Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2009 Issue

Things I wish my mother had told me about employment law: Mistakes to avoid in initiating employment cases

By Iris Weinmann

Practicing employment law presents many challenges not found in other types of litigation. The relationship between an employee and employer, which can sometimes span decades, can personalize the dispute between them so much that the lawsuit can sometimes feel like a divorce case. There are political challenges as well. Judges have so many employment cases on their dockets that they may well feel that at least some must be without merit and may have strong opinions about an employer's inherent right to fire an employee.


Weinmann

Some of the challenges are beyond the practitioner's control. Others, however, can be overcome through tactical and strategic decisions made throughout the progression of the case. While space limitations preclude an in-depth discussion of every possible issue, the purpose of this article is to discuss some commonly-made mistakes during the initial stages of the case and how to avoid them in order to maximize a successful resolution for the client.

Mistakes to avoid in case selection

• Focusing on technical facts to the exclusion of emotional appeal

Successful resolution of an employment case, like any case, first requires a meritorious case. However, in an employment case, more so perhaps than other types of cases, the client and how he or she will present to a jury is as important as the technical merits of the case. So while the first issues to be addressed relate to the merits of the potential client's case, it is also important to evaluate the client, how believable he or she is, how well he or she is able to articulate what happened, how well he or she will be able to handle the stress of litigation, and how he or she will be perceived by a jury. A good rule of thumb is that if you and your staff don't like your client, the jury probably won't either. Even the best technical case can be lost with the wrong client. The converse can be true too. A case that is marginal on paper can turn into a huge victory with a sympathetic, articulate, believable client.

• Maintaining too narrow a focus in the client interview process

Most potential clients do not know the legal basis for their claims. All they know is that they were wronged. While the client may come in with a specific focus, it is up to the practitioner to look at the broader picture. While a client may come in with what he or she thinks is a wrongful termination claim, he or she may also have other claims he never thought about, such as wage and hour claims or defamation claims. It is important during the initial interview to ask broad questions about the employee's work environment to try to uncover all potential claims and not just focus on the one reason the client came in to the office.

See Weinmann, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2009 Issue

• Failing to research the financial viability of the potential defendants

Especially in this economic climate, who the defendant employer is and whether or not that defendant has insurance coverage should play a crucial role in the decision whether or not to take a particular case. An otherwise valuable case with strong liability and strong damages loses its value if there will be no one around to pay the verdict.

• Not being leery enough of clients already in litigation who are seeking new counsel

It is important to be very cautious before accepting cases already in litigation. First, it is necessary to try to ascertain the reasons the client is dissatisfied with his or her current or former counsel. Is it because the prior counsel is not properly representing the client, or is it because the client has unreasonable expectations and demands? Multiple previous attorneys having represented a client on a single case should raise red flags.

Even assuming a genuine reason for the client's dissatisfaction with prior counsel, counsel must be aware of potential pitfalls and what problems are being inherited. Were administrative remedies properly exhausted? Were the proper claims pled? Some problems can be remedied, but others cannot, and counsel must be aware of, and communicate with the client about, what problems exist and how those problems may affect the ultimate outcome of the case. Counsel should also carefully explain to the client that the prior attorney may also make a claim for fees out of any recovery, and how that may financially impact the client.

Mistakes to avoid in forming the attorney-client relationship

• Forgetting that the practice of law is a business, as well as a profession

The practice of law, although a passion for many of us, is also a business. In addition to making decisions affecting the ultimate resolution of the case, the successful employment law practitioner must also make business decisions to allow his or her practice to stay afloat and to earn a living. This is especially true for employment lawyers representing employees on a contingency basis. These cases can take one and a half or more years to get to trial, then several more years during the appellate process. During that time, the attorney may not receive any compensation for the work performed. There is no right or wrong way to conduct the business, since every practitioner's situation is different, but the types of decisions that need to be made include whether or not to charge a fee for the initial consultation; whether to charge a retainer fee for initiating litigation and, if so, how much to charge; and whether to advance costs or require the client to pay the costs. Because of the tremendous investment in time and money that the attorney will put into the case, it is important for the client to have an investment in and a financial stake in it, as well. Charging something gives the client an investment, weeds out the less serious clients, and helps with cash flow. A client with no financial investment is more likely to become unreasonable when it comes to evaluating settlement proposals and may be more willing to make his or her case about justice or principle as opposed to about a sound financial decision. While the pursuit of justice is an admirable goal, this goal must be tempered with sound economic decisions.

• Failing to specify who owns attorney's fees

In a case brought under the Fair Employment and Housing Act or other statute that allows for the recovery of attorney's fees, the retainer agreement must specify how attorney's fees will be treated. This may not only have ramifications in terms of preventing disputes with the client at the conclusion of the case, but also may have tax ramifications, as well. Will a fee award simply be included in the gross recovery, and then split pursuant to the percentages specified in the retainer agreement? Or does the fee award go to the attorney, with the underlying award going to the client? What about sanctions awards? Do those go to the attorney, since sanctions are reimbursement for extra time put in to compel the defendant to do something it should have done anyway, or is that part of gross recovery so that a percentage goes to the client? While there is no right or wrong answer, these are decisions that need to be made and addressed at the outset to prevent later problems.

• Failing to account for cross complaints in the retainer agreement

All too often, employers will file cross-complaints against the employees who sue them, for example, to allege trade secret violations or breach of a non-competition agreement. While in many instances these cross-complaints lack merit and are merely part of an aggressive defense to the underlying lawsuit, they still require a response and add extra work to the lawsuit. The retainer agreement must address how cross-complaints will be treated. Is the defense of the cross-complaint included in the general services covered by the contingency agreement, or will the employee be required to pay the attorney on an hourly or other basis to defend the cross-complaint?

One factor to consider is whether the claims in the cross-complaint allow the prevailing party to recover attorneys' fees. If so, it is important that the fee structure between the attorney and client not provide an argument by the cross-complainant that the client did not incur any additional fees as a result of the cross-complaint and that the employee, even if successful in defending it, should be precluded from recovering attorney's fees.

• Failing to address how the attorney will be compensated for non-monetary benefits achieved as a result of the lawsuit

There may be situations in which an employee is offered reinstatement as a result of the lawsuit, either with or without additional monetary compensation. If that occurs, how will the attorney be compensated? The retainer agreement may specify that in the event of reinstatement, the attorney will be entitled to a percentage of the first year's salary, or the retainer agreement could specify that the attorney will be entitled to a fixed sum in the event of reinstatement. If the retainer agreement is silent on this

See Weinmann, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2009 Issue

point, and the employee receives non-monetary benefits, the attorney may be precluded from obtaining any payment for the valuable services provided.

• Failing to inform the client of the ramifications of filing for bankruptcy protection.

Where a plaintiff in a pending or contemplated employment lawsuit has filed or files for bankruptcy protection, it can have significant implications on the case and on the attorney representing the plaintiff. First, in order to be entitled to payment for legal services rendered, counsel must be employed by the bankruptcy estate, and must file a motion with the bankruptcy court to obtain court approval to provide representation. (11 U.S.C. § 327.) Moreover, employment claims that exist as of the date the plaintiff files for bankruptcy protection become property of the bankruptcy estate. (11 U.S.C. § 541, subd., (a)(1); *In re Alvarez* (11th Cir. 2000) 224 F.3d 1273, 1276-1279, *cert. denied,* 531 U.S. 1146 [121 S.Ct. 1083].) This means that the proceeds from such claims, including money received in settlement or after verdict, belong to the bankruptcy estate for the benefit of the individual's creditors and not to the individual employee. The employee may therefore lose incentive to participate fully in the litigation, and the trustee will be the one to make decisions regarding the lawsuit. This changes the dynamic of the litigation and may well affect the ultimate value of the case.

• Failing to advise the client of what the attorney will and will not be doing on his or her behalf

The retainer agreement should be very specific about what the representation will entail. It is too easy for clients to simply assume that since you are their lawyer for one matter, you are their lawyer for everything. Some specific issues that may arise with respect to employment representation are whether the representation will include collateral matters, such as workers' compensation filings, representation at unemployment appeals' hearings, or assistance in applying for disability benefits. Also, there will be significant tax implications of any settlement or verdict, and it should be made clear to the client at the outset in the retainer agreement, and perhaps then again prior to any settlement decision being made, that you are not a tax specialist, cannot make any representations as to tax treatment, and that the client should consult his or her own accountant with any questions regarding the tax treatment of any settlement or judgment.

• Failing to protect against clients who unreasonably refuse to settle or otherwise heed your professional advice

Practitioners should consider including a mechanism in their retainer agreements designed to protect the attorney from clients who unreasonably refuse a settlement offer recommended by the attorney, who lose interest in or abandon the case, or who discharge the attorney. This protection could include conversion of the payment arrangement from a contingency basis to an hourly basis on the occurrence of certain specified events.

Mistakes to avoid in satisfying administrative prerequisites

• Failing to include all legal theories in administrative filings with the Department of Fair Employment and Housing and/or Equal Employment Opportunity Commission

Before bringing a lawsuit alleging discrimination, harassment or retaliation in violation of the Fair Employment and Housing Act, the aggrieved party is required to exhaust administrative remedies by filing a complaint with the Department of Fair Employment and Housing ("DFEH") within one year after the alleged unlawful conduct, and obtain notice of the right to sue. (Gov. Code, §§ 12960, 12965, subd., (b).) There are similar requirements before filing a lawsuit based on violations of Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act and the Age Discrimination in Employment Act. (See, e.g., 42 U.S.C. § 2000e-5; 42 U.S.C. § 12117, subd., (a); 29 U.S.C. § 626, subd., (d).) Because failure to exhaust these administrative remedies will bar a later lawsuit, it is important that such filings cover all range of legal theories. If the client checks the box for age discrimination but not disability discrimination, a later lawsuit alleging disability discrimination may be barred. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724 [35 Cal.Rptr.2d 181].)

If the client comes to the attorney after having already filed a complaint with the DFEH and/or EEOC, the attorney must carefully review the filing to ensure that all potential legal theories have been included and, if not, amend the administrative complaint in a timely manner. If the client has not yet filed an administrative complaint, the attorney should closely monitor the filing to ensure that all proper theories are alleged.

• Failing to amend administrative filings when new facts come to light

Occasionally, new facts will arise after the initial administrative filing, which give rise to a new legal theory. For example, a client still employed by the company might allege that she is being discriminated against because of her gender, and file a DFEH or EEOC complaint based on that allegation of discrimination. When the company learns of her filing, it terminates her. The client now also has a retaliation claim. The client should amend her initial administrative filing to add retaliation, or when that claim is asserted in court, the defendant will likely argue that the retaliation claim should be dismissed for failure to exhaust administrative remedies. (*Martin v. Lockheed Missiles & Space Co., supra,* 29 Cal.App.4th at 1723.)

• Filing the civil complaint too early

In some cases, it may be prudent to hold off filing the civil complaint until after the EEOC and/or DFEH has conducted its investigation. In most cases, if the administrative agency learns that a civil action has been filed, it will close its investigation. Information received during the course of the administrative agency's investigation is often helpful, especially because the employer will often take a position, in writing, as to the reasons for the employee's termination which later changes as the litigation pro-

See Weinmann, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2009 Issue

gresses. The employer's shifting reasons for the termination decision can be used as evidence that the termination was for a discriminatory reason. (See, *Payne v. Norwest Corp.* (9th Cir. 1997) 113 F.3d 1079, 1080 [an employer's stating fundamentally different reasons at different times for termination creates an inference of pretext]).

Moreover, if the investigation leads the administrative agency to find probable cause that the employer engaged in unlawful discrimination, that can greatly enhance the value of the case. In the Ninth Circuit, an EEOC finding that there was probable cause to believe discrimination occurred is per se admissible in related civil proceedings. (*Plummer v. Western Int'l Hotels Co., Inc.* (9th Cir. 1981) 656 F.2d 502, 505.) In California state courts, the judge has discretion to admit such findings. (*Michail v. Fluor Mining & Metals, Inc.* (1986) 180 Cal.App.3d 284, 286-287 [225 Cal.Rptr. 403].)

However, where counsel decides to hold off filing a complaint to allow the administrative agency time to conduct its investigation, counsel must be cognizant of the statute of limitations on other claims not tolled during the pendency of the investigation. For example, the statute of limitations for defamation claims is one year. (Code Civ. Proc., § 340, subd., (c).) If the statute of limitations on a defamation claim or other non-FEHA claims approaches while the investigation is pending, counsel may want to file a civil complaint containing the non-FEHA claims, and later amend to add the FEHA claims after the client receives his or her notice of right to sue.

• Failing to comply with the government tort claims act when necessary

A claim against a governmental entity may not be maintained unless a formal claim has first been presented to such entity and rejected, either expressly or impliedly due to the passage of time. (Gov. Code, §§ 945.4, 912.4.) Claims brought under the Fair Employment and Housing Act are not subject to the claims filing requirements even when brought against governmental entities, because FEHA provides its own claims filing procedures. (*Garcia v. Los Angeles Unified School Dist.* (1985) 173 Cal.App.3d 701, 710-711 [219 Cal.Rptr. 544, 549-550].) However, other claims are subject to the tort claims act and will be barred if the claims requirements have not been satisfied. This may include, for example, claims for wrongful termination in violation of public policy, defamation, intentional infliction of emotional distress and other common claims often brought in employment cases. Thus, when planning on commencing a lawsuit against a governmental employer, the practitioner must evaluate whether a tort claims act filing is necessary, and must comply with the strict time requirements set forth in Government Code section 911.2.

Mistakes to avoid in initiating the lawsuit

• Failing to include the right causes of action

The complaint provides a roadmap for the rest of the litigation – what discovery will be allowed, what the court will consider in evaluating motions for summary judgment, what evidence can be presented at trial, what the jury will be allowed to find, and whether there will be insurance coverage available to satisfy a judgment. As discussed above with respect to case selection, it is important for counsel to conduct due diligence as early as possible to determine all potential bases for liability. As discovery proceeds, if new facts come to light which reveal other potential claims not included in the initial complaint, counsel should seek leave to amend the complaint to add such claims.

While it is beyond the scope of this article to discuss every potential claim that could be included in an employment lawsuit, there are some recurring issues that should be noted. First, a question often arises as to whether to include what may seem like duplicative claims. For example, if an employee alleges that he or she was terminated for a discriminatory reason in violation of the Fair Employment and Housing Act, that client will have a claim for violation of the FEHA, but could also plead a cause of action for wrongful termination in violation of public policy. (See, *Rojo v. Kliger* (1990) 52 Cal.3d 65, 74-75 [276 Cal.Rptr. 130] [holding that the FEHA does not preempt common law claims for wrongful termination, including wrongful termination in violation of public policy].) While the claims may seem duplicative, and the wrongful termination claim will not allow for the recovery of attorney's fees, the wrongful termination claim does not first require the exhaustion of administrative remedies. Counsel should include the wrongful termination claim in case the defendant is able to allege problems with the administrative requirements. At trial, counsel can then decide whether to submit both claims to the jury, or dismiss the wrongful termination claim at that time.

A claim that is often viable and should not be forgotten is the employer's failure to take all reasonable steps to prevent discrimination, harassment or retaliation from occurring. An employer has an affirmative obligation under FEHA to take all reasonable steps to prevent discrimination and harassment. (Gov. Code, § 12940, subd., (k).) This affirmative obligation also extends to the prevention of retaliation. (*Taylor v. City of Los Angeles Dept. of Water & Power* (2007) 144 Cal.App.4th 1216, 1240 [51 Cal.Rptr.3d 206], *overruled on other grounds in Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1174 [72 Cal.Rptr.3d 624].) Failing to take such reasonable steps constitutes a separate unlawful employment practice for which the employer can be held liable. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040 [6 Cal.Rptr.3d 441].)

The failure to prevent cause of action is valuable because it may allow more extensive discovery regarding the employer's policies and conduct in response to allegations of unlawful discrimination in the workplace, and a broader presentation of evidence at trial. While defendants generally try to argue that only the plaintiff's claims of discrimination and the employer's response

See Weinmann, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2009 Issue

thereto are relevant, where the employer's failure to take reasonable steps to prevent discrimination is at issue, it is easier to establish why a much broader scope of evidence should be allowed into all complaints of discrimination and all actions taken (or inaction) by the employer in response.

Another common area in which causes of action are sometimes forgotten is that dealing with disability discrimination. When an employee is terminated due to a physical or mental disability, he or she may have a valid discrimination claim under the FEHA. (Gov. Code, § 12940.) However, where the employer failed to engage in an interactive process with the employee to try to determine effective reasonable accommodations for the employee's disability, the employee may also be able to allege a cause of action for failure to engage in the interactive process. This should be separately pleaded. (See, Gov. Code, § 12940, subd. (n).) Similarly, if there was a reasonable accommodation available, yet the employer refused to provide it, the client may also be able to state a cause of action for failure to provide a reasonable accommodation for the disability. This, too, should be separately pled. (See, Gov. Code, § 12940, subd., (m).)

It is also important not to forget potential claims under the California Family Rights Act ("CFRA"), codified at Government Code section 12945.2. The CFRA makes it unlawful for an employer to deny an employee's request for leave to care for either the employee's own serious health condition or the serious health condition of the employee's child, or to terminate a qualified employee for exercising his or her right to such leave. (Gov. Code, §§ 12945.2, subd., (c)(3) and subd., (l)(1).) Often, claims for violation of the CFRA overlap disability discrimination claims. For example, an employee who is terminated after taking time off work due to a disability may have a claim for violation of the CFRA, in addition to claims for disability discrimination and failure to reasonably accommodate the disability.

Additionally, in framing the complaint, counsel should be cognizant of any possible claims that may trigger insurance coverage, such as negligence claims, including negligent hiring and retention, and defamation claims.

Finally, just because the facts of the case justify a certain cause of action, it does not necessarily mean that such a cause of action must be included in the complaint. One example is a cause of action for intentional infliction of emotional distress. Such a cause of action requires as one of its elements that the plaintiff have suffered severe emotional distress. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 617 [262 Cal.Rptr. 842].) The inclusion of this cause of action may make it more likely that the defense will be entitled to require the employee to undergo a defense mental examination. In some cases, that possibility will not deter the filing of the claim, while in others, it may not be in the client's best interests to include it.

• Failing to name the appropriate defendants

As important as alleging the proper causes of action is naming the appropriate defendants. First, the practitioner should determine the identity of the plaintiff's employer. There is a rebuttable presumption that the person or entity listed on the plaintiff's W-2 wage and tax statement is the employer. (Gov. Code, § 12928.) However, that may not be the entire story. Often, employees can be deemed to have joint employers. For example, it is not uncommon for a plaintiff to work for a subsidiary of a company, where the parent is involved enough in controlling the plaintiff's work that the parent can be deemed a co-employer. (See, e.g., *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 737 [80 Cal.Rptr.2d 454] [in determining whether two corporations should be considered a single employer for purposes of FEHA, the court considers four factors: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control].) Similarly, a plaintiff may be paid by an employment agency, but perform services at an entity that contracts with the employment agency, such that the contracting entity can be considered a joint employer. (*Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1183 [10 Cal.Rptr.3d 52].) Counsel should conduct due diligence in determining whether any related companies can be considered the plaintiff's joint employer and name all potential employers in the suit.

Another issue is whether to name individual defendants. One benefit of naming individual defendants is to avoid removal to federal court where the company is incorporated and maintains its principal place of business outside of California. (See, 28 U.S.C. § 1441, subd., (b) [any case that could have been brought in federal court based on diversity of citizenship is removable].) Another benefit is the access to individual defendants for purposes of obtaining deposition and trial testimony. Where a public entity is the employer, counsel may consider naming individual defendants to trigger the ability to recover punitive damages. (See, Gov. Code, § 818 [punitive damages are not recoverable against a public entity].)

Whether an individual may properly be named as a defendant depends on the claims being asserted. Under current law, individuals may not be held personally liable for discrimination or for retaliation under FEHA. (*Reno v. Baird* (1998) 18 Cal.4th 640, 663 [76 Cal.Rptr.2d 499]; *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624].) However, they can be held individually liable for harassment under the FEHA (Gov. Code, § 12940, subd., (j)(3).)

Further, although the law is still unsettled in this area, it appears that individuals may be held personally liable for retaliation in violation of the CFRA. Unlike in *Jones*, which found no individual liability for retaliation in violation of Government Code section 12940, there is evidence that in enacting section 12945.2, the California state legislature intended liability under that section to parallel liability under the Federal Family Medical Leave Act ("FMLA"), which imposes lia-

See Weinmann, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2009 Issue

bility for retaliation on individual supervisors. (*Mitchell v. Chapman* (6th Cir. 2003) 343 F.3d 811, 827). After FMLA was enacted on February 5, 1993, the California Legislature introduced legislation designed to amend CFRA to conform it more closely with the FMLA. (*Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal.App.4th 934, 941 n. 7 [118 Cal.Rptr.2d 822].) Consistent with FMLA's definition of "employer" and its imposition of liability for retaliation, California Code of Regulations, section 7297.7 was enacted, which prohibits *any person* from terminating or otherwise discriminating against an individual because that individual has exercised his or her right to CFRA leave. (Cal. Code Regs, tit. 2, § 7297.7.) Thus, a claim against an individual defendant for retaliation in violation of CFRA should be viable.

Individuals can also be held personally liable for traditional tort claims such as defamation and intentional infliction of emotional distress. (See, *Sheppard v. Freeman* (1998) 67 Cal.App.4th 339, 343 fn. 4, 349 [79 Cal.Rptr.2d 13].)

• Failing to consider the advantages and disadvantages of federal versus state court

Where the plaintiff can choose between federal and state court by choosing to include or exclude federal claims, or by either naming or not naming non-diverse defendants, the attorney must evaluate whether to file in federal court or in state court. There are several issues to consider. One is the pool of judges in the state court where the case would be venued versus the pool of judges in the federal court district where the case would have to be filed. Another factor to be considered is the differing requirements for a jury verdict. In federal court, there can be as few as six jurors and any jury verdict must be unanimous. (Fed Rules Civ. Proc., rule 48.) In state court, 12 jurors hear the case, but only nine of the 12 must agree on any single issue. (Cal. Const., Art. I, § 16; Code Civ. Proc., § 220; Code Civ. Proc., § 618.)

Also important are the different time standards for a motion for summary judgment. In state court, a party must be given at least 75 days notice of a motion for summary judgment, with opposition due 14 days before the hearing. (Code Civ. Proc., § 437c, subd., (a) & (b)(1).) In federal court, much less notice is required, and depending on the district in which the case is pending, the plaintiff may have only a week to oppose – a daunting task in most employment cases. (See, e.g., CD CA Local Rule 6-1 [21 days notice required for a motion personally served]; CD CA Local Rule 7-9 [opposition due 14 days before hearing].)

Budget considerations may also factor into the decision whether to file the case in federal court or state court. Some state courts are so backlogged, that it may take years for a civil case to get to trial. In those areas, a federal court case may proceed more quickly. This factor may become even more of an issue with the current budget crisis.

• Failing to immediately file a demand for jury trial if the case is removed to federal court

If a defendant removes a case to federal court, counsel should immediately file a written demand for jury trial. Unlike in state court, a demand for jury trial must be in writing and must be filed within 10 days. (Fed. Rules Civ. Proc., rule 38, subd., (b).) This is a trap for the unwary.

• Failing to ascertain whether the client is bound to arbitrate his or her claims

Many employers now require their employees to sign agreements, as a condition of employment, requiring the employee to submit any disputes to binding arbitration. It is important to ascertain at the outset – prior to filing suit – whether a valid and binding arbitration agreement exists. Even if the client does not recall signing a stand-alone arbitration agreement, counsel should carefully examine handbooks, employment applications and employment agreements to determine if the employer will have an argument that the claim should be arbitrated.

If so, the first question is whether the agreement is enforceable. The enforceability of arbitration agreements is beyond the scope of this article, but there are many defenses to arbitration that counsel should research before conceding the validity of the arbitration agreement.

Also, counsel should ascertain whether there are shortened limitations periods or other conditions that must be satisfied prior to demanding arbitration, to avoid losing the client's case on a technicality. Such shortened limitations periods may or may not be enforceable, but counsel should not take unnecessary chances. (See, *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1175 [provision in arbitration agreement that effectively shortened the FEHA statute of limitations was found substantively unconscionable]; *Soltani v. Western & Southern Life Ins. Co.* (9th Cir. 2001) 258 F.3d 1038, 1044 [finding six-month limitations period in an employment contract not to be substantively unconscionable under California law]).

Conclusion

While many mistakes to avoid are learned the hard way – by making them – it is the author's hope that by providing a checklist for practitioners to consult before approaching employment litigation, mistakes can be avoided before they are made.

Iris Weinmann is a partner in Greenberg & Weinmann, located in Santa Monica. Ms. Weinmann has concentrated her practice on the representation of employees in civil rights and other employment-related litigation since 1994. Together with her partner, Paul Greenberg, she has successfully tried multiple employment cases to verdict. She has also argued several appeals before the Court of Appeal for the State of California.