CUSTOM CONTENT
JANUARY 23, 2017

# LABOR & EMPLOYMENT

## A Roundtable Discussion

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.

**SUE M. BENDAVID**
*Chair, Employment Practice Group*
*Lewitt Hackman*

**JONATHAN FRASER LIGHT**
*Managing Attorney*
*LightGabler LLP*

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

## LABOR & EMPLOYMENT ROUNDTABLE

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

**LIGHT:** Perhaps the most important one is in limbo: the new federal salary threshold of over $47,000 for exempt salaried employees that was supposed to be effective December 1, 2016. We'll see what the court of appeal does about the injunction in place, and whether the new administration backs away from the increase. Remember that California's minimum went up to $10.50 on January 1 ($12.00 in Los Angeles and unincorporated L.A. county areas), which raises the state's minimum salary exemption threshold to $43,680. Note that the city/county extra increase in minimum wage doesn't affect the salary test.

**ROSENBERG:** Despite a spate of onerous 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 onerous) labor regulations to protect the employees working within their borders. Many have hidden traps for business 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 any worker who in any particular week performs at least two hours of work within the City's borders. Also, several cities passed industry specific regulations like Los Angeles and Santa Monica. Both cities have ordinances just covering hotel workers, which require hospitality employers to pay a minimum wage of $15.37 per hour (Los Angeles) and $13.25 per hour (Santa Monica). An excellent resource for staying up to date is: laborcenter.berkeley.edu/minimum-wage-living-wage-resources/california-city-and-county-living-wage-ordinances/.

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

**BENDAVID:** A slew of 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, it also mandates a series of cumbersome steps that must be followed: changes to job postings, changes in the hiring process (including written assessments, reassessments and notices), and maintaining records for three years after the position has been filled. The Fair Pay Act has been expanded as well. It now expressly requires equal pay for substantially similar work beyond gender, and including race and ethnicity. Any disparities must be based on factors such as education, experience or merit system – not on gender, ethnicity or prior salary history. We expect this to result in an increase in discrimination claims by employees who (perhaps mistakenly) believe their race, gender or ethnicity were taken into consideration when salaries were decided. Employers should also remember to post proper all-gender signage on single user restroom facilities. Not posting the proper signage could lead to discrimination claims as well as fines. All in all, it's important to remember to treat employees consistently in the terms and conditions of their employment.

### ◆ What can employers expect from the California legislature this year?

**ROSENBERG:** The presidential election revealed a stark contrast between California and most of the nation. With Democrats holding a near super majority in Sacramento, I expect that California businesses will beset by new and more onerous labor regulations and stepped up enforcement of the laws already on the books. Also, the prevailing view in Sacramento is that too many workers don't enjoy the benefits of the state's many labor regulations because so many of them are paid in cash or as freelancers or so-called independent contractors. According to the law, most workers are "employees" and labor law compliance is required. True independent contractor status is the rare exception. Under California law, businesses that misclassify workers as independent contractors face stiff fines and compliance lawsuits. In addition, competitors that shoulder the full economic burden of employment law compliance are filing suit against those who don't in order to obtain a level playing field. Unions seeking to expand their ranks are doing the same.

**BENDAVID:** In 2016, the Legislature enacted new rules for different categories of workers, focusing on janitors; cosmetology workers; personal attendants, agricultural workers, and others. The intent appears to be an increased focus on protecting groups of individuals with lower incomes and those perceived to be more at risk of abusive tactics. In 2017, we expect this to continue and for there also to be focus on additional leave rights, including paid leaves.

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> SUE M. BENDAVID

### ◆ How important is sensitivity training in the workplace in 2017?

**LIGHT:** It's the hot topic on several issues: harassment, bullying and gender identity have been a big focus and even employers who have less than 50 employees should give serious consideration to conducting such training for their supervisors. All employers should consider such training for their non-supervisors, as the law doesn't require it even for larger employers. Then follow up periodically with reminders. Don't wait another two years to reinforce the importance of these issues.

**BENDAVID:** Employers are highly susceptible to harassment and discrimination claims. According to the EEOC, about 32 percent of employment litigation in California relates to race-related claims, 28 percent relates to sex discrimination, 25 percent relates to age and 32 percent relates to disability. (The numbers don't add up to 100 percent because claimants often make several discrimination charges, rather than just one). Additionally, about 47 percent claim employer retaliation. So how important is sensitivity training? It's critical for management and can be used to help rebut claims of discrimination. Training should include methods for identifying and eradicating incidents of discrimination or harassment even before a complaint is filed. It should also include the proper handling of complaints, investigations and responsive action. Mismanagement in this process can lead to a lawsuit.

**ROSENBERG:** From a risk management perspective, words matter. I cannot think of a better investment to insulate the company from expensive discrimination lawsuits than management training. While no magic bullet, I am amazed by how many of these cases would not have been filed if only the company thought to provide staff with a clear direction about what's acceptable and what's not. In a quiet courtroom, none of the "must tell" jokes and comments sound nearly as funny or interesting, especially when the audience is a jury. In my estimation, this training is an absolute must for any business seriously interested in lawsuit avoidance and morale building. By law, this training must be given to all people managers, but I recommend that you make it mandatory for everyone, especially the owners. This way, there is no confusion about expectations and consequences. Letting everyone know what's expected of them and proactively managing complaints is the best insurance policy for keeping the company out of court.

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

**BENDAVID:** First, ensure the employees that they (like others) are entitled to be treated with the same level of respect and professionalism as others, irrespective of their transgender status. They should not be subject to bullying or discrimination by fellow employees or management. Additionally, ask the employee to let management know if she/he prefers a specific form of address in terms of name and whether they want to be referred to as she or he. Some employees may want to make a transition privately while others will be more open about the process. Employers should ensure individual preferences are considered and met. Update personnel records, directories, email addresses and business cards accordingly. To the extent possible, ensure dress codes, including uniforms, are gender neutral (i.e., don't mandate that female wait staff wear skirts, dresses or cosmetics, for example). Last, remember the new single-user bathroom law going into effect. These facilities must have signage indicating they are "all-gender" facilities.

**LIGHT:** The new unisex rule for single-user restrooms is a small step. Sensitivity training as part of overall harassment avoidance training would be useful. I would not recommend a specific training on that single subject, however, as it puts too much of a spotlight on the issue. That may be embarrassing or uncomfortable for the one or two transgender employees that a company may have.

### ◆ Would you say that a company's employee handbook is still vital in this day and age or have they become a thing of the past?

**ROSENBERG:** Absolutely vital. Here's why. The well-written handbook contains important and legally required policies on a host of subjects. It will be your best friend in litigation if properly written. Some of these policies are legally mandated and the handbook is a great way to insure these policies are disseminated. Also, the handbook is an important orientation tool to acquaint new hires with company policy and set the cultural tone in employment related matters. A word of caution: Resist the temptation to buy a stock handbook on the Internet or borrow one from a colleague. Yes, it's much cheaper and faster, but this is one area where the phrase "penny wise and pound foolish" really comes to mind. The handbook must be a reflection of current policy and corporate culture to have any real value.

**BENDAVID:** Bound, paper booklets may be becoming obsolete as more employers are moving to electronic recordkeeping, but the existence of a handbook and its subject matter is more important than ever. Employee handbooks establish expectations of both the employer and the employee with respect to their obligations to each other, as well as guidelines for proper conduct in specific situations. They provide guidelines for management on procedures and compliance with local, state and federal laws. They also provide legal protections for employers – particularly when employees provide signed acknowledgements of receiving and understanding the information provided. They are the employers' first line of defense. Though some employers are opting for electronic versions of handbooks, it is still recommended to have signed acknowledgments with the employee's actual signature on paper.

**LIGHT:** Like annual reviews, they seem to be expected by staff — and companies sometimes are criticized for not having strong handbooks when there is a dispute. It's still a good place to include all basic policies, but it needs to be updated regularly to ensure that it doesn't have problematic language. Basic info about medical premiums and sick time should be in writing, and the handbook is the obvious repository.

### ◆ 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?

**ROSENBERG:** California has always been at the forefront of dealing with issues relating to the delicate balance between work and family obligations. Under California's Family-School Partnership Act, employers facing a terrorist threat must allow employees to leave work to pick up their kids (or not come in at all that day if they hadn't arrived to work). This law contains a so-called "emergency leave" provision mandating that employers allow parents time off to address so-called «child care provider or school emergency" situations, like when an employee's child cannot remain in school or with a child care provider because the school or child care provider has requested that the child be picked up. In such cases, the law's usage rules (max 8 hours a month) don't apply, and the employee may use all of their annual allotment (40 hours) for this purpose.

### ◆ What recommendations do you have with respect to employers complying with the new Fair Labor Standards Act salary exemption rules that took effect on Dec. 1?

20

## LABOR & EMPLOYMENT ROUNDTABLE

**BENDAVID:** 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, we are recommending that they stay put for now, pending the court's rulings. 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, reverting back may cause more turmoil (let alone morale problems) and create even more headaches if 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?

**ROSENBERG:** 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 new voter initiative 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 drug/alcohol use and testing. Among other things, this policy should set the company's clear expectations (zero tolerance?), provide for management training to detect policy violations and establish a well-defined regimen for handing the transportation of suspected policy violators and their test results.

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

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**LIGHT:** Insurance carriers will push hard for early mediation to save money, even if we're still inside the employer's EPLI deductible. Mediation is usually an efficient and cost-effective method of resolving even difficult employment disputes even prior to litigation being filed, especially if the employer is in a weak position. Why waste money on litigation legal fees when you'll be at the negotiating table anyway at some point in the fight? A good percentage of disputes resolve at early mediation prior to a lawsuit being filed, far different than the approach years ago, when mediation was almost an afterthought well into the litigation.

**BENDAVID:** Unlike arbitration, mediation is a voluntary process where the parties can sit down and try to resolve their disputes without the risk and costs associated with going to trial. Mediation is generally handled in a private conference room (or multiple rooms since the parties are usually separated) while the mediator engages in "shuffle diplomacy." The mediator shuffles back and forth between the sides hearing the facts, considering the law, and ultimately trying to negotiate terms that are agreeable to both sides. At some point in the process, after the facts and law have been discussed, the mediator's job is to convey settlement numbers and try to elicit one that works. We are seeing an increase in the number of employee claims litigated via demand letter and response letter, as opposed to actual filing of lawsuits in court. 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 all the way to trial). In other cases, especially where the allegations are hotly contested and or where the client has the financial ability to fight, the clients are less likely to agree to an early mediation. Regardless of whether the case settles or not, 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-competes and other restrictive covenant agreements?

**LIGHT:** Employers generally can't enforce a true non-compete under California law, and even having such language in a confidentiality agreement without enforcing it is a violation of law. Employers really can't enforce more than the law allows, but a confidentiality agreement is a good way to perhaps inhibit competition by the former employee using protected information (which is about all an employer can protect against). Also, ensure that such information is protected in your e-system, that it can be retrieved from departing employees, and that you allow limited access to it. Also, employers should understand an "announcement" versus a "solici-

22

LABOR & EMPLOYMENT ROUNDTABLE

tation" by departing employees who go after their former employer's customers. Announcements ("here's my new contact info") are legal and can't be stopped; solicitations ("and let's get together for lunch") generally are not legal if they are the result of the former employee's access to or use of proprietary information.

**ROSENBERG:** Be careful and get an expert involved quickly! California law vigorously protects the right of a former employee to compete with his or her former company, so long as the former employee does so fairly. So-called covenants not to compete or other such restrictive covenants are generally unenforceable in California except in rare cases involving the sale of the business or the purchase of stock. Thus, they are not worth the paper they're written on. On the other hand, a well worded agreement, which protects the company's trade secrets, and other valuable proprietary confidential information is enforceable in California and will be worth its weight in gold when a former employee attempts to misappropriate that information for the benefit of a new employer or some new entity the former employee has joined. A recent change to a federal law called the Defend Trade Secret Act also added requirements for these policies to be enforceable. My advice to clients: get good legal advice quickly no matter which side of the dispute you find yourself.

**BENDAVID:** In California, under Business & Professions Code Section 16600, non-compete agreements are generally void (with some exceptions): "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." However, confidentiality agreements and trade secret agreements are generally upheld. Therefore, rather than impose a non-compete, we recommend a strongly worded and detailed confidentiality agreement which expressly outlines the specific information that the employee is obligated to protect. The agreement should expressly state that it survives the termination of employment. In other words, employees should be told that, even if they leave employment, the trade secret (like the Coca-Cola recipe), must be maintained as confidential and not used or disclosed to anyone else. We also recommend that employers create a formal "program" protecting its trade secrets incorporating a variety of steps: confidentiality agreement; clear handbook policies; locked cabinets; password protected data; limited employee access, etc.

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

**LIGHT:** Other attorneys may disagree because "arbitrators tend to split the baby," but that's not my experience. I absolutely prefer arbitration to a jury trial on sensitive discrimination, harassment and retaliation issues, many of which turn on key legal points that get more traction with an arbitrator. Also, we can still use them to avoid class action, although that's up in the air right now.

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

**ROSENBERG:** A common feature in so many lawsuits from fired workers is the inadequacy of the employer's communications regarding job expectations (best to do so in writing) and the consequences for failing to meet them (also best to do in writing). A simple question I ask in every one of termination review client discussion is "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, scrub the employee's file to see whether it tells the same story you are. If not, you are exposed. A well- documented 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. Also, verify that no one in management asked the employee to do something illegal or to cover up for management's having done so. That's a recipe for an expensive lawsuit.

**LIGHT:** Neglecting to document the process and not starting early enough before the employee is a whistleblower or is injured. Also, failing to provide concrete examples of the basis for discipline. Third, ensuring that annual reviews are accurate, detailed, and consistent with discipline.

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

**BENDAVID:** We are still seeing a large number of meal and rest break claims, as well as overtime, minimum wage, off the clock work, and related actions. Though we often hear from clients that they are paying correctly, upon a closer review, we uncover inadvertent errors, often made unintentionally because of a lack of knowledge. For example, employers must pay overtime based on the "regular rate of pay" and not just the regular hourly rate. That means incentive bonuses and commissions must be included when calculating overtime. With the private attorneys' general act (PAGA), we are seeing more penalty claims, included in class actions as well as individual lawsuits. A close audit of an employer's wage and hour practices, along with corrective action is highly recommended.

> 'You don't have to pay sick time when the employee leaves the company, and you can begin to discipline for excessive absenteeism sooner if there are less days available for sick leave. And be careful about undesignated "personal days" that aren't specific to, e.g., a birthday ("take your birthday off or within one week on either 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

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

**LIGHT:** Do not refer to whatever the IC is creating for you as a "work made for hire," even though that's the standard terminology under federal copyright law. California Unemployment Insurance Code sections 686 and 621(d), as well as Labor Code section 3351.5(c), provide that such language automatically creates an employment relationship. Just provide that the IC is selling the employer the work product by way of an express assignment clause. The employers may have to give it back in 30 years, but unless the IC is writing Fast & Furious 17, it really doesn't matter.

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

**ROSENBERG:** The number one issue I see in my practice is the confusion caused by companies being in a locale like the City of Los Angeles, which wrote its own (and more onerous) sick pay requirements. Another issue is managing sick pay and PTO. Under the CA paid sick leave law, the usage obligations only apply to actual paid sick days. That's a good reason to segregate them from PTO. Otherwise, all of a company's PTO benefits will be subject to the onerous CA sick pay law's carryover, pay stub reporting and usage rules. Also, if the company's PTO includes vacation, then the entire PTO balance must be paid when the employee leaves the employment and the former employee can collect stiff penalties for late payment. In contrast, accrued sick pay does not have to be paid out when the employee leaves the employment.

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

**BENDAVID:** With the new paid sick leave laws (state and local), we are now recommending that employers separate out vacation benefits 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 compliance and provide the employer more control when an employee takes time off for vacation or other absence not related to sick leave.

**LIGHT:** It used to make sense because it was easier to track one category. Now it's probably better to separate them for at least two reasons. You don't have to pay sick time when the employee leaves the company, and you can begin to discipline for excessive absenteeism sooner if there are less days available for sick leave. And be careful about undesignated "personal days" that aren't specific to, e.g., a birthday ("take your birthday off or within one week on either side of it"). If they are generic, they are treated exactly like vacation or PTO and must be paid at separation (and accrued).

### ◆ What are an employer's responsibilities regarding individuals with mental health conditions?

**BENDAVID:** The EEOC recently outlined rights for employees with mental health conditions – confirming that these individuals are protected from discrimination and harassment in the workplace. Employers should remember to engage in an "interactive dialogue" when the employee requests an accommodation, or when the need for an accommodation becomes apparent. When possible, try your best to accommodate and be sure to document those efforts. If you will suffer an "undue hardship" discuss that with the employee first (as part of your "interactive dialogue") and get the employee's feedback and hopefully acknowledgement that the requested accommodation is too difficult or impossible to provide.

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

**LIGHT:** Nope. The EEOC Green Rules have made this even more problematic, because employers must scrutinize the conviction to determine if it is remote in time, unrelated to the work 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 to a "ban the box" statewide prohibition on asking about convictions until after an offer is made. San Francisco implemented it a couple of years ago and Los Angeles did so late in 2016.

### ◆ 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. That's simply not true. A layoff is an economically based termination of the employment relationship where the employer must decide which employees are expendable. 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 for pregnancy or family leave, or perhaps 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 and managed when making staff cutbacks.

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

**LIGHT:** Return phone calls and email in a timely fashion. Provide practical advice that isn't cookie-cutter, especially in dealing with sensitive disability leave issues that may erupt into litigation if not handled properly (e.g., if you believe the employee is never coming back and just stringing out the leave time, why terminate and give the employee a reason to sue?).

**BENDAVID:** 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, health care, etc.

**ROSENBERG:** Two things. First, we listen. I mean truly listen, so we may ascertain precisely what the client is trying to achieve and determine a strategy for how to get there. In a sense, we are risk option managers. Second, in the end, what you are buying is legal expertise and the ability to really see what's coming. At my firm, all of the front line advisors and litigators have at least 20+ years of experience managing labor law transactions and cases. Collectively, that's 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 industry 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.