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. What follows 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. Thanks to our superb panel for their expert insights.
GABLE: Although most of the new employment laws implemented in California since 2018 have been aimed at the workplace, one of the most significant changes for 2018 related to the hiring process, rather than the employment relationship. The January 2018 new law included a prohibition against asking an applicant to disclose criminal convictions prior to making a job offer (AB 1008), and a prohibition against requiring an applicant to reveal salary history (AB 168). With these changes, the California legislature sought to curtail the risk of discriminatory hiring decisions, while at the same time limiting the employer’s ability to find out about an applicant’s background or independently negotiate mutually agreeable compensation with an applicant. Other key changes for 2018 included SB 63, adding the “Paycheck Fairness” provision for California businesses, along with some of the most significant changes for 2018 related to the hiring process.

GABLE: The most likely source of litigation in the coming year is not the variety of 2018 California Supreme Court decisions, but the California Supreme Court’s decision in Dynamex Operations West, Inc. v. Superior Court (2018), which revisited the classification of independent contractors. The Court implemented the three-part “ABC Test,” establishing burdensome criteria for independent contractors that all but assimilate the “employee” status of the sweeping majority of California’s independent contractors. Some California business owners often misclassify seemingly “independent” workers as independent contractors, partially to satisfy the desires of the workers themselves and partially to avoid the cost and complexity of California’s challenging employment laws. Unfortunately, misclassification of employees as independent contractors carries substantial legal risk, with heavy penalties and damages for the employer. Debate is raging now as to whether the Dynamex decision was intended to be retroactive; it is almost certain that the decision will form the basis of numerous misclassification complaints against employers who previously had no idea they were violating the law.

BENDAV: The bills expanding rights of harassment victims are likely to increase the number of lawsuits employers can expect. Employers may experience more claims based on harassment, discrimination, retaliation, wrongful termination, and infliction of emotional distress. Employers should be proactive and train employees, circulate updated policies, and make sure all required posters are in place. If allegations are made, do not sweep them under the rug. Respond promptly. Investigate the merits. And, take responsive action if you conclude misconduct occurred. You should also monitor conduct after the investigation to ensure no retaliation occurs. In terms of wage claims, we continue to see an increase in class actions and PAGA lawsuits. The California Supreme Court’s decision in Dynamex created a new standard for who is an “employee” under the FWC Wage Orders. Therefore, we expect to see an increase in claims by “independent contractors” seeking to obtain employee status and corresponding benefits, such as overtime, meal and rest period penalties and PAGA penalties. Employers should audit their wage and hour practices including classifications of workers.

ROSENBERG: A few weeks ago, the California Supreme Court adopted a new and extremely broad, pro-worker standard for determining when someone is legally classified as an independent contractor under California’s Wage Orders. In doing so, the court ditched a more flexible test that had been the rule for nearly 30 years, in favor of a much more employee-friendly test from Massachusetts that’s sure to result in thousands of independent contracts being reclassified as employees. Also, California’s Fair Pay Act requires employers to prove that any wage difference between similar jobs is not due to an employee’s gender, race or ethnicity. The law places a high burden on employers to justify such wage differentials. Since the burden is so high, an employer cannot simply assert that a wage claim is not justified because it “the market” or “to the market.” That’s why the training is mandated for larger employers (SV-elect). Employers that have handled too many cases over the years that were completely avoidable had participant knowledge that the behavior in question was offensive to others and against company policy. Another reason to train 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 what behavior stands and what will happen if someone’s behavior crosses the line. In my opinion, these is the single best investment a company can make toward ensuring that it stays out of court.

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KAREN L. GABLE
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Among other things, the regulations provide that an employer or job applicant should maintain an ongoing dialogue with the individual to provide certain accommodations. The regulations specifically protect an employee or job applicant who identifies as transgender or otherwise expresses their gender identity or expression (how one chooses to present him/herself to the world), or the perception of such appearance or behavior. The regulations mandate that employers should be able to articulate their suspicions. Carefully worded policies must be able to articulate your suspicions. Carefully worded policies must be more useful than detrimental.

ROSENBERG: The state’s job-bias regulations now prohibit discrimination against transgender individuals. The rules outlaw discrimination, harassment and retaliation based on a person’s gender identity (how one sees herself/himself), gender expression (how one chooses to present him/herself to the world), or the perception of such appearance or behavior. The regulations specifically protect an employee or job applicant who identifies as transgender or otherwise expresses the gender identity or expression (how one chooses to present him/herself to the world), or the perception of such appearance or behavior.

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mediator is effective, he or she can explain to the employer why settlement may be a more economic or better course of action depending on the facts.

Gabler: Employers often believe that mediation, or any other form of alternative dispute resolution, is an indication of “sabotage” 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, even settlement will typically cost far less than it would cost to win the case. 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. Unfortunately, the mandatory attorneys’ fees associated with most employment law matters can prompt employers to settle disputes merely to avoid financial risk that has little to do with potential liability. Waiting until the eve of trial or pressure on the opposing party merely means that the opposing party’s attorney nowrequires tens of thousands in fee recovery to make settlement worthwhile. In some cases, hotly contested litigation is necessary, when an opposing party is wholly unreasonable, or when other employees are waiting in the wings for their bite at the apple. In most cases, who wins or loses on trial is fighting with his opposing counsel, and who exacerbates 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 can also truly act as counselors, serving the interests of the client rather than themselves, and making justifiable resolution options that allow the employer to focus its resources on the business instead of on its former employees and its legal counsel.

Gabler: Non-compete clauses are generally unenforceable in California, except in certain limited circumstances (such as in the sale of a business). 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. The same applies to solicitation of co-workers and customers. Employers should have clear non-solicitation and non-compete agreements that prohibit the employee from taking, disclosing or using the employer’s trade secrets to unfairly compete, or to solicit others to leave. In other words, a supervisor 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 the like 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 new company that the new company provides greater salary and benefits than what he knows is provided at the old company. While this is a fairly narrow protection for employers, the trade secret side of it is that there need not be any geographical or chronological limitations on these prohibitions. Many agreements state that the employee cannot compete or solicit “within a certain radius.” By adding the phrase “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.

Bendavid: Employee arbitration clauses and class action waivers are now enforceable because of a recent U.S. Supreme Court decision. By adding non-competes, non-solicitors and further plaintiffs could act together for the common good under the National Labor Relations Act. The federal Circuit Courts were split on this question, but SCOTUS opted the NLRB does not mean the employer and employee cannot separately agree to privately arbitrate disputes. There are pros and cons to arbitration, including cost, time, lack of appeal, or jury vs. private judge. Additionally, plaintiff’s still have the right to sue in court for penalty claims under the Private Attorneys General Act. Before employees elect arbitration, a serious discussion on the issues should take place so the employer make an informed decision that best fits its circumstances. I was not previously a fan of arbitration, but while simultaneously fighting the individual employee’s claim in arbitration, the pros and cons of arbitration is something that ought to be discussed with labor counsel.

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Gabler: The most significant error made by employers is negotiating with an employee in a manner resulting in discipline. 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 th story, and thus loses control of the situation: The employee is now able to tell the story of what the employee did, and the employer then finds himself on the defense. Additional mistakes include: (1) being too nice, (2) being too mean! Some employers fail to convey any empathy, fear of rocking the boat, bullying the employee, causing a fight, or simply to avoid confrontation. When employees are not given clear information about where they are falling short, they lose the opportunity to grow, to improve, and to progress in the job. Similarly, the employer who fails to convey its dissatisfaction to the employee loses the opportunity to train and upgrade the existing employee, instead having to invest additional resources in recruiting, hiring and training when things don’t work out. On the other hand, some employers express too much of the attitude that the person is the problem, or anger or other negative emotions, and the discipline becomes a personal attack rather than a productive discussion of areas of growth. When an employee is told that they are not competitive, he simply becomes resentful and shuts down. At that point, improvement becomes impossible and the relationship will continue to deteriorate.

Bendavid: If you have participated in any of my trainings you may have heard me say the following: “If it is not in writing, it didn’t happen.” Not documenting the discipline is the number one mistake; and most employers know this. I frequently receive employer calls asking about a prospective termination, only to be told that they never documented the prior performance problem. Even if you verbally counsel an employee, you should follow up in an email or other writing to the employee to confirm the conversation took place. The number one mistake is disciplining an employee for something they are legally entitled to do. For example, you should not discipline employees for taking protected time off.

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

Rosengren: That’s a huge assumption that’s very dangerous fol- lowing last month’s California Supreme Court ruling severely limiting who can be legally classified as an independent con- tractor. Businesses that engage service providers as independent contractors should consult with counsel immediately to see if the relationships will pass muster under the new test. The new test, which is much harder to meet, means that most indepen- dent contractors will have to be reclassified as employees, with all of the attendant costs and burdens. The California Supreme Court adopted a three-part standard, called the “ABC” test, to distinguish employees from independent contractors. A worker is presumed to qualify as an employee unless the hiring entity can prove: (A) the worker is free from the entity’s control and direction in connection with performance of work, both as a matter of contract language and in fact; (B) the worker performs work “outside the usual course of the hiring entity’s business; and (C) the worker is “customarily engaged” in an independent business, occupation, or trade of the same nature as the work he or she performs for the hiring entity. Contractors are now of critical importance, but won’t be worth the paper on which they are written unless the fact supports the hiring entity paying “wages.” A, B and C of the new test.

Gabler: Although the existence of an independent contractor agreement will not automatically invalidate a class action suit, it is nevertheless critical to have an enforceable agreement in place to defend the worker’s contractor status. This has become even more important in light of the California Supreme Court’s recent decision in Dynamex Operations West, Inc. v. Superior Court (2018), in which the Court developed a far more burdensome three-part “ABC” Test regarding the classifi- cation of workers as independent contractors. Ideally, contractor agreements should include, without limitation, reference to the worker’s status as a contractor (without calling the worker “employee” in the agreement!); the contractor’s right to set the work schedule and have its own staff, the contractor’s obligation to pay its own taxes and procure its own insurance, the contractor’s right to work with any other clients (provided there is no conflict of interest of competition), and the obligation to arbitrate disputes under the agreement. Random buzz- words or misstated phrases can severely undercut the contractor classification, and employers would be well served to develop the agreement with the assistance of employment law counsel.

Which pay practices are most likely to result in a class action suit?

Bendavid: The most common class action claims are failure to provide proper meal breaks, failure to provide proper rest breaks, failure to properly pay overtime, misclassification and corresponding claims for pay stub violations and waiting time penalties. You should regularly audit your pay practices.

Sue M. Bendavid

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The most common class action claims are failure to provide proper meal breaks; failure to provide proper rest breaks; failure to properly pay overtime, misclassification and corresponding claims for pay stub violations and waiting time penalties. You should regularly audit your pay practices.
When it comes to employment law, this is not a good idea:

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failure to properly pay overtime; misclassification (e.g., non-exempt or employee/independent contractor) and corresponding claims for pay stub violations and waiting time penalties. Common mistakes are a lack of protective pay stubs and failing to pay employees the correct amount for their work. Employers should be aware of the requirements and penalties for not properly paying employees.

ROSENBERG: Meal and rest break class actions and class actions for failing to provide “suitable seating” to employees are still a huge threat to employers. Matters get even worse when the California Supreme Court ruled 18 months ago that rest breaks must be absolutely “duty free.” In other words, an employer may not require (or even ask) employees to remain on premises or to remain on-call in the event of an emergency. The ruling involved a security guard service where the employees were asked to leave their radios “on” during their 15-minute paid rest break just in case an emergency occurred and they were needed. Though it rarely happened, the Court said that the requirement of keeping the radios turned on converted the rest break to work time and the employees were entitled to a rest break penalty equal to one hour of pay for every day that the offering rule was violated (there is a 4-year statute of limitations). The ruling upheld a $100+ million verdict in favor of the security guards.

GABLER: Class actions can arise from a wide variety of wage and hour violations, and every employer in California will have violations sooner or later. 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 provide all used or accrued paid time off, failure to pay overtime and the corresponding failure to pay minimum wage are as common as well. To protect the compa-
ny, an employer must develop an integrated, enforceable policy 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 violations. Interestingly, case law has held that a company with no penalty payments to any employee at any time must be in violation of the wage and hour laws, because every employee misses a break or a meal period or fails to accurately record their time at some point. It is actually a better defense to record and pay for the occasional penalty, so that you can show the court that you are aware of the rules and any violations of those rules, and are fully prepared to pay the applicable penalty to the employee in the normal course of business.

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

GABLER: You would think so, but perhaps not! PTO policies are easier 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 the requirement of 1½ hours of PTO for every 50 hours of the employee’s time and payroll, and of accrued time at termination. As with the sick leave rules, the employer must frontload the PTO (making it fully available at the outset of employment) or establish 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, requiring additional sick leave hours in certain locations. 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 change an employee’s usage of available time. For these reasons, employers may wish to separate vacation and sick time, thereby saving money and reducing unanticipated absenteeism, instead of using a combined PTO policy.

BENAVID: Even since the passing of California’s mandatory paid sick leave laws, most businesses are recommending that employers separate vacation and sick leave policies. The sick leave rules are very strict and you want to make sure that there is limited flexing on sick paid and more flexibility with vacation – we suggest you separate the two. Further, vacation and PTO must be paid on separation, PTO is not considered as a higher pay out since PTO usually accrues at a higher rate than just vacation.

ROSENBERG: Bundling the company’s paid time off policy used to be the rage. After passage of the state’s sick leave laws, that’s no longer the case. The nuances in the paid sick leave law make it more beneficial to unbundled paid time off benefits because the current sick leave law, which only requires the employer to make paid time off available, does not apply to any other paid time off benefits. Also, accrued sick leave need not be paid to departing employees. However, there are some pay stub and vacation and sick leave benefits are bundled into a single policy. So, by including vaca-

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

BENAVID: For most employers, you cannot have a strict rule barring employment to anyone with a criminal record. If you do, you might be inadvertently excluding individuals for discriminatory reasons and subject to liability for race or national origin discrimination. Also, under the new “ban the box” rules, you must first conditionally offer employment. If the applicant accepts and if you then conduct a background check, you cannot automatically rescind the offer. There is a mandated process you must first implement and complete. Each situation must be individually analyzed and the individ-

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

BENAVID: Make sure you have access to an HR professional who knows what they know and what they do NOT know. That HR professional should regularly attend seminars, read updates on employment laws, and keep his or her finger on the pulse as laws are changing. Our clients also read our blogs and attend our regular updates during which we describe the changes in the law and the practical implications of those law changes.

GABLER: 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 risk management tool for employees as well as a guide for employers. Second, attend the myriad of employment law talks held both online and in person. New laws, cases and administrative opin-

How does a law firm differentiate itself from the competition in 2018?

GABLER: To be truly effective, it is not enough to be an employ-
ment law expert or to provide quality legal advice (although both are critical). Business owners should want and expect their employment law counsel to be an external team mem-

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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 risk management tool for employees as well as a guide for employers. Second, attend the myriad of employment law talks held both online and in person. New laws, cases and administrative opinions are released every week, and regular education is critical to keeping up with new laws. Third, employers need to develop and maintain a relationship with a skilled employment law attorney to address ongoing workplace issues and disputes. Although the Internet has made it possible for businesses to obtain employment law advice, much of it is inaccurate, overly gener-

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