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 at this point in 2016 – from the perspectives of those in the trenches of our region today.
A fully-compliant employee handbook serves and distribute those documents to employees. Other human resource documents each year,yer) to update the employee handbook and law counsel (not your CPA or corporate law-GABLER:

Taking advice from the Internet. As they say,their weight in gold in avoiding costly employ-[433x782]ars never ask if you conducted training, and you never want the answer to be “no.” Although it is mandatory only for supervisors in companies with at least 50 employees, employers in smaller companies should consider supervisory training as well, and every employer should train all staff.’

Karen L. Gabler

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

MINKOW: There are many training and education opportunities available to human resource professionals and company executives to keep companies current on the latest changes to employment law. In fact, local law firms and human resource organizations invest a significant amount of time and money in providing seminars 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made simply when the decision makers are unaware of the applicable regulation or requirement, or they are relying on an outdated personnel manual without any guidance from counsel.

ROSENBERG: I have devoted nearly 40 years exclusively to the study of labor/employment law and I can tell you that there is some new development almost every day. Having a top-notch experienced human resources person who can stop on most of this can be worth their weight in gold in avoiding costly employment claims. Training up with a labor law firm that provides regular updates on legal developments is another good idea. Watch out about taking advice from the Internet. As they say, you get what you pay for.

GABLER: First, work with qualified employment law counsel (not your CPA or corporate lawyer) to update the employee handbook and other human resource documents each year, and distribute those documents to employees. A fully-compliant employee handbook serves as a risk management treatise for employers as well as a guide for employees. Second, attend the myriad of employment law seminars available today, both online and in person. New laws, cases and administrative opinions are released every week, and regular education is critical to keeping up with new laws and workplace trends. Third, develop and maintain a relationship with a skilled employment law attorney to address ongoing workplace issues and disputes. Although the Internet has a wealth of information about employment law issues, much of it is inaccurate, overly generalized, inappropriate for your business. There is no substitute for solid legal advice from a trusted advisor who knows you and your company.

The Labor Department just recently finalized a new rule that’s expected to make an additional 4.2 million salaried workers eligible for overtime pay. How big of an effect will this have on California businesses?

ROSENBERG: Huge. The new regulation (which are federal rules) increases the annual minimum salary requirement for exempt status to $47,400/year ($913/week) beginning December 1, 2016. In California, the minimum salary for exempt status is a moving target pegged at twice the state minimum wage. Currently, this equates to an annual salary of $41,600 ($800/week), which is lower than the new federal standard. This means that California employers MUST pay the higher federal salary to continue treating employees as overtime exempt after December 1, 2016. However, with state mandated increases in minimum wage, by 2021 California’s minimum wage will be $12/ hour and the requisite salary for an overtime exemption will then be $49,920 ($960/week), which is even higher than the new federal standard.

GABLER: As long as businesses continue to hire humans, and the workplace continues to become more diverse, there are bound workplace disputes arising from what people say and do to each other. Like it or not, employers have to realize that the labor laws law demand a certain level of workplace decorum. Employees who fail to adhere to these standards put the business at great risk of a potent discrimination or harassment lawsuit.’

Richard S. Rosenberg

Harassment training is one of the most effective ways to avoid workplace claims and educate supervisors about how seemingly innocent behavior may lead to significant liability. It also provides evidence against harassment claims: opposing attorneys in a harassment claim will always ask if you conducted training, and you never want the answer to be “no.” Although it is mandatory only for supervisors in companies with at least 50 employees, employers in smaller companies should consider supervisory training as well, and every employer should train all staff.

Karen L. Gabler

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

GABLER: Harassment training is one of the most effective ways to avoid workplace claims and educate supervisors about how seemingly innocent behavior may lead to significant liability. It also provides evidence against harassment claims: opposing attorneys in a harassment claim will always ask if you conducted training, and you never want the answer to be “no." Although it is mandatory only for supervisors in companies with at least 50 employees, employers in smaller companies should consider supervisory training as well, and every employer should train all staff. If presented effectively, the mandatory addition of abusive conduct and bullying topics can be a tremendous help to employers in avoiding simmering disputes. Contrary to popular belief, the majority of harassment claims don’t begin with harassment—they begin with workplace conflict, and complaints of mistreatment, disrespect, or lack of communication. An effective training program should cover more than just harassment law—it should include effective communication, quality leadership and supervision, workplace conflict, discrimination, the everyday (innocent) interactions that lead to complaints, and management tips on counseling employees and avoiding misunderstandings that can lead to harassment disputes.

MINKOW: I believe that sexual harassment training is quite effective when done with a live presenter in an interactive classroom setting. Unfortunately, electronic training sessions do not send the same message or have...
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develop evidence sufficient to demonstrate to the opposition that no viable claim exists.

- There’s been a lot of talk in the media about transgender people and their use of the bathrooms they most identify with. What California’s legal landscape looks like on this issue?

ROSENBERG: Since 2012, it has been unlawful for California employers to discriminate against employees on the basis of their gender identity or gender expression. Gender identity is defined as one’s personal conception of one’s gender. Gender expression is defined as a person’s chosen gender related appearance and behavior, whether or not the expression is stereotypically associated with the person’s assigned sex at birth. When a person’s gender identity does not match his or her biological sex (i.e., the sex that he or she was assigned at birth), that person may refer to themselves as transgender. Unlike gender expression (referring to the external manifestation of gender expressed through one’s name, pronouns, clothing, haircut, voice, or body characteristics), gender identity is not visible to others. Typically, transgender persons seek to make their gender expression align with their gender identity, rather than their biological sex. CA law protects people from discrimination, harassment and retaliation based on gender identity.

GABLER: California includes gender, gender identity and gender expression in its list of protected categories, providing legal protection to transgender persons. As a result, banning transgender persons from the bathroom that corresponds to their gender identity would be discriminatory. Employees often argue that permitting a transgender person to use the purportedly “opposite” bathroom would make others “uncomfortable.” This is certainly not the first time (and likely will not be the last) that people have embraced discriminatory conduct on the misguided theory that they are not “comfortable” with the differences of others, but discomfort provides no legitimate basis for a discriminatory decision. Ultimately, employers and employees alike should remember that any decision made or position taken which excludes or hampers the rights of others simply because of their protected characteristics is, quite simply, an act of discrimination.

- What should employers know about employee arbitration and PAGA?

ROSENBERG: Arbitration is NOT a panacea and it’s certainly something that should be undertaken without a thoughtful discussion with counsel about the pros and cons. Everything that makes it a good thing (it’s informal, cheaper, faster and binding) are the very same reasons to stay away from it as well.

- What is the best way to determine the amount of work that has changed over time and a reclassification will be necessary to fit the current activities.

ROSENBERG: There is simply no magic bullet to erase past liability for the misclassification of employees. Exempt status is like a tax loophole and it’s only available if the facts and the law line up. Sometimes you can package the needed change in status with other beneficial changes in the hopes that it won’t be obvious to any of the affected employees. Another is to own up to the mistake in some manner and negotiate a resolution (settlement) that everyone is willing to live with. In most cases, it will be cheaper than settling a lawsuit. If this is done, be sure to get a legally binding release agreement so that the affected employees cannot take the money and still make a claim later on. Any fix must be tailored to the particular situation because no two groups of employees are the same.

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

GABLER: Class actions can arise from a wide variety of wage and hour violations, and every employer in California will have violations due to simple human error. The most common class action claims arise from meal and rest period violations. Claims for “off the clock” work, failure to properly itemize the payroll, failure to...
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Nicole Minkow, Chair, Employment Law Department

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record all used or accrued paid time off, failure to pay overtime and the corresponding failure to pay minimum wage are common as well. To protect the company, the employer must develop clear, enforceable policies on wage issues, which can show the court that the company was aware of the law and made every effort to enforce it. Then, the employer must track compliance and take action on any violations. Interestingly, a 2013 case held that a company with no penalty payments to any employee at any time must be in violation of the wage and hour laws, because every employee misses a break or a meal period or fails to accurately record their time at some point. It is actually a better defense to record and pay for the occasional penalty, so that you can show the court that you are aware of the rules and any violations of those rules, and are fully prepared to pay the applicable penalty to the employee in the normal course of business.

ROSENBERG: The pay practices attracting the most attention are: (i) not paying minimum wage; (ii) misclassifying employees as either overtime exempt or treating them as independent contractors; (iii) not providing (and adequately documenting) required meal and rest periods; and (iv) making illegal deductions from employee pay. Two new issues likely to spur debate are: (i) not paying for the occasional penalty, so that you can show the court that you are aware of the rules and any violations of those rules, and are fully prepared to pay the applicable penalty to the employee in the normal course of business.

ROSENBERG: No. Under state law, you may not base an employment decision on a record of an arrest which did not lead to a conviction, so don’t ask about them or have a job application or employment role that asks. The same is true with a criminal conviction that was judicially expunged and a host of other minor convictions. The federal EEOC considers a blanket exclusion of convicted criminals to be unlawful. Also, certain cities and counties have enacted so-called “Ban-The-Box” ordinances which require companies to assess applicants’ criminal history, such as Alameda County, Berkeley, Carson, Compton, East Palo Alto, Oakland, Pasadena, Richmond, San Francisco, and Santa Clara County.

GABLE: Employment must be able to justify the legitimate business reasons for the decision – there, 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? 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.

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

GABLE: Does it make sense for businesses to combine their vacation and sick time into a single PTO policy? ROSENBERG: Employers must be able to justify the legitimate business reasons for the decision – there, 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? 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.

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GABLE: You would think so, but perhaps not! PTO policies are easier for employers to track, and employers enjoy the flexibility of taking time off without explaining the specific purpose of their absence. That said, a combined PTO policy must comply with both the vacation rules and the sick leave rules (which are more burdensome under the July 2015 mandatory sick leave law). As with vacation rules, the PTO policy must provide for accrual and carry over of up to a minimum of 1.50 times the annual leave, and payout of accrued time at termination. As with the sick leave rules, the employer must track the PTO (making it fully available at the outset of employment) or accrue a minimum of 48 hours (or six days, whichever is greater), which often means the employer is granting more PTO at the outset of employment than it might otherwise prefer. In addition, an employer can require advance notice of vacation and may deny a request for vacation time off, but employers can use sick time unexpectedly and intermittently, with the employer having limited ability to discipline an employee for using available time. For these reasons, employers may wish to separate vacation and sick time, thereby saving money and reducing absenteeism, instead of using a combined PTO policy.

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