# Labor and Employment

**EXECUTIVE SUMMARY**

Technological innovations have introduced a host of new legal questions to the employment law area. Thanks to computer and mobile technology, workforces are increasingly virtual and global, creating new tensions in labor law compliance, particularly when it comes to wage-and-hour requirements. Furthermore, the use of social media by employees, employers, and labor unions continues to raise new practical and legal issues.

Our panel of experts from Northern and Southern California discusses these trends, as well as notable cases such as *Dukes v. Wal-Mart Stores, Inc.* (603 F.3d 571 (9th Cir. 2010) *cert granted*, 131 S.Ct. 795 (2010)), *Laster v. AT&T Mobility LLC v. Concepcion*, (584 F.3d 849 (9th Cir. 2009), *cert granted sub nom. AT&T Mobility LLC v. Concepcion*, 130 S.Ct. 3322 (2010)), and *Brinker Restaurant Corp. v. Superior Court* (165 Cal. App. 4th 25 (2008)(now pending before California Supreme Court)). They are Steven Blackburn and Betsy Johnson of Epstein, Becker & Green; Dan McCoy and Victor Schachter of Fenwick & West; Garry Mathiason of Littler Mendelson; Ken Sulzer of Seyfarth Shaw; and Pam Teren of the Teren Law Group. *California Lawyer* moderated the roundtable, which was reported by Laurie Schmidt of Barkley Court Reporters.

**MODERATOR: What are the legal issues addressed by recent wage-and-hour litigation and court decisions?**

**BLACKBURN:** One important decision pending before the California Supreme Court—among several in the wage-and-hour law arena that are going to have significant impact—is *Sullivan v. Oracle Corp.* (557 F.3d 979 (9th Cir. 2009)(question certified to California Supreme Court)). The court will decide whether a California-based employer must apply the California Labor Code to out-of-state employees when they travel into the state on business. The nearly uniform practice, of course, has been for employers to pay employees according to the law of the state in which they reside, even if they spend substantial time in California. The logistical aspects of requiring an employer to apply different wage-and-hour principles to employees who travel into a state for a short period are immense. But it is easy to see good arguments on both sides. For example, looking at laws related to smoking in the workplace, arguably it's reasonable to assume that out-of-state employees who work temporarily in California could be bound by the state's anti-smoking provisions. Should wage-and-hour laws similarly apply, depending upon where the work is being performed?

**SCHACHTER:** *Oracle* is just one case addressing our increasingly mobile workforce. The court in *Narayan v. EGL, Inc.* (616 F. 3d 895 (9th Cir. 2010)) took another approach. That case involved a Texas company with California employees who worked in a California facility. The Ninth Circuit found that for employees located in California, the California Labor Code applies, and it disregarded a Texas choice-of-law provision in the employment agreements.

In the case of *Holliday v. Lifestyle Lift, Inc.* (No. 09-4995 (N.D. Cal. filed Oct. 20, 2010)), executives were charged with creating a policy denying overtime to all non-exempt workers. The California employees sued an executive, a resident in Michigan, in California courts. The court ruled there was personal jurisdiction because there were sufficient contacts between the executive and California through phone calls and visits.

**JOHNSON:** On the flip side, I have a client, a California-based nationwide company that had an employee who relocated back East, where the firm has offices. But the employee still did most of his work in California. In laying off the employee, the question was: Is he a New York employee subject to New York law regarding payout of vacation and termination, or is he subject to California law? The mobile workforce does create issues that the laws were never intended or drafted to deal with.

**MATHIASON:** These cases illustrate that we have employment laws—especially wage-and-hour laws—often manufactured decades ago that are being contorted to fit the current environment. A growing part of the workforce in California may never set foot in California. We have typically applied the law of the physical location of the individual performing the work. Increasingly, technology is making this standard obsolete. With legislative action politically deadlocked, courts are being called upon to balance the new world of work with the original intent of the statutes.

**SULZER:** A number of wage-and-hour issues arise in the telecommuting context as well, particularly as we wait for the *Brinker* decision regarding meal and break periods, and whether they must be "ensured" or "provided."

On the flip-side of this, there is a new kind of class action involving employees who are the least mobile—class actions under the labor code related to "suitable seating" for workers. *Bright v. 99 Cent Only Stores* (189 Cal. App. 4th 1472 (2010)) brought this issue to our attention, and now a plaintiff can sue under the Private Attorney General Act of 2004 (Cal. Lab. Code §§ 2698–2699.5) for recovery. We've seen this in the retail and hospitality industries, but now other industries are concerned about exactly what this trend means. A number of them are looking for an ergonomic defense whereas, in the hospitality or retail industry, there's another defense, which is that if you are customer facing, standing—not sitting—is part of the job.

**McCOY:** You'll also see these cases in white-collar working environments, such as biotech labs. Sophisticated counsel will take these cases into the high tech sector in the same way that overtime misclassification cases evolved from retail and fast food to high tech.

**JOHNSON:** The seating cases are an example of the plaintiffs bar getting more creative with the types of claims they are bringing since the low-hanging fruit has

# ROUNDTABLE

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### PARTICIPANTS

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already been plucked. Section 15 of most wage orders require employers to provide a comfortable temperature in the workplace; that could be the next wave of class action litigation. We're getting into the weeds on a lot of the less visible issues in the wage-and-hour area.

**MATHIASON:** Plaintiffs counsel are mining micro-inequities in the labor code. All of this is driven by the attraction of class action status, the significant costs for litigation, and therefore, the significant settlement value. This will continue until the courts make these kinds of classes hard to certify and they grant more summary judgments.

**TEREN:** As a plaintiffs lawyer and an employee rights advocate, I prefer cases where I'm empathetic about the situation, or where it's an issue that I care about. As a general matter, seating and temperature don't make the cut for me; they also don't seem to have much jury appeal. There are just too many serious abuses I am dealing with in my practice.

**SULZER:** With plaintiffs looking for different types of class actions to pursue, we frequently see claims based on time rounding. Judges are looking closely at that, and restricting the de minimis argument. Plaintiffs use *Rutti v. LoJack Corporation, Inc.* (596 F.3d 1046 (9th Cir. 2010)) to say, "There's no such thing as de minimis in California anymore. If you underpay somebody by two minutes, you owe them two minutes, plus penalties.

**SCHACHTER:** In that regard, an enormous area of potential litigation involves employees checking emails on mobile devices. If somebody does that for a minute here and there, to what extent do these di minimis involvements with the workplace trigger an obligation to pay overtime?

**MATHIASON:** There's a need for a di minimis standard under both state and federal wage-and-hour law. If the employer's policy does not require off-duty email monitoring, 15 minutes would be a reasonable di minimis standard. But there needs to be a standard.

**SULZER:** It is lawful under the Fair Labor Standards Act (29 U.S.C. §§ 201–219). The way the de minimis rule develops may depend on how many of these cases are removed to federal court where resources allow more decisive rulings and federal law as a guide.

**McCOY:** It will be difficult to establish a clear de minimis rule; these are fact-specific cases. The harder cases are those, for example, where a manager has an implied understanding with an assistant about checking email

during off hours, just in case there's something that needs urgent attention. The employer will have a difficult time obtaining summary judgment in those circumstances. What it comes down to is that employers need to train managers about the risk they create for the business when they set these kinds of work expectations for their non-exempt staff.

**TEREN:** On the flip side of cases where the employer is supposedly "stealing time" through time rounding, there are cases where the employer will require an employee to arrive 20 minutes to an hour before their shift, but not allow them to clock-in. That happens in restaurant cases because the employer wants to see what the flow of business is. That's unfair to employees.

**BLACKBURN:** In my experience, one of the most common causes of non-compliance with wage-and-hour laws has been employee preference—they don't want to take lunch because that lengthens their work hours, or they want to check their BlackBerry at home, or very commonly, they don't want to be considered a non-exempt employee. Another case that could have some significant consequences is *Liberty Mutual* (*Harris v. Superior Court* (*Liberty Mutual Ins.*), 154 Cal.App.4th 164 (2007), hearing granted by California Supreme Court, 171 P.3d 545 (Cal. 2007)), which will take up the administrative exemption. Will the court adopt the administrative-production dichotomy? The administrative exemption is a very important one for employers and is very difficult to apply.

**SCHACHTER:** There is some good news: In *Hodge v. AON Insurance Servs.* (2011 WL 311169), workers' comp adjusters were found to be exempt. The court rejected the administrative-production dichotomy, which will become a trend. As courts start dealing with these issues, they are going to appreciate the realities of the workplace.

**JOHNSON:** This makes it difficult to advise clients when they do their internal audits for compliance purposes. When looking at all these job classifications, who should be considered administratively exempted? Even if we have judicial or legislative focus on this, it is still going to be difficult to say with 100 percent certainty that an employee is considered exempt under state or federal law.

**SULZER:** The exemption issue has been around for a good 15 years in the class action area. Another issue that's been around for many years is independent contractors. Because of the economy, a number of companies laid off a substantial number of people and now use more independent contractors. Accordingly, we have seen an increase in class action challenges to independent contractor status. Betsy [Johnson] brought up audits, and many clients are now looking at whether their independent contractors are properly classified.

**MATHIASON:** There is a push toward a free agent-type of workforce, which draws people toward becoming independent contractors with more flexible work schedules. Simultaneously, there is a movement by the government to find revenue. The Internal Revenue Service and U.S. Department of Labor (DOL) have made it a priority to challenge independent contractor status, and 14 states tightened the classification standards. Organizations are going to need to do audits and careful monitoring of their contingent workforces.

**McCOY:** The independent contractor issue is back, although less in the context of class actions, and more in terms of administrative enforcement. In California, the Employment Development Department is aggressively auditing my clients, both randomly, as well as in response to claims for unemployment that contractors make when their contracts end.

**MODERATOR: How do you predict *Brinker* will come out?**

**TEREN:** From a plaintiff's point of view, the ruling that's up for review weakens employees' rights. *Brinker* essentially found breaks are optional; I read the decision as saying that there could literally never be a situation where a class action for a failure to provide breaks could occur. I used to represent employers, and sometimes still do, and the courts need to find a balance between

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**PAM TEREN** launched the Teren Law Group in Redondo Beach in 2008. Her practice is dedicated to employment litigation, representing mainly employees. Ms. Teren has had many jury trial victories, including four trial wins in 2009 and 2010 with collective judgments of $3 million. The *Daily Journal* recognized Ms. Teren as a 2010 Leading Labor and Employment Lawyer. She also testifies as an expert and speaks on employment issues. Previously, she practiced law in Paul Hastings' Employment Law Department and co-founded Abrolat & Teren. **pam@terenlawgroup.com**

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establishing that breaks are important and not making it a policing situation for employers.

**SULZER:** My suspicion is the decision is going to be similar to *Sav-on Drug Stores, Inc. v. Superior Court* (34 Cal. 4th 319 (2004))—discretion is given to the trial judge, but they will not decide the issue for us, other than perhaps in certain contexts.

**JOHNSON:** In the years since *Brinker* has been pending in the state Supreme Court, nuanced issues in the meal and rest break area have arisen that aren't even addressed in *Brinker*. So it is not going to end the litigation on meal and rest periods.

**MATHIASON:** *Brinker* is an opportunity for the state Supreme Court to take a bold stand in favor of common sense and the plain meaning of the statute. Meal- and rest-break class actions cost millions of dollars to litigate, and for that reason alone are often settled. Thereafter, it is common for only 10 to 15 percent of the class to actually make claims. If employers "provide" the breaks and employees voluntarily decline to take them, this is what the Legislature intended. It is demeaning to assume an exempt employee can decide to take breaks, but a non-exempt employee is incapable of making similar decisions. Something is wrong when more money is spent on litigating meal- and rest-break cases than discrimination claims.

**TEREN:** However, what tends to happen is there's an incentive to not take breaks during the middle of the day because the employees want to get their work done and leave. On the other hand, I have represented individuals with low blood sugar who work in restaurants that did not allow them to take necessary eating breaks, and they suffered long-term health effects. The Legislature thinks breaks are important enough for them to include a break requirement in the labor code, so they should be enforced. That requirement must be balanced with the practicality of the enforcement, but just giving lip service about providing a break means that in reality, no one will take a break, and that's a problem.

**SCHACHTER:** There is a problem if there is an abuse of that policy, but it's not a question of ensuring; it's a matter of bad practice. Companies want to provide the opportunity, but they want to do it in a way that their operations can function. I predict *Brinker* will uphold company policies that provide an opportunity for a break, and they will not need to ensure it.

**BLACKBURN:** From both a policy and political standpoint, *Brinker* is teed up to be a gray decision, not a black-and-white decision. I could see the court taking into account all of the various considerations, and applying something akin to a variation of the totality of the circumstances standard that has been a source of great aggravation for all of us over the years, and which could present some profound complications for class certification issues around the question of commonality.

**McCOY:** I would hope that the general rule will be that employers need to provide and not ensure; the rulings from the lower court certainly support that conclusion.

**MODERATOR: What trends are you seeing related to arbitration agreements in the employment context?**

**MATHIASON:** Following *Gilmer v. Interstate/Johnson Lane Corp.* (500 U.S. 20 (1991)), the use of employee arbitration agreements has expanded to cover nearly a quarter of the California workforce. The legal standard for the enforceability of these agreements has been increasingly clarified to include multiple due process requirements. A current question is whether such agreements can preclude class actions or class arbitrations. Applying the Federal Arbitration Act (FAA, 9 U.S.C. §§ 1–16), the U.S. Supreme Court in *Stolt-Nielsen* (*Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (April 27, 2010)), held that the affirmative consent of the parties was needed for class arbitration. Almost no agreements provide for class arbitration, and many require arbitration of disputes as opposed to joining a class action. For wage-and-hour class actions in California, our Supreme Court in *Gentry* (42 Cal.4th 443 (2007)) has limited the ability of arbitration agreements to preclude participation in class actions in various circumstances, including when employees reasonably fear retaliation or lack knowledge of their rights. Arbitration agreements that are unconscionable or exculpatory of unwaivable employee rights are not enforced under California law.

Now, the U.S. Supreme Court has before it *AT&T Mobility*, which tests whether a state court ruling disallowing class action waivers as part of an arbitration agreement is preempted by the FAA. An organization with arbitration agreements needs to keep current with the due process requirements and legislative attempts to preclude their use. A portion of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203; see 18 USC Section 1514A(e)(2)), and a portion of the Department of Defense Appropriations Act of 2010 (Pub. L. No. 111-118; see § 8116), restrict the use of employee arbitration agreements.

**SULZER:** As a practical matter, the California courts seem increasingly hostile toward arbitration agreements. There are appellate cases such as *Trivedi v. Curexo Technology Corp.* (189 Cal. App. 4th 387 (2010)) and *Sonic-Calabasas A, Inc. v. Moreno* (2011 WL 651877) that nitpick at arbitration agreements. On top of that, I see numerous motions to compel arbitration in L.A. Superior Court. Some judges just seem hostile to plainly enforceable arbitration agreements that comply with *Armendariz v. Foundation Health Psychcare Services, Inc.* (24 Cal. 4th 83 (2000)).

**McCOY:** *Sonic-Calabasas* is going to be a key part of any discussion I have with a client about the pros and cons of arbitration. The inability to short-circuit a Berman hearing is significant.

**TEREN:** When it comes to unconscionability, there's no real choice for an employee; if someone wants the job, they're going to sign the agreement. The Legislature needs to add a law that creates a cause of action that says you can sue for not being hired or getting fired for refusing to sign an arbitration agreement if there is to be a real choice regarding arbitration.

Also, the selling point of an arbitration agreement is that it is supposedly faster, cheaper, and more efficient. But all of my cases that go to arbitration take up to three times as long because the arbitrators are so willing to accommodate extensions. Arbitration agreements are a tremendous benefit to employers. They remove virtually any risk of punitive damages, overall damage awards are far smaller, and they permit long delays. Those are serious disadvantages for the plaintiff that in and of themselves would arguably make arbitration agreements substantively unconscionable.

**McCOY:** There's one advantage for the plaintiff with respect to arbitration: The likely unavailability of summary judgment. That's in contrast to a superior court case where simply the threat of summary judgment can significantly impact decisions about settlement and a case generally.

**MATHIASON:** We have found arbitration to be less expensive and faster than traditional litigation. The key is selecting an arbitrator who is actively involved in the administration of the case. Since juries are not involved, awards are more predictable and therefore, the percentage of cases settled is significantly higher than traditional litigation. While juries play a critical role in our system of justice, the U.S. is almost alone in the world in using a jury to decide an employment case.

**BLACKBURN:** Things have evolved to the point where

there is now a substantial question as to whether mandatory arbitration is in the best interest of many employers. Arbitration clauses now include many features that closely resemble the civil litigation processes, which is what employers were trying to get away from in the first place. And there are many disadvantages to arbitration for employers, such as a limited right to appeal and the question of whether you reserve the right to seek appropriate injunctive relief against the employee. My experience has also been similar to Pam [Teren]'s—there's a question as to whether or not it's faster, cheaper, or more fair.

**SCHACHTER:** It seems that California continues to disfavor arbitration, and it's the U.S. Supreme Court decision in *14 Penn Plaza LLC v. Pyett* (129 S. Ct. 1456 (2009)), that is more expansive about the use of arbitration. The California cases that just came down: *Sonic-Calabasas*, *Trivedi*, and *Pearson Dental Supplies, Inc. v. Superior Court* (48 Cal 4 th 665 (2010)), knocked out arbitration for procedural or substantive reasons, or a combination of both. With *Pearson*, the California Supreme Court found an error of law in the arbitration decision, and then set it aside on a statute of limitations issue. I have concerns about whether California courts are prepared to defer to the arbitration process.

**JOHNSON:** I have mixed feelings about arbitration. Generally, if you have a good arbitration provision, it still acts as a deterrent for plaintiffs who don't have strong cases. But the law is still changing, especially in California. In the beginning, after *Armendariz*, every time we had a new appellate court decision, we ran out to review our arbitration agreements to make sure they complied with that decision, only to have the next decision come down. I would also agree that arbitration is not faster or cheaper, and I've noticed a trend where arbitrators, because there is no right to appeal, tend to split the baby.

**MATHIASON:** From everyone's comments, it's clear that arbitration is not strictly a one-sided tool. It is maturing and more arbitrators are becoming familiar with employment disputes.

**MODERATOR: How has social media affected employment law?**

**JOHNSON:** It's safe to say that the technology is far ahead of the law. What we're facing is similar to arbitration, where everybody initially decided it was a good idea to have a policy and they threw one together. What we're trying to do with our clients now with social media policies is ask them, "What is the purpose of the policy, and how are you going to implement it and enforce it?"

We're also facing the hours-worked issues, with employees spending time during the workday on social media, and not necessarily for business purposes. There was a recent study that said that employees spend approximately ten hours a week during the workday surfing social media. Oftentimes, these are the same people who are claiming that they worked an extra half-hour and now they want overtime for it. There's also going to be some issues with privacy on employer hardware, and monitoring employee use of social media—how far can an employer intrude into the non-work-related social media that employees are engaging in? And then there are issues related to obtaining discovery from social media sites, and using it in litigation.

**SULZER:** There was the *American Medical Response* case that recently settled with the National Labor Relations Board (NLRB), where a company's social media policy caused the NLRB to issue a complaint for an unfair labor practice because an employee's use of social media can be considered "protected concerted activity." This case shows that the Obama administration and the NLRB understand that unions intend to use social media to reinvigorate the labor movement. (*American Medical Response of Conn., Inc.*, No. 34-CA-12576 (Nat'l Lab. Rel. Bd.))

**SCHACHTER:** The strong message to our clients from the decision in *City of Ontario v. Quan* (130 S. Ct. 2619 (2010)) is that the social media policies must be communicated clearly. Though *Quan* did not decide whether any expectation of privacy was violated, it determined that, because the company had clearly communicated policies, the employer's search of text messages was "not overly intrusive" and therefore lawful. There's also an interesting decision in *Holmes v. Petrovich Development Co.* (191 Cal. App. 4th 1047 (2011)), where the court of appeal said that employee communications to her attorney on a work computer via work email were not protected by attorney-client privilege.

**BLACKBURN:** Another area I've been interested in is jury selection. People in the courtroom gallery are able to call up all kinds of information on the individual being voir dired using a smart phone. There are some interesting ex-parte contact issues, as well, when attorneys are using social media.

**McCOY:** Social media is going to continue to make sexual harassment law even more complex. It will create a new dimension and new bases for claims in that area of the law. Further, social media will continue to be used as evidence to defend against overtime claims as well as claims that breaks were denied. It's powerful evidence because this activity can all be tracked.

**TEREN:** I use social media for trial preparation, and I get great cross-examination questions from posts made to social media. Often witnesses will get up on the stand and say something completely different than what they had just said on an open Facebook page that I didn't need a password to review.

In terms of a company's social media policies, one thing to consider, especially in a sexual harassment or whistleblower context, is that the policies can be used against the employer. For example, if the policy says that employers are monitoring social networks, emails or texts, and if there is a manager who is texting sexually-charged messages to their subordinate, the implication to a potential plaintiff is that the employer was aware and tolerated the behavior.

**SULZER:** Additionally, what should managers and executives do with respect to their own social media participation? Regulating executives' and managers' use of social media, and educating them on privacy settings, is something that hasn't been discussed nearly enough.

**MATHIASON:** As companies become more global, they also need to look at the local laws. About 70 percent of U.S. recruiters check social media profiles of a job applicant, but in Turkey, for example, this can be a criminal offense.

**MODERATOR: What trends are you seeing with regard to corporate whistleblower retaliation cases?**

**SCHACHTER:** I have seen an explosion of filings in these cases, especially from individuals with financial responsibilities in their companies. The Dodd-Frank provisions offer attractive remedies, including double-back pay, jury trials, rights to immediate reinstatement, exemption from mandatory arbitration, and the direct right to sue in federal court. There is no question we will see increasing litigation in this area.

**SULZER:** This dovetails into the wage-and-hour area. Under section 1102.5 of the California Labor Code, any employee may say, "I didn't get my meal periods," and it may be a weak case. But if the employee complained about not getting his or her meal periods and then was disciplined or fired, now you've got a retaliation case. I have seen more of that type of case recently.

**MATHIASON:** In 2010, the number of charges filed with

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the Equal Employment Opportunity Commission for retaliation exceeded all other categories, including race discrimination. If there was any doubt about the expansion of protections against retaliation, a unanimous U.S. Supreme Court decision in *Thompson v. North American Stainless, L.P.* (131 S.Ct. 863 (2011) ended the debate with its recognition of third-party retaliation claims under Title VII.

**McCOY:** With respect to Dodd-Frank, you now have a significant financial incentive for people to make these complaints—one that does not exist in most other retaliation contexts.

**TEREN:** The reason behind the uptick in cases is the fraud that has happened. Our government is also hurting for money, and it can't afford enforcement; whistleblowers are an effective internal policing mechanism. In California, we have protections for private employees but for many serious issues, public employees are limited to the Whistleblower Protection Act (Cal. Gov't Code §§ 8547–8547.13), which provides a $10,000 fine, and has administrative filing prerequisites, which make these claims less attractive from a plaintiff's perspective. With situations like the City of Bell where there's massive fraud alleged, the government should consider amending the statute to enhance the remedies and to permit common law claims against public entities.

**JOHNSON:** In California, we've had Labor Code section 1102.5 for years; we have a common law claim for whistleblowing in California. Plus various California agencies have whistleblowing and retaliation provisions built in. This is a revived area because of the publicity from Dodd-Frank, and we're going to see an uptick in California state claims for retaliation as well.

**McCOY:** With section 1102.5, we have a higher burden of proof—a clear and convincing standard that the employer must establish, not a preponderance. That's a profound difference from a common law retaliation claim, and it's one that significantly impacts an employer's ability to obtain summary judgment.

**BLACKBURN:** There are a number of developments in retaliation cases that are becoming a danger area for employers. Garry [Mathiason] alluded to *North American Stainless* that expanded the range of people who could claim to be victims of retaliation. There is also *Kasten v. Saint-Gobain Performance Plastics Corp.* (585 F.3d 310 (7th Cir. 2009)) where the court is exploring the range of formality that complaints can take—such as in a passing remark to the supervisor—does that turn a person into a potential victim of retaliation? Have they engaged in protective activity? The decision in *Kasten* could provide some interesting guidance on what a person needs to do to trigger the retaliation protections of a statute.

**MODERATOR: What additional policy or trends are you watching?**

**SULZER:** I see more "corporate campaigns" by the labor movement. Unions are using wage-and-hour class actions as a part of an organizing effort. On the employer's side, companies are using social media during union negotiations to counter claims made by unions.

**JOHNSON:** This is the calm before storm, as far as new legislation in California. Next year we're going to see a lot of employment legislation and increased enforcement. It's going to be important for employers in California to take the time to do their internal audits, to look at their policies and practices to make sure that they're in compliance. It's always easier to tweak or add to a policy that's generally compliant then to create one from whole cloth when an amendment or new law comes into effect.

**MATHIASON:** President Barack Obama's agency and department appointees have laid the foundation for the launch of regulatory initiatives that will change workplace legal compliance more so than any other force in the last 100 years. From DOL recordkeeping requirements, to the new Health Care Regulations, to NLRB rulemaking on union access, every agency and department is launching initiatives. Monitoring, responding, and complying will be the central challenge of employers for 2011 and 2012. On the state level, there's also a trend toward anti-bullying initiatives. Research suggests that it's more prevalent than sexual harassment. It's a slippery slope because the definition of bullying is unclear. But employer policies can do a lot to prevent these claims.

**TEREN:** The trend in jury verdicts is that there's a recent uptick for plaintiffs. It seems that people currently are more empathetic toward plaintiff cases. I find that juries in general have been much more open to listening to a case and awarding something significant.

**SCHACHTER:** *Dukes v. Wal-Mart*, the largest class action lawsuit in the history of employment law, will define in a meaningful way the parameters of class actions with respect to discrimination and wage-and-hour matters. This sex discrimination class action is unprecedented in its size, and depending on how the Supreme Court rules, it could be a great boom or bust for large class actions. And yet, in California, there's *Tien v. Tenet Healthcare Corp.* (192 Cal. App. 4th 1055 (2011)), where a class asserting wage claims under the labor code was decertified because the court said plaintiffs have to show actual, individualized injury. While we have some conflicting trends, I predict that we're going to see more decertifications if the California courts require individualized proof. Also, we're going to see the continued growth of mediation and self-mediation, where plaintiffs and defense counsel take a step back to figure out how to resolve disputes without formal litigation.

**BLACKBURN:** What's of interest to me are the efforts in several states, most famously in Wisconsin, to pull back on the collective bargaining rights for public employees. This has the potential to change the labor relations climate, and could cast a large shadow over union activity in the private sector. Alternatively, it might reinvigorate the union movement, extending over to the private sector.

**McCOY:** As hiring picks up, more people are moving around, and that typically means fights over the enforceability of non-competes and non-solicitation clauses. I'm fascinated by *Silguero v. Creteguard, Inc.* (187 Cal. App. 4th 60 (2010)), where a California court created a new tort claim against an employer that either refuses to hire or terminates an individual subject to a non-compete that is not enforceable under California law because the employer doesn't want to have a fight with a competitor over enforceability. It's a dangerous case that could potentially spawn a lot of litigation.

Employee mobility has certainly impacted this area of the law. Employees can come into California from other states where they were subject to non-competes, and/or they have feet in two different states, or are constantly on the go. The choice-of-law issues in this area have always been significant, but they'll become even more significant as the workforce continues to become more mobile and more virtual.

**MATHIASON:** One trend that encompasses all we've discussed is the rapid growth of the contingent workforce. Projected to reach 25 to 35 percent of the total workforce, they present legal challenges in the application of non-competes, privacy standards, union bargaining unit determinations, wage-and-hour requirements, and every major area of employment and labor law. These developments will help shape the practice over the next decade.