

Speaker 1: [inaudible]

Speaker 2: Welcome to the very first episode of the performance review podcast. I'm your co-host Ryan Bykerk and I'm joined by my co-host Philip person, a partner in the San Francisco office of Greenberg Traurig. Welcome Philip. Hello there. But before we get started, [00:00:30] I wanted to talk briefly about what this podcast is about and why we're doing it. So Phillip and I are California labor and employment specialists, and we just, we know that life happens at work and, and what happens at work affects all of us. So the goal of this podcast is just to give you an inside look at our lunch conversation or our water cooler discussions back when we had those things about compelling employment issues that California employers are facing and [00:01:00] by water cooler talk, I mean, I really do mean that this isn't intended to be dry or academic, but we're going to try and cover the things that we're actually talking about at work.

Speaker 2: Um, we're hoping to interview some executives, tell some fun stories and, and cover some compelling topics and have a little fun along the way. The thought is that this would probably be useful, uh, or hopefully it would be useful for in-house counsel, uh, human resources, professionals, anybody in this labor and employment space, maybe even other California labor and employment [00:01:30] attorneys working for companies with employees in California, uh, you know, really anywhere from startups to multinational corporations. So to that end and with the idea that we really are interested in hearing from all of you, uh, we've started an email address for this podcast so that you can write to us with any thoughts, topics to cover crazy stories you might have or whatever you find interesting in the space. And that's performance review one word@gtlaw.com (performancereview@gtlaw.com). I'll give you that email address again at the end, but performancereview@gtlaw.com. [00:02:00] Please send us emails, uh, give us those, you know, crazy stories that you might have. We know that they're out there. We'd love to hear from you since it's our first episode and it's just past mid-year, uh, increasingly past mid-year. We thought what better way to kick off this podcast than to call the year 2020 into the office and give 2020 a mid-year performance review and see if it needs any improvement.

Speaker 3: Well, hold on there, before we do that, let's get some introductions so that people [00:02:30] can know who we are.

Speaker 2: That's uh, that's a good call. Uh, so how about, how will we do that? How will we do this? I'll start by introducing you and then since I'm going to be really nice, you can be intro. You can introduce me and I'm sure you'll be equally nice.

Speaker 3: Oh, a favor for a favor. Exactly.

Speaker 2: So Phil Phillip is a partner up in our San Francisco office and he handles the whole, the whole gamut of labor and employment work. Uh, he, he, he really does it all from, from single plane of factions to the large bet, the company class, [00:03:00] as well as the day to day advice and counseling. Um, I've heard him say this before and I, I plan to steal this. He deals with all the employment issues for his clients, so that they can focus on

operating their business, uh, which just makes a lot of sense to me. So if I ever had problems up north, uh, I always call Phillip he's meeting my first call.

Speaker 3: Well, you can steal that line. You can keep that line. We'll share it.

Speaker 2: Okay. Thank you. See, he's tired as too

Speaker 3: Ryan, for those who don't know you, you're a partner in the Los Angeles office [00:03:30] and like me, you deal with issues, California employers face on a day in day out basis, both advising California employers on the intricacies of California labor and employment compliance, and even duke it out in court to protect their interests. You've handled everything. I know you've handled everything from class actions to the single plaintiff, but really I think your practice, I would say focuses mainly on wage and hour litigation these days.

Speaker 2: Yeah. I'd say that's true. And increasingly on, on pocket [00:04:00] cases. So, Hey look, thank you. That I, that was, I mean, we were, I was nice to you. You were nice to me. I don't think any of us even have to pay for these nice introductions at this point. I think we're in good shape. So, oh,

Speaker 3: I was hoping your check was in the mail.

Speaker 2: So with, with all that said with all the introductions out of the way, I think it's high time to call the year 2020 into the office and give it that performance review review that we've been talking about. When you say

Speaker 3: Going into 2020, you would have thought that the big story for employers was going to be AB five, the major [00:04:30] shift in the employee, independent contract world, or maybe the near inevitable preemption fight on the California legislature, his efforts to curtail employment arbitration agreements with AB 51, some thought the me too movement, the changes that were brought about there, we would see a lot of that trickling into our practice. We did get some of those things for sure, but really the first part of the year has been all about COVID 19 serious racial tension [00:05:00] and a landmark Supreme court ruling on title seven. We have also market volatility. We've seen Congress work with the rare unity to get the care act relief passed, including the payroll protection program and all of these. Obviously they affect employers.

Speaker 2: Yeah, that's, that's a really, it's a really good overview and certainly more than we could cover in any great depth, but let's, let's maybe start with COVID. I know we're all sick of talking about COVID, but you [00:05:30] really can't ignore the major impact that this health pandemic has had on businesses. Uh, could you, why don't, why don't you maybe take us through just kind of a high level, look at this

Speaker 3: High level, we're talking about store closures, layoffs pay cuts, deferred payments, increased debt loads. What else? Increased safety measures. All of these have an influence on how we respond to the crisis and how we grow from them. This has impacted businesses in different ways and [00:06:00] may change our dare. I say, even

reshape how we work, we may have more increased remote work, less physical uses in office. There's lots of changes coming.

Speaker 2: Yeah. And we probably can't get into all the details, but for listeners who especially are dealing with HR issues or compliance issues on a day-to-day basis, how, how is this affecting practical reality? How's it affecting day to day life

Speaker 3: Day-to-day for those companies who are fortunate, they're focused on [00:06:30] getting the job done, meeting client and customer needs while at the same time taking the appropriate steps to protect their employees. Employees safety really is probably the main day-to-day concern. Employers are using temperature checks. They're doing questionnaires, mandatory, PPE reading and rereading ocean Cal OSHA guidance. That's that's really important, but those employers who have been hit harder, they are focused on dealing with the loss of revenue for lows [00:07:00] in compensation reductions.

Speaker 2: Yeah, it seems like the pump is really, is really primed for potential COVID litigation. I mean, transition in a time of change is difficult for any employer, but it seems particularly hard in California because there really is a complex web of rules and regulations. Um, so we're seeing employers have to deal with all of that. And then of course be very careful about whether their actions are discriminatory or is, or if there's perceived discrimination relating to that. [00:07:30] If there's a, they have to think about, I think re reimbursements for remote workers, which of course is going to be an increased cost and could be an unwelcome increased cost at a time when revenues are perhaps down perhaps significantly down. Um, they're gonna have to be looking to, I think at, at time off and sick leave policies and some of those are, are just being passed, you know, there's new law in that space. So, um, really a lot of things going on. So what are you seeing employers do right now to kind of [00:08:00] focus on how this year is going to finish out about getting back to the new normal, whatever, whatever that means,

Speaker 3: The new normal. I feel like every time I watched the news, they say there is no new normal. And I think that applies here too. The guidance changes on a daily basis. So it probably isn't worth talking about the substance of the rules that exist at this moment in any great detail, but it might be worth creating a checklist of things to consider if you're an employment practitioner, HR, exact, something to that nature. Here's [00:08:30] some of the things that I think you should be considering is stay on top of the ocean. Cal OSHA developments, Cal OSHA provides guidance by industry. A lot of people don't know that check their website, whether it's a music industry, the restaurant industry, manufacturing industry, you name it. There's lots of information there. And there's lots of specific guidance there to maintain a list of the counties in which operate, uh, check the state and county resources every week or so, because [00:09:00] especially when it was March or April Ryan, you know, this, that it was changing almost on a day to day, if not hour by hour basis.

Speaker 3: And we were all freaking out, I would also say check-in with the trade associations, you might be a part of to see what they're doing. Follow legal periodicals or blogs to identify what's going on with the litigation in your field. I'd say, make it a habit. Do it once a

week or so cases filed against similarly situated. Employers are cases filed against [00:09:30] people who have policies that are similar to you. Those could give you some lead time into correcting or revising your policies before you have to take a, a foot into the courtroom. I would also say you should probably prepare some COVID specific handbooks agenda to address issues like revise, work schedules and scheduling practices, revise, vacation, and holiday policies, uh, attendance, and leave policies. Also, we have now the FCRA FMLA expansion [00:10:00] policies emergency paid sick leave, all relating COVID-19 telecommunity. We talked about the new norm, maybe working from home and you need some policies there, accommodation policies, health and safety policies relating to social distance, temperature shifts, new procedures, all this. You want to tie that up with an acknowledgement form as well. Those are all good, but make sure you're updating them appropriately as these laws change.

Speaker 2: Yeah, man, that's a great checklist. And I think, [00:10:30] I think the only thing I would well you're very welcome. The only, the only thing I think I'd add is at least for me, and this is just a me thing. I, I think it makes sense. Just calendar a reminder once a week, if not more frequently to kind of take a look quickly at all, or a select set of this checklist, just cause there is, there is no a week's going to get past you and the world's going to be totally different the way that this, this stuff is developing. So, all right. So 2020s performance reviews so far, I think I would say 2020 gets an [00:11:00] unsatisfactory on the COVID front. I mean, is that fair? I

Speaker 3: Agree. I agree. I'd give it

Speaker 2: A year enough with the COVID already, but there are things I think that you've, you've outlined them really well here that employers can do to try and stay ahead of the curve or at least keep up with the pace of change. All right. So the other issue, one of the, one of the many other issues that you identified here is racial tension and how it has brought civil rights and diversity back into the spotlight. And I think we're seeing some [00:11:30] employers rise to the occasion and really meaningfully address this, uh, others perhaps less. So, uh, is this something from your perspective, Philip, is this something that employers need to be thinking about? And, and if so, what are the issues that they need to consider?

Speaker 3: Well, there are a few things going on here. First of all, like you said, life happens at work. I might want to put that on a, because this is the second time we said that and it's actually pretty catchy, but life happens at work. So this isn't going away [00:12:00] and it can't be ignored. Let's start with the positives. Some corporations are becoming more acutely aware of the impact of diversity or the lack of diversity that can have that impact can have in, in their workplace. This is a place where the employer's silence could be a missed opportunity saying something in response to the demonstrations or preparing action plans could send a positive message to your workforce, to your vendors, investors, and to your customers. [00:12:30] This goes from the boardroom down to the factory floor. We're seeing a greater push for diversity and a discussion of why it's important. Those are some of the positives.

Speaker 2: Yeah, I, I agree. And I, I, I see diversity in the, in the workplace as being well there's many things, but there, there are really two major prongs, I think. I mean, first I think it's just the right thing to do to meaningfully have this discussion and to, and to lead in it. But second, I think done correctly. [00:13:00] It also seems to be better for business. I mean, it just, it just makes eminent sense to me, um, that generally your customers are going to come from diverse backgrounds. It only makes sense that a diverse workforce is going to help a company be more appealing as a company. I think it also gives you the opportunity to, uh, you know, properly managed, bring in a diversity of opinion from diversity of experience, diversity of background, uh, that, that helps you uncover and then develop those great ideas, but that's not [00:13:30] easy necessarily, but, um, I think the value is significant.

Speaker 2: So there's, I think a lot of work can be done that, that sad. I think some employers probably try to stay out of this discussion for it, for maybe any number of reasons. Maybe, maybe the fear is that they don't feel equipped to have this discussion or to, to act on it. Um, maybe they, they find it a distraction from quote, real work. Uh, maybe, maybe they just don't want to offend, or they don't want to pander or be perceived as pandering or, or they just, [00:14:00] they just don't think they have a role to play here. What, what would you say to an employer? Who's kind of thinking about that. Thinking I'll just stay on the sidelines for any of these reasons and just leave this alone.

Speaker 3: Well, employer staying on the sidelines, it's not going anywhere. You're going to have to get in the game sometime. I'd say that in some ways the discussion is really just unavoidable. Honestly, the question is not if it's going to happen, it's how it's going to happen with management's input and direction, [00:14:30] or without it really this topic, it can arise from the simple water cooler you're using your water cooler water cooler, or anytime your water cooler or lunch discussion. It can come to your HR team when dealing with leave requests or questions about attire policies. It could come up when talking about off-duty conduct, which come into play with social media posts. Uh, but please recall that California labor code section 96, K and [00:15:00] 98.6 generally protect employees, uh, lawful off-duty conduct. As we said at the outset, when they use this life happens at work, we need to put that on a t-shirt and this is no exception. Diversity is part of life. And as my good buddy, Ryan would say, life happens at work.

Speaker 2: That's right. All right. I'm now I'm starting to think we've got to trademark this thing, but, um, so, all right, so there are some positives here, um, that we already talked about [00:15:30] and we just talked about how you're not going to you can't put your head in the sand here. Um, so like we did with COVID are, are there any kind of labor and employment related pitfalls that employers and, and human resources professionals should, should keep in mind in this space? You know, what, what can employers do and what should they

Speaker 3: Not do? If I was creating a to-do or a not to do list, it would be pretty long, but giving you a high level in terms of what not to do. We already mentioned [00:16:00] that California doesn't allow employers to make decisions based off of lawful off duty content. Again, labor code 96, K 8 98 0.6, that could come into play. So whatever your

position is regarding the protests or other related issues, you might not be able to terminate or discipline an employee for taking the opposite position during off duty conduct, in terms of what to do, revisit your hiring practices, revisit your promotion related policies and practices, [00:16:30] revisit your trainings. Companies are often focused on sexual harassment training and trust me, that is very appropriate and very needed, but it's also worth taking a broader view. So let's start incorporating some of these diversity trainings consider bringing in legal counsel as some of these diversity trainings and other trainings can get pretty

Speaker 2: Tricky. Yeah. That, that all, all of that makes sense. I think that that's a good to do and, and not to do list. Um, so, so most importantly, of course, for this performance review [00:17:00] podcast, how would you, how do we, how do we rate 2020s performance on this one? I mean, I suppose we could say developing, I don't know if that's on the traditional scale.

Speaker 3: Well, if that's on the, on the traditional grading scale, but we can give it a developing or not call it a deep cause that has another connotation, but I'd say developing. Yes.

Speaker 2: Yeah. Okay. That's good. See, look, this is not a traditional performance review, so we get to make up the, the categories. So, so this is developing, so we'll make it up as we go. This is the pilot episode. [00:17:30] Exactly. So we'll, we'll keep an eye on this one. I think it's an important issue and it's one that's going to obviously continue to develop.

Speaker 3: So let's shift gears. Another development in 2020 was the Supreme court's decision on whether title seven protects, sexually oriented orientation and gender identity, both stock versus Clayton county, Georgia. They'll certainly an important case nationally. What's the impact for California employers?

Speaker 2: Yeah, it is a big [00:18:00] case. And obviously we don't want to take away any of anything from that, but for California employers, there really isn't any real change. You know, San Francisco, your neck of the woods, uh, has protected against discrimination in employment for sexual orientation since like the late 1970s. Um, the California fair employment and housing act has protected people from discrimination on the basis of sexual orientation since 1992. Uh, and from gender identity and expression since 2003. So this decision while it's really important. And of course, if you're a [00:18:30] California based employer and you have employees outside of California, this might impact your operations. But for people with employees just purely in California, uh, all this is doing is really bringing the rest of the country into sync with where California already was.

Speaker 3: I'd say, you're spot on that's right. It's still a landmark ruling, but with little impact on California employers, some of our colleagues at GT published a, uh, an alert analyzing the case and what employers need to know [00:19:00] is worth checking out. They reported that less than half of the states in the U S had laws, expressly mentioning sexual sexual orientation and or gender identity in anti-discrimination statutes. This represents a big shift in those states, but not so much in California.

Speaker 2: Yeah. So for California, the California employers, I suppose for once they can say like, okay, there's a been a change in the law, but it's not something I need to go run out and do something about right now. [00:19:30] Um, so I guess for California, I back to our performance review scorecard, I suppose we could say for California, this meets expectations. I mean, is that fair

Speaker 3: Meets expectations? Yeah. Status quo. That's where we're at.

Speaker 2: Yeah, there we go. So this is an area of California has long been in front, uh, and the rest of the countries now coming into line. So, so let's, let's kind of sum this up with, we've covered these three basic topics regarding COVID 2020 gets an unsatisfactory. And I think we can all just emphatically agree with [00:20:00] that. Um, it's it's but it's no time to panic or bury our heads in the sand. Uh, Phillip has given us a great COVID checklist that can help employers try to stay ahead of the curve. So that that's a place where you've got to be deliberate and stay ahead of that one, uh, regarding racial tension and diversity, you know, we, we didn't know exactly how to rate that, but we said it was developing. Uh, but I think, I think it really is an important place, an important space.

Speaker 2: It's an opportunity where employers can be, uh, real leaders. And we provided a couple of do's and [00:20:30] don'ts for employers addressing the tough questions in that space. And then regarding the, the boss stock case entitled seven, we're given 2020 on meets expectations. And that, of course, isn't to downplay the importance of the opinion, just to reflect that, Hey, this is a shift in law that for once, uh, doesn't have a huge on California employers. So meets expectations 2020, I guess I'd say so far is a mixed bag, but we're definitely putting 2020 on a performance improvement plan just for, just for COVID. Right.

Speaker 3: Exactly. [00:21:00] 2020 has been something else

Speaker 2: It has. And it's on notice now, so I don't know what that's going to do, but hopefully great things. All right. So that kind of concludes our rough overview. Again, we have barely skimmed the surface, some of these other, some of the issues that Philip mentioned at the very beginning we'll come back to and we'll have some, uh, some episodes that get a little bit more into detail on those. But one of the things about employment law is the interesting stories. And so we're going to try in each episode [00:21:30] to explore a new, just weird, uh, employment story with names and identifying facts, maybe change to protect the innocent and or guilty as needed. Of course. So, uh, Philip, why don't you get us kicked off with our first ever weird, interesting, odd employment story.

Speaker 3: Let's see a wild employment story. One comes to mind actually. So this one involved a group of employees who brought an action against a developer [00:22:00] and a wholesaler of health of health programs, the employees, alleged discrimination and hostile work environment based upon their, uh, based on what their religious beliefs. There were a group of employees that claim to be practicing members of an onion head and harnessing happiness, religion for short, we'll just call them. So

Speaker 2: Just to make sure I'm hearing you correctly, Philip, you said onion had, as in the thing that I assume a vegetable [00:22:30] that grows out of the ground,

Speaker 3: Onionhead whether it's special. I think it falls in the vegetable category.

Speaker 2: I think it's the vegetable. So now of course, now you should definitely, you should definitely email us to tell us how dumb we are about vegetables, but I think it's a vegetable. So onion head, all right. I'll, I'll bow out and let you tell the story. Thank you, Philip.

Speaker 3: The CEO hired his, his aunt who introduced the religious and spiritual practices and teaching at the workplace. [00:23:00] Obviously you can tell we're not too familiar with the Onionhead religion, but the allegation in there is that they began to provide texts, beliefs, and practices that related to the uninhibited religion, including workshops, at least at the employees that who, who practice the Onionhead religion were the chosen employees and certain prayers in the workplace. So now you have the employees who are not part of the uninhibited [00:23:30] religion. We're bringing the action and went to trial, and the jury returned a unanimous verdict in favor of the plaintiffs on the hostile work environment claim, but rule in favor of the defendant on the remaining claims the jury over \$5 million in compensatory and punitive damages. As I tell you all the time, craziest things happen at work and it never gets boring,

Speaker 2: Man, that, that is true. There is always something interesting going [00:24:00] on. And, um, I think the takeaway, at least for me, is I'm not supposed to start an onion, head, religion, and force people to be part of it at work. Right?

Speaker 3: Depends. What's what the goal is. Okay, perfect. Well,

Speaker 2: Let's talk, uh, let's talk briefly about our next step.

Speaker 3: Got it, got it. Next episode. It's going to be one of the topics we alluded to. We're going to be looking at AB five. It was expected to be the banner [00:24:30] issue for California employers this year, and it looks like it's going to make a late in the year. Push it's come up as an election issue. It's also had a recent superior court ruling relating to that legislation. So tune in next time to find out more about AB five and whether we give it a, it needs improvement on our next episode. In the meantime, please email us at the email ryan listed before: performancereview@gtlaw.com [00:25:00] with any thoughts, questions, comments about whether onion is a vegetable and a thank you for joining the performance review.