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. Below 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 in 2017 – from the perspectives of those in the trenches of our region today.
LABOR & EMPLOYMENT ROUNDTABLE

- What are the most significant new employment laws taking effect in 2017?

LIGHT: Perhaps the most important one is the federal salary threshold of over $27,000 for exempt salaried employees that was increased to $47,900 on December 1, 2016. We'll see what the courts of appeal do about the injunction in place, and whether the new administration backs away from the increase. Remember that California's minimum wage went up to $12.00 on January 1, 2017, in Los Angeles and other unincorporated L.A. County areas, which raises the state's minimum salary even further to $15,630. Note that the city-county extra increase in minimum wage doesn't affect the salary test.

ROSENBERG: Despite a plethora of new federal and state legislation in my opinion, one of the most interesting legislative developments is the huge uptick in the number of cities and counties which have passed their own (more uniform) labor regulations to protect the employees working within their borders. Many have hidden traps for businesses that send workers into a covered area, but are based elsewhere. For example, the City of Los Angeles' minimum wage law not only applies to L.A.-based companies, but also to workers who in any particular week perform at least two hours of work within the City's borders. Also, several cities and counties in Southern California, such as Long Beach, Santa Monica, and San Gabriel, have increased their minimum wages. Both cities and counties have increased the minimum wage for single-employee businesses in California cities and counties, to bring them up to the federal minimum wage standard.

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

BENNYARD: A few of the new anti-discrimination laws will likely cause headaches for employers. Los Angeles' Ban the Box ordinance not only prohibits businesses from asking about an applicant's criminal history, but also mandates a series of clemency steps that must be followed to post-job openings, changes in the hiring process, and maintaining records. Applicants who have not been convicted of a crime may be considered for employment. Also, in 2016, the California Fair Employment and Housing Act was amended to allow the attorney general to issue regulations for expunging arrest records.

- What can employers expect from the California legislature this year?

ROSENBERG: The current legislative session is in full swing, and business owners should be aware of the new laws that are being considered that affect their businesses. We can expect to see more changes in the area of employment law, and it is important for employers to stay informed and make sure that they are taking the necessary steps to comply with the new laws.
Protecting your *business*. Protecting you.

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BENADVIS: On November 22, 2016, the U.S. District Court granted an Emergency Motion for Preliminary Injunction and stopped the Department of Labor from implementing and enforcing the new salary rules for exempt employees under the FLSA. On December 1, 2016, the Department of Justice, on behalf of the Department of Labor, filed an appeal. For business owners who did not yet change their pay practices to either increase salaries or change workers to hourly status, we are recommending that they stay put for now, pending the court’s ruling. Business owners who already increased salaries or switched workers to hourly status, now face the decision of whether to keep those changes or switch employees back to their previous compensation. However, reversing back may cause more turmoil (i.e., morale problems) and create even more headaches of the courts ultimately rule the increase is valid. Even though the hearing will be held on an “expedited basis” the review by the court of appeals could take months. Many employers are opting for a wait-and-see before taking further action.

- How have the changes in marijuana laws affected your clients?

ROSSNER: Not much. California’s Supreme Court has ruled that employers do not have a legal obligation to relax their drug-free workplace policies to accommodate medical marijuana use. And, the recent trend of legalizing the recreational use of marijuana does nothing to change that. However, there is great risk for litigation when employers do not have a well thought out and legally compliant policy covering drugs/alcohol use and testing. Among other things, the employer should set the company’s clear expectations (zero tolerance!), provide for management training to detect policy violations, and establish a well-defined for handling the transportation of suspected policy violators and their consequences.

- What should employers know about mediation in the context of employment disputes?

ROSSNER: In some cases, our clients choose to mediate early in an effort to get the matter behind them (often due to financial inability to defend the way to trial). In other cases, especially where the allegations are both contested, and whether the client has the financial ability to fight, the clients are less likely to agree to an early mediation agreement. Regardless of whether the case involves one or mediation can be useful in educating both sides about the facts and law in their cases, including their respective strengths and weaknesses.

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

ROSSNER: Employers generally can’t enforce a non-compete under California law, and even having such language in a confidentiality agreement without enforcing it is unlikely to be enforced. Even a non-compete that is enforceable today can’t be enforced more than the law allows, but a confidentiality agreement is a good way to protect sensitive business information. Also, if such information is protected in your employee’s job, it can be returned after departing. In other cases, you allow limited access to it. Also, employers should understand an “announcement” is meant to protect the company’s reputation.
You don’t have to pay sick time when the employee leaves the company, and you can begin to discipline for excessive absenteeism soon after they are no longer available for sick leave. And be careful about designating “personal days” of leave that aren’t specific to, e.g., a birthday (“take your birthday off or within one week on each side of it”). If they are generic, they are treated exactly like vacation or PTO and must be paid at separation (and accrued).

JONATHAN FRASER LIGHT

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

LITIGATION: Nope. The EEOC’s Guidelines have made it even more problematic, because employers must scrutinize the conviction to determine if it is remote in time, unrelated to the job to be done, whether the employee is closely supervised, the age of the employee when it occurred, and other mitigating factors. Also, we’re heading down the road toward “ban-the-box” legislation. New York is the latest state to pass such a law, while San Francisco imposed a similar restriction within the same time frame.

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

ROSENBERG: Most employers erroneously assume that you can lay someone off without legal consequences. That’s simply not true. A layoff is a terminologically based termination of the employer relationship when the employer must decide which employees are expendable. In every layoff there is the “why” 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 too much time off as permitted by law for pregnancy or family leave, or perhaps someone who filed a safety or other complaint with a state or federal agency). Although an employer clearly has the legal right to fire the best team possible, there are numerous laws which must be kept in mind and managed when making staff cuts.

How does a law firm specializing in labor and employment discrimination itself from the competition in 2017?

BEHAVIOR: We represent employers exclusively. Additionally, we have large franchise & distribution, corporate and business litigation, practice groups, which means we’re knowledgeable about employment and business matters in a wide range of industries — including those offering professional services, hospitality, manufacturing, healthcare, etc.

ROSENBERG: The EEOC recently outlined right of employees with mental health conditions — confirming that these individuals are protected from discrimination and harassment in the workplace. Employees should be encouraged to engage in an “interactive dialogue" when the employee requests an accommodation, or when the need for an accommodation becomes apparent. When possible, try to accommodate the employee and document those efforts. If you will suffer an “undue hardship” discern that the employee is first (as part of your “interactive dialogue”) and get the employee’s feedback and hopefully acknowledged that the requested accommodation is too difficult or impossible to provide.

What are some of the practical challenges employers face when implementing California’s paid sick leave law?

ROSENBERG: The number one issue we see in any practice is the confusion caused by companies being in a locale like the City of Los Angeles, which have two (or more) sets of rules that per employee must abide by. Also, we can still use them to be able to close their case, though that’s the air in the right now.

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

ROSENBERG: A common feature in so many lawsuits from federal to state court is that the employer fails to provide a proper context for the employee’s communications (or negligent job expectations that it was in writing) and the consequences for failing to meet them (also best to do in writing). A simple example of termination done wrong is a company article that left the employee’s inclusion in the discussion “will the employee be surprised?”. The answer to this simple question speaks volumes. If yes, then the potential for a legal claim is greatly increased. Also, an employee’s fails to see whether it tells the story you’re trying to tell. If not, you are exposed. A well documented file is worth its weight in gold when it comes time to discipline an employee or trying to convincesieren that you have already turned your former employee’s case. Also, verify that no one in management asked the employee to do something illegal or that it’s management’s hiring decisions. That’s no proper for an expensive lawsuit.

How does it make sense for businesses to combine their vacation and sick time into a single PTO policy?

BEHAVIOR: With the new paid sick leave laws (state and local), we are recommending that employers separate vacation from sick leave. There are rules that apply to sick leave, that don’t apply in the vacation context. Separating out the benefits can help demonstrate an employer’s intent and what’s more, an employee’s control when an employee takes time off for vacation or other absence related to sick leave.

UH-oh! Retirement call and email in a timely fashion. Provide practical advice that works in the workplace, specifically on dealing with sensitive, disability leave issues that may ensnare litigation if not handled properly (e.g., if you believe the employee is never coming back and just shutting out the leave time, why terminate and give the employee a reason to sue)?

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What are an employee’s responsibilities regarding individuals with mental health conditions?

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