

LABOR & EMPLOYMENT LAW ROUNDTABLE

What Owners and Executives Need to Know



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As the legal landscape continues to evolve in terms of labor and employment, the Los Angeles Business Journal once again turned to some of the leading employment attorneys and experts in the region to get their assessments regarding the current state of labor legislation, the new rules of hiring and firing, and the various trends that they have been observing, and in some cases, driving. Below is a series of questions the Business Journal posed to these experts and the unique responses they provided – offering a glimpse into the state of business employment in 2015 – from the perspectives of those in the trenches of our region today.



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'Employers are sometimes reluctant to self-audit out of fear of creating a paper trail or rocking the boat. However, almost every business can benefit from a self-audit, and by working with employment counsel these audits can be privileged.'

JULIE R. TROTTER

'I recommend to every client that they do a wage and hour self-audit as part of a more global employment practices self-audit. Often times, wage hour and labor law compliance matters are invisible and don't show up as potential liabilities until a lawsuit is filed. By that time, the "fix" can be very expensive.'

RICHARD S. ROSENBERG



◆ What are some of the latest trends specific to wage or class-action cases?

SCHERWIN: Just about every wage-hour case or class action lawsuit includes a claim for damages under the Private Attorney General Act ("PAGA"). Plaintiffs' lawyers are using PAGA to keep cases out of individual arbitration and continue to essentially maintain class-action type lawsuits even when the defendant-employer has an arbitration agreement. Many Plaintiffs' lawyers will attempt to resolve the lawsuit as a class action (rather than an individual or PAGA action) by using PAGA to push the case aggressively if the defendant-employer refuses to settle the lawsuit on a class-wide basis. Another trend that I continue to see, is that despite very strict requirements for California employers regarding what specific items need to be included on a pay stub, many employers in California still fail to comply with these requirements leading to a host of wage-hour liability.

ROSENBERG: A particularly vexing problem for employees who work part time in restaurants and other retail industries is the irregularity of their work schedule. There is an entire segment of the workforce who simply don't know from one day to the next whether they will be working. They are tasked to call in to their employer each day to see if they are on the schedule. If no work is available, they receive no pay. This uncertainty wreaks havoc with their personal life, especially if the employee has family obligations that have to be managed. Employees feel that they must stay glued to the phone because if they turn down a work opportunity then they may not be in the consideration when one occurs. Employees customarily are not being paid for this time and this practice is being challenged in a couple of class-action lawsuits alleging that the employee should be paid for their so-called "standby" time for the inconvenience of having to put their life on hold waiting to find out if there is work. Employers argue that they need the scheduling flexibility and that nobody is forcing employees to take the work.

TROTTER: Misclassification cases continue to get a boon as a result of the Court of Appeal decision granting class certification in a case against Joe's Crab Shack last

November. There the court looked at similarities in training manuals, evaluation forms and the operations of the restaurants to justify certification of a class of assistant and general managers. Another hot wage and hour topic is independent contractor misclassification cases. With recent wins for plaintiffs at both the certification and trial stage, employers using independent contractors in any capacity should carefully analyze these relationships to see if they pass the test. The biggest trend by far, however, is the use of PAGA to circumvent class action waivers and certification requirements.

◆ Would you say that the number of class action/PAGA claims increasing? Why?

SCHERWIN: The answer is unequivocally yes. It remains relatively easy for employees and Plaintiffs' lawyers to pick apart the very strict requirements under the California Labor Code and bring a PAGA claim or class action against an employer. Put bluntly, it is not hard for an employer to make a mistake based on a lack of understanding or knowledge of the nuances in the Labor Code. As such, it is important for employers to seek counsel and guidance on items such as overtime, meal periods, rest periods, pay stubs, and commission/bonus payment plans.

TROTTER: PAGA claims are definitely on the rise. Increasingly PAGA claims are being brought as stand-alone claims, unaccompanied by class claims for the underlying wage violations. PAGA claims are attractive to plaintiff's attorneys because the California Supreme Court has held they cannot be waived by an arbitration agreement, and because they are not subject to class certification requirements. PAGA penalties (typically \$50/\$100 per employee per pay period) can quickly add up for employers with a large employee population. PAGA claims present complicated and unsettled legal issues for employers that further raise the stakes and expense of litigation. For instance, courts are wrestling with how discovery works in PAGA cases, how such cases should be tried, and whether a plaintiff can recover multiple PAGA penalties stemming from one wrong misstep such as misclassifying an employee. Plaintiffs often try to leverage these uncertainties to drive up settlement demands.

ROSENBERG: If the workflow in our office is any indication, then the answer is "Yes." Even though there is a great deal of publicity about employer exposure for non-compliance with wage hour rules and regulations, there seems to be in a never ending list of employers who haven't gotten the message. There is a huge incentive on the part of the lawyer to take these cases because they will be resolved with a significant attorney's fees payment in most instances. I also tell clients to watch out what they wish for. Pushing these cases into arbitration, which is the current fad, is no panacea. Imagine having to arbitrate 100 or more individual wage and hour cases. The attorney fees alone would crush most companies. Moreover, the employer is legally obligated to pay for the entire cost of the arbitrator, which typically runs \$3-\$5000 per day.

◆ Should businesses consider doing a wage/hour self-audit? Should they consider doing a more global employment practices self-audit? What would such audits encompass and how should they go about performing them?

TROTTER: Employers are sometimes reluctant to self-audit out of fear of creating a paper trail or rocking the boat. However, almost every business can benefit from a self-audit, and by working with employment counsel these audits can be privileged. The number of employment lawsuits filed against businesses dwarfs all other types of claims combined. Performing periodic self-audits not only helps prevent litigation, there are also operational benefits. Reviewing job descriptions, for instance, helps businesses weed out archaic functions and streamline operations. Such reviews are also important in analyzing exemption issues, creating a baseline of essential functions for accommodations, and measuring performance. Sometimes self-audits uncover practices that are unknown to upper management and at odds with stated policies. While global audits can seem overwhelming, a good first step is to outline the company's current practices by topic (i.e. hiring, wages, leaves, conduct), and then identify potential gaps as a starting point.

ROSENBERG: I recommend to every client that they do a wage and hour self-

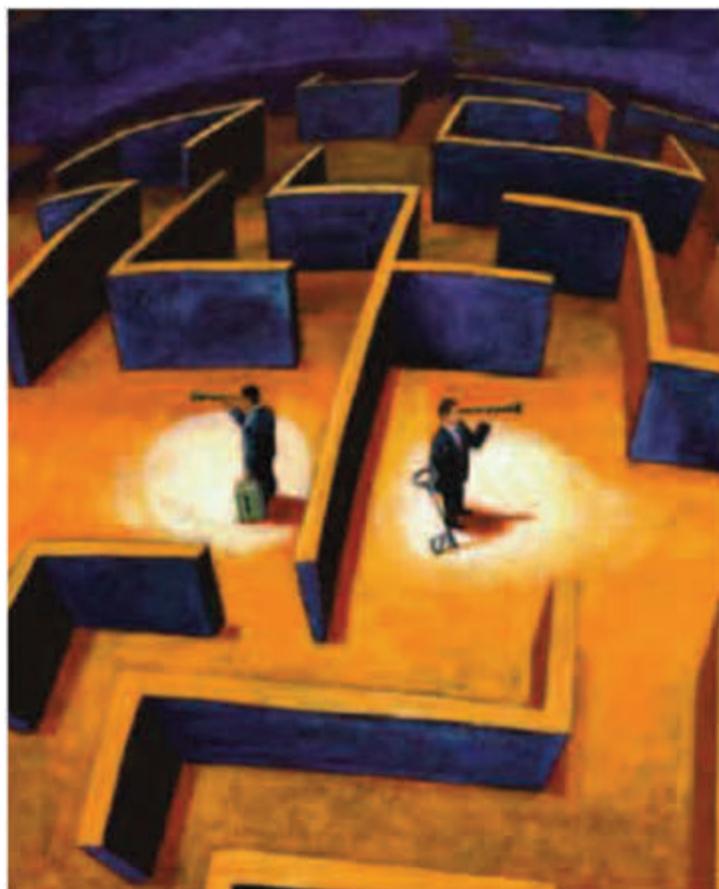
audit as part of a more global employment practices self-audit. Often times, wage hour and labor law compliance matters are invisible and don't show up as potential liabilities until a lawsuit is filed. By that time, the "fix" can be very expensive. Having done this for over 38 years, I know all too well that all it takes is one good case and the company's finances can be adversely affected for years. In our law firm, we strongly believe in the practice of preventing problems and we do everything we can to convince clients to scrub their employment practices and address deficiencies before they become the subject of an adversary proceeding.

SCHERWIN: I believe this is an important exercise to do and probably one that should be done at least every five years. The audit should consist of accumulating all of the company's policies related to wage-hour issues including memos that have been sent by managers on items such as overtime, timekeeping, meal periods, rest periods, time rounding, commission payments, bonus payments, and job descriptions for exempt employees. These should be reviewed for compliance to ensure that the policies/memos do not conflict with California law. Next, the audit should consist of pulling a random sample of time and pay records to review payment for overtime, meal periods, and any time rounding that has been done over a period of time.

◆ California just passed a required paid sick leave law. When does it take effect, and how much leave is required?

MOCK: The Healthy Workplace Healthy Families Act of 2014 requires employers to provide full time, part-time or temporary employees who work 30 days or more in a year with up to three days or 24 hours of paid sick leave annually, upon request. Beginning July 1, 2015, one hour of paid sick leave will accrue after each 30 hours worked, or an employer may provide the 3 days or 24 hours all at once on an employment anniversary date or at the beginning of the calendar year. Using the second method allows employers to avoid carry-over of unused but accrued paid sick leave to the following year. Employees are eligible to use accrued paid sick leave after 90 days of employment for their

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and labor
laws are
complex
and ever
changing.**



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guide you
through
the maze.**

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'Employers who are faced with an employee who has not returned to the job following family leave need to review their existing policies regarding required communication with supervisors and/or human resources personnel during an approved leave, document attempts to communicate with the employee, and determine if disciplinary action is warranted for violation of the employer's policies.'

JANICE MOCK

'I recommend that every employer in California have mandatory pre-dispute arbitration agreements with each of its employees. Because of recent court rulings, these agreements permit the employer to put language in the arbitration agreement that prohibits the employee from filing a class action lawsuit.'

TODD B. SCHERWIN



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own care (including to address legal matters as victims of domestic violence, sexual assault or stalking) or for a family member's diagnosis, care or treatment. Employers should already be displaying a poster issued by the DLSE detailing the requirements of the new law (required as of January 1, 2015) and informing new hires with written notice of the paid sick leave. Employers will also need to track the hours used and accrued by employees to be included with an employee's pay stubs and to keep records for three years.

SCHERWIN: Technically, the law took effect January 1, 2015 and required companies to post new notices at the worksite. Beginning July 1, 2015 every employer in California is required to provide employees paid sick leave either by giving an employee three days (or 24 hours, whichever is greater) to use at any time during the measured year or permit employees to accrue one hour of sick pay for every thirty hours worked up to a maximum of six days (or 48 hours, whichever is greater). For most employers it will simply be easier to grant every employee three sick days per year so that there is no need to worry about the administrative headaches of tracking the accrual. Remember accrued or granted sick leave does not need to be paid at termination.

ROSENBERG: At its core, the law requires employers to provide no less than three days of paid sick leave per year to every full-time employee, and that amount is prorated for part-time employees. The law is written in a very complex way and many employers are having difficulty understanding how to comply. Every company in California must comply with this rule by July 1 and we encourage companies to address the issue now because there is a lot of planning in terms of choices for how to comply.

◆ **In light of recent legislation, what are the most difficult/dangerous leave of absence/return to work issues facing California employers?**

TROTTER: Forgetting the basics is often the biggest mistake employers make with respect to accommodation and leave issues. It is easy to get mired in the details

of legislative changes and the complicated interplay between various leave statutes such as CFRA, FMLA and PDL. What employers sometimes forget is the fundamental, basic obligation of accommodating a disabled individual under FEHA and the ADA. This includes providing a leave of absence, if appropriate, to individuals who may not otherwise qualify for leave under CFRA or the FMLA. Another area where employers sometimes fall short is tapping out of the interactive process too early. While employers do not have to agree to the employee's choice of accommodation, they must provide an effective accommodation. Sometimes, it takes several tries to get it right and employers need to remember they are not off the hook if they merely offer one accommodation that ends up being ineffective.

◆ **Is it a correct assumption that a business may terminate an employee who doesn't return to work at the end of a family leave of absence?**

ROSENBERG: Absolutely not. This is one of the fundamental misunderstandings about family leave that gets employers into trouble. Employees who need additional time off after their allotment of family leave law is exhausted (480 hours annually for a full-time employee) have rights under the ADA and state laws prohibiting discrimination against the disabled. These laws obligate employers to "reasonably accommodate" employees who have a bona fide physical or mental disabilities, unless all accommodations would cause the employer to suffer and "undue hardship." Time off is one kind of accommodation contemplated under these laws and the burden is on the employer to show that making additional time available would be too burdensome. Employers lose this argument most of the time. Disability discrimination lawsuits (especially those for the failure to accommodate) are on the rise and the jury awards demonstrate that they are very risky.

SCHERWIN: This misnomer is what often gets employers sued in California. The law requires that eligible employees be provided up to 12 weeks of job protected medical leave to care for themselves or an immediate family member with a serious medical condition. However, once that

12 weeks has expired, an employer's obligation does not end. If an employee is out for his/her own medical condition that employee may be entitled to additional leave under California and Federal law. Specifically, the employer is required to provide a leave of absence as long as it doesn't cause an undue hardship on the employer. Because the undue hardship standard is not clearly defined employers should seek guidance before terminating an employee who has been out on a medical leave. Additionally, policies that grant a maximum amount of leave before automatic termination have been found to be a per se violation of California law.

MOCK: The operative word here is "may." Employers who are faced with an employee who has not returned to the job following family leave need to review their existing policies regarding required communication with supervisors and/or human resources personnel during an approved leave, document attempts to communicate with the employee, and determine if disciplinary action is warranted for violation of the employer's policies. The California Supreme Court recently confirmed in *Richey v. Autonation, Inc.* that while on leave under the California Family Rights Act (CFRA), an employee has no greater right to reinstatement or to other benefits and conditions of employment during medical or family leave than he or she would have if continuously employed during the same period. (See C.F.R. Section 825.216(a)). In *Richey*, the employee violated company policy by performing outside work for a restaurant he owned while on an approved medical leave, and was explicitly warned by his supervisor of the existing policy prior to his termination and in several documented attempts to reach him. Under these facts, the Court found that his employer was entitled to enforce its policies and terminate him as if the same violation of policy had occurred when he was actively working.

◆ **Should businesses be making any changes to their standard employee arbitration agreements in light of recent court rulings on the subject?**

SCHERWIN: Yes. I recommend that every employer in California have mandatory pre-dispute arbitration agreements with each of its employees. Because of recent

court rulings, these agreements permit the employer to put language in the arbitration agreement that prohibits the employee from filing a class action lawsuit. However, in light of other recent case law, agreements that compel employees to waive their right to bring a PAGA claim are not permitted. Therefore, employers in California should ensure that arbitration agreements contain the proper language needed to ensure fairness in arbitration, along with a class action waiver with some sort of carve out for PAGA claims.

TROTTER: Yes. If the goal is to reduce the risk of class or collective actions, two primary issues should be considered: (1) who decides the issue of arbitrability — the court or arbitrator; and (2) will a severability clause or "poison pill" be an effective tool to protect the employer from being forced to litigate class or representative actions in arbitration where appellate review is limited. Most employers prefer that the court determine whether class or representative claims are permitted. This intent should be clearly stated in the agreement. In addition, with the proliferation of PAGA claims, employers should scrutinize the plain language of any severability or poison pill clauses to determine what happens to the PAGA claim — does it go to arbitration, should it be stayed, does it blow up the agreement etc. Overzealous drafting can lead the court to set aside and invalidate the agreement altogether.

◆ **In light of what appears to be a national trend toward legalizing marijuana, what are the rights of California employers? Can they still prohibit medical marijuana use in their workplace? Can/should businesses drug test for marijuana use?**

MOCK: Like alcoholic beverages, even if legalized, recreational marijuana use will still be regulated by the state, as seen already in Colorado and Washington. Legalization does not mean that employers will be prohibited from enforcing workplace rules against activities like possessing, smoking marijuana or consuming marijuana edibles on the job because just like drinking alcohol, getting high during the workday impacts productivity and depending on the type of work environment, may possibly

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'Despite the passage of the Compassionate Use Act, California employers do have the right to require pre-employment drug tests and can consider drug use in employment decisions. Those rights have been confirmed by the California Supreme Court. Further, employers are not required to accommodate the use of illegal drugs, either at the workplace or at home. Where employers need to be careful, however, is balancing an individual's right of privacy with the employer's right to a drug-free work environment.'

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endanger the employee using marijuana or his/her coworkers. In the event of legalization, employers can have a no drug policy that prohibits use during work hours and includes an invitation to those employees being treated for a condition that requires the use of medical marijuana to contact human resources to discuss any reasonable accommodation that might be needed. Under the ADA and DFEHA, accommodation does not have to be the one accommodation requested by the employee such as using marijuana products during work hours, but may include modifying his/her work schedule so that medical marijuana can be consumed at home. In 2008, the California Supreme Court, in *Ross v. RagingWire Telecommunications Inc.*, gave employers wide latitude when the Court held that the Compassionate Use Act (allowing possession and cultivation of

marijuana for medical use when recommended by a physician or osteopath) did not apply to employment and that *illegal* drug use could be taken into consideration in making employment decisions. However, with legality on the horizon, that same rationale could not be made with a drug that is no longer outlawed, and employers may find they are challenged when refusing to hire an applicant who is found to have used legal marijuana products through pre-employment drug testing.

TROTTER: Despite the passage of the Compassionate Use Act, California employers do have the right to require pre-employment drug tests and can consider drug use in employment decisions. Those rights have been confirmed by the California Supreme Court. Further, employers are not required to accommo-

date the use of illegal drugs, either at the workplace or at home. Where employers need to be careful, however, is balancing an individual's right of privacy with the employer's right to a drug-free work environment. Employers cannot single out particular applicants for drug screening based on protected characteristics such as race or disability. Further, an employer's right to drug test current employees is much more limited and should be reviewed with counsel. Multi-state employers also need to examine the rules in all states in which they operate. Some states have enacted specific laws giving medical-marijuana users protected status and prohibiting employers from discrimination on this basis.

SCHERWIN: Based on California Supreme Court precedent, an employer can still prohibit employees from using marijuana

and can still make termination decisions if an employee who was subjected to a valid drug test has marijuana in his/her system. Employers get themselves into trouble by drug testing in a situation that is not permissible in California. For most private employers, the only situation where you can drug test is pre-employment, reasonable suspicion, and post-accident. If a drug test is done under an illegitimate circumstance, then an employer may have violated an employee's right to privacy and may be guilty of terminating that employee in violation of public policy. The second area where employers should look to improve is by having an anti-drug policy that defines its drug testing as well as listing marijuana as one of the illegal drugs that is prohibited.

ROSENBERG: Because the use of marijuana

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TODD B. SCHERWIN

'It is highly recommended that companies of all sizes have their employee handbook reviewed by labor attorneys with a lot of experience in traditional union management relations matters. In the past five years, I haven't seen a single handbook, which didn't have at least one rule that would be considered unlawful by the NLRB.'

RICHARD S. ROSENBERG



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na is still a federal offense, the court cases say that employers are not required to accommodate the use of marijuana for medical reasons. Nor must a business tolerate employees coming to work under the influence of marijuana, which is used recreationally. In consideration of the experience of states like Colorado and Washington, to be sure the conversation around marijuana use has taken a dramatic shift. Still, the legal issue is whether federal law trumps any permissive state law. In the meantime, employers have the right to drug test employees and screen for job applicants and employees who are marijuana users. However, once an employee is hired, drug testing becomes a more complicated and very fact intensive balance of the employer's right to have a drug-free work environment and the employee's privacy rights. The best course of action is to have any testing regimen blessed by labor counsel.

◆ **California has a new anti-bullying training requirement. What does that entail?**

MOCK: Every two years, covered employers must provide at least two hours of classroom or other interactive training for supervisory employees that gives "information and practical guidance" concerning federal and state prohibitions against sexual harassment and correction and remedies available for victims of sexual harassment in employment. This requirement is found in Government Code Section 12950.1, and was recently expanded to include "prevention of abusive conduct" as a component of that required training and education effective January 1, 2015. No specific time allotment or content requirement for the new component was indicated. Training materials for covered employers will have to be revised to cover abusive conduct, and policies for investigating complaints of workplace harassment should also be reviewed. Abusive conduct is broadly defined in the new subsection as malicious conduct that "a reasonable person would find hostile or offensive" and that is unrelated to an employer's legitimate business interests. It also notes that a single act will not constitute abusive conduct unless especially severe or egregious, and that the term may include repeated

verbal abuse, derogatory remarks, insults, epithets, and verbal or physical conduct that a reasonable person would find threatening, intimidating or humiliating. The subsection goes on to include "gratuitous sabotage or undermining of a person's work performance" as falling within the definition.

ROSENBERG: The California legislature has mandated that employers add the topic of workplace bullying to their mandatory sexual harassment training. All supervisors must be trained every two years, and within six months of being elevated to a supervisory position. Training requires employers to focus employees' attention on the adverse impact of workplace bullying and any internal processes for addressing such incidents if they occur in the workplace. Many workplace law experts believe that the legislature will eventually outlaw workplace bullying and provide employees yet another opportunity to sue employers on the basis of an untoward work environment. Legal definitions in the training law are very broad and are capable of laying the groundwork for a very expensive lawsuit.

SCHERWIN: This new anti-bullying training requirement may simply be a precursor to California passing an anti-bullying law. For now, employers should ensure that the mandatory sexual harassment and discrimination prevention training that it is required to do for supervisors (if 50 or more employees) contains training on anti-bullying.

◆ **What can employers do to protect their image, but not run afoul of free speech and National Labor Relations Act protections for individuals?**

MOCK: Companies should be immediately responsive to any critical social media posts by employees and take the discussion off-line as soon as possible to work directly with the individual toward a resolution. As for employee posts, you cannot limit an employee from discussing workplace conditions or advocating for a better working environment. But you can terminate employees who post false and defamatory information on social media sites. Best practice is to remain responsive to employee concerns before they get to the point of a rant on Twitter.

◆ **How prominent are retaliation claims in 2015 and what can your clients do, if anything, to protect themselves from such claims?**

TROTTER: The EEOC recently reported that retaliation and whistleblowing claims are at an all-time high. For the fifth year in a row, retaliation claims made up the highest percentage of all discrimination claims filed, beating out sex, race, age and disability. Some plaintiff's attorneys are even trying to turn single-plaintiff retaliation claims into multi-plaintiff PAGA claims by citing to Labor Code section 1102.5, which prohibits retaliation for whistleblowing. The best way for employers to protect against retaliation claims is through training and documentation. Employers should regularly train managers about the many forms of retaliation to prevent inadvertent or perceived forms of retribution. In addition, companies should implement regular and robust documentation procedures so there is a clear record of any performance issues. Having a clear record of the reasons for an adverse job consequence is the best way to defend against accusations of improper retaliatory motives.

ROSENBERG: Retaliation cases comprise the largest segment of new cases filed last year. They are so dangerous because the accused retaliator often doesn't have a clue that s/he may have stepped over the line. The good news is that the "fix" is relatively easy for employers. Legal awareness training for managers is the best defense to a retaliation lawsuit because managers who are educated about their legal responsibilities are far less likely to engage in unlawful retaliation. This training is a must in my estimation because so many of the labor laws are counterintuitive. It's really very simple. If a law gives employees the right to do (or not do) something, managers can't treat them poorly for having taken advantage of what the law provides. Timing is critical element. Too often, bad things happen shortly after an employee uses a legal right, such as taking time off for pregnancy, a disability or family leave.

◆ **Should non-union companies be concerned about what the National Labor Relations Board says about the content of employee handbooks?**

ROSENBERG: Absolutely! In the last five years, the NLRB has been on a tear going after nonunion employers over the content of their employee handbooks. We see charges filed against employers who have seemingly innocuous policies that run afoul of employee rights under the federal labor relations law known as the National Labor Relations Act. It is highly recommended that companies of all sizes have their employee handbook reviewed by labor attorneys with a lot of experience in traditional union management relations matters. In the past five years, I haven't seen a single handbook, which didn't have at least one rule that would be considered unlawful by the NLRB.

MOCK: Yes, absolutely. The NLRA applies to non-union employers with respect to limitations on "protected activity" that might be contained in employee handbooks. If a handbook prevents an employee from discussing his/her compensation, for example, that runs afoul of the protections of the National Labor Relations Act and the employer can be held liable for violations of the Act if they terminate an employee for violation of the handbook prohibitions.

SCHERWIN: Non-union companies should be more concerned than union companies due to the fact that union company's handbooks are under more scrutiny from the unions themselves. Non-union employees seem to be filing more and more charges with the NLRB because employees are more aware of who the NLRB is because the NLRB has become more prominent based on the legal positions it has taken related to social media. Handbook policies are under heavy scrutiny from the NLRB and the NLRB seems to be itching to find handbook policies in violation of the National Labor Relations Act. The policies most under fire are social media policies and any policies that seem to prohibit employee "protected" speech in the workplace. It is important for all employers to have their handbooks reviewed yearly to ensure compliance and especially now to have handbooks reviewed to make sure any social media policies are not prohibiting protected concerted activity.

◆ **How important is it for businesses to be aware of the new NLRB "quickie election" rules?**

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ROSENBERG: I can't say too much about this. With only 5% of the private sector employers being union, most companies don't pay any attention to union matters. This is about to change. On April 14th, the NLRB issued new regulations, which make it far easier for unions to win organizing rights at a company. There are many many things employers can and should be doing right now if they don't want a union at their company. Waiting until the onset of active organizing is not a viable option because the new rules permit unions to take their time building employee support, then force employers to have a vote on the matter before the company can effectively get its message across to its employees.

◆ **Is it ever okay for an employer to seek additional information in order to determine whether or not a reasonable accommodation can be provided to allow an employee to continue performing their job?**

TROTTER: Employers should proceed with caution when seeking additional information from a medical provider to effectively accommodate a disabled individual. The FEHC regulations provide guidance on this topic; however, employers also need to review recent changes to CFRA effective July 1st. When dealing with an accommodation request, employers can ask for reasonable medical documentation confirming the existence of a disability and the need for accommodation, but the diagnosis. An employ-

er can also ask for clarification, including what the employee's functional limitations are for specific duties. When dealing with a CFRA leave, however, employers may only contact a medical provider to authenticate medical certification. The interplay between the ADA, FMLA, CFRA and PDL is complicated. Sometimes employers get mired in the details of whether an employee qualifies for CFRA or FMLA and neglect to consider the overarching obligation to accommodate an employee under the ADA, no matter how long the employee has worked for the company.

◆ **Personal electronic devices are used by just about everyone now. Does that create concerns or issues for your clients?**

MOCK: Yes. Employees who use personal devices for work-related communications are exposing the employer to security threats that don't exist in the protected office environment on network equipment. However, it is understandably cheaper in the short run to let employees use their own devices than for the company to buy them. If a company does allow personal devices to be used, then the IT department should make the device as secure as possible, communications should be encrypted, the device should be erasable if lost, and other steps should be taken to be sure company information remains safe even after the employee stops working for the company.

SCHERWIN: It absolutely does. Personal electronic devices ("PED") cause issues because of the potential inappropriate conduct that employees engage in while using the PEDs such as harassing emails, chain e-mails, pictures, etc. Additionally, employers also have to worry about all of the wage-hour issues associated with PEDs. Specifically, if non-exempt hourly employees are using personal electronic devices "off the clock" to perform work for the company there is substantial liability created because not only does the company have constructive knowledge that the individual was working "off the clock" but it also gives the appearance that the company is condoning employees working off the clock. It is important for employers who allow non-exempt employees access to work related information and emails outside of work, to maintain strict policies and a checks and balances system to ensure it is not creating huge wage-hour liability.

◆ **How big an issue is trade secret/confidential information protection in the employment arena in 2015?**

ROSENBERG: Huge. Often, a company's most valuable asset is its intellectual property. There are many things a company may do defensively to avoid becoming a victim of trade secret theft and misappropriation. And, it's easy for an employer to unwittingly give employees and competitors the right to

use their trade secrets if the information needing protection is mishandled or the company lacks the requisite policies and procedures courts require for a company to be able to protect these invaluable assets.

◆ **What can businesses do to remain up-to-date with ever-evolving employment law trends?**

SCHERWIN: First, it is important to have a solid Human Resource professional(s) either in your organization or outside of your organization you can trust to provide you the latest insight in legislation and trends to watch out for. It is also important to attend yearly or quarterly updates put on by law firms, HR organizations, or similar providers. Unfortunately, ignorance of these new laws is not an excuse and therefore partnering with a lawyer or HR professional is the best way to stay up to date and keep your business out of trouble.

ROSENBERG: There are lots of resources out there for employers. Many things are free. Join trade associations and subscribe to labor law journals. But, I honestly feel there is simply no substitute for adding savvy battle tested labor counsel to the decision making team. So many seemingly small HR decisions carry huge monetary and PR exposure.

◆ **What are your clients most concerned about in terms of future legislation or regulation?**



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“ THEY'RE WORRIED ABOUT OVERTIME. I'M JUST WORKING OFF THE CLOCK. ”

I NEVER WEAR THE SAFETY GOGGLES. THEY LEAVE A MARK. ”

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LABOR & EMPLOYMENT LAW ROUNDTABLE



'Employees who use personal devices for work-related communications are exposing the employer to security threats that don't exist in the protected office environment on network equipment. However, it is understandably cheaper in the short run to let employees use their own devices than for the company to buy them.'

JANICE MOCK

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TROTTER: California businesses continue to be frustrated by exemption tests that do not reflect the modern work environment. The administrative exemption, for instance, is a quagmire that leaves many diligent and well-intended companies scratching their heads. On top of that, many highly paid employees want the freedom, flexibility, prestige and opportunities that go along with being classified as exempt. One of the bills that many of my clients are watching and supporting is AB 1470, which is designed to conform to the federal overtime exemption for highly-compensated employees and would cover employees making at least \$100,000 in fields such as financial services, technology, insurance and more. At the same time, however, the U.S. Department of Labor is pushing to revamp FLSA overtime exemptions. Although the scope of any proposed changes remains to be seen,

an avalanche of new misclassification cases is likely to follow.

SCHERWIN: The one item that probably keeps more employers up at night more than any other is the continuing legislation related to increasing the minimum wage. Not only does the idea of large increases in minimum wage effect compensation of the lowest wage earners, but it also has a domino effect on entire organizations. Most notably, because the minimum salary to be considered a white-collared exempt employee is tied to the state minimum wage, an increase in minimum wage has an effect on everyone. For example, today, with minimum wage at \$9 per hour, the minimum salary threshold for a white-collared exempt employee is \$37,440 per year. However, if the minimum wage increases to \$15 like has been discussed in the past few months, the minimum salary threshold will increase to \$62,400.

◆ **What should a business look for in its legal representation when it comes to labor and employment law?**

ROSENBERG: Experience, and lots of it. Clients pay us to be able to anticipate what's going to happen. While none of us is clairvoyant, having risk managed tens of thousands of proposed personnel transactions gives you invaluable insight into situations. Also, look for subject matter experience. Labor unions, wage hour law, whistleblower cases, trade secret protection. These are complex and ever evolving areas of the law. In my opinion, you need to partner with a team of labor law experts (better yet industry experts) with a proven track record of success to provide the necessary guidance.

TROTTER: Businesses should look for a firm dedicated to building a true part-

nership. This means attorneys who are taking the time to learn the industry, proactively spotting issues, and brainstorming solutions alongside the business without waiting to be engaged on a particular matter. Employment counsel should create the feeling they are an extension of the business operations; this includes figuring out the goals of the business and factoring those into the litigation strategy, as well as offering training and counseling at the conclusion of a matter so that the business can shore up policies or practices that led to litigation. Subject area knowledge is important. However, it is only the starting point. For employment cases in particular, businesses should seek out firms that offer creative solutions for litigation and case resolution. Streamlining costs while aggressively defending a client's rights can be difficult goals to harmonize. Firms that strike that balance solidify long-term relationships.

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