LAW SPECIAL REPORT

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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 steadily rising minimum wage, lactation rooms 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 State Supreme Court in the matter of **Dynamex Operations West** Inc. v. Superior Court of Los Angeles.

Rosenberg

"Dynamex involved a trucking company," said **Richard Rosenberg**, partner at **Ballard Rosenberg Golper & 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 lawsuit 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 performance of the work, both under the contract for the performance of the work and in fact;

(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.

Prong B has emerged as 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

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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's part of your business, creating the work for the customer."

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

"You have control over those things," added **Katherine Hren**, partner at Ballard Rosenberg Golper & Savitt. "You can exert less control over someone so that it starts to weigh more as an independent contractor. You can have them form their own corporation. You can do lots of things that make it appear as if someone is an independent contractor. But the B test, there's no way that that can be changed. … The employer no longer has that flexibility to tweak things here and there to try to swing the pendulum in one direction or the other."

Hren

"How do you make a movie without a film editor? You can't. A lot of these guys can be hired too, but some of them will have their own business, they have an LLC and they work through that LLC," added Rosenberg.

While it's still unclear how the law will work in the marketplace, cases brought under case law will help lawyers and state officials determine the effectiveness of the new test for California employers. It is expected that the new test will be retroactive, although the law was not clear on that point, Rosenberg and Hren said.

Sexual harassment training

By 2020, employers in California with five or more employees will be required to provide at least one hour of sexual harassment prevention training for every employee. Previously, it was required only of managers.

Bendavid

"After the law was passed, I have received many calls from companies to set this up; it reminds people of the obligation to conduct this training," said **Sue Bendavid**, partner at Encino-based **Lewitt Hackman**, No. 5 on the Business Journal's list of law firms.

"Before, employers were doing the staff training to be proactive and in an effort to establish that they take these issues seriously. Employers want to proactively take steps to prevent harassment and discrimination from occurring in the workplace and things of that nature. … Now, it's required as a matter of law," she explained.

The change also brought employer size requirements for training down from 50 to five employees. Non-supervisory employees must attend an hour of "classroom or other effective type of training," and supervisors need to have two hours of training, according to Bendavid. Companies must provide training every two years.

Online classes for staff employees are in the works and are expected to be available later this year.

The only roadblocks expected for employers are cost and timing. Depending on turnover at a company, frequency might be an issue. Online training might alleviate cost, leaving supervisors to still receive in-person training all in a day.

Bendavid, who provides training to various employers in the Los Angeles area, modifies her training models based on type of employee in attendance – namely, supervisor versus non-supervisor.

"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, trainers 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, abuse, 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.

"The more we can tell people about the rules of the road and the consequences if they violate those rules, hopefully the 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, but the new statute added that the area should not be a bathroom.

Employers are encouraged to take a look at their workspace and plan ahead.

"Is there a room that is already not in 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 to 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 $13.25 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.

"It used to be the simplest question in the world, 'What is the minimum wage?' Now you need to know if you're in a city, a county, an industry or an area that has its own minimum wage," added Rosenberg.

An employee completing a government contract, for example, may have a separate minimum wage. Unionized employers may waive the state's minimum wage if its employees are under a union contract.

"The unions have been the largest proponents of raising the minimum wage, but most of the minimum wage statutes have an exception for those employers in the union; they can waive it," said Rosenberg. "The theory behind that is the union will negotiate a whole package of wages and benefits, so they don't need the protection of the law."

Pomerance

Once the employer jumps through the hoops to determine the minimum wage for the year, the company then needs to see how it can absorb cost.

"Some businesses who have very small margins are going to be squeezed unless they turn around and raise the prices or the cost of what they do," said **Drew Pomerance**, partner at **Roxborough Pomerance Nye & Adreani** in Woodland Hills, the No. 23 firm on the list. "Ultimately, I would suspect, like everything else, this will be passed onto the consumer."

Employers also need to think about increases in payroll taxes, workers comp and insurance premiums, Pomerance 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 and they're making $16 an hour, you're going to have to raise them too or they will leave and you'll lose good, long-term employees," Pomerance pointed out.

Arbitration Claims

Case law in the last year has impacted the arbitration process, according to Rosenberg and Pomerance. In some instances, employers' strategy of limiting the risk of a runaway jury verdict through arbitration has the potential to do more harm than good.

"An arbitrator can give you a horrible outcome, worse than a jury trial, because unlike a jury trial, arbitration is almost unappealable," said Rosenberg.

Costs may not be in the employer's favor either, according to a state ruling several years ago, Rosenberg said. The ruling determined that if 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 only cost the judicial system imposes.

"If you go to arbitration, the California Supreme Court says the employer has to pay any cost above (the filing fee,) which effectively means paying for the cost of the arbitration. Arbitrators charge, on average, $2,500 to $10,000 a day for their time," added Rosenberg.

Employers also 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 out there are getting really good at just filing PAGA claims," said Pomerance. "Any business that has arbitration agreements still has to understand that they could face court exposure on PAGA."

Although courts may stay the case pending arbitration, employers would do well to face the claim head-on and be prepared, regardless if it's fighting the claim, addressing it or resolving it, Pomerance said.

Plaintiffs' lawyers are required to send a letter to the state to start the process, which the employer would also receive. A 60-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 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 done a ton of pro-worker rulings that some would say drive business out of California," said Rosenberg. "Dynamex is like a beacon to states like Texas, who say 'Come bring your people here as independent contractors. You won't have to mess with all these 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 how these changes affect the California work force.