PRACTICE AREA

Labor and Employment

ATTORNEYS

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OVERVIEW

Our Labor and Employment Law Team provides representation to local, regional and national clients, and covers a full range of labor and employment issues in most industries.

Each of the main areas of our labor and employment law practice is described below.

General Labor Advice and Counsel

The team works with its clients to establish and maintain labor relations policies and procedures which promote efficiency of the client's operation in the course of conforming with applicable federal and state law. The goal is to assist our clients in creating and preserving a work environment which is conducive to productivity and provides maximum possible protection against liability for violations of applicable labor relations laws. This service includes preparation of employment applications, policy and personnel manuals, evaluation forms, review of compensation and benefits formulas, etc. The firm also provides regular consultation services to managers regarding handling of employment-related issues which arise on a routine basis.

Employment Agreement, Severance Packages, Independent Contractor Agreements and Arbitration Agreements

The MAAS employment team regularly assists employers in documenting relationships regarding the performance of services by individuals on behalf of the employer. This can include writing employment agreements. These agreements can include detailed provisions establishing intellectual property rights. They also can include detailed provisions about the right of either party to end the relationship. Some of the agreements will establish an employer/employee relationship, while others establish an independent contractor relationship (however, the characterization adopted in the contract is not binding). The agreements also include severance agreements ending the individual's relationship with the client.

Those agreements may have to comply with the Older Worker Benefit Protection Act. Finally, these agreements may also include an arbitration provision. These arbitration provisions are often challenged as procedurally or substantively unconscionable.

Labor-Management Relations

Our attorneys regularly represent clients ranging from multi-national corporations to small retail establishments in traditional labor relations matters arising under the National Labor Relations Act. This representation includes union organizing campaigns and unfair labor practice proceedings before the National Labor Relations Board, Public Employee Relations Board, and the courts. We also provide advice and counsel to employers in collective bargaining negotiations and act as the representative when requested. We represent employers in arbitration of grievances arising under collective bargaining agreements and in litigation before federal courts in connection with contract actions and duty of fair representation matters, including litigation arising from picketing and strikes. Counseling aspects of this practice area include union avoidance strategies and union relations.

Wrongful Termination

The firm has played a leading role in the representation of employers in wrongful termination cases subsequent to the establishment of those theories of liability in the early 1980s. Our attorneys are extremely familiar with both the factual and legal defenses available in this form of litigation. We consider it important, at the outset, to determine in great detail what, if any, evidence the plaintiff can cite to support his or her cause of action and to take control of the discovery process from the earliest stage. This approach enables us to assess the case at a relatively early stage, project the course the litigation will take, and provide advice to the client regarding the likely possible future courses of the litigation. If the client determines that the case ought not be litigated, we work to secure the most advantageous possible settlement under the circumstances. If the case is one which may be defeated by motion or is one which the client determines should go to trial, we proceed forward with a cost effective but diligent approach to position the case for a favorable disposition through a motion for summary judgment or trial. Our attorneys have considerable trial experience if trial becomes necessary.

Equal Employment Opportunity Matters

The Team has an extensive employment discrimination practice through which it has represented its clients in proceedings before the California Fair Employment and Housing Commission, the Equal Employment Opportunity Commission of the United States, and the Office of Federal Contract Compliance Programs, among other agencies. In many cases, our representation begins before the administrative charge of discrimination is filed and continues through the administrative investigation and any subsequent litigation in state or federal trial and/or appellate courts. We represent employers in response to charges of discrimination on the basis of race, sex, religion, national origin, age, handicap employee benefits status, veterans' status, and various state and federal "whistle-blowing" statutes. Our

representation has included claims ranging from straightforward individual cases of disparate treatment through a spectrum of increasing complexity, including class actions and affirmative action programs.

Wage and Hour

The MAAS employment team advises employers on wage and hour issues. These wage and hour issues are quite complex and recently have become a new focus of employee claims. They include federal wage and hour issues regarding exempt employees and overtime under the Fair Labor Standards Act. They also include issues requiring payment of prevailing wages under the Davis Bacon Act, the Service Employee Act and other federal statutes. Likewise, the issues include analysis of the more detailed state wage and hour issues that arise under recent wage and hour legislation codified in Labor Code section 510 et seq., the Industrial Welfare Commission Orders and other California Labor Codes. The California employer faces a far greater challenge than the employers in other states due to the substantial differences between California's wage and hour laws and those of the federal government. California has substantial differences in how overtime is calculated, the rules establishing exempt employee status, payment of the final wages to the employee, and accrual of vacation time.

Unfair Competition and Trade Secrets

The attorneys in the Labor and Employment Law Practice Group regularly represent employers with regard to claims of employee raiding, trade secret misappropriation, and unfair competition by business competitors and former employees. We also advise employers as to their obligations regarding misappropriation of trade secret information, as well as advise departing employees on confidential information obligations to their soon-to-be former employers. In addition, our attorneys have extensive experience in drafting agreements regarding the protection of an employer's confidential proprietary information and intellectual property. Group members have also represented employers both in prosecuting and in defense of claims of breach of restrictive covenant agreements, such as non-compete and non-solicitation agreements.

Business Torts, Unfair Business Practices and Defamation

In addition to all the more traditional labor and employment issues, the MAAS employment team also assists employers with the defense of business torts, claims of unfair business practices regarding employment and defamation. Business torts can include interference with contractual relations, trade liable, negligent hiring, whistle blowing, intentional and negligent infliction of emotional distress (and the workers' compensation preemption arguments related thereto), and claims arising under Business & Professions Code section 17200.

RIFS, Layoffs and Plant Closures

Our employment team advises employers regarding rights with respect to reduction in force, layoffs and plant closures. These rights generally arise under federal WARN and state WARN acts. These statutes contain statements of their

applicability that can be inconsistent and difficult to apply in actual practice and thus become a potential hidden liability especially in purchase and sale of the assets of a company by another company.

Mandated Leaves of Absence

Employers today are faced with myriad federal and state leave laws mandating paid and unpaid leaves of absence for everything from family and medical leave, work-related injuries, and accommodation of disabilities to jury duty, military service, and time off to vote. Our attorneys have special expertise in guiding employers through the maze of mandated leave laws when dealing with an ill or injured employee and/or an employee absent from the workplace. We regularly counsel employers in managing employee absences not only to ensure legal compliance and minimize workplace disruption, but also to promote the employee's return to work as soon as possible. In those situations where it is lawful and appropriate, we also provide counsel to employers through discipline and termination decisions involving employees on, or returning from, leaves of absence.

Occupational Safety and Health

Members of the Team have represented clients in both advice and litigation matters arising under all laws regulating job safety and health issues in the work place. Group members have represented clients before the federal Occupational Safety and Health Administration, the federal Mine Safety Health Review Commission and Cal-OSHA, as well as the Workers Compensation Appeals Board on serious and willful misconduct and discrimination issues. Cases have included those dealing with trench safety, dust pollution, noise levels, construction regulation, pressurized containers, AIDS and blood-borne disease control criterion, and right-to-know/hazard communication program matters, among others. We have also defended a number of employers in actions brought in various state and federal courts alleging discharge of employees allegedly in violation of state and federal law. One such successful case, Division of Labor Law Enforcement v. Sampson, 64 Cal. App. 3d 893, resulted in an amendment to Cal-OSHA. The Group's approach recognizes the importance of job safety and health, as well as the practical problems which employers can face in attempting to implement programs to comply with the requirements.

Workplace Violence Prevention and Management

Employers are increasingly confronted with the difficult task of assessing and responding to threats and violence in the workplace. The attorneys in the Labor and Employment Law Practice Group work with employers to identify potential problems before they arise, by offering managers' training and other services designed to promote a safe workplace. We also regularly counsel employers in the adoption and implementation of workplace safety and security policies and procedures. Our attorneys also assist with incident management when threatening misconduct or violence occurs. When necessary, we assist employers in obtaining restraining orders and injunctions to protect employees from threats of violence in the workplace.

Workplace Privacy

With the advent of the electronic workplace, comprehensive workplace policies regarding employees' use of technology such as computers, e-mail, and voice mail have taken on greater significance. Our attorneys have extensive experience in drafting policies that walk the fine line between protecting the employer's legitimate business interests and respecting employee rights to privacy. We also regularly counsel employers through the implementation and enforcement of such policies, as well as policies related to workplace searches and investigations, substance abuse prevention and alcohol and drug testing, and pre-employment inquiries and procedures. In addition, our attorneys regularly train managers and other supervisory personnel regarding compliance with, and enforcement of, these policies.

Multiemployer (Union) Plans

We help employers understand the consequences of the underfunded status of union or multiemployer plans. These consequences include the effects of "funding improvement" plans and "rehabilitation" plans adopted by trustees as well as the cost for leaving a plan (withdrawal liability). We then help to develop strategies to mitigate or avoid such consequences.

Executive Compensation

Our team works with clients to design and structure appropriate deferred compensation arrangements including, deferred bonuses, Supplemental Executive Retirement Plans, Excess Benefit Plans, Severance Plans and Phantom Stock or Stock Appreciation Rights (SARs) to meet the requirements of Code section 409A and also avoid current taxation to the worker. Any such arrangement must be carefully structured to comply with ERISA and the Internal Revenue Code to prevent unintended tax consequences. If the arrangement does not meet the requirements of Code section 409A, there are severe tax consequences to the employee or independent contractor earning the compensation. The compensation is taxed when the worker has a vested right to it, plus it is subject to an additional 20% Federal tax. If the worker is subject to California state income tax, he or she will be subject to an additional 20% California tax, as well. Due to the complexity of this area, it is not uncommon to discover that an arrangement does not comply with the requirements under section 409A and the regulations. We also work with clients to correct such noncompliant plans to minimize the effect of noncompliance.

In addition, such employees are often compensated with an equity stake in the business in various ways. Corporations can issue options to buy stock or grants of restricted stock. Limited liability companies can provide restricted membership interests or profits interests.

Executive Compensation techniques can be used to reward performance and loyalty, to ensure executives participate in a change in control of the business, to help fund the succession of the business by one or more key employees, and to permit them to save for retirement in amounts above the limits permitted under tax

qualified plans.

ERISA Compliance

Our team helps employers design, adopt, and operate appropriate tax qualified retirement plans to ensure that they obtain the advantages of tax qualification.

Employers provide employee benefits to attract and retain the best talent for their organization and to capitalize on the associated tax advantages of doing so. Generally, anything of value provided by an employer to an employee as part of the employment relationship will be taxed as income to the employee when provided, unless specifically excluded under the Internal Revenue Code. Qualified retirement plans such as pension, profit sharing, and 401(k) plans have tax advantages by complying with Internal Revenue Code section 401(a), which addresses limits to annual compensation. These advantages include immediate tax deductions to the employer for employer contributions, tax exempt earnings by the plan, and tax deferral for the employees until the benefits are actually received. However, these benefits come at the price of the plan having to meet many complex legal requirements in the written plan document and in operation. These requirements include minimum coverage and participation rules, minimum vesting rules, nondiscrimination rules, limits on the amount of compensation that can be considered under the plan and limits on the overall benefits under the plan. Failing to meet the rules to be a tax “qualified” plan can result in a plan that does not enjoy customary tax advantages.

Once a plan is adopted it must be amended for any changes in the law by certain effective date deadlines to retain its tax advantages. We help clients ensure their plans are properly updated.