The San Fernando Valley Business Journal has once again turned to some of the leading employment attorneys and experts in the region to get their assessments regarding the current state of labor legislation, the new rules of hiring and firing, and the various trends that they have been observing, and in some cases, driving. Here are a series of questions the Business Journal posed to these experts and the unique responses they provided – offering a glimpse into the state of business employment in 2018 – from the perspectives of those in the trenches of our region today.
What are the most significant new employment laws taking effect in 2018?

ROSENBERG: These are my top choices for 2018: (1) employers are no longer permitted to ask about criminal convictions until after a conditional offer of employment is made (the “Ban the Box”); (2) employers are no longer permitted to ask about compensation history during the application process; (3) the recent changes to federal legislation to mandate and accommodate the needs of transgender employees; (4) employers facing an immigration audit must insist that the federal government only contact the City Attorney’s office, which included 36 months of probation and community service on top of having to pay what was owed under the ordinance.

What are the latest developments in minimum wage increases?

ROSENBERG: Figuring out the minimum wage is no longer a matter of simply checking the applicable federal and state rule. There are now over 20 cities and counties in California that have their own unique local minimum wage ordinance mandating higher minimum wages, and often on a different timetable than the state and federal minimums. Some of these regulations are even industry specific, like the ordinances in Los Angeles and Santa Monica mandating an even higher minimum wage for employees working in the hospitality industry. Also, many of these local ordinances now carry criminal penalties for non-compliance. A Santa Monica business owner recently entered into a plea agreement with the City Attorney’s office, which included 36 months of probation and community service on top of having to pay what was owed under the ordinance.

Light: California’s minimum wage is $11/hr as of January 1, 2018 for larger employers (25+). Smaller employers have faced an increase in 2017 to $10.50 per hour. An increase in the minimum wage will put pressure on employers to increase wages for those employees who are only slightly above minimum wage, in the face of rising employment costs such as healthcare and minimum wage increases.

How will the Trump administration impact the employment law landscape moving forward?

Light: Other than immigration issues, the Trump administration will not have much impact on California employment law. Employers are subject to both state and federal law, and the one that most favors the employee is the one that a California employer must follow. California wage and hour law is typically more stringent than the federal law, which means that by following state law, employers can avoid the consequences of violating federal law. While there may be some changes in areas such as workplace safety and immigration, it is unlikely that the Trump administration will have a significant impact on California employment law.

Bendavid: Employers can expect more business-friendly rulings from the National Labor Relations Board. As an example, the NLRA just relaxed its joint employer standard. In terms of the NLRB, companies with workers in San Diego, El Cerrito, Cupertino, Santa Monica and Pasadena must raise minimum rates for those with 26 or more employees, and $10.50 per hour for those with 25 or fewer employees as of the New Year. Howev-er, companies with workers in Los Angeles, Santa Monica and Pasadena must raise minimum rates to $12 and $13 for larger employers and $12 for smaller employers. An increase in the minimum wage will put pressure on employers to increase wages for those employees who are only slightly above minimum wage, in the face of rising employment costs such as healthcare and minimum wage increases.

What are your thoughts on the passage of AB 168 and the Ninth Circuit’s ruling in Rizo v. Yovino, No. 16-15372 (9th Cir. 2017), concerning salary history inquiries by employers?

Light: In light of the new California statute, Rizo was certified for re-hearing before the entire Circuit, so it’s likely to be resolved in favor of prohibiting salary history to be used to justify paying a worker less than a man (which is the current ruling allows). The new law creates a more level playing field, and may well benefit not only women, but also people of color who may have been paid less in the past because of a lower salary history. Employers can still ask what the applicant’s salary “expectation” is, and it will likely be a few percentage points higher than what the worker is currently earning. That information should give the prospective employer some insight into prior salary. The more difficult task for employers may be to establish “salary ranges” for a position, which tells employers what to pay and who they will hire.

Bendavid: In Rizo v. Yovino, the plaintiff was paid five percent more than her peers when she worked for Fresno County – the same five percent guideline applied to all new hires. Rizo later found out she was being paid much less than her male peers when she transferred to a police base. Gender-based discrepancy occurred because of geographic origin, rather than gender discrimination – Rizo formerly worked in another state with lower wages. A Ninth Circuit Court decided last April for the defendant employer, finding no gender-based pay dis- crimination. However, Rizo asked the case be reheard, so stay tuned. AB 168 is the state’s attempt to level the playing field. According to Assemblmenber Swann Egger: “The practice of seeking or requiring the salary history of job applicants helps perpetuate wage inequality that has spawned generations of working women.” It is likely to be reversed in court. The question is: who will the employee be able to blame? It is my 9-year-old daughter, and all women, can be confident that their pay will be based on their abilities and not their gender. In the workplace, the legislature wants to ensure that if you get paid equally, it may be tempting for some businesses to lower operational costs by paying some staff a bit less than others – but attempts to do so are illegal. The new law will help to prevent this in the long run in defending a discrimination lawsuit.

How can employers (especially those with smaller companies and facilities) meet the needs of, or accommodate, a growing transgender workforce?

Rosenberg: After familiarizing yourself with the new law, the first step is to be sure that current policies are adequate to address the unique needs of this community. Part of that process likely will include sensitivity training for senior leadership and other people managers. This training is now required for larger employers (30+ employees). Most of the claims are avoidable where management shows leadership and sets clear expectations for employees about protecting the rights of this community and being sensitive to their particular needs. Too often, top management’s silence is seen as tacit approval of offending behavior. In my opinion, this is the single best investment a company can make toward insuring that these matters stay out of court.

Light: Employers need to train their workers to be more accepting (not just “tolerant”), figure out how to handle bathrooms and changing room issues and anticipate these issues before being confronted with them. Have private area for use by any gender when requested. I saw a sign in front of a Washington D.C. restaurant’s single-stall restrooms, “Men, Women and Everyone Else.” They also had an interior sign that said the usual “Employees must wash hands,” but included “everyone else SHOULD.”

What accommodations must an employer offer to employees who are parents of school age children if there is a school closure due to a terrorist threat?

Bendavid: When there is a threat at an employee’s child’s school, employers should use common sense and allow the employee to leave. Forget the legal mandates and whether or not the business size imposes requirements. Employee welfare and child safety are paramount. As for legal obligations, California employers with 25 or more employees are required to provide paid time off in the event of an “ongoing emergency” situations such as a school closure due to a terrorist threat. To mitigate the impact on employers, the law permits employers to limit usage of this time to up to 8 hours per month. However, that limit is suspended in a real emergency situation. Even if your employee has already used all 40 hours, we would still recommend giving the employee whatever time they need to address the emergency. You can deal with the attendance issue later. No employer wants to deal with the consequences of being at the workplace when their child is home alone in an emergency situation. Employers with 50+ employees must allow employees of school age children up to 40 hours to address a terrorist threat or other emergency situations requiring a parent or guardian to pick up the child.

Rosenberg: California’s Family-School Partnership Act gives employers of school age children up to 40 hours of time off per year time for matters relating to parenting such as attending school functions. That law also specifically provides for emergency leave for parents to address “child care provider or school emergency” situations such as a school closure due to a terrorist threat. To mitigate the impact on employers, the law permits employers to limit usage of this time to up to 8 hours per month. However, that limit is suspended in a real emergency situation. Even if your employee has already used all 40 hours, we would still recommend giving the employee whatever time they need to address the emergency. You can deal with the attendance issue later. No employer wants to deal with the consequences of being at the workplace when their child is home alone in an emergency situation.

What changes can we expect to see at the NLRRB?

Light: With the shift to a more conservative Republican agenda, employers will get some relief from the more aggressive positions likely to include sensitivity training for senior leadership and other people managers. This training is now required for larger employers (30+ employees). Most of the claims are avoidable where management shows leadership and sets clear expectations for employees about protecting the rights of this community and being sensitive to their particular needs. Too often, top management’s silence is seen as tacit approval of offending behavior. In my opinion, this is the single best investment a company can make toward insuring that these matters stay out of court.
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**LIGHT:** Often, the parties can resolve the issues during mediation and mediation works in a very high percentage of cases. Employers they should not have to pay a penny to resolve an unmeritorious settlement. That puts them in the frame of mind that mediation can be very effective and should be considered.

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

**LIGHT:** Mediation typically is a great way to resolve matters after a lawsuit is filed. Larger employers may have interminable grievance and mediation procedures that can be effective, but the typical small or medium size business may only go to mediation if a formal claim is made, usually by a former employee. Employers often don’t want to pay much to settle at the outset, or feel that mediation will not work. Employers may be more convinced, but often forgotten is the internal corporate cost of “down-time” dealing with the claim. It’s a drain on productivity to have multiple strategy meetings with attorneys, collection and retention of documents in the computer system, etc. Once these costs are evaluated, early settlement—usually through a good mediator—is a great strategy once you have at least a reasonable idea of the risks and value of the case. Mediators typically cost between $50-$100 per day, the mediation lasts a single day, and then the employer must factor in the cost of its lawyer to prepare a mediation brief and attend. But it’s still much cheaper than a full-blown litigation that will put the employer into six figures in attorney fees rather quickly.

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

Bendavid: California is competition friendly, and the state does not permit covenants not to compete, with limited exceptions. The basis is that someone leaving Company A can fully expect to go work for Company B, even if Company B is a direct competitor — because no Californian should be prohibited from working. Of course, there are exceptions particularly for shareholdings or positions where company will be in a direct conflict with a company. Also, employers can still require employees to sign confidentiality and trade secret protection agreements and should consider company protocols for the protection of sensitive confidential and proprietary information, like trade secrets. This can include agreements, policies, locked cabinets, limited disclosure to only those with a need to know, and the like.

**ROSENBERG:** California law on this subject is a bit schizophrenic. On the one hand, the law is very protective of employee free movement, so most non-compete agreements are unenforceable. However, the law also permits employers to vigorously protect its proprietary and trade secret information by having employees sign agreements severely restricting them from making unauthorized use or disclosure of an employer’s confidential or trade secret information. As such, it behooves employers to take a proactive approach to identify what’s protectable and have employees sign appropriate agreements protecting the employer’s information.

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

Bendavid: For our clients, arbitration is not always the favored option. One reason is that employers must pay the arbitrator’s fees. This has to be balanced against the arbitration and the arbitrator’s fees — which can add up. Also, some claims (like PAGA claims) are not subject to arbitration which means you may be litigating in two courts. So, we look at the costs with the arbitrator and the PAGA claims in court. Arbitration rulings are usually binding and non-appealable. The leverage of appeal can become relevant when the arbitrator’s decision is something to consider when deciding whether or not to arbitrate. The type of business you are, the strength/weaknesses of your claim or the novel nature or the type of claims asserted may impact this as a consideration. There are pros to arbitration. For example, for those who want privacy, arbitration may be the better option, as the proceedings are private. The hearings are held in a conference room, as opposed to a public courtroom. You can also pick your judge, provided you and the other side agree.

**LIGHT:** I understand from some clients and my brethren in the law that other attorneys are advocating against arbitration agreements. I strongly disagree. I’ve won (arbitration) and lost (jury trial) cases that would have had a different result had they been in court or in arbitration. The fear apparently is that arbitration “split the baby” too often, but that has not been my experience. Also, plaintiff lawyers much prefer to be in front of a judge, so that should be indication enough of the wisdom of implementing an arbitration policy with applications to and with as many existing employers as possible.

**What are the implications of the Seventh Circuit’s en banc decision in Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017), holding that Title VII of the Civil Rights Act includes the right of individuals to be protected against discrimination on the basis of same-sex orientation?**

Bendavid: Justices of the 7th Circuit Court of Appeal (in Indiana) considered the case on whether a female employee asserted she was barred from full time employment and rejected for promo-

**LIGHT:** We’ll see if they are EMPLOYEES they aren’t LIC. So that’s a problem right there. But if a WORKER can qualify as an IC, one simple tip is not to include any language that the materials to be used as a “work for hire.” There are California Unemployment Insurance Code sections (856 and 621(d)) and a Labor Code section (3351.3(c)) that turn this otherwise legitimate IC relationship into an employment relationship by the use of that language.

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

Rosenberg: We find a lot of wage hour class action and collective action lawsuits. The matters attracting the most attention are: (i) not paying minimum wage; (ii) illegal rounding of time records; (iii) misclassifying employees as overtime exempt or independent contractors; (iv) not providing (and adequately documenting) state-mandated meal and rest periods; and (v) making illegal deductions from employee pay. Two newer issues are the requirement that CA employers must provide “suitable seating” for most California employees, and claims by “piece workers” for when they are not being paid at the appropriate rate for the work-related activities and for premium pay for paid rest breaks.

Bendavid: We are still seeing employers routinely failing to properly document all hours worked and all meal breaks for their non-exempt employees. We are also seeing errors in pay- stubs. Take a look at your timesheets and compare with the corresponding paystubs. Do the hours match? Are you properly recording and paying all hours worked including overtime? Do your paystubs contain all the required elements under Labor Code Section 226 (including gross/wages, total hours worked; all wages; all taxes; all deductions; your legal name and address; the employees’ name and last 4 digits of their Social Security number)? Do your paystubs show the available sick leave balance? These mistakes, while unintentional, can lead to early penalties and fees. Under the Private Attorneys’ General Act (PAGA), we are seeing more standing PAGA claims and PAGA claims included in class actions. A closer audit of an employer’s wage and hour practices, along with correct action is highly recommended.

**LIGHT:** Simple. Suspending meals and rest breaks can result in companies being sued. Meal and rest break policy-making, documentation, and implementation are all frequent traps for employers even if they consider themselves sophisticated on these issues. Without regular audits of both paperwork (timekeepers) and actual practice (what are my supervising doing in the field or out on the manufacturing floor?), an employer has no way of knowing that a rogue supervisor or crew leader is doing things contrary to policy (“Let’s combine the second break with the meal so we can leave early!”).

**What are some of the practical challenges employers face when implementing California’s paid sick leave law?**

Bendavid: Like minimum wage, local ordinances make administering sick leave a challenge for employers. For example, the Los Angeles ordinance and the state’s requirements vary on caps on use, caps on accrual, or whether or not a physician’s note is required in the event of injury or illness. Sometimes when the local ordinance or California statute is silent regarding some of these points, which makes it even more difficult to navigate. The rule of thumb? Always follow the higher standards. And don’t forget to consider Worker’s Comp, or leave of absence under FMLA/CRFA, for pregnancy (FPLS), and time off as a reasonable accommoda-

**LIGHT:** An employee frequently takes Fridays and Monday off “due to illness,” an employee frequently takes Fridays of the employee is on a Monday holiday—but the employer can’t ask for a doctor’s pre-

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note under California’s rules. No easy answers to those. Although if the employer has legitimate access to the employee’s Facebook account, for example, and sees the employee frolicking in Las Vegas on those sick days, then discipline or termination is allowed.

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

BENDAVID: No. Ever since the paid sick leave law was implemented, I advocated for employers to separate their policies. There are rules that apply to sick leave, that don’t apply to the vacation context. And vice versa. Separating the policies can help demonstrate compliance and provide the employer more control when an employee takes time off for vacation or other absence not related to sick leave.

ROSENBERG: Combining these policies into a single “Paid Time Off” (PTO) program was very popular a few years ago. However, with the onset of mandatory paid sick leave benefits, many companies have opted to unbundle these benefits to insure that only the sick leave hours will be subject to the onerous carryover, pay stub reporting and usage rules which govern sick leave. Also, by law unused accrued sick pay does not have to be paid out to employees when they leave. But, if vacation and sick hours are combined, then the entire balance is treated as vacation and must paid out at termination.

LIGHT: Combining vacation and sick time into a single PTO policy doesn’t make sense anymore, primarily for two reasons. First, there is a separate category from PTO. An employer doesn’t have to pay out unused sick time at departure, but does have to pay out all PTO (and vacation). Second, an employer can start to claim an employee for excessive absenteeism even for illness once the sick time allotment has been exhausted; which will occur more quickly when sick time is a separate category from PTO.

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

ROSENBERG: Yes. Employers with 5+ employees in California must comply with the State’s new “Ban the Box” law. The new law prohibits private employers from even asking a job applicant to disclose prior criminal convictions until after a conditional offer of employment is made. Where an employer wishes to delve into the applicant’s criminal record and deny employment based upon that information, the employer must provide the applicant a mandated “fair chance process” which allows the applicant time to respond to the employer’s concerns before filling the position. Employers in this situation must be prepared to show there is sufficient connection between the criminal offense and the applicant’s intended job duties to justify the refusal to make a job offer.

LIGHT: The employer must evaluate all criminal records (now only following an employment offer) under the EEOC and California’s version of the “Green Rules.” They require an individual assessment of the nature of the crime, how old it is, whether there has been intervening employment, whether the crime relates to the job at issue, how closely supervised the employee may be, etc. For example, a potential warehouse worker who will be closely supervised, will never leave the premises for work, won’t have access to an on-site daycare center, won’t work next door to a school, and worked elsewhere successfully for two years, is likely entitled to a job even with a child molester conviction if it is a few years old.

◆ Are there new immigration-related claim issues?

ROSENBERG: Yes. AB 450 went into effect this year. It imposes strict requirements on how California employers must behave when a federal immigration agent comes knocking. If an ICE agent shows up at your door to initiate a workplace inspection, you should have proper documentation demonstrating that the employee was a legal resident at the time of the inspection. If a federal agent enters your premises, you should provide all documentation that the employee met the immigration requirements. The new law contains stiff penalties and fines for employers who do not comply.

BENDAVID: One new protection arises from the passage of Assembly Bill 450, the Immigration Worker Protection Act. In short, the bill prohibits employers from allowing federal immigration officers access to a work place’s non-public areas unless the officer has a warrant. Additionally, employers cannot provide employee records to immigration agents without a subpoena, and must notify employees of an impending immigration agency’s inspection. If a federal agent enters your premises, you should quickly seek legal advice to make sure you comply with the law, or else you may face steep, state-imposed penalties.

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

LIGHT: Failure to have proper documentation demonstrating why choices were made that were legitimately business-related, failure to create a matrix of the various discrimination categories (age, race, ethnicity, disability, recent or pending workers compensation claims, etc.) to determine if those categories are disproportionately represented by workers being laid off versus workers being retained. Age is typically the most commonly affected discrimination category in a layoff, as older workers tend to be more highly compensated (heavier hit on budget) or, in a physical environment, perhaps less effective or more prone to injury (workers comp claims). Employers may need to “balance the ticket” by having, for example, reasonable ratios of older and younger workers on the layoff list.

ROSENBERG: Many employers believe that a company can layoff whoever it wants and that the employee will not have any legal recourse. That’s simply not true. Person’s selected for layoff can sue (and win) if they were selected for layoff on account of one of their protected status (such as age, gender, race) or because they were a whistleblower who opposed a practice that the employee reasonably believed was illegal or if they are selected in retaliation for having availed himself or herself of a legal rights (e.g., pregnancy or work injury leave). So, it’s incumbent on the business to develop and use a clear set of legitimate criteria when evaluating which employees to layoff. A well-documented layoff list is worth its weight in gold when fighting an employee claim or trying to convince an inquiring lawyer to turn down your former employee’s case. Timing can be critical (if example, laying off someone who just returned from maternity leave) and all facts should be carefully evaluated.

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