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Roundtable Series

LABOR & EMPLOYMENT

Experts round up this year's top employment law issues

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An update on employment law in the Trump era, pay equity, LGBTQ discrimination, and medical marijuana accommodation.

Labor & Employment

The Trump administration is making waves in the labor and employment landscape as the Justice Department squares off against federal agencies on issues ranging from sexual orientation discrimination to class action waivers. On the state level, a new California law and Ninth Circuit ruling on salary history inquiries ignited a lively dialogue on the enduring issue of equal pay. Our panel of experts discussed these issues as well as recent cases on the ADA's applicability to gender dysphoria, and evolving workplace protections for medical marijuana users.

California Lawyer met for an update with Cathy L. Arias of Burnham Brown, Ann Fromholz of The Fromholz Firm, Gay Grunfeld of Rosen Bien Galvan & Grunfeld, Wendy Lane of Greenberg Glusker, Jon D. Meer of Seyfarth Shaw, and Daniel T. Ho of Thomas Employment Law Advocates.

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DISCUSSION

MODERATOR: How will the Trump administration impact the employment law landscape?

DANIEL T. HO: The biggest impact Trump himself will have arises out of the lifetime appointment of federal court judges. The appointment of Neil Gorsuch, in lieu of Merrick Garland, will have an enormous impact. To illustrate, the Supreme Court recently heard argument as to whether arbitration agreements through which employees waive their rights to bring class actions violate the National Labor Relations Act. It appeared to me from the transcript that Justice Kennedy—the likely swing vote—was leaning in favor of enforcement of class action waivers pursuant to the Federal Arbitration Act. If one justice leaves, and Trump, for better or for worse, has the opportunity to appoint another member of the Federalist Society, we'll see a greater shift in the Court's ideological balance.

MODERATOR: What do you think about the Justice Department and National Labor Relations Board taking opposite positions in that case?

WENDY LANE: I think the Justice Department's actions reflect the stated intent of the new administration: to reduce employer costs in dealing with what has been such a surge of employment litigation, particularly in the last eight years. In the case of class action waivers, this administration's position is that employers and employees should be allowed to contract to litigate wage and hour issues individually without an employer facing the risk of a class action every time one employee wants to bring some sort of a wage claim.

This concern about economics is spilling over into many other areas. The Office of Management and Budget recently an-

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nounced that the expanded EEO-1 form that was supposed to go into effect in March has now been stayed, and employers are now instructed to continue using the old form. The acting chair of the EEOC—Victoria Lipnic, a Republican appointee by Trump—specifically said she was concerned about the costs employers would incur in responding to the additional questions in the expanded new form. Lipnic and the OMB didn't feel that the information the EEOC would be obtaining would be worth those costs of trying to respond to the expanded form.

Certainly, there are social and political issues driving this administration as well, but economics is clearly also one of them.

JON D. MEER: Whatever people may think of the administration, the business community is certainly responding well. The stock market is at a record high, unemployment is at a record low, and the decreasing regulation, or perception of decreasing regulation, is something that will ultimately help everyone. The chamber of horrors that people refer to of eliminating rights and what's going to happen if employees can't pursue class action claims because they have to waive them in arbitration agreements is overblown. As a defense lawyer, I have great confidence in the plaintiffs' bar that they will find a way to get past this. Whether it will be all PAGA-related lawsuits, or something else that might not be subject to mandatory arbitration, there will still be a way to protect rights of employees.

CATHY L. ARIAS: You don't have to change a law or issue a new policy to impact the employment law landscape. This administration can do so merely by controlling the purse strings. President Trump issued a hiring freeze; we've seen a trimming of head counts and budget reductions, which has resulted in fewer investigators and fewer auditors in the Department of Labor, the EEOC, OSHA, and other units. So, expect to see a failure to enforce employment laws or at the very least delayed enforcement. At a glance, some might say that's favorable for business, but I'm not so sure that's the case. Businesses and the workers are both potentially harmed when this kind of thing is delayed. There is definitely an interest by all in having conclusions to investigations—prompt and efficient conclusions.

GAY GRUNFELD: Whether it's the hiring freezes, the budget cutbacks, the Supreme Court appointment, the agency appointments, or the attorney general, this administration is stacking up to be the most anti-worker administration in history. It is very bad news for low-income and middle-income workers in the United States.

You're right, Jon [Meer]. Here, in California, if and when the class action waivers are allowed, we still have PAGA for now, and, perhaps, some low-wage workers will be able to pursue their rights to be paid fairly here in California. But nationwide, this administration will be harmful to employees.

I also note that in March of this year, President Trump revoked former President Obama's Fair Pay and Safe Workplaces Executive Order using the Congressional Review Process, which means that future presidents and the Department of Labor are now permanently barred from reissuing similar regulations. The Trump administration is hostile to workers' rights.

HO: Much of the administration's impact will depend on which state's laws apply in a particular case. Setting aside the class action waiver issue, employees can still bring plenty of lawsuits under state law. The Trump administration, for the most part, can't undo state law. The Tenth Amendment to the Constitution limits the extent to which the federal government can supersede state law.

So a California employee has very different rights than an employee subject to Texas state law. Trump will have a substantial impact at the federal level. But in California, employees can still bring PAGA claims in court. Wage and hour claims, meal and rest periods claims under state law, can still be brought.

ARIAS: That's an interesting comment. As a defense attorney, I caution clients to expect California to respond to President Trump's actions. This State has taken on more than one lawsuit against the administration. To the extent that the federal regulations are perceived to be too pro-business, I suspect that California will ramp up its efforts to protect workers' rights. And we'll see new laws, new regulations, greater enforcement,

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which could have a substantial economic impact on California business. As an example, take a look at AB 450, which places restrictions on a California employer's cooperation with immigration raids and can prescribe penalties up to $10,000 for each time that a California employer cooperates in any of these raids. That is clearly a response to the current administration.

ANN FROMHOLZ: I agree with that, to some degree. I firmly believe that one of the goals of the current administration is to roll back many of the regulations that the Obama administration put in place. For example, it already rolled back the FLSA overtime regulations that the Obama Department of Labor instituted.

In California, employees here have more protections than elsewhere. I've worked in Texas and Nevada, which do not have extensive state employment laws, so federal law does apply. It's a very different environment for workers, employers, and lawyers. As Cathy [Arias] was saying, Governor Brown has shown recently that he will respond to what the Trump administration is doing. I expect we'll see more of that.

MODERATOR: What changes can we expect to see at the NLRB?

HO: The NLRB's 2015 decision in *Browning-Ferris Industries of California*—essentially holding that companies can be held responsible for labor violations committed by their contractors—has posed a broad threat to companies that "franchise out" their business. I'm confident the new NLRB will change course, and that the ability of employees to unionize, to the extent it's valid, will be limited to smaller entities. It will dramatically change the scope of which entities can be subject to collective bargaining.

FROMHOLZ: As Dan [Ho] mentioned, the Obama board decided the *Browning-Ferris* case, addressing the issue of joint employers. There's also a pending McDonald's case that goes specifically to the issue of fast-food workers and whether fast-food workers, if they decide to organize, could bargain only with the franchisee, or could bargain also with the corporate entity. When the Obama board was constituted, we expected that case to go one way. And now that Bill Emanuel and Marvin Kaplan have been confirmed, the board will, I think, take a different view of that particular issue.

MEER: The NLRB was largely irrelevant ten years ago. We have less than seven percent of our non-public sector workforce organized. So, to its credit, the NLRB started sticking its nose into social media and McDonald's workers, and all sorts of constituencies that were never part of the board's charge. To talk about a rollback or change in the board's power, it really is just a return to what they're supposed to be doing, which is adjudicating the right to collectively organize and bargain with an employer. When the NLRB starts getting into the civil litigation areas that it's been looking at for the past seven or eight years, it's appropriate to try and roll it back and let those areas be handled by the courts rather than an administrative agency.

GRUNFELD: I disagree. The NLRB's enforcement of Section 7 rights, which is what is at issue in *Ernst & Young v. Morris*—the right to collectively organize through class actions—is a very appropriate exercise of the NLRB's power. We will have to wait and see how the Supreme Court decides that case.

FROMHOLZ: Another NLRB issue that is going to be of interest to most people is the timing of elections. The rule under the Obama board that was put into place in 2015 significantly shortened the timetable for elections. That was met with furor by the business community. I think we can expect that to change, and probably very soon.

MODERATOR: On the pay equity front, what are your thoughts on the passage of AB 168 and the Ninth Circuit's ruling in *Rizo v. Yovino*, No. 16-15372 (9th Cir. 2017) (en banc ordered August 29, 2017), concerning salary history inquiries by employers?

FROMHOLZ: It is important to note that *Rizo* was filed before the California Equal Pay Act took effect and before AB 168 passed and was signed by Governor Brown. Had it been filed at a different time, we likely would have seen a different outcome. The holding

is entirely contrary to the California Equal Pay Act. I expect that either that holding will change with the en banc review, or there will be some other case that overrules it. AB 168 prohibits employers from asking about salary history, period.

HO: The material issue in *Rizo* is what standard an employer must meet under federal law to defend itself against a claim of gender pay disparity. If *Rizo* had not been vacated, an employer would only need to show that it has a policy that uses pay history reasonably. What the en banc Ninth Circuit will likely do is interpret the federal Equal Pay Act to make it consistent with California law, which imposes a strict statutory burden upon employers. Unlike the Equal Pay Act, the California Fair Pay Act specifically requires that pay differences for similar work be supported by business necessity.

MEER: The employers' affirmative defense can be stated in one sentence: What system are you trying to replace capitalism with? Courts weighing business necessity, rather than business relatedness, is dangerous. Business relatedness is a standard that has applied for decades, and it has been used to answer lots of different claims of discrimination. If the courts must decide whether relatedness isn't enough, and you need necessity, then you have courts making business decisions. I don't think that helps employees or employers.

HO: But we're lawyers, not legislators. Instead of relying on political ideology to defend my clients, I need to be mindful of what state law requires. The California Legislature has expressly made business necessity the standard for defenses to race and gender-based pay disparity, for similar work, irrespective of location. So I have to advise my clients with that standard in mind. My issue with state law is the absence of a carve-out for geographic location. State law unfairly burdens employers who might choose to pay their employees more in Los Angeles than in Victorville, based on cost of living. But I can't change the words in the statute; I can, however, provide guidance as to compliance.

LANE: I support efforts to create fair pay for women and minorities, and I understand that if an employer looks at prior salary by itself in setting the salary for a new hire, it could perpetuate an implicit bias that is reflected in an employee's salary from a prior job. However, prior salary can also instruct the employer as to the going market rate. In order for employers to continue to recruit and retain the best workers, they need to provide competitive pay that's commensurate with the skills and experience of their employees. The Fair Pay Act already challenged implicit biases and unfair pay disparities while allowing employers to factor in an employee's skills and experience when setting salary. Notably, AB 168 does not prevent employees from volunteering prior salary information. It will be interesting to see how many employees will elect to offer this information when employers cannot ask for it.

MEER: What's so interesting about all this is in California, for other forms of discrimination, we changed our jury instruction a couple of years ago to say that discrimination had to be more than just a motivating factor, it had to be a substantial motivating factor. That recognized that there are very few absolutes when employers are making decisions.

Just as somebody's pay history may be affected by gender discrimination or biases in our culture or in prior jobs, it also may be based on numerous legitimate considerations. But the new ban on asking about prior compensation assumes that all prior pay was infected by unlawful discrimination, to the exclusion of many other legitimate factors.

It is problematic to try and put pay equity at a standard that is different from the ones used for other forms of discrimination. For example, if a person was suing for gender discrimination in connection with their termination, they'd be subject to a substantial motivation based on gender standard. The pay equity laws seem to reduce that standard for pay. It is at odds with how we interpret discrimination law in California.

GRUNFELD: That's exactly the point. The current situation is that women are still, decades after entering the workforce, and decades after the passage of Title VII, earning

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between 20 and 30 percent less overall than men. These laws are designed to eliminate the difficult process of determining, based on the substantial motivating factor test and other hurdles, whether discrimination has occurred and instead jump-start a solution to this problem.

I am glad the governor signed AB 168 into law. *Rizo* is out of step with California law and national trends, and the en banc court will, I hope, address that. As Governor Brown agrees, prior salary can no longer be a factor in deciding what to pay a person precisely because that has resulted in significant pay discrepancy over time.

MEER: But there's almost a hypocrisy in having a law saying that employees, once they're employed, can't be barred from sharing their salary information; can't be barred from saying, "I'm paid more than you are." Yet, when they're seeking a job, the employer can't make those sorts of inquiries. It doesn't make any sense that we would want that information to be excluded on the hiring end only so that once the employee enters the workforce, they can start talking about it, and nobody can prohibit them from talking about it.

GRUNFELD: But it's totally different. The employer has much more power than the employee. That's why this sort of inquiry is now prohibited on the front end.

ARIAS: I find this discussion interesting. I've been waiting to see the floodgates of pay equity lawsuits come down the pipe, and I haven't seen that.

LANE: Well, we may not have seen numbers, but we've seen some pretty staggering settlements and rulings like the $19.5 million *Qualcomm* settlement.

ARIAS: Oh, absolutely. Certain industries have been targeted and paid some very large sums. But by and large, we haven't seen the flood of pay equity litigation that we thought might be coming.

In my opinion, businesses are doing the right things to avoid litigation. Companies are conducting their own pay equity audits to determine whether or not there are any disparities among comparator groups. And if there are, they're trying to identify why those discrepancies exist; whether there are legitimate factors. And generally, I'm finding that businesses are very open to correcting these disparities. If not, I expect that juries and the plaintiff's bar will assist in changing behaviors. I'm hoping that next year we will have made tremendous strides and there won't be any need to discuss pay equity lawsuits.

LANE: We'll probably need to keep talking about it until we see equal pay.

GRUNFELD: I agree with Cathy [Arias]. People are calling me, and probably all of you, and saying, "Who's the best consultant? Let's make sure that there aren't any problems with how we're paying our employees from an equal pay perspective." And, of course, we need to mention that under the California Equal Pay Act, race and ethnicity—not just sex—are protected categories. So, employers have a big job ahead of them to come into compliance with this law.

Also, there are some really important lawsuits being filed, and we would be remiss if we didn't mention the Google lawsuit that was filed recently in San Francisco, a class action seeking to change the way Google pays its women employees. That's an important lawsuit, as well as the Oracle case, which is pending. And Wendy [Lane] mentioned Qualcomm's $19.5 million settlement—a significant settlement.

FROMHOLZ: And the State Street case. State Street was, ironically, the company that put out the "Fearless Girl" statue in front of the bull on Wall Street. They just settled an OFCCP case in which the allegations were that State Street didn't pay its female executives equally to the male executives.

GRUNFELD: The tech, legal, and financial sectors are being held accountable for failing to pay their employees equally. As these cases get resolved, they will help shore up the principles underlying the California Fair Pay Act, which will have implications for employers across the country.

MODERATOR: What are the implications of the Seventh Circuit's en banc decision in *Hively v. Ivy Tech Community College*,

853 F.3d 339 (7th Cir. 2017), holding that Title VII bars sexual orientation discrimination?

FROMHOLZ: This will go to the Supreme Court. I don't know that it has any real impact on California because our laws already specifically protect sexual orientation and gender identity. This is an issue that's been brewing at the EEOC for some time.

Interestingly, in *Zarda v. Altitude Express*, No. 15-3775 (2d Cir. 2017) (en banc ordered May 23, 2017), the EEOC and the Justice Department were against each other. The EEOC continued to take the position that Title VII covers sexual orientation and prohibits discrimination against employees on the basis of sexual orientation. The EEOC's position is that sexual orientation is part of sex. But the Justice Department wrote an amicus brief arguing that sexual orientation is not protected under Title VII. The Second Circuit seemed somewhat confused about why the Justice Department was weighing in. This was right before Attorney General Sessions issued the memo taking the position that Title VII does not protect against discrimination against people on the basis of gender identity.

GRUNFELD: *Hively* is a momentous decision. The en banc Seventh Circuit did an excellent job of synthesizing precedents and concluding that under *Obergefell v. Hodges*, *Loving v. Virginia* and *Price Waterhouse v. Hopkins*, "sex" within the meaning of Title VII must include sexual orientation.

As the court's opinion points out, the central conundrum of *Hively* is that an employee in the United States today can legally marry her same-sex partner on a Saturday, yet be fired for that same reason on Monday. From a logical, moral perspective, that is unfair under *Hively* and other cases; it is also unlawful.

MEER: This can be an issue for Congress. Fortunately, here in California, our statute specifies the protected categories such as sexual orientation, so everybody understands what they are, and there isn't a need for interpretation. Title VII can be amended. That's probably more effective than waiting for a case to get to the Supreme Court.

FROMHOLZ: The current Congress will not change the law to expressly protect sexual orientation. The Employment Non-Discrimination Act, which would have prohibited discrimination on the basis of sexual orientation and gender identity, has been proposed in Congress multiple times. The last time it was proposed, in 2013, many people said that it failed to pass because it included a protection on the basis of gender identity. If ENDA had passed, we wouldn't be having this discussion. But I think there's zero chance ENDA or a similar bill will pass in this Congress. So, the issue will go to the Supreme Court.

GRUNFELD: Congress did not amend the law to make sure that Title VII covered sexual harassment; the courts did that.

I agree, this question will come before the Supreme Court. Indeed, there is a factually similar case called *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), in which a petition for certiorari is currently pending. In *Evans*, the Eleventh Circuit came out the opposite way from the Seventh Circuit in *Hively*. So, we do have a split in the circuits. This is a momentous issue that is of tremendous concern to all Americans. Luckily, here in California, employees have protections through the FEHA.

ARIAS: What I find interesting about this topic relates back to our earlier discussions concerning President Trump and this administration instituting what is generally thought to be a pro-business agenda that will placate the business community and hinder pro-labor legislation and regulations. In fact, the Attorney General's memo could have the polar opposite effect on the business community.

I can't speak for all business, but certainly, I have a good sense from the clients that I work with that they are not too happy with the attorney general's memo. In my opinion, most employers believe strongly that discrimination is bad for their business. Most have antidiscrimination policies and practices in place and support the principles of equality and fair treatment. In fact, if the business community makes it known to the president and the Legislature that this is not something they support, we may see a quick

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legislative solution rather than having a long drawn out process through the Supreme Court.

HO: I think we're dealing with separate issues here—a purely legal question, and its latent political consequences.

Even as employer-side counsel, I think *Hively* was correct in holding that discrimination on the basis of sex necessarily includes discrimination on grounds of sexual orientation. Judge Wood articulated her rationale in a simple way by comparing it to racial discrimination. If someone told a black man, "I'm not hiring you because you are married to a white woman." To say that is not racial discrimination, we would all find ridiculous. You are using race as a substantial factor in taking adverse action against someone. You are doing the same thing if you take adverse action against a man because he's married to another man. You are using sex as a factor in taking action. Notably, the decision was joined by someone who is not a traditional liberal: Judge Easterbrook. Judge Posner concurred in the decision.

However, I am worried that when this goes to the Supreme Court, people will not take the time to understand the granularities in the *Hively* opinion. We're a very divided nation right now. I would be concerned—notwithstanding my agreement with Judge Wood's reasoning in *Hively*—that an affirmance of the *Hively* rationale would lead to an even stronger backlash from people who view the judiciary as unnecessarily activist. The legitimacy of an independent judiciary, as a co-equal branch of government, is a bedrock of our political system. So, it's a very difficult issue for me, personally.

LANE: That's interesting because even Sessions, and others supporting his memo, were saying, "Let's push Congress to make this explicit in the statute." Maybe I'm falling in line with Cathy [Arias] and her optimism that with enough pressure from constituents, Congress will address the issue and protect your concerns about the judiciary.

MODERATOR: What are your thoughts on *Blatt v. Cabela's Retail Inc.*, No. 5:14-cv-04822 (E.D. Pa. May 18, 2017), concerning the extension of the ADA to gender dysphoria?

FROMHOLZ: Because, as we have discussed, there is no express protection for gender identity under Title VII, this plaintiff, who believed that she was subjected to discrimination on the basis of her gender identity, saw the ADA as another possible route to a remedy.

MEER: It's interesting. In the 1970s, the Diagnostic and Statistical Manual, the treatise for medical conditions, defined homosexuality as a psychiatric disability, and that now seems abhorrent to almost everyone. I'm not sure if putting a disability label on gender identity is the direction we want to be going.

LANE: The result that Jon [Meer] is speaking to, which I think we all agree is not what most of us hope for, is the very reason why we need to amend Title VII. Otherwise, you face this situation where somebody is calling their gender identity issues a disability just to try and seek another avenue of relief.

It's an interesting time right now, but it's going to become even more interesting when we have these circuit splits and the federal agencies and the Justice Department are taking opposing positions.

I guess we're coming full circle to the beginning of our conversation: what do we see going on in this administration? I think we can agree there is too much uncertainty. As much as we all have policies that we're in favor of, when there's so much inconsistency in interpretation and enforcement, how can anyone implement those policies? How do employers know what they can and cannot do?

ARIAS: The *Blatt* case is an example of creative pleading by a plaintiff in order to obtain a remedy for discrimination. It makes me feel very uncomfortable, as an LGBT person, to characterize this transgender person as suffering from a disability. I'm extremely uncomfortable with the vehicle being used to get this result.

HO: If there is a bleed-over into defining gender identity, by necessity, as gender dysphoria, which I don't think *Blatt* necessarily does, it will make it much harder to get

cases dismissed before trial. Disability cases, by nature, involve interactive process and reasonable accommodation obligations, in which a judge is more likely to find a material factual dispute and kick it to a jury.

I don't think we can rely on the current Congress to clarify anything with respect to Title VII. If there was more balance in Congress, I might expect further clarity. But my goodness, Roy Moore is now a candidate for a Senate seat. So this is a problem that courts will have to deal with because I don't expect any amendments, certainly at the federal level, any time soon.

ARIAS: What you may see is some movement toward amending Title VII to expressly include sexual orientation, but the inclusion of transgender workers may be too controversial at this point. I hope I am wrong.

MEER: I'm more optimistic. Even in our own state of California, not so long ago, we didn't allow same-sex marriage, and then, there was a very quick change on that. There can be a groundswell on a lot of these issues that will cause faster reaction.

LANE: That's true. And it only took a few years after that for California to codify and provide protections for those who are defined as "transitioning" and "transgender." Our statutes and regulations are very specific. But California does have a more liberal set of rules for employees to begin with. I don't know if it is safe to assume that on a national basis, we're going to see that kind of change. As mentioned earlier, part of the answer may need to be social activism. If big businesses, whether required by law or not, take a stand and place the pressure, maybe Congress will fall in line; maybe they will not. It just goes to show that it's important to focus on more than just the law because the law only gets us so far.

MODERATOR: The Massachusetts Supreme Judicial Court recently ruled in *Barbuto v. Advantage Sales and Marketing*, SJC -12226 (July 17, 2017), that medical marijuana users may assert claims for disability discrimination under state law. What is this case's potential reach in California?

LANE: California employers should definitely pay attention to *Barbuto* because Massachusetts is often at the forefront of causes that California is quick to adopt—from sick pay to asking about prior salary. This could be something that we see coming down the line in California.

But I also think that some have overstated what the *Barbuto* case stands for. It does not require an employer to allow a worker to be under the influence and impaired on the job, even if their use of marijuana is medicinal. The ruling was only that the company should have engaged in the interactive process.

Barbuto says only that if a drug test is positive, the employee should not be automatically terminated. The employer then needs to ask questions such as: "Are you impaired on the job;" "Can you still perform the essential functions of the job;" and "Are there alternate accommodations or treatments?"

Barbuto was an office employee. We might have seen a very different result if the employee were a truck driver, where there might be a risk if the person is impaired.

Employers already have to engage in interactive processes regarding so many other conditions in California; I think, at most, they're facing the risk of having to engage in just one more form of the interactive process.

MEER: I think all the paranoia about marijuana is hyperbole—the fear of what will happen, how to accommodate it and all that. We've accommodated the legal drug of alcohol for dozens and dozens of years, and have very clear rules on when someone is impaired, they're violating company policy, but the condition of taking alcohol or being an alcoholic doesn't necessarily mean that somebody should be showed the door in their job. Marijuana, per much of the medical information, is less addictive than alcohol and may be even less impairing. So, it seems strange that especially here in California—where we have not seen an increase in crazy drug addicts committing crimes or being impaired at the workplace—that we're so worried about the legalization of marijuana. Maybe the people who are so worried about legalized marijuana should just (legally) smoke a joint and chill out.

FROMHOLZ: Going back to *Barbuto*, the question is whether that case is going to affect California law. We need to look at the California statute legalizing marijuana that went into effect this year. We also need to look at the case law in California. Current case law still is *Ross v. RagingWire Telecommunications*, 174 P.3d 200 (Cal. 2008), which says that because marijuana is illegal under federal law, employers are not required to accommodate marijuana use, whether it's for medical reasons or some other reason.

Wendy [Lane], you have a good point that if the employee has a disability, the employer still should explore what the appropriate accommodation is, but right now *Ross v. RagingWire* tells us that marijuana use doesn't have to be one of the possible accommodations.

LANE: For now. It's within the realm of possibility, certainly, that we can see a bill proposed in the next year or so that alters the law as we know it today. But I agree that as of now, we are not affected by *Barbuto*.

ARIAS: I suspect that the plaintiffs' bar might be looking for the right case and the right time to revisit the *Ross* decision. I recall the oral argument in *Ross*, and a few of the justices were concerned that the employer was seemingly being excused from its obligation to engage in the interactive process.

Since *Ross*, there have been a few developments with medical marijuana. Medical marijuana can now be formulated to provide symptom relief without the high, intoxication, or mood alteration that you might normally associate with recreational

marijuana. So if I was a plaintiff's attorney, I might be on the lookout for a disabled individual who is terminated for using medical marijuana, and, in particular, a strain of medical marijuana that doesn't provide the high and intoxication, and has been formulated specifically for symptom relief.

As someone who represents California employers, that's the kind of case that concerns me. In such circumstances, a judge could very well conclude that an employer has to make an accommodation of its antidrug policy and allow someone to utilize medical marijuana and remain employed. My advice would be to engage in the interactive process if you're a California employer.

Also, I wanted to mention that I saw a survey that was put out by the ABA in 2015. And according to the survey, there were nine states where employers likely have a duty to accommodate an employee's medical marijuana use. So it's just not Massachusetts. This is a lot more common than I was even aware of.

GRUNFELD: It is time to revisit *Ross*. The composition of the California Supreme Court is different, the use of medical marijuana has changed, and the state has declared that recreational marijuana is legal. Ninety percent of states allow some form of marijuana. And, of course, *Barbuto* distinguishes *Ross* on the basis of the Compassionate Use Act language.

So, it may be a situation where the plaintiffs' lawyers in *Ross* relied too heavily on that statute, regarding which I have to agree with the Supreme Court that, by its plain language, did not apply to the employment situation. However, looking at *Ross* today, the facts of that case are very sympathetic: you have a U.S. Naval officer with a disability, and a physician who prescribed him medical marijuana to use in the evenings to alleviate serious pain, with no impact on his work performance. In circumstances such as these, California employers should, at the very least, engage in the interactive process and presumably accommodate their employees' needs.

ARIAS: If I were a plaintiff's attorney, I wouldn't be pushing this if the job was truly safety sensitive: heavy equipment users, airline pilots, and the like, right? But there are certainly some jobs where I'm sure they can make a very good case to the California Supreme Court. We will have to wait and see.