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.

Thanks to our superb panel for their expert insights.
“Be sure there is language that protects your company if a contractor does something to place you in legal jeopardy.”

RICHARD S. ROSENBERG

What are the most significant new laws taking effect in 2019 that could be impactful to businesses?

ROSENBERG: The suite of #MeToo protections. Of those, the new law that forbids employers from including any form of non-disclosure (i.e., confidentiality) provision into a settle- ment resolving claims of sexual assault, sexual harassment, gen- der harassment or discrimination unless the settling employee wants confidentiality. Notably, this rule only applies once a claim has been filed in court or with the BEOC or CA Fair Employment & Housing Commission. Pre-litigation settle- ments with a confidentiality provision are still permissible.

GABLER: The most significant legal change arising in 2019 was the substantial expansion to California’s harassment laws and training requirements. SB 1345 (amending California Gov- ernment Code Sections 12950 and 12950.1) mandates that all employers with five or more employees must provide two hours of harassment training to supervisors and one hour of harassment training to non-supervisory employees every two years, with new supervisors and employees being trained within six months of starting the position. Additional obligations apply for temporary or seasonal employees as well as agricultural workers. The legislature added a number of additional prohibitions and mandates in 2019, including voiding any con- tradictory or settlement agreement which prevents a party from testifying regarding alleged sexual harassment in future matters or prohibiting the disclosure of factual information regarding sexual harassment or discrimination claims, enhancing professional relationship liability for harassing conduct, and related retalia- tion and tax law provisions. These laws represent a growing recognition in California, as well as nationwide, that workplace harassment is a serious problem which has received insufficient attention in cishet and all industries. With ever-increasing harassment claims in administrative agencies and civil courts, employers must be mindful of their training and reporting requirements. Now, more than ever complaints of harassment must be taken seriously and must result in swift and serious disciplinary action.

Which of California’s newer employment laws are most likely to land employers in court?

BENDAVID: We anticipate a surge in wage claims by “in- dependent contractors” seeking to obtain employee status and corresponding benefits, such as overtime, meal and rest peri- od penalties, and PAGA (Private Attorney General Act) penalties. The California Supreme Court’s 2018 landmark Dynamex decision made it extremely difficult to categorize workers as independent contractors. Now, employers face even greater exposure following the Ninth Circuit’s recent deci- sion in Viasque v. Jan-Pro Franchising Int’l, which ruled that the restrictive Dynamex test applies retroactively. Employers should take a proactive approach and audit not only the classi- fication of their workforce but their wage and hour compliance.

GABLER: Because California’s employment laws are so burdensome and hiring employees can be so costly, many companies try to avoid employees altogether by retaining independent contractors to do the company’s work. Unfortunately, mis- classification of a worker creates tremendous liability for the employer from a variety of sources, including state and federal government agencies as well as civil liability to employees. The idea that an “independent worker” is the same as a lawful “independent contractor” is simply incorrect. This legal risk expanded exponentially with the California Supreme Court’s decision in Dynamex Operations West, Inc. v. Superior Court (2018), in which the Court developed a far more burdensome “ABC Test” regarding the classification of workers as indepen- dent contractors. In short, workers who perform the day-to-day operations of the business are highly likely to be employees rather than contractors. Whether the employer could control the worker has far more relevance than whether the employer actually chooses to do so. Employers must be mindful of the fact that letting workers come and go as they please or honoring the worker’s request to be treated as a contractor does not support a valid independent contractor classification or save the employer from what could amount to six figures or more in damages.

ROSENBERG: There are three biggies. First, is the misclassifica- tion of workers as independent contractors. Last year, the CA Supreme Court decided to considerably narrow who can be treated as a contractor. This affects tens of thousands of CA workers. The class action suits for overtime pay and benefits are already coming. Second, employers are challenging the com- pany’s time keeping policy of “rounding” to the nearest quarter or tenth of an hour. Third, many common commission or performance pay programs qualify as “piece rate” work under a statute passed in 2017. By law, employees who are paid this way also must receive segregated minimum wage payments for their non-commission earning work and documented enhanced rest breaks.

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 “rolling over” or “being extorted.” In fact, one of the most sig- nificant 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 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 feel- ings 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 attor- ney/fee awards associated with most employment law matters can prompt employers to settle disputes merely to avoid finan- cial risk that has little to do with 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 in fee recovery to make settlement worthwhile. In some cases, hotly contested litigation is neces- sary, such as when an opposing party is wholly unreasonable, or when other employers are watching in the wings for their bite at the apple. In most cases, however, an attorney who wins, on fighting with his opposing counsel, and who exasperates 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 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.

BENDAVID: Mediation gives employers the opportunity to resolve a case confidentially without the costs and risks asso- ciated with a trial. Mediators are often former attorneys or judges who use their experience as practitioners to work with the parties to come to a mutually agreeable solution. During the mediation, employers can expect the mediator to “shuffle” between parties and discuss the factual and legal weaknesses in the respective cases, helping each to understand the potential risks if the case moves further along in the litigation process. Employers today face unprecedented public relations issues that can quickly result in the ruin of a business’ reputation or the onslaught of new claims. Mediation allows employers to sometimes incorporate confidentiality clauses as part of a medi- ation settlement, which employers should seriously consider. Given the challenges posed by litigating in today’s public eye, the benefits of a mediated outcome are significant.

ROSENBERG: Court statistics show that fewer than 5% of all employment cases go to trial. That means that almost nearly 95% of all cases will eventually settle. Mediation is a voluntary process that will enable parties to explore resolution confiden- tially before they have run up a drawer full of legal bills. Legal claims are costly to defend and time consuming, mediation can be a great escape valve allowing the company to move forward while minimizing the cost and hassle of the litigation process.

How do you advise clients regarding the implementation and enforcement of non-compete agreements?

GABLER: Non-compete clauses are generally unenforceable in California, except in certain limited circumstances, 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, an employer is not permitted to use the trade secrets of the former employer to compete, nor to benefit himself or others. The same applies to solicitation of co-workers and customers. Employers should have clear non-solicitation and non-competition agreements which prohibit the employer from taking, disclosing or using the employer’s trade secrets to unfairly compete, or to solicit others to leave. In other words, a salesman can sell the same wares for another company, but he cannot take the former employer’s customer lists or contact information, marketing plans, business models or financial data in order to do it. Similarly, an employer can encourage a former co-worker to apply for an opening at his new company, but he cannot inform the co-worker that the new company provides greater compensation and benefits than what he 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 restrictions, the prohibition can continue indefinitely, as there is no time period when the company’s trade secrets are suddenly open season.

BENDAVID: Under California law, non-competition agreements are seen as “anti-business” and generally unenforceable. With limited exceptions, employers cannot lawfully restrict employees from engaging in a trade or business once they leave the job.
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We advise clients to arm themselves with strong confidentiality or trade secret agreements while implementing policies or safeguard company information. This includes creating internal practices, such as limiting digital and physical access to those who need to know, and enforcing relevant provisions in the employer's handbook. This way, an employer can show the steps it took to protect its confidential and proprietary information and be better positioned to take action when an employer who improperly uses such information, both as a breach of contract and violation of the Uniform Trade Secrets Act.

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

**ROSENBERG:** Not documenting the reasons why discipline is being issued and not giving employees what a jury would consider a fair chance for the employee to succeed before being fired.

**GABLER:** The most significant error made by employers is neglecting to document performance issues and any resulting disciplinary action. 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 employer is no longer able to tell the story of what the employer did to him, and the employer promptly finds herself on the defense. Additional mistakes include: (1) being too nice, and (2) being too mean! Some employers fail to convey any negativity, for fear of rocking the boat, hurting their own personal relationships, or for fear of being sued after the fact. Employers should think of documentation as an essential ingredient to a fireproof defense.

**GABLER:** Employee handbooks should be created (or reviewed) by qualified employment law counsel, and should be updated on an annual basis. Sample handbooks can easily be obtained through a variety of services or online resources. That said, a generic handbook created without the benefit of legal oversight and support management efforts. They can provide clear evidence of the employer's policies and practices, and satisfy the employer's obligation to provide clear notice of employee rights and benefits. A quality handbook incorporates not only the basic legal requirements, but also should include legally strategic and policy options designed to thwart employee complaints and avoid lawsuits. Updating handbooks on an annual basis allows the employer to incorporate new laws and cases, and provides evidence that employees were reminded of important company policies each year. Annual acknowledgement requirements are terrific evidence that the employee was well aware of the employer's handbook and could legitimately be expected to operate within its terms. There is simply no substitute for the protection of a compliant and enforceable handbook prepared or reviewed by expert employment law counsel.

Are there any issues businesses need to be aware of in drafting agreements with an independent contractor?  

**ROSENBERG:** Yes. The agreement will be viewable evidence if the worker's contractor status is ever challenged. The best agreements are those that clearly lay out the facts demonstrating the worker’s service provider can be treated as an independent contractor. Employers also should address the protection of the trade secrets that a contractor may encounter when doing the contracted-for work. Finally, the agreement should define the scope of the work to be performed and the agreed-upon compensation.

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**KAREN L. GABLER**

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

**GABLER:** Employers must be able to justify the legitimate business reasons for the decision – then, actually justify it with written documentation. Why must the business eliminate positions at all? Why is the employee losing his job? Is his position being eliminated? If so, 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 memoranda 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? If asked, how will we prove that we had a legitimate, non-discriminatory reason to remove him? Falling back on “at will employment” is not enough – failing to provide the reason for the separation from employment allows the employer to fill in that blank with an unlawful reason, creating legal risk and cost for the employer.

**GABLER:** There are some rules of thumb to reduce the risk of litigation for unlawful termination or retaliation when downsizing through layoffs. First, companies should establish and document criteria for identifying workers to be laid off – determining whether the decision will be based on seniority, experience, job performance or disciplinary history. Second, ensure the layoff candidates meet your criteria and that you have supporting documentation. Review personnel files to ensure there are no “red flags” that might cause employees to believe they were selected for unlawful reasons, e.g., previous complaints of harassment, in which case a layoff may be misconstrued as retaliation. That doesn’t mean a person who previously made a complaint can’t be laid off – it just means employers should ensure they have legitimate reasons for their decisions – that

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remains a federal offense even in states like California where ROSENBERG: debated questions about the viability and efficacy of marijuanastance abuse policies. Beyond these legal issues, there are hotly
then quickly leaves the body. Marijuana can remain in the
marijuana in the workplace (although medicinal use implicates
policy language. Nevertheless, despite the legalization of mari-
unlawful drug under California state law. Thus, policies must
GABLER: From a practical standpoint, the legalization of rec-
the employer would not allow the employee to leave work.
no employer wants to defend a case where an employee's child was placed in danger because
with the attendance issue later. No employer wants to defend
per month. However, that limit is suspended in a real emer-
school emergency" situations such as a school closure due to a
employers with less than 25
children, I can tell you – it's simple: do everything you can to
BENDAVID: If there is a school closure due to a violent threat?
employees who are parents of school age children
What accommodations must an employer offer to
employees selected for layoff can sue (and win!) if they were
Many employers believe that a company can
fight an employee claim or wish to convince an inquiring law-
made, if an employer decides to deny employment based solely (or in part) on
the criminal history, the employer must make an individual assessment and determine whether the conviction has a direct adverse relationship on
the specific job duties the applicant would perform. Employers may consider felony convictions only to the extent that the conviction is reasonably related to the job position, among other factors. For
instances, applicants with felony child abuse convictions might be rejected for a preschool position, and applicants with felony embezzlement convictions might be rejected for an accounting
position. On the other hand, applicants with felony DUI convictions could not reasonably be rejected for a job that does not involve driving on behalf of the company. If a conviction appears on a legitimate post-offer background check, employers must analyze whether the timing, nature, scope and outcome of the conviction are sufficiently relevant to the job position that the offer can be lawfully revoked.
BENDAVID: Both California and Los Angeles have passed “Ban the Box” laws that restrict employers from inquiring into, and making employment decisions based on, conviction histories of job applicants. Under the California Fair Chance Act, employ-
ers with five or more employees are prohibited from including on any application for employment, before the employer makes a conditional offer of employment, any question regarding the applicant’s conviction history and inquiring into or considering the conviction history of an applicant. The applicant has the option to withdraw the application if there is a conditional offer of employment. If, following a conditional offer of employment, an employer conducts a background check and intends to deny a position, the employer must notify the applicant and give the applicant an opportunity to respond. If the employer answers in the affirmative, the applicant must then be given the opportunity to explain why the conviction should not bar employment. The City of Los Angeles has even broader rules and procedural hoops that employers must follow before deny-
ing employment.
Are there new issues arising with immigration-related claims?
ROSENBERG: Yes. The Social Security Administration’s “No-Match” letters are back after an eight year hiatus. Employ-
receiving one should consult with a legal expert before
responding. Also, ICE is on a tear with stepped up workforce
enforcement actions (i.e., “raids”). Also, new LA laws make it illegal for members of management and supervisors to threaten employers with deportation or reports to immigration.
What can employers do to remain current on the ever-evolving business and employment law trends?
BENDAVID: Employment law is one of the fastest evolving legal
as well as for employees. Second, attend the
training of employment law professionals who are
broad and include seminars, webinars and in-person programs. It is critical that
specialist in the field. Third, develop a plan to receive regular updates online and in person. New laws, cases and administrative
orders are released every week, and regular education is critical to
keeping up with new laws and workplace trends. Ignorance of the law is not a valid excuse for employment law violations, and continuing education goes a long way toward protecting the employer. Third, develop a plan to receive regular updates of
employment law attorneys.
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 employer handbook serves as a risk management treatise for
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When it comes to employment law, this is not a good idea:

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