As the legal landscape continues to evolve in terms of labor and employment, the San Fernando Valley Business Journal turned to some of the leading employment attorneys in the Valley 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 law in 2015 – from the perspectives of those in the trenches of our region today.
What are the most significant new employment laws taking effect in 2015?

MINKOW: The most significant change for 2015 that affects every employer is the mandatory paid sick leave requirement. This new law requires every company to analyze their existing sick leave and/or PTO policies to ascertain compliance. Most companies will need to revise their employee handbook and some may have to implement new leave policies where none previously existed. Also, FEHA’s expansion to unpaid interns, volunteers, and individuals in apprenticeship training programs should not be ignored. Employers should be aware of this new law and take all reasonable steps necessary to prevent harassment and discrimination from taking place.

ROSENBERG: My top six new California labor laws are: (1) A new law requires almost every employer (regardless of size) to provide a paid sick leave benefit which accrues at the rate of 1 hour for every 30 hours worked. That law also mandates a detailed accounting of sick leave balances each pay period. (2) The extension of harassment and discrimination protections to unpaid interns, volunteers, and individuals in apprenticeship training programs should not be ignored. (3) Employers who use a temp agency to supplement their employees are now liable to these workers for the any leave requirement. This new law requires every company to analyze their existing sick leave and/or PTO policies to ascertain compliance.

What can employers expect from the California legislature this year?

ROSENBERG: Much more of the same. The prevailing view is that employers need to be reined in for engaging in business practices designed to deny employees the protections of the state’s labor regulations. One of the biggest abuses is the use of workers denominated as independent contractors doing jobs that used to be done by employees. These laws (and lawsuits) are aimed at insuring that only truly independent business people can be legitimately claimed as an independent contractor. All the rest must be treated as employees with all of the tax and insurance burdens that flow from the employment relationship. Also, companies with questionable business practices can be held liable as well. (6) Stiff new penalties for employers (and perhaps its owners as well). The fact that an entire industry does something is no defense whatsoever.

What will the new paid sick leave law impact employers?

GABLER: Apart from the cost of providing paid sick leave to all employees, and the legal fees involved in creating compliant sick leave policies, the most significant concern for employers regarding the new paid sick leave law is the state’s growing tendency to insert itself into the employment relationship. When our legislature mandates the availability of employee benefits, the employer’s ability to negotiate with its employees is substantially diminished. Employers cannot increase wages in lieu of additional benefits, or use the lack of paid time off to encourage consistent attendance. The employer’s ability to demand doctor’s notes from absentee employees is also in question under the new law’s mandate to refrain from retaliating against an employee for using paid sick time. Legislation of this nature also makes it increasingly difficult for us to attract and retain businesses, adversely impacting our economy and ultimately, reducing available jobs for the very employees our legislature seeks to protect.

MINKOW: For companies that already provide sufficient sick leave or paid time off, the new law will have a minimal impact and may only require some policy revisions and reevaluation of the accrual and carryover requirements. However, many small businesses do not provide paid sick leave to their employees so these companies must now implement a new policy that complies with the law. Failure to do so may give rise to litigation that could be extremely detrimental to these small businesses.

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GABLER: Growing businesses focus heavily upon “outside factors” – budget, sales, production – while neglecting intangible “internal factors” – quality hiring, legal compliance, insurance, workplace culture. Revise employee policies for continued compliance with increased employee ranks.

Karen L. Gabler

Nicole G. Minkow

Growing businesses focus heavily upon “outside factors” – budget, sales, production – while neglecting intangible “internal factors” – quality hiring, legal compliance, insurance, workplace culture. Revise employee policies for continued compliance with increased employee ranks.
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The most common mistake a growing business makes is not implementing policies and procedures from the start. We see many growing companies that do not have an employee handbook or any other policies giving rise to exposure on meal and break and harassment claims, amongst others.

NICOLE G. MINKOW

How serious a legal issue is social media in the workplace?

ROSENBERG: How serious a legal issue is social media in the workplace?

very termination review discussion is “will the employee be surprised?” If yes, then the potential for a legal claim is greatly increased. Also, scrub the employee’s file to see whether it tells the same story you are. If not, you are exposed. A well-documented file is worth its weight in gold when fighting an employee claim or trying to convince an inquiring lawyer not to turn down your former employee’s case. Also, verify that no one in management asked the employee to do something illegal or over up for management’s doing so. That’s a recipe for an expensive lawsuit.

GABLER: Employers must be able to justify the legitimate business reasons for the decision – then, actually justify it with written documentation. 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? Failing back on “at will employment” is not enough – failing to provide the reason for the separation from employment allows the employee to fill in that blank with an unlawful reason, creating legal risk and cost for the employer.

MINKOW: There are many issues an employer should consider prior to terminating an employee. First, employers should base all employment-related decisions 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. Third, employers might consider obtaining a valid release in exchange for some amount of severance from a departing employee when there is a risk of a possible legal challenge to the termination. Fourth, companies in the process of conducting a “mass layoff” must keep in mind the California and Federal WARN notice requirements.

Should employers be considering any changes to their email/electronic communications policies following the recent NLRB ruling allowing employees to use their employer’s email system for union organizing purposes?

ROSENBERG: Yes! The NLRB ruled that employees have a presumptive legal right to use the company email system to communicate about union organizing or to engage in other so-called “protected activities” on the employee’s non-working time (i.e., lunch and rest breaks, before/after work). Decades of NLRB legal precedent make clear that the term “protected activity” broadly extends to grousing about wages, hours and working conditions, including saying uncompromising things about the company and it’s management. Most computer access policies don’t comport with the ruling because they either contain a blanket prohibition on employee use of company email for non-business messages or limit personal use based upon content without taking the NLRB rules into account. Employers need to update their policies to provide that employees are permitted to send non-business email during their non-working time or to engage in other legally protected activities. To be sure you get it right, employers must consult with a specialist with extensive NLRB experience.

With California law now requiring employers to add “abusive conduct” training to their mandatory sex harassment training, how serious a legal issue is “abusive conduct” in the workplace?

MINKOW: This new training requirement does not significantly change the employer’s obligations. Indeed, abusive conduct, at this point, is technically not a violation of the Fair Employment and Housing Act. However, repeated abusive conduct often lays the foundation for harassment. Thus, when abusive con-
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duct remains unchecked, illegal harassment can develop, exposing the company to liability. Hopefully this new training requirement will heighten employees’ sensitivities to conduct that may create an illegal-hostile working environment and reduce the employers’ risk.

**ROSENBERG:** According to the author of the bill, numerous studies have shown that abusive work environments can have serious effects on targeted employees, including feelings of shame and humiliation, stress, loss of sleep, severe anxiety, depression and many other stress-related disorders and diseases. Workplace bullying is not just an employee issue. Abusive work environments can reduce productivity and morale, which may lead to higher absenteeism rates, frequent turnover, and even increases in medical and workers’ compensation claims. While current job bias laws already protect employees from abusive treatment at work on the basis of race, color, sex, national origin, age, sexual orientation, gender identity and the like, “bullying” does not always qualify under any of these categories, leaving targeted workers vulnerable.

The new law aims to hopefully reduce the incidence of workplace bullying by requiring larger companies (50+ employees) to include training and education about “abusive conduct” when doing their mandatory sexual harassment training.

**GABLER:** Abusive conduct in the workplace represents a new and dangerous frontier of potential employer liability. “Abusive conduct” is a largely undefined employment concept, and employers can expect increased claims of workplace stress, discrimination and harassment based merely upon employee complaints that supervisors or co-workers are being “mean.” Nevertheless, there is no question that abusive conduct at work is detrimental to employers and employees alike. In addition to potential litigation, workplace bullying decreases productivity and increases costly turnover. To demonstrate a commitment to professionalism and courtesy in the workplace, employers should develop stringent policies on abusive conduct, bullying, gossip, and professionalism, and promptly discipline offenders for poor behavior as soon as it arises, without overanalyzing whether it is “unlawful.” Employer policies, documentation, discipline and training on abusive conduct at work will set the tone for a positive and professional workplace culture, benefiting the company overall as well as protecting from potential liability.

**Domestic violence has been in the news a lot lately. Does the law impose any requirements on employers who employ someone who is a domestic violence victim?**

**ROSENBERG:** Yes. Employers must afford victims of domestic violence or sexual assault support and time off as required by law. In companies with 25+ employees, the employer may not discharge, discriminate against or retaliate against a domestic violence or sexual assault victim for taking time off from work: (1) to seek medical attention for injuries; (2) to obtain services from a domestic violence shelter, program or rape crisis center; (3) to obtain psychological counseling; (4) to participate in safety planning; or (5) take other actions to increase safety from future domestic...
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RICHARD S. ROSENBERG

Employers often fail to provide all available leaves of absence, and to proactively and fully inform employees about leave terms. Employers faced with a potential leave of absence should first consider whether there is an available statutory leave.

KAREN L. GABLER

◆ What is one of the most important things employers should do to prevent a lawsuit from occurring?

GABLER: Document, document, document! Effective documentation provides clear information to both employers and employees about expectations, rights, obligations and status. It avoids the misunderstandings and workplace conflict, which form the basis of the sweeping majority of legal disputes. It firmly establishes the legitimate business reasons for the employer’s decisions, countering claims of discrimination, retaliation, and more. In a lawsuit where employer and employee disagree about past events, there are only two ways to prove the employer’s position: (1) put the employer’s witnesses on the stand and hope the finder of fact believes their testimony; or (2) present “the file” with clear, contemporaneous documentation of what happened and why. Ask your employment law counsel to create or review documentation of particularly thorny or hotly disputed issues. Dated and signed documentation of decisions and events is always a better bet than banking on the performance of individual witnesses in an employment dispute.

ROSENBERG: At the front end, you must hire the right people. Doing so is complicated because of all the restrictions placed upon employers in terms of the information you can ask for in an interview or job application, or even what you can look at when doing a pre-hire background check. For risk management purposes, you MUST familiarize your self with the labor law do’s and don’ts of interviewing and hiring and understand which labor laws trump common employer policies. For example, the retailer Abercrombie and Fitch just found out the hard way when they lost a hiring case at the U.S. Supreme Court over their failure to hire a female job applicant that interviewed wearing a hijab head scarf. The retailer had “look” policy designed to insure that all employees project a certain image and didn’t hire the applicant because she evidently didn’t fit that “look.” The Supreme Court ruled that employers must accommodate employee religious beliefs and that employer policies on appearance and dress must give way to the religious needs of the worker. The same is true with all of the publicity lately involving former Olympic champion Bruce Jenner’s transition. These issues are complex and hiring managers must know how to handle them.

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

GABLER: A blanket prohibition against applicants with criminal records is unlawful discrimination. Employers may consider felony convictions only to the extent that the conviction is reasonably related to the job position, among other factors. For instance, applicants with felony child abuse convictions could be rejected for a preschool position, and applicants with felony embezzlement convictions could be rejected for an accounting position. On the other hand, applicants with felony DUI convictions could not be rejected for a job that does not involve driving. Application questions regarding convictions must include a variety of disclaimers, and the potential for discrimination claims is high. Employers should consider eliminating the “conviction question” from applications and interviews, and instead make job offers contingent upon passing a background check. If a conviction appears, 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.

ROSENBERG: 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 recently issued an enforcement guidance on the subject that prohibits an outright ban on the hiring all convicted criminals in favor of a more nuanced process, which requires an employer to evaluate the criminal offense against the job duties. EEOC requires employers 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 a minor or the mentally impaired may mandate extensive criminal background checks.

◆ What are some of the most common Leave of Absence related mistakes that employers make?

MINNOW: The most common leave-related mistake is failing to provide unpaid time off as a reasonable accommodation to a disabled employee who is unable to return to work after the expiration of his or her protected leave under the FMLA and/or CFRA. Both California’s Fair Employment and Housing Act and the Americans With Disabilities Act require employers to provide a reasonable accommodation to a disabled employee, unless such accommodation would pose an undue hardship upon the employer. The cases confirm that a leave of absence is a reasonable accommodation under the law. Implementing a hard and fast cap on the length of that leave (i.e. maximum of 6 months beyond FMLA exhaustion) is also a grave mistake as each employee’s situation must be analyzed on a case-by-case basis.

GABLER: Employers often fail to provide all available leaves of absence, and to proactively and fully inform employees about leave terms. Employers faced with a potential leave of absence should first consider whether there is an available statutory leave. If not, or if that leave has been exhausted, state and federal law require employers to engage in an interactive discussion with the employee to review the viability of further reasonable accommodations. At the outset and continuously throughout the leave period, employers should fully inform the employee in separate writings (not merely in the handbook) about how long the employee is entitled to be on leave, whether the employee will receive pay or benefits from the employer or any other source, what documentation the employee has to submit (and when), and whether the employee is guaranteed reinstatement. Regular communication can avoid misunderstandings, incorrect assumptions and unnecessary stress for both employee and employer.

ROSENBERG: Most of these lawsuits issues arise from a lack of education on the employer’s part about: (1) which absences are legally protected; (2) how much time off the law affords to employees; and (3) how absence requests must be handled. The law gives employers latitude to be absent or tardy and it’s illegal for employers or co-workers to give them a hard time for it, or worse yet, discipline employees for having used legally protected time off. Doing so gives rise to expensive claims that the employer unlawfully “interfered” with the employee’s rights or discriminated against the employee. These laws also require employers to communicate these legal rights in writing via a workplace poster and in the employee handbook. Most handbooks we review are legally deficient in this respect. For risk management, we urge employers to: (1) be sure time off policies are legal; (2) post the posters; and (3) train management on these complex rules.

◆ What are your clients most worried about in terms of labor laws today?

GABLER: The most significant source of stress for our employment clients remains the never-ending stream
of employment laws placing ever-increasing burdens upon California employers, and the legislature’s growing tendency to insert itself into the employment relationship. The average employer focused on keeping a business afloat cannot reasonably track, implement and document its compliance with thousands of employment laws and cases in a cost-effective manner. Employers who make every effort to treat their employees fairly often find that “no good deed goes unpunished,” with minor mistakes and hidden “gotchas” in the law leading to unreasonably excessive liability. Statutory attorney fee awards in employment cases effectively bully employers into settling frivolous cases filed by under-performing employees, at great cost to the company. A significant percentage of the work we do with our clients today is focused on proactive strategies designed to enhance employee productivity and morale while protecting the business from often-missed legal nuances or baseless legal claims.

MINKOW: Most companies are simply worried with “getting it right.” There are so many rules and regulations to keep track of, especially with regard to wage and hour issues. This is one area where even the good-intentioned company can make an honest mistake, leading to significant exposure. This is why having the employee handbook reviewed regularly by competent counsel is key. Also, consistent enforcement of these policies is necessary.

◆ What are the biggest off balance sheet liabilities employers face?

ROSENBERG: My top three are: (1) non-compliance with wage-hour laws and worker misclassification as independent contractors; (2) the employment of unauthorized workers; and (3) absolute corporate liability for the errant behavior of its people managers for acts of workplace harassment, discrimination and retaliation. None of these are obvious, yet each poses a huge threat to the company’s bottom line. And, the first two items are uninsurable. With six and even seven figure jury awards and agency prosecutions becoming commonplace, employers must do three things right away. First, audit compliance and come up with a plan to address any deficiencies. Second, train all managers on the rules of the road for hiring and how to properly fill out the mandatory Form I-9. Third, train all levels of supervision about the many rules governing their behavior toward job applicants and employees, emphasizing their role and responsibility in regard to the company’s labor law compliance.

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

GABLER: To be truly effective, it is not enough to be an employment law expert or to provide quality legal advice (although both are critical). Business owners should want and expect their employment law counsel to be an external team member of the organization, working closely with management to develop the most productive and efficient workforce as well as protecting against legal violations and resolving employee disputes. Our firm provides twice-monthly complimentary seminars to give our clients and
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human resource professionals the basic tools necessary to address their most common questions without increasing legal fees. By actively investing our own time and resources into our clients’ businesses, we gain a deeper understanding of how we can best serve their needs when thornier issues arise, and we can share in the joy of their successes as much as we do our own.

• What do businesses need to know about finding, interviewing and hiring the very best attorney for their specific needs?

MINKOW: There are so many experienced and qualified attorneys in the Los Angeles area that finding the right one can be a daunting task. Look for attorneys that are experienced in the practice area but also take the time to learn about your company and your business. Employment law advice is not always a “one size fits all” solution. Each business is different and your attorney should appreciate the nuances of your company and your industry. Look for attorneys who conduct regular training seminars, as they are also typically known in the industry. Our clients like the personal attention they receive, as they feel like their issues are our top priority. The bottom line is that a company needs to trust their counsel.

ROSENBERG: The foundation of course is experience and expertise. Your lawyer must know the law. But, that’s only the start. There is no substitute for having extensive experience risk managing thousands of proposed personnel decisions and litigating these disputes in front of a jury. Clients pay us to be able to anticipate what’s going to happen. Also, look for subject matter experience. Labor unions, wage hour law, whistleblower cases, trade secret protection. These are complex and ever evolving areas of the law. In my opinion, you need to partner with a team of labor law experts (better yet industry experts) with a proven track record of success to provide the necessary guidance. Finally, you need someone who knows how to use the law to get what you want done. Too many lawyers spend their time telling you what you can’t do instead of coming up with creative solutions to meet your objectives.

GABLER: The most common mistake in retaining counsel to handle employment issues is choosing an attorney who specializes in business or general litigation instead of an employment law expert. Obtaining quality employment law advice depends upon retaining a quality attorney well versed in thousands of employment law statutes and cases, with substantial experience “in the trenches” of employer-employee interactions. In addition to researching the experience, skill and references of potential employment counsel, business owners should consider whether the attorney is creative and proactive, rather than merely adversarial and reactive. The best attorney will work with you to develop a risk management and problem-solving strategy that best serves your business – not the law firm’s business – taking into account your workplace culture and business goals. Look for the attorney who not only knows the law, but who can also provide effective, creative and thoughtful ways to integrate legal compliance into your business operations in a cost-effective manner.

‘At the front end, you must hire the right people. Doing so is complicated because of all the restrictions placed upon employers in terms of the information you can ask for in an interview or job application, or even what you can look at when doing a pre-hire background check.’

RICHARD S. ROSENBERG