ASSOCIATION OF CORPORATE COUNSEL

TITLE: **401 (k) Fees – An Update on Regulatory Actions Affecting Service Providers**

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PRESENTED BY: ACC Employment Law & Labor Committee

SPONSORED BY: **Jackson Lewis LLP**

FACULTY: **JoAnna Brooks,** Partner, Jackson Lewis LLP

MODERATOR: **David A. Hitchens**, VP – Human Resources Counsel, LandAmerica Financial Group, Inc.

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Operator: Welcome to this ACC webcast. David, please go ahead.

David Hitchens: Good afternoon, everyone. Good morning, depending on where you are today. My name is David Hitchens, and I am the Subcommittee Co-Chairman on the ACC Employment & Labor Law Committee. I am Vice President, Human Resources Counsel for LandAmerica Financial Group in Richmond, Virginia, and I am delighted to be the moderator for today's webcast.

I first want to address couple of logistical items then I'll have the pleasure of introducing today's issues. The title for today's webcast, Top Ten California Employment Law Issues.

The intent of this program is to highlight some of unique challenges employers face in California whether we are talking about a particular statutory or regulatory scheme, such as California's owners regional requirements or topper in position of more generally applicable Federal Laws Immigration Enforcement.

The program is really designed there is an overview for those in-house counsel like me, who are not California lawyers but whose clients have presence in California, about one-third of LandAmerica is now 10,000 plus employees are located in California. But it accounts for about 80 percent of our employment litigation docket. So I am well aware perhaps painfully aware of the difficulties presented there.

For those of you, who are California lawyers however, there will certainly be areas we plan to explore with a little more depth, particularly in the areas of regional law and class action litigation, which have seen some major developments past couple of weeks.

We would really like to start presentation – interactive as possible, it will be a last question online. To do this you have your screen open, you should have at the bottom left hand corner, a box, which says chat. Please type in your questions there and click send. You can enlarge that box if you need to. I'll see your questions there submitted and I'll try to get them to our speaker as she makes away to the slide.

Please understand that depending on the number of questions submitted, we may not have time to get to all of them today. We will provide answers to your questions and post them on the committee Web site.

Another matter, which is very important to the ACC and the Employment Labor Law Committee, is the evaluation form, which you are ask to complete. Middle of the left hand side of your screen you should see a link to a webcast evaluation. We'd very much appreciate it if you take a few moments to complete that evaluation form at the end of today's presentation.

So they are reviewed and used continually to improve these webcast they can remain in superior resource available from the agency. Please note that this webcast is being recorded and will be made available on the ACC Web site. And again, if you have technical difficulties during the session please e-mail ACC webcast at commpartners.com, note that there are two M's in commpartners.

That being said, allow me to introduce our presenter and we'll go from there. We are delighted to have with us today JoAnna Brooks, a partner in the San Francisco office of Jackson Lewis, would be speaking to us about how does she uses California Employment Law.

JoAnna has extensive experience specializing in the defense of employment disputes, including, harassment, discrimination, breach of contract, wage and hour and unfair business practices.

She routinely works on complex multi-plaintiff and class action matters. JoAnna also represents employers in matters before the California Labor Commissioner, California Unemployment Insurance Appeals Board and California Workers' Compensation Appeals Board.

In addition to her litigation practice, JoAnna spends considerable time counseling clients regarding preventative measures to avoid litigation. She assists employers in the formulation of personnel policies and procedures. She has conducted numerous training seminars on prevention of discrimination and harassment in the workplace, personnel management and wage and hour compliance.

JoAnna joined Jackson Lewis in 2003, prior to which she worked as an associate specializing in the defense of employment matters at Wilson, Sonsini, Goodrich and Rosati. She received her J.D. from the Georgetown University Law Center in 1995, and her B.A. in Political Science from Purdue University with Highest Distinction, 1992.

While attending Purdue, she was a member of the Dean's List for eight consecutive semesters and honored as a student in the top one percent of her class. At the Georgetown University Law Center, JoAnna received numerous accolades, including an American Jurisprudence Award, Moot Court honors and Dean's List honors.

Welcome JoAnna and now I'll turn it over to you.

JoAnna Brooks: Thank you, David. Heather, could you advance the slide please. I want to thank everyone for joining us this morning or this afternoon depending on where you at, and as David stated a California can be challenge from compliance prospective.

The California landscape is constantly changing and from an employment lawyer standpoint that can be very exciting but certainly from an in-house perspective, it can be very difficult to stay on top of.

Purpose of this program is to ensure that you are always one step ahead. We're going to go through the top 10 employment low trend in California based on what we're seeing in the last few years. And keep in mind there are so many different areas of employment law in California that we could cover as part of this program that we really selected some of the high point that we're encountering on most frequent basis, and as David mentioned, we really want to encourage your participation. So feel free to inter-check questions as we're going to the material and we will

attempt to respond to as many questions as possible and also the time at the end to respond as well.

So the first top 10 issue that we're going to discuss is discrimination and harassment at workplace, and for everyone who does business in California, you are no stranger probably to the fact that you have to comply with those Federal Laws and State Laws with regard to prevention of discrimination and harassment in the workplace.

California really isn't much different than the other state in that regard although we have some additional protections in California. For example, we have protections based on sexual orientation and general identity and a protection under disability laws or a little bit broader than they are from the federal standpoint.

So individuals with serious medical conditions could be covered under California law, which is much broader as I indicated in comparison to the American disability's act and many state laws. But what we're going to talk about today is one of the trend that we're seeing and I participated in another program earlier this year, where the head of the EEOC district office here in San Francisco built mayoscope and at that presentation, he talk about some statistical information that was quite interesting, which I'd like to share with you today.

One another comment that he made was that – we're seeing this unusual increase in teenager sexual harassment claims out here in California. Particularly in the retail sector and the restaurant industry, there tends to be more workforces in the teenager range versus some of the more complex workplaces office environment high-tech banking industry. And in those cases at the EEOC is seem, there are typically situations where someone who is under 18 being supervised by an older working and age is – age range of 30 to 40 years of age. And they are seeing sort of a pattern and practice of situations where teenagers are claiming sexual harassment has occurred.

I don't know, this is just something new to California or it just becoming more prevalent because of an awareness of sexual harassment prevention policies and therefore, we're seeing an increase incidence of people starting claims. But in certainly you know warming and disturbing trend that we're seeing in California.

The other trend that we're seeing is a 14 percent increase in same sex harassment claim. So as I mentioned earlier, California has protection based on sexual orientation. We also have protections obviously for general discrimination in the workplace and we also have protection based on general identity, which might include transgender or cross-gender individual.

But the type of claim that we're seeing as you know a claim where two individuals of the same sex are involved in harassment scenario and so you know unlike perhaps other states that don't have a greater prevalence in this area because perhaps the protection are not as expensive. We are seeing quite a bit of same sex harassment claims asserted in California.

And then we also have a 15 percent increase in age discrimination claim files with the EEOC which in my practice doesn't come out to surprised because I am actually seeing quite a bit of this myself. So what we are particularly seeing are claims in the Silicon Valley where we have you know different generations to sort of battling for position for these various lucrative positions within the community and it's a lot of tension when you have essentially four different generations working together in the workplace right now.

You have the gen-X versus the gen-Y, you have the baby boomers, you have work for two group and so everybody is sort of working together trying to making a living and they starting to compete for the limited number of positions in the workplace and so we are seeing an increase you know throughout California not just the Silicon Valley of age discrimination claim.

We are also seeing an increase in gender stereotype of family responsibility discrimination claim. And what is that mean, this is a new area in fact the EEOC recently issued guidelines in this area to help employers understand that a little bit better and to give you a couple of examples we're seeing claims for example where a male employee who is taking time off to care for a child. My claim that he is been treated differently in the workplace because the expectation of the stereotype is that a male employee is an expected to take time off for his kids.

And therefore you know what's wrong with you should be back here at work. You shouldn't be taking time off, can't your spouse or your partner take care of that. So we're seeing those claims. We are also seeing claims where female employees will claim that they were treated less favorably for taking time off to care for children or that they were viewed in a negative light for not taking time off.

So you know we're seeing a mix of different types of claims and I strongly encourage those of you who are on this call. If you are familiar with this area to take a look at the new EEOC guideline because they do provide really detailed examples of what could be a potentially viable claim. And this isn't a claim that is under some new statute, this claim is been recognize within federal – gender discrimination and state gender discrimination existing statutory of requirements.

The other thing I was reported at this recent presentation that I went through by the head of EEOC was a concern on a state wide level that employers still are willing to train their employees regarding the law of discrimination and harassment.

As most of you probably know we do have a mandatory sexual harassment training law in California and the EEOC reported that they routinely as part of their initial investigation of any claim will immediately request evidence of compliance with California training requirements. The same is true for – from the California Department of Fair Employment and Housing perspective this state agency that investigate claims if discrimination and harassment.

So you know definitely you want to make sure that you are in compliance with those mandatory training requirements but even beyond that the EEOC reports general failure of employers to complaint, I'm sorry, to train on these areas where we are seeing many complaint, not just in sexual harassment claims but all type of – forms of discrimination and harassment in the workplace.

The EEOC also reported poor legal oversight of HR investigations. And with a describer situations where the HR team jumped into an investigation without consulting with legal and perhaps, got pretty far still before there was really any legal invention or perhaps decisions about how to respond to a complaint of discrimination and harassment were handled by HR without any legal oversight.

And the example that they gave was a case that resulted in a colorful mishandling of the situation and the case of EEOC versus Lockheed Martin, there was – it result in $2.5 million settlements with the EEOC of that claim and you know without going into the sexual background of that case. It highlights some of the issues intentions between legal and HR and I think it's really critical from this standpoint of understanding how important it is that your legal team have involvement with HR investigations of complaints to discrimination and harassment, if you don't have those internal protocols you really need to make sure that you do.

The other thing that was emphasized in this report was the EEOC's emphases on pursuing systemic claims of discrimination harassment. And what – we are referring to there are situations where EEOC sees, for example trickling that of various charges of discrimination or harassment. And they start to wonder well, is it just you know one-off situations or is this a much larger problem that we should be taking a closer look at. And I actually had one of my clients unfortunately get caught up in one of this investigations and I can tell you it's extremely unpleasant. They had a couple of employees you filed charges of discrimination on the basis of

race. And then over a period of about six to eight months, there were about four, five additional charges that were filed of a similar nature and the EEOC decided to launch a nationwide investigation. This company is hiring practices, promotion practices and treatment of minorities in the workplace.

So it has been a long battle with the EOC to prove that this was not a systemic case of discrimination. So you really want to make sure that you take charges of – any charge of discrimination seriously. But certainly if you have a string of charges you want to be very aware of the potential risk have more on the logical investigation.

So what does this all mean from management legal, HR perspective? What it really means is that, it's much more complex in California and perhaps some of the other state that you might be operating in. You want to make sure that your management team; your HR team understands those complexities and get you involve at the appropriate stage in dealing with complaint to discrimination and harassment. You are also…

David Hitchens: JoAnna?

JoAnna Brooks: Yeah.

David Hitchens: We have a question about what the proper role is of your counsel when we talked about getting in-house counsel involved in investigations. Are you talking about in-house counsel actually doing the investigation and interviewing witnesses and gathering facts or in a purely advisory manner with management or human resources personal?

JoAnna Brooks: I am generally recommending that it would be in advisory manner. In fact, there maybe even cases where the legal, the permit wants to recommend an outside party conduct the investigation for greater objectivity and perhaps, more credibility and a subsequent litigation.

So there's a lot of factors that have to be wait but certainly that's going to be handled by an internal HR team. I'm recommending that a legal team communicate to HR, that it's important to HR not just go out and start doing the investigation on their own without consulting us legal.

You know there is important strategic decision to that who to interview, how to interview those individuals and the timings of those interviews. And ultimately, I do think HR and legal should be working hand on hand and coming up with the appropriate strategy in dealing with the complaint and from a remedial standpoint. But generally speaking we don't have the in-house legal team conducting the actual interviews. Although for some small companies that don't have an HR team that maybe the case.

The EEOC emphasis on systemic discrimination is also a pattern that we anticipate will continue for the future. So again from a company internal standpoint, you want to make sure that you are looking at your complaints on a more broad level versus just one-off situation. And really taking into consideration how they might trigger in more logical investigation.

And certainly dealing with those issues from an internal standpoint you know it's same practices issues, it's a promotion issues, hiring practices. I am really taking a close look on how the company is addressing those issues on an internal basis.

OK. You could also update your policies certainly as you have policies in California, they don't currently address serious medical conditions as protected under California law, general identity and sexual orientation. You want to make sure that you update these policies to comply with California law.

And again, you want to make sure that all of your management in HR team is aware of these different forms of discrimination and harassment, so that they can properly ensure complaints as well.

And with respect to charges of discrimination that might come in the door, you want to analyze and address your internal EEO statistics at all stages of employment to avoid those larger scale claims that I mentioned earlier, ok.

Our next top ten issue is retaliation and again, I am not telling anyone something new here but the low of retaliation has existed for a long time and under both federal and state laws across the country. But in California, we have seen that there's been a significant increase in retaliation claims. The EEOC estimated that at least 30 percent of all EEOC filling include a retaliation claim and I would estimate in my practices it's virtually all of them. I rarely see a charge of discrimination where the complainant doesn't allege retaliation claim.

And part of this stands from the United States Supreme Court decision in Burlington Northern versus white where the landscape of retaliation law was significantly expanded by the court. The court held that employment show, employer action likely to chill employee opposition. And no showing of economic former adverse action would necessarily be required and what that really means is that you know employee can come to the court with faxes.

For example, none of the employees would speak to me after I made my complaint of discrimination or harassment. I was given a less desirable schedule or I was transferred to a cubical and I used to have an office. Those were all management type decisions that don't necessarily impact someone's compensation or benefit, but nonetheless could be the basis for retaliation claim.

California has a similar case for that it takes a very expensive view and therefore, what we anticipate we'll continue to see is an increased in retaliation claim. Also it's much less likely that you can achieve some rejudgment on the retaliation claim, I had given the standard that exist.

David Hitchens: JoAnna, you also wanted to interject another question. When you talk about an increased in retaliation claims what percentage of those or sort of add-ons to underlying charges of discrimination and what percentage of those or sort of standalone retaliation claims?

JoAnna Brooks: Well. I don't have precise statistics on that. The EEOC statistic is that we see 30 percent of what appears to be standalone. I don't know what the statistics is for those are – couple with other complaints.

David Hitchens: JoAnna totally what's – what are you seeing you know my impression of Burlington Northern was that there certainly we're going to be, more employer activities that could be considered retaliatory at perceptions but that might not see such an uptake in standalone retaliation claims and because of that case, just because the things you would talk about changing an office you know this sort of things that now could be considered chilling and therefore retaliatory.

This don't generate the sort of damages that most claims attorneys are going to be looking for and so may be you know an add-on I didn't see that something that was going to by itself generate a whole lot more claims. I'm just wondering if you've seen anything that sort of tested that theory.

JoAnna Brooks: Yeah. I think you're right. I think that where, do we see the retaliation claims as a standalone. It almost always is combined with underlying claims of discrimination and harassment, and I haven't necessarily seen an uptake in the standalone form. What I generally see is that every single charge of discrimination and harassment that comes to my door has the retaliation box check.

And you know typically when it's check, the allegation and support of it, what I'm finding is that you know they do find a long lines of you know no one talk to me anymore. Or you know I felt like, I was being ostracized by my manager by you know getting the different schedule you know been spoken to in a more direct about manner and communications via e-mail, things like that.

Whereas before we would almost always see that the support for the retaliation claim was I was demoted or I would see the decreased in pay or I was terminated. Now the support for the retaliation claim is just much broader than it used to be. Which creates you know a significant challenge for in-house legal to continue to monitor after a complaint of discrimination and harassment has been brought. And to make sure that managers are trained to understand that all these various activities could be evidence of retaliation.

So basically what we do recommend is that in light of the broader landscape that you consider updating your retaliation policies, training your managers, making sure that they understand the law of retaliation and how it can impact them in their day-to-day monitoring of the workforce. Ok.

Our next top ten item is whistleblowing and this, of course, has long been a source of claims in California but became much more popular with the passage of Sarbanes-Oxley.

So public companies, Sarbanes-Oxley is probably very familiar but for many either private employers, they really didn't pay much attention to State whistleblowing laws until recently.

State whistleblowing laws can apply to any player, any employer in California so both public and private companies. And there is also a claim that can also be asserted for whistleblowing activity, known as a public policy wrongful discharge type of claim.

David Hitchens: JoAnna, we had a question before about the application of California law and I think this is probably as good time as any to bring it up. We can only talk about you know any employee in California being subject to State whistleblowing laws or public policy wrongful discharge type claims.

Can you talk a little bit about you know employee and employee who is not based in California or the company that is not based in California that has somebody working in California on assignment or something like that and what kind of an access does the employee need to have to California in order for these sorts of state specific laws and others so this would apply you know could apply to regional and other things.

What is, sort of, that this comes generally in access and employee needs to have the California in order for these things to apply?

JoAnna Brooks: Well, there is no bright line growing right now. But generally speaking there have been decisions where California employees, sort of, a conflict of law analysis and if California has a strong overwriting public policy basis for running its loss to apply to a particular employee then generally speaking California law will apply.

What I usually tell my clients who have California employees who past through, if the employee resides in California for any period of time and works in California even if its on a temporary basis, you need to be aware of California compliance requirement. So for example, some times we have managers who are out of state and they manage employees in California.

We generally recommend that those managers receive training on California compliance to ensure that they are supervising their employees within California requirement. And if they have occasionally come to California, visit California employees, we would generally recommend that you also provide the California mandatory sexual harassment training to those individual. But that is in bright line going on you know if the person just comes in one day a year versus several

days, the more contact that the individual has of the state, the more likely it is the California law will apply but again if it's an overwriting public policy issue, California will sometimes step in and say we're working on employer law, no matter what.

And on the whistleblowing – to go back to whistleblowing you know California has a very broad statute in comparison to sex. California statute states that the employer may not retaliate against or maintain a policy preventing an employee from engaging in a protected activity.

So virtually, any type of protected complaint could be a whistleblowing action if there is subsequent retaliation. So we see claims, for example, of whistleblower protections and cases where an employee violation occurred or brought a claim of workers comp, any type of discrimination, harassment complaint. So it's much broader than Sarbanes-Oxley where the protected activity typically involves some type of securities matter.

And I think it's important again that employer understand just how broad this is. For example, we are going to about wage and hour complaints in just a few minutes and you know wage and hour complaints could be considered protected activity in California.

So if you know you are not so happy because an employee brings a complaint to your attention even if it's completely unwarranted, you could have potential whistleblowing protections that come into play as well.

And this side, you have in front of you right now that talk about the potential penalties. Again, there could be substantial on a Sarbanes-Oxley, criminal penalties can even come into play. But California does have a limit on the amount of severe penalties not to exceed 10,000.

So what can you do to comply with California's whistleblowing laws. It's critical that you develop and implement those policies to comply with the whistleblowing protections and again training your managers to understand the scope of the protection, training your HR personnel and again you want to make sure that you have procedures and protocols in place to monitor for retaliation during an act or any investigation of any complaint in California that could be consider protected activity.

And again it's always a good idea to consult with counsel before taking any adverse actions against the whistleblowers if you have any doubt so whatsoever.

Our next top California issue is Disability Management and I think David had mentioned that we are going to spend quite a bit of time on wage and hour but this is another area where California is particularly complex. You, of course, have your ADA Protections under Federal Law and then the overlying California State Law Protection falls into the California Fair Employment and Housing Act.

As I mentioned earlier, the definition of what's protected as a protected disability is much broader in California. So serious medical conditions and when I say serious medical condition, it could be virtually any chronic medical condition in California. It could be considered protected.

I generally tell legal professionals, HR professionals, that whenever you have an employee in California that has a leave of absence for medical reasons that extends beyond seven days, you need to start thinking about California disability protection.

We also have a more complex structure where it pertains to disabilities related to pregnancy. California has a Pregnancy Disability Leave Act that provide performance of protected leave in the event of the person is certified as disabled to that time period and then we also have overlapping California Family Rights Act protection for bonding with baby of an additional 12 weeks of unpaid leaves.

This can you know be very confusing for other state employers who are more familiar with this federal Family and Medical Leave Act protection of only 12 weeks in the event of a birth or adoption of a child. So what we typically will see in California is the employer understands the FMLA protection but forgets about the Pregnancy Disability Leave Act of additional four month.

So you want to make sure that your policies reflect those protections. California also has some additional protection that come into play such as the Paid Family Leave Act for time off the care for family member, domestic partner or child. We also have the San Francisco sick leave ordinance as well as the San Francisco healthcare ordinance.

And these are all very special protections and if you are not familiar with them, you should make sure that you are familiar and that your policies are updated accordingly. So what can you do to make sure that you are in compliance, again you want to make sure the your managers are able to spot disability management issues and make sure that they understand the complexity of the California landscape in that process.

Remember that, any disability analysis is fact to specific, so we can never give you just a you know one off you know this is what you do every time you deal with the disability. Your managers need to be trained to understand that complexity and to bring those issues to legal where appropriate.

Also make sure that your managers and your HR professionals are always considering disability protections at the end of any type of FMLA or California Family Rights Act leaves of absence as well as any Workers Comp leave. That's another area where we see some significant problems in California where the employer thinks that they are in full compliance because they provided FMLA protection and then they don't consider that they might need to provide further leave in order to comply with the fair implement in Housing Act or ADA Protections.

And then the other area where you know we see a lot of problems is the complexity with the necessary forms that the employers uses in California to comply with all of this leaves of absence. And again, it gets very complex because there is lot of different overlapping lease that could be applicable. You want to make sure that you are not using forms that only apply to the federal protections and then in fact in corporate California protections as well.

All right and our next top 10 issue is Wage & Hour and as David mentioned this is a really hot area in California without getting into a lot of the detail here so if I had to say that we are seeing the number of wage and hour claims in this state began to surpass discrimination harassment claim and that's understood s to jurisdiction that's already the case.

Wage and hour long California's extremely complex and one of the links that we have for you in the side is the link to the California divisional labor standard enforcement Web site. And if you are not familiar with the basic wage orders that apply to your particular industry, you need to be familiar, you need to look on the Web site and pull up your particular wage order and become familiar with not only the underlying statutory requirements, but the wage and hour orders and the opinion letters and the (DLSC) guidance on wage and hour complaints in California.

Some of the trends that we see our – you know minimum wage increase on the state level, which you need to stay after date on, but also some local ordinances have been increasing the minimum wage. For example San Francisco has a minimum wage ordinance that employer sometimes run a follow-up, because they don't stay up to date with the requirement.

Misclassification of employees as exempt versus non-exempt is another area where we saw a big trend in the late 90s and early 2000 time period, sort of, attacking the retail and restaurant and hospitality industry in general where you know large number of plans that Assistant Managers from misclassified has exempt.

Now, we are seeing that same charge go across all industries. Banking industry has been hard hit, the hi-tech industry is now being hard hit. And you know in my own practice, I see basically whenever an employee leaves his or her employment that if there is any type of issue with regard to misclassification, we're finding out about it. We're getting a letter from a plaintiff's attorney telling us that this employee wasn't misclassified and we think they are entitled to overtime. So be aware that this is certainly a trend here in California.

David Hitchens: JoAnna, could you talk a little bit more about the differences in the federal exemptions versus exemptions under California State Law and particularly as it might apply to the computer professional exemption and others.

JoAnna Brooks: Sure. Whether it was recently regulations to revise the federal protections and make them much more lenient for employers, but even before that happened California law is much more onerous then the federal law with respect to exempt classifications and the reason why its more difficult to comply with is that, there is a strict requirement do you have to be able to show and for each one of the exemptions where it is executive administrative professional or otherwise that your individual who you classified as exempt is performing management type duties or exempt type duties more than 50 percent of the time, that they are working in that position. And the federal law is not so exact in that, it only requires that you show to that person be primarily engaged in exempt duty. So its more over qualitative versus a quantitative approach to California – I'm sorry, under the federal law and under California law, its more of a quantitative versus a qualitative approach or you literally have to show on a day-to-day basis that the person is spending more than 50 percent of their time performing management related duties.

With respect to the computer professional exemption, California has also very strict requirements of how much the person has to be earning and the types of duties the individual has to be performing in order to meet that exemption. And the amount of the person has to be earning currently is $36 an hour, but that was recently adjusted downward. It was previously as high as $49 an hour, which made it difficult for many employers to meet the computer professional exemption.

And even with the other exemptions, I mentioned there is a requirement, salary requirement is much higher than the Federal Law and in California, it's two times than minimum wage that has to be met. And some employers would have individuals classified as exempt that didn't quite make the salary requirement. And if you don't make the salary requirement, it automatically disqualifies you from meeting the exemption even if you meet the duties requirement.

The other hard area here in California is Meal and Rest break compliance and we've had some really exciting development just in the last week, which are not reflected on the slide. Murphy versus Kenneth Cole was the case that sort of sparked it all where the California Supreme Court ruled that a meal period penalty which we had always referred to as a penalty, but now we have to refer to as a wage, the one hour of addition pay that is triggered by a meal period violation, is treated by the California Supreme Court as a wage versus a penalty.

And the issue there is that, if it's treated as a wage to statute of limitations is three years under the Labor Code and potentially four years under the California Business and Professions Code Act. And if it's treated as a penalty, it's only one year and so all of sudden these types of cases became very popular to plaintiff's counsel.

It's also if it's a wage you can recover waiting time penalties and penalties for any accurate wage statement from meal period violations. So all of a sudden again with the passage of or the issuance of the Murphy versus Kenneth Cole decision which was on April of 2007, we had a huge proliferation of meal and rest period type cases.

The federal courts started to wean back those cases when they came out with the White versus Starbucks decision and that decision the court held that the employer need only provide a meal period not necessarily ensured that it's taken.

And in making that ruling the court granted summary judgment to the employer on the basis that the employee had testified in his deposition that he sometimes missed his meal period because he didn't want to take a meal period because he wanted to you know to take less than a full 30 minute and you know for his own personal reason and the court said well you know we are not going to penalize for an employer for an employee who elects of his own decision to escape his/her meal period or take less than the full 30 minutes.

And basically the court held it in the legislature couldn't possibly have anticipated that employer would be held in such type's scrutiny under California law and to basically essentially force employees to take a full meal period. That has subsequently done the subject to the State Court decision which is called the Brinker versus Superior Court decision and that ruling just came out this past week supporting this federal interpretation. And we have a link also for you in the side – on the left side to the Jackson Lewis Web site where if you click on that link, the very first article referenced is a summary of that Brinker decision.

And its a very exciting decision and it will most likely be appealed other way to the California Supreme Court and but we also had a California Division of Labor Standards Enforcement opinion letter or actually it's directive to the DRC representatives that enforce the California Wage & Hour laws that they should at this point immediately began to apply the Brinker holding, which is a significant development again some players in California that would have been plagued by you know how do we comply with the strict meal period requirements in California.

David Hitchens: JoAnna, because the Brinker decision I think those nicely with the next topic of after clock work and then our next peak topic plus action litigation and thank you because I am so excited that I want to talk about this case as much possibly can, well we still have it. And if there is anybody from Brinker on the phone, we probably – folks here who have employees in California certainly thank you for the good work in the Fourth Appellate District. Could you talk a little bit more in detail about you know Brinker and you talk a little bit that breaks apart of the case. But could you talk a little more about after clock piece and then also the implication, so both of those things in terms of class certification?

JoAnna Brooks: Sure. On the after clock work piece at the Brinker decision, the issue involved you know some times employees, they don't know how the employer when they skip part of mail period or they work a little bit longer and they do so after clock.

And the issue in that case was whether not in employer that lacks knowledge could still in fact to be held reliable for after clock were claims and the court held again in favor of the employer finding that, unless the employer has knowledge that the viability of the after clock claim essentially goes away.

So again pulling a grand of summary judgment implacable and the Murphy, I am sorry the White versus Starbuck case would have been which was also discussed in White versus Starbuck on the summary judgment level but in the Brinker case, it was in the class third level.

So the issue in Brinker was whether or not an individual who brining class action, can go forward on the basis that they have claims for similar situated individual based on this after clock work. And the court in the both meal period instance and also the after clock basically was holding that you know you can't really show commonality because both of these types of claims require an individualize and analysis of whether the employee you know decided to take his or her meal period for 30 minutes and was prevented from doing so or whether that person voluntarily decided to take less then the four 30 minutes.

And again with respect to after clock work you would need to have an individualize enquiry with respect to whether management knew that the person was doing this you know actually working after clock, when they have been clock in. So the decision is wonderful for employer in California and creates a much more manageable situation, when dealing with meal period compliance in after clock type of claim.

So it sort of does tell into the class action and before we get to that, I just want to mentioned that you know one of the things that its really critical that you do in California is be aware of you know what's going on with your personnel in terms of compensation and benefits.

Do you have you know employee moral issues around that particular issue to keep it up-to-date on what's going on with the legal development? And again we've given you a link to the DLC site and also the Jackson Lewis Web site. It's really important because in California things are constantly changing and we also really strongly recommend that you consider and internal wage in our audit of your payroll practices. It's not just one thing I mean there are number of different areas where we are seeing class action litigation in a wage in our contact.

So you know misclassification, meal period compliance that's the one area but the vacation pay are paste up out of state check drawn on the ((inaudible)) bank all types of technical issue, that if you are currently familiar with them, you really need to consider, consulting with outside counsel or working with someone that is familiar with the compliance for California.

David Hitchens: Expense reimbursement that is another big one?

JoAnna Brooks: That’s true in travel reimbursement is another area that we're seeing a lot of litigation in.

All right. So we're going to move on the class actions and if we run a little bit over, I think we started a little bit late, so hopefully we still have a little bit of time at the end. But I really want to focus on this wage in our class action piece, because it is as we said earlier where we are seeing the most litigation these days.

In terms of class actions not only do we see wage in our complaints as a major area of increased litigation, but also the claims I mentioned before about discrimination, in fact there was a nine certain case, that just came out the other day, certifying the class his employees on the basis of national origin discrimination and harassment and pay compliance issue.

So we are definitely seeing a trending in that area, where Plinius counsel, the Plinius bar in California has decided you know that they are going to pursue this much larger claims. And part of the reason why they are pursuing is because it is quite lucrative. One of the few cases is I have ever made the way a trial in California was a Bromer case here is Alameda County Superior Court and the – the Court ended up with wording a 178 million in that case.

Very few of this wages in our class actions actually make their way to trial and part because it is type of outcome. The other class action development that probably most of you are aware, but if you are not, you should be aware of it, it’s a Duke versus Wal-Mart decision.

Another situation where in the Federal Court, there was a certification of a nationwide class action involving general discrimination, which you know surprises all because it was extremely comp alluded fact pattern in which you know you have people with numerous different locations, different managers, different pay structures overtime, but nonetheless, the court found basically based on statistical data that was provided by the Plinius side, that this could in fact, the certified as a class action.

And again we were talking about you know a company as largest as Wal-Mart we’re talking – millions of employees at stake and million of dollars at a stake. So this is really what we refer to

is that that firm litigation, so it's critical that employees are aware that how expensive it can be to defend these actions and also how expense it can be to resolve them. We anticipate there will be a continuing increase in class action litigation. We don't see any slowing down at all despite the fact that the Brinker decision came out there are so many other issues, in terms of wage in our compliance, that panels counsel can hang their head on, that we don't think it will necessary stand that high.

So again, what can you do from an in-house perspective again, employee morale is critical, if you don't have satisfaction surveys or hot line or someway that you can monitor employees' satisfaction we strongly encourage that you consider doing so. Most of this cases that we get in class action contact, come out of discounted employees, angry about something completely unrelated to wage in our class actions that they ultimately bring.

And in fact, they did the presentation for the state bar several months back, where I was on a panel with (Plinius) counsel that bring this class action wage and hour losses. And they said that the first time they do when any employee comes to the door it says I have a discrimination compliant direct or I have been treated unfairly by my employer is that they ask a person a series of question about well, are you classified as a exempt to non-exempt you gave your meal period, you gave your rest period.

You know how does the company handle vacation pay? And all by the way can I take a look at your last pay check to see whether or not it compliance with payroll and pay sub requirement. And so again even if the employee doesn't come or doesn't go to claim attorney to pursue a wage and hour complain. It can very optimum result in that, so again the handling of discrimination compliant or day-to-day compliant is critical to an overall enforcement, in prevention practice to world class action litigation.

And again, we strongly recommend that you consider wage and hour audit, you want to make sure that to open attorney client privilege. And so the method of conducting that audit becomes very important. And if you are faced with repeated compliance or charges of discrimination as I mentioned before you want to be analyzing your workforce of all levels at all pay differentials promotion levels, all of those EEO statistics are very important to monitor on a v-team basis, so to avoid complaints of discrimination.

And again you want to make sure that you implement corrective measures as necessary. When we did a presentation last week on specifically focusing just on class action litigation, one of the in-house attorneys asks you know what we do to convince the CEO and the CFO of the company. How important this is.

And if numbers like a 178 million in the Wal-Mart verdict don't jump out of them. You can easily just take your own data for your own company and do a rough analysis of whatever it look like, if for example you reclassified a particular workgroup and then estimates based on the average salaries, whatever it look like in a range of OK, if we estimate this person would have worked one hour, this group had worked one hour overtime a week up to 10 hours of overtime per week.

And you can come up with those numbers and you can put them in front of your management until then look this is the exposure that we're looking at. Whatever we can do about this and that often can have a significant impact on those discussions.

David Hitchens: JoAnna, we get a comment and if I think we need to obviously hurry along as quickly as we can to get through, well, we have to go through. We had a comment with respect to the employee satisfaction comment that you made. Employers need to be vary, that they're going to do a survey or something like that to discover what sorts of issues there maybe that you better be prepared to take action response to that. And that is certainly true and something that I've canceled clients about many times in the past you know the only thing worse that you know then not knowing there is a problem is knowing there is a problem and not doing anything to fix it so…

JoAnna Brooks: Absolutely.

David Hitchens: So it certainly is a good advice.

JoAnna Brooks: Absolutely, and if you have hot line set up and you are not monitoring for wage an hour issues or general discrimination issues, you really need to make sure, because I know a lot of employer set up socks complaints hot line. And then what they are seeing is a flurry of these other types of complaint. I absolutely, do not ignore those other types of complaints, she want to make sure that you are addressing them. And in fact, if you don't, it can't be ground for punitive damages in wage an hour class action loss there.

David Hitchens: I think it maybe, it might make sense with respect to privacy to go straight to the – what can we do slide. And talk very briefly about the
and how that we can do about that?

JoAnna Brooks: OK. Certainly, on this piece again, we are just highlighting there was a major development the Ross versus Raging wire decision. And basically it's just allowing employers the flexibility that they should have always had, to make sure that they are screening out individuals to maybe using illegal drugs and even though that might be prescribe for medical reasons. So as an employer in California, you still have the ability to exclude people from employment who test positive for medical marijuana and likewise, if someone is working for you. And test positive from medical marijuana as part of your drug screening process or at post accident testing. And you can still put that individually even though they are taking medical marijuana that allowed under state law under the Compassionate Use Act.

Our number eight topic is immigration. And I'm actually not going to spend a lot of time on this either. Just to highlight the fact that we are seeing an increase in up-tech and rise in California. The highly publicized at a loss of rate occurred in May of this year and what we are also seeing is that we are getting a lot of increase of our clients about I-9 complaints. And you need to be aware of that obviously wherever you do business.

But particularly in boarder states like California, Taxes there is apparent titer scrutiny going on at the moment, so you want to make sure that you aware at the potential violations. And also what the potential repercussions could be as it extremely, financially, devastating to an employer to be impacted by these types of several incremental penalties. And in the case of some employers to loose a large portion of their work force is you know obviously it could completely shut down operation.

So what can you do, we recommend you consider an internal audit of your I-9 process and your paper work, that you've establish I-9 procedures to ensure complaints. And that you also become aware of and understand the Safe Harbor Regulations that are replicable on immigration contexts.

David Hitchens: JoAnna, if you could just talk briefly about ADR, I think that the tense of the training we've probably covered sufficiently earlier, but let's you know we can talk about ADR and then we will ramp up.

JoAnna Brooks: All right. Well, our number nine topic is ADR, we always get a lot of increased from clients about whether or not we think that they should implemented in ADR process. And there are a lot of different things that you can do, such as a pay review internal pay review process informal mediation, formal mediations and arbitrations.

So there are lots of different alternatives out there, it doesn't necessarily mean that you have to have arbitration; I think that's sort of the misconception here. There are a lot of internal processes that you can use and implement. But we do tend to see that arbitration in some cases

can be quicker and more efficient, sometimes, it can result more award and may reduce attorney's fees. I mean, there are also downsides they are using arbitration and one downside is that you are stuck with whatever the arbitration award is your rights to appeal and you know that isn't always necessary the best thing for employer.

So what we generally recommend is that you really think about what works best for your company and you consider those different forms of internal deceive resolution, because we have found this statistically employers that implement some sort of internal deceive resolution system have a much lower rate of outside litigation, which stands to reason, because you are dealing with those issues and those complaints on an internal versus an external basis.

We recommend that you consider arbitration agreements. And if you do already have an arbitration agreement, please make sure that you have it reviewed on an annual basis. And update it periodically, because what the worst situation is that you have all this time of money diverted to implementing an arbitration agreement and then you find out November hold is not enforceable possible, because there is some sort of problem with how its drafted. In California it is very specific and what is required in those arbitration agreements. So you need to make sure, that you were viewing those and making sure they update that accordingly.

All right. And then our last topic again is training. And since all you are on this call, you probably already have a keen awareness of the importance of training and keeping up-to-date on legal developments. And so you know it's very important that you understand the California does have mandatory sexual harassment training for employers, their specific requirements for that training and we certainly can provide more detail, so if you have any questions about that.

But it's also important that, you know that regardless of whether California had mandatory training or not, it's something that you should just do in order to develop yourself of the defenses that are available to employers. You want to be able rely on the – alleges defense for a federal court, titled seven type of claims. And in California we have with refugees and again to understand where it's not necessarily a complete defense to underlying liability, but it can cut off damages as an individual was trained in the companies policies and practices and didn't avail him or herself to the companies internal more media mechanisms before going out and finding the complaint.

So it's very critical that you have adequate policies and training employees to ensure that you can rely on those defenses. And again it – make sure the employees know that employer really does care about this and the employer does mean business when it comes to enforcement of its policies. So we do recommend you ensure complaints with the mandatory training requirement, but we also recommend in California that you trained on all of these other forms to discrimination and harassment that could potentially be at issue.

And then, there's other form of training that we recommend as well. And I want to highlight wage and hour complaints, because I have been doing a lot of wage in our complaints training recently for employers. Particularly in the high-tech industry and also in the restaurant retail industries, because nothing is worst than having your legal department understandable, but your front line managers ignore it at those rules, because if there is a disconnect, than you're less very exposed.

So our last slide is our question slide and I know that David has been consulting some of those questions already, but David, do we have any other questions that I need to address at this time?

David Hitchens: I don't think so. I think that there are a couple of outstanding questions that we can address offline. And those answers will be posted on the Employment Labor Low Committee webpage after this. So I think with that, we will conclude today's webcast.

On behalf of the Employment Labor Law Committee, I'd like to thank our speakers JoAnna Brooks and Jackson Lewis for its continued support of the ACC and the Employment Labor Law Committee. I want to remind everybody again, who is attending today, to please take a few

moments to complete the webcast valuation that is linked on the left hand side of your page in the middle. And remember that the answer again, the answers to questions that we have not gone to today will be posted on the committee Web page. Thanks very much.

JoAnna Brooks: Thank you.

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