The San Fernando Valley Business Journal has once again turned to some of the leading business attorneys in the region to get their assessments regarding the current state of labor and employment legislation, the new rules of hiring and firing, traps to avoid, and the various trends that they have been observing, and in some cases, driving. What follows 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 law today – from the perspectives of those in the trenches of our region today. Thanks to our superb panel for their expert insights.
**Law Roundtable**

**Why are the most significant new laws taking effect this year that impact businesses?**

**ROSENBERG:** Here are my top 5: (1) It’s now illegal to use a job applicant’s salary history when negotiating wages, so employers must not ask a job applicant to disclose salary history and must not refer to or use that information as a factor in deciding whether to hire someone or how much to pay them; (2) “Accessing” a baby’s housing allowance must now be offered by all employers with just 20 or more employees; (3) under the “ban-the-box” laws, employers of five or more employees may not ask job applicants about their criminal history until after a conditional offer of employment has been extended and the law also requires that prior criminal record is not considered as a separate “non-binary” as a gender; and (4) expanded “national origins” job bias regulations that take effect on July 1, 2017, enhance protections for workers to include on-the-job and employment practices, discrimination in the terms of employment such as wages, as well as the classification of an employee as an independent contractor or wage and hour violations.

**GARLER:** Although most of the new employment laws implemented on an annual basis in California have substantial (usually adverse) impacts on California businesses, some of the most significant laws for 2016 related to the housing process, rather than the employment relationship. The January 2018 new laws included a prohibition against asking an applicant to disclose criminal convictions prior to making a job offer (AB 1000), and a prohibition against requiring an employee to reveal criminal records (AB 1605). With these changes, the California legislature sought to curtail the risk of discriminatory hiring decisions, while at the same time limiting the employee’s ability to avoid an unfair discharge. But an employee’s background that is derived independently negotiate mutually acceptable compensation with an applicant. Other new laws for 2018 included 3080H, adding the New Parent Leave Act to require companies with 20-49 employees to provide up to 12 weeks of unpaid baby bonding leave to new parents, and the legalization of recreational marijuana, allowing employers to grapple with the dichotomy between federal drug laws and state drug laws and the continued enforceability of no-tolerance drug and alcohol policies in the workplace. As with any change to California’s burdensome employment laws from year to year, there are new additions to the list of employees to work with qualified employment law counsel to update their employee handbook, employment applications, and other employment documentation.

**RENAUD:** The most significant new regulatory and proposed statutory laws target harassment and discrimination California adopts at the state level in 2018. One example is the new anti-discrimination that went into effect July 1, 2018, with expanded “national origin” to include those with physical, cultural or linguistic characteristics associated with a particular group. Protections are afforded to those who marry or associate with persons of a national origin group, who are associated with an organization, like a school or religious organization, that promotes a national origin group’s interests. Employers should be careful to ensure employees are not harassing or discriminating based on language, low English proficiency, or affiliation with a national origin-related group. A new IBS rule regulates deductions for payments made to settle harassment claims if the settlement is subject to nondisclosure. So the choice for an employer to make a sexual harassment claim to the matter confidential at the cost of the rollover, or to take the deduction and let plaintiff say what they will. There are also a host of pending “nurse too” bills which, if signed into law, will expand the rights of harassment victims. The bills propose a longer statute of limitations, the right to sue individuals for retaliation, record keeping and other related mandates.

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**GARLER:** The most likely source of litigation in the coming year is not the variety of 2018 legislative changes, but the California Supreme Court’s decision in D & N Operation Wear, Inc. v. Superior Court (2018), regarding the classification of independent contractors. The Court upheld the third part of “ABC Test,” establishing burdensome criteria for independent contractors that all but ensures the “employees” status of the prevailing majority of workers. California businesses often misclassify seemingly “independent workers” as independent contractors, partially to satisfy the desires of the workers themselves and partially to avoid the cost and complexity of California’s challenging employment laws. Unfortunately, misclassification of employees as independent contractors carries substantial legal risk, with heavy penalties and damages for employers.

**RENAUD:** The bills expanding rights of harassment victims are likely to increase the number of lawsuits employers can expect. Employers may expect more claims based on harassment, discrimination, retaliation, wrongful termination, and infliction of emotional distress. Employers should be proactive in terms of training, and make sure their postings are in place. If allegations are made, do not sweep them under the rug. Promptly investigate the merits. And, take appropriate action if you conclude misconduct occurred. You should also monitor and conduct after the investigation to ensure no retaliation occurs.

**ROSENBERG:** In few weeks ago, the California Supreme Court adopted a new and extremely broad, pro-employee standard for determining when someone may be legally classified as an independent contractor vs. an “employee” under the FlC Wage Orders. Therefore, we expect to see an increase in claims by “independent contractors” seeking the benefits of the wage and hour orders of the California Court of Appeals.

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**What is new about employment law in 2018?**

**RENAUD:** The “MeToo movement” has, so far, essentially led to significant changes in employment law. The most obvious is the shift away from a “no evidence” standard for sexual harassment claims, and the increased focus on the employer’s role in preventing such behavior.

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**How important is sensitivity training in the workplace in 2018?**

**ROSENBURG:** In the wake of the #MeToo movement, it’s absolutely vital for any business seriously interested in avoidance and morale building. That’s why the training is mandated for larger employers (50+ employees). We have handled way too many cases over the years that were completely avoidable had the participants known that the behavior in question was offensive to others and against company policy. Another reason to train is that management’s silence on the subject can be seen as tacit approval of the offending behavior. This training should be done throughout the organization so every one of a clear understanding of exactly where the company stands and what will happen if someone’s behavior crosses the line. In my opinion, this is the single best investment a compa-
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GARLIPE: California includes gender, gender identity and gender expression in its list of protected categories, providing legal protection to transgender persons. As with all forms of discrimination, this protection is critical and open communication is key. Employers should train all employees (management as well as staff) on all forms of discrimination, including gender identity, on an annual basis. Management must remember that workplace culture starts at the top – corporate executives as well as supervisors must set a positive example with their own conduct, and must be mindful of comments and conduct going on each day in the workplace. Ongoing reminders to employees to be sensitive to and embracing of the differences among us versus the toxic for a diverse workplace, and willingness to take complaints seriously creates a level of comfort among those who might otherwise suffer in silence. It is also important to remember that “separate is not equal.” Facilities must be equally accessible in accordance with law. Employers sometimes argue that taking steps to protect the rights of transgender employees, such as permitting a transgender person to use the appropriately “designated” bathroom, would make others “uncomfortable.” This is certainly not the first (and likely will not be the last) time in our history that people have employed discrimination口径 as the misguided theory that they are not “comfortable” with the differences of others, but discomfort provides no legitimate basis for discriminatory decisions or behavior. Ultimately, employers and employees alike should remember that any decision or action taken which excludes or hampers the rights of others simply because of their protected characteristics is, quite simply, an act of discrimination.

ROSENBERG: The state’s job-bus regulations now prohibit discrimination against transgender individuals. The rules outline a model for employers to follow which mirrors the laws prohibiting discrimination based on sex, gender identity or expression. While these laws are important, they do not fully protect transgender workers from discrimination in the workplace. The California Fair Employment and Housing Commission recently updated its guidance on how to handle workplace complaints involving transgender individuals. The updated guidance provides employers with new tools to help them effectively respond to complaints and prevent discrimination in the workplace.

BENAVID: Many employees understand they have the right to a drug-free workplace because of federal prohibition on marijuana use. Employees struggle with what their actual company policy should be. Should they turn a blind eye to using marijuana in drug-free workplaces, or should they turn a blind eye to using marijuana in drug-free workplaces? Employers have a duty to comply with state and federal laws. In some states, however, employees with medical marijuana cards are protected from workplace discrimination.

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BENAVID: The California Family School of Public Health has an emergency leave provision which requires employers to allow parents of children who are children of a school-aged child care provider or school emergency conditions. This includes where an employee’s child cannot remain in a school or with a child care provider. A school district can provide leave during this period. This leave is provided to employees who have been employed for at least one year. The employee must have been employed for 30 hours per week for at least one year. The employee must have been employed for 30 hours per week for at least one year.

RICHARD S. ROSENBERG

In the wake of the #MeToo movement, sensitivity training is absolutely vital for any business seriously interested in lawsuit avoidance and morale building. In my opinion, this is the single best investment a company can make toward ensuring that it stays out of court.

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LH
Lewitt Hackman
Lewitt, Hackman, Shapiro, Marshall & Harlan
A Law Corporation

Our Employment Practice Group:

SUE M. BENDAVID, CHAIR
NICHOLAS KANTER
NICOLE KAMM
HANNAH SWEISS
TAL BURNOVSKY YEYNI
AMY I. HUBERMAN

16633 Ventura Boulevard, 11th Floor • Encino, California 91436
lewitthackman.com • 818.990.2120
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**GABLE:** Employers often believe that mediators, or any other form of alternative dispute resolution, is an indication of "bullying over" or "being cowed." In fact, one of the most significant expenses in any litigation matter is the attorneys’ fees incurred to defend against the employer’s claim. And, in most cases, early settlement will typically cost far less than it would cost to win the case. Most employment disputes have for many decades added up to the bottom line for companies, and the result is no longer a question of money and the impact that dealing with these issues can have on a company’s bottom line.

**ROSENBURG:** The U.S. Supreme Court issued an important ruling confirming the right of an employer to force employees to use arbitration of their employment disputes under the National Labor Relations Act. Finally, California will no longer permit employers to force employees to arbitrate representative actions, penalty claims under the state’s Private Attorney General Act (PAGA) for wage and other Labor Code violations. This means that the employer could face an expensive multiyear court battle under the PAGA law as well as the prospect of the California Supreme Court issuing a decision that is unfavorable to the employer.

**BENNET:** Employment arbitration and class action waivers are now enforceable because of a recent U.S. Supreme Court decision. Essentially, the question was whether plaintiffs could act together for the common good under the National Labor Relations Act. The federal Circuit Courts were split on this issue. But SCOTUS ruled that the employer and employee cannot separately agree to private arbitration disputes. There are pros and cons to arbitration, including cost, time, lack of appeal, or jury vs. private judge. Additionally, plaintiffs still have the right to sue in court for penalty claims under the Private Attorneys General Act. Before employers can demand that employees agree in writing on the issues should take place so the employer can make an informed decision that best suits his or her circumstances. It was not previously a fan of arbitration because employers must pay the arbitrator's fees and for other reasons – but given the increase in wage/hour class actions and the rising million-dollar class action waves, the rule is running.

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

**GABLE:** The most significant error made by employers is not following company policies in hiring and/or employment. Employers must remember that if an employee is not following the rules and/or employment, the employer must punish the employee for the offense. The employer must follow the rules and/or employment. The employer must follow the rules and/or employment. The employer must follow the rules and/or employment. The employer must follow the rules and/or employment. The employer must follow the rules and/or employment.

**BENNET:** New employees are generally unaware of their rights in Cali- fornia, with limited exceptions. If the exceptions do not apply to you, then at a minimum, make sure you have strong confidentiality agreements along with a trade secret protection plan in place. This includes having policies describing employee obligations, locked cabinets or safes to contain confidential information with access given to only those employees with a need to know, among other steps. Note that non-competes in other states may be valid. So, if you are looking to hire an applicant from another state, make sure you are not subject to any restrictions that could limit your court.

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

**ROSENBURG:** That’s a huge assumption that you realize is very dangerous, following last month’s California Supreme Court ruling severely limiting who can be legally classified as an independent contractor. Business that engage service providers as independent contractors should consult with counsel immediately to see if the relationships will pass muster under the new test. The new test, which is much harder to meet, means that more independent contractors will have to be reclassified as employees, with all of the attendant costs and burdens. The California Supreme Court adopted a three-part test, called the “ABC” test, to distinguish employees from independent contractors. A worker is presumed to be an employee unless the hiring entity can prove: (A) the worker is free from the hiring entity’s control and direction; (B) the work is not part of the usual course of business of the hiring entity; and (C) the worker is customarily engaged in an independent business, occupation, or trade of the same nature as the work he or she performs for the hiring entity. Contracts are not critical of importance, but if the worker is in a business or trade that is similar in nature to the one in which the employer is involved, the fact that the worker is in a business or trade that is similar in nature to the one in which the employer is involved, the fact that the worker is in a business or trade that is similar in nature to the one in which the employer is involved, the fact that the worker is in a business or trade that is similar in nature to the one in which the employer is involved, the fact that the worker is in a business or trade that is similar in nature to the one in which the employer is involved.

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

**BENNET:** The most common class action claims are failure to provide proper meal breaks; failure to provide proper rest breaks; failure to provide proper pay overtime; misclassification and corresponding claims for pay stub violations and waiting time penalties. You should regularly audit your pay practices.

**SUE A. BENNETT**
failures to properly pay overtime; misclassification (e.g., non–white-collar paid) of independent contractors and corresponding claims for pay stub violations and waiting time penalties. You should regularly audit your pay practices. We never see employers who are doing everything right. Even the smallest unintentional mistake can lead to claims for huge penalties.

ROSENBERG: Meal and rest break class actions and class actions for failing to provide "suitable seating" to employees are still a huge problem for California employers. Matters get even worse when the California Supreme Court ruled in 2015 months ago that rest breaks must be absolutely "duty-free." In other words, an employer may not require (or even ask) employees to remain on premises or to remain on-call in the event of an emergency. This ruling is likely to cause greater harm when the employees were asked to leave their "restroom" during their 10-minute paid break just in case an emergency occurred and they were needed. Though it relatively little, the Court said that the requirement of keeping the restroom on reserve the rest break to work time and the employees were entitled to a rest break penalty equal to one hour of pay for every day that the employer failed to provide a break in the workplace. The ruling upholds $150 million verdict in favor of the security guards.

GABER: Class actions can arise from a wide variety of wage and hour violations, and every employer in California will have violations (due to simple mistakes or, as in most instances, a lack of training on the part of class actions claims arise from meal and rest period violations. Claims that workers "clocked" work, failed to properly train the payroll, failure to record all work or to include paid rest time off, failure to pay overtime and the corresponding failure to pay minimum wage are common, as well. To protect the company, the employer must develop clear, enforceable policies on wages and hours. The employer can show that the company was aware of the law and made every effort to enforce it. Then, the employer must track compliance and take action on any violations. Interestingly, case law has held that a company with no penalty payments to any employee at any time must be in violation of the wage and hour laws, because every employee misses a break or a meal period or fails to accurately record their time at some point. It is actually a better defense to record violations occasionally, so as to show the court that you are aware of the rules and any violations of those rules, and are fully prepared to pay the applicable penalty to the court or the proper governmental agency.

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

GABER: You would think so, but perhaps not! PTO policies are easier for employers to track, and employees enjoy the flexibility of taking days off without notice. Yet, PTO policies can make compliance with both the vacation policy and the sick leave rules (which are more burdensome under the state's mandatory sick leave laws) more challenging.

As with vacation time, the PTO policy must provide for accrual and carry over of up to a maximum of 10-15 years the annual leave, and for accrual of paid time at termination. As with the sick leave rules, the PTO policy must provide for standard calculations of time in employment (i.e., a maximum of 40 hours or 6 days, whichever is greater) which, according to court decisions, requires the employer to pay more PTO for the current year than the previous year. The result is that the employer's obligations may be increased if an employer fails to provide sufficient vacation and sick time to avoid more mandates for the future. Employers must analyze whether the vacation, time off and option to use vacation as paid time off is a better option than the current practice.

BENDAYV: Even since the passage of California's mandatory paid sick leave law, as well as various cities' "sick leave to your employees" mandates, we are recommending that employers have separate vacation and sick leave policies. The sick leave rules are very strict and you want to make sure to comply. Since there is limited flexibility on paid sick and more flexibility with vacation - we suggest you separate the two. Further, vacation and PTO must be paid in separate PTO. This can result in a higher payoff per year since PTO usually accrues at a higher rate than just vacation.

ROSENBERG: Bending the company's paid time off policies used to be the rage. After passage of the state's sick leave laws, that's no longer the case. The nuances in the paid sick leave law make it more beneficial to unbundle paid time off benefits because the circumstances, coverage, and pay and pay reporting rules do not apply to any of the state's sick leave benefits. Also, accrued sick leave need not be used for departing employees. However, that's not the case where the sick leave and vacation benefits are bundled into a single policy. So, by including vacation and sick leave into a single policy, the company will have to pay departing employees for both sick leave and vacation time. Further, the state's sick leave and vacation leave are not "light payment" penalties under the Labor Code.

• Can a business legally impose a rule barring the employment of job applicants with criminal records?

BENDAVY: For most employers, you cannot have a strict rule barring employment to anyone with a criminal record. If you do, you may be required to subsequently fail hiring individuals for discriminatory reasons and subject to liability for race or national-origin discrimination. Also, under the new "ban the box" rules, you must first conditionally offer employment. If the applicant accepts and then you conduct a background check and learn that you are required to do so, then you may make a mandatory process you must immediately complete. Each situation must be individually analyzed and the individual must be given the opportunity to explain why the employer should not be barred.

GABER: A blanket prohibition against applicants with criminal records is unlawful discrimination, and the employer's ability to find out about an applicant's criminal history in the hiring process is limited. As of January 1, 2018, California implemented the "Ban the Box" rules, which are based on California Government Code Section 12952, making it an unlawful employment practice for employers with five or more employees to include in their employment application questions about criminal history or inquire about an applicant's criminal history during the initial phase of the hiring process, before a conditional offer of employment has been made. Even if a conditional offer of employment has already been made, if the employer decides to hire the candidate, the employer must continue to hire the candidate for the position for which he or she was offered. The employer must be aware that the employer may be subject to civil liability for discrimination.

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

BENDAYV: Make sure you have access to an HR professional who knows the law and is knowledgeable about what the HR is not. That HR professional should regularly attend seminars, read updates on employment laws, and keep his or her knowledge current. Always be sure to follow the laws and regulations which are in place. Employment law is a complex area. Employers should always consult with a qualified attorney before taking any action.

GABER: First, work with qualified employment law counsel (not your CPA or corporate lawyer) to update the employee handbook and other human resource documents each year, and distribute them to all employees and employees who do contract work. Employers need to know about the employee's job duties and responsibilities. Employers must prepare an application that provides for an employment decision, which should include the date of employment, the time of employment, and the position. The employer must conduct a post-offer criminal background check and verify the employment information provided on the application. The employer must prepare the application for employment within 30 days of accepting the employer's offer of employment. The employer must maintain records of the employee's application, including the date of hire, the time of hire, and the position of the employee. The employer must maintain records of the employee's termination, including the date of termination, the time of termination, and the position of the employee.

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

BENDAYV: Employers must be able to justify the legitimate business reasons for the decision - that is, actually justify it with written documentation. For example, you can't layoff someone for "not doing his job." His position being eliminated? If so, you're the person responsible. If so, he's been warned about any deficiencies and given an opportunity to improve. If not, why not? Is the decision in line with internal memos and prior performance reviews? Does it follow into any protected categories, thereby giving him a reasonable time for him to remedy the situation? Separation from employment was discriminatory or retaliatory? If asked, how will you prove that his behavior was not discriminatory or retaliatory? If not, then your client retains the affirmative defense to prove the employment was not discriminatory or retaliatory. Failing back on "it was not employment" is not enough - failing to provide the reason for the termination from employment will allow the employee to fill that with an unlawful reason, creating legal risk and cost for the employer.

ROSENBERG: Many employers erroneously believe that a layoff cannot be legally challenged, but that's not true. In every layoff, decisions are made about who to retain and who to let go. Those selected for layoff can use the fact that they were selected to challenge the decision of the employer's action, or because they opposed some employer practice that was illegal (i.e., they are a "whistleblower"). In every layoff decision, I have tried to identify the basic questions "why now?" (i.e., why do you need a layoff?), and "why me" (i.e., how have you picked who to layoff?). We recently argued for the most challenges for the company. Simply put, you might be able to show that the employee who is being used to comply with the law is not the same employee as you are. In many of these cases, the employer has little to no record of job performance to effectively make the comparison. Be sure to keep the reference files to see if they support the layoff story. If not, you are exposed. A well-documented file is worth its weight in gold if you are sued or if you continue an inquiring lawyer to turn down your former employee's case.

How laws a firm differentiate itself from the competition in 2018?

GABER: 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 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 protecting against legal violations and resolving employee disputes. As an example, 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 involving our time and resources into their businesses, we gain a deeper understanding of how we can best serve their needs. Business owners now expect to share in the joy of their successes as much as we do our own.