The San Fernando Valley Business Journal has once again turned to some of the leading business attorneys in the region to get their assessments regarding the current state of labor and employment legislation, the new rules of hiring and firing, traps to avoid, 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 law today – from the perspectives of those in the trenches of our region today.
What would you say is the most significant new law affecting businesses in 2017?

ROSENBERG: California’s Fair Pay Act is one of the most controversial employment laws on the books today. It establishes a “comparator” standard for equal pay, thereby making the legal framework for equal pay litigation the legal framework for a wage-and-hour complaint. This standard applies in the context of both union and non-union workplaces, and it applies to employees who work at different locations. The act also requires employers to maintain records of employee pay, and it prohibits discrimination in pay based on race, sex, or other factors.

Which of California’s employment laws is most problematic for businesses today?

BENDAVID: Wage and hour laws continue to be the greatest threat to business security and viability in California today, with meal and rest periods having the most significant impact, followed closely by meal and rest period violations. The wage and hour laws are incredibly detailed and burdensome. Compliance depends not only upon clear policies and solid management practices, but also upon the cooperation of employees who do not understand the impact of simple violations (or who seek to take advantage of the employer by deliberately violating basic rules). Clun actions and claims under the Private Attorneys General Act (PAGA) carry not only significant compensation damages for violations, but also substantial additional penalties for minor errors. Based upon the penalties potentially available when numeros wage and hour laws are violated, an employer with only $5,000 in uncompensated damages could receive up to $20,000 or more in PAGA penalties for relatively simple violations, especially if you multiply those numbers by tens or even hundreds of employees, the financial impact can easily bring a small company and severely impact the viability of a larger company. In addition, when an employer recovers an amount in a wage and hour action, the employer is entitled to pay the employee’s attorneys’ fees in full, making wage and hour litigation an exorbitant cost for plaintiffs’ counsel. Although many businesses in California could avoid at least a few wage and hour violations here and there, given the burden of liability in some amount is often almost guaranteed, early resolution of wage and hour claims is critical to avoiding what can be astounding financial risk.

BENDAVID: Wage and hour laws continue to cause employers grief and are regularly the focus of employee lawsuits. Employers are often accused of “wage theft.” Through sometimes wage theft is deliberate, more often it is not and is as a result of lack of knowledge or accidental miscalculations. Accidental wage errors are more common than you may think and a surprised employer erroneously misclassifies a worker as exempt or as an independent contractor. Other times the employee has intentionally understated the clock and, e.g., claiming a supervisor pressured employees to work just a few minutes after hours with the intent to meet a deadline. Then there are times that they are just plain old meals and rest break violations. It’s easy for employers to misunderstand or misapply the various and often conflicting labor code provisions and wage order rules. Unfortunately, ignorance of the law is no defense to these claims.

How important is sensitivity training in the workplace in 2017?

BENDAVID: Managers should be trained on the rules pertaining to harassment, discrimination, retaliation as well as anti-bullying. Employers should instruct supervisors to report any complaints to a designated company representative such as a human resources manager, so the company can resolve the claim internally, if possible. California law requires employers with 50 or more employees to include this in the mandated sexual harassment prevention training. The objectives are to assist employers in changing or modifying their policies and practices, and to provide information related to the negative effects of abusive conduct; and to develop, distribute, and maintain a set of policies and procedures to assist employees in assisting them in preventing, and effectively responding to incidents of sexual harassment.

The training should discuss mechanisms to promptly address and correct wrongful behavior. Sensitivity training about diverse employment issues can also help the employer to understand the impact of harassment or discrimination. Mismanagement can lead to a lawsuit or charges before the Equal Employment Opportunity Commission (EEOC) or depart- ment of Fair Employment and Housing (DFEH).

ROSENBERG: Sensitivity training is absolutely vital for any business seriously interested both in lawsuit avoidance and morale building. That’s why the training is mandatory for larger employers (50+ employees). We have handled way too many cases over the years that were completely avoidable had the participants known that the behavior in question was both offensive to others and against company policy. Another reason to do the training is that management’s silence on the subject can be seen as a tacit approval of the offending behavior. This training should be done throughout the organization so everyone has a clear understanding of exactly where the company stands and what will happen if someone’s behavior crosses the line. In my opinion, this is the single best investment a company can make toward insuring that it stays out of court.

How can businesses remain current on the ever-evolving employment laws?

BENDAVID: First, work with qualified employment law counsel (not your CPA or corporate lawyer) to update the employee handbook and other human resource documents each year, and distribute those documents to employees. A fully compliant employee handbook serves as a model management treaty for employers as well as a guide for employees. Second, attend the myriad of employment law seminars available today, both online and in person. New laws, cases and administrative interpretations are released every week, and regular education is critical to keeping up with new laws and workplace trends. Third, develop and maintain a relationship with a skilled employment law attorney to address ongoing workplace issues and disputes. Although the Internet has a wealth of information about employment law issues, much of it is inaccurate, overly generalized, and inapplicable to California employers or inappropria- te for your business. There is no substitute for a trusted advisor who knows you and your company.

Would you say that a company’s employee handbook is still vital in this day and age or have they become a thing of the past?

ROSENBERG: Yes, and here’s why. First of all, certain policies must be given to employees in writing. The handbook is the perfect place to do so to insure that they are properly disseminated. Second, a well-written handbook will be your best friend in employee litigation. Thand, the handbook is an important orientation tool to acquaint new hires with company policy and culture. A word of caution: Resist the temptation to buy a stock handbook on the Internet or borrow one from a colleague. Yes, it’s much cheaper and faster, but this is one area where the phrase “penny wise and pound foolish” really comes to mind.

BENDAVID: Managements Electrical Authority and Energy Law are being adhered to in order to make it even more challenging, thus creating an even greater threat to economic development in the state.

BENDAVID: One significant new law is the “Bun the Box” rule implemented in Los Angeles as well as other cities as a protection for the rights of children. The rule is designed to make it more difficult for employees to commit minor acts of theft and to protect the State for broader restrictions on an employer’s ability to make pre-lit or other employment decisions based upon an employee’s criminal records. This will require employees to change their application procedures and arrest questions that can be asked of an interviewee.

What accommodations must an employer make for parents of school age children if there is a school closure due to an emergency?

BENDAVID: Historically, courts have been ruling in favor of the employer when plaintiffs claimed they were wrongfully terminated because of mari- juana use, mainly because possession and use of marijuana remains illegal under federal law. How- ever, employers should continue to monitor this court rulings may be undergoing a change as more states begin legalizing the drug. For now, employers may still make possession or use of mari- juana a violation of company policy, especially if the drug is used on company premises. The employer is under the influence while working. Use caution, however, when sending an employee out for a drug test as a positive result may not be followed prior to doing so (e.g., generally an employee must have a reasonable suspicion that a current employee is under the influence).
‘California’s Fair Pay Act is one of the most controversial employment laws on the books today. We predict a veritable tsunami of new equal pay litigation because the legal framework is fraught with ambiguity and the payoff for plaintiffs and their lawyers could be huge.’

RICHARD S. ROSENBERG

‘The employee handbook continues to be the most significant document an employer should have in the workplace. When prepared properly and updated regularly, handbooks can protect the employer, bind the employee, defend against a claim and support management efforts. Handbooks are one of the first documents requested in any employment law claim, and can provide clear evidence of the employer’s policies and practices.’

KAREN L. GABLER

‘Managers should be trained on the rules pertaining to harassment, discrimination, retaliation as well as anti-bullying. Employers should instruct supervisors to report any complaints to a designated company representative such as a human resources manager, so the company can resolve the claim internally, if possible.’

SUE M. BENDAVID

The same applies to solicitation of co-workers and customers. Employers should have clear non-solicitation and non-competition agreements that prohibit the employee from taking, disclosing or using the employee’s trade secrets to unfairly compete, or to solicit others to leave. In other words, a salesperson can sell the same widgets for another company, but he cannot take the former employer’s customer lists or contact information, marketing plans, business models, financial data, and similar information in order to do it. Similarly, the employee can encourage a co-worker to apply for an opening at his new company, but he cannot inform the employee that the new company provides greater salary and benefits than what he already knows is provided at the old company. While this is a fairly narrow protection for employers, the side benefit is that there need not be any geographical or chronological limitations on these prohibitions. Many agreements state that the employee cannot compete or solicit for two years, or within a certain radius. By adding “by use of the company’s trade secrets” to the restriction, the prohibition can continue indefinitely, as there is no time period when the company’s trade secrets are suddenly open season for competitive purposes.

SUE M. BENDAVID

What are the most frequent mistakes made by employers when disciplining employees?

BENDAVID: Inconsistency is a primary problem leading to employees feeling they were discriminated against by their supervisor as a result of their race or other protected characteristics (e.g., when one employee is terminated while another is simply written up for the same policy violation). If there is a history of bad behavior and the termination is because of a “straw that broke the camel’s back situation,” ensure there is a record of previous transgressions. Employers should also ensure that the discipline is not as a result of the employee exercising a legally protected right. For example, an employee who has a work related injury should not be disciplined for submitting a workers compensation claim. Keep in mind the protected activities and the numerous leave laws.

SUE M. BENDAVID

The use of marijuana (or its derivatives) for a variety of medical issues, and future legislation will have to address unlawful drugs, alcohol, and prescription drugs. Marijuana, while still unlawful under federal law, is no longer an “unlawful drug” under California state law. Thus, policies must be re-written to incorporate this newly legal drug to ensure clear policy language. Nevertheless, despite the legalization of marijuana for medicinal or recreational use, California employers still need not permit employees to use or be under the influence of marijuana in the workplace (although medicinal use implicates the obligation to consider reasonably accommodating the employee with a leave of absence or other option until he can stop using marijuana). This naturally calls into question the issue of “what does it mean to be under the influence?” Alcohol provides an easy answer, as it temporarily impairs the employee and then quickly leaves the body. Marijuana can remain in the user’s system for many weeks, creating positive test results long after the user is no longer discernibly impaired. We can expect to see litigation and future legislation on this issue, and employers must be sure to define the term “under the influence” in their substance abuse policies. Beyond these legal issues, there are hotly debated medical issues, and future legislation will have to consider where the use of marijuana may be more productive than detrimental.

RICHARD S. ROSENBERG

There is a lot of confusion about the reach of the new law. For example, while recreational marijuana use amongst adults (over age 21) at home is no longer a crime in California, it remains a federal offense. Also, the new law specifically preserves the right of a company to ensure that employees are not coming to work under the influence of that drug and not using, possessing or distributing the drug on company premises. However, unlike alcohol, there is no uniform standard for measuring when a person is “under the influence.” And, the drug stays in the system and is detectable in a drug test weeks after its ingestion. Thus, the testing facility is recommended so that everyone has a clear understanding about what constitutes a policy violation.

RICHARD S. ROSENBERG

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

GABLER: Employers often believe that mediation, or any other form of alternative dispute resolution, is an indication of “failing over” or “being extorted.” In fact, one of the most significant expenses in any litigation matter is the attorneys’ fees incurred to defend against the employee’s claim, and, in most cases, early settlement will typically cost the employer far less than it would cost to win the case (even when the employer is insured). Most employment disputes have far more to do with psychology than with employment law, and are often the result of miscommunication, assumptions, hurt feelings and other aspects of human communication that fall outside the law. Bringing both sides to the table can resolve these issues, make people feel heard on both sides, and create a path to resolution that allows both parties to move forward without further stress or expense. Unfortunately, the mandatory attorneys’ fee awards associated with most employment law cases can prompt employers to settle disputes merely to avoid financial risk that has little to do with actual wrongdoing or potential liability. Waiting until the eve of trial to put maximum pressure on the opposing party merely means that the opposing party’s attorney now requires tens of thousands of dollars in fee recovery to make settlement worthwhile for his law firm. In some cases, hostile contested litigation is necessary, when an opposing party is wholly unreasonable, or when other employers are waiting in the wings for their bite at the apple. In most cases, however, an attorney who insists on fighting with his opposing counsel, and who excercises a case for personal gain rather than to serve the client, is simply lacking in skill or finesse. Business owners should seek out not only attorneys who are skilled litigators, but litigation attorneys who also can truly act as counselors, serving the interests of the client rather than themselves, and negotiate viable resolution options that allow the employer to focus its resources on the business instead of on its former employees and its legal counsel.

GABLER: Employers often believe that mediation, or any other form of alternative dispute resolution, is an indication of “failing over” or “being extorted.” In fact, one of the most significant expenses in any litigation matter is the attorneys’ fees incurred to defend against the employee’s claim, and, in most cases, early settlement will typically cost the employer far less than it would cost to win the case (even when the employer is insured). Most employment disputes have far more to do with psychology than with employment law, and are often the result of miscommunication, assumptions, hurt feelings and other aspects of human communication that fall outside the law. Bringing both sides to the table can resolve these issues, make people feel heard on both sides, and create a path to resolution that allows both parties to move forward without further stress or expense. Unfortunately, the mandatory attorneys’ fee awards associated with most employment law cases can prompt employers to settle disputes merely to avoid financial risk that has little to do with actual wrongdoing or potential liability. Waiting until the eve of trial to put maximum pressure on the opposing party merely means that the opposing party’s attorney now requires tens of thousands of dollars in fee recovery to make settlement worthwhile for his law firm. In some cases, hostile contested litigation is necessary, when an opposing party is wholly unreasonable, or when other employers are waiting in the wings for their bite at the apple. In most cases, however, an attorney who insists on fighting with his opposing counsel, and who excercises a case for personal gain rather than to serve the client, is simply lacking in skill or finesse. Business owners should seek out not only attorneys who are skilled litigators, but litigation attorneys who also can truly act as counselors, serving the interests of the client rather than themselves, and negotiate viable resolution options that allow the employer to focus its resources on the business instead of on its former employees and its legal counsel.

SUE M. BENDAVID

In mediation, a neutral third party engages in “shuttle diplomacy” between the parties to see if matters can be resolved. It virtually always means employers will pay agreed upon sums of money to employee plaintiffs and their attorneys. But mediating typically costs less than defending claims in court, and risking potentially large judgments if there is liability exposure. A good mediator will demonstrate to both sides the weaknesses in their respective cases so that the parties can understand the risks if they continue in the litigation process. Oftentimes employers will come in to mediation with large demands that make no sense given the damages analysis and the claims. A neutral mediator can help bring them down to reality about the value (or lack of value) of their case. Similarly, mediators can be expected to tell employers how juries or judges may perceive cases and defenses in an effort to convince employers to buy their peace.

SUE M. BENDAVID

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

BENDAVID: Non-competes in California are generally unenforceable, with limited exceptions. In contrast, an employer has a right to protect trade secrets and other confidential information — that means creating policies, confidentiality agreements and implementing other procedures to protect that information from improper use, disclosure or dissemination, including to the employer’s new employer.

GABLER: Non-competes are generally unenforceable in California, except in certain limited circumstances (such as in the sale of a business). While employers can prohibit competition during employment, a departing employee has the right to work with any employer of his choice in the future. However, employers are not permitted to use the trade secrets of the former employer to compete, nor to benefit themselves or others.

RICHARD S. ROSENBERG
When it comes to employment law, this is not a strategy:

Innovative | Experienced | Responsive

LightGabler
We Make Business Work*

EMPLOYMENT COUNSEL & LITIGATION | INTELLECTUAL PROPERTY
Camarillo 805.248.7208 | San Luis Obispo 805.783.2300 | LightGablerLaw.com
and federal laws before writing up an employee.

**GABLER:** The most significant errors made by employers is neglecting to document performance issues and resulting disciplinary actions. Employers must remember that “if you can’t prove it, it didn’t happen!” When the employer fails to document its reasons for discipline or termination, the employer loses the chance to tell that story, and thus loses control of the situation: the employee is now able to tell the story of what the employer did to her, and the employer promptly finds himself without further stress or expense.

Karen L. Gabler

---

**‘Most employment disputes have far more to do with psychology than with employment law, and are often the result of miscommunication, assumptions, hurt feelings and other aspects of human communication that fall outside the law. Bringing both sides to the table can resolve those issues, make people feel heard on both sides, and create a path to resolution that allows both parties to move forward without further stress or expense.’**

And federal laws before writing up an employee.

**GABLER:** The most significant errors made by employers is neglecting to document performance issues and resulting disciplinary actions. Employers must remember that “if you can’t prove it, it didn’t happen!” When the employer fails to document its reasons for discipline or termination, the employer loses the chance to tell that story, and thus loses control of the situation: the employee is now able to tell the story of what the employer did to her, and the employer promptly finds himself without further stress or expense.

Karen L. Gabler

---

**‘In mediation, a neutral third party engages in “shuffle diplomacy” between the parties to see if matters can be resolved. It virtually always means employers will pay agreed upon sums of money to employee plaintiffs and their attorneys. But mediation typically costs less than defending claims in court, and risking potentially large judgments if there is liability exposure. A good mediator will demonstrate to both sides the weaknesses in their respective cases so that the parties can understand the risks if they continue in the litigation process.’**

Sue M. Bendaive

---

**‘Most employment disputes have far more to do with psychology than with employment law, and are often the result of miscommunication, assumptions, hurt feelings and other aspects of human communication that fall outside the law. Bringing both sides to the table can resolve those issues, make people feel heard on both sides, and create a path to resolution that allows both parties to move forward without further stress or expense.’**

Karen L. Gabler
Protecting your business. Protecting you.

Lewitt Hackman
Lewitt, Hackman, Shapiro, Marshall & Harlan
A Law Corporation

Employment Practice Group:

Sue M. Bendavid, Chair
Nicholas Kanter
Nicole Kamm
Hannah Sweiss
Tal Burnovski Yeyni
Amy E. Huberman

16633 Ventura Boulevard, 11th Floor • Encino, California 91436
lewitthackman.com • 818.990.2120
violations of those rules, and are fully prepared to pay the applicable penalty to the employee in the normal course of business.

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

BENDAVID: Promptly investigate (consider using a third party to do so, depending on the circumstances). Obtain statements from the accuser as well as the accused, any potential witnesses and supervision. Review relevant documents. Carefully document everything thoroughly and throughout the process. Assess the situation and determine whether or not the allegations can be substantiated and if so, ensure corrective action is taken. Inform the complainant about the responsive action taken. Consider reaching out to counsel for compliance guidance along the way.

ROSENBERG: Take it seriously and do a thorough investigation, failure to prevent, and failure to remedy discrimination and harassment. Taking to investigate, failure to prevent, and failure to remedy discrimination or harassment, no matter how small and no matter how seemingly normal course of business.

- Does it make sense for businesses to combine their vacation and sick time into a single PTO policy?

BENDAVID: Under the new paid sick leave law, the usage rules only apply to actual paid sick days. That’s a good reason to unbundled them from PTO. Otherwise, all of the company’s PTO benefits will be subject to the sick pay law’s onerous carryover, pay stub reporting and usage rules. Also, if the company’s PTO includes vacation, then the entire PTO balance must be paid when the employee leaves paid the employees the employment and the employee can collect still penalties for late payment. In contrast, accrued sick pay does not have to be paid out when the employee leaves the employment. This is yet another reason to separate the sick pay benefits from other PTO benefits.

GABLER: You would think combining vacation and sick time into a single PTO policy would make sense, but perhaps not! PTO policies are easier for employers to track, and employers enjoy the flexibility of taking time off without explaining the specific purpose of their absence. That said, a combined PTO policy must comply with both the vacation rules and the sick leave rules (which are more burdensome under the state’s mandatory sick leave laws). As with vacation rules, the PTO policy must provide for accrual and carry over of up to a minimum of 1.5 times the annual leave, and or accrued time at termination. As with the sick leave rules, the employer must meet the PTO (making it fully available at the outset of employment) or accrue a minimum of 48 hours (or six days, whichever is greater), which often means the employer is granting more PTO at the outset of employment than it might otherwise prefer. City-specific sick leave laws impose even greater burdens. In addition, an employer can require advance notice of vacation and may deny a request for vacation time off, but employers can use sick time unexpectedly and intermittently, with the employer having limited ability to discipline an employee for using available time. For these reasons, employers may wish to separate vacation and sick time, thereby saving money and reducing absenteeism, instead of using a combined PTO policy.

BENDAVID: With the new city ordinances on sick leave, we are recommending that employers not use combined Paid Time Off policies, unless they have a separate standalone sick leave policy that complies with the city’s rules. Also, remember that accrued, unused PTO must be paid on separation from employment, unlike sick leave.

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

GABLER: A blanket prohibition against applicants with criminal records is allowable. Employers may consider certain felony convictions only to the extent that the conviction is reasonably related to the job position, among other factors. For instance, applicants with felony child abuse convictions could be rejected for a preschool position, and applicants with felony child abuse convictions could be rejected for an accounting position. On the other hand, applicants with felony DUI convictions could not be rejected for a job that does not involve driving. Application questions regarding convictions must include a variety of disclaimers, and the potential for discrimination claims is high. With the growing trend in “ban the box” legislation prohibiting employers from asking about convictions in the application process, employers should eliminate the “conviction question” from applications and interviews entirely, and instead make job offers contingent upon passing a background check. If a conviction appears in this process, analyze whether the timing, nature, scope and outcome of the conviction is sufficiently relevant to the job position that the offer can be lawfully revoked.

ROSENBERG: If you are located within the City of Los Angeles, then you must comply with the City’s new “Bau the Box” ordinance. It restricts questions regarding convictions only to the extent that the conviction is reasonably related to the job position, among other factors. For instance, applicants with felony child abuse convictions could not be rejected for a preschool position, and applicants with felony child abuse convictions could be rejected for an accounting position. On the other hand, applicants with felony DUI convictions could not be rejected for a job that does not involve driving. Application questions regarding convictions must include a variety of disclaimers, and the potential for discrimination claims is high. With the growing trend in “ban the box” legislation prohibiting employers from asking about convictions in the application process, employers should eliminate the “conviction question” from applications and interviews entirely, and instead make job offers contingent upon passing a background check. If a conviction appears in this process, analyze whether the timing, nature, scope and outcome of the conviction is sufficiently relevant to the job position that the offer can be lawfully revoked.

‘Employers must pay overtime based on the “regular rate of pay” and not just the regular hourly rate. That means incentive bonuses, commissions and potentially other sums must be included when calculating overtime for a nonexempt employee. We are seeing employers make errors about this due to lack of knowledge, and expect to see more claims on this in the future. Other trouble areas include piece-rate pay practices, not prohibiting off-the-clock work; misclassification, and not providing for or paying for missed meal and rest breaks.’

SUE M. BENDAVID

‘Take any internal complaint of discrimination or harassment seriously and do a thorough good faith investigation. That’s what the federal and state laws require and that’s what employees have come to expect. We also recommend reviewing the matter with expert labor counsel to be well prepared to deal with expert labor counsel to be well prepared to deal with any violations.

KAREN L. GABLER

‘The most common class action claims arise from meal and rest period violations. Claims for “off the clock” work, failure to properly itemize the pay stub, failure to record all used or accrued paid time off, failure to pay overtime and the corresponding failure to pay minimum wage are common as well. To protect the company, the employer must develop clear, enforceable policies on wage issues, which can show the court that the company was aware of the law and made every effort to enforce it. Then, the employer must track compliance and take action on any violations.’

RICHARD S. ROSENBERG
Workplace and labor laws are complex and ever changing.

The best way to fight legal issues in the workplace is to prevent them in the first place. And if you do have a problem, you want a law firm with the management focus and legal experience to see you through to resolution.

Our attorneys have been working with employers for more than 30 years to manage employment issues, defend claims, stay compliant, and devise strategies for manager and employee training, mergers, and union matters. You can also turn to us for employment contracts, commission agreements, employee handbooks, affirmative action, and more.

Call us today to see what our labor lawyers can do for your company.

Let us guide you through the maze.

The Law Firm For Employers

BALLARD ROSENBERG GOLPER & SAVITT, LLP

15760 Ventura Blvd. • 18th Floor
Encino, CA 91436
818.508.3700 • www.brgslaw.com
How can businesses in the retail sector best respond to overtime and minimum wage pressures?

**BENDAVID:** Retail employers should keep this rule of thumb in mind: Most of the time, the local ordinance carries a higher burden than state regulations, and California laws will generally be stricter than federal law. That isn’t always the case, but most of the time it is true. For example, San Francisco has specific laws regarding scheduling predictability for retail employers; the state does not. San Francisco also has one of the highest minimum wage standards, increasing to $14.00 per hour on July 1, 2017, while Los Angeles will raise wage rates to $10.50 per hour for employers with 26 or more employees on July 1st ($10.50 per hour for companies with 25 or fewer employees). Then there are the meal and rest breaks – though employers are not obligated to ensure their employees take them, they are obligated to provide these breaks – during busy, holiday shopping times. Ensure employers are not performing “off the clock” work. Meeting sales goals on a deadline can sometimes create pressure for management, who will sometimes turn a blind eye when employers punch out, but then ask the employee to tidy up one last customer, clean up the selling floor, or tally up receipts. This can only lead to litigation. Last, remember the 7th day of rest rule: A California Supreme Court recently issued its opinion in Mendes v. Nordstrom, clarifying requirements. Employers must provide one day of rest for each workweek. The Court clarified that employers are not entitled to one day off on a rolling basis for any seven continuous days worked in a row (thus periods of more than six days of work that stretch across more than one workweek are not necessarily prohibited). In addition, the day of rest rule does not apply when an employee’s work hours do not exceed 30 in any workweek or 6 in any workday. This exception only applies to those who never exceed six hours of work on any day of the workweek. Thus, if on any one day an employee works more than six hours, a day of rest must generally be provided during that workweek.

◆ What are some legal issues that companies often overlook during a layoff or termination process?

**Rosenberg:** Many employers erroneously believe that a layoff cannot be legally challenged. The many hundreds of layoff lawsuits filed each year prove otherwise. In every layoff, decisions are made about who to retain and who to let go. The rule for layoff can be, if they thought they were selected for an illegal reason such as their gender, race and the like or because they opposed some employer practice that was illegal. In most of the performance termination lawsuits we handle, the employer did an inadequate job communicating job expectations (best to do in writing) and the employee’s failure to meet them (also best to do in writing). A simple question I ask in every termination review discussion is “will the employee be surprised?” If yes, then the potential for a legal claim is greatly increased. Also, scrub the employee’s file to see whether it tells the same story you are. If not, you are exposed. A well-documented file is worth its weight in gold when fighting an employee claim or trying to convince an inquiring lawyer not to turn down your former employee’s case. It’s also important to verify that no one in management asked the employee to do something illegal or cover up for management’s doing so. That’s a recipe for an expensive lawsuit.

**Gabler:** Employers often assume that laying off an employee is a “safe” move, but this is not always the case. Employers must be able to justify the legitimate business reasons for the decision – then, actually justify it with written documentation. Why is the employee losing his job? Is his position being eliminated? If yes, will you re-open the position later? Is he a poor performer? If so, has he been warned about any deficiencies and given an opportunity to improve? If not, why not? Is the decision in line with internal memos and prior performance reviews? Does he fall into any protected categories that will give him a reason to complain that his separation from employment was discriminatory or retaliatory? Is he one of a group of similar employees and, if so, why was he chosen over others? If asked, how will we prove that we had a legitimate, non-discriminatory reason to remove him? Failing back on “at will employment” is not enough – failing to provide the reason for the separation from employment allows the employee to fill in that blank with an unlawful reason, creating legal risk and cost for the employer.

**BENDAVID:** There are some rules of thumb to reduce the risk of litigation for unlawful termination or retaliation when downsizing through layoffs. First, establish and document criteria for identifying workers to be laid off – determining whether the decision will be based on seniority, performance, among other factors. Among other things, make sure the professional cares more importantly, make sure the professional cares more about the success of your business than her own. A trusted advisor doesn’t merely instruct the client on next steps; she asks where the business wants to go, and then finds a way to take it there.

For more information, contact:
Ballard Rosenberg Gofler & Sautti, LLP
(570) Ventura Blvd., 18th Floor
Encino, CA 91436
(818) 508-3700
www.brgslaw.com

Levitt Hackman
16633 Ventura Boulevard, 11th Floor
Encino, California 91436
(818) 907-3220
www.levittlaw.com

LightGaber
760 Paiso Camarillo, Suite 300
Camarillo, CA 93010
(805) 248-2207
www.lightgalber.com

◆ What kinds of trusted advisors should growing businesses seek out?

**Gabler:** At a minimum, every business should have a trusted employment law attorney, experienced business or corporate law attorney, quality insurance agent, and skilled financial professional. Each category is critical to a healthy business, and all four are necessary to the protection and growth of the business. Each of these professionals can advise on the best methods to protect the significant investment every business owner makes, but they all carry their own areas of expertise and skills, all of which overlap but none of which replace each other. Beware of the CPA or the business lawyer who offers advice on employment law issues (and vice-versa) – the best professionals “know what they don’t know” and are willing to seek input from other specialists. Make sure that each of these professionals can provide insightful and creative advice on growing the business, internally as well as externally. A trusted advisor is proactive as well as reactive, and can support and guide (as well as protect) the business owner. Most importantly, make sure the professional cares more about the success of your business than her own.

◆ A blanket prohibition against applicants with criminal records is unlawful discrimination. Employers may consider certain felony convictions only to the extent that the conviction is reasonably related to the job position, among other factors.

**Karen L. Gabler**

◆ With the new city ordinances on sick leave, we are recommending that employers not use combined Paid Time Off policies, unless they have a separate standalone sick leave policy that complies with the city’s rules. Also, remember that accrued, unused PTO must be paid on separation from employment, unlike sick leave.

**Sue M. Benda**

◆ Many employers erroneously believe that a layoff cannot be legally challenged. The many hundreds of layoff lawsuits filed each year prove otherwise. In every layoff, decisions are made about who to retain and who to let go. Those selected for layoff can sue if they think they were selected for an illegal reason such as their gender, race and the like or because they opposed some employer practice that was illegal.

**Richard S. Rosenberg**
Protecting Personal Information: A Guide for Business

Many companies keep sensitive personal information in their files—names, Social Security numbers, credit card, or other account data—that identifies customers or employees. This information often is necessary to fill orders, meet payroll, or perform other necessary business functions. However, if sensitive data falls into the wrong hands, it can lead to fraud, identity theft, or similar harms. Given the cost of a security breach—losing your customers’ trust and perhaps even defending yourself against a lawsuit—safeguarding personal information is just plain good business.

Some businesses may have the expertise in-house to implement an appropriate plan. Others may find it helpful to hire a contractor. Regardless of the size—or nature—of your business, the principles below will go a long way toward helping you keep data secure.

GENERAL NETWORK SECURITY

• Identify the computers or servers where sensitive personal information is stored.

• Identify all connections to those services on that computer to prevent unauthorized access to that machine.

• When you receive or transmit credit card numbers, passwords, account information—via email. Unencrypted email is not a secure way to transmit information.

• Log out users who don’t enter the correct password within a designated number of log-on attempts.

• Explain to employees why it’s against company policy to share their passwords or post them near their workstations.

• Identify the computers or servers where sensitive personal information is stored.

• Identify all connections to those services on that computer to prevent unauthorized access to that machine.

• When you receive or transmit credit card numbers, passwords, account information—via email. Unencrypted email is not a secure way to transmit information.

• Log out users who don’t enter the correct password within a designated number of log-on attempts.

LAPTOP SECURITY

• Restrict the use of laptops to those employees who need them to perform their jobs.

• Assess whether sensitive information really needs to be stored on a laptop. If not, delete it with a “wiping” program that overwrites data on the laptop. Deleting files using standard keyboard commands isn’t sufficient because data may remain on the laptop's hard drive. Wiping programs are available at most office supply stores.

• Require employees to store laptops in a secure place. Even when laptops are in use, consider using cords and locks to secure laptops to employees’ desks.

• Train employees to be mindful of security when they’re on the road. They should never leave a laptop visible in a car, at a hotel luggage stand, or packed in checked luggage unless directed to by airport security. If someone must leave a laptop in a car, it should be locked in a trunk. Everyone who goes through airport security should keep an eye on their laptop as it goes on the belt.

There’s no one-size-fits-all approach to data security, and what’s right for you depends on the nature of your business and the kind of information you collect from your customers. Some of the most effective security measures—using strong passwords, locking up sensitive paperwork, training your staff, etc.—will cost you next to nothing and you’ll find free or low-cost security tools at non-profit websites dedicated to data security. Furthermore, it’s cheaper in the long run to invest in better data security than to lose the goodwill of your customers, defend yourself in legal actions, and face other possible consequences of a data breach.

Information for this article was provided by the FTC.