ROUNDTABLE

Employment Law

EXECUTIVE SUMMARY

Coming in the midst of the recession, some recent government actions and court rulings on employment issues have significant implications for both employers and employees. President Barack Obama signed the Lilly Ledbetter Fair Pay Act of 2009, which presents new challenges for employers and attorneys. Meanwhile, employers must mull the impact of the Internal Revenue Service's plans to randomly audit thousands of employers for possible misclassification of employees as independent contractors. Our panel of defense and plaintiff employment experts discusses the effects of these government actions as well as some recent influential cases such as the California Supreme Court rulings on *Hernandez v. Hillsides, Inc.* and *Edwards v. Arthur Andersen,* and finally, the U.S. Supreme Court's *Ricci v. DiStefano* decision. They are Mark Romeo of Crowell & Moring in Irvine; JoAnna L. Brooks and C. Christine Maloney of Jackson Lewis in San Francisco; Liza Ring of McKesson Corporation; and Ken Sugarman of Rudy, Exelrod, Zieff, & Lowe in San Francisco. *California Lawyer* moderated the roundtable, which was reported by Krishana DeRita of Barkley Court Reporters.

MODERATOR: In *Hernandez v. Hillsides, Inc.* (47 Cal. 4th 272 (2009), the California Supreme Court ruled that employees have a reasonable expectation of privacy in the workplace, but it doesn't prevent employers from conducting some hidden surveillance in an employee's office for legitimate business concerns. Has this changed the landscape for employers?

RING: It didn't change the law but clarified it. Most employers in California and elsewhere have known that they should use surveillance equipment only in limited circumstances when there's clearly evidence of an issue that needs resolution. *Hillsides* told us it's okay to engage in certain limited amounts of surveillance. However, it was really important that the employer didn't overreach. They had the camera on only at night, not during women's workday. We may have had a very different outcome if it were 24-hour surveillance.

ROMEO: The location of the surveillance was a key factor in the court's reasoning. The employer didn't place the camera in a bathroom—or in another place where you would expect to have a high degree of privacy—but in an office, albeit with a door that could be locked.

MALONEY: Probably *Hillsides'* biggest impact is it holds that employers don't have to prove they used the least intrusive means possible to conduct covert surveillance. It doesn't mean they should ignore less intrusive means—the manner of surveillance will always be relevant—but at least it's not a required element of the employer's case. Any employer seeking to do covert surveillance in a semi-private office must proceed very carefully. *Hillsides* makes clear that it's not unlawful to do so, but you've got to be conscious of scope. And the employer in this case did so by focusing on the computer where the alleged misconduct was occurring and not the broader office, only during non-work hours, and didn't tape the employees doing anything that might be deemed highly offensive like changing clothes.

> **"*Hillsides* makes clear that it's not unlawful to do covert surveillance in a semi-private office, but you've got to be conscious of scope."** ***—C. Christine Maloney***

ROMEO: In this case, the employer's ability to articulate strong countervailing concerns had a lot to do with the court's decision. Stopping the viewing of pornographic material in the workplace, which was a home for abused children, was a key factor in finding the placement of cameras in the workplace to be constitutional. Obviously, this factor won't exist in all workplace environments.

SUGARMAN: Definitely a key take-away was whether an employer has a burden to show that less intrusive means could've been used. What the California Supreme Court left undisturbed were cases imposing a different standard on a government agency, so that a government agency may still be required to prove that less intrusive means were not available, and suggesting that even a private employer must show that less intrusive alternatives were not available where clear invasions of central, autonomy-based privacy rights are at issue. The court also said that the existence of less restrictive alternatives is still relevant generally, in that the means of the privacy invasion must be reasonable, citing previous California Supreme Court cases for this standard. The court really pointed us back to earlier precedents on the less intrusive means issue rather than say anything new about it. Significantly, in *Hillsides,* the Court found there was in fact a privacy intrusion, even though the plaintiffs themselves were never actually videotaped.

MODERATOR: Railroad workers sued Los Angeles' MetroLink, for invasion of privacy by installing cameras inside a control cab. MetroLink wants to do so because an accident killed 25 people, wherein the employee running the train was allegedly texting just before the crash occurred. Do the workers have a claim? (See *Bhd. of Locomotive Engineers & Trainmen v. So. Calif. Reg'l Rail Auth.,*

No. 09-07601 (C.D. Cal. filed October 20, 2009).)

MALONEY: The obvious difference with *Hillsides* is that MetroLink isn't doing anything covertly. They gave employees notice that the cameras would be installed and be in plain view. The *Hillsides* court expressly stated that nothing in that decision affects the employer's ability to install cameras when employees have been advised that they may be videotaped. In such a circumstance, employees have very diminished expectations of privacy, if any. Clearly in MetroLink, the employers have legitimate interest in passenger safety and there's a history of misconduct in the form of employees texting when they should be paying attention to passenger safety.

SUGARMAN: The complaint in the MetroLink case doesn't actually allege any breach of privacy claims squarely, so it's not the same as *Hillsides*. The case concerns issues of violating the collective bargaining agreement. There's a Fourth Amendment due process claim, which appears to go less to the core issue of privacy than to a procedural due process claim. If privacy issues were squarely implicated, one would have to ask what sorts of private activities could employees be doing while they're actually operating the train, at least what sorts of activities we're willing to protect. On the issue of using the least intrusive means, MetroLink should make sure that the cameras are turned off when the trains are not being operated.

MODERATOR: What about employers accessing employee information on Facebook, MySpace, YouTube, and Twitter?

BROOKS: That's different from *Hillsides* because networking sites are public forums, and employees posting there have already subjected themselves to a certain degree of scrutiny. Employers can access those sites to analyze hiring and retention decisions. However, offensive and inappropriate postings are more often brought to an employer's attention through employee complaints. Employers have a right to investigate complaints about misconduct involving public communications.

MALONEY: But that depends on how the employer gets to that information. For instance, this summer the city of Bozeman, [Montana] gained notoriety for putting in place a hiring procedure requiring all applicants for city employment to disclose their user names and passwords for any web pages, blogs, or social networking sites, so that the city could investigate those in the course of the background check. It became a national controversy, and the city council has since stopped. In Bozeman, the employer was trying to go behind the curtain to see what's out there and not necessarily available to the public. Alternatively, some employers have gained access to employees' social networking sites by deception, such as asking other employees to give them access. This practice is fraught with peril. (See http://blogs.wsj.com/digits/2009/06/23/montana-town-stops-asking-applicants-for-facebook-logins/).

"It's better to err on the side of classifying someone as an employee, or to work through a temporary employment agency, versus misclassifying the person as an independent contractor." ***—JoAnna L. Brooks***

RING: Like the recent Houston's restaurant case about an employer accessing an employees' restricted social networking site (*Pietrylo v. Hillside Restaurant Group,* 2:06-cv-5754). Employers must be aware of California Statute Labor Code Section 96(k), which says they can't discipline or terminate employees for off-duty conduct. Some employers readily accept that, and others may be like the city of Bozeman. They really shouldn't be looking at that stuff and taking it into consideration in making promotion, discipline, or termination decisions.

MODERATOR: Is the case of *Quon v. Arch Wireless Operating Co., Inc.* (529 U.S. 892 (9th Cir. 2008)) different because the employer was the police department?

MALONEY: It didn't matter much that the employer was a police department. The importance of *Quon* is that you may have a beautiful formal policy that says employees may not use employer-provided Internet, email, or other communication systems for anything but business purposes. But if you give contrary instructions to that formal policy you then create a reasonable expectation of privacy for the employees. In that case, a command officer in the police department had given contrary instructions and said basically, "Don't worry about it. As long as you pay for your minute overages, nobody cares what you write." So his verbal instructions overrode the policy. I think that would apply to any employer.

BROOKS: And it also applies to social networking sites. Employers must avoid conflicting messages about the right to privacy. They should tell employees that they monitor usage of these sites, particularly where the company encourages usage of social networking as a marketing tool. The employer must give clear instructions to employees about their obligation to comply with company policy when communicating in the virtual world. If the employer were to give conflicting instructions as was the case in *Quon,* the employer may have difficulty justifying its review of the content and enforcing its policies.

SUGARMAN: As an advocate for employees who gets calls about adverse employment actions, one of the first things I do during an intake is to find out what activities the employee engaged in that might be protected. What protected categories might you be in? What information did your employer have about you or your activities? The more an employer goes out and finds information about who workers associate with, what kind of things they say, and what they're interested in, the more the employer opens up ground for inferences to be drawn that its real motivation, or part of it, for taking an adverse employment action was some protected activity or characteristics that it would've learned about when monitoring the employee's online activities.

ROMEO: I've seen this come up in two different contexts: One is the employer wanting to ensure employees are actually working during the workday, as opposed to surfing the Internet. If that's the employer's objective, the employer doesn't need to actually access the content of the person's Facebook post or [Twitter] tweet. It's just a matter of unobtrusively finding out whether the employees were on the Internet. But if you have a public company, and a disgruntled employee posts the company's trade secrets on a website, or libels the company in a Facebook post, then the employer has a higher chance of lawfully gaining access to the content of the electronic postings.

MALONEY: An employer has to show that any off-duty conduct has some nexus to the job. A lot of times, off-duty conduct does have a nexus, as Mark [Romeo]

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pointed out. Another example would be employees who bad-mouth or say discriminatory and harassing things about their co-workers on their blogs or Facebook pages. The employer has a legitimate interest in controlling that. In that case employers can develop policies that attempt to regulate blogging activities related to the job. It must be made clear that employees shouldn't disclose confidential insider information on their blogs, that they're expressing their own views and not that of the employer, and when, if ever, they may use company trademarks or insignia on their personal websites.

MODERATOR: The IRS recently announced it would randomly audit 6,000 U.S. employers for possible misclassification of employees as independent contractors. What are the implications for a company that is found to misclassify, such as paying unpaid employment taxes to the IRS or claims by the Employment Development Department?

BROOKS: If you misclassify someone as an independent contractor, you're potentially violating all the requirements of the Labor Code applicable to employees. Depending on how the employer pays the individual, the employer could owe back wages for failure to meet the minimum wage and overtime requirements, or also owe wages for missed meal and rest breaks. There are other statutory penalties triggered by the failure to properly pay wages owed in a timely manner. ERISA liability is another significant risk for the failure to provide benefits offered to employees. As you mentioned, the EDD and IRS will also come looking for you. Back taxes and penalties could be owed. So there's an enormous risk for employers who misclassify.

In California, we start with the presumption that everyone is an employee. Basically, I advise employers: If it walks like a duck, and quacks like a duck, it's probably a duck. If an employer needs someone on a temporary basis to perform the same type of work as its regular employees, it's better to err on the side of classifying someone as an employee, or to work through a temporary employment agency, versus misclassifying the person as an independent contractor.

RING: A lot of employers turn to using independent contractors to get around what's commonly called a headcount issue. In the time that I've practiced law, some of the angriest responses I've received from clients have been about independent contractor issues. It's just very hard for people to grasp.

BROOKS: Unfortunately, due to the economic downturn, some companies turn to reclassifying employees as independent contractors as a means to cut costs. Whenever I receive a call from a client contemplating such a move, one of the questions I ask is, "What has changed? Is the employee doing something different than previously?" If the answer is, "No, we're just trying to cut costs," then more likely than not there's a potential misclassification issue.

RING: If the IRS sees a 1099 and a W-2 from the same employer in the same year, they're going to look into it to see if the employee was misclassified. California is usually the leader in employee rights, but Massachusetts has a statute that defines the term "independent contractor" and provides for damage awards to individuals if they've been misclassified. In one case, *Somers v. Converged Access,* No. SJC-10347 (Aug. 21, 2009)), the misclassified individual was entitled to damages, even though the employer

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proved that he ended up getting paid more than he would have as an employee. California doesn't have a similar statute or even a really clear independent contractor definition. Instead, it applies its own version of IRS's 20-factor test.

BROOKS: It's true. California has relied on the definition of employee in FLSA [Fair Labor Standards Act] and also on the 20-factor test. It'd be very helpful if we had a clear guideline on what's an independent contractor.

RING: Or maybe not, if we had a treble damages provision in that definition like the Massachusetts statute.

SUGARMAN: I have many colleagues who have done these cases. The technical and the liability consequences of independent contractor misclassification are fairly straightforward. You can dig through the provisions in the Labor Code one by one and that's where the employer's problems are going to be. Expense reimbursements are a big issue. You have employees paying for uniforms, tools, equipment, car insurance, things of that nature. So damages really can add up in terms of expense reimbursement liability.

ROMEO: We're seeing a rise in mileage reimbursement cases, filed under California Labor Code Section 2802; they're usually filed with claims for unpaid "travel time" wages. These claims can be a very big issue to companies of all sizes, adding up to tens of millions of dollars if you have a work force that needs to be out on the road for one reason or another. Questions in these cases center on what control an employer exercises over its workers while they're traveling and when employees should be deemed to be working, compared with their normal commute time. From a tax perspective, employers may be assessed 1.5 percent of the employee's federal income tax liability and 20 percent of the amount that should've been withheld for FICA taxes. Employers will be liable for state income tax amounts not withheld unless they can show the employees appropriately reported income and paid taxes due.

MODERATOR: President Obama in January signed the Lilly Ledbetter Fair Pay Act of 2009, which supersedes the Supreme Court decision in *Ledbetter v. Goodyear Tire* (529 U.S. 618 (2007)). Now the statute of limitations begins not only when a discriminatory compensation decision or practice first occurs, but also each time wages, benefits, or other compensation is paid. So what must employers change in order to comply with the act?

BROOKS: Employers must take a more proactive stance in monitoring promotions and pay increases, and continue to track and audit routinely to avoid compensation disparities. You have to be careful how you do these types of audits in order to preserve the attorney-client privilege. But you really have to take a closer look at what your organization is doing and routinely monitor those decisions to avoid claims.

ROMEO: First, standardize merit increases by placing restrictions on management concerning the amounts of such increases. Also, conduct a thorough compensation analysis, which uses statistics to find pay disparities in terms of race, gender, and other protected categories. However, to ensure that such analysis isn't subject to disclosure later on, have HR or the business folks make a specific request to legal counsel to have a statistical regression analysis performed. Further, adopt a holistic approach to the compensation process. This means employers should look at the compensation analysis beginning during the interview process when you're hiring people; compare the salary being requested by the would-be recruit to those of incumbents performing similar jobs. Increasingly, courts are questioning the argument that the employer had to pay the incoming Hiree A, for example, 20 percent more than similarly-qualified incumbents because he was already making more with the former employer, so we had to pay Hiree A that disparity to get him on board.

"Standardize merit increases by placing restrictions on management concerning the amounts. Also, conduct a thorough compensation analysis, which uses statistics to find pay disparities in protected categories." ***—Mark Romeo***

RING: Because he was the better negotiator.

ROMEO: Exactly. Studies have shown that men tend to negotiate more than women, and so the courts are saying that the employer shouldn't be able to rely on that to justify an otherwise material disparity in compensation.

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SUGARMAN: This sounds easier than it is, but being as transparent as possible with employees about what's happening probably makes sense. This includes more transparency about the decisions in their own cases and systematic practices that are affecting people's compensation, pay scales, pay criteria, or classifications.

As an advocate for employees I'm certainly going to argue to keep laches defenses as narrow as possible. But laches defenses are going to be aggressively pursued now. And if there's been transparency and an employee has been able to pursue as many trails as possible and tells me about these facts, I may not only see real problems with the merits of the core discrimination claim, but also the heightened potential for a successful laches defense arising from the fact that the employee was armed with the facts and continued not to press any claim.

ROMEO: And if employers document the compensation decisions along the way, extending document retention policies, a plaintiffs lawyer or the EEOC will probably be less likely to pursue a discrimination action based on a disparity in pay.

BROOKS: Transparency is great in theory, but there's the difficulty of privacy. In California, our employees are very aware of their privacy rights, and so you might be able to discuss with employees the decision-making system but not really be able to divulge to them the decisions that were made. You're still going to have a problem, such as what happened in the *Ledbetter* case, where the employee may not really have knowledge of the disparity in compensation until a much later point in time.

RING: You may not be able to have transparency with respect to details about other people, but an employer can, and many employers are moving in this direction, having transparency about the process. For an example, you can tell employees, "If your rating is in the middle, your merit increase won't be more than X percent." If that seems like too much information, perhaps the employer can reassure employees that everyone is subject to the same merit increase limits, and that nobody is going to be an outlier.

Many employers have a very metric-based system, where the manager is supposed to put in a lot of data that could be useful in defending a case in the future. Of course, it's not effective if the employer or manager just says, "Brad is a great guy, and Debbie whines a lot" and she gets the lower increase and he gets the higher one.

SUGARMAN: To turn to the doctrinal aspect of the Ledbetter Act, one area that's been flagged for concern by employer advocates is that it covers not just discriminatory compensation decisions, but also "other practices" affecting compensation. It's inevitable that there's going to be a fair amount of litigation on the issue of what's "other practices."

Many practices feed into employee compensation. Who gets the training opportunities? Who gets the opportunity to do extra credit, so to speak? Who gets the face time with the person who matters? The courts are probably going to try to stake out a place in the middle of the spectrum so that not every practice or act that has some indirect bearing on compensation is going to come within the Ledbetter Act, but many practices that bear more directly on compensation will.

> **"To turn to the doctrinal aspect of the Ledbetter Act, one area that's been flagged for concern by employer advocates is that it covers not just discriminatory compensation decisions, but also 'other practices' affecting compensation."** ***—Ken Sugarman***

MODERATOR: Does the Lilly Ledbetter Act apply to both intentional discrimination and disparate impact claims?

SUGARMAN: Some interesting and complicated issues are likely to arise out of how disparate impact claims are going to play out in this context. I don't see why, on the face of the statute, disparate impact claims wouldn't be covered. Employing practices that have a disparate impact is a form of discrimination. So when you see the words "discriminatory compensation decision" or "other practice" in the Ledbetter Act, that language encompasses the decision to use a practice that has a disparate impact and the application of that practice.

ROMEO: I'd argue that disparate impact as it has been historically defined—for example, a facially neutral policy or test that has an adverse impact on one particular group of protected workers—would not have a high degree of applicability to a claim that the employer has paid one class of employees, such as males more than the females, or the Caucasians more than the other races in the workplace. Such practice is arguably not facially neutral, but more targeted/intentional conduct, which leaves some room to argue that it may not be appropriate for a disparate impact analysis.

RING: It remains to be seen. *AT&T Corp. v. Hulteen* (129 S.Ct. 1962 (2009) is the first Supreme Court case to address the Ledbetter Act. It was a pregnancy discrimination case, and the plaintiff, who went on maternity leave before the Pregnancy Disability Act (42 U.S.C. § 2000e (k)) was passed, didn't get the post-PDA service credit she thought she was entitled to. She argued under Ledbetter that she should've received that credit, but the Supreme Court disagreed. The Court held that it wasn't illegal when the company did it, and so she's not entitled to go back and get the additional credit. At least that's one small corner that's been clarified.

MODERATOR: Disparate impact also brings us to *Ricci v. DiStefano* (129 S.Ct. 2658 (2009)), wherein the U.S. Supreme Court held that an employer who decides to disregard a test, because a statistically significant percentage of a particular race or sex did poorly on the test, is engaging in intentional discrimination even if the favored group is in a protected class. Can employers be more confident now in backing a test result that shows some disparate impact as long as it's objective?

MALONEY: The ruling doesn't necessarily give them much comfort in that regard. *Ricci v. DiStefano* is very much a damned if you do, damned if you don't decision. Clearly the employer thought it was trying to do the right thing when it saw the statistical disparities in the test results. The Court has imposed a very vague, very high standard for an employer to be able to throw out test results that show that kind of statistical disparity. There's no real standard articulated. It seems that in order to be able to throw out the exam results you have to show you'd lose a disparate impact case. So what do employers do to deal with the *Ricci* decision? I think the answer is test design. You work on developing a better test, one that truly measures job-related requirements.

RING: But didn't the employer—the New Haven Fire Department—validate the test?

SUGARMAN: An employer that's doing its absolute best effort to figure out if it's designing proper tests doesn't just phone it in. While the New Haven Fire Department did real work on some of the front end aspects of designing or deciding on the test they were going to use, they were less thorough and thoughtful on some of the back-end issues—for example, who they had review the test and how they were going to use it. There also was the issue that they chose to give the written part of their test 60 percent of the weight and the other part of the test 40 percent. They made that critical decision on their own. In hindsight, an employer needs to assume that every step of the process in developing your test and using it is going to be a critical decision point.

ROMEO: First, before using any type of qualifications-based test, consider whether it's the best way to measure the skills, knowledge, and qualifications needed to succeed in the job. Second, explore if the proposed test's passing rate and cutoff scores won't have a disparate impact one group of employees versus another. Third, measure how employees, who are doing well in the job, perform on a proposed test before rolling the test out more globally.

SUGARMAN: Fire departments around the country have developed a new approach to figuring out the most qualified candidates by having assessment centers that put people through a process of role-playing, answering questions, and responding to situations. So the New Haven Fire Department was actually out of step with some more current practices in its own industry. But at the end of the day, the core challenge that employers face after *Ricci* is the same challenge they faced already: It really can take a lot of time and resources to make sure you're not about to start using criteria for hiring and promotions that are going to create a disparate impact without any justification that can withstand scrutiny.

ROMEO: And if the test has already been administered, if you didn't follow the three other rules to begin with, and you think you could be in trouble, don't just adjust or change the cutoff scores. Also, don't throw out the results or refuse to use the test or device unless you're prepared to show you would lose the Title VII (42 U.S.C. §§ 2000e-2000e-17) discrimination suit.

The Court suggested that to satisfy the strong evidence burden, the employer has to show the test was unrelated to the job for which it was used, or didn't serve an important business need, or that the employer ignored ways of selecting employees that would've met the needs with a less discriminatory effect. So that's an incredibly tough row to hoe.

MALONEY: Written tests are often the most vulnerable to challenge. Practical skills tests may well be a better measure of job success.

SUGARMAN: The New Haven Fire Department has now been sued by one of the African American firefighters—sort of the other shoe dropping. So they're now being sued for the disparate impact. It will be interesting to see how that goes. I believe the plaintiff in the case scored the highest in the department on the non-written part of the fire department's test, so the issue of why the department is giving 60 percent to the written part of the test is front and center.

MODERATOR: While *Edwards v. Arthur Andersen* (44 Cal. 4th 937 (2008)) rejected the narrow restraint exception to California's prohibition against covenants not to compete, it didn't directly discuss exceptions such as sale of business, dissolution of partnership, and trade secrets. What's the potential impact of the decision on these exceptions in California?

ROMEO: One of the things *Edwards* did was eviscerate the distinction between the narrow restraint doctrine that the federal courts—at least in the Ninth Circuit—had adopted à la *IBM v. Bajorek* (191 F.3d 1033 (9th Cir. 1999)). It left open the so-called trade secret exception and whether the protection of the employer's trade secrets was a legitimate basis to uphold an otherwise unlawful restraint on competition. In *Retirement Group v. Galante* (No. D054207 (Cal. Ct. App. Aug. 20, 2009)), the court reasoned there's no trade secret exception under California Business & Professions Code Section 16600, but rather the prohibition is based on the Uniform Trade Secrets Act. Post-Edwards, a straightforward noncompete isn't going to be upheld. What we run into day in and day out is whether nonsolicit clauses (both of customers and employees) are valid. You go back to *Thompson v. Impaxx* (113 Cal.App.4th 1425 (2003)), and the court explaining that the enforcement of a nonsolicit of customer provision depends on the identity of the customer rising to the level of a trade secret.

RING: It's very, very hard for most employers to meet that standard. Many employers don't treat their information confidentially enough to be able to prove that it's a trade secret. Often, many employees have seen the information the employer is trying to protect. Many employers either don't know how or don't have the time to take all the precautionary steps. For example, if you're talking about customers at a sales meeting, does the sales manager make sure everybody turns back in any information that was handed out? Probably not. Does the company stamp everything "confidential"? Probably not. Later, if you walk by the car of someone who was at that meeting, you might see the document lying face up in their back seat. It's hard to convince a court your information is a trade secret when you don't treat it like one. That's a practical challenge for a lot of employers.

ROMEO: Hopefully, to protect their IP, employers are reviewing their proprietary information agreements, making sure they're up to date. Employers also should be training their higher-level personnel on best practices to protect trade secrets from walking out the door when an employee leaves to go work for a competitor.

"It's hard to convince a court your information is a trade secret when you don't treat it like one. That's a practical challenge for a lot of employers." ***—Liza Ring***

BROOKS: It's also important for employers to provide training to management about California's general rule prohibiting noncompete agreements. Managers are usually the first to learn that an ex-employee is now working for a competitor and interacting with the employer's customers. Many managers, particularly those working for employers headquartered outside of California, think they can enforce noncompetes and nonsolicits more aggressively than what is allowed in this state. Employers need to ensure managers avoid conduct that might trigger claims for unlawful interference with the former employee's right to work for a competitor.