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. Below is a series of questions the Business Journal posed to these experts and the unique responses they provided – offering a glimpse into the state of business employment in 2017 – from the perspectives of those in the trenches of our region today.
What are the most significant new employment laws taking effect in 2017?

Light: Perhaps the most important one is in limbo: the new federal salary threshold of $47,400 for exempt salaried employees that was supposed to be effective December 1, 2016. We'll see what the court of appeal does with the injunction in place, and whether the national各行 parties back away from their position. Remember that California's minimum wage went up to $10.50 on January 1 ($12.00 in Los Angeles and unincorporated L.A. county areas), which raises the state's minimum salary threshold to $43,680. Note that the city/county extra increase in minimum wage doesn't affect the salary test.

Rosenberg: Despite a spate of onerous new federal and state legislation, in my opinion, one of the most interesting legislative developments is the bump up in the number of cities and counties which have passed their own (more onerous) labor regulations to protect the employees working within their borders. Many have hidden traps for business that send workers into a covered area but are based elsewhere. For example, the City of Los Angeles' minimum wage law only applies to L.A. based companies, but also to any worker who in any particular week performs at least two hours of work within the City's borders. Also, several cities passed industry-specific regulations like Los Angeles and Santa Monica. Both cities have ordinances just covering hotel workers, which require hospitality employers to pay a minimum wage of $13.25 per hour (Los Angeles) and $11.25 per hour (Santa Monica) as an excellent resource for training up to date in Labor, Berkeley, ed./minimum-wage-living-wage-resources/california-city-and-county-living-wage-ordinances/.

Which of California's new employment laws are most likely to land employers in court?

Bendavid: A slew of new anti-discrimination laws will likely cause headaches for employers. Los Angeles' Ban the Box ordinance not only prohibits businesses from asking about an applicant's criminal history, it also mandates a series of cumbersome steps that must be followed: changes to job postings, changes in the hiring process (including written assessments, reassessments and notices), and maintaining records for three years after the position has been filled. The Fair Pay Act has been expanded as well. It now expressly requires equal pay for substantially similar work between gender, and including race and ethnicity. Any disparities must be based on factors such as education, experience or merit system — not on gender, ethnicity or prior salary history. We expect this to result in an increase in discrimination claims by employees who (perhaps mistakenly) believe that similar work and similar occupations are taken into consideration when salaries were decided. Employers should also remember to post proper gender signage on single restroom facilities. Under this law, this training must be given to all people managers, but I recommend that you make it an absolute must for any business seriously interested in lawsuit avoidance and morale building. By law, this training must be given to conducting such training for their supervisors. All employers should consider such training for their non-supervisors, as the law doesn't require it even for larger employers. Then follow up periodically with reminders. Don't wait another two years to reinforce the importance of these issues.

Bendavid: Employers are likely to be susceptible to harassment and discrimination claims. According to the EEOC, about 32 percent of employment litigation in California relates to race-related claims, 25 percent relates to sex discrimination, 25 percent relates to age and 32 percent relates to disability. (The numbers don't add up to 100 percent because claimants often make several discrimination charges, rather than just one). Additionally, about 47 percent of the time employers deny the claim. So how important is sensitivity training? It's critical for management and can be used to help rebut claims of discrimination. Training should include methods for identifying and eradicating incidents of discrimination or harassment even before a complaint is filed. It should also include the proper handling of complaints, investigations and responsive action. Management in this process can lead to a lawsuit.

What can employers expect from the California legislature this year?

Rosenberg: The presidential election revealed a stark contrast between California and most of the nation. With Democrats holding a near super majority in Sacramento, I expect that California businesses will brace for new and onerous labor regulations and stepped up enforcement of the laws already on the books. Also, the prevailing view in Sacramento is that too many workers are covered by state's many labor regulations because so many of them are paid in cash or as freelancers or so-called independent contractors. According to the law, most workers are "employees" and labor law compliance is required. True independent contractor status is the rare exception. Under California labor laws, businesses that misclassify workers as independent contractors face stiff fines and compliance lawsuits. In addition, competitors that shoulder the full economic burden of employing workers don't enjoy the benefits of the state's many labor regulations and stepped up enforcement of the laws already on the books.
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16633 Ventura Boulevard, 11th Floor • Encino, California 91436
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LABOR & EMPLOYMENT ROUNDTABLE

BENDAVID: On November 22, 2016, the U.S. District Court granted an Emergency Motion for Preliminary Injunction and stopped the Department of Labor from implementing and enforcing the new salary rules for exempt employees under the FLSA. On December 1, 2016, the Department of Justice on behalf of the Department of Labor filed an appeal. For business owners who did not yet change their pay practices to either increase salaries or change workers to hourly, we are recommending that they stay put for now, pending the court’s rulings. Business owners who already increased salaries, or switched workers to hourly status, now face the decision of whether to keep those changes or switch employees back to their previous compensation. However, reverting back may cause more turmoil (let alone morale problems) and create even more headaches if the courts ultimately rule the increase is valid. Even though the hearing will be held on an “expedited” basis, the review by the court of appeals could take months. Many employers are opting for a wait and see and before taking further action.

✦ How have the changes in marijuana laws affected your clients?

ROSENBERG: Not much. California’s Supreme Court has ruled that employers do not have a legal obligation to relax their drug free workplace policies to accommodate medical marijuana use. And, the new voter initiative legalizing the recreational use of marijuana does nothing to change that. However, there is great risk for litigation when employers do not have a well thought out and legally compliant policy covering drug/alcohol use and testing. Among other things, this policy should set the company’s clear expectations (zero tolerance?), provide for management training to detect policy violations and establish a well-defined regimen for handling the transportation of suspected policy violators and their test results.

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

LIGHT: Insurance carriers will push hard for early mediation to save money, even if we’re still inside the employer’s EPLI deductible. Mediation is usually an efficient and cost-effective method of resolving even difficult employment disputes even prior to litigation being filed, especially if the employer is in a weak position. Why waste money on litigation legal fees when you’ll be at the negotiating table anyway at some point in the fight? A good percentage of disputes resolve at early mediation prior to a lawsuit being filed; different than the approach years ago, when mediation was almost an afterthought well into the litigation.

BENDAVID: Unlike arbitration, mediation is a voluntary process where the parties can sit down and try to resolve their disputes without the risk and costs associated with going to trial. Mediation is generally handled in a private conference room (or multiple rooms since the parties are usually separated) while the mediator engages in “shuffle diplomacy.” The mediator shuffles back and forth between the sides hearing the facts, considering the law, and ultimately trying to negotiate terms that are agreeable to both sides. At some point in the process, after the facts and law have been discussed, the mediator’s job is to convey settlement numbers and try to elicit one that works. We are seeing an increase in the number of employer claims originating via demand letter and response letter, as opposed to actual filing of lawsuits in court. In some cases, our clients choose to mediate early in an effort to get the matter behind them (often due to financial inability to defend all the way to trial). In other cases, especially where the allegations are hotly contested, and where the client has the financial ability to fight, the clients are less likely to agree to an early mediation. Regardless of whether the case settles or not, mediation can be useful in educating both sides about the facts and law in their cases, including their respective strengths and weaknesses.

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

LIGHT: Employers generally can’t enforce a true non-compete under California law, and even having such language in a confidentiality agreement without enforcing it is a violation of law. Employers really can’t enforce more than the law allows, but a confidentiality agreement is a good way to perhaps inhibit competition by the former employee using protected information (which is about all an employer can protect against). Also, ensure that such information is protected in your e-system, that it can be retrieved from departing employees, and that you allow limited access to it. Also, employers should understand an “announcement” versus a “solici-
When it comes to employment law, this is not a strategy:

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You don’t have to pay sick time when the employee leaves the company, and you can begin to discipline for excessive absenteeism sooner if there are less days available for sick leave. And be careful about undesignated “personal days” that aren’t specific to, e.g., a birthday (”take your birthday off or within one week on either side of it”). If they are generic, they are treated exactly like vacation or PTO and must be paid at separation (and accrued!).

JONATHAN FRASER LIGHT

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

LIGHT: Nope. The EEOC Green Rules have made this even more problematic, because employers must scrutinize the conviction to determine if it is remote in time, unrelated to the work to be done, whether the employee is closely supervised, the age of the employee when it occurred, and other mitigating factors. Also, we’re heading to a “ban the box” statewide prohibition on asking about convictions until after an offer is made. San Francisco implemented it a couple of years ago and Los Angeles did so late in 2016.

What are some legal issues that companies often over-look during a layoff or termination process?

ROSENBERG: Most employers erroneously assume that you can lay off anyone you like without legal consequences. That’s simply not true. A layoff is an economically based termination of the employment relationship where the employer decides which employees are expendable. In every layoff, there is the “why me?” question that the business must be able to answer with a legitimate reason.

I have represented employers in many layoff cases where a single employee (out of hundreds laid off) claims to have been selected for layoff because of their membership in a protected class such as race, gender, disability status, etc., or in retaliation for having engaged in some other protected activity (think “whistleblower,” someone who took time off as permitted by law for pregnancy or family leave, or perhaps someone who filed a safety or other complaint with the state/federal agency). Although an employer clearly has the burden of showing that the decision to lay off the employee was made for a legitimate, non-discriminatory reason, it’s not an easy hurdle because of the EEOC’s heightened enforcement efforts.

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

BENDAVID: In California, under Business & Professions Code Section 16632, non-compete agreements are generally void (with some exceptions); “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind to that extent void.” However, confidentiality agreements and trade secret agreements are generally upheld. Therefore, rather than impose a non-compete, we recommend a strongly worded and detailed confidentiality agreement which expressly outlines the specific information that the employee is obliged to protect. The agreement should expressly state that it survives the termination of employment. In other words, employers should be told that, even if they leave employment, the trade secret (like the Coca-Cola recipe), must be maintained as confidential and not used or disclosed to anyone else. We also recommend that employers consider a formal “promotion” protecting its trade secrets incorporating a variety of steps—confidentiality agreement, clear handbook policies, locked cabinets, password protected data, limited employee access, etc.

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

LIGHT: Other attorneys may disagree because “arbitrators tend to split the baby,” but that’s not my experience. I absolutely prefer arbitration to a jury trial on sensitive discrimination, harassment, and other such issues because the parties can turn key legalese into more general terms that get more traction with an arbitrator. Also, we can still use them to avoid class action, although that’s in the air now right up.

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

ROSENBERG: A common feature in so many lawsuits from fired workers is the inadequacy of the employer’s communications regarding job expectations (best to do in writing) and the consequences for failing to meet them (also best to do in writing). A simple question I ask in every one of termination review client discussion is “will the employee be surprised?” The answer to this simple question speaks volumes. If yes, then the potential for a successful claim increases. So-called covenants not to compete or non-compete clauses are generally unenforceable in California except in rare cases involving the sale of the business or the purchase of stock. Thus, they are not worth the paper they’re written on. On the other hand, a well worded agreement, which protects the company’s trade secrets, and other valuable proprietary confidential information is enforceable in California and will be respected if properly written. In other words, restrict the use of your intellectual property.

What is the number one issue I see in my practice is the confusion caused by companies being in a locale like the City of Los Angeles, which wrote its own (and more onerous) sick pay requirements. Another issue is managing sick pay and PTO. Under the CA paid sick leave law, the usage obligations only apply to actual paid sick days, not the CA paid sick leave law’s 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 the employment and the former employee can collect still remaining penalties for late payment. In contrast, accrued sick pay does not have to be paid out when the employee leaves the employment.

What is a company doing to protect sensitive data when drafting agreements with them?

BENDAVID: The EEC recently outlined tight rules for employees with mental health conditions—confirming that these individuals are protected from discrimination and harassment in the workplace. Employees should remember to engage in “interactive dialogue” with their employer when the employee requests an accommodation, or when the need for an accommodation becomes apparent. When possible, try your best to accommodate and be sure to document those efforts. If you will suffer an “undue hardship”, discuss that with the employer first (as part of your “interactive dialogue”) and get the employer’s feedback and hopefully acknowledgement that the requested accommodation is too difficult or impossible to provide.

How does a law firm specializing in labor and employment differentiate itself from the competition in 2017?

ROSENBERG: We represent employers exclusively. Additionally, we have large franchise & distribution, corporate and business litigation practice groups, which means we’re knowledgeable about employment and business matters in a wide range of industries— including those offering professional services, hospitality, manufacturing, health care, etc.

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BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 Ventura Blvd. ● 18th Floor
Encino, CA 91436
818.508.3700 ● www.brgslaw.com