails herself of the full maximum seven months. Nor are you going to get employees who have four months of disability related to pregnancy and childbirth.

Frank: This complicated interplay between the state and federal statutory schemes places an even higher premium on employers' record keeping — when the leave starts, when it ends, what leave is being taken. Everything must not only be clear in the records but clearly communicated to the employee.

Oppenheimer: The last two items I'd like to cover involve new form interrogatories in the state courts for employment law cases and recent legislative developments in the credit reporting act.



'California employers and employees should be paying attention to California law [covering the rights of disabled workers], not simply federal law in this area.'
— David Oppenheimer

Frank: The good news is that as of July 1, employment lawyers on both sides who want to use form interrogatories will no longer feel like square pegs. A set of form interrogatories specifically focused on employment claims has been developed by a working group of practicing employment lawyers, has gone through the draft and comments stage, has been finalized and will be implemented by the Judicial Council on July 1. This should greatly streamline the process of using form interrogatories because it will avoid having to haggle over language in the current general set of form interrogatories that does not apply to employment issues, for example, what "incident" means.

This is a very positive development. The interrogatories are very detailed as to the different substantive causes of action that we see: contract claims, tort claims, statutory claims. They are also very focused and precise with respect to the different damages and elements that are going to be at issue in these cases. We anticipate that they'll be widely used, and we welcome them.

Oppenheimer: And the Credit Reporting Act developments?

Frank: We see, in our practice, a focus on both the state and federal reporting act laws, primarily in connection with workplace investigations. That could be either a sexual harassment or discrimination investigation. Or it could be a situation where an employer engages a consultant to assess a possible threat of physical violence in the workplace or some other situation where there's a focus on an individual or a group of individuals beyond just looking to see if they have bad credit or other negative personal history information at the time you're hiring them. I just wanted to mention, briefly, that California law — apropos of other parts of our discussion — is starting to diverge even more greatly from federal law than it had in the past in some important ways. There are new amendments to the California act in effect this year that are worth paying careful attention to.

Oppenheimer: What kind of problems are created by this development?

Frank: When you look at one of the two types of reports, the investigative consumer report — this is the report where you're looking not just at the person's credit history but beyond that to character, reputation, personal characteristics and so forth — the notice requirement is triggered not just when you go to an outside agency, but when the company itself engages in a process of putting together that type of investigation, for purposes of preparing a report. That's different from the federal rule, and it's an important requirement of which employers need to be aware.

Oppenheimer: So if I'm evaluating a number of employees to choose who among them to promote, is that now the kind of evaluation process and reporting process that I have to disclose?

Frank: Not necessarily. It depends on what your evaluation is looking at. If you're looking at what the person has done in the workplace and the quality of their work, not necessarily. If it's something beyond that, and it overlaps into the area of an investigation, where you're going beyond their skills and qualifications for a position, then you do have to look at it very carefully to see if the notice and other requirements of the California act apply.

The other significant difference is that under the California amendments, once the report has been completed the employer must give it to the subject of the report even if the subject doesn't request it and even if the employer is not taking any adverse employment action.

Oppenheimer: So it becomes a potential discovery tool for plaintiffs.

Hayashi: I'll give you an example. Someone brings a sexual harassment complaint and let's say it relates somewhat to acts outside of the workplace. Now, in the course of doing an investigation, you also want to interview neighbors or friends or people who are not employees. Maybe you want to do a criminal records search on the alleged harasser. Maybe you want to do a court record search to see if the employee has made a number of claims against others. That type of investigation, which may have just been done in the normal course of an employer investigating a sexual harassment claim, I think, may trigger the investigative consumer report provisions.

Also, since September 11, we have had an increasing number of employers who have wanted to do background checks on prospective employees in much more depth. They may want to do criminal record searches. They may want to find out if the person has any gun permits. Employers are now asking whether they can look into these things. The answers, which include the limitations, have been found under the Fair Credit Reporting Act. For example, you can't go back more than seven years for a number of different types of information.

We're seeing a situation where the law changed right at a point in time where employer interest in this area got heightened. ▫