As the legal landscape continues to evolve in terms of labor and employment, the San Fernando Valley Business Journal 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 2015 – from the perspectives of those in the trenches of our region today.
Labor & Employment Roundtable

The most significant change for 2015 that affects every employer is the mandatory paid sick leave requirement. "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."

Tobias Kennedy

◆ What are the most significant new employment laws that are 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.

Kennedy: Well, 2015 is really the first year of the PPACA’s penalties being enforced for the employer shared responsibility provision. The law has been on the books since 2010, but we are finally in the year where non-compliance can cost companies money if they are an eligible employer. We have all heard so much about the ACA, but the one thing I personally like to stress to employers is that they should be aware the freebie years are ending. For employers of greater than 100 employees, this renewal will be the one that they need to be compliant on, and for employers of 50-99 employees, it’s next year’s renewal, so the time really is upon us.

Additionally, there are ACA reporting requirements that employers will really want to familiarize themselves with.

Rosenberg: My top six new CA labor laws: (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 and individuals in a limited duration program providing unpaid work experience. (3) Employers who use a temp agency to supplant

◆ How will the new paid sick leave law impact employers?

Rosenberg: Beginning July 1st, employers who don’t provide paid sick leave benefits will be required to offer a minimum paid sick leave benefit to all employees (1 hour for every 30 hours worked). Employers who already provide paid sick leave or PTO benefits will need to be sure that the policy is compliant, both in terms of the amount of sick leave offered and the accrual rate (There is a limited exemption for certain unionized employees). Employers also must account to employees for sick pay accrual and usage each pay period on the employee’s pay stub or another document distributed with each pay stub. Finally, employers must post a new paid sick leave benefit poster from the State and provide all overtime-eligible new hires with an updated Wage Theft Protection Notice.

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 carry-over 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.

◆ The new “wage theft” initiatives have been getting a fair amount of publicity. What are they and should businesses be concerned about them?

Bendavid: The term “wage theft” has been used in connection with off the clockwork, overtime violations, paying less than minimum wage, or refusal to pay wages owed when an employee quits or is terminated. The California Controller and Labor Commissioner are cracking down on employers who don’t properly pay their workers – by demanding restitution or filing lawsuits. The collected wages are transferred to the state treasury, to be doled out to affected employees by the Controller. Employers should ensure they establish accurate records of all hours worked and wages paid. Employers should provide accurate pay stubs in compliance with Labor Code Section 226. Employers who pay in cash are most at risk for being accused of wage theft. Also, all employees who are entitled to overtime must receive written notice stating the employer’s regular and overtime rates. If employees earn incentive bonuses or commissions, those must be spelled out as well.

◆ What are some common mistakes growing businesses make, and what are some good points to consider before these businesses enter the hiring process?

Kennedy: As businesses grow, they need to be sure they are working intimately with their broker as their growth may see them arrive at different thresholds in the ACA. Hopefully, the broker is asking the right questions about compliance and business forecasting, but it’s prudent to be in conversation with the consultant as you grow. Did you just get yourself over 250 employees? There are dramatically different expectations on your business in regards to PPACA compliance for being over 50 employees versus under 50. How about the 100-employee threshold? Once you hit that you see another round of new regulations. Are you getting to the point where you’re issuing 250 W-2’s now? There are several different sets of rules in the reform bill that are dependent on your size, so you want to be sure you keep an eye on that as you grow and hire.

Minkow: 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. While small businesses may not see the benefit of spending the money to have a good handbook prepared and implemented, putting solid employment policies in place, and maintaining a practice of complying with and implementing these policies, will be a positive foundation for growing businesses a good foundation in the effort to avoid costly lawsuits down the road.

Light: New businesses often categorize many of their employees as “exempt” salaried people not entitled to overtime, meals or rest breaks. Later on when they become larger and more sophisticated, they learn the easy way (their new HR...
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Director enlightens them) or the hard way (lawsuit) that they shouldn’t have classified the employee as exempt. A thorough HR review early on by a professional consultant or attorney can save headaches, and money, later.

NEBENS: In line with what you hear in the news we see some companies “low bailing” salaries thus creating a minimal salary growth. When employees are being paid at the low end of the scale companies run the risk of losing good people.

CARRIE NEBENS

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BENDAVID: A big mistake is not realizing that job bias laws impose strict limits on what interviewers may ask a job applicant in an interview and on a job application and restrict what information you can look into about an applicant’s background. Since these rules are counterintuitive, it’s imperative that people doing the hiring receive training on what’s permissible. Second, companies should train personnel on how to use all social media for organizational purposes, including in email communications. When privacy settings are used by employees to engage in social media discussions about firing, discrimination and retaliation claims, employers risk being exposed to liability for prohibiting the employees from discussing the terms and conditions of employment. Employers are cautioned to make these decisions with counsel.

NLRB expert review these policies; (ii) train managers on these rules; and (iii) use extreme caution before disciplining or terminating an employee for their on line communications.

MINKOW: Social media is here to stay and employers should embrace it. The biggest risk to employers is when they take action based on a social media comment or conduct as this could give rise to several challenges. For example, an employer who terminates an employee for commenting about a manager on social media could be exposed to liability for prohibiting the employee from discussing the terms and conditions of employment. Employers are cautioned to make these decisions with counsel.

ROSENBERG: Very serious. The National Labor Relations Board has issued numerous decisions against employers who discipline employees over their social media content. Many of these decisions call for the reinstatement of these workers with back pay. The NLRB gives employers a very wide berth to openly criticize management and the company on social media. And, it’s illegal to have a written social media policy that unduly restricts employees’ social media activity, even if no one has ever been disciplined under it. Employers are urged to: (i) have an NLRB expert review these policies; (ii) train managers on these rules; and (iii) use extreme caution before disciplining or terminating an employee for their on line communications.

◆ Should employers be considering any changes to their email/social/online 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 employers 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 grouping about wages, hours and working conditions, including saying uncompensatory 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. Employers will need to revise their policies to insure employees understand that they
Workplace and labor laws are complex and ever changing.

The best way to fight legal issues in the workplace is to prevent them in the first place. And if you do have a problem, you want a law firm with the management focus and legal experience to see you through to resolution.

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Continued from page 26

Employers should participate in the latest court rulings, and changes in labor associations also provide updates (including HR associations or at our law firm). Other new laws by attending seminars at various venues. It is time-consuming it is to keep up with California.BENDAVID: the ever-evolving employment law trends? How can employers remain current on◆

● What are some key ways employees can optimize their digital footprint?

NEBENS: The first step to evaluating and improving your online presence is to learn what other people see when they look for you online. Go to the most popular search engines and do a search for your name. Preferably the name you list on your resume or job applications. What results are returned? Are they positive? Is there anything that needs to be remedied? Privacy is important too. Many social networks’ default privacy settings are set to public. The settings from counsel. Indeed, many of these seminars are free for employers.

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

LIGHT: The problem lies not only in the obvious morale problems created by a bullying co-worker (bad or abusive supervisor worse), but it opens the door to employee claims that they are being bullied because of their race, age, disability, etc. The failure to rein in an abusive employee allows the employee to claim discrimination, harassment or retaliation, which carry several types of damages and attorney fees. So “supervisor Bob just being Bob” is no longer acceptable because of the serious legal implications such behavior creates beyond just being a jerk.

BENDAVID: Abusive conduct, or bullying, can be either verbal or physical. Both forms take a toll on your employee’s physical and emotional health. The legal repercussions can manifest into hostile work environment (harassment or retaliation claims – not to mention low morale and productivity. If an employee file suit for harassment or retaliation, they will often add claims of “Inflation of Emotional Distress” against the employer and the individual employee accused of abusive conduct. This type of conduct can also increase an employer’s risk for workers compensation stress claims.

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.

● 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?

BENDAVID: Employees who are victims of domestic violence may request time off 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: (i) to seek medical attention for injuries; (ii) to obtain services from a domestic violence shelter, program or rape crisis center; (iii) to obtain psychological counseling; (iv) to participate in safety planning; or (v) take other actions to increase safety from future domestic violence or sexual assault, including temporary or permanent relocation. These employees are also allowed to use any paid sick leave benefits for such absences. It’s also really important that managers and HR people are sensitized to the unique challenges these employees face. It’s easy for co-workers and managers to not see the stress and strain that these employees for taking this time off.

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

LIGHT: Document, document, document. Even a simple email summarizing a conversation is helpful. If the employee refuses to sign, don’t sweat it, just note she refused to sign. Tell your managers to write things down and email them to HR or to the employee. They can’t be afraid of that confrontation. They’re managers, so suck it up and take on that responsibility. You can save a lot of money at the back end if things go badly with that employee later. Paper, whether electronic or hard copy, is the manager’s best friend (but please, don’t circulate jokes to your staff!).

ROSENBERG: Many lawsuits arise from the simple fact that the employer did an inadequate job in communicating job expectations (best to do in writing) and the employee’s failure to keep up (also best to do in writing). A simple question I ask in every termination discussion is “will the employer be surprised?” If yes, then the potential for a legal claim is greatly increased. Also, scrub the employee’s file to see whether the file 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 before a gov-
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BENDAVID: Employers cannot “prevent” all lawsuits. They are an unfortunate reality in California and are often brought by disgruntled employees who were fired for good reasons. But an employer can reduce the likelihood of being sued and help defend if they are. Document everything. Before firing an employee, make sure you have lawful reasons, and that the reasons are on record. A good termination is one that does not come as a surprise. Make sure your company policies are clearly written, whether you’re outlining your expectations of your employee’s work performance, your meal/rest break policies, your leave of absence policies, or your dress code. If an employee makes a complaint that you or a co-worker violated the law, thoroughly investigate and record the findings. Properly worded emails, signed letters and interoffice memos are absolute musts. If you are firing for cause, make sure you have or prepare documentation that can be used as evidence to support the termination decision.

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

ROSENBERG: No. California law has long prohibited 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. Further, since statistically there are more criminal convictions among minorities and persons of color, EEOC recently issued enforcement guidance on the subject. The guidance prohibits an outright ban on hiring all convicted criminals in favor of a more nuanced job application process that requires an employer to evaluate the criminal offense against the job duties. According to EEOC, before rejecting an applicant because of a criminal conviction record, the following must be considered: (i) the nature and gravity of the offense or conduct; (ii) the time that has passed since the offense, conduct and/or completion of the sentence; and (iii) the nature of the job held or sought. EEOC places the burden squarely on the employer to demonstrate that there is a real connection between the criminal offense and the applicant’s intended job duties.

LIGHT: No. State and federal law prohibit this, and in fact the job application must contain language specifically indicating that a conviction is not an automatic disqualifier. San Francisco has added “ban the box,” which prevents this question until later in the hiring process (after an offer). In addition, the EEOC has issued its “green rules,” designed to force employers to scrutinize convictions to determine with greater certainty and to a higher standard whether the conviction will truly impact the workplace. An old conviction, a conviction unrelated to the employer’s work, a job that will be closely supervised and doesn’t involve independent work away from the facility, all may suggest that the conviction is irrelevant to the job.

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

NEBENS: Savvy candidates for employment should always remember to do an image search of themselves from the beginning. If you are applying for a job, you’ll want to look closely at any photos of you that are public. Do they accurately represent how you want to be seen by potential employers? Your digital footprint is more than just words. Either delete questionable photos or hide them with strict privacy settings. You may also need to ask friends to delete or un-tag photos of you that they have on their profiles.

◆ With wellness programs all the rage, what are the legal issues employers face when implementing such a program?

LIGHT: Employers need to be wary of obtaining, even inadvertently or innocently, personal health information that may have HIPAA privacy implications. A wellness program generally requires employees to offer up such information, or there may be pressure to join the program; and then less healthy employees are singled out and perhaps ostracized or ridiculed. There is also a federally imposed cap of 20% of the employee’s medical insurance premium as to the bonus payable to a participating employee. Just as medical plans can’t discriminate against less healthy employees in premium payment levels, wellness plans need to ensure that no discrimination occurs.

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

MINKOW: 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.

ROSENBERG: Most LOA lawsuits issues arise from a lack of education on the employer’s part about: (i) which absences are legally protected; (ii) how much time off the law affords to employees; and (iii) how absence requests must be handled. The law gives employees wide 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: (i) be sure time off policies are legal; (ii) post the posters; and (iii) train management on these complex rules.

LIGHT: When the 12 weeks of FMLA time runs out (or the employee isn’t eligible for FMLA) employers often forget that they still must assess whether they can reasonably accommodate additional time off under the ADA or similar state laws. Employers should bend over backward to accommodate additional time off, as these decisions are routinely second-guessed because the employer probably could have done more to accommodate the time off. Also, employers need to document every encounter with the employee regarding the “interactive dialogue” to determine if there is a reasonable accommodation available.

BENDAVID: The most common leave of absence mistake is not realizing that many leaves overlap. For example, a workers compensation leave may also trigger rights under the Family and Medical Leave Act/California Family Rights act (FMLA/CFRA). It may also have overlapping protections under the Fair Employment and Housing Act and Americans with Disabilities Act (FEHA/ADA) if the leave is for a disabled worker. Though employers sometimes grant extended time off, they often fail to document that the time off falls under these laws. Another frequent mistake is to fail to engage in and to document the “interactive dialogue” with an employee who is disabled. Such a dialogue is required so that the employer can discuss the essential job functions of the employee’s position and any reasonable accommodations the employer can provide (such as a leave of absence).

Any tips for the modern employee candidate?

NEBENS: Showcasing your portfolio and past works online can be a great way to impress potential employers. Think of your online presence and portfolio as a supplement to your resume. Show employers what you are capable of and what you can bring to their team. To further optimize your digital footprint you can register your name as a domain or get your own website to host your profile on. Having your own website means you’ll have at least one property online that you have complete and total control over.

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

BENDAVID: Most clients are worried about being sued, even if they know they had good intentions and were trying to do the right thing. Most clients understand they should have documented performance problems, but acknowledge their failings in doing so. Many clients are also troubled on learning that a practice they have been utilizing for years (with no problems at all) is actually unlawful or has now become unlawful due to law changes. Clients can avoid some of these problems by staying abreast of the law and by periodically amending policies and procedures when needed.

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 that even the good intended company can make
Continued from page 31

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?

LIGHT: Class action wage and hour claims that are hidden for years and then a single unhappy employee finds a lawyer and makes a class action claim involving hundreds of (or just a few dozen) employees going back four years. A single claim for just two missed, short, or late meal breaks per week (or rest breaks) at, say, $20 per hour is $8,000 over four years (2 per week x 50 weeks x 4 years = 400 meals x $20 = $8,000); and that’s before adding another $8,000 in penalties, plus interest and attorney fees. Multiply that by the number of affected employees and that could cripple a company. Do an HR audit ASAP!

ROSENBERG: The top three are: (i) non-compliance with wage-hour laws; (ii) the employment of unauthorized workers and (iii) absolute corporate liability for the errant behavior of anyone in supervision for acts of workplace harassment, discrimination and retaliation. None of these is obvious, yet each poses a huge threat to the company’s bottom line. And, the first two items on the list are uninsurable. With six and seven figure jury awards and agency prosecutions becoming almost commonplace, employers are urged to do three things right away. First, audit compliance and come up with a plan to address any compliance 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 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?

LIGHT: Answer the phone and email promptly. Provide clear, simple advice without sounding like a long-winded cover-every-contingency, even-the-less-than-1%-possibilities attorney. Learn about businesses and how they work. Be practical and offer solutions, not just alternatives. Clients want to know what you would do, not three recommendations and they have to pick. There’s risk in every decision, but as a practical matter one solution may work great and be relatively low risk; but some attorneys won’t take any risk in their advice and that’s not how business works.

◆ 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 who 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.

BENDAVID: Ask for referrals from those you know and trust. Look for someone with experience in handling employment law and who can understand you and your risk-tolerance level. Interview the person to make sure you are a good match. Not all attorneys are the same and lawyers have different strategies based on their personal experiences. Beyond that, find an attorney who’s knowledgeable and capable of reviewing your current policies and procedures — in all aspects of your dealings with employees, not just someone who only wants to deal with hearings and litigation. Make sure they understand the big picture of your company and your short and long-term goals.

LIGHT: Don’t be afraid to ask if the attorney has specific experience in the category of work you need. Have them provide examples. Find out, for example, if they are primarily a business lawyer dabbling in employment law (always a dangerous category), or whether they have hands-on experience advising companies on day-to-day employment issues. It’s a bonus if they have had trial experience: they can see what the back end of a bad situation looks like, and can provide even better preventative advice because they will be able to answer the question, “How’s this going to look to a jury in a year if this goes badly?”