EMPLOYMENT

EMPLOYMENT LAWYERS RARELY MAKE GUEST APPEARANCES ON ESPN'S SPORTCENter. But with a regional director of the National Labor Relations Board ruling to reclassify student-athletes at Northwestern University, employment law is on every channel. Our panel from Northern and Southern California weighed in on whether student-athletes are university employees, on the impact of recent changes to the labor code, the latest round of wage-and-hour class actions in the fast-food industry, and on key upcoming decisions in cases including *Salas v. Sierra Chemical Co*. *California Lawyer* met with Cathy L. Arias of Burnham Brown; Gay Grunfeld of Rosen Bien Galvan & Grunfeld; James L. Morris of Rutan & Tucker; Mike D. Moye of Hanson Bridgett; and Natalie Pierce of Littler Mendelson. The roundtable was moderated by *California Lawyer* and reported by Cherree P. Peterson of Barkley Court Reporters.

EXECUTIVE SUMMARY

MODERATOR: What are the implications of *Salas v. Sierra Chemical Co.* (pending before the California Supreme Court as No. S196558; previous court of appeal opinion, 129 Cal.Rptr.3d 263 (2011))? What effects do you see for litigators relating to the unclean hands doctrine and after-acquired evidence?

CATHY L. ARIAS: I'll summarize the case. The plaintiff worked as a seasonal employee for Sierra Chemical. When hired, he apparently presented false documentation establishing his right to work in the United States. He worked for Sierra for several years, each season being laid off and returning with the same fraudulent documentation. After he sustained his second industrial injury, he was allegedly told by a supervisor that he needed to bring a doctor's note releasing him to full duty. His supervisor advised Salas that he could not return to work unless he was 100 percent. Salas never returned to work, was not able to present that documentation, and sued for disability discrimination in violation of California's Fair Employment and Housing Act. Through discovery it was determined that he was an undocumented worker, and Sierra was granted summary judgment on the grounds that he never had a right to the job. Under the unclean hands and after-acquired evidence doctrines, his case was dismissed.

JAMES L. MORRIS: The interesting dichotomy is whether actionable treatment someone undergoes during employment can be remedied, even if there is no remedy for loss of employment. It's almost a foregone conclusion, given the primacy of *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), that Salas cannot be reinstated and will not be eligible for back pay.

GAY GRUNFELD: I just want to interject that one of the procedural issues here was that although you say his documentation was "fraudulent" and he wasn't entitled to work, the plaintiff contends that that was a disputed issue of material fact. Judge Elizabeth Humphreys of County of San Joaquin Superior Court agreed. And she did not grant summary judgment initially. There was only the one affidavit from a man from North Carolina claiming he had the same Social Security number. The plaintiff continues to contend that summary judgment shouldn't have been granted. That would be a way for the California Supreme Court to avoid a ruling that seems inconsistent with the new state law, SB 1818, codified at Labor Code § 1171.5, that tries to prevent the exploitation of undocumented workers because it's bad for all workers when an employer discriminates and there's no remedy. The case raises serious questions about how to incentivize employer compliance with our anti-discrimination laws.

MIKE D. MOYE: The after-acquired evidence doctrine is sometimes an after-acquired theory too, for the employer. But in this instance, the piece of evidence would have been disqualifying in the very first instance. It's not a question of interpreting an employer's policy.

GRUNFELD: Right. So you're deciding that since the North Carolina declarant said that it was his Social Security number and Salas

didn't say no, there's no material issue of disputed fact and the court can reach out and decide it was a false Social Security number and in that circumstance deny him back pay. Because he isn't asking for front pay or reinstatement.

MOYE: I go to the question of whether that's discrimination and whether the resolution here is going to impair the statutory protection against discrimination. I don't think it does. It's a fairly clear-cut point as to who's entitled to work and who's not entitled to work.

NATALIE PIERCE: Unlike in *McKennon (McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352 (1995)), where the United States Supreme Court established an exception to the after-acquired evidence doctrine where the claim serves an important societal interest, in this case, there are two competing policy considerations, two statutory schemes to preserve. *McKennon* holds that the doctrine of after-acquired evidence will not serve to dismiss claims "in every instance," but there still has to be a balance with the employer's interest.

MORRIS: The case also implicates California Labor Code Section 1171.5 (the statute enacted to try to counter *Hoffman Plastic*). It says you can't have discovery into somebody's immigration status without showing by clear and convincing evidence that the inquiry is necessary to comply with federal immigration laws. I'd say the employer's legal obligation not to continue the employment of unauthorized workers meets that standard.

ARIAS: Our cases are inherently about credibility, so there seems to be something abundantly unfair about statutes that don't allow the employer to take discovery of an employee's immigration status which may demonstrate a history of untruths while at the same time permitting plaintiffs to explore credibility concerns of managers and supervisors. Juries should be allowed to weigh the credibility of all the witnesses and hear all the evidence which may impact their determination.

GRUNFELD: This is not a case about credibility. It's about discrimination based on disability and workers' comp leave. Also, if you are allowed to pursue these issues about how someone started working for this employer and then deny them remedies, you are encouraging sexual harassment, wage theft, and other behaviors that don't benefit other employees or the workforce as a whole.

One factor I wanted to consider is whether it's important that

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plaintiff Salas was a seasonal worker. The court analyzed it as a "failure-to-hire" case, where in fact he had been recalled numerous times and had obtained seniority, which seemed to provide more of a permanent status. See *Salas*, 129 Cal.Rptr.3d at 265-66.

MOYE: I suspect it could be a factor. The statute says it doesn't apply to the I-9 inquiries made within the first three days of employment. So if he's a regular worker, the question is: How did this actually come to light in terms of the documentation? If the employer's doing something which suggests discrimination, i.e. making an inappropriate inquiry into the I-9 status, if they have documentation which on its face has been accepted, then you get back to that. So yes, the seasonal nature of it makes it easier to sort out whether there's a discriminatory intent or a failure-to-hire issue.

MORRIS: To your point, Gay [Grunfeld], I'm a management-side employment lawyer, and even I don't see this case as supporting an argument that employers should be free to refuse to pay minimum wages or should tolerate sexual harassment of a worker, when that worker has been hired without legal authorization.

PIERCE: Getting back to SB 1818, the statute in part recognizes the primacy of federal immigration law through its provision excepting "any reinstatement remedy prohibited by federal law," though I agree with James [Morris] that SB 1818 is designed to cabin *Hoffman Plastic* as much as possible.

ARIAS: There's a distinction between the award of back pay that has been earned and future damages, which have not been earned and could not be earned given the barrier to employment. *Hoffman Plastic* does limit the ability to order the payment of back wages. And there are going to be some counter arguments to the application of *Hoffman*. One of them could be that *Hoffman* limited the powers of the NLRB, but the interests served by back pay and similar remedies under civil rights law are more important than the countervailing interests of the NLRB and enforcing the labor law.

That might be one of the arguments that plaintiffs counsel may make in this case. There's also *Rivera v. Nibco, Inc.* (364 F.3d 1057 (9th Cir. 2004)). In that case, the Ninth Circuit declined to apply *Hoffman*. It didn't say why. It was looking at a discovery motion, and it didn't specifically address why the rationale for *Hoffman* wouldn't apply. But it provided multiple procedural reasons why *Hoffman* did not compel the conclusion that the prohibition of back pay applied to Title VII actions.

MODERATOR: Changing tacks to the recent National Labor Relations Board decision that football players at Northwestern University could be classified as employees, what are the ramifications?

MOYE: It presents a higher level of discussion on ESPN SportsCenter. We're talking about an administrative decision that doesn't have any effect beyond one private university. So the question is how it might impact public colleges and universities, which are subject to state labor employment laws. For example, here in California, the UC system or CSU system is not under the jurisdiction of the NLRB but the Public Employment Relations Board. But if you extend it to its logical conclusion, in the Spring Sing at UCLA you have drama students spending all kinds of time, and some of them have scholarships from the drama or music department. Are they now employees because the university benefits from that?

I understand there's a lot of surface appeal. But there are important social issues beyond what they're actually claiming because they're not seeking wages. They're seeking a number of compensatory items in terms of their obligations to the university in exchange for the scholarship benefit. But I would be hard pressed to see this in the Seventh Circuit or in the U.S. Supreme Court.

> ***"You have a scholarship agreement and the question is whether or not that contract is unconscionable? Whether that contract has been breached?"***
>
> —MIKE D. MOYE

ARIAS: I'm not sure I agree with you, Mike [Moye], about the widespread impact. By the way, sports and law is one of my favorite topics; I was a student-athlete at UC Davis and I understand the time commitment involved. The NLRB's decision to classify the football players as employees was largely based on their time commitment, which I assert is typical of all student-athletes regardless of their sport. Northwestern has no choice but to appeal this decision. If football players are employees, then women's volleyball players are employees, as are lacrosse players. The financial impact could be quite large. Also, if this occurred at Northwestern, then why not Stanford or USC? It's going to be a slow process because the next step is the appeal by Northwestern. And if unsuccessful, the vote by student-athletes on whether or not they're going to unionize. In the interim what you're going to see is major progress by the NCAA and the university to address these student-athletes' concerns—short of making them employees.

MORRIS: A lot of people have done the Chicken Little analysis and said that the sky is falling. And that could be the ultimate result for intercollegiate scholarship athletics, but it isn't the case yet. All that has happened so far is this: the NLRB regional director made the most compelling case that he could for the football scholarship athletes being employees (rather than students) because they're under so much control by the university and because the time commitment for football scholarship athletes is so disproportionate to their academic time.

GRUNFELD: Whoever represented the players showed that they were working something like a hundred hours a week during the

season, had no control over their schedule, and are completely dominated by this sport. Their demands are very reasonable. They want medical coverage, workers' comp when they're injured, and measures to reduce concussion risks.

MOYE: Isn't it really a contract issue? You have a scholarship agreement, and the question is whether that contract is unconscionable? Whether that contract has been breached by the university?

MORRIS: No, I think it's an issue of whether one can be deemed an employee. That's what it takes just to get into the arena. And that's what the regional director spent most of his 24 pages deciding: that these football players are employees, not students. I see a lot of long-term ramifications if the decision of the regional director is upheld, which I predict the NLRB will do because of the way it's composed and because of where things stand politically. I predict the election will proceed as scheduled on April 25, with the ballots being impounded and not counted while the NLRB decides whether to uphold the regional director's decision.

It's completely foreseeable that if the vote goes in favor of unionizing, the university will refuse to bargain, and that will trigger appellate review, either in the D.C. Circuit or in the Seventh Circuit. This has a lot of political ramifications for the NLRB, because it would be such an unpopular decision across the country. It would widen the gap between private and public universities if private university football teams were allowed to organize, even if their bargaining goals were modest.

ARIAS: The Northwestern athletes have taken a very smart approach in saying they want a voice in governance, in medical care, and in academic support. Of course, the cynics at ESPN and elsewhere say this is the first step toward pay for play.

MORRIS: It's the camel's nose under the tent.

ARIAS: The football players who are generating tens of millions of dollars for the schools will eventually want a big piece of it. And, with Title IX, the volleyball player gets her equal share too.

MORRIS: I could see senators from, let's say, the states that house the Southeastern Conference football teams proposing legislation to exclude the NLRB from jurisdiction over intercollegiate athletics. There will be a strong political tendency to stand up for things perceived to be as American as apple pie. The reason this has gotten so much attention is that it's a multi-billion-dollar industry and there's such a disconnect between the multi-million-dollar salaries of the highest-paid coaches and the players who produce the revenue but share in it not at all.

GRUNFELD: Speaking of multi-billion-dollar industries, we also have to mention the Raiders case. Public opinion seems to be very much with the Raiderettes. You could say it's a contractual issue. But since they agreed to work many hours without pay, practicing, going to charity events and so forth, there you clearly have employees whose labor code rights are being violated.

MORRIS: That's resolved on a different axis—whether they are employees instead of volunteers. There are no scholarships for Raiderettes. I have a hard time seeing how the Raider cheerleaders could be viewed as anything other than employees. But that's something that has limited relevance, because it doesn't invoke the scholarship athlete issue.

MODERATOR: Let's move on to wage-and-hour, an area in which there are seven cases pending against one fast-food chain, McDonald's. How does the panel see this going, and are fast-food restaurants back under the spotlight?

MOYE: This is the second iteration of this. In the last couple of years, this relationship between the franchise and the franchisee was in the area of the Americans with Disabilities Act compliance. Franchisors were being brought into that litigation under the same theories underlying these wage-and-hour class actions, asserting that the franchisors control the franchisee, while individual franchisees typically don't have enough employees to make a wage-and-hour class action. I don't know that they're going to get to the franchisors. What they're going to end up doing is create a risk between the franchisor and franchisee and then ultimately we'll need to reshape that relationship.

GRUNFELD: In the McDonald's cases, one of the allegations is that the employers have workers clock out and wait around when the store's not busy. They say to clock out and wait until more people come in to eat. If that's a policy coming from the franchisor, that's just not any way to run a railroad under California labor law. That kind of policy, if proven, should be found unlawful.

MOYE: But that's precisely the issue: Franchisors don't have a policy that you operate an efficient, profitable restaurant. The question of how you make those pancakes, that's the franchisee's decision. So do you define the joint employer relationship based upon the use of a particular system or based on individual decisions about how the employees are treated?

PIERCE: This raises a major question in the wake of *Brinker* over whether the absence of a policy assuring compliance with wage-and-hour laws is sufficient for class certification. (See *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004 (2012).) If not, certification should be denied on commonality grounds.

There are also political factors at play. Fast-food workers have been traditionally difficult to unionize because of high turnover rates. So there's a lot of grassroots movements involving these non-union fast-food workers that appear to be supported by unions.

MORRIS: I agree with Natalie [Pierce]. This seems more political than legal. Organized labor would like to see enough pressure put on major fast-food corporations at the corporate level to push down

on their franchisees certain levels of working conditions that ordinarily would be left to the determination of an individual franchisee. I don't believe there's any viable legal argument that the major franchisor fast-food companies are actually the employers or even the joint employers of people who work for the franchisees.

PIERCE: Some of the largest class actions against fast-food companies right now are in California, but fast-food companies do not sit alone as recent targets. We track the number of class actions filed in California. Despite *Brinker*, or perhaps because of it, the number of class actions filed in California actually went up from 1,228 in 2012 to 1,494 in 2013, and 32 percent of all class actions nationwide are filed in California, where 550 class actions filed in 2013 included claims for meal and rest-break violations.

However, after *Benton*, *Bradley*, and *Falkinbury*, where we were seeing this trend of appellate courts certifying classes simply based on alleged uniform lack of California-compliant meal and rest period policies, a recent ruling out of the Southern District of California offers welcome news. (See *In re Benton v. Telecom Network Specialists, Inc.*, 220 Cal. App. 4th 701 (2013), *In re Falkinbury v. Boyd & Associates, Inc.*, 216 Cal. App. 4th 220 (2013), and *Bradley v. Networkers Int'l, LLC,* 211 Cal. App. 4th 1129 (2012).) In *Coleman v. Jenny Craig*, 2014 WL 808658 (S.D. Cal. Feb. 27, 2014), Coleman challenged Jenny Craig's payroll system that paid an automatic one-hour premium for missed meal periods, but didn't pay it for shortened or late meal periods and also didn't communicate to employees the circumstances under which they were entitled to missed meal periods.

> ***"Paying the premium wage when a break is not provided is key. It's cheaper than buying EPLI insurance or defending a class action, so pay it."***
>
> —CATHY L. ARIAS

After *Benton*, plaintiffs sought reconsideration. They argued that under *Benton*, employers were required to promulgate a policy informing employees of their rights to premium payments. The district court said it didn't read *Benton* the same way and concluded that plaintiffs did not cite authority for the proposition that an employer must inform its employees of their entitlement under certain circumstances to a one-hour premium payment.

MOYE: There were some straightforward points that you could take away from the *Brinker* decision, and this now is the release of all the uncertainty that was pent-up from while *Brinker* was pending. The meal and rest-break issue is always going to be there as long as there are employees and as long as there are meal periods and rest-breaks to be missed.

GRUNFELD: Plaintiffs are focusing on companies and their policies because that's what the courts are telling us: You want to attack the policy. It is more difficult to come in with one or two employees who missed meal breaks and have to prove this was happening every day. For example, in *In re Auto Zone*, 289 F.R.D. 526 (N.D. Cal. 2013), Judge Charles Breyer granted Rule 23 certification only of a rest-break subclass, "[b]ecause this subclass's claims are based entirely on the legality of defendant's uniform written rest-break policy..." (289 F.R.D. at 534.) Many of the cases we're seeing with donning and doffing off the clock, wage, meal, and rest periods focus first on what the employers' policies are. I represent plaintiffs in a wage-and-hour class action where the employer's written policy states you must bring your lunch to work, strongly suggesting you cannot have a half-hour meal period uninterrupted by work demands, in violation of the Industrial Welfare Commission wage orders.

PIERCE: Despite the fact that *Coleman* says you don't actually have to specifically state that premium pay is available, I am always giving clients model meal and rest-break periods policies, including a premium request form so that an employee can raise their hand and say, "You know what, I didn't get my opportunity to take my 30-minute meal break." The model policy and request form provide evidence that an employer informed employees, and gave them every opportunity to let us know if anything got in the way of those legally mandated breaks. While Jenny Craig did not inform employees of entitlement to premium pay, it did instruct employees to submit time edits for late or short meal breaks.

ARIAS: Paying the premium wage when a break is not provided is key. It's cheaper than buying Employment Practices Liability Insurance or defending a class action, so pay it. The other thought I had about Natalie's statistics is that we need to consider the impact of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), which forced class action plaintiffs attorneys to focus their attention to smaller legal claims, filing more lawsuits, and moving away from gigantic nationwide suits. With the way that *Brinker* is being interpreted by the courts and the impact of *Dukes*, I predict we're going to see the uptick in class actions for a long time.

MOYE: But the possibility of removal to federal court also impacts the size of the actions being filed. There's an opportunity to stay in state court and not have to deal with the federal courts.

MORRIS: It continues to bother me that many courts are stopping their class certification analysis at the point at which they identify what is alleged to be a common policy, rather than looking to see whether the policy is actually *applied* in a way that might produce liability. I'm tempted to advise an employer client to adopt a policy that just says, "We provide the opportunity to take meal periods, and we authorize and permit rest-breaks, all in accordance with California law." Now, that would be a common policy that applies to every employee. Is that enough to certify a class when somebody

says, "I allege there are meal period and rest-break violations going on at this employer?"

If you follow the logic in cases like *Falkinbury*, *Benton,* and the Ninth Circuit case *Abdullah v. U.S. Security Associates, Inc.,* 731 F.3d 952 (9th Cir. 2013), they all repeat the mantra that "liability arises from the adoption of a uniform policy that violates the wage-and-hour laws." Well, I'm sorry, but most of the time you can't tell from looking at the policy whether it violates the wage-and-hour laws. That has to be determined from the way the policy is applied.

Notwithstanding Gay [Grunfeld]'s example, there are very few employment policies that are illegal on their face. Given the ease with which these cases are being certified, somebody is going to have to step up and try one of these cases, and perhaps end up with a finding that there is no class-wide liability, even though on an individual basis some people might be able to prove a violation.

MOYE: If you end up trying a wage-and-hour case, it's going to become more clear and will really underscore the problem that the analysis is not going far enough in the first instance with regard to certification. So it will flush itself out, it's just a question of how much you're going to have to go through to get there.

> ***"We can't have employers deciding to fire employees because of problems with their applications. That's not the real world."***
>
> —GAY GRUNFELD

GRUNFELD: This time next year, we're probably going to be discussing *Duran v. U.S. Bank* (pending as No. S200923; previous court of appeal opinion, 137 Cal.Rptr.3d 391 (2012)), in which the California Supreme Court is considering the use of representative testimony and statistical evidence in a wage-and-hour class action trial. And if you on the defense side go to trial in these cases and you win, you've established there's no liability for millions, if not more, in back pay. So maybe that's what you need to do more.

MOYE: Gay [Grunfeld]'s throwing the gauntlet down.

MODERATOR: Can we focus on the amendments to the labor code? What effects will SB 496 have in terms of expanding retaliation protection to internal whistleblowers?

ARIAS: It's going to test employers' internal procedures for employees to raise questions or concerns about the company's business activities or about the conduct of the company's employees or their managers. We're always advising our clients to develop policies, develop procedures, and train on those policies and procedures. This expansion of rights makes that even more important. Because if you have a manager who's not informed of what his or her obligation is when a whistleblowing activity occurs, that can open the floodgates for the company.

PIERCE: I agree. This is a major expansion of whistleblower protections, and there are of course ambiguities in the amendments. For example, the law expands protections to those who complain internally to a "person with authority over the employee" or another employee who has the authority to investigate. Who might that be? Employers may want to adjust their job descriptions, handbooks, and policies to clarify chains of authority and individuals who are capable of undertaking investigation.

GRUNFELD: The statute does modify that to say that the employee has to have "reasonable cause to believe" that the information discloses a violation of law. The statute makes it important that employers be careful in how they handle employee complaints and what they're complaining about. Consider, for example, the verdict recently against *Playboy*, see "$6m verdict adds to employer fears of whistleblower lawsuits," *San Francisco Daily Journal* (March 17, 2014), where the Board of Directors was not following its own policies in setting executive compensation. Juries are not liking employers who fire people who have legitimate concerns about the company's compliance with law.

MOYE: Retaliation cases have always been difficult in terms of the potential for that disputed issue of fact. The language of this statute, exacerbates that by raising the issue of whether this person meets the definition, and then did they say something or were they about to say something? All of that stuff adds up to the point that an employer is probably more than likely to get a summary judgment. It doesn't take much for a court to be reluctant to grant summary judgment because of the nature of the claim.

MORRIS: It's a race to the bottom, in that the more ignorant an employee can claim to be, the easier it is for the employee to say, I may be ignorant of wage-and-hour laws, but I had "reasonable cause to believe" I was supposed to be able to take a meal period at such-and-such a time, even though that's objectively wrong. It makes it difficult for employers to take any action if the person has ever said anything about anything, or if the person is believed to be a person who'll say anything about anything.

PIERCE: The law also now says if it's part of your job to spot these compliance issues, that's not going to preclude you from bringing these claims. I handled some cases last year where the result would be different with these amendments. We should also remember that California employers are not alone in needing to establish or reframe whistleblower policies. The U.S. Supreme Court's recent decision in *Lawson v. FMR LLC*, 134 S.Ct. 1158 (2014), expanded what we thought might just be Sarbanes-Oxley and Dodd-Frank protections for employees of the 4,500 publicly-held companies in the U.S. to the employees of millions of companies that are either contractors, subcontractors, officers, employees, or agents of publicly held companies.

ARIAS: There is also the expansion now to include local laws and regulations. If you are an employer in the Bay Area, you know how active San Francisco is in regulating your business. This expansion is yet another challenge to employers because it provides even more risk for innocent mistakes and regulations to be concerned about. SB 496 creates new sources of liability, especially for businesses operating in active municipalities, because it incorporates violations of local laws and expands the potential for retaliation claims.

MORRIS: I wanted to circle back to *Salas v. Sierra Chemical Co.* in the context of California Labor Code sections 1019 and 1024.6, two new statutes that are as yet untested but very interesting. Section 1024.6 says an employer cannot take adverse action against an employee who updates or attempts to update his personal information. Does this immunize someone who says, "You know that Social Security card I gave you when I applied for employment? It was invalid. Now I have a valid one." Is that a person who has "updated his or her personal information"?

ARIAS: Does it invalidate a company policy to terminate anyone who lies on an employment application or in the hiring process?

MORRIS: My response, which is as yet untested, would be for the employer to say, "That relates to your qualifications because it shows you were not authorized or qualified to hold this job when you applied. Thank you for telling me you lied to me when you applied. You're now discharged." I'm sure there's a counterpoint to that, but that's the way I'd look at it.

GRUNFELD: The counterpoint is we need comprehensive immigration reform as soon as possible. We need to wake up and see what kind of world we live in, where many employees without appropriate documentation are working hard at jobs–we can't have employers deciding that they're going to fire those employees because of problems with their applications. That's not the real world.

MORRIS: I would agree with you on the need for immigration reform, but immigration is a federal issue, and I think it should be resolved at a federal level rather than an ad hoc state-by-state basis.

GRUNFELD: But if employers are hiring employees, using their labor, and allowing them to work hard for many years, employers shouldn't be able to get away with discriminating against them, sexually harassing them, or taking away their wages. It's a major policy problem, but the solution is not just throw Mr. Salas's case out of court on summary judgment.

MORRIS: You haven't heard me urge that people should be sexually harassed at work, or not paid. In fact, I have said the contrary. But I do believe that people who get hired should be appropriately authorized. That is the law until it's not. Now, the other statute that's interesting is California Labor Code Section 1019, dealing with unfair immigration-related practices, including retaliating against anybody for exercising any right protected by the labor code. Perhaps it wasn't intended, but it's an invitation for employees who believe they may be at risk to ask questions about their paychecks or about their meal periods every 90 days or so, which is the look-back period within which there's a presumption of retaliation if anything bad happens to somebody on an immigration-related basis. There's room for these statutes to be "worked" by people trying to get out in front of their unauthorized employment status being discovered.

PIERCE: Labor Code Section 1019 problems can arise even at the beginning of employment. Employers will perhaps use E-Verify software in situations where they're not required to by federal law, or they'll request additional documents to verify authorization for work, or subject these documents to high standards of review, each of which runs the risk of being considered an unfair immigration-related practice under the statute.

> ***"What most people don't realize is that Section 1019 puts employers' business licenses at risk. It's more draconian than being exposed to liability for back pay."***
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> —JAMES L. MORRIS

MOYE: What distinguishes the whole issue of immigration status is the employer has a separate, legitimate concern that creates potential liability. Many inquiries from an employer that relate to immigration fall under the category of protecting its own interests and ensuring that it is satisfying its own obligations, as opposed to simple curiosity, which is oftentimes a basis for making these inquiries, or even the case of the discrimination. As a practical matter, there are a lot of employers who don't necessarily want to know they've already violated the law by hiring an undocumented worker.

PIERCE: There really is no employer incentive to run afoul of 1019. From what I've seen, employers are already complying with the statute. But yes, it will create some new ambiguities in its application. Under this law, employers need to get their investigations absolutely right. There's little room to be over diligent, or not diligent enough.

MORRIS: What these last two comments show is that employers–I know it's hard for people to feel sorry for employers–find themselves on the razor's edge. I've fielded calls from clients saying, "We've discovered that Mr. X is not a legal worker. We really like him. Can we look the other way?" What most people don't yet realize is that Labor Code Section 1019 puts employers' business licenses at risk. It's far more draconian than just being exposed to liability for back pay. The employer is arguably going to have to stop doing business at all for a period of time if the court suspends its business license. *All* employees would lose pay if that happened. ■