LABOR & EMPLOYMENT

A Roundtable Discussion

WHAT OWNERS AND EXECUTIVES NEED TO KNOW

SUE M. BENDAVID
Chair, Employment Practice Group
Lewitt Hackman

JONATHAN FRASER LIGHT
Managing Attorney
LightGabler

RICHARD S. ROSENBERG
Founding Partner
Ballard Rosenberg Golper & Savitt, LLP

The San Fernando Valley Business Journal has once again turned to some of the leading employment attorneys and experts in the region to get their assessments regarding the current state of labor legislation, the new rules of hiring and firing, and the various trends that they have been observing, and in some cases, driving. Here are a series of questions the Business Journal posed to these experts and the unique responses they provided – offering a glimpse into the state of business employment in 2018 – 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 2018?

ROSENBERG: These are my top choices for 2018: (i) employers are no longer permitted to ask about criminal convictions until after a conditional offer of employment has been extended ("Ban-the-Box"); (ii) employers are no longer permitted to ask about compensation history during the application process; (iii) employers have new significant obligations to manage and accommodate the needs of transgender employees; (iv) employers facing an immigration audit must insist that that the federal agent produce a warrant before allowing the federal agent access to employees or employer records.

BENDAVID: Employers and hiring personnel should use extra caution when interviewing new employee candidates. The new "Ban the Box" law is now effective throughout California. This law imposes strict protocols regarding questions about a candidate's criminal history. Employers cannot ask about convictions until AFTER a conditional job offer is made (either direct questions or indirectly). And, even after a post-offer/pre-hire background check is performed, the employer must evaluate the conviction and anticipated job and provide the applicant time for feedback – before rescinding the offer. Assembly Bill 1008 applies to employers with five or more employees, with few exemptions. Assembly Bill 168 prohibits employers from asking about a job candidate's salary history, benefits, and other compensation packages. Further, information of this nature cannot be considered when deciding whether to hire or when deciding how much to pay. If an applicant requests pay information for a particular job opening, the employer is to provide the pay scale. More than ever, employers should ensure their pay practices are in strict compliance. Make sure your nonexempt employees are paid at least minimum wage, which has gone up statewide. Also, pay attention to LOCAL minimum wage rules that have even higher minimum wage rates and penalty provisions. Employers should also be mindful of Senate Bill 306, which gives the Labor Commissioner much more authority to investigate retaliation claims, or even the suspicion of a retaliatory action.

◆ How will the Trump administration impact the employment law landscape moving forward?

LIGHT: Other than immigration issues, the Trump administration will not have much impact on California employment law. Employers are subject to both state and federal law, and the one that most favors the employee is the one that a California employer must follow. California wage and hour law is typically more stringent in favor of the employee, so federal law will not have much impact. Where the Trump administration could make an impact, however, is tightening immigration laws or enforcing them more harshly, which may thin out the workforce in California for jobs typically held by undocumented workers-particularly in agriculture, low-end manufacturing, food processing, and hospitality.

BENDAVID: Employers can expect more business-friendly rulings from the National Labor Relations Board. As an example, the NLRB just relaxed its joint employer standard. In terms of the President's stance on immigration enforcement, some employers rely heavily on a migrant or immigrant work force, while others do not. Some employees may feel the impact of this, which may, by extension, impact their employers. In the face of potential investigations, employers should review their I-9 practices and procedures. Also, because of the feds' increased focus on enforcement, the California legislature has spoken by enacting more state legislation to protect undocumented workers. Employers should ensure they understand these new protections, which include providing notice to workers about inspections by an immigration agency.

ROSENBERG: We agree with most experts that the Trump administration will be rolling back federal employment regulations, making it easier for employers. For example, in the labor relations arena, which is governed exclusively by federal law, we have already seen the Trump appointees to the NLRB roll back several Obama-era decisions, and we predict this trend will continue. However, the California legislature and courts continues to develop protections for employees that must be followed.

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

BENDAVID: Alleged wage and hour violations continue to be the most common plaintiff complaint. California employers should not only be aware of increasing minimum wage rates that vary county to county and city to city – they should also be aware of when new rates go into effect. Some raises are applied in January, others in July. At least one jurisdiction increases minimum pay in October. Further, companies that employ drivers, sales reps or others who travel from one jurisdiction to another while on the clock should be especially careful of paying these employees properly. Apart from private law suits by employees (or their attorneys), we have seen an increase in local enforcement by the State and the City of Los Angeles. Auditing your payroll practices is more important than ever.

◆ What are some of the latest developments in minimum wage increases?

ROSENBERG: Figuring out the minimum wage is no longer a matter of simply checking the applicable federal and state rule. There are now over 20 cities and counties in California that have their own unique local minimum wage ordinance mandating higher minimum wages, and often on a different timetable than the state and federal minimums. Some of these regulations are even industry specific, like the ordinances in Los Angeles and Santa Monica mandating an even higher minimum wage for employees working in the hospitality industry. Also, many of these local ordinances now carry criminal penalties for non-compliance. A Santa Monica business owner recently entered into a plea agreement with the City Attorney's office, which included 36 months of probation and community service on top of having to pay what was owed under the ordinance.

LIGHT: California's minimum wage is $11/hr as of January 1, 2018 for larger employers (26+). Smaller employers are faced with an increase to $10.50. Los Angeles City and County employers (but only in unincorporated areas of the county) need to watch the additional increases that go into effect July 1, 2018: $13.25 for larger employers and $12 for smaller employers. An increase in the minimum wage will put pressure on employers to increase wages for those employees who are only a bit above current minimums, so there is a domino effect that employers need to consider. Also, remember that to calculate the minimum salary requirement to be exempt from overtime, employers must use only the California minimum (two times that rate) and not any county or city minimum rate, regardless of the location of the company or its employees.

BENDAVID: Though the federal minimum wage currently remains at $7.25 per hour, businesses with employees in California and/or 17 other states must pay higher rates in 2018. No matter the federal rate, employers must always pay the higher amount to comply with the law. California minimum wage increased to $11 per hour for companies with 26 or more employees, and $10.50 per hour for those with 25 or fewer employees as of the New Year. However, companies with workers in San Diego, El Cerrito, Cupertino, San Jose and other areas must pay higher rates. On July 1, 2018, larger employers (26+) with employees working in the City of Los Angeles, Santa Monica and Pasadena must raise minimum rates to $12 and $13.25 per hour. These increases also impact salaried exempt employees who must earn a minimum of two times the state's minimum wage to comply with the exemption (there are other factors as well for the exemption). For some employees, this means they can expect a raise to a minimum of $45,760 per year if working for a larger employer (26+ employees).

◆ What are your thoughts on the passage of AB 168 and the Ninth Circuit's ruling in Rizo v. Yovino, No. 16-15372 (9th Cir. 2017), concerning salary history inquiries by employers?

LIGHT: In light of the new California statute, Rizo was certified for re-hearing before the entire Circuit, so it's likely to be reversed in favor of prohibiting salary history to be used to justify paying a woman less than a man (which the current ruling allows). The new law creates a more level playing field, and it may well benefit not only woman, but also people of color who may have been paid less in the past because of a lower salary history. Employers can still ask what the applicant's salary "expectation" is, and it will likely be a few percentage points higher than what the worker is currently earning. That information should give the prospective employer some insight into prior salary. The more difficult task for employers may be to establish "salary ranges" for a position, which an employer must provide to a prospective employee.

BENDAVID: In Rizo v. Yovino, the plaintiff was paid five percent more than her prior salary when she took a job with Fresno County – the same five percent guideline applied to all new hires. Rizo later found out she was being paid much less than several of her male colleagues. In this case, the policy-based discrepancy occurred because of geographic history, rather than gender discrimination – Rizo formerly worked in another state with lower wages. A Ninth Circuit Court decided last April for the defendant employer, finding no gender-based pay discrimination. However, Rizo asked the case be reheard, so stay tuned. AB 168 is the state's attempt to level the playing field. According to Assemblymember Susan Eggman: "The practice of seeking or requiring the salary history of job applicants helps perpetuate wage inequality that has spanned generations of women in the workforce. AB 168 is a needed step to ensure that my 9-year-old daughter, and all women, can be confident that their pay will be based on their abilities and not their gender." In short, the legislature wants equally qualified employees to be paid equitably. It may be tempting for some businesses to lower operational costs by paying some staff a bit less than others – but attention to qualifications and pay scales can be useful in the long run in defending a discrimination law suit.

◆ How can employers (especially those with smaller companies and facilities) meet the needs of, or accommodate, a growing transgender workforce?

ROSENBERG: After familiarizing yourself with the new law, the first step is to be sure that current policies are adequate to address the unique needs of this community. Part of that process likely will include sensitivity training for senior leadership and other people managers. This training is now required for larger employers (50+ employees). Most of the claims are avoidable where management shows leadership and sets clear expectations for employees about protecting the rights of this community and being sensitive to their particular needs. Too often, top management's silence is seen as tacit approval of offending behavior. In my opinion, this is the single best investment a company can make toward insuring that these matters stay out of court.

LIGHT: Employers need to train their workers to be more accepting (not just "tolerant"), figure out how to handle bathroom and changing room issues and anticipate these issues before being confronted with them. Have private areas for use by any gender when requested. I saw a sign in front of a Washington D.C. restaurant's single-stall restroom: "Men, Women and Everyone Else." They also had an interior sign that said the usual "Employees must wash hands," but included "everyone else SHOULD."

◆ What accommodations must an employer offer to employees who are parents of school age children if there is a school closure due to a terrorist threat?

BENDAVID: When there is a threat at an employee's child's school, employers should use common sense and allow the employee to leave. Forget the legal mandates and whether or not the business's size imposes requirements. Employee welfare and child safety are paramount. As for legal obligations, California employers with 25 or more employees are required to provide parents, step-parents, foster parents, grandparents and guardians up to eight hours of unpaid leave each month to participate in a child's school or daycare activities. The employee should provide notice when taking time off for these activities. But the same law, California Labor Code §230.8, also provides for leave in the case of emergencies – these include behavioral or discipline problems; natural disasters including fire, earthquake or flood; and can be interpreted to include time off to address a terrorist threat or other emergency situations requiring a parent or guardian to pick up the child.

ROSENBERG: California's Family-School Partnership Act gives employees of school age children up to 40 hours of time off per year time for matters relating to parenting such as attending school functions. That law also specifically provides for emergency leave for parents to address "child care provider or school emergency" situations such as a school closure due to a terrorist attack. To mitigate the impact on employers, the law permits employers to limit usage of this time off to just 8 hours per month. However, that limit is suspended in a real emergency situation. Even if your employee has already used all 40 hours, we would still recommend giving the employee whatever time they need to address the emergency. You can deal with the attendance issue later. No employer wants to defend a situation where an employee's child was placed in danger because the employer would not allow the employee to leave work.

◆ What changes can we expect to see at the NLRB?

LIGHT: With the shift to a more conservative Republican agenda, employers will get some relief from the more aggressive positions taken by the NLRB over the previous administration's eight years. Less restrictions on record keeping and reporting have already been implemented, as have rules favoring employers on recording meetings and who may attend a disciplinary meeting on behalf of the employee.

BENDAVID: The National Labor Relations Board is undergoing

18

LABOR & EMPLOYMENT ROUNDTABLE

Continued from page 16

employer-friendly changes under the current administration. Most recently, the Board overturned the 2015 Browning-Ferris decision, which held that two or more entities could be held as joint employers if they had certain levels of control. That was bad news for franchisors like McDonald's who could be jointly liable for the wage and hour claims brought against franchisees. Employers may see more pro-employer changes in 2018.
Rosenberg: In the last few weeks of December, the Trump administration's new appointees to the National Labor Relations Board (NLRB) rolled back three major Obama-era rulings involving who is a so-called "joint employer," which employees can unionize in a so-called "micro" bargaining unit and when common employee handbook provisions will be found to be unlawful. We expect to see the Trump appointees to continue rendering decisions to undo unfavorable Obama-era rulings.

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

LIGHT: Not much, since marijuana is still a Category 1 federal illegal drug. Employers don't have to allow employers to be high or get high while on the job; regardless of whether they have a Compassionate Use Marijuana Card. Employers may have to accommodate a disability for which marijuana is being used (find another, legal, drug to manage pain, e.g.), but are not required to accept the marijuana user into their workforce. An employer may also want to determine what level of "positive" its testing lab is using (20 or 50 nanograms of THC per milliliter are most common) if the employer is concerned about a low threshold disqualifying otherwise strong applicants or during post-accident testing of existing employees.

ROSENBERG: This is a huge source of concern. Cannabis use remains a federal offense even in states like California where voters have legalized its medicinal and recreational use. Things became even more complicated on January 3 when the U.S. Attorney General issued a memo to federal prosecutors permitting them to resume prosecuting marijuana offenses in states such as California. Also, the new CA 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.

BENDAVID: Some clients are worried about enforcing a drug policy while others plan to treat employee cannabis use like alcohol: so long as it doesn't happen on the job, it's ok. For those that are worried – and many are, especially if employees must drive or operate other dangerous equipment – you still have the right to enforce a drug free workplace on the premises and that your employees may not be under the influence. It doesn't matter if the employee is using marijuana, alcohol or other drug. If these disrupt operations or endanger someone, an employer may discipline or terminate the user. But do so very carefully and consult an attorney – unique situations can give rise to discrimination or wrongful termination claims. Also be aware of employee privacy rights, particularly in regards to drug testing. If you want to reserve the right to conduct drug testing for current employees you should have a drug policy in place that includes language like the following: "If the Company has a reasonable suspicion that an employee is under the influence, we reserve the right to conduct a drug test. If the test is positive, that could lead to discipline, up to and including termination." Make sure you can articulate the "reasonable suspicion." Do they smell of mariju na? Is their speech slurred? Are their eyes red? Etc.

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

ROSENBERG: Mediation can be very effective and should be considered in all employment cases. Most of our employer clients feel victimized by employee suits and have no desire to pay a monetary settlement. That puts them in the frame of mind that they should not have to pay a penny to resolve an unmeritorious matter. The vast majority of disputes never go to trial and mediation works in a very high percentage of cases. Employers should consider utilizing mediation for pre-litigation disputes. Often, the parties can resolve the issues during mediation and avoid time consuming and expensive litigation.

LIGHT: Mediation typically is a great way to resolve matters after the employer has received a demand letter from an attorney and before a lawsuit is filed. Larger employers may have internal grievance and mediation procedures that can be effective, but the typical mid-sized or small employer is only going to use mediation if a formal claim is made, usually by a former employee. Employers often don't want to pay much to settle at the outset, or their insurance carrier is yet to be convinced; but often forgotten is the internal corporate cost of "down-time" dealing with the claim. It's a drain on productivity to have multiple strategy meetings with attorneys, collection and retention of documents in the computer system, etc. Once these costs are evaluated, early settlement–usually through a good mediator—is a great strategy once you have at least a reasonable idea of the risks and value of the case. Mediators typically cost between $5k-$10k per day, the mediation lasts a single day, and then the employer must factor in the cost of its lawyer to prepare a mediation brief and attend. But it's still much cheaper than a full-blown litigation that will put the employer into six figures in attorney fees rather quickly.

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

Bendavid: California is competition friendly, and the state does not permit covenants not to compete, with limited exceptions. The basis is that someone leaving Company A can fully expect to go work for Company B, even if Company B is a direct competitor – because no Californian should be prohibited from working. Of course, there are exceptions particularly for shareholders or partners who sell their interests (good-will) in a company. Also, employers can still require employees to sign confidentiality and trade secret protection agreements and should consider company-wide protocols for the protection of sensitive, confidential and proprietary information, like trade secrets. This can include agreements, policies, locked cabinets, limited disclosure to only those with a need to know, and the like.

ROSENBERG: California law on this subject is a bit schizophrenic. On the one hand, the law is very protective of employee free movement, so most non-compete agreements are unenforceable. However, the law also permits employers to vigorously protect its proprietary and trade secret information by having employees sign agreements severely restricting them from making unauthorized use or disclosure of an employer's confidential or trade secret information. As such, it behooves employers to take a proactive approach to identify what's protectable and have employees sign appropriate agreements protecting the employer's information.

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

BENDAVID: For our clients, arbitration is not always the favored option. One reason is that employers must pay the arbitrator's fees. This means they are paying defense fees and the arbitrator's fees - which can add up. Also, some claims (like PAGA claims) are not subject to arbitration which means you may be litigating in two forums: the non-PAGA claims with the arbitrator and the PAGA claims in court. Arbitration rulings are usually binding and often non-appealable. The leverage of appeal can become relevant to either side in the litigation and is something to consider when deciding whether or not to arbitrate. The type of business you are, the strength/weaknesses of your claim or the novel nature or the type of the claims asserted may impact this as a consideration. There are pros to arbitration. For example, for those who want privacy, arbitration may be the better option, as the proceedings are private. The hearings are held in a conference room, as opposed to a public courtroom. You can also pick your judge, provided you and the other side agree.

LIGHT: I understand from some clients and my brethren in the law that other attorneys are advocating against arbitration agreements. I strongly disagree. I've won (arbitration) and lost (jury trial) cases that would have had a different result had they been in court or in arbitration. The fear apparently is that arbitrators "split the baby" too often, but that has not been my experience. Also, plaintiff lawyers much prefer to be in front of a jury, so that should be indication enough of the wisdom of implementing arbitration with every applicant and with as many existing employees as possible.

◆ What are the implications of the Seventh Circuit's en banc decision in Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017), holding that Title VII bars sexual orientation discrimination?

BENDAVID: Justices of the 7th Circuit Court of Appeal (in Indiana) considered a claim by Kimberly Hively who asserted she was barred from full time employment and rejected for promotions because she is a lesbian. She asserted a claim under Title VII of the Civil Rights Act of 1964 which prohibits discrimination on the basis of a person's "race, color, religion, sex, or national origin…" The 7th Circuit stated: "We conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination," and held this is actionable under Title VII. For California employers this type of protection is not new. Our laws already expressly protect individuals as a result of their sex and sexual orientation. And California's new gender regulations provide further guidance. In short, don't discriminate based on sexual orientation, identity, or expression. That type of claim is actionable under California's Fair Employment & Housing Act, and now federal law as well.

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

LIGHT: Well, if they are EMPLOYEES they aren't ICs. So that's a problem right there. But if a WORKER can qualify as an IC, one simple tip is not to include any language that the material the IC is creating is a "work for hire." There are California Unemployment Insurance Code sections (686 and 621(d)) and a Labor Code section (3351.5(c)) that turn this otherwise legitimate IC relationship into an employment relationship by the use of that language.

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

ROSENBERG: We defend a lot of wage hour class action and collective action lawsuits. The matters attracting the most attention these days are: (i) not paying minimum wage; (ii) illegal rounding of time records; (iii) misclassifying employees as overtime exempt or independent contractors; (iv) not providing (and adequately documenting) state-mandated meal and rest periods; and (v) making illegal deductions from employee pay. Two newer issues are the requirement that CA employers must provide "suitable seating" for most California employees; and claims by "piece" workers for pay when they are not engaged in actual production related activities and for premium pay for paid rest breaks.

BENDAVID: We are still seeing employers routinely failing to properly document all hours worked and all meal breaks for their non-exempt employees. We are also seeing errors in paystubs. Take a look at your timesheets and compare with the corresponding paystubs: Do the hours match? Are you properly recording and paying all hours worked including overtime? Do your paystubs contain all the required elements under Labor Code Section 226 (including gross/net wages; total hours worked; all wage rates; all deductions; your legal name and address; the employees' name and last 4 digits of their Social Security number)? Do your paystubs show the available paid sick leave balance? These mistakes, while unintentional, can lead to costly penalties and fees. Under the Private Attorneys' General Act (PAGA), we are seeing more standalone PAGA claims and PAGA claims included in class actions. A close audit of an employer's wage and hour practices, along with corrective action is highly recommended.

LIGHT: Simple. Screwing up meals and rest breaks can result in companies being sued. Meal and rest break policy-making, documentation, and implementation are all frequent traps for employers even if they consider themselves sophisticated on these issues. Without regular audits of both paperwork (timesheets) and actual practice (what are my supervisors doing in the field or out on the manufacturing floor?), an employer has no way of knowing that a rogue supervisor or crew leader is doing things contrary to policy ("let's combine the second break with the meal so we can leave early").

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

BENDAVID: Like minimum wage, local ordinances make administering sick leave a challenge for employers. For example, the Los Angeles ordinance and the state's requirements vary: on caps on use, caps on accrual, whether or not a physician's note can be requested, and monetary penalties for violations. Sometimes either the local ordinance or California statute is silent regarding some of these points, which makes it even more difficult to navigate. The rule of thumb? Always follow the higher standards. And don't forget to consider Worker's Comp, or leaves of absence under FMLA/CFRA, for pregnancy (PDL), and time off as a reasonable accommodation under the ADA and FEHA for disabled employees.

LIGHT: An employee frequently takes Fridays and Monday off "due to illness;" an employee frequently takes Fridays off when there is a Monday holiday—but the employer can't ask for a doctor's

LABOR & EMPLOYMENT ROUNDTABLE

note under California's rules. No easy answers to those. Although if the employer has legitimate access to the employee's Facebook account, for example, and sees the employee frolicking in Las Vegas on those sick days, then discipline or termination is allowed.

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

BENDAVID: No. Ever since the paid sick leave law was implemented, I advocated for employers to separate their policies. There are rules that apply to sick leave, that don't apply in the vacation context. And vice versa. Separating the policies can help demonstrate compliance and provide the employer more control when an employee takes time off for vacation or other absence not related to sick leave.

ROSENBERG: Combining these policies into a single "Paid Time Off" (PTO) program was very popular a few years ago. However, with the onset of mandatory paid sick leave benefits, many companies have opted to unbundle these benefits to insure that only the sick leave hours will be subject to the onerous carryover, pay stub reporting and usage rules which govern sick leave. Also, by law unused accrued sick pay does not have to be paid out to employees when they leave. But, if vacation and sick hours are combined, then the entire balance is treated as vacation and must paid out at termination.

LIGHT: Combining vacation and sick time into a single PTO policy doesn't make sense anymore, primarily for two reasons. First, an employer doesn't have to pay out unused sick time at departure, but does have to pay out all PTO (and vacation). Second, an employer can start to discipline an employee for excessive absenteeism even for illness once the sick time allotment has been exhausted; which will occur more quickly when sick time is a separate category from PTO.

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

ROSENBERG: No. Employers with 5+ employees in California must comply with the State's new "Ban the Box" law. The new law prohibits private employers from even asking a job applicant to disclose prior criminal convictions until after a conditional offer of employment is made. Where an employer wishes to delve into the applicant's criminal record and deny employment based upon that information, the employer must provide the applicant a mandated "fair chance process" which allows the applicant time to respond to the employer's concerns before filling the position. Employers in this situation must be prepared to show there is sufficient connection between the criminal offense and the applicant's intended job duties to justify the refusal to make a job offer.

LIGHT: The employer must evaluate all criminal records (now only following an employment offer) under the EEOC and California's version of the "Green Rules." They require an individual assessment of the nature of the crime, how old it is, whether there has been intervening employment, whether the crime relates to the job at issue, how closely supervised the employee may be, etc. For example, a potential warehouse worker who will be closely supervised, will never leave the premises for work, won't have access to an on-site daycare center, won't work next door to a school, and worked elsewhere successfully for two years, is likely entitled to a job even with a child molester conviction if it is a few years old.

◆ **Are there new immigration-related claim issues?**

ROSENBERG: Yes. AB 450 went into effect this year. It imposes strict requirements on how California employers must behave when a federal immigration agent comes knocking. If an ICE agent shows up at your door to initiate a workplace inspection, you are no longer permitted to voluntarily consent or allow a document review. Instead, AB 450 says that you are supposed to forbid entry of the agent and not cooperate by providing documents until the agent return with a subpoena or warrant signed by a judge. And. employers must give employees notice of the contact with ICE within 72 hours of receiving the request. The new law contains stiff penalties and fines for employers who do not comply.

BENDAVID: One new protection arises from the passage of Assembly Bill 450, the Immigration Worker Protection Act. In short, the bill prohibits employers from allowing federal immigration officers access to a work place's non-public areas unless the officers have a warrant. Additionally, employers cannot provide employee records to immigration agents without a subpoena, and must notify employees of an impending immigration agency's inspection. If a federal agent enters your premises, you should quickly seek legal advice to make sure you comply with the law, or else you may face steep, state-imposed penalties.

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

LIGHT: Failure to have proper documentation demonstrating why choices were made that were legitimately business-related; failure to create a matrix of the various discrimination categories (age, race, ethnicity, disability, recent or pending workers compensation claims, etc.) to determine if those categories are disproportionately represented by workers being laid off versus workers were being retained. Age is typically the most commonly affected discrimination category in a layoff, as older workers tend to be more highly compensated (heavier hit on budget) or, in a physical environment, perhaps less effective or more prone to injury (workers comp claims). Employers may need to "balance the ticket" by having, for example, reasonable ratios of older and younger workers on the layoff list.

ROSENBERG: Many employers believe that a company can layoff whoever it wants and that the employee will not have any legal recourse. That's simply not true. Person's selected for layoff can sue (and win) if they were selected for layoff on account of their protected status (such as their age, gender, race) or because they were a whistleblower who opposed a practice that the employee reasonably believed was illegal or if they are selected in retaliation for having availed himself or herself of a legal rights (e.g., pregnancy or work injury leave). So, it's incumbent on the business to develop and use a clear set of legitimate criteria when evaluating which employees to layoff. A well-documented layoff file is worth its weight in gold when fighting an employee claim or trying to convince an inquiring lawyer to turn down your former employee's case. Timing can be critical (for example, laying off someone who just returned from maternity leave) and all facts should be carefully evaluated.