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, what changes have come to the labor law landscape in light of the COVID pandemic, the new rules of hiring and firing, and the various trends that they have been observing, and in some cases, driving.

Here are questions the Business Journal posed to these experts and the unique responses they provided – offering a glimpse into the state of business employment in 2021 – from the perspectives of those in the trenches of our region today.

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With the onset of the COVID-19 pandemic in 2020, the business world was (and still is) faced with many new challenges. What implications will the COVID-19 situation have on employment law?

POMERANCE: Now that we are over ten months into the pandemic, it seems pretty clear that COVID's impact will be significant and long lasting. The world will change in many ways, even after the vaccine is widely distributed. As individuals continue to work remotely, even after things get back to normal, employers will have to be on top of all wage and hour requirements, as it will be much harder to track overtime or working "off the clock" when employees are at home. Ensuring rest breaks and meal breaks are lawfully provided will be difficult. And, what happens if an employee is injured while working from home? Is workers' compensation implicated? If employees do return to the workplace, safety will become the top priority. CAL/OSHA Emergency COVID-19 regulations became effective November 30, and require the development of written prevention protocols, which include a system for identification, investigating, and tracking COVID-19 in the workplace. Similarly, I think you will see more employees having to take a leave of absence and, of course, an increase in workers' compensation costs as people who do return continue to get sick. It will be very difficult for employers for at least the first half of 2021.

ROSENBERG: To be sure, this is a developing story. COVID-19 regulations for employers began in March with the Governor's original Stay- at- Home Order and then the federal government and various city and county health departments quickly followed suit. The result was that employers were beset by an array of quickly changing and often contradictory requirements to follow as the nation grappled with how to arrest the virus. Many of these rules carry criminal penalties for non-compliance and permit employees and government agencies to file suit as well. More than ever, employers need to partner with a knowledgeable labor law advisor to ensure compliance with the multitude of ever changing COVID-19 labor law obligations.

BENDAVID: Our federal, state and local legislatures created significant new employer obligations and employee entitlements related to COVID-19. Most of the new laws are designed to mitigate the spread of the virus and lessen the financial impact on employees (e.g., paid time off while obligating workers to isolate or quarantine). With more employees teleworking/working from home now, we anticipate seeing an increase in wage and hour and other employee disputes stemming from work-at-home issues, and subsequent bills and court opinions clarifying employers' obligations. There remain many pending questions. For example, is an employer obligated to reimburse an employee for the business use of the employee's workspace (home office)? How much should be paid as reimbursement for the employee's work-related internet usage? What obligations does an employer have to provide an ergonomic workspace at home? Employers should continue to educate themselves as laws/cases are issued.

For organizations who have undergone furloughs and layoffs due to COVID-19-related challenges, what are some of the legal challenges to consider?

LIGHT: Did the employer pay out vacation or PTO after ten days of furlough? Did it give WARN Act notices appropriately, assuming the company had the requisite number of employees? What criteria will management use to decide who to bring back without getting sued for, most frequently, age discrimination? Did the company provide severance agreements with proper age discrimination waiver language and notices?

BENDAVID: As businesses are forced to downsize or close, employers should consider federal and state Worker Adjustment and Retraining Notification (WARN) Acts. Generally, large employers covered under WARN must provide advance notice before plant closings or mass layoffs. On March 18, 2020, Governor Newsom signed Executive Order N-31-20, temporarily suspending Cal-WARN's 60-day notice requirement where a mass layoff, relocation, or termination is caused by COVID-19 "business circumstances." Similarly, the federal Department of Labor interpreted "business circumstances" to include "[a] government ordered closing of an employment site that occurs without prior notice." Notably, written notice is still required, and should be given asap when the need to conduct a mass layoff or plant closure arises. Employers must also consider wage and hour issues when employees are furloughed or laid off, including accrued vacation payouts. Per labor commissioner opinion letters, if a furlough does not have a specific end date within ten days/same pay period, the "furlough" is a layoff for wage and hour purposes. We hope to see some leniency by the courts and labor commissioner given the extreme circumstances employers face following abrupt shutdowns under government orders.

ROSENBERG: As companies plan for the resumption of more normalized operations, management must insure that they are compliant with any new worker protection laws giving laid off employees the right to be recalled to their former jobs. Many larger cities and counties have passed such rules. These laws have cumbersome advance notice and paperwork requirements and allow workers who have not been properly recalled to file suit for lost wages and benefits. Also, these laws permit the employee to recover their attorneys fees if they win.

What are some of the key considerations that employers should be thinking about and implementing as they navigate managing a newly remote workforce?

BENDAVID: Employers should consider a teleworking policy that outlines expectations and employee rules regarding work and break hours, productivity, and security practices. Importantly, non-exempt employees should be instructed to only perform work during their work hours and to accurately track hours worked and meal periods. If employees must work at varying hours throughout the workday (e.g., to accommodate child care issues), employees must be told to record the start and end time of each work period, even if that means multiple time entries every day. A telecommuting policy should include the employer's meal, rest, and overtime policies and non-exempt employees should be reminded not to work off the clock. Employers should reimburse employees for necessary business expenditures, such as office supplies and a reasonable percentage of costs associated with an employee's internet and phone use. Securing confidential information outside the workplace is another important consideration. Employees should take all practical steps to secure confidential information, including shredding sensitive documents, shielding others from seeing protected information, and using secure connections (e.g., avoiding public Wi-Fi and using a virtual private network).

POMERANCE: I think the COVID Pandemic will have a lasting impact on how people work. There is no doubt many businesses will have at least part of its workforce continuing to work from home. As such, these businesses must be able to manage wage and hour compliance remotely. This means that employers have to carefully track overtime and whether employees are "working off the clock". Employers would be well advised to adopt specific guidelines that lay out clear expectations for when employees are expected to work, their exact hours, and when they are expected to be off the clock. Employers will also have to be able to clearly track and enforce the taking of rest and meal breaks. Doing all this remotely will present significant challenges.

ROSENBERG: From a labor law compliance perspective, employers must insure that overtime eligible employees are being paid for all hours worked (including applicable overtime pay) and that employees are being properly reimbursed for home internet, cell phone and any other expenses incurred in carrying out their duties. For example, the State Labor Commissioner takes the position that you must pay a portion of the remote worker's cell phone and internet charges, even if the employee is on a flat rate plan and has incurred no additional charges by working from home. Also, state rules about meal and rest periods apply to remote workers. Employer processes for tracking these should be implemented. Workers compensation laws also apply if the employee suffers an injury while working remotely.

LIGHT: Does the employee have a suitable workplace and suitable chair, desk and lighting? The employer may be required to provide that additional equipment. Include use of and speed upgrades to internet and electrical consumption in the list of items subject to reimbursement. The payment is whatever is "reasonable" as negotiated between employer and employee. We use "screens, internet usage, and electrical consumption" as our catch-phrase. As a side note, if employees are using their smart phones only to log in and out four times a day (including meals), that costs about $1.05 in bandwidth usage for 22 work days in a month. One of my clients pays $12 in January and July to cover that cost for six months at a time.

What modifications to employers' policies and procedures are required in light of COVID-19?

ROSENBERG: Right after Thanksgiving, the California Occupational Safety and Health Standards Board has passed emergency Cal/OSHA regulations requiring employers to immediately implement a detailed written COVID-19 Prevention Program and specifying provisions which must be included. These include new requirements that go beyond those imposed by existing federal, state and local statutes, ordinances and orders. For example: (i) a requirement to ensure that employees excluded from the workplace due to COVID-19 symptoms or exposure, or a positive COVID-19 test, maintain their earnings while excluded; (ii) a requirement to provide no-cost COVID-19 testing to employees exposed to infected co-workers; (iii) a prohibition against requiring excluded employees to test negative before they can return to work; and (iv) specific requirements for employers that lodge or transport their employees. The new regulations apply to all California employees, except those working alone without contact with other persons, working from home, or working in workplaces (such as hospitals, medical offices and medical labs) which are already covered by existing regulations applicable to workplaces at high risk for transmission of airborne diseases.

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BENDAVID: COVID-19 forced employers to restructure in significant ways, from implementing strict cleaning and disinfecting protocols to updating employee handbooks that reflect new employee leave entitlements. Employers must adhere to the new California Division of Occupational Safety and Health (Cal-OSHA) emergency regulations, which provide a framework and rules to protect workers from COVID-19. The regulations require employers to develop a COVID-19 prevention plan, which includes investigation, isolation, and notification procedures. Employers should consider designating specific personnel to ensure that the Cal-OSHA COVID-19 prevention plan is put into place and properly implemented. Employers need to consider and may need to modify the physical workplace and related procedures to reflect the ever-changing local/state safety protocols. Employers in Los Angeles must comply with the County's industry-specific orders, which establish health and safety protocols such as mandatory health screenings, face coverings, postings, and more. Many employers may need to physically re-arrange their facilities to ensure social distance requirements, such as mandatory limits on occupancy. This prompted many employers to stagger work schedules and permit teleworking where possible.

What are some best practices for handling employee leave and accommodation requests related to COVID concerns?

LIGHT: Unlike the federal CARES Act sick time law, the state version covering certain employers doesn't provide any payroll tax credits. To the extent that health care providers, for example, can use the federal law they should do so to take advantage of the federal tax credit.

ROSENBERG: Know the law before you act and be especially sensitive to the employee's heightened health and safety concerns due to COVID-19. Employers with five or more employees must follow the California Family Rights Act. Similarly, the new Cal/OSHA Emergency Regulation will obligate an employer to grant unlimited leave (paid in many circumstances) to affected employees. Also, you need to check for any applicable local ordinances. For example, the City of Los Angeles passed a Supplemental Paid Sick Leave ordinance in April that requires larger employers (> 500 employees in L.A. or > 2000 nationwide) to pay up to 80 hours of Supplemental Paid Sick Leave (max $511/wk.) for any employee who has COVID-19 or been in close contact who has the virus. That same law also requires employers to give up to 80 hours of paid leave to any employee age 65 or older who asks for the time off (since they are among the most vulnerable) or if the employee (any age) requesting time off has a specified health condition (such as heart, lung or kidney disease, diabetes, asthma, or a weakened immune system).

BENDAVID: When an employee indicates they have COVID-19 or were in "close contact" with an infected individual, employers must consider a myriad of leave laws and related pay/benefit issues (e.g., city/state required paid sick leave, time off under the Family Medical Leave Act, California Family Rights Act, or under the new Cal-OSHA regulations, etc.). Further, if an employee is disabled as a result of COVID-19, employers must consider Fair Employment and Housing Act (FEHA) and Americans with Disabilities Act (ADA) rules, which require employers to provide reasonable accommodations unless doing so would impose an undue hardship. Workers' compensation benefits may also be required. Ensure that you document the time off and pay/benefit issues, so you can subsequently prove compliance, if necessary.

How should employers handle employee travel to COVID hot spots?

ROSENBERG: You must check and know the applicable rules. They are changing all the time. Example: the current State and Los Angeles County Health Orders prohibit all non-essential travel. That means that employers may not insist (or even allow) business travel, except as permitted by the Order. For leisure travel, these same rules apply for now, but could be changing in the future. Example: On December 30, 2020 Los Angeles County issued a Mandatory Directive On Travel. Non-essential travel is discouraged. Anyone traveling into the County from a point of origin outside of the Southern California Region (the 12 Counties from the Mexican border to the south, San Luis Obispo County to the north and Riverside/San Bernardino to the east) must quarantine for at least 10 days.

BENDAVID: Employers should review local and state travel restrictions, such as Los Angeles County's December 30, 2020 Mandatory Directive on Travel, which followed California's Travel Advisory. The Directive requires individuals entering L.A. County from anywhere outside of Southern California to quarantine after non-essential travel for at least 10 days after arrival. California's Advisory states that persons arriving in California from out-of-state should quarantine for 14 days after arrival. Employers should remind employees that pursuant to the County's Directive and State's Advisory, they are strongly encouraged to avoid non-essential travel. Employees who choose to engage in nonessential travel must quarantine upon their return.

LIGHT: Everywhere is a hot spot right now, so it's perhaps not so much the location, but the travel method. Car, ok. Plane, maybe not ok. Also, what is the activity at the location? Family reunion with 20 people? Or meeting two people and maintaining social distancing outside in the backyard? Employers are entitled to inquire as to the nature of the travel because of the overriding health and safety issues.

As COVID vaccines start to become more widely available, what is your advice to companies who want to implement mandatory vaccines for their employees?

ROSENBERG: The law on mandatory vaccination is still in its infancy. For years, hospitals have been requiring employees to vaccinate in order to protect co-workers and patients. Similarly, I think the need to protect employee/customer health will be a legitimate basis for employers to require employees to vaccinate against COVID-19 as a condition of employment, with two major exceptions: where the employee can present a legitimate health or religious concern. EEOC and the California job-bias agency have addressed this in context of mandatory face coverings and require employers to endeavor to "reasonably accommodate" employees who pose such objections to wearing a face covering. I would suspect they will take the same approach in regard to vaccinations. I also note that in the wake of COVID-19, EEOC updated it's pandemic guidance. In it, EEOC states employers may administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard, provided the test is considered accurate and reliable. The U.S. Food and Drug Administration publishes information about what may or may not be considered safe and accurate testing. The CDC and local health departments do so as well.

LIGHT: It's up to individual employers if they want to make vaccination mandatory. Employers need to be aware, however, that employees may claim medical and religious reasons for declining to get vaccinated. Employers are entitled to probe on the religious basis and should obtain a doctor's note for any medical claim, but can't probe further. Note that there are on-line draft letters available from various sources that employees can use to claim the religious exemption. If employees are successful in avoiding vaccination on either of these bases, employers may be forced to allow them to work.

BENDAVID: The Department of Fair Employment and Housing has not yet provided guidance concerning mandatory COVID-19 vaccinations under California law. For now, we refer to the U.S. Equal Employment Opportunity Commission's guidance —the EEOC generally permits employers to require mandatory COVID-19 vaccinations, if employers comply with other requirements. For example, employers seeking to mandate vaccines should consider having a third-party administer the vaccine to avoid eliciting protected medical information in the pre-screening process. If an employer requires employees to receive their vaccination from an outside provider, federal restrictions against disability-related inquiries would not apply. Employers can then require that employees provide receipt of a COVID-19 vaccination. If going this route, caution employees against providing any sensitive health or medical information when providing proof of vaccination, and do not ask employees follow-up questions that may elicit disability-related information (e.g. why the employee may not have received a vaccination). Further, employers must consider reasonable accommodations for employees who are unable to receive the vaccine due to disability or religious reasons.

How should an employer handle communication of a confirmed COVID case among its employees?

POMERANCE: Most significantly, AB 685 introduced into law at the beginning of the year significant reporting requirements in the workplace when there is a COVID-19 case. Notices must go to employees and local public health agencies, as well as protocols must be in place for cleaning and disinfecting. These new reporting requirements could possibly come into conflict with an employee's right to privacy regarding his or her medical issues. Those rights, however, may be superseded by fellow employees' rights to be able to come to work in a safe environment free from disease. I would expect further clarification on these reporting requirements over the next few months.

ROSENBERG: Be very careful. You must inform employees that they may be in possible danger. However, the HIPPA health information privacy rules require employers to keep such information confidential unless the employee has given permission to reveal their identity. The EEOC takes the position revealing the employee's identity is an ADA violation. Thus, employers must make every effort to limit the number of people who get to know the name of the employee. This means

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that you must tell employees that "someone" with whom they have worked has tested positive, but you may not reveal the employee's identity. If the employee is working remotely to accommodate the illness, you may tell employee about the WFH arrangement, but may not reveal why. Also, EEOC permits interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee, without revealing the employee's identity. For small employers, coworkers might be able to figure out who the employee is, but employers in that situation are still prohibited from confirming or revealing the employee's identity. It is recommended that all employer officials who are made aware of the employee's identity should be instructed that they must maintain the confidentiality of this information (doing so in writing is best).

BENDAVID: Employers must provide written notice to employees within one business day of learning of potential exposure to COVID-19 in the workplace, to all employees present at the same worksite as the infected individual within the infectious period, stating that they may have been exposed to the virus. The notice must include information pertaining to COVID-19 related benefits under federal, state, and local laws (e.g., workers' compensation, COVID-19 related leave, etc.), and the employer's disinfection and safety plan per the Center for Disease Control and Prevention (CDC) guidelines. Employers should not disclose the identity of the infected individual (even if that may be obvious in smaller workforces). Employees in "close contact" must be told to quarantine for 10 days after their last contact with the infected employee. "Close contact" means any individual within six feet of an infected person for more than 15 minutes over 24 hours – or an individual who had unprotected exposure to an infected person's body fluids and/or secretions. A person with COVID-19 is considered infectious from two days before symptoms first appeared or two days before they tested positive.

LIGHT: Under various state and local laws, employers are required to alert "affected employees" in their "regular manner of communication," although some of the laws require written notice. Identifying the affected group requires some version of contact tracing, and using security cameras can sometimes be effective for this effort. Affected employees then need to assess their exposure risk based on the well-established criterion of a cummulative15 minutes of contact within six feet, masked or unmasked, within a 24 hour period. Cal/OSHA's latest regulations effective November 30, which are being challenged in court, require companies to pay employees if they are told to stay home because of possible exposure and are otherwise "able and available" to work. It's likely that Cal/OSHA exceeded its authority with this mandate, but we will see what the courts do about it.

Do you expect collective bargaining agreements to change in the future as a result of the crisis?

ROSENBERG: They already have. Unions have been keenly focused on how COVID-19 impacts the employees they represent and have been demanding bargaining on an array of related topics such as PPE, safety precautions, medical leave, hazard or "hero" pay, to name a few. This has been especially challenging in jobs with high customer contact or in workplaces deemed "essential."

What advice do you have for employers that want to maintain a collaborative relationship with unions?

LIGHT: I have found that if supervisors treat their people well, there are fewer friction points with the union. It's the same old saw; employees leave or become unhappy most frequently because of an unfair, unfriendly, or abusive supervisor. I've even seen a group of lower level supervisors join a bargaining unit because of an abusive supervisor. That vote could have been avoided had senior management taken more proactive action against the difficult supervisor who caused the vote.

As a presidential transition approaches and emotions surrounding the election are still running high, is it lawful for employers to prohibit or otherwise regulate political speech in the workplace?

POMERANCE: With the country so polarized and divided, it is to be expected that more employees will want to express personal political views in their workplace. Labor Code Sections 1101 and 1102 prohibit employers from restricting an employee's political activities, including holding certain views or running for office. But, the First Amendment does not prohibit a private employer from reasonably regulating speech in the workplace. Therefore, a California employer can impose some limitations on political speech in the work environment, but that is a different issue from whether an employer *should* impose such limitations. It is probably lawful to prohibit an employee from posting political content on company platforms, or to hold political rallies on company property. But beyond that, the employer is getting into murky waters, and ought to seek specific advice on a case-by-case basis.

LIGHT: Employees don't have full First Amendment rights in their workplace, much to their surprise sometimes. It's the same with social media if it negatively affects the workplace. Employers may take steps to prevent workplace speech related to politics, and may also take action if an employee's social media content is spilling into the workplace and creating a toxic environment.

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

LIGHT: The changes to the California Family Rights Act (CFRA) are dramatic, in that the minimum required head count is reduced from 50 to five; the five could be located anywhere in the country; and a single California-based employee among the five would be entitled to 12 weeks of job-protected leave. The employee no longer needs to work within 75 miles of 49 other employees, although the legislature retained the 1250 hour and one year work requirements. Smaller employers may have difficulty running a small business with that much guaranteed time off or be unaware of this change. Employers small and large still need to remember that exhaustion of FMLA or CFRA rights doesn't end the leave discussion, because an employer must still evaluate a continuing leave request under state and federal disability laws covering "reasonable accommodation."

POMERANCE: Since the most significant law this past year was AB 5 pertaining to classification of independent contractors, it seems likely that the new amendment to that statute, AB 2257, will likewise produce confusion and conflicting interpretations, thus resulting in a plethora of lawsuits. The new law attempts to revise the "ABC" test for business to business contracting, and also carves out a number of occupations that may be exempt from the ABC test under certain circumstances. Moreover, the recent passage of Proposition 22 dealing with ride share services (Uber, Lyft, etc.), attempts to create a sort of "hybrid" worker, who is still an independent contractor but is nevertheless entitled to some of the benefits of employment. I would suspect that this area of the law will likely be heavily litigated for years to come.

ROSENBERG: On January 1, the California Family Rights Act (CFRA) was extended to employers with as few as 5 employees (before Jan 1st, you had to have at least 50 employees). Like the federal Family Medical Leave Act (FMLA), the CFRA requires covered employers to provide eligible employees with up to 12 weeks of job-protected leave annually because of the employee's own serious health condition, for the employee to care for specified family members facing medical issues or to care for/bond with a new baby in the home. CFRA compliance is difficult. It requires new policies, retooling handbooks, developing new paperwork packets to give employees who inquire about the leave and educating managers to understand these new rights to avoid actions or statements that can be deemed illegal 'interference" with these rights. For employers with 100 or more employees, California's new Pay Data Reporting requirement (March 31 deadline) is very concerning. These employers are now required to file with the state detailed annual reports setting out certain demographic, pay and position information on their employees to enable the government to engage in "targeted enforcement" of California's anti-discrimination, "pay equity" and wage and hour laws. Finally, the new year brings a higher state minimum wage requirement. Along with that comes a new higher threshold for the minimum salary that must be paid to retain an overtime exemption. Remember also that certain cities and counties have their own (typically higher) minimum wage and special (higher) wages for employees in certain occupations.

What can employers expect from the California legislature in 2021?

POMERANCE: It seems likely that the Coronavirus will continue to dominate life here at least through the first half of the year, with perhaps some return to normalcy beginning in the third quarter. As such, I would hope and expect the legislature to do everything in its power to remedy the economic effects of the pandemic. It should attempt to not only protect employees (which it has typically done pretty well), but it must also look out for the needs of businesses, especially those small "mom and pop" businesses that have really been hit hard. Big corporate powerhouses like Amazon and Walmart can undoubtedly weather the storm, and perhaps may even thrive in this environment, but for small businesses, the legislature should look to be giving them significant tax breaks, liability protection, and perhaps even some direct financial assistance in order to help them get back on their feet.

BENDAVID: Apart from COVID-19 issues, we hope the legislature will take another look at the ABC test and exemptions for independent contractors. More lobbying is expected in an effort to include different types of professionals as exempt from the ABC test; and instead to use the "Borello" standard, which

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focuses more on control and the weighing of various factors (e.g., who supplies tools, ability to profit/sustain a loss, etc.).

LIGHT: COVID substantially reduced the amount of bills reviewed and signed, so I would expect an uptick. There's still confusion regarding independent contractor law after Dynamex and AB 5, so I would expect some more tweaking of those laws in particular.

What effect does the increasing number of millennials have on a company's approach to employee relations?

BENDAVID: As more millennials join and start advancing in the workplace, managers from different generations will need to consider how best to communicate expectations and job requirements. Better communication ultimately leads to a healthier work environment and satisfied employees, which helps reduce the risk of litigation and employee claims. Particularly now with COVID-19 and more employees working at home, employers should consider flexibility and different types of work arrangements to attract qualified applicants, including millennials who may seek out companies that provide these options.

LIGHT: You need more ping pong tables and a really high functioning Keurig.

In today's social media environment, what recourse does a company have for employees who are publicly active in political or other causes that are inconsistent with the company's values?

POMERANCE: I would advise employers to do their due diligence upfront when interviewing applicants for a job. Search social media postings and if the person espouses views in his or her public postings that are inconsistent with the company's values, then don't hire the person. While you cannot discriminate against that person in the hiring process, there is no law that forces you to hire someone who posts material on social media that is offensive. If you are dealing with a current employee who posts offensive content on social media, there is not much you can do if the employee does so on his or her own time and on their own individual (non-company) platforms. My feeling is that as long as the social media posts are not wholly outrageous (such as blatantly racially offensive or the like), it is probably better to ignore them than to call attention to them.

How have the changes in marijuana laws affected your clients?

LIGHT: Some are way mellower. Many have taken a lighter approach to the subject by treating marijuana use more like alcohol: don't show up to work or come back from lunch smelling like marijuana and you're good to go. Others have stopped pre-employment testing for marijuana. Employers do need to remember that when they send an injured worker to the medical clinic for treatment, the clinic can't automatically test for drug use. There must be some possibility that drugs contributed to the accident; usually the simple approach is to determine whether the worker contributed even a small amount to the accident and then the standard is likely met. For example, a sleeping passenger injured in a vehicle accident should not be tested because they almost certainly did not contribute to the accident.

ROSENBERG: This is a huge source of concern. Cannabis use remains a federal offense even in states like California where voters have legalized it's medicinal and recreational use. Also, California law specifically preserves the right of a company to insure that employees do not come to work under the influence and are not using, possessing or distributing the drug on company premises. However, there is no uniform drug testing standard for evaluating whether a person is impaired. And, since cannabis remains in a user's system and is detectable in a drug test weeks even after its ingestion, employers will have to work with local authorities and their drug testing labs to develop defensible standards for measuring impairment.

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

LIGHT: Don't do it. Unless the employee is selling an interest in a business, along with goodwill, a true non-compete won't be enforceable under California law, either when hiring someone from a competitor or after losing someone to a competitor. I often give tutorials to employers who are faced with this issue on the distinction between a legal and allowable "announcement" and an illegal "solicitation" of clients or customers by a former employee. Also, employers need to be especially careful to scrutinize such agreements when hiring someone out of state; other states vary in allowing versions of non-compete language.

POMERANCE: I advise my clients that the easy default rule to live by is that restrictive covenants are pretty much illegal in California as a restraint against trade. So, I ask the client exactly what is the critical information within its business that needs to be protected? So much information today is publicly available online that a company should be able to clearly define what is truly proprietary and then take real steps to protect this information. By drilling down with the client as to what information they absolutely need to keep proprietary, they will be better able to craft a restrictive covenant that will pass scrutiny, and be able to protect what is truly proprietary and valuable to them.

BENDAVID: Under California law, non-compete agreements are perceived as "anti-business" and generally unenforceable. With limited exception, employers cannot lawfully restrict employees from engaging in a trade or business once they leave their job. We advise clients to arm themselves with strong confidentiality or trade secret agreements while implementing policies that safeguard company information. This may include limiting digital and physical access to those who need to know, and enforcing relevant provisions in the employer's handbook. This way, an employer can show the steps it took to protect its confidential and proprietary information and be better positioned to take action against an employee who improperly uses such information, both as a breach of contract and violation of the Uniform Trade Secrets Act.

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

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

BENDAVID: We anticipate that many employers will continue to face claims for failure to provide proper meal and rest breaks, failure to properly pay overtime, and claims for failure to reimburse for necessary business expenses as more employees are now working from home. This will also result in increased penalty claims under California's Private Attorneys General Act (PAGA). As employers continue to navigate the remote office, it's critical to set telecommuting expectations in writing. For example, nonexempt employees should be reminded of proper timekeeping practices and only work overtime with prior approval. In California, employers have a duty to reimburse employees for reasonable and necessary expenses, including business-related cellphone use. Employers should ensure that remote employees are being properly reimbursed a reasonable amount for expenses such as Wi-Fi use, cellphones, and office supplies.

LIGHT: One that came up in a case recently is the payment of sick time when an employee has nondiscretionary bonuses or commissions in their payroll. Sick time must be paid at that blended rate, just like overtime would be paid. There is also a case pending over whether meal and rest break premiums need to be paid at that higher blended rate. There is a decent argument as to why not, but for sick time, which is wage replacement, it's clear that the higher rate needs to be paid.

ROSENBERG: We continue to see the same ones over and over: (i) failure to provide meal and rest breaks; (ii) overtime not being paid or miscalculated; (iii) employees being paid off the clock; (iv) employees not being properly reimbursed for business expenses; (v) recordkeeping and paystub violations; (vi) failure to pay vacation pay and bonuses upon termination; (vii) allowing supervisors to be part of a tip pool; and (viii) the misclassification of workers as independent contractors. In addition to the back pay for these violations, the Private Attorney General Act (PAGA) authorizes the employee to collect multiple penalties that could result in exposure as high as $1800 per employee per pay period (12 months max.). These PAGA penalties are over and above any amounts owed to the employee. And, since PAGA allows the lawyer bringing the suit to recover attorney's fees if they win, this has no-doubt contributed to why so many PAGA suits get filed and settled each month.

POMERANCE: I think most – but not all – companies today have pretty much figured out how to properly track and pay overtime, as well as being able to guard against employees working off the clock. As such, I think where they remain most vulnerable is in the providing of meal and rest breaks. As alluded to earlier, because the pandemic has forced a large segment of the workforce to work from home, it has become increasingly difficult for employers to track breaks, or ensure that their employees are provided such breaks. As society continues to adjust to working remotely, employers will have to figure out how to ensure compliance with the meal and rest break laws, or they will remain at risk.

LABOR & EMPLOYMENT ROUNDTABLE

How has the worker's comp landscape changed in recent times?

BENDAVID: COVID-19 impacts workers' compensation benefits significantly. On September 17, 2020, Governor Newsom signed SB 1159, creating a rebuttable presumption that a COVID-19 related illness or death is compensable. The law applies to employers with five or more employees, when the following conditions are met:

- Employee tests positive within 14 days after s/he last worked at their place of employment at the employer's direction;
- The work performed was on or after July 6, 2020; and
- The employee's positive test occurred during a COVID-19 "outbreak."

An "outbreak" exists if, within 14 calendar days:

- Four employees test positive for COVID-19 (100 or fewer employees at a worksite);
- Four percent of employees working at a specific location test positive for COVID-19 (100 or more employees at a worksite); or
- A worksite is ordered closed by a public health department, California Department of Public Health, Division of Occupational Safety and Health, or a school superintendent.

Employers must give timely notice to their claims administrator in the event of a COVID-19 infection of an employee.

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

ROSENBERG: That's a tall order. The phrase "penny wise and pound foolish" comes to mind. Many labor laws carry individual liability for the business owner, even if the company is set up as a corporation. In my opinion, a company is best served by developing a relationship with law firm that specializes in labor law compliance and litigation defense. The firm should also be large enough to have a team of dedicated subject matter specialists and knows your industry. The firm should have a compliance newsletter which notifies clients of significant changes in the law and emerging trends. They should have specialists who can effectively train managers on litigation avoidance and problem prevention.

POMERANCE: I think it is very difficult. It is hard enough for lawyers who specialize in this area to keep up. As such, I advise my clients that they engage us twice yearly to have employment "tune-ups" where they meet with us to go through their policies and procedures, and we can help them with any modifications or updates to their handbooks and other policies, if so needed. Our firm, like many others, sends routine e-mail notices out to our clients when there are new cases or other updates in the law, but if you are the one who is running a business, you have enough on your plate without having to read, study, and make sense of the numerous e-mail updates that come across your computer screen. That's why we ask for their undivided attention twice a year to carefully go over with them their policies and procedures. This seems to help them stay on top of the ever- changing environment.

LIGHT: Call or email the attorneys answering these questions. No employer can effectively keep up with all the laws and the interpretation of the laws as determined by the courts. As one of my clients said after paying $400,000 in a class action settlement based on relatively minor infractions that added up to significant penalties, "I didn't know that doing nothing wrong is not the same thing as doing EVERY THING right."

BENDAVID: Employment law is one of the fastest evolving legal areas at the local, state, and federal levels. It's critical that employers hire top-notch human resources professionals that have their finger on the pulse of this ever-changing legal landscape. These HR professionals should regularly attend seminars, frequently read articles and blogs, and be aware of major pending court cases. It's also crucial for employers to regularly audit their company policies and practices with a skilled employment law attorney.

How does a law firm specializing in labor and employment differentiate itself from the competition in 2021?

BENDAVID: While Los Angeles is home to many law firms, it can be difficult to find trusted legal advisors. Business owners should look for practitioners with a reputation for providing thorough and realistic counseling with an eye to the most cost-effective course of legal action for the risks involved. Further, as a result of COVID-19, it's critical now more than ever to retain a legal team that actively tracks legal trends and updates on the local, state, and federal level. Labor and employment attorneys should understand how the unfolding legal issues surrounding COVID-19 intersect with their specific clients and various business sectors and be ready to timely respond effectively to such challenges. Last, we're a one-stop law firm for business. Not only do we have a large employment law practice, we also have team members who practice in corporate, franchise, real estate, intellectual property, tax and other business areas.

LIGHT: Provide frequent updates with the new laws and regulations, especially with myriad federal, state and local Covid laws upon us. Answer your own phone; respond to email quickly. It's not enough for an attorney, especially in the employment field, to respond within 24 hours these day, as clients expect an almost instantaneous response; and often need it that quickly.

POMERANCE: Obviously, most of the law firms who specialize in labor and employment are good lawyers who know and understand the law. So that is a given. Beyond that, in order to be invaluable to a client, a lawyer ought really to understand his client's business beyond just what type of business it is and how many employees it has. How does the business actually run? Who makes the decisions? How do economic trends affect the business? What are its markets, and who are its competitors? As well, I think it is important that the law firm have the ability to take cases to trial. There are lots of good litigators who can draft discovery and write motions, but there are far fewer trial attorneys who know how to win a case in court in front of a jury. While most cases settle and do not go to trial, you will get much better settlements if the other side knows your lawyer is a skilled trial attorney. My advice to businesses is to make sure your lawyer can try a case in court and win it.