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 2016 – from the perspectives of those in the trenches of our region today.
What are the most significant new employment laws taking effect in 2016?

MINKOW: While the legislature was pretty quiet last year, there are a few significant changes for 2016. Here are my “top five.”

First, the amendment to the Equal Pay Act makes it easier for employees to challenge pay disparities based on gender. As a result, employers must make an extra effort to properly document all pay differences and the legitimate reasons for those differences.

ROSENBERG: My top four: (1) California employers should consult with their counsel to determine if their wages to ensure it meets or exceeds $10.00 an hour. This requires employers to, among other things, reexamine their exempt and inside salespersons. The City of Los Angeles also established its own minimum wage and prevailing wage notice, recordkeeping and penalties for noncompliance. Assembly Bill 1513 adds new rules for employers who pay by piece rate. These complicated calculation rules will create headaches for payroll personnel. Furthermore, the state passed the California Fair Pay Act, which is expected to result in claims by employees who feel they are not paid the same as their female/male counterparts. This law eliminates the requirement that the pay difference be within the same establishment) and eliminates use of the terms “equal work” for “equal skill, effort and responsibility.”

NEBENS: California now has one of the strongest equal pay laws in the USA: California Fair Pay Act SB 5-58. There is a bigger burden on the employer for sex discrimination. This law broadens current laws by prohibiting employers from paying employees of the opposite sex differently for jobs that are in a similar light, even if employee titles are different or they work at different locations. For example, a female maid that cleans hotel rooms should be paid the same as a male janitor that cleans the same hotel’s public areas.

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

NEBENS: The new minimum wage rate change affects the classification of employees as exempt or nonexempt. To qualify for an overtime exemption, in addition to all the other legal requirements, an employee must earn a minimum monthly salary no less than $80 per month. California’s minimum wage for full-time employees in the state’s labor regulations. One the biggest changes to the state’s labor regulations. One the biggest changes to the state’s labor regulations. One the biggest changes to the state’s labor regulations.

BENDAVID: Vigorous enforcement of labor law scofflaws and even more job protections. The prevailing view in Sacramento is that too many scofflaws and even more job protections. The focus of these seminars is always litigation prevention. By attending regular training sessions, employers and management can learn best practices in handling a variety of issues that could lead to litigation if handled poorly. We find that most employers intend to comply with the law and mistakes are made simply when the decision makers are unaware of the applicable regulation or requirement, or they are relying on an outdated personnel manual without any guidance from counsel. Indeed, many of these seminars are free for employers.

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

NEBENS: A great way for employers to stay on top of trends and regulations is to partner with a professional services team. A shameless plug, but our experience has been that many organizations invest a significant amount of time and money in providing semi- nars and training regarding employment law compliance. The focus of these seminars is always litigation prevention. By attending regular training sessions, employers and management can learn best practices in handling a variety of issues that could lead to litigation if handled poorly. We find that most employers intend to comply with the law and mistakes are made simply when the decision makers are unaware of the applicable regulation or requirement, or they are relying on an outdated personnel manual without any guidance from counsel. Indeed, many of these seminars are free for employers.

How important is sensitivity training in the workplace - and should it be something for management or for all employees?

NEBENS: According to the EEOC, retaliation litigation is on the rise. Additionally, we anticipate more discrimination and harassment claims stemming from the recent shootings in Paris and San Bernardino, and political comments...
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about those of the Muslim faith. We also antici-
pate increased focus on transgender employees
either by those who are transitioning or self-
identifying with a gender opposite the one they
were born with. Generational clashes between
Boomers, Gen-Xers and Millennials also compli-
cate how employers handle employee disputes.

It’s the employer’s responsibility to provide a
safe work environment. Now more than ever
employers need to be proactive and provide
management training to ensure employees are
not mistreated and so that employees under-
stand they must act respectfully to others, even
if they are different from themselves.

ROSENBERG: In my opinion, it’s vital for any
business seriously interested in lawsuit avoid-
ance and morale building, and should be done
throughout the organization. Experience shows
that a great many employee lawsuits begin with
employees believing that management supports
(or at least tolerate) behavior they view as dis-
criminatory or hostile towards them on account
of a legally protected characteristic such as their
race, gender, religion, sexual orientation or
ancestry, to name a few. Letting everyone know
exactly where the company stands on these
issues and then proactively managing com-
plaints whenever they arise is the most effective
insurance policy to keep the company out of
court.

◆ How has the sexual harassment train-
mandate worked in your experience,
and how will it change with the new
requirement to include the topics of abuse
and bullying?

LIGHT: I’ve conducted hundreds of these train-
ings and overall I think they help, but it’s not
the end-all. Regular follow-up by management and
promotion, by example, reinforces the points raised.
We’ve been including a bullying component for
years because it clearly affects relationships
in the workplace and often such conduct is based
on a protected category such as sex/gender. So
there shouldn’t be much change in the overall
message because, whether it’s harassment or
bullying, it’s all based on the concept that
someone is abusing their power in the work-
place.

ROSENBERG: It’s hard to accurately measure the
effect. Like so many HR issues, success in this
endeavor is measured by the absence of some-
thing bad happening. I can tell you this: I have
trained thousands of managers and the aware-
ness level is much higher in 2016 than even just
five years ago. So, to the extent that these
educated managers change their behavior, then
I have to think that the law is doing exactly
what the lawmakers intended in terms of pro-
viding a greater percentage of the State’s work-
ers with a harassment free work environment. I
suspect that the same thing will happen
with workplace bullying now that this impor-
tant subject is part of the training dialog for
larger companies (50+ employees). This is terri-
ably important because numerous studies have
shown that abusive work environments can
have serious effects on targeted employees and
drive up workers compensation and other
costs.

MINKOW: The new training mandate regarding
abusive conduct has not significantly impacted
or changed an employer’s obligations to provide
mandatory sexual harassment training to super-
visors every two years. We have found that most
training providers have modified their programs
to include information regarding abusive con-
duct and the definitions set forth in the statute.
However, employers should certainly ask the
question to ensure that their training provider’s mate-
rials are current with the new mandate.

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

ROSENBERG: It starts with education about what
is a very complex and emotionally charged topic.
And, dialogue with employers in that communi-
ty to understand their needs and concerns. This
reminds me of the discussions when the AIDS
epidemic first hit and most employers didn’t
have a clue how they were supposed to handle
the matter. Many acted out of fear and igno-
rance. The LBGT community, and the transgen-
der community in particular, has seen a tremen-
dous boost in awareness with the media atten-
tion given to the subject in the past two years.
Employers are going to have to proactively
engage this issue as they would any other diversi-
ity matter. The most immediate issues are likely
to be co-worker harassment and facilities usage.

BENDAVID: The FEHA protects employees from
discrimination based on, among other things,
sex, gender, gender identity and gender expres-
sion. Accommodating transgender employees
creates a new challenge for employers.

Transgender employees are expected to be treat-
ed according to the gender s/he identifies with;
not the one s/he is born with. This creates a
conflict when non-transgender workers don’t
want to share a locker room or restroom with cowork-
ers who are currently transitioning. Employers
are expected to make “reasonable” accommoda-
tions. If converting a bathroom into a “unisex”
bathroom is achievable, the employer should
take that action. Employers should maintain an
ongoing dialogue with the individual to ensure the
employee’s reasonable needs are met, pro-
voked they will not result in undue hardship.

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

MINKOW: At this point, the employee handbook
is here to stay, whether it is in paper form or elec-
tronic form. It is vital for employers to make sure
policies and procedures are in place and distrib-
uted to employees. In fact, when we defend litiga-
tion, the first place we look is to the handbook as
it sets the foundation for the company’s practices.
Moreover, many states have stated that a legal
requirement so keeping everything in a handbook is an easy way to remain compliant.

NEBENS: There is no downside to maintaining
an employee handbook. In fact, keeping your
handbook and policies current can be a great way to stay up-to-date on new and
upcoming state and federal requirements. There is no downside to maintaining an employee handbook. In fact, keeping your
handbook and policies current can be a great way to stay up-to-date on new and
upcoming state and federal requirements. You learn as you
revise, and a good handbook ensures there are no “gray areas” for employees. Employers
should also feel free to ditch their old hand-
books and upgrade to a digital version that
employees can access from their computers and
smartphones. Employers will be more likely to
take advantage of an interactive or searchable
digital handbook that they can pull up at their
convenience rather than a chunky binder that

Eventually, everything is going to be electronic.
Handbooks and policies need to be kept up to date
as laws change. The handbook is a tool employers can use to help
defeat employee claims for missed meal and rest breaks, harassment, discrimination, etc. ’

CARRIE NEBENS

In light of recent events in San Bernardino and a Planned Parenthood clinic in Colorado, what can employers do
to keep their employees safer?

BENDAVID: Violence in the workplace can origi-
nate from many sources, including employees; clients; clients with political agendas; rob-
bers; and abusive friends, relatives or acquain-
tances of employees. Employers should review their security measures. Employers
are concerned about a disgruntled terminated
employee, the employer should take steps to
prevent people by changing policies to protect
employees. Employers should consider LEGAL background checks
there are significant laws on this topic. If there is
a potentially violent situation, the employer
can seek a temporary restraining order, consider
engaging security guards and notify the local
authorities (police) so they are put on notice.
Also, train management to recognize and stop
harassment, bullying and discrimination.

ROSENBERG: Every employer ought to consider
adopting a formal workplace violence preven-
tion plan containing 5 key components: (1) a
workplace violence policy; (2) crisis manage-
tment team; (3) supervisor training in cus-
tomer/client/vendor compliance; and (5) an
“Active Violence” plan. Sadly, after virtually
all of these unfortunate incidents, employers
come forward to say that they saw something,
but didn’t put the pieces together. A coordinated approach can save lives. Consult
with your labor attorney about finding the resources to develop your program.

To almost every lawsuit we defend, we rely on a company’s
policies in an effort to demonstrate compliance with the
laws. The handbook is a tool employers can use to help
defeat employee claims for missed meal and rest breaks, harassment, discrimination, etc. ’

SUE M. BENDAVID

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Have employees sign arbitration agreements that prevent them from participating in class action lawsuits. Those clauses are still enforceable and federal law keeps pushing back on California’s efforts to eliminate them. JONATHAN FRASER LIGHT

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?

NEBENS: The Family School Partnership Act SB 579 was amended to expand the reasons why an employer can leave to attend to a child in school. The law now includes leave for school and childcare provider emergencies, including closures, natural disasters, behavioral/discipline problems, and requests that the child be picked up from school. It also includes leave for finding, enrolling, or reenrolling a child in school or with a licensed childcare provider. The law now better coordinates with California’s paid sick leave law. Employers are now prohibited from discharging or discriminating against employees for taking off up to 40 hours per year to engage in these child-related activities.

How will the Browning-Ferris decision affect staffing agencies?

NEBENS: Many staffing agencies will need to step up. People expect that staffing agencies are going to do the right thing, as compliance will be monitored at a higher level. Staffing agencies need to confirm that their employees are protected and ensure they are in compliance with all state and federal regulations, including the ACA. Employers in California also need to adhere to the Healthy Workplaces, Healthy Families Act of 2012. Staffing agencies are now going to be paid sick leave after working in California for 30 or more days within a year.

The decision states that two or more employers are joint employers if they share the ability to control the employees’ day-to-day activities, including their work environment as far as harassment situations are concerned. This can occur when an employee is being monitored at a higher level. Staffing agencies no longer can successfully point to the staffing agency as the sole employer. The group of entities are now going to be tagged as a joint employer in most situations, so that decision shouldn’t have a large impact on them. It’s their clients who will now have a tougher time claiming that they aren’t a joint employer; they no longer can successfully point to the staffing agency as the sole employer.

With the NLRB continuing to prosecute employers who have employees sign mandatory arbitration agreements, what should an employer do?

ROSENBERG: This is a huge problem and there is no good answer. When there is a federal agency (the NLRB) pushing its own enforcement agenda in the face of federal court decisions saying they are dead wrong, so employers with mandatory arbitration agreements have two Faustian choices: either abandon the practice altogether or face the consequences of federal court actions. Whether or not the NLRA is upheld in Congress, employers and staffing agencies are still in a better position to push for arbitration agreements than when the Browning-Ferris decision came down.

When should employers make accommodations?

BENDAVID: Employers are obligated to provide “reasonable accommodations” in a variety of situations. This can occur when an employee is disabled, pregnant, or has a religious practice that needs accommodating. Another type of accommodation is providing a private room for employees who need to pump breast milk at work. Employers should conduct “interactive dialogues” with employees when these situations arise, to discuss what accommodations the employees are seeking, whether those accommodations are reasonable and whether the accommodations can be provided or will result in undue hardship for the employer. Reasonable accommodations that do not result in undue hardship to the employer (which defense carries a high burden of proof) should be made to avoid discrimination claims. These rules come into play under the Americans with Disabilities Act, the Fair Employment and Housing Act (FEHA), Title VII of the Civil Rights Act of 1964, the Pregnancy Disability rules and others. Some of these can apply to not only employees, but others as well. An employee or applicant may need an accommodation in order to fill out the job application. This has been the rule that applicants have used to gain an equal opportunity to participate in the application process.
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What are the implications of SB 358, the California Fair Pay Act, which prohibits an employer from paying an employee a wage rate less than that paid to employees of the opposite sex for doing substantially similar work?

ROSENBERG: The new law places the burden squarely on the backs of employers to prove that a wage difference between substantially similar jobs is not due to gender. The only way to legally justify a wage differential is to prove it is based upon a seniority or merit system, a system which measures earnings by quantity or quality of production or a “bona fide factor other than sex, such as education, training or experience.” Employers need to know that a deep dive will be made into any employer claim that the wage difference is justified by “the market” or linked to the prior earnings history of the comparator because the legislature believed that the market may be inherently biased. Among the very common sense questions employers are asking: (1) How can I be sure that different jobs (at different locations) won’t be deemed “substantially similar” enough to require equal pay? (2) Can a company still safely pay a new hire for the market or what a new hire was earning in a previous position? And, (3) what does it take for an employer to justify a pay difference under the guise of it being “job related” and “consistent with business necessity?” The legal framework is fraught with ambiguity and a veritable tsunami of new equal pay litigation is expected to take effect in or around July 2016. If the new legal framework is fraught with ambiguity, a non-exempt employee at a wage rate less than that paid to employees of the opposite sex for doing substantially similar work may not be recoverable later in a lawsuit.

If a business has misclassified some of its employees as exempt salaried workers, how can that company fix the situation without buying a lawsuit?

LIGHT: It’s problematic. There is no easy answer. Some clients just pay and move on. Others make clear that it’s too much money and they can’t pay. Options then are to bury the change in other actions such as: It’s a new year and new policies; your job description is changing; we have a new handbook and new policies; hey, now you get overtime; the lawyers made us do it. Also, when setting an hourly rate, don’t lower the hourly rate from their existing salary in order to absorb the expected overtime. Employers really hate that and you’re buying a claim in that situation. Try to manage the over-time and slow play bonuses and raise to absorb the extra expense.

MINKOW: When employees are misclassified, the exposure is typically under overtime and provisions for missed meal periods and rest breaks. Fixing this problem and minimizing litigation risk is difficult, unless the employer makes the employee “whole” with regard to the unpaid wages. To do this, we recommend the employer estimate the actual overtime and penalties owed to the affected employee and cut them a check. Obtaining a release in connection with this payment is also advised and the parties must acknowledge in that release that a good faith dispute exists with regard to the unpaid wages. Without this language, there is a risk the release could be invalid as releasing wages that are owed to an employee is generally a violation of public policy. Simply changing the employee’s status to non-exempt, without any explanation or pay, can be risky.

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

BENDAVID: The terms “employee” and “independent contractor” are very two distinct concepts. If a worker, engaged as an independent contractor, the company retaining the contractor should ensure its contract clearly confirms the contractor status. It should include defense, indemnification and hold harmless provisions, among other terms. Caution should be used when it comes to “work made for hire” provisions. Including those that might result in a finding that the contractor was actually an employee (see, e.g., Labor Code Sections 3351.1(c), 686 and 621(d). The EDD states that, in some cases, including a work made for hire provision in a contract can create a statutory employee.

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

LIGHT: Failure of supervisors (who aren’t trained properly) to identify meal and rest break rules, pay stubs missing one or more of the nine pieces of information required; Off the clock work such as travel time or work during end-of-day work (e.g., putting on multiple pieces of clothing or equipment); failure to reimburse for personal equipment use (e.g., cell phones); improper time card rounding practices; improper classification of supervisors as exempt from overtime (e.g., fast food “front of house” employees); a poorly drafted arbitration agreement can cut down on the exposure by eliminating class action—but not PAGA claims that carry a one-year statute of limitations. Still, that’s better than four years in class action.

BENDAVID: Employers are most likely to violate wage and hour laws due to lack of knowledge, rather than conscious efforts to game the system. It gets complicated considering different city ordinances affecting compensation. For example, some San Fernando Valley employers may not realize they must comply with City of Los Angeles minimum wage standards, which increases to $10.50 per hour on July 1, 2016 or 2017, depending on company size. Also remember that minimum thresholds for exempt employees increased, and may rise significantly at the federal level shortly. Add the complications of meal and rest breaks, which spur more claims, notwithstanding the favorable Brinker ruling which held that employers need not play “meal police.” Questions debating whether employees didn’t take breaks and whether employer practices caused them to be denied breaks are making the rounds in Courts. Additionally, employers should be very careful regarding the reimbursement of employee expenses, ensuring leave is administered properly, and that employers and independent contractors are properly classified.

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

LIGHT: It depends on what the goal is. PTO is much less labor intensive because an employer doesn’t have to track the basis for the absence and there’s only one category to track. If you don’t want to pay out sick time at departure you don’t have to, but if it’s lumped in with vacation as PTO, then of course it all must be paid. So, bottom line, is it convenience or expense that you are concerned about?

ROSENBERG: Under the new paid sick leave law, the usage rules only apply to actual paid sick days. That’s a good reason to segregate them from PTO. Otherwise, all of the company’s PTO benefits will be subject to the same law.Additional considerations include the sick pay penalties for late payment. In contrast, accrued sick pay does not have to be paid out when the employee leaves the employment. This is yet another reason to separate the sick pay benefits from other PTO.

How meaningful are online photos of people when it comes to the hiring process?

NEBENS: Photos are usually one of the first things that pop up when an employer searches for a prospective employee online. Online screening can be a great way to quickly gather additional information from an applicant that isn’t available in their normal application materials. A candidate’s activity online can be a great way to identify their involvement in their industry and get a glimpse at their work attitude or their expertise. However, it’s important to note that online photos and videos might not convey sensitive or discriminatory information, such as age, race, religion, marital status, etc. It is important
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not to misuse the information you glean from an applicant’s online presence. Online searches can be a great tool for gaining insights about applicants, but proceed carefully.

◆ What are your thoughts on AB 1017, which proposed that employers may not request compensation history from applicants?

LIGHT: It was vetoed, so that’s good news. Compensation history is relevant to the hiring process but it wouldn’t be fatal for employers not to have that information. "Salary requirements" do help weed out candidates who may not fit the budget, but you’ll learn that soon enough when your offer is rejected. Still, would be useful to have that information at the front end and hopefully we won’t see that bill resurface.

ROSENBERG: If AB 1017 had passed, it would have outlawed the practice of asking a job applicant for their salary history and prohibited employers from pegging an applicant’s salary offer to what he or she made in their last position(s). Proponents of gender pay equity argue that the law was necessary because the market is rigged against women and that setting wages to past salary simply locks in the previous pay inequity. The other side argues that ignoring compensation history is relevant to the hiring process but it wouldn’t be fatal for employers not to have that information at the front end and hopefully we won’t see that bill resurface.

BENDAVID: Generally, if an employer has a complete bar on hiring applicants with criminal records, the employer may be accused of discrimination. Caution should be used to ensure that the conviction is related to the job for which the applicant is seeking to be hired. For example, a driving under the influence conviction may be a bar to hiring for a driving position.

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

MINKOW: There are many issues an employer should consider prior to terminating an employee. First, employer must make sure that employees are paid all wages due and owing at the time of termination, including all accrued and unused vacation. Believe it or not, many employers overlook this basic requirement. Employers should also ensure that all employment-related decisions are based on legitimate, non-discriminatory reasons and have appropriate documentation to support such decisions should they be challenged. Second, all decisions should be made consistently. For example, if a company decides to terminate an employee for excessive absences, the decision makers should feel confident the attendance policy is applied consistently to all employees, otherwise the affected employee might claim he or she was singled out for some discriminatory reason. If the layoff or termination may expose the company to some risk, the employer might consider obtaining a valid release in exchange for some amount of severance from a departing employee.

LIGHT: An age discrimination claim is the most common result of a layoff or reduction in force. Employers should conduct a census of the “before and after” of their workforce composition to determine if they have too many older workers in the layoff group (or workers in other protected categories). Adjustments may need to be made as a result. Also, don’t overlook that employers may lay off employees on leave if handled properly. Those employees aren’t immune from layoff just because of that status. Document the legitimate business reasons for all layoff decisions. You may need that later to defend a claim.

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

ROSENBERG: Yes, but employers have to use extreme caution whenever inquiring into criminal background. California law prohibits employers from asking about (or using) arrest and certain conviction records when evaluating job applicants. Employers must know these rules and scrub employment application forms for prohibited inquiries. The simple question found on many job application forms, “Have you ever been convicted of a crime?” is illegal in California. Further, EEOC has stated that a ban on the hiring all convicted criminals is illegal. Rather, EEOC demands a more nuanced process that requires an employer to show that there is a real connection between the criminal offense and the applicant’s intended job duties. Finally, the answer may very well depend on which city the employee will be working in or the type of job. Several municipalities have passed their own restrictive ordinances on the subject. On the other hand, certain jobs like law enforcement, teachers, nurses, and those involving minors or the mentally impaired may mandate extensive criminal background checks.

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