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 2017 – from the perspectives of those in the trenches of our region today.

Thanks to our superb panel for their expert insights, including:

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programs and methods of training delivery (i.e. in person or web-based) for sensitivity and other preventive training in the workplace. However, the EEOC continues to promote sensitivity training, A 2016 report of the Equal Employment Opportunity Commission (EEOC) noted that if they test for marijuana is deciding whether they will implement a zero tolerance policy or allow a small amount in an employee's possession. The Court also held that employers are not required to accommodate any employee who wishes to continue using marijuana as a part of their medical treatment. As a best practice, employers should have a corporate “zero tolerance” policy to address drug and alcohol use.

What are the most significant new employment laws taking effect in 2017?

BOWMAN: Amendments to the California Pay Act prohibit employers from paying employees at a wage rate less than rates paid to employees of another race or ethnicity for substantially similar work, and prohibit using prior salary alone to justify any disparity in compensation. The State minimum wage in January 1, 2017 through 2022 will be increased. The minimum wage for this year is $10.50, and among the nice ripple effects of the increased minimum wage is a new restriction of $48,062 a year (or the State minimum wage) to meet the salary test for a white-collar exemption. A new statute on limiting choice of law and forum provisions prohibits employers from requiring an employee who primarily resides and works in California as a condition of employment to (1) adjudicate outside of California claims that arise in California, or (2) waive the substantive protections of California law.

SCHERWIN: In Los Angeles, it is the LA Fair Chance Ordinance,nicknamed the “ban the box” law along with the increase in minimum wage. The Fair Chance Ordinance puts a huge burden on employers seeking to conduct a criminal background check on an applicant. Employers within Los Angeles can no longer ask about criminal convictions on applications, must post information regarding compliance with the Ordinance on all job postings, and must go through an assessment process. AFTER providing a conditional offer if the employer wishes to revoke the offer after discovering criminal convictions. Additionally, with minimum wage continuing to increase, employers need to understand that minimum wage increases effect not only those employees earning minimum wage, but also those employees who are paid a salary as exempt employees. These salary-based employees also are subject to the minimum wage and its increases. For example, when minimum wage increases to $11 per hour that salary will be $45,760.

What can employers expect from the California legislature this year?

BOWMAN: AB 5 proposes to require employers to offer additional hours of work to current nonexempt employees before hiring additional workers. AB 108 proposes to prohibit employers asking questions about criminal history until a conditional offer is made; in the event that an employer were to decline to hire based on a criminal history, the basis would have to be disclosed to the applicant at the time of the offer. The process for the employer to respond. AB 166 proposes to prohibit an employer from asking job applicants about their salary history and would require an employer to provide a salary range for the position in the job posting. AB 600 proposes to expand terms under the California Family Rights Act: “child” to include adult children and domestic partner’s children, family member would include grandparent, grandchild, sibling, or domestic partner, and “parent” would include a parent-in-law.

What are the most significant new employment laws taking effect in 2017?

What should employers know about mediation in the context of employment disputes?

REDDICK-WRIGHT: Mediation continues to be a great tool for resolving employee disputes. With the backlog of employment and other cases in the California courts, the use of mediation and other alternative dispute resolution methods is a critical element for resolving employment disputes without the time and expense of litigating a case in court. Many employers, in consultation with their legal counsel, will opt to engage in mediation prior to an employment lawsuit being filed, or, during an employment lawsuit. Generally, the parties opt to utilize an experienced private mediator through such agencies as the American Arbitration Association (AAA), which can provide a neutral perspective and process for helping to resolve the dispute. Additionally, for state court cases, the Los Angeles Superior Court currently is evaluating the return of its pro bono mediation program, which would include a panel of trained mediators to mediate cases. For federal court cases, the United States District Court, Central District of California, has a trained panel of volunteer mediators.

How do you advise clients regarding the implementation and enforcement of non-competes and other restrictive covenant agreements?

SCHERWIN: In California all employers should take a look at their restrictive covenants and non-disclosure agreements to ensure that the language is not so broad as to be unenforceable in California. The California Supreme Court has taken to the extreme the analysis of specific and unique knowledge or information that an employee has acquired during employment because an employee has run away with confidential information or trade secrets and the agreement cannot be enforced and the company has limited avenues to recover against the sueing employee.

What are your views on using arbitration agreements as an alternative to employment litigation?

BOWMAN: There are pros and cons to the arbitration of employment disputes. The pros include: (1) no jury or big verdicts, a more confidential proceeding, a faster proceeding, cheaper settlements, possibility of enforcement of class action waiver, and generally, scheduling flexibility. The cons include: costs because the employer must pay for the cost of the arbitrator, arbitrators’ fees, arbitrators’ discovery, the loss of appeal, restrictive covenants and non-disclosure agreements to ensure that the language is not so broad as to be unenforceable in California. This then leads to frustration from the business leaders because an employee has run away with confidential information or trade secrets and the agreement cannot be enforced and the company has limited avenues to recover against the sueing employee. For example, if there are strong arguments for a dispute, the employer may keep the case in court.

REDDICK-WRIGHT: When done correctly, arbitration agreements can provide a great alternative for pursuing and defending employment law cases outside of the traditional court system. To be valid, an arbitration agreement must be crafted in a way that is fair to the employee and does not limit the rights the employee otherwise would have had the employee pursued the case in court. For example, the agreement should provide for: (1) use of a neutral arbitrator; (2) sufficient opportunity for discovery; (3) a written decision by an arbitrator; (4) all types of relief otherwise available in court; (5) no unreasonable fees or costs to be paid by the employee. Additionally, recent cases suggest that arbitration agreements should avoid limiting an employee’s right to join in class action lawsuits on wage and hour claims, and cannot require California employees to pursue arbitration claims in another state (i.e. the headquarters of a company) where California laws do not apply.

Assuming employees actually qualify as independent contractors, are there any issues businesses need to be aware of in drafting agreements with them?

BOWMAN: Agreement memorializing an independent contractor (IC) relationship should include factors that demonstrate an
IC relationship, not an employment relationship will possible, agreements should be made with entities rather than individuals. Agreements should state that the parties intend to have an IC relationship, that the ICs may work for others, that they will not receive training, that the business will not control the means and manner of doing the work, that the ICs may hire employees, that they may set their own hours of work, that they will work off the business' premises, that they will pay their own expenses and furnish their own equipment, and that they will be paid by the job. The agreements should avoid at-will termination and provide for termination for cause. Also, “work made for hire” clauses should be carefully reviewed to avoid a determination of employee status for unemployment insurance and workers' compensation purposes.

With the growth of construction and infrastructure projects in California and throughout the nation, what should employers in these industries expect to see in 2017?

REDDOCK-WRIGHT: California alone has billions of dollars of construction and infrastructure projects planned for the next 50 years and beyond. With these projects, we will see an increase in the use of Project Labor Agreements, aka PLAs, as a tool for ensuring the projects use union labor to build and construct the projects, and that such laborers are paid at living and prevailing wage standards. PLAs often include requirements for local hiring and apprenticeship goals and the incorporation of benefits to the surrounding communities where such projects take place. Additionally, with so many projects slated for construction, there is a growing concern that the state will not have enough trained workers to build, construct, and maintain the projects in the near future, and in years to come. Hence, we will see an increased effort and collaboration among business, labor, non-profits, and secondary and higher education institutions to determine how to best prepare, train, and grow the workforce of the future.

Which pay practices are most likely to result in a company being sued in a wage-hour class action?

SCHERWIN: One of the biggest killers out there for employers is still...
the lack of compliant pay stubs. In California, the Labor Code is very specific as to what needs to go on the pay stub to the employees when they are paid. Too often there are still missing pieces that lead to “gotcha” litigation and significant penalties against the employer. Unfortunately seven-figure judgments are awarded or settlements are paid out for simple errors on the pay stubs.

BOWMAN: Common wage and hour violations that are alleged in wage and hour class actions include the failure to provide meal and rest periods consistent with the wage orders (including on-duty and on-call rest breaks, improperly combining rest breaks, failure to provide a timely meal period, failure to provide a second timely meal period, failure to separately compensate employees paid commissions and piece rate for breaks, etc.), off the clock work, the failure to properly calculate the regular rate for overtime purposes, rounding polices that result over a period of time in the failure to compensate employees for all time actually worked, failure to reimburse employees for costs, failure to properly classify employees as exempt and wage statements that do not provide the required information. Employers should diligently audit their wage and hour practices to ensure they are operating consistently with the law and to decrease their exposure in this area.

What should an employer do when it receives an internal complaint of discrimination or harassment?

REDDOCK-WRIGHT: When an employee makes an internal complaint of discrimination and harassment, federal and state law require employers to conduct an immediate, thorough, and impartial investigation of the complaint. The investigation can be conducted internally by a trained, human resources professional, attorney, or investigator. However, depending on the nature and sensitivity(ies) of the complaint, it sometimes is best for the company to hire an experienced, outside investigator to conduct the investigation. Under California law, outside investigators must be an attorney, a licensed private investigator, or work under the license of either. A company’s investigation practices should be outlined in and consistent with its written anti-harassment and discrimination policies. When done correctly, and when part of an overall and aggressive anti-discrimination and harassment program, an employer’s immediate response to, and investigation of an internal employment complaint of discrimination or harassment, can serve as a mitigating defense for the employer to a pending or later-filed employment lawsuit involving the same allegations.

Can an employer legally impose a rule barring the employment of job applicants with criminal records?

BOWMAN: It would be legally risky. San Francisco and Los Angeles have ordinances, which limit the use of criminal histories and provide for disclosure of the criminal history to the applicant and a fair chance for the applicant to respond. Moreover, the EEOC Guidance on the consideration of convictions advises employers to apply the following factors to evaluate whether the applicant should be hired: the nature and gravity of the offense, the time that has passed since the offense and/or completion of the sentence, and the nature of the job sought. The Guidance goes on to recommend an individualized assessment, considering the following factors: the circumstances surrounding the offense, the number of offenses, the age at conviction or release from prison, performance of the same type of work after conviction with no incident, the length and con-
‘A really great and simple way to remain up-to-date on employment law trends is to sign up for employment law newsletters and e-blasts, like the one our firm Fisher Phillips puts out. Regularly attending legal update programs is also an excellent way to both remain current on employment trends and meet other HR professionals facing similar issues. For example, we host free monthly breakfast briefings in our LA office where we discuss a different topic every month ranging from LA Fair Chance Ordinance, sexual harassment, minimum wage, to marijuana laws—we take feedback from our attendees to discuss issues that are relevant and crucial for businesses in Los Angeles.’

TODD SCHERWIN

Areas of Practice:
- Project Labor Agreement (PLA), Labor Compliance, and Workforce Development Consulting on Public and Private Sector Construction and Infrastructure Projects
- Alternative Dispute Resolution Services as a Mediator, Arbitrator, Ombudsman, Facilitator, or Neutral Hearing Officer for Litigation and Workplace Disputes
- Workplace & Title IX Sexual Assault Investigations/Advice & Counsel
- Anti-Discrimination, Sexual Harassment, Diversity, Ethics, and Other Compliance Training for Employers and Employees
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we host free monthly breakfast briefings in our LA office where we discuss a different topic every month ranging from LA Fair Chance Ordinance, sexual harassment, minimum wage, to marijuana laws—we take feedback from our attendees to discuss issues that are relevant and crucial for businesses in Los Angeles. Sometimes, having the opportunity to share experiences with others going through similar issues helps tackle real-life employment problems.

REDDOCK-WRIGHT: Staying on top of the latest employment laws and trends can be a challenge. I recommend employers do the following: (1) if the company does not have such resources internally, they should retain an outside lawyer or law firm that specializes in employment law to advise them on the ever-evolving employment landscape; (2) subscribe to the newsletter or blog of a reputable employment law attorney, law firm, employment department within in a reputable law firm, and/or of a reputable chamber or human resources policy and advocacy organization; (3) hire a human resources leader that is well-versed in and trained in and knowledgeable of the employment laws and practices and equip this team member with the tools and resources to participate in continued education for themselves and their team; (4) attend conferences, seminars, and meetings that provide updates on employment laws for employers.

BOWMAN: Ogletree offers several programs to keep employers up to date. Ogletree offers an annual Workplace Strategies four-day program that covers virtually every labor and employment law topic. Ogletree’s offices also have regular breakfast briefings for employers and an annual all day briefing on new developments in the states in which they have offices. Further, Ogletree has an annual program in Napa Valley on Navigating California Employment Law and a corporate counsel annual program specifically designed for the in-house attorney. Ogletree also has regular webinars, e-alerts and seminars in practice areas including immigration, labor relations, international employment law, benefits and executive compensation, investigations, etc.”

LOB A. BOWMAN