LEGAL TRAPS AT WORK

By AMY STULICK Staff Reporter

Valley attorneys discuss recent changes in employment law – and the liability landmines they present for managers and companies.

Employment law has become a dynamic concern for managers, as recent court cases and new laws impact their daily job chores. A mixed bag of new requirements – namely the definition of independent contractors, arbitration, a steady rise in minimum wage, maternity leave for new mothers and sexual harassment training for every employee – are forcing some employers to scramble.

Those looking for clarification on the various changes should check in with a local employment lawyer. The Business Journal’s list of law firms starts on page 12. In addition, the Business Journal spoke with several local attorneys to gauge how employers can adapt to the most problematic new rules.

Independent contractors

One of the most notable changes, especially when it comes to L.A. County’s booming gig economy, are stringent independent contractor requirements. The new rules stem from a decision by the California Supreme Court in the matter of Dynamex Operations West Inc. v. Superior Court of Los Angeles.

"Dynamex involved a trucking company," said Richard Rosenberg, partner at Ballard Rosenberg Gelper & Savitt in Encino. The No. 16 firm on the list. "The allegation was that the independent contractors should be reclassified as employees. It was a victory by those employees; they were seeking to get the benefits of all those employment-related things that they didn’t receive because they were treated as independent contractors."

In the decision, the court adopted a three-part test to determine whether an independent contractor should be an employee. Legal jargon for the test reads as follows:

(A) that the worker is free from the control and direction of the hiring entity in connection with the employee;
(B) that the worker performs work that is outside the usual course of the hiring entity’s business; and
(C) that the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

Rosenberg B has emerged as one of the most troubling for employers in California. Many employers in the entertainment industry, for example, hire independent contractors that essentially do the same line of work:

“If you’re an advertising agency and you want to make an ad for one of your customers, and so you hire..."
graphic artists who are independent contractors, they’re part of the product that you’re producing,” Rosenberg explained. “You’re not going to be able to make them independent contractors, because that part of your business, creating the work for the customer.”

Poongs A and C are similar to requirements on the previous test and more manageable for employers.

“You have control over those things,” added Katherine Eron, partner at Holland Rosenberg Delap & Sarats. “You can exert less control over someone so that it starts to weigh more as an independent contractor. You can have them from their own corporate. You can do less things that make it appear as if someone is an independent contractor. But the test there is no way that you can contractually control the independent contractor from the employee.”

Here

“When you’re speaking to management, you’re in essence speaking to the company itself,” said Bendavid. “We add things to the supervisor’s training that are unique to the supervisors. We talk about the different levels of liability. When a supervisor engages in harassment, for example, there is strict liability, as opposed to non-supervisors engaging in the conduct.”

For staff employees, training like Bendavid want them to know that these rules are in place to protect them, individuals are made aware that harassment is just a portion of what the training covers. Discrimination, prevention, retaliation, those bullying and transgender rights are covered, too.

The broad spectrum of topics discussed is a result, at least in part, of the MeToo movement, Bendavid said.

“We often can’t talk about the rules of the road and the consequences if they violate those rules, hopefully, more likely that they won’t engage in that conduct in the first place,” she added.

Lactation rooms

California clarified rules pertaining to lactation room requirements. In 2017, a provision under the labor code required an employer to provide an employee with a room or location in close proximity to the work area, and the new statutes added that the area should not be a bathroom, a restroom.

Employers are encouraged to take a look at their workplace and plan ahead. “Is there a room in that use that can be designated the lactation room?” “Make sure it can lock, windows can be closed, blinds can be closed,” said Bendavid. “If they don’t have the ability to do that, because of the type of business that they are, they need to think about other temporary locations that they can transform to accommodate employees who want to express breast milk at work.”

Taking an existing space and dedicating it for lactation purposes, even if it’s just for a month or two, is acceptable so long as it’s private and free from intrusion. The solution could be as simple as putting a lock on the door of a small, underutilized conference room that meets all the other requirements.

Minimum wages

Location and industry are major factors when determining an employee’s minimum wage, and employers should pay close attention to them.

For example, a waitress working in the city of Los Angeles gets paid a minimum wage of $12.25 an hour, while a restaurant in Beverly Hills pays its waitresses a minimum wage of $12. Rosenberg said.

If your employees work outside of these designations, the minimum wage is $11.

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Pomenance

Some businesses who have very small margins are going to be specious unless they turn around and raise the prices or the cost of what they do,” said Druw Pomenc, partner at Batesworth Pomenc New & McAdams in Woodland Hills, No. 23 firm on the list. “Ultimately, I would respect. Like everything else, this will be passed on to the consumer.”

Employers also need to think about increases in payroll taxes, workers comp and insurance premiums, Pomenc said, as well as ensuring that senior employees—especially if they’re paid just above minimum wage—are bumped up too.

“If they see that people who are coming on board with no experience are getting $15 an hour, and they’ve been with you for 15 years, they’re a good employee, they’re making $10 and it makes no sense for them to have to raise them too or they will leave and you’ll lose good, long-term employees,” Pomenc pointed out.

Arbitration claims

Case law in the last year has impacted the arbitration process, according to Rosenberg.

“The arbitrator can give you a horrific outcome, worse than a jury trial, because unlike a jury trial, arbitration is almost unappealable,” Rosenberg said.

Costs may not be in the employer’s favor either, according to a state supreme court ruling last year. A recent supreme court decision determined that an employer wants to move a dispute from court to arbitration, that employer cannot impose any greater cost than it would be in court.

Currently, the filing fee for a single plaintiff in court is roughly $500, the cost just the judicial system imposes. If you go to arbitration, the California Supreme Court says the employer has to pay for any costs associated with effectively means paying for the cost of the arbitration. Arbitrator’s charge, on average, $2,000 to $15,000 a day for their time,” added Rosenberg.

You’ll need to consider the influx of Private Attorney General Act claims in California and what to do if your company is notified of an impending PAGA lawsuit.

“The plaintiff’s lawyers are getting really good at just filing PAGA claims,” said Pomenc. “Any business that has arbitration agreements should stand that they could face court exposure on PAGA.”

Although courts may stay the case pending arbitration, employers could do well to face the claim head-on and be prepared, regardless if it’s striking the claim, addressing it or resolving it, Pomenc said.

Plaintiff’s lawyers are reported to send a letter to the state to start the process, which the employer could also receive. A 45-day window is provided to both parties before the case is actually filed, giving the employer time to determine how it wants to proceed. For more information about PAGA lawsuits, see the interview with Karen Gabler of LightGabler, No. 24 on the Business Journal’s list of law firms, on page 12.

Looking ahead

Taken together, the new rules show the state prefers companies that have employees and not independent contractors, and that California law skews very employee friendly, sometimes at the expense of employers.

Restrictions and costly lawsuits could deter potential employers from setting up shop in California or force existing employers to move out of state, lawyers say.

“The (California) Supreme Court is one of the most liberal supreme courts in the country. They have decided a number of earlier rulings that some would say drive business out of California,” said Rosenberg. “California is a beacon to states like Texas, who say ‘Come bring your people here as independent contractors. You don’t have to mess with all those expenses and overtime’.”

Case law related to these changes will take some time to accumulate, but may give employment attorneys, employers and managers a better idea of what changes affect the California work force.