LABOR & EMPLOYMENT LAW ROUNDTABLE

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As the legal landscape continues to evolve in terms of labor and employment, the San Fernando Valley Business Journal turned to some of the leading employment attorneys in the Valley 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. Following is a series of questions the Business Journal posed to these experts and the unique responses they provided – offering a glimpse into the state of business employment law in 2013 – from the perspectives of those in the trenches of our region today.

Labor & Employment Law Roundtable

WHAT OWNERS & EXECUTIVES NEED TO KNOW

◆ In your view, in what ways has the labor and employment law landscape changed over the past ten years in our state? Have these changes benefitted or hindered California businesses?

ROSENBERG: First, the workplace has become more contentious. According to court statistics, there are more employment law cases filed than any other type of case. These suits are tried to a jury, and most of the time the jury members are themselves employees who tend to view the evidence through that lens. It's very difficult for an employer to get a fair shake in court or before a governmental agency. Second, there has been a veritable avalanche of new labor/employment laws and regulations that employers are required to know about and follow. Sadly, a great many of these rules are counter-intuitive, and they are apt to stymie even the most savvy business owner or operating executive. Having an experienced and battle tested employment lawyer at your side is essential to avoiding employment law liability.

BENDAVID: We've seen a dramatic increase in wage and hour claims, particularly in connection with meal and rest break litigation. In 1999, the legislature passed AB 60, which imposed financial penalties for missed breaks. Four years later, a significant wave of class action litigation started. The threat and imposition of penalties resulted in employers being more rigid with employees in providing breaks and in recordkeeping. Employers have had to turn their focus to policing employees' work time, rather than on productivity and efficiency. It remains to be seen if this will change after the Brinker Restaurant Corp. v. Superior Court ruling in 2012.

GURNICK: According to employment law attorneys from the Attorney Referral Service of the San Fernando Valley Bar Association, increased litigation has led to a need for both employees and employers to find attorneys, maybe for the first time. For many employers, it is not just the risk of an employee hitting them with a lawsuit on an employment claim, there is just as much concern over the expenses associated with defending employment lawsuits – even lawsuits without merit. In light of employment law changes and statutes, which are perceived as hinders and believed to be the reason for an increased cost of doing business, savvy attorneys from the ARS and employers can implement systems to resolve employment disputes more quickly, more cost-effectively, and protect the business against the risk of million dollar jury verdict.

◆ Looking to the future, do you anticipate more changes to the legal and employment law landscape in the coming year or two?

KOEGLE: California is typically at the forefront of pro-employee legislation and boasts a judiciary that often leans in a pro-employee direction, and we have no reason to believe the next few years will be any different. Specifically, we anticipate legislative changes to the meal and rest period regulations following the California Supreme Court's decision in Brinker (April 2012), as well as the addition of mandatory paid sick leave for all employers in the next few years. We also anticipate the legislature will continue to expand worker protections in the wage and hour arena and in cases involving claims of discrimination or retaliation. However, the biggest challenges for employers will likely come as the Affordable Care Act continues to generate plenty of opportunities for legislative change and interpretation by the courts.

ROSENBERG: Yes, there will be more changes. Employment laws reflect the social norms of the times. New laws are always coming up to deal with new issues. One example is how the ever increasing acceptability of same sex marriage

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spawned a host of laws and regulations outlawing sexual orientation discrimination in the workplace and rules requiring the same employee benefits for same sex couples. I couldn't imagine having that discussion when I started as a labor lawyer 35 years ago. When the economy faltered and we witnessed the devastating effects of chronic unemployment, we saw new laws create strong protections against the use of credit information as an employment screening device. And, with an ever-increasing number of new moms in the workplace, we now have rules requiring employers to accommodate mothers who are breastfeeding their babies.

◆ What are some common mistakes a new business owner for a Start-Up company makes, and what are some good points to consider before it hires its first employee to avoid being sued by employees?

BENDAVID: New business owners are often tempted to hire "consultants"– workers engaged as independent contractors. Sometimes employers do this on a trial basis to see whether a candidate will work out. This is a mistake. Even temporary workers, or those brought in on a trial basis can be considered employees, as defined by law. This means they must be covered by workers' comp, and must be paid in accordance with California law. My suggestion for start-ups is to take time to research basic employment laws before hiring that first worker. At the very least, hire the individual through a payroll service or temp agency until the employer/employee framework can be put into place.

GABLER: Many new business owners are so focused on the "business" issues such as production, marketing, funding, inventory, they forget to address "internal" employee issues such as hiring, training, payroll and supervision. While business issues must naturally take precedence, start-ups can develop a solid foundation without great cost by retaining employment counsel to provide a new employee checklist, create a new hire packet, obtain mandatory workplace postings, develop basic forms to address common employee issues, and establish a reasonable timeline and budget to further enhance employment law compliance. The most common legal pitfalls for new employers come from California's burdensome wage and hour laws. By properly classifying employees, understanding meal and rest period requirements and applicable overtime rules, setting up accurate timekeeping procedures and establishing compliant payroll systems, start-up employers can avoid simple wage and hour errors that can rapidly derail their new ventures.

ROSENBERG: One mistake is not having a consultation with a labor law expert before they hire the first employee, particularly when it comes to setting up hiring criteria, pay arrangements and common employer policies like those covering vacation pay and when to charge employees for lost or damaged equipment (think laptops, smart phones, uniforms). Startups often end up making very costly mistakes because they rely upon the advice of their CPA or business lawyer when making these decisions. And, there is a commonly held belief that employees may lawfully agree to waive the minimum protections in the law, which they can't. One example is unpaid internships. Most of these arrangements are illegal, even if the intern desperately wants to get a foot in the door. Also, there is no such thing as volunteer time in most work settings. Employees have to be paid the state minimum wage ($8.00/hr) for each and every hour they work. This includes after hours meetings, training sessions, responding to email or texts relating to the business and the like. By the same token, most workers are not exempt from overtime pay and must be paid overtime pay—even if they agree to do otherwise. I tell clients to think of the overtime pay exemptions like a tax loophole. The burden is on the employer to establish that the employee is truly overtime exempt.

GURNICK: Startups should not avoid seeking legal help early on. Most owners believe that attorneys are expensive. Certainly some attorneys can be very costly; however, the Attorney Referral Service of the San Fernando Valley Bar Association offers referrals to affordable quality attorneys that could get involved early to help with policies and procedures and employee handbooks.

◆ What is the legal community doing to help employers avoid lawsuits and provide employee risk management?

GABLER: In recent years, there has been a tremendous increase in the use of alternative dispute resolution methods for employment matters. State budget issues, increased burden on the judiciary and the availability of high-quality mediators and arbitrators have made it more attractive and effective for employers and employees alike to work cooperatively to resolve workplace disputes, rather than engaging in protracted and costly litigation in the court system. More employment attorneys are embracing their roles as "counselors" instead of merely "litigators," working with clients to pursue creative solutions to workplace problems (thereby reducing stress and cost on both sides). By providing proactive guidance to clients, employment law attorneys can promote legal compliance for employers and a better understanding of legal rights for employees, thus preventing disputes from arising in the first place.

GURNICK: Most business executives and owners understand the importance of effective and experienced legal counsel to advise them on issues before a lawsuit is filed. The Attorney Referral Service of the San Fernando Valley Bar Association provides free referrals to vetted attorneys in the San Fernando Valley and Eastern Ventura County. We also offer a Speaker Service program to businesses, civic organizations, service clubs, professional organizations and schools. The attorneys of the Speaker Service present programs that stimulate a lively discussion for any group. The ARS also offers a "Lunch and Learn" program. This program takes place at your worksite during the lunch hour. The presentations can be designed to educate top level management or to help employees with personal and financial matters that affect their overall well-being and success in life. The attorneys of the Speaker Service are willing to speak about any matter of legal interest.

◆ What are your clients most worried about in terms of emerging legislative trends?

ROSENBERG: Compliance with the Affordable Care Act ("Obamacare") is a huge issue now for every business. The deadlines are fast approaching and most of the rules are not yet in place. The fall will be every busy for labor lawyers and their clients as everyone rushes to get into compliance by year end. Also, with Democrats having a super majority in the state legislature, there are any number of bills coming down the pike that make it more costly and cumbersome to operate a business in the state. With almost each new legal regulation comes a compliance challenge and possible legal claims for not adhering to the new requirement.

◆ How serious a legal issue is social media in the workplace?

GABLER: Social media is challenging because: (1) technology moves faster than the law, and we have little existing legal foundation for today's advances; and (2) it provides employees the opportunity to lawfully do behind the employer's back what they could not do to the employer's face. If an employee said to his employer in the office, "I hate you and I don't want to work for you," few would quarrel with the employer's decision to remove that employee. When an employee posts a blog stating that he hates his employer and wishes he worked elsewhere, he has a free speech right to speak his mind in that social media forum and his written expression of

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opinion may not always be sufficient grounds for termination. The conflict between technology and "real life" will provide great opportunity for creative and ground-breaking legal argument in the coming years.

KOEGLE: We view social media in the workplace as the proverbial double-edged sword. While it creates an inexpensive and effective opportunity to market your business in the digital marketplace, the abuse by employees is sometimes substantially more harmful than the benefits. The biggest issues we are seeing with social media in the workplace are: (1) lost productivity due to employee dalliances and distractions during work hours; (2) an "unauthorized" employee's e-mails, posts or tweets being viewed by the public as representative of the company's position; and, (3) increasing claims of employee harassment, stalking, bullying and retaliation through electronic media. Thankfully, a well-drafted social media policy, when communicated and enforced, can significantly reduce the risk associated with these issues. Unfortunately, many employers haven't taken these risks seriously enough, and believe that employee social media use is harmless. We typically refer to these employers as "defendants."

◆ Although there are no state laws specifically prohibiting workplace bullying, it's an issue that has received some media attention lately. Is this something that employers need to keep an eye on or is it much ado about nothing?

ROSENBERG: It can be a huge area of exposure. Every state and federal anti-discrimination statute outlaws harassment and retaliation. If an employee can claim that he or she is being picked on at work because of their membership in a protected class (such as age, sexual orientation, race, national origin or religion), there is already plenty of legal protection to create huge liability for a business owner. We saw plenty of those cases post 9/11 involving employees of Middle Eastern decent and more recently with employees who choose to dress in an ethnically or religiously identifiable manner . And, since the law in holds an employer strictly liable for the actions of its supervisory staff, the opportunity for those folks to create a huge liability for the company is there every day. All people managers – even those at the lowest level- must be trained to know and follow the rules because the business is on the hook financially for what they do and for happens to others on their watch.

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

KOEGLE: Too many employers choose to bury their heads in the sand and hope that ignoring their problems will make them go away. Knowledge of the law provides employers with the ability to make fully-informed business decisions – this doesn't mean that the right decision will be made, however, it does allow the employer to assess the relative risks and rewards associated with that decision. There are various educational resources available to California employers through the California Chamber of Commerce (www.calbizcentral.com), the Department of Fair Employment and Housing (www.dfeh.ca.gov/CaseLawAlerts.htm), numerous business and trade organizations, and law firms through online newsletters and/or blogs. Also, many pro-business groups host low-cost or no-cost annual legal updates to keep employers up-to-speed on the latest laws, court decisions and trends in employment law. Having knowledgeable, reliable employment law counsel on your speed dial is also a tremendous asset.

GABLER: There are three particularly effective methods of keeping abreast of the most current employment law issues. First, update and distribute the employee handbook and other human resource documents each year, after review by qualified employment law counsel. A fully-compliant employee handbook can serve as a treatise for employers as well as a guide to employees. Second, attend the myriad of employment law seminars available today, both online and in person. Regular education is critical to keeping up with new laws and workplace trends. Third, develop and maintain a relationship with a skilled employment law attorney to address ongoing workplace issues and disputes. Although the internet has a wealth of information about employment law issues, much of it is inaccurate or inapplicable to California employers. There is no substitute for solid legal advice from a trusted advisor who knows you and your business.

GURNICK: The Attorney Referral Service of the San Fernando Valley Bar Association offers a Speaker Service program to businesses, civic organizations, service clubs, professional organizations and schools. The attorneys of the Speaker Service present employment law programs that stimulate a lively discussion for any group. The ARS also offers a "Lunch and Learn" program. This program takes place at your worksite during the lunch hour. The presentations can be designed to educate top level management or to help employees with personal and financial matters that affect their overall well-being and success at work or in life. The attorneys of the Speaker Service are willing to speak about any matter of legal interest.

◆ What is one of the most important things employers should do to prevent a lawsuit from occurring?

GURNICK: Business owners should be proactive and take advantage of every opportunity to help upper management and HR understand employment Laws. Several business owners are facing lawsuits stemming from sexual harassment, discrimination and disability claims. Employees are taking action, and it is typically after they have been terminated. The Attorney Referral Service of the San Fernando Valley Bar Association has seen an increase in requests for attorneys to respond to demands in such claims. ARS attorneys believe the biggest increase is coming in the area of age discrimination. Top level management and HR training is absolutely important to help avoid such stressful lawsuits. The ARS offers a free Speaker Service program and can provide business owners free attorney referrals to vetted attorneys located in the San Fernando Valley and Eastern Ventura County. Referrals include a free initial half-hour consultation.

BENDAVID: Before firing an employee consider all the facts. Even though employees are presumed terminable at will in California (unless they have a contract), employees cannot be fired for unlawful reasons. Ask yourself these questions:

- Are there any facts that would support a claim for wrongful termination?
- If you have a good and lawful reason to terminate, have you documented that in writing?
- Does the employee know that his/her performance is lacking?

If you have good cause, make the case as unattractive as possible to the employee and the prospective plaintiff's attorney by writing a memo stating the reasons for the termination. Be kind and professional, but candid as well. Though you can feel sympathetic to the employee, don't sugar coat the reasons for the termination or simply call it a "lay off." False reasons can later be used against you and make the case harder to defend.

GABLER: Document, document, document! Effective documentation provides clear information to both employers and employees about expectations, rights, obligations and status. It avoids misunderstandings and workplace conflict, the bases of the sweeping majority of legal

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disputes. It firmly establishes the legitimate business reasons for the employer's decisions, counteracting claims of discrimination, harassment, retaliation and more. In a lawsuit where employer and employee disagree about past events, there are only two ways to prove the employer's position: (1) put the employer's witnesses on the stand and hope the finder of fact believes their testimony; or (2) present "the file" with clear documentation of what happened and why. Ask your employment law counsel to create or review documentation of particularly thorny or hotly disputed issues. Dated and signed documentation of decisions and events is always a safer bet than banking on the performance of individual witnesses in an employment dispute.

ROSENBERG: Unfortunately, ignorance of the law is no defense. The most important thing an employer can do to manage this type risk is adding a seasoned labor lawyer to their team of trusted advisors and consult with that lawyer in advance of making decisions involving employees. A single employment transaction that takes but a few moments (like firing someone or even not hiring someone)—can end up costing the business hundreds of thousands of dollars in defense costs and liability. Most businesses wouldn't make a decision of that financial magnitude without serious contemplation. The same level of thoughtful analysis should be accorded to employment decisions as well.

◆ What are some legal issues that companies overlook during the hiring process?

GABLER: There are two critical steps employers should take to protect themselves in the hiring process. First, fully research the applicant's prior experience and education. In a majority of employment lawsuits, we find that the employee does not have the education or experience he claimed to possess, or he has omitted critical background facts from his resume or application. Second, do not permit the new hire to commence employment before all pre-hire conditions are met. If you want your new employee to take a drug and alcohol test, pass a physical exam or sign an arbitration agreement, inform the applicant of your prerequisites in the offer letter, and wait for compliance before letting him start the position. It is always easier to withdraw a conditional offer of employment than it is to terminate a new employee.

ROSENBERG: There are a myriad of rules that must be followed in the hiring process. Many are counter-intuitive. For example, state and federal laws heavily regulate the types of questions which may be asked in a job interview and which types of information an employer may look into when doing a pre-employment background check (example: a recent state statute outlaws the sue of credit information when hiring for most jobs). Also, most employers really don't understand just how few employees are really exempt from the federal and state overtime pay requirements. In the last decade, CA employers have paid billions in class action back pay settlements, most of the time because of ignorance about the OT rules. Another huge mistake is the misclassification of employees as so-called independent contractors. Again, there is huge liability for mistakes. A written independent contractor agreement—even one which the worker asks the employer to sign— won't help a bit if the legally required factors don't support a true independent contractor relationship.

BENDAVID: Employers often fail to confirm the terms of employment in a well-written offer letter or agreement. The offer letter should:

- Confirm the employee is hired "at-will." You should reiterate that except for at-will employment (which can only be changed in writing), the employer has the right to modify the terms of employment, including job titles, duties, pay, benefits, etc.
- Include an "integration clause" confirming it sets forth the entire understanding of the parties in connection with the employment, incorporating a provision stating the letter can only be modified by someone in upper management and only in writing.
- Add a confidentiality provision if the employee will have access to sensitive information obligating the employee to protect confidential information and trade secrets.
- Spell out the employee's wages and benefits.

Offer letters are often used in post-termination litigation to establish the employee's at-will status and to confirm the employee agreed to protect company property. If well written, they are a helpful tool.

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

ROSENBERG: Most employers erroneously assume that you can lay off anyone you like without legal consequences, and that's simply not true. A layoff is an economically based termination of the employment relationship. In every layoff, there is the "why me" question that the business must be able to answer with a legitimate reason. I have represented employers in many layoff cases where a single employee (out of hundreds laid off) claims to have been selected for layoff because of their membership in a protected class such as race, gender, disability status, etc. or in retaliation for having engaged in some other protected activity (think "whistleblower", someone who took time off as permitted by law such as pregnancy or family leave or someone who filed a safety or other complaint with a state/federal agency). Although an employer clearly has the legal right to field the best team possible, there are numerous laws which must be kept in mind when making staff cutbacks.

◆ A common business question these days is whether or not business owners are permitted to use independent contractors for product/service sales? How do you advise your clients on this topic?

BENDAVID: In today's legal environment, I encourage companies to strongly consider (or reconsider) hiring workers as independent contractors. Walk through the factors used by the EDD, IRS, DOL, the DLSE and courts to determine the risks of misclassification, which can generate government claims resulting in penalties, fines, and taxes – as well as employee claims for wage and hour violations, reimbursement of expenses, Labor Code penalties, etc. Misclassification is also problematic if the worker is injured on the job and there is no workers compensation coverage. Problems arise in a host of industries, and no companies are immune. Given the information sharing agreements between federal and state governments, and newer legislation in California, this area requires close employer scrutiny. If the factors weigh more heavily in terms of an employer-employee relationship, we then discuss how best to transition the worker while reducing the risk of possible claims.

ROSENBERG: Be careful because the cash starved government is after these so-called independent contractor relationships. Sadly, most won't pass muster if reviewed by the labor law and taxing authorities. .When you call a worker an independent contractor, you are effectively thumbing your nose at the numerous federal and state agencies which exist to regulate one aspect or another of the "employment" relationship, and they don't like it. I tell every client that while it's perfectly lawful to hire an independent contractor to perform product/service sales, you are pushing the rock up hill legally. Before doing so, the business ought to invest in a proper legal assessment because the exposure for a misstep can be huge – especially if there are a number of people being treated this way.

KOEGLE: Proper independent contractor designation is becoming increasingly difficult, regardless

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of the type of work performed. However, a recent series of cases and administrative decisions has made characterizing sales associates as contractors even more difficult. Remember, the presumption under California law is that every California worker is a non-exempt employee. In order to properly move that worker from the employee presumption, into an independent contractor position, a subjective, 17-point test regarding the workers' duties must be applied. Those seventeen points basically boil down to how much control the business exercises over the work performed. The more control, the less likely the worker is a contractor. When it comes to sales representatives, unless the worker is: (1) selling other companies' products/services (sometimes even competing goods) in the same market as your company; or (2) able to set price margins, discounts, etc. when completing sales transactions, it is highly unlikely s/he can be properly qualified as a contractor.

◆ How about using contractors for overflow work? How do you advise your clients in that regard?

ROSENBERG: The service provider is either a contractor or an employee. There is no middle ground and the only safe way to manage the issue is to treat the worker as an employee. The fact that its only for overflow is irrelevant.

KOEGLE: Again, the analysis all comes down to the employer's degree of control. The more restriction or guidance provided by the business as to how the work is done (e.g. processes, timing, priority, quality assurance requirements, etc.), the less likely the worker is a contractor. Additionally, in the case of overflow work, if the employer has other workers who are classified as employees, and they perform the same type of work tasked to the overflow worker, the worker is very likely an employee – a temporary employee, but an employee nonetheless.

◆ If a client asks about whether or not they are required to pay overtime and provide meal and rest periods for salaried employees, how do you typically advise them regarding paying overtime?

BENDAVID: For overtime issues, consider the following:

• Is the employee paid on a salaried basis and earning at least twice minimum wage ($2,773.33 per month)? This salary is necessary for executive, administrative and professional exemptions from overtime.
• Review the employee's duties. Are they exempt duties requiring independent discretion and judgment? Do they satisfy the other exemption conditions? If so, no overtime would be due and no penalties are associated with a failure to provide breaks.

However, merely paying a salary does not mean they are exempt. If they do not qualify, I advise clients to pay overtime. In these circumstances, I suggest employers change the worker to an hourly rate to avoid confusion about the correct overtime amount due. We provide policies and procedures explaining meal/rest period rules to reduce the risk of penalty claims for missed breaks. Nonexempt employees should be provided breaks and should be asked to sign policies to confirm they understood the rules.

ROSENBERG: It's a complex question because it assumes that the salaried worker is indeed overtime exempt. In every overtime exemption question, there are two sets of questions and the answer to BOTH must pass muster. First, is the employee truly being paid on a "salary basis" (that's more complex that you might imagine) and is the salary high enough? If so, the second issue is whether the employee's duties qualify for the exemption (most don't) and does the employee typically spend at least 51% of their work week engaged in those 'exempt" duties? In many cases, employers find out the hard way that they guessed wrong on one or both of these questions. Again, this is an area where having a seasoned advisor look the situation over could save the company a ton of money and legal headaches.

GABLER: Employers often mistake "salaried" for "exempt." Paying a "salary" does not by itself make the employee exempt from overtime and other wage and hour laws. Employees must meet specific legal tests to reach exempt status, thereby avoiding meal and rest periods or overtime pay. While an employer may lawfully pay a salary to a non-exempt employee for a pre-set schedule of weekly hours, the "salaried" non-exempt employee still must keep accurate time cards and receive appropriate meal and rest periods to avoid wage and hour liability. If that employee works more than eight hours in the workday or forty hours in the workweek, overtime pay beyond the salary already paid remains due to the employee.

KOEGLE: The analysis needs to be whether the employee is "exempt" from the overtime and meal and rest period laws. The presumption under California law is that every worker is essentially a "non-exempt" employee, meaning that the employee is entitled to overtime payments for all hours worked in excess of eight in a day or 40 in a week. These requirements apply to every worker unless they meet the requirements of one of the specific exemption categories. The exemption tests for each of these categories looks at the earnings of the worker (minimum salary test) along with their job requirements (duties test). If both prongs of the respective tests are satisfied, the employee can be designated as exempt, and there is no need to pay overtime.

◆ Some businesses today are looking to avoid the requirements of the Affordable Care Act by moving all of their employees to part-time status, working less than 30 hours per week. What do you tell clients exploring that option?

KOEGLE: Unless the employer is currently in the 50-60 employee realm, it is highly unlikely that moving a few employees from full-time to "part-time" will make a difference. Many employers fail to understand that the minimum employee calculations in the ACA refer to "full-time equivalents" meaning that every two employees working 20+ hours (and so on) will count as one employee for the 50 employee threshold. Therefore, a manufacturing business with 200 employees would not benefit by dropping its line workers to 30 hours, as they would still have over 100 "full time equivalents" – well in excess of the 50 employee threshold which triggers the ACA coverage requirements.

◆ What are some of the most common Leave of Absence related mistakes that employers make?

BENDAVID: Managing leaves of absence is challenging – in fact, it's probably the hardest thing for employers to manage given various overlapping laws. The biggest mistake I see is the failure to understand the leave rights of employees and the corresponding failure to document the time off. For example, if an employee has a work related injury, the employee can take a workers' compensation leave. However, the time off may also qualify as leave under the Family and Medical Leave Act/California Family Rights Act, and may also qualify as a reasonable accommodation under the ADA and the Fair Employment and Housing Act. Employers should make sure they understand and send letters to employees so the employer can later demonstrate compliance with leave requirements. Another mistake is that sometimes employers terminate after the expiration of an FMLA/CFRA leave, but fail to consider whether another leave law applies to the employee.

GABLER: Employers often fail to provide all available leaves of absence, and to proactively and fully

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inform employees about the leave terms. Employers faced with a potential leave of absence should first consider whether there is an available statutory leave. If not, or if that leave has been exhausted, employers should consider whether interactive discussion is necessary to review the viability of further reasonable accommodations for the employee. At the outset and continuously throughout the leave period, employers should fully inform the employee in separate writings (not merely in the handbook) about how long the employee is entitled to be on leave, whether the employee will receive pay or benefits from the employer or any other source, what documentation the employee has to submit (and when), and whether the employee is guaranteed reinstatement. Regular communication can avoid misunderstandings, incorrect assumptions and unnecessary stress for both employee and employer.

KOEGLE: The "alphabet soup" of leave requirements can be a challenge for even the most savvy business owner: FMLA (Family Medical Leave Act), CFRA (California Family Rights Act), PFL (Paid Family Leave); PDL (Pregnancy Disability Leave); USERRA (Uniformed Services Employment and Reemployment Rights Act), workers' comp, and the list goes on and on. While some of these leaves of absence can run concurrently, others will run consecutively. Even if an employer allows an employee to exhaust all possible time required under the various statutes, and errs on the side of caution in running the various leaves consecutively, there may still be a requirement to provide additional leave, if that leave could be defined as a "reasonable accommodation" of a recognized disability under the Fair Employment and Housing Act. Which is why, employers should consult with competent legal counsel when determining which leaves apply, how the leave is calculated, and whether additional leave may be necessary under certain circumstances.

ROSENBERG: Not understanding just how far the law requires a company to bend when accommodating employees who take legally protected time off is a common mistake. And, being unable to resist the temptation to give the employee a hard time (some call it illegal harassment) when they announce their intention to use these leave rights. Another key mistake is not holding the employee's job open or setting arbitrary limits for when they have to return. Recent cases and governmental guidance documents suggest that employers act at their peril when doing so.

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

GABLER: To be truly effective, it is not enough to be an employment law expert or to provide quality legal advice (although both are critical). Business owners should want and expect their employment law counsel to be an external team member of the organization, working closely with management to develop the most productive and efficient workforce as well as protecting against legal violations and resolving employee disputes. Our firm provides twice-monthly complimentary seminars in two locations, designed to give our clients the basic tools necessary to address their most common questions. By actively investing our time and resources into their businesses, we gain a deeper understanding of how we can best serve their needs when thornier issues arise, and we can share in the joy of their successes as much as we do our own.

ROSENBERG: Two things. First, we listen, I mean truly listen so we may ascertain client is trying to achieve and how to get there. That's our job. In a sense, we are risk option managers. Second, in the end, you are buying legal expertise and the ability to really see what's coming. At our firm, all of the front line advisors and litigators have at least 20+ years experience doing nothing but management side labor law transactions and cases. Collectively, we have hundreds of years of battle tested experience to draw from when devising a plan of action. You have to be comfortable that your team has the requisite experience and know how to tell you (in language you can understand!) when you are walking off a short pier… and what must be done to maximize your chance of a good outcome.

◆ What do businesses need to know about finding, interviewing and hiring the very best employment labor attorney?

KOEGLE: When it comes to handling an issue before it becomes litigation, it is important to remember that not all attorneys who profess to be employment or labor counselors have experience in the practical or pragmatic application of that law. Reading and understanding the "black letter law" is not the same as having the ability to translate that into real world scenarios or urgent employment-related decisions. Common sense goes far, but practical business sense is a tremendous asset for an employment law counselor. When it comes to picking an attorney once you've been sued, trial experience is a must. How many cases has the attorney/firm taking to jury verdict in the last two or three years? Obviously, the higher the number, the greater the attorney's experience, and the better that attorney would be in assessing the risk/exposure of a case and advising the client in the risks associated with trial.

BENDAVID: Just like with other service providers, you have to make sure you feel comfortable with the attorney you are hiring. It has to be a good "fit." Do you feel comfortable talking with the attorney? Do they seem competent and capable in the advice they are giving you? Are they experienced and give advice that is practical for your business? Do they appreciate your needs and respond promptly? Most of our clients are referred from other clients or from other service providers who worked with our firm in the past.

GABLER: The most common mistake in retaining counsel to handle employment issues is choosing an attorney who specializes in business or litigation instead of an employment law expert. Obtaining quality employment law advice depends upon retaining an attorney well-versed in thousands of employment law statutes and cases, with substantial experience "in the trenches" of employer-employee interactions. In addition to researching the experience, skill and references of potential employment counsel, business owners should consider whether the attorney is creative and proactive, rather than merely adversarial and reactive. The best attorney will work with you to develop a risk management and problem-solving strategy that best serves your business – not the law firm's business – taking into account your workplace culture and business goals. Look for the attorney who knows the law, but who can also provide effective and thoughtful ways to integrate legal compliance into your business operations in a cost-effective manner.

GURNICK: In hiring the best attorney, there are many factors to consider, including the attorney's standing with the State Bar, experience, results, communication, honesty, trust and plain old-fashioned hard work. The Attorney Referral Service of the SFVBA is certified and approved as a model program by the American Bar Association and State Bar of California. The ARS has a membership of close to 200 attorneys, including employment law panel members that are among the very best and brightest attorney. Through the ARS, business owners have access to attorneys throughout the San Fernando Valley. When Business owners contact the ARS for a referral, the ARS Consultants will discuss the key features that could help find the best attorney to help with exact needs. Participating attorneys must carry insurance, agree to fee arbitration for fee disputes, meet high standards of experience, be a CA State Bar member in good standing.

'In hiring the best attorney, there are many factors to consider, including the attorney's standing with the State Bar, experience, results, communication, honesty, trust and plain old-fashioned hard work.'

DAVID GURNICK

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- Equal Employment Opportunity Commission (EEOC Charges)
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