CUSTOM CONTENT
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LABOR & EMPLOYMENT

A ROUNDTABLE DISCUSSION

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The San Fernando Valley Business Journal has once again turned to some of the leading employment attorneys and experts in the region to get their assessments regarding the current state of labor legislation, the new rules of hiring and firing, and the various trends that they have been observing, and in some cases, driving. Here are 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 2020 – from the perspectives of those in the trenches of our region today.

Thanks to our superb panel for their expert insights.

LABOR & EMPLOYMENT ROUNDTABLE

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What are the most significant new laws taking effect that could be impactful to businesses?

ROSENBERG: Here are five new laws that could be impactful to businesses: 1) AB 9 extends the statute of limitations for filing job bias claims under CA law from one year to three years. This gives employees an additional two years to assert a claim of discrimination. 2) AB 5 codifies new rules making it extremely difficult for employers in California to properly classify workers as "independent contractors." 3) AB 51 prohibits employers from requiring employees or job applicants to sign an agreement requiring the employee to arbitrate claims for violations of the state's job bias laws or the any claims under the CA Labor Code. Note: this law was recently enjoined by a federal court on the grounds that it is pre-empted by the federal law favoring arbitration. 4) AB 749 prohibits employers from including a so-called "no rehire" provision in a settlement agreement with a current or former employee following the filing of a lawsuit, administrative agency complaint, alternative dispute resolution forum, or through an employer's internal complaint process. The only exception is where the employer has made a good-faith determination that the settling employee engaged in sexual harassment or sexual assault. 5) SB 142 enacts some significant new requirements related to lactation rooms. Existing law requires that a lactation room shall not be a bathroom, and shall be in close proximity to the employee's work area. Some of the new requirements are: (i) the room must be shielded from view and free from intrusion while the employee is pumping breast milk; (ii) the employee is provided access to a sink with running water and a refrigerator suitable for storing milk (or another cooling device) in close proximity to the employee's workplace and have access to electricity or alternative devices such as extension cords or charging stations needed to operate an electric or battery-powered breast pump.

BENDAVID: Without question, one of the most significant bills this year is Assembly Bill 5. AB 5 codified a so-called simplified "ABC" test for determining whether a worker can be classified as an independent contractor. It placed the burden of proof squarely on the shoulders of the hiring entity to prove the worker is correctly classified. Due to lobbying efforts, the legislature added several conditional and limited exemptions (e.g., lawyers, doctors, travel agents, HR consultants, to name just a few). Regardless, AB 5 will impact virtually every company that uses outside vendors to perform services. Employers should review all service provider relationships in view of the ABC standard and reassess whether the worker can remain an IC or be transitioned to employee status. We also expect an increase in employment harassment suits due to Assembly Bills 9 and 51. Under AB 9, employees now have three years (instead of one) to lodge a complaint. AB 51 bans mandatory arbitration should employees allege violations of California's Fair Employment and Housing Act. The enforceability of AB 51 is in question, however, due to recent court action to enjoin enforcement, which means employers should stay tuned.

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

ROSENBERG: We envision a slew of class action lawsuit under AB 5 challenging a business's classification of workers as independent contractors. The new law creates a presumption that all workers are employees and places the burden on the employer to prove otherwise. Under the new laws so-called "A-B-C" test, it is now much harder for employers to satisfy this burden. This affects tens of thousands of CA workers.

What can companies expect from the California legislature in 2020?

BENDAVID: The California legislature is already starting the process to amend Assembly Bill 5. It just recently introduced Assembly Bill 1850 and stated: "This bill would declare the intent of the Legislature to enact legislation that would further clarify the application of the California Supreme Court's decision in Dynamex and recently-enacted requirements under the Labor Code." Employers who wish to lobby the legislature should move quickly to see if the legislature is willing to exempt their particular industry from the ABC test.

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

LIGHT: True non-competes are not enforceable in California except in limited circumstances (e.g., an owner sells her business). The best an employer can do is mirror what the law allows, which is, for example, provisions prohibiting solicitation using the Company's proprietary information – which can include customer and vendor lists. An "announcement" is acceptable ("Hi it's Jon, here's my new contact info"); a "solicitation" is not ("Hi it's Jon, I'd love your business, let's have lunch, etc."). Also, employers need to be careful about hiring people in or from other states; some states do allow restrictive covenants that would otherwise be unenforceable in California. Review their agreements before hiring.

ROSENBERG: California law is very protective of employee mobility, so most "non-compete" agreements are unenforceable. The law also permits employers to vigorously protect proprietary and trade secret information by having employees sign agreements which prohibit them from taking, using or making unauthorized disclosure of the employer's confidential or trade secret information. The key is taking a proactive approach to identify what information is legally protectable, having employees sign an agreement that properly protects that information and the employer consistently enforcing those secrecy rules.

BENDAVID: The State of California strongly opposes noncompete agreements in most settings. With limited exceptions, businesses cannot prohibit former employees from seeking work, even with direct competitors. There are very narrow exceptions to this rule (when a business owner sells the owner's stock for example – the prior owner can be subject to a limited non-compete). But generally, employers should not ask employees to sign non-compete agreements, nor expect such agreements to be enforceable in court. Employers can, and should however, protect their businesses by implementing strict confidentiality agreements and trade secret protection plans. Apart from confidentiality agreements, employers should have policies in place which advise employees about their obligations to protect the company's confidential information and trade secrets. Employers should also ensure that databases are password protected and that information is distributed on a need to know basis only.

What are the key points employers should know about mediation in the context of employment disputes?

ROSENBERG: Mediation works and in most cases proves to be a much better method of conflict resolution that going to court. Court statistics show that fewer than 5% of all employment cases actually go to trial. That means that almost nearly 95% of all cases will eventually settle. Mediation is a voluntary process that will enable parties to explore resolution confidentially before they have run up a drawer full of legal bills. Legal claims are costly to defend and time consuming. Mediation can be a great escape valve allowing the company to move forward while minimizing the cost and hassle of the litigation process.

LIGHT: It's a great way to get to resolution before incurring a huge amount of legal fees. A company will usually pay more than it wants to pay, so get a realistic assessment early on from your attorney and don't have a heart attack. It's still cheaper and safer than litigation. We will go to mediation on receipt of a demand letter, especially if the facts aren't pretty. Get the facts and documents together and encourage your attorney to share information with the other side; we don't want surprises at mediation (on either side, generally). The more the other side knows about your case going in, the easier time you will have getting them to a result you can accept. If finances are an issue, be prepared to show your numbers and perhaps share before the mediation. Attorneys are lousy at reading financial documents and may need some help beforehand. Don't automatically decline the mediator suggested by the other side. If they trust that mediator, they will have an easier time accepting what the mediator proposes.

BENDAVID: Mediators are often hired to help parties resolve disputes. The mediator performs what I call "shuffle diplomacy" to help everyone realize that settlement can sometimes be better than litigating, and potentially losing the case at trial. A good mediator can often connect with the employee (sometimes on an emotional level) and demonstrate the legal and factual weaknesses in their case. The mediator can also help employees understand they are not going to get rich by suing their former employers. If the mediator is effective, he or she can explain to the employer why settlement may be a more economical course of action depending on the law and the facts of each case.

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

LIGHT: I am 100% in favor of arbitration and can't understand why some attorneys disagree. It's safer, less expensive, and less time-consuming. Plaintiff attorneys don't get to use a jury that may be more emotional, less focused on the facts, less understanding of the law, and more likely to award big damages. Arbitration agreements also prevent employees from participating in wage and hour class actions (yes, that's enforceable, still). Some attorneys believe that arbitrators are prone to "split the baby," but that has not been my experience.

BENDAVID: Under AB 51 (if it survives the current legal challenge) an employee may still bring a claim under the Fair Employment and Housing Act (FEHA) in court, rather than being compelled to privately arbitrate the dispute. For other claims, arbitration has both benefits and risks. Employers should weigh costs, time, the lack of an appeal if the decision goes against the employer, etc. Employers should also consider the benefits associated with class action waivers, while under-

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standing that plaintiffs still may sue in court for wage and hour penalty claims under the Private Attorneys General Act (PAGA). 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.

As automation becomes more ubiquitous in the workplace and employers adopt artificial intelligence tools for greater efficiency, what should businesses be aware of from a legal perspective?

BENDAVID: As employers modernize their processes with the use of Artificial Intelligence, they may lay off workers who previously performed the same tasks. Before employers conduct mass layoffs, they must determine whether they are obligated to provide advance notice under the federal and state Worker Adjustment and Retraining Acts ("WARN Acts"). Aside from that, another danger is running afoul of discrimination laws. Employers should ensure that when replacing staff with AI, they establish criteria for layoffs that do not have a disparate impact based on protected characteristics. To mitigate the impact, employers should also consider whether those employees being replaced with AI can be retrained for other positions within the company.

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

ROSENBERG: The biggies are: (i) not documenting performance problems in real time; (ii) not giving the employee a fair chance to succeed before being fired; (iii) not understanding that an employee's testimony is "evidence" that a jury can rely upon when making an award; (iv) not being consistent when meting out discipline (i.e., not treating likes alike); and (v) failing to understand that in certain cases (such as disability or religious accommodation), an employer must bend the rules and treating likes alike will get them in trouble.

LIGHT: Failure to document. Failure to document. Failure to document. Starting early enough in the process, before the employee realizes they are in trouble and then takes a mysterious fall in the lunch room (we had a case with a guy who poured coffee on the floor and then "fell"), claims "stress," or complains about working conditions, their boss, wage issues, or anything else that "protects" them; it's a great strategy by employees. A gentle email can be enough "documentation" to start the process, and jurors, judges, opposing counsel and government agencies tend to believe paper generated at the time over someone's memory. Have your supervisors identify their weakest link and begin this process as their New Year's Resolution. And don't inflate an employee's performance review to be nice or to avoid the stink eye and passive-aggressive behavior in protest; it looks bad to discipline an otherwise "good" performer and will hurt the company later when defending against a discrimination claim.

BENDAVID: Inconsistency in imposing discipline is a primary problem leading to employees feeling they were discriminated against by their supervisor as a result of their race or other protected characteristic (e.g., when one employee is terminated while another is simply written up for the same policy violation). If there is a history of bad behavior and the termination is because of a "straw that broke the camel's back," ensure there is a record of previous transgressions. Remember: from a juror's perspective, they may conclude that "If it's not documented, it didn't happen." Employers should also ensure that discipline is not a result of the employee exercising a legally-protected right. For example, an employee who has a work-related injury should not be disciplined for submitting a workers compensation claim. An employee who takes time off for medical leave or pregnancy, should not be terminated or disciplined as a result. Keep in mind the protected activities and the numerous leave laws under state, federal and local laws before writing up or terminating an employee.

What are some of the most common mistakes that businesses make when it comes to employees and intellectual property?

BENDAVID: Aside from ensuring your intellectual property is protected at the federal and international levels via trademarks, copyrights, and patents, employers should also ensure staff members sign confidentiality and non-disclosure agreements. Another key step to protecting IP begins in the employee handbook. Employers should create very clear, written policies regarding the use of the business's IP in social media and discuss restrictions on how such information is to be used or shared outside the company.

What advice would you give to a new company with respect to the creation of an employee handbook?

ROSENBERG: Use a labor law expert. Handbooks are legal documents that must be written with great care and updated as laws change. Leaving this to consultants or in- house personnel without considerable legal background is risky because a typical handbook has 100+ legal regulations that must be accounted for and communicated correctly. Even small policy mistakes can easily land an employer in court and expose the company to a six figure jury award. Remember, you get what you pay for.

BENDAVID: Employee Handbooks are an important place to keep and communicate your company policies to your employees. Handbooks are often used as the cited source when employers choose to discipline an employee, or when making the decision to terminate (e.g., when employees violate your policies). They should contain key policies, including employment at will, anti-harassment and discrimination policies, and policies regarding various leave laws. As for harassment and discrimination matters, the handbook should explicitly state that harassment and discrimination will not be tolerated and provide instructions for how employees should notify the company in the event they are being harassed or discriminated against. The handbook should state that all claims will be taken seriously, timely investigated, that the employer will keep the claim and investigation confidential to the extent possible, and that steps will be taken to correct the situation if the investigation reveals the claim is substantiated. It is also critical to have written policies describing your Company's compliant meal and rest break rules so you can prove to employees (and to their counsel and the court if need be) that you have proper policies in place.

How do you determine if a person is an employee or an independent contractor?

LIGHT: It's a simple as ABC. Do they control their work? Do they do what the company does? Do they have their own business? Or are they in one of the specific "Professions," carved out by new Labor Code section 2750.3 that codifies the Dynamex case and its ABC test (which includes, amazingly, the Avon Lady and the Repo Man)? Are they in the "professional services" category with specific carve outs (grant writers, etc.)? Or, most generically, does this relationship qualify as a "bona fide business to business contracting relationship"? This is a company's likely best shot, but the worker still must pass the old Borello test and demonstrate, among several criteria, that the worker has a business license, controls their work, actually has other clients/customers, and provides services to the company and not to the company's customers (that one can be a killer).

BENDAVID: Employers must now use the A-B-C Test to determine whether or not a worker can be considered an independent contractor. To quote AB 5: "(A) The person 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) The person performs work that is outside the usual course of the hiring entity's business. (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." The hiring entity bears the burden of proving each one of these elements. If any of the conditions are not satisfied, and if none of the exemptions apply, the worker is an employee in the eyes of the law.

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

LIGHT: Don't slide in "employee-looking" clauses like at-will, benefits, or expense reimbursements that logically should be the IC's responsibility. Do try to mirror the requirements of the new IC test under the Labor Code. DO NOT include "work for hire" or "work made for hire" language. Even if the IC arrangement is otherwise completely legitimate, those words will void the relationship under the unemployment laws and create an employment relationship requiring unemployment insurance contributions, according to the EDD. There are other ways to convey ownership rights in whatever the IC is creating for the company. A good business lawyer should be able to figure that out.

ROSENBERG: Under AB 5, you must have a written agreement with every independent contractor. And, the agreement will be valuable evidence if the worker's contractor status is ever challenged. The best agreements are those that clearly lay out the facts demonstrating why the service provider qualifies to be treated as an independent contractor to meet the many requirements of AB 5. Employers also should add tight protections for the protection of the trade secrets that a contractor may encounter when doing the contracted-for work. Finally, be sure there is strong indemnity language that protects the company if the company is sued on account of something the contractor does.

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

BENDAVID: As mentioned, the state and federal WARN Acts requires certain employers to provide advance notice when

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conducting a mass layoff, plant closure, and in other circumstances. Aside from ensuring sufficient and proper notice is provided, employers should also develop sound criteria to determine who should be laid off and who retained – criteria that does not adversely affect a protected group (e.g., have a disparate impact based on race, national origin, age, etc.). Once the criteria is established, it should be documented and employers should ensure the laid off employees are timely paid all wages and accrued/unused vacation, reimbursed for expenses, made aware of changes to benefits, etc.

ROSENBERG: Many employers believe that a company can layoff whoever it wants without legal recourse. Actually, employees selected for layoff can sue (and win!) if they were selected (i) on account of a protected status (such as age, gender, race); (ii) because they voiced opposition to any practice that the employee reasonably believed was illegal; or (iii) in retaliation for having availed themselves of a legal right (e.g., taking a pregnancy or work injury leave) . Business should develop clear criteria for who stays and who goes. A well-documented layoff file is worth its weight in gold if you have to fight an employee claim or wish to convince an inquiring lawyer to turn down your former employee's case. Timing is also critical. For example, laying off someone who just returned from maternity leave or who recently complained about workplace harassment is very risky.

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

LIGHT: The list is (almost) endless: Failure to include non-discretionary bonuses in overtime calculations; rounding practices that mostly favor employers; failure to include shift differentials in overtime; non-compliant pay stubs; failure to monitor meal break time punches to ensure 30 minutes are commenced by the end of the 5th hour (employers still screw that up despite being whacked upside the head for years on this issue); auto-deducting for meals; failure to provide a third rest break when working past 10 hours; failure to pay for travel time; allowing employees to lump rest breaks together; misclassifying workers as salaried exempt; improperly paying inside salespeople; not paying for hand tools (if not earning double minimum wage); use of personal phones; auto reimbursement. Etc., etc., etc. It's brutal, and no one gets it completely right. As one of my class-action-scarred clients remarked: "I didn't know that doing nothing wrong is not the same as doing everything right."

BENDAVID: The big issue this year will be misclassification of employees as independent contractors. But we regularly see employers being accused of misclassifying employees as exempt, violating meal and rest break rules, allowing employees to work "off the clock," or miscalculating overtime pay. Sometimes these issues occur when managers and human resources personnel are not properly trained, or when policies get ignored because of the day-to-day demands of the business.

ROSENBERG: Number 1 is off the clock work. Starbucks found out the hard way that asking employees to clock out before they are completely done working- even for a few minutes- can result in a huge liability. Number 2 is meal and rest breaks. Our Supreme Court clarified that rest breaks must be absolutely duty free. Employer may not require (or even ask) employees to remain on premises or to remain on call in the event of an emergency. Number 3 is paystub deficiencies. Every paycheck must have the required data or the company faces a fine. Number 4 is time clock "rounding". While the practice technically is still legal, the employer will face legal liability if the practice end up working in the favor of the employer.

Can an employer legally impose a rule barring the employment of job applicants with criminal records?

BENDAVID: California's "Ban the Box" law prohibits employers from asking about criminal history before offering employment. Strict rules bar an employer from withdrawing the offer of employment if a criminal history is discovered after selecting a candidate for employment. The offer can be withdrawn, but only after an involved and time-consuming process of assessing the circumstances and allowing the applicant to respond. It is not easy to withdraw an offer of employment based on criminal history – there must be a "direct and adverse relationship with the specific duties of the job" – and it's unlawful to bar a candidate's application for employment, with limited exceptions. The City of Los Angeles has its own "Ban the Box' ordinance which is similar to the State's rules, and which also requires employers to provide the assessment to the applicant.

ROSENBERG: No. Employers in California with just five or more employees must comply with the State's "Ban the Box" law. This law prohibits these private employers from even asking a job applicant to disclose prior criminal convictions until after a conditional offer of employment is made. Where an employer wishes to delve into the applicant's criminal record and deny employment based upon that information, the employer must provide the applicant a mandated "fair chance process" which allows the applicant time to respond to the employer's concerns before filling the position. Employers in this situation must be prepared to show there is sufficient connection between the criminal offense and the applicant's intended job duties to justify revoking the job offer.

LIGHT: Not these days. An employer must first wait until an offer is made before getting this information. Under the federal and state "Green Rules," the employer must then evaluate the nature of the crime as it relates to the position sought. Is this a warehouse worker who won't interact with the public, is closely supervised, and has no access to financial or other confidential company or customer information? Was the crime several years ago and have there been intervening successful jobs stints? If it was a DUI, is the applicant going to be at a desk job and won't drive on the company's behalf? Of course, when employees find out that the worker is on the Meghan's Law website (and they will), the employer will have a dilemma and can't legally terminate that warehouse worker, generally.

Are there new issues arising with immigration-related claims?

ROSENBERG: Yes. The Social Security Administration's "No-Match" letters are back after an eight-year hiatus. Employers receiving one should consult with a legal expert before responding. Also, ICE is on a tear with stepped up workforce enforcement actions (i.e., "raids"). Also, recently enacted CA laws make it illegal for members of management and supervisors to threaten employees with deportation or reports to immigration.

BENDAVID: Claims for harassment and discrimination because of national origin or perceived national origin continue to be an issue for employers. The laws are quite broad and apply to a wide variety of workers. For example, laws protect those who speak English as a second language, affiliate with ethnically based organizations, or marry someone associated with a national origin group. Federal and state laws prohibit discrimination in hiring and firing based on citizenship status as well as intimidation and retaliation. Equal employment opportunity policies should be reviewed and modified as necessary to address these issues.

What can employers do to remain current on the ever-evolving business and employment law trends?

BENDAVID: Make sure you have access to an HR professional who knows what they know and perhaps more importantly – who knows what they do NOT know, so they can seek proper legal advice. That HR professional should regularly attend seminars, read updates on employment laws, and keep their finger on the pulse as laws are changing. Our clients 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. Companies should send their HR professionals to these training sessions so they can keep up to date.

How does a labor-focused law firm differentiate itself from the competition in 2020?

LIGHT: Respond to email and phone calls timely, or at least let the client know your timetable for a response. Provide practical business-oriented advice and not a legal treatise on the pros and cons of whatever legal issue is on the table. Weigh the real risks of a particular path and don't necessarily always recommend the safest option. Our clients have businesses to run and a lawyer can kill any deal and give the safest option every time; but that often doesn't solve a problem. Be practical, use common sense, understand what your client needs from you and provide actual advice: "If it were my business, here's what I'd do…"

ROSENBERG: The key ingredient is taking the time to really know your client, their business, their needs and their goals and charging a fair fee for your services. There are lots of lawyers who are well versed in the basics. However, the lawyers and law firms that stand out are those who possess substantial industry expertise, are creative problem solvers and who take the time to really understand a client's goals and objectives.

BENDAVID: Our Employment Practice Group represents employers only in all stages of litigation, whether our clients are considering mediation, arbitration, or trial. We represents employers in various jurisdictions where claims may be filed (Labor Commissioner, the U.S. Department of Labor, the EDD, and of course in state and federal courts). But even before we get to the stage where an employee makes a claim, we are intent on helping employers reduce the risk of claims being made in the first place. That means helping businesses manage their challenging employee situations, training their staff, managers and HR professionals, auditing policies and pay practices, and advising clients. Additionally, unlike employment law boutiques, we have the benefit of having lawyers in house with overlapping practice areas in franchise, mergers and acquisitions, intellectual property, tax, etc. We often collaborate with these other departments when there is a client need.