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JULY 9, 2018

BUISNESS LAW ROUNDTABLE

What You and Your Organization Need to Know

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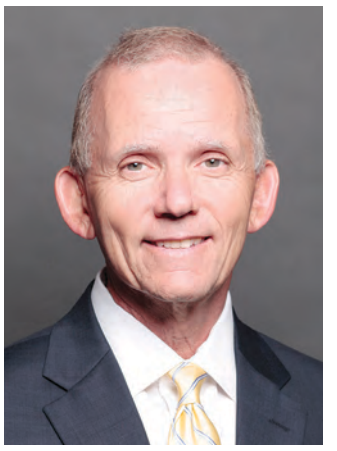

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The San Fernando Valley Business Journal has once again turned to some of the leading business attorneys in the region to get their assessments regarding the current state of labor and employment legislation, the new rules of hiring and firing, traps to avoid, and the various trends that they have been observing, and in some cases, driving. What follows 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 law today – from the perspectives of those in the trenches of our region today. Thanks to our superb panel for their expert insights.

LAW ROUNDTABLE

◆ What are the most significant new laws taking effect this year that impact businesses?

ROSENBERG: Here are my top six: (1) it's now illegal to use a job applicant's salary history when setting wages, so employers may not ask a job applicant to disclose salary history and or use that information as a factor in deciding whether to hire someone or how much to pay them; (2) "parental" (baby bonding) leave must now be offered by all employers with just 20 or more employees; (3) under the "ban-the-box" law, employers with five or more employees may not ask job applicants about their criminal history until after a conditional offer of employment has been extended and the law lays out a complicated procedure that must followed when considering criminal conviction history to make or deny a job offer; (4) new protections for immigrants under our state's "sanctuary" laws prohibit employers from allowing an ICE agent to inspect a facility or review employment records without a warrant and require the employer to make specific communications with employees about the ICE contact; (5) employees may "update" their gender on birth certificates, driver's licenses and identity cards without undergoing clinical treatment or getting a court order, making California the first state to legally recognize "non-binary" as a gender; and (6) expanded "national origin" job bias regulations that take effect on July 1, 2018 enhance protections afforded to job applicants and employees, including undocumented workers, under the state's national origin discrimination rules. The new regulations broaden the definition of illegal national origin discrimination and outlaw or restrict a common policies such as the mandatory use of the English language at work, English proficiency rules, and restrictions on foreign sounding accents, to name a few. With California's ever increasing diversity, this is sure to be a new and expanding area of employment litigation.

GABLER: Although most of the new employment laws implemented on an annual basis in California have substantial (usually adverse) impacts on California businesses, some of the most significant changes for 2018 related to the hiring process, rather than the employment relationship. The January 2018 new laws included a prohibition against asking an applicant to disclose criminal convictions prior to making a job offer (AB 1008), and a prohibition against requiring an applicant to reveal salary history (AB 168). With these changes, the California legislature sought to curtail the risk of discriminatory hiring decisions, while at the same time limiting the employer's ability to find out about an applicant's background or independently negotiate mutually agreeable compensation with an applicant. Other key changes for 2018 included SB 63, adding the New Parent Leave Act to require companies with 20-49 employees to provide up to 12 weeks of unpaid baby bonding leave to new parents, and the legalization of recreational marijuana, forcing employers to grapple with the dichotomy between the lawful off-duty use of cannabis products and the continued enforceability of no-tolerance drug and alcohol policies in the workplace. As with any change to California's burdensome employment laws from year to year, these new additions compel employers to work with qualified employment law counsel to update their employee handbooks, employment applications, and other employment documents.

BENDAVID: The most significant new regulatory and proposed statutory laws target harassment and discrimination California adopted new regulations regarding national origin discrimination that went into effect July 1, 2018. The rules expand "national origin" to include those with physical, cultural or linguistic characteristics associated with a particular group. Protections are afforded to those who marry or associate with persons of a national origin group, or who are associated with an organization, like a school or religious organization, that promotes a national origin group's interests. Employers should be careful to ensure employees are not harassing or discriminating based on language, low English proficiency, or affiliation with national origin-related groups. A new IRS rule disallows deductions for payments made to settle harassment claims if the settlement is subject to nondisclosure. So the choice for an employer sued for sexual harassment is to keep the matter confidential at the cost of the deduction, or take the deduction and let plaintiffs say what they will. There are also a host of pending "me too" bills which, if signed into law, will expand the rights of harassment victims. The bills propose a longer statute of limitations; the right to sue individuals for retaliation, record keeping and other related mandates.

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

GABLER: The most likely source of litigation in the coming year is not the variety of 2018 legislative changes, but the California Supreme Court's decision in Dynamex Operations West, Inc. v. Superior Court (2018), regarding the classification of independent contractors. The Court implemented the three-part "ABC Test," establishing burdensome criteria for independent contractors that all but assure the "employee" status of the sweeping majority of workers. California business owners often misclassify seemingly "independent" workers as independent contractors, partially to satisfy the desires of the workers themselves and partially to avoid the cost and complexity of California's challenging employment laws. Unfortunately, misclassification of employees as independent contractors carries substantial legal risk, with heavy penalties and damages for the employer. Debate is raging now as to whether the Dynamex decision was intended to be retroactive; it is almost certain that the decision will form the basis of numerous misclassification complaints against employers who previously had no idea they were violating the law.

BENDAVID: The bills expanding rights of harassment victims are likely to increase the number of lawsuits employers can expect. Employers may experience more claims based on harassment, discrimination, retaliation, wrongful termination, and infliction of emotional distress. Employers should be proactive and train employees, circulate updated policies, and make sure all required posters are in place. If allegations are made, do not sweep them under the rug. Respond promptly. Investigate the merits. And, take responsive action if you conclude misconduct occurred. You should also monitor conduct after the investigation to ensure no retaliation occurs. In terms of wage claims, we continue to see an increase in class action and PAGA lawsuits. The California Supreme Court's decision in Dynamex created a new standard for who is an "employee" under the IWC Wage Orders. Therefore, we expect to see an increase in claims by "independent contractors" seeking to obtain employee status and corresponding benefits, such as overtime, meal and rest period penalties and PAGA penalties. Employers should audit their wage and hour practices including classifications of workers.

ROSENBERG: A few weeks ago, the California Supreme Court adopted a new and extremely broad, pro-worker standard for determining when someone may be legally classified as an independent contractor under California's Wage Orders. In so doing, the court ditched a more flexible test that had been the rule for nearly 30 years, in favor of a much more employee-friendly test from Massachusetts that's sure to result in thousands of independent contracts being reclassified as employees. Also, California's Fair Pay Act requires employers to prove that any wage difference between substantially similar jobs is not due to an employee's gender, race or ethnicity. The law places a high burden on employers to justify such wage differentials. Since the legislature believed that the market is inherently biased, any employer claim that a wage difference is justified by "the market" or linked to the prior earnings history of the comparators will be viewed with great skepticism. So-called "pay equity" cases are on the rise.

◆ What can businesses expect from the California legislature this year?

BENDAVID: The #MeToo movement raised a groundswell of support for sexual harassment victims, and political leaders across the nation are riding the wave. This means there will be more protections in place. For employers, the challenge is to keep abreast of the new laws and make sure you comply. You should expect quite a few. The other challenge is to ensure sexual harassment (or other types of harassment/discrimination) does not occur in the workplace. All employees from management to human resources personnel, down to the lowest-paid hourly employee should know the company's policies, what to do if they witness or experience harassment, and what behaviors are expected from everyone.

ROSENBERG: If you have never heard of "predictive scheduling," read on. The concept, which refers to the legal requirement of providing employees advance notice of their work schedules (and any changes to those schedules), has picked up steam in several cities in California and elsewhere. The cities of San Francisco, Seattle, New York, and now the state of Oregon, all have predictive scheduling laws, and Los Angeles and the state of California could be next. These laws generally require employers to provide employees a minimum amount of notice for their work schedule and any changes to an employee's scheduled shift. These laws were designed to make it costly for employers to place employees in the position where they do not know from day to day whether they will be working. For example, San Francisco's ordinance, requires retail employers in the city with 20 or more employees to provide their schedules at least two weeks in advance. And, if the employer changes an employee's schedule with less than seven days' notice, the employer must pay the employee a penalty of an additional one to four hours of pay, depending on the amount of notice provided and the length of the shift. While California has yet to enact a predictive scheduling law, a bill known as the Fair Scheduling Act of 2015 was introduced in the California Assembly in early 2015. Although that law died in the state Assembly, the blueprint remains for legislators to resurrect the Act in the future.

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>
> KAREN L. GABLER

◆ How important is sensitivity training in the workplace in 2018?

ROSENBERG: In the wake of the #MeToo movement, it's absolutely vital for any business seriously interested in lawsuit avoidance and morale building. That's why the training is mandatory for larger employers (50+ employees). We have handled way too many cases over the years that were completely avoidable had the participants known that the behavior in question was offensive to others and against company policy. Another reason to train is that management's silence on the subject can be seen as a tacit approval of the offending behavior. This training should be done throughout the organization so everyone has a clear understanding of exactly where the company stands and what will happen if someone's behavior crosses the line. In my opinion, this is the single best investment a company can make toward insuring that it stays out of court.

BENDAVID: In addition to sexual harassment issues, we anticipate more discrimination and general harassment claims stemming from religious affiliations, gender biases, ethnic biases and language biases. More of our clients are asking for employee sensitivity trainings to help them interact more fairly with coworkers, professional services clientele, and retail or hospitality industry customers. The Unruh Civil Rights Act specifically prohibits California business establishments from discriminating against anyone, based on certain protected characteristics, including sex, race, color, religion, ancestry, national origin and disability (among other traits). Unruh specifically requires business establishments to provide "full and equal accommodations, advantages, facilities, privileges or services..." Companies should be mindful of this and train staff on conduct towards those who patronize their businesses. But besides preventing employees from harassing and discriminating against each other and clients, management needs to know how to step in to protect employees when it is the customer behaving badly.

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

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GABLER: California includes gender, gender identity and gender expression in its list of protected categories, providing legal protection to transgender persons. As with all forms of discrimination, education is critical and open communication is key. Employers should train all employees (management as well as staff) on all forms of discrimination, including gender identity, on an annual basis. Management must remember that workplace culture starts at the top: corporate executives as well as supervisors must set a positive example with their own conduct, and must be mindful of comments and conduct going on each day in the workplace. Ongoing reminders to employees to be sensitive to and embracing of the differences among us sets the tone for a diverse workforce, and willingness to take complaints seriously creates a level of comfort among those who might otherwise suffer in silence. It is also important to remember that "separate is not equal." Facilities must be equally accessible in accordance with law. Employees sometimes argue that taking steps to protect the rights of transgender employees, such as permitting a transgender person to use the purportedly "opposite" bathroom, would make others "uncomfortable." This is certainly not the first (and likely will not be the last) time in our history 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 discriminatory decisions or behavior. 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.

ROSENBERG: The state's job-bias regulations now prohibit discrimination against transgender individuals. The rules outlaw discrimination, harassment and retaliation based on a person's gender identity (how one sees him/herself), gender expression (how one chooses to present him/herself to the world), or the perception of such appearance or behavior. The regulations specifically protect an employee or job applicant who is "transitioning" from discrimination and harassment. Among other things, the regulations provide that an employer must abide by an employee's request to be identified by a particular gender, name and/or pronoun, unless the employer must meet a legally mandated obligation. Also, job applications can no longer require applicants to disclose their sex on a job application or ask about it in an interview, except on a voluntary basis. Employers must provide equal access to jobs and to comparable, safe and adequate bathroom and other facilities and permit employees to use facilities that correspond to that employee›s stated gender identity or expression, regardless of the employee's appearance or assigned sex at birth. Employees are not required to undergo (or provide proof of) any medical treatment or procedure, or provide any identity document, to be allowed to use facilities designated for a particular gender. Finally, an employer cannot impose any physical appearance, grooming or dress standard based on one›s gender identity or expression.

BENDAVID: Transgender employees are expected to be treated according to the gender they identify with; not the one they are born with. This creates conflict when non-transgender workers don't want to share a locker room or restroom with coworkers who are contemplating transition, in the process of transitioning or have already completed the process. Employers are expected to make "reasonable" accommodations. Employers should maintain an ongoing dialogue with the individual to ensure the employee's reasonable needs are met to the extent possible. Employers should also be mindful of the privacy rights of the individual involved.

◆ 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?

ROSENBERG: Yes, and here's why. First of all, certain policies must be given to employees in writing. The handbook is the perfect place to do so to insure proper dissemination of these policies. Second, a well-written handbook will be your best friend in employee litigation by having certain policies (e.g., at will employment and discrimination/harassment). Third, the handbook is an important orientation tool to acquaint new hires with company policy and culture. A word of caution. Resist the temptation to buy a stock handbook on the Internet or borrow one from a colleague. Yes, it's much cheaper and faster, but this is one area where the phrase "penny wise and pound foolish" really comes to mind.

BENDAVID: Handbooks are more important than ever. A properly worded handbook can be your first line of defense if you are accused of violating the law. If a handbook or some electronic form of company policy expressly informs employees of the company's expectations, and if the employee failed to meet those expectations, the policy violation can be used to justify a firing in the face of a wrongful termination claim, or used to bolster an employer's defense in a lawsuit. The Handbook should also include compliant wage and hour policies, such as policies on meal and rest breaks afforded to your employees. Your handbooks must be updated regularly as the laws change. Just think of the latest new laws regarding harassment and discrimination, language protections, or sick pay leave. If the handbook is more than a year or two old, many of those policies are already out of date.

GABLER: The employee handbook continues to be the most significant document an employer should have in the workplace. When prepared properly and updated regularly, handbooks can protect the employer, educate the employee, defend against a claim and support management efforts. Handbooks are one of the first documents requested in any employment law claim, and can provide clear evidence of the employer's policies and practices. They satisfy the employer's obligation to provide clear notice of employee rights and benefits, both to protect employees and to avoid claims of "you didn't tell me!" They set the standard for the employer expectations against which employees will be measured. They can serve as a treatise for management and human resource professionals as well, providing guidance on the employment laws that must be followed. They also provide a basis for management to discipline or evaluate employees. Most managers struggle with having to inform employees of performance deficiencies, and pointing to specific policy violations is far easier than merely offering a negative opinion. Many employers make the mistake of using generic form documents to create a handbook; there is simply no substitute for the protection of a compliant and enforceable handbook prepared or reviewed by expert employment law counsel.

◆ What accommodations must an employer offer to employees who are parents of school age children if there is a school closure due to a violent threat?

BENDAVID: Having personally experienced this with my own children, I can tell you – it's simple: Do everything you can to accommodate those employees. Employers with less than 25 employees are not required by law to allow staff members to leave, but imagine the resentment and disruption to operations if you DO NOT allow them to go. For companies with 25 or more employees, you are required to provide parents, stepparents, foster parents, grandparents and guardians up to eight hours of unpaid leave to participate in a child's school or daycare activities – as well as leave in case of emergencies such as violent threats and national disasters.

ROSENBERG: California's Family-School Partnership Act has an emergency leave provision which requires employers to allow parents time off to address certain so-called child care provider or school emergency" situations. This includes when an employee's child cannot remain in a school or with a childcare provider because the school or child care provider has requested that the child be picked up. State law gives employees a maximum of 40 hours per year for time off relating to parenting (i.e., attending school functions and the like). To mitigate the impact on the company, employers may limit usage to just eight hours per month. However, these usage rules are suspended in a real emergency situation. Even if the employees already has used all 40 hours, we would still recommend giving the employee whatever time they need to address the immediate emergency since the optics of doing otherwise could be awful if something bad happened after the employer refused to allow the parent to pick up their child.

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

GABLER: From a practical standpoint, the legalization of recreational marijuana creates a need for substantial updates to the employer's substance abuse policy. Most drug and alcohol policies address unlawful drugs, alcohol, and prescription drugs. Marijuana, while still unlawful under federal law, is no longer an unlawful drug under California state law. Thus, policies must be re-written to incorporate this newly legal drug to ensure clear policy language. Nevertheless, despite the legalization of marijuana for medical or recreational use, California employers still need not permit employees to use or be under the influence of marijuana in the workplace (although medicinal use implicates the need to consider reasonably accommodating the employee with a leave of absence or other options until he can stop using marijuana). This naturally calls into question the issue of "what does it mean to be under the influence?" Alcohol provides an easy answer, as it may temporarily impair the employee and then quickly leaves the body. Marijuana can remain in the user's system for many weeks, creating positive test results long after the user is no longer discernibly impaired. We can expect to see litigation and future legislation on this issue, and employers must be sure to define "under the influence" in their substance abuse policies. Beyond these legal issues, there are hotly debated questions about the viability and efficacy of marijuana use (or derivatives thereof) for a variety of medical issues, and future legislation will have to consider where the use of marijuana may be more useful than detrimental.

BENDAVID: Many employers understand they have the right to a drug-free workplace because of federal prohibitions on marijuana. Employers struggle with what their actual company policy should state. Should they turn a blind eye so long as marijuana use occurs off company property, and not during working hours? Or, should they have a zero tolerance policy, such that if a prospective employee tests positive, they are rejected and an employment offer rescinded? Employers have a duty to protect all employees, and employers with 25 or more employees must reasonably accommodate employees who volunteer to enter an alcohol/drug rehabilitation program. While employers have the right to drug test, you must ensure you comply with the law. Employees have privacy rights, but if you have proper policies in place you can send employees to be drug tested if you have a "reasonable suspicion" they are under the influence. You should be able to articulate your suspicions. Carefully worded policies can help establish your requirements and describe under what circumstances drug testing will take place.

ROSENBERG: There is a lot of confusion about the reach of the new law. For example, while recreational marijuana use amongst adults (over age 21) at home is no longer a crime in California, using cannabis remains a federal offense. Also, the new law specifically preserves the right of a company to insure that employees are not coming to work under the influence of the drug and not using, possessing or distributing the drug on company premises. However, unlike alcohol, there is no uniform standard for measuring when a person is "under the influence." And, the drug stays in the system and is detectable in a drug test weeks after its ingestion. Thus, advance coordination with the drug testing facility and a well-written drug testing policy is recommended so that everyone has a clear understanding of the employer's expectations.

◆ What should businesses know about mediation in the context of employment disputes?

BENDAVID: Mediators are often hired to help the parties resolve their disputes. The mediator can perform "shuffle diplomacy" and help each side realize that settlement may be better than costs of litigation. A good mediator can connect with the employee and help him/her understand they are not going to get rich by suing their former employer and show them the weaknesses in their case, legally and factually. Also, if the

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mediator is effective, he or she can explain to the employer why settlement may be a more economical or better course of action depending on the facts.

GABLER: Employers often believe that mediation, or any other form of alternative dispute resolution, is an indication of "rolling over" or "being extorted." In fact, one of the most significant expenses in any litigation matter is the attorneys' fees incurred to defend against the employee's claim, and, in most cases, early settlement will typically cost far less than it would cost to win the case. Most employment disputes have far more to do with psychology than with employment law, and are often the result of miscommunication, assumptions, hurt feelings and other aspects of human communication that fall outside the law. Bringing both sides to the table can resolve those issues, make people feel heard on both sides, and create a path to resolution that allows both parties to move forward without further stress or expense. Unfortunately, the mandatory attorneys' fee awards associated with most employment law matters can prompt employers to settle disputes merely to avoid financial risk that has little to do with potential liability. Waiting until the eve of trial to put maximum pressure on the opposing party merely means that the opposing party's attorney now requires tens of thousands in fee recovery to make settlement worthwhile. In some cases, hotly contested litigation is necessary, when an opposing party is wholly unreasonable, or when other employees are waiting in the wings for their bite at the apple. In most cases, however, an attorney who insists on fighting with his opposing counsel, and who exacerbates a case for personal gain rather than to serve the client, is simply lacking in skill or finesse. Business owners should seek out not only attorneys who are skilled litigators, but litigation attorneys who also can truly act as counselors, serving the interests of the client rather than themselves, and negotiate viable resolution options that allow the employer to focus its resources on the business instead of on its former employees and its legal counsel.

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

ROSENBERG: California law is a little schizophrenic when it comes to employee movement. Our laws vigorously protect the right of employees to compete with a former employer by outlawing non-compete agreements in most work settings. However, our state law also permits an employer to vigorously protect its valuable trade secret and proprietary information and to prohibit the poaching of employees by former employees. This is an area where it is critical to have expert employment counsel review any employment agreement or policy for legal compliance. A misstep can be very costly.

GABLER: Non-compete clauses are generally unenforceable in California, except in certain limited circumstances (such as in the sale of a business). While employers can prohibit competition during employment, a departing employee has the right to work with any employer of his choice in the future. However, employees are not permitted to use the trade secrets of the former employer to compete, nor to benefit themselves or others. The same applies to solicitation of co-workers and customers. Employers should have clear non-solicitation and non-competition agreements that prohibit the employee from taking, disclosing or using the employer's trade secrets to unfairly compete, or to solicit others to leave. In other words, a salesperson can sell the same widgets for another company, but he cannot take the former employer's customer lists or contact information, marketing plans, business models, financial data, and the like in order to do it. Similarly, the employee can encourage a co-worker to apply for an opening at his new company, but he cannot inform the employee that the new company provides greater salary and benefits than what he knows is provided at the old company. While this is a fairly narrow protection for employers, the side benefit is that there need not be any geographical or chronological limitations on these prohibitions. Many agreements state that the employee cannot compete or solicit for two years, or within a certain radius. By adding "by use of the company's trade secrets" to the restriction, the prohibition can continue indefinitely, as there is no time period when the company's trade secrets are suddenly open season.

BENDAVID: Non-competes are generally unenforceable in California, with limited exceptions. If the exceptions do not apply to you, then at a minimum, make sure you have strong confidentiality agreements along with a trade secret protection plan in place. This includes having policies describing employee obligations, locked cabinets or safes to contain confidential information with access given to only those employees with a need to know, among other steps. Note that non-competes in other states may be valid. So, if you are looking to hire an applicant from another state, make sure they are not subject to any restrictions that could land you in court.

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

ROSENBERG: The U.S. Supreme Court issued an important ruling confirming the right of an employer to force employees to use arbitration of their individual and "class" action claims in lieu of going to court. While most practitioners believe that employers are better off addressing employee claims in a private arbitration (instead of in front of a jury), there are certainly drawbacks to be considered. One of them is cost. In California, the employer is responsible for paying all of the costs in arbitration. If a matter is hotly contested, this could be a very expensive process. Also, under state law, an arbitrator's decision is not appealable in most cases. Thus the employer could be stuck with an outlandish arbitration ruling. Finally, California will not permit employers to force employees to arbitrate representative action penalty claims under the state's Private Attorney General Act ("PAGA:") for wage and other Labor Code violations. This means that the employer could face an expensive class action style court battle under the PAGA law while simultaneously fighting the individual employee's claim in arbitration. The pros and cons of arbitration is something that ought to be discussed with labor counsel.

BENDAVID: Employee arbitration clauses and class action waivers are now enforceable because of a recent U.S. Supreme Court decision. Essentially, the question was whether plaintiffs could act together for the common good under the National Labor Relations Act. The federal Circuit Courts were split on this question. But SCOTUS opined the NLRA does not mean the employer and employee cannot separately agree to privately arbitrate disputes. There are pros and cons to arbitration, including cost, time, lack of appeal, or jury vs. private judge. Additionally, plaintiffs still have the right to sue in court for penalty claims under the Private Attorneys General Act. Before employers elect arbitration, a serious discussion on the issues should take place so the employer can make an informed decision that best fits its circumstances. I was not previously a fan of arbitration because employers must pay the arbitrator's fees and for other reasons – but given the increase in wage/hour class actions and the new ruling permitting class action waivers, the tide is turning.

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

GABLER: The most significant error made by employers is neglecting to document performance issues and resulting disciplinary action. Employers must remember that "if you can't prove it, it didn't happen!" When the employer fails to document its reasons for discipline or termination, the employer loses the chance to tell that story, and thus loses control of the situation: The employee is now able to tell the story of what the employer did to her, and the employer promptly finds himself on the defense. Additional mistakes include: (1) being too nice, and (2) being too mean! Some employers fail to convey any negativity, for fear of rocking the boat, hurting the employee, causing a fight, or simply to avoid confrontation. When employees are not given clear information about where they are falling short, they lose the opportunity to grow, to improve, and to progress in the job. Similarly, the employer who fails to convey its dissatisfaction to the employee loses the opportunity to train and support an existing employee, instead having to invest additional resources in recruiting, hiring and training when things don't work out. On the other hand, some employers express too much personal opinion, frustration, anger or other negative emotions, and the discipline becomes a personal attack rather than a productive discussion of areas of growth. When an employee is attacked and deemed to be incompetent, he simply becomes resentful and shuts down. At that point, improvement is unlikely, and the relationship will continue to deteriorate.

BENDAVID: If you have participated in any of my trainings you may have heard me say the following: "If it is not in writing, it didn't happen." Not documenting the discipline is the number one mistake; and most employers know this. I frequently receive employer calls asking about a prospective termination, only to be told that they never documented the prior performance problems. Even if you verbally counsel an employee, you should follow up in an email or other writing to the employee to confirm the conversation took place. The number two mistake is disciplining an employee for something they are legally entitled to do. For example, you should not discipline employees for taking protected time off.

> 'The most common class action claims are failure to provide proper meal breaks; failure to provide proper rest breaks; failure to properly pay overtime; misclassification and corresponding claims for pay stub violations and waiting time penalties. You should regularly audit your pay practices.'
>
> SUE M. BENDAVID

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

ROSENBERG: That's a huge assumption that's very dangerous following last month's California Supreme Court ruling severely limiting who can be legally classified as an independent contractor. Businesses that engage service providers as independent contractors should consult with counsel immediately to see if the relationships will pass muster under the new test. The new test, which is much harder to meet, means that many independent contractors will have to be reclassified as employees, with all of the attendant costs and burdens. The California Supreme Court adopted a three-part standard, called the "ABC" test, to distinguish employees from independent contractors. A worker is presumed to qualify as an employee unless the hiring entity can prove: (A) the worker is free from the entity's "control and direction" in connection with performance of the work, both as a matter of contract language and in fact; (B) the worker performs work "outside the usual course" of the hiring entity's business; and (C) the worker "is customarily engaged" in an independent business, occupation, or trade of the same nature as the work he or she performs for the hiring entity. Contracts are now of critical importance, but won't be worth the paper on which they are written unless the facts support the hiring entity passing parts A, B and C of the new test.

GABLER: Although the existence of an independent contractor agreement will not automatically create a contractor relationship, it is nevertheless critical to have an enforceable agreement in place to defend the worker's contractor status. This has become even more important in light of the California Supreme Court's recent decision in Dynamex Operations West, Inc. v. Superior Court (2018), in which the Court developed a far more burdensome three-part "ABC Test" regarding the classification of workers as independent contractors. Ideally, contractor agreements should include, without limitation, reference to the worker's status as a contractor (without calling the worker "employee" in the agreement!), the contractor's right to set the work schedule and hire its own staff, the contractor's obligation to pay its own expenses, the contractor's obligation to invoice the company for services rendered and the timing of payment for services (without using company payroll!), the contractor's obligation to pay its own taxes and procure its own insurance, the contractor's right to work with any other clients (provided there is no conflict of interest of competition), and the obligation to arbitrate disputes under the agreement. Random buzzwords or misstated phrases can severely undercut the contractor classification, and employers would be well served to develop the agreement with the assistance of employment law counsel.

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

BENDAVID: The most common class action claims are failure to provide proper meal breaks; failure to provide proper rest breaks;

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failure to properly pay overtime; misclassification (exempt/non-exempt or employee/independent contractor) and corresponding claims for pay stub violations and waiting time penalties. You should regularly audit your pay practices. We rarely see employers who are doing everything right. Even the smallest unintentional mistake can lead to claims for huge penalties.

ROSENBERG: Meal and rest break class actions and class actions for failing to provide 'suitable seating" to employees are still a huge problem for California employers. Matters got even worse when the California Supreme Court ruled 18 months ago that rest breaks must be absolutely "duty free." In other words, an employer may not require (or even ask) employees to remain on premises or to remain on-call in the event of an emergency. The ruling involved a security guard service where the employees were asked to leave their radios "on" during their 10 minute paid rest break just in case an emergency occurred and they were needed. Though it rarely happened, the Court said that the requirement of keeping the radios turned on converted the rest break to work time and the employees were entitled to a rest break penalty equal to one hour of ay for every day that the offending rule or practice was in place (there is a 4 year statute of limitations). The ruling upheld a $100+ million verdict in favor of the security guards.

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 paystub, failure to 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, case law has 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.

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

GABLER: You would think so, but perhaps not! PTO policies are easier for employers to track, and employees 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 state's mandatory sick leave laws). 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 frontload 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. City-specific sick leave laws impose even greater burdens, requiring additional sick leave hours in certain locations. In addition, an employer can require advance notice of vacation and may deny a request for vacation time off, but employees 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 unanticipated absenteeism, instead of using a combined PTO policy.

BENDAVID: Ever since the passing of California's mandatory paid sick leave law, as well as various cities' versions, we are recommending that employers have separate vacation and sick leave policies. The sick leave rules are very strict and you want to ensure you comply. Since there is limited flexibility on paid sick and more flexibility with vacation – we suggest you separate the two. Further, vacation and PTO must be paid on separation. PTO thus can result in a higher pay out since PTO usually accrues at a higher rate than just vacation.

ROSENBERG: Bundling the company's paid time off policies used to be the rage. After passage of the state's sick leave laws, that's no longer the case. The nuances in the paid sick leave law make it more beneficial to unbundle paid time off benefits because the cumbersome usage, carryover and pay-stub reporting rules do not apply to any other paid time off benefits. Also, accrued sick leave need not be aid to departing employees. However, that's not the case where the sick leave and vacation benefits are bundled into a single policy. So, by including vacation and sick leave into a single policy, the company will have to pay departing employees for their unused sick leave or face stiff "late payment" penalties under the Labor Code.

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

BENDAVID: For most employers, you cannot have a strict rule barring employment to anyone with a criminal record. If you do, you might be inadvertently excluding individuals for discriminatory reasons and subject to liability for race or national origin discrimination. Also, under the new "ban the box" rules, you must first conditionally offer employment. If the applicant accepts and if you then conduct a background check, you cannot automatically rescind the offer. There is a mandated process you must first implement and complete. Each situation must be individually analyzed and the individual must be given the opportunity to explain why the conviction should not bar employment.

GABLER: A blanket prohibition against applicants with criminal records is unlawful discrimination, and the employer's ability to find out about criminal convictions in the hiring process is limited. As of January 1, 2018, California implemented the "Ban the Box" rule on a statewide basis with California Government Code Section 12952, making it an unlawful employment practice for employers with five or more employees to include in their employment applications questions about criminal history or inquire about an applicant's criminal history during the initial interview stage, before a conditional offer of employment has been made. Even after a conditional offer of employment has been made, if an employer decides to deny employment based solely (or in part) on the criminal history, the employer must make an individualized assessment as to whether the applicant's criminal history has a direct adverse relationship on the specific job duties the applicant would perform. 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 might be rejected for a preschool position, and applicants with felony embezzlement convictions might be rejected for an accounting position. On the other hand, applicants with felony DUI convictions could not reasonably be rejected for a job that does not involve driving on behalf of the company. If a conviction appears on a legitimate post-offer background check, employers must 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: Federal and state law speak to this issue. The United States EEOC considers a blanket ban on the hiring all convicted criminals to be illegal under Title VII. EEOC requires an employer to be able to prove that there is a real connection between the applicant's prior criminal offense and the intended job duties. Also, the state's "Ban the Box" law prevents private employers from even asking about or requiring the disclosure of any criminal history until after a conditional offer of employment is made. There are certain exceptions for people who work with children and the like. If the employer elects to conduct a post-offer criminal background check and wishes to deny the employment based upon that information, then the employer must provide the applicant a complicated documentable "fair chance process" before declining employment. The employer also must hold the job open while doing so. Employers are also required to post a notice informing applicants of the ordinance, and to remove questions from job applications about criminal history. Finally, California law prohibits employers from asking about (or using) any arrest and certain conviction records when evaluating job applicants. The simple question "Have you ever been convicted of a crime" is illegal in California.

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

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? Falling 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.

ROSENBERG: Many employers erroneously believe that a layoff cannot be legally challenged, but that's not true. In every layoff, decisions are made about who to retain and who to let go. Those selected for layoff can sue if they think they were selected for an illegal reason such as their gender, race and the like or because they opposed some employer practice that was illegal (i.e., they are a "whistleblower"). In every lay off discussion I have, I ask the company two basic questions: "why now" (i.e., why do you need a layoff?) and "why me" (i.e., how have you picked who to keep?). It's the latter question that often poses the most challenges for the company. Simply put, you must be able to show that the employee who is suing you was not as good as the one(s) you kept. In a great many of these cases, the employer has little or no record of job performance to effectively make the comparison. Before implementing a layoff, be sure to scrub the employee files to see if they support the layoff story. If not, you are exposed. A well-documented file is worth its weight in gold if you are sued or if you are trying to convince an inquiring lawyer to turn down your former employee's case.

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

BENDAVID: Make sure you have access to an HR professional who knows what they know and who knows what they do NOT know. That HR professional should regularly attend seminars, read updates on employment laws, and keep his or her finger on the pulse as laws are changing. Our clients also read our blogs and attend our regular updates during which we describe the changes in the law and the practical implications of those law changes.

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, inapplicable to California employers or inappropriate for your business. There is no substitute for solid legal advice from a trusted advisor who knows you and your company.

◆ How does a law firm differentiate itself from the competition in 2018?

GABLER: To be truly effective, it is not enough to be an employment law expect 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. As an example, our firm provides twice-monthly complimentary seminars in two locations, designed to give our clients the basic tools necessary to address their most common questions. By actively investing our time and resources into their 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.

BENDAVID: When you hire a lawyer or a law firm, you are looking for a trusted professional advisor. Every client is different and lawyers are different too. So, find someone that returns your calls, promptly answers your questions, understands you and your business and that you can trust is looking out for your best interests. The lawyer should try to assess what type of company you are in terms of compliance and risk tolerance and guide you accordingly.