Labor and Employment

EXECUTIVE SUMMARY

Social media such as Facebook, Twitter, and LinkedIn are raising a number of new legal questions in the employment law arena. In particular, practitioners note that there is conflicting or nonexistent case law on issues related to relying on social media for hiring, policing employee online activity, and workplace harassment in new communication mediums, such as the increasingly common "textual harassment" cases.

Our panel of experts from Northern and Southern California discusses these issues, as well as trends in noncompete agreements and trade secret protections, and the ripple effects of the ruling by an en banc panel of the Ninth Circuit in *Dukes v. Wal-Mart,* the employment discrimination class action case involving 1.5 million plaintiffs. They are Mark Ross of Fisher & Phillips; Laura M. Franze and Roland Juarez of Hunton & Williams; Richard Kellner of Kabateck Brown Kellner; Steve Serratore of Serratore Law; Laura J. Maechtlen of Seyfarth Shaw; and Richard Frey of Venable. *California Lawyer* moderated the roundtable, which was reported by Laurie Schmidt and He Suk Jong of Barkley Court Reporters.

MODERATOR: What are the potential impacts of the Ninth Circuit decision in *Dukes*?

MAECHTLEN: *Dukes v. Wal-Mart Stores, Inc.* (603 F.3d 571 (9th Cir. 2010)) establishes a roadmap for approaching class certification under Rule 23. A primary holding in *Dukes* is that, while a court may not make determinations on the merits in the context of a class certification motion, it must conduct a "rigorous analysis" to ensure that the requirements of Rule 23 are met. This "rigorous analysis" often requires looking beyond the pleadings to issues overlapping with the merits, and while courts have discretion to limit discovery, they must examine these overlapping issues so long as they bear upon the Rule 23 elements.

We are reading this holding as requiring plaintiffs to have a robust burden of proof to certify a class, and one that allows defendants to insist on a "rigorous analysis" as to each factor under Rule 23. We are also recognizing, however, that a defense to class certification has to focus on the evidence underlying the Rule 23 factors alone, including an attack of plaintiffs' statistical analysis.

Finally, one of the more controversial aspects in *Dukes* is the plaintiffs' request to certify a class for punitive damages. In examining this issue, the court articulated a new, multifaceted approach for determining whether monetary or injunctive relief predominates. In defining and applying this new standard, *Dukes* affirmed a finding traditionally rejected by other courts that punitive damages do not require individualized determinations of harm, so long as plaintiffs have alleged that the company's policies or practices affect all class members similarly. This affirmation deepened an existing circuit split as to whether or not punitive damages certification theory can be pursued.

KELLNER: *Dukes* has to be looked at in line with other Ninth Circuit cases, such as *U.S. Steel (United Steel Int'l. Union v. ConocoPhillips Co.,* 593 F.3d 802, 808 (9th Cir. 2010)), as saying, "You cannot leapfrog over the plaintiffs' theory to make a merits-based determination."

The plaintiffs' theory in *Dukes* was that there's a decentralized decision-making process that permeates how all decisions are made at Wal-Mart, which is the common bond that makes class certification appropriate.

FRANZE: Isn't that the elephant in the room—whether decentralized promotion and pay policies can ever be the common thread that holds together a class action? Because decentralized policies are, in essence, no policy.

KELLNER: One of the things we have found is that often, when you have a combination of no policy and a pervasive culture, it is appropriate for class certification.

ROSS: But isn't that the problem—no policy or practice? Insofar as culture is proof of some common unlawful practice or policy, I can understand the argument. But to say that a class claim is going to rise or fall solely on the basis of a culture is a circular argument—culture alone without reference to a particular practice would allow class claims to be made in almost every case, which takes things too far. Without a specific policy or practice that applies to the class, where is the common issue of law or fact that predominates over questions affecting individual class members?

KELLNER: Quite often, the defendant argues that when a case involves employees at numerous corporate locations, there cannot be a class because individual issues predominate. When you point to a class of more than 1 million people, it tempers that argument.

JUAREZ: Speaking of cultural issues, one allegation in *Dukes* is that promotion decisions were made without notifying the plaintiff that the jobs were available, which led to men receiving the promotions. This is a common allegation in class action promotion cases, which have resulted in large settlements. Promotion opportunities are not announced, and decisions are made before women can express an interest. Employers should consider this when looking at the impact of *Dukes* on their policies and practices.

FRANZE: A lesson from *Dukes* to employers is to create a protocol for considering how the pool of employees for promotions is devised. Certainly, that would protect an employer from opportunistic legal claims later on from employees who never wanted the promotion to begin with. There also are *Daubert* (*Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579

ROUNDTABLE

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(1993)) issues because the Ninth Circuit opinion arguably parts ways with the Third and Seventh Circuit in terms of the scrutiny that expert testimony receives at the class certification stage. That's an issue that is ripe for U.S. Supreme Court review.

SERRATORE: A recent slip opinion (*Valenzuela v. MC2 Pool & Spa,* et al., No. C09-01698 RS (HRL), 2010 WL 3489596 (N.D. Cal. Sept. 3, 2010)) could potentially affect the issue of whether the class is entitled to merits discovery early on and during certification discovery, and whether or not there should be bifurcation. That's going to affect how we look at *Dukes* because if you can get merits discovery early, which is uncommon, with a class of 1.5 million employees, that can be significant in terms of leverage for pre-certification mediation.

KELLNER: This goes to being careful for what you wish for. If the defendants want to argue for a rigorous analysis, plaintiffs are going to demand full discovery because our due process rights would be violated if we can't get that discovery. Further, the due process aspects have additional implications here because when you get to a merits determination by a judge, isn't there the potential that you're impinging upon the right to a jury trial?

FRANZE: I'm interested in the crossover between merits discovery and certification discovery, particularly if the plaintiffs' case rests on this idea that there is a culture of discrimination. In that instance, isn't class discovery coextensive with merits discovery?

ROSS: What the *Dukes* court was saying here is that while there may be some overlap in the certification-merits proof, the evidence the court is considering for certification purposes is more in the nature of a proffer that is not ultimately binding on the court or the employer. In other words, at the certification stage, the question is whether the proof made by the plaintiffs is legally sufficient to allow it to make findings that permit the court to certify. But those findings don't establish the ultimate issues in a case. Otherwise, the decision can't pass constitutional muster.

SERRATORE: From a macro standpoint, in *Dukes,* Brad Seligman of the Impact Fund succeeded in establishing a roadmap, with help from the Ninth Circuit, on how to obtain class certification of 1.5 million employees in a discrimination case. This is unprecedented. Although they are uncommon, we may see large employment

discrimination class cases filed because the plaintiffs bar has been emboldened by *Dukes.*

FREY: The practical effect of *Dukes* is the plaintiffs bar will argue it at a precertification stage to get higher settlement numbers. It is unlikely that *Dukes,* in its present state, will ever get tried. It's either going to get settled, or the U.S. Supreme Court is going to hear it and, hopefully, change it. To me, this is all about leverage at this point and the plaintiffs won this one.

ROSS: Speaking of leverage, *Dukes* was initiated by counsel for the United Food and Commercial Workers (UFCW) as part of that union's corporate campaign to organize Wal-Mart employees and as a device for garnering their support for the union. We have seen a lot of unions and their counsel raising claims against employers who are being targeted for organizing. After *Dukes,* I wouldn't be surprised to see many more union-sponsored suits.

FRANZE: UFCW was intimately involved in organizing and providing evidence that supports the *Dukes* case, just as they were involved in many of the promotion-related cases involving grocery chains of the '80s and '90s. To the extent that the Employee Free Choice Act of 2009 (EFCA) (H.R. 1409) increases the persuasive power or dominance of unions, we may see an increase in employment class litigation.

SERRATORE: A February 2009 *Los Angeles Times* article about EFCA and disparity in worker pay cited a statistic that noted that in the private sector, 33 percent of American workers in 1955 were organized and in 2009, only 8 percent were organized. This article hypothesized that this decrease in organized labor is the cause of a shrinking middle class and a greater disparity between rich and poor.

ROSS: Actually, EFCA now appears to be a dead letter. But there are still likely to be major changes in labor law coming from the NLRB—not from legislation—in a wave of new cases overturning recent pro-employer decisions. The new Obama Board has also indicated a keen interest in rulemaking. This is a major shift for the agency. Those rules promise to dramatically change the landscape of union organizing. Unions will use those new labor-friendly rules in combination with corporate campaign tactics like class actions to organize new workers and grow membership. In that sense, this circles back to *Dukes,* which may prove to be a preview of coming attractions.

KELLNER: From the plaintiffs' perspective, unions have a positive role in litigation because they can provide a great deal of information on the common practices. In good economic times, things such as disparate impacts or wage differentials can be dealt with in negotiated formats within the context of the Collective Bargaining Agreement (CBA). But when there is no communication, and injustices cannot be resolved through a CBA, then there may be no choice other than litigation.

FRANZE: Even if EFCA is unlikely to pass, a number of fallback positions will be pursued. Some of them will be through NRLB rulemaking; some of them will be through NLRB decisions. We may see something like what happened in Canada, where a petition for election resulted in an election in a short time period that decreases the ability of the employer to respond. We're going to see at least the attempt at more union-friendly rules to support union campaigns and certifications.

MODERATOR: What are the latest developments regarding employee mobility and noncompete agreements in California?

FREY: Non-California employers are still trying to avoid California Business & Professions Code 16600 by entering into noncompete agreements, and saying that they're enforced under foreign state law. Companies are also now asking employees to sign a forum-selection clause where the California employee

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agrees that they could be served and that they would have to litigate in a foreign state.

The *Silguero* case (*Silguero v. Creteguard,* 187 Cal.App.4th 60 (2010)) is interesting because it reenforces the California rule that says you can't have a noncompete agreement, but it does so in a way that most people probably wouldn't have predicted. The case involved an employee who was fired by her new employer, which agreed to abide by the previous employer's noncompete. The case is an outlier, but in these economic times, I've represented a number of California-based employers or employees dealing with the enforcement of a noncompete. If you lose the race to the courthouse, you may be in for an uphill battle. If somebody gets a judgment in a foreign court, California will honor a noncompete that it otherwise wouldn't.

MAECHTLEN: In the *Silguero* case, the practical implication from an employer's perspective is: "What do I do if I want to hire an employee who has one of these noncompete agreements?" It is a practical reality in a world where the law is murky, that employers will be faced with the situation where human resources professionals without law degrees may try to minimize risk, but end up creating a bigger problem. It is a concern as to where the case law is going, and how employers will interpret it in a practical way.

"A lesson from *Dukes* to employers is to create a protocol for considering how the pool of employees for promotions is devised." *—Laura M. Franze*

FREY: What California is signaling in these cases is that 16600 (Cal. Bus. & Prof. Code § 16600) should be honored in every case. If you have a clear noncompete, there will be no exception unless you sold a partnership interest or sold a business. The Trade Secret Exception isn't really an exception; it's just enforcement of the Uniform Trade Secrets Act (California Civil Code Section 3426–3426.11). So if trade secrets have been taken, you can get an injunction and seek damages. Other than that, it's not going to be enforced in California.

FRANZE: Though it might be an outlier, to the extent that *Silguero* represents the way that courts might decide another case concerning hiring an employee with a covenant not-to-compete agreement, it puts employers in a difficult position of determining whether a prior agreement not to compete or not to solicit is enforceable. And even if the law in California is employee-oriented on that point, you still have gray areas regarding what to do when the agreement was devised in another state where the employee was working previously.

JUAREZ: Lawyers argue all the time that 16600 precludes all forms of noncompetition protection in California, but I disagree. Certainly there's been a shift in the arguments since *Edwards v. Arthur Andersen LLP* (44 Cal. 4th 937 (2008)). Previously, federal courts interpreted California law to provide employers with some protection under the "narrow restraint" exception. So long as the restraint did not totally preclude someone from working in his or her profession, reasonable restrictions on competition were permitted. Employers relied on the theory until the California Supreme Court struck it down in *Edwards.* But one level of protection the state Supreme Court has not struck down is the Trade Secret Exception. California federal courts have said that since *Edwards* didn't address the Trade Secret Exception, it is alive and well, and will be used to enforce non-solicitation clauses to protect trade secrets. *Bank of America* (*Bank of America v. Lee,* 2008 WL 4351348 (C.D. Cal.)) is a good example. Some state courts, on the other hand, are suggesting that they don't really believe the Trade Secret Exception exists and/or ever existed. The state courts have, however, left open the possibility that a non-solicitation clause, narrowly tailored to protect trade secrets, can be enforceable in California. It is most certainly an open question. *Dowell v. Biosense Webster, Inc.* (179 Cal. App. 4th 564 (2009)) is a good example where the court discusses this possibility and goes through a reasonableness analysis, only to find the clauses did not fit into the Trade Secret Exception. In addition, because of *Edwards,* judges will be looking at alternatives in the law to protect companies against unfair competition. One trend is the use of duty of loyalty or fiduciary duties to make sure that ex-employees—especially senior managers—don't use confidential information and key client information to compete unfairly. A recent decision by Judge Marilyn Patel (*Thomas Weisel Partners LLC v. BNP Paribas,* 2010 WL 1267744 (N.D. Cal.)), analyzes the duty of loyalty and how it can be applied in these types of situations. So while employees can't be restricted from working for a competitor, there must be some balance to protect employers in the state of California.

ROSS: If you have evidence to satisfy the statutory definition of a trade secret, which is not a small feat, and you have evidence of threatened misappropriation, the court is going to find a way to help you. If, on the other hand, your evidence is not quite as compelling as you would like it to be, it's probably going to boil down to a damage claim. In some ways, the trench warfare that comes with the litigation following the initial flurry of activity can be worse than the injunction.

SERRATORE: It's important to keep separate the concepts of the ability to compete verses the ability to steal. Often, the allegation is that the employee took something from Employer A without any real evidence of a trade secret misappropriation, whether it be a customer list or something else. This is because Employer A recognizes how 16660 protects an employee's ability to compete, so the only way for Employer A to gain leverage is by bringing a claim under the Uniform Trade Secret Act, or as Roland [Juarez] mentioned, through a breach of fiduciary duty or breach of a duty of loyalty claim.

KELLNER: Realistically, there aren't that many trade secrets. A lot of companies are presently using publicly accessible social media applications to develop their client lists. So what an employer may think is a trade secret often really isn't, and it becomes a restriction of trade. This is especially true when you're dealing with employees where this is the only means by which they can make a living.

JUAREZ: I frequently hear the argument that nothing is a trade secret in California, and I disagree with that argument, as well. The reality is when you look at the case law in this area, a piece of information that one court might determine is not a trade secret could very well be a trade secret in another court. It depends on the facts of the situation and how it's kept private. In the social media context, there's already some case law related to people subpoenaing Facebook for information. And there is some suggestion that the courts are going to respect the privacy functions of Facebook. When companies are using social media to promote their business, they need to make sure

that if they want to keep some information private, they keep it within a defined group of people and use the tools provided by the social media platform to keep the information private. This will assist in maintaining trade secret status. Just because salespeople are on Facebook doesn't mean that suddenly, there's no trade secret protection in California, and I don't think that's the way the law is going to go.

SERRATORE: These cases really should be mediated earlier, but they never are. You can parse out a settlement in the sales world so easily in so many different ways, and we all know how much money is spent litigating early on in these cases.

KELLNER: I have had success with early mediations. It's important, because the anger gets ratcheted up in these cases, especially for a company concerned that the discovery is going to be too invasive, and where the plaintiff thinks that their ex-employer is taking away their ability to work. Those tensions can be easily resolved in mediation.

FREY: Mediation hasn't been effective in my experience because it's not necessarily that the ex-employer is angry that the employee left, but the business leaves overnight in these cases, and the litigation is now being financed by the new company, and that's the biggest strategy point in these cases. Then you have to decide whether you're going to involve your customers in this dispute. Once the customers learn that they're essentially a disputed piece of property, the customer tends to go to a third party altogether.

MODERATOR: How has social media impacted your practice and how you counsel your clients?

FRANZE: Social media brings up employment issues aside from the protection of trade secrets we've discussed. It would be an unusual week when we didn't get a question or complaint from a client related to an employee who is blogging and possibly defaming other individuals, another employee, or the company. That raises issues about duty of loyalty, conflicts of interest, and fiduciary duty. The case law doesn't necessarily agree on how to handle those issues.

SERRATORE: This is a burgeoning area of law. All of this is very new in terms of how companies are policing off-duty conduct within the social media realm. Recent cases related to Domino's Pizza and Burger King, where employees were posting videos on YouTube of themselves taking baths in the sinks of the restaurant or engaging in other conduct that creates a public relations crisis for the employer. How do you police that? What policy does the employer have for off-duty conduct? Statistics show that only 10 percent of employers have policies relating to social networking, whether it be on-duty or off-duty. This gets complicated, given that employers also need to be cognizant of employees' privacy rights, Stored Communications Act (18 U.S.C. § 2701–2712) protections, and other state laws that may impede an employer's ability to police social networking.

FREY: There is also a California statute (Labor Code Section 96(k)) that says you can't discipline an employee for lawful off-duty conduct.

FRANZE: I don't think that that statute would protect an employee from breaching either an expressed or implied obligation to their employer.

FREY: That's why employers need policies that expressly say these things. The more we want employees to work long days, the more likely they're going to have to conduct some of their personal life at work, and employers have to address that.

MAECHTLEN: We've been counseling clients to adopt social media policies that incorporate other key employment policies of the employer, including those addressing harassment, discrimination, disclosure of confidential information, and/or the employer's code of conduct. For example, there are new "textual harassment" cases coming up where employees are texting each other phrases or photos via mobile devices that could rise to the level of workplace harassment. A good social media policy should prohibit unlawful conduct by incorporation of other policies.

KELLNER: From the plaintiff's perspective, these kinds of situations have real impacts on the employees. These are not innocuous. The employer has the responsibility to monitor these things, and if they don't, real people can be hurt or harmed. What makes it even worse is that when something becomes viral, all of a sudden, a small problem becomes a large problem.

ROSS: One thing that we haven't talked about is social media in the context of hiring. Going back full-circle to *Dukes,* this is a class claim looking to happen. Because you're essentially using social media for the purpose of identifying and selecting candidates, and insofar as the numbers don't line up and this could be proof of an adverse selection process, the use of social media in connection with hiring could be a minefield.

FRANZE: We also have the duty to provide a safe workplace—there's a tension between online privacy, verses not looking into things, and then hiring somebody who poses a severe danger in the workplace. I don't think employers have a safe harbor here. Having thoughtful policies that are uniformly enforced go a long way toward mitigating some of the risks.

SERRATORE: In a *Wall Street Journal* poll from 2009, 70 percent of employers found content on social media websites that caused them not to hire an applicant. Although you can make your Facebook page private, employers can set up a dummy account, befriend an applicant, and gain access through backdoor methods. Or, some people still have social networking pages that can be viewed publicaly. I agree with the other panelists that the law is—and will be—in catch-up mode.

MAECHTLEN: Termination issues are also implicated by social media. LinkedIn allows users to write a recommendation for co-workers and former colleagues. We are seeing instances where managers, despite an employer's internal policy, will write glowing recommendations for a terminated employee online, which are direct evidence in a wrongful termination lawsuit. Employers need to make sure that they have policies dictating how supervisors interact with subordinates online, and should stay aware of how their workforce is interacting online.

FRANZE: Another question is that when an employer conducts web research of a prospective applicant, is that a consumer report? It's not under federal law. But it could be under state law, where the definition of a consumer report is potentially broader, depending on what information is obtained by an employer, and where it isn't necessarily limited to a consumer reporting agency. There may be some instances where a web search might trigger notice requirements for employers.

FREY: The U.S. Supreme Court had a chance in *Quon* (*City of Ontario v. Quon,* 130 S. Ct. 2619 (2010)) to clarify some things in this area. But Justice Anthony Kennedy wrote that the Court was not going to do so because it's too complicated and rapidly changing.