LABOR & EMPLOYMENT ROUNDTABLE 2016

What Owners and Executives Need to Know

SUE M. BENDAVID
Chair, Employment Practice Group
Lewitt Hackman

JONATHAN FRASER LIGHT
Managing Attorney
LightGabler LLP

NICOLE G. MINKOW
Senior Employment Counsel
Pearlman, Borska & Wax

CARRIE NEBENS
President
Equis Staffing

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. 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 2016 – from the perspectives of those in the trenches of our region today.

LABOR & EMPLOYMENT ROUNDTABLE

'The amendment to the Equal Pay Act makes it easier for employees to challenge pay disparities based on gender. As a result, employers must make an extra effort to properly document all pay differences and the legitimate reasons for those differences.'
NICOLE G. MINKOW

'According to the law, most workers are employees and independent contractor status is the rare exception. Employers who misclassify workers as contractors face stiff fines and compliance lawsuits.'
RICHARD S. ROSENBERG

◆ What are the most significant new employment laws taking effect in 2016?

MINKOW: While the legislature was pretty quiet last year, there are a few significant changes for 2016. Here are my "top five." First, the amendment to the Equal Pay Act makes it easier for employees to challenge pay disparities based on gender. As a result, employers must make an extra effort to properly document all pay differences and the legitimate reasons for those differences. Second, the minimum wage has increased to $10.00 an hour. This requires employers to, among other things, reexamine their exempt employees' wages to ensure it meets or exceeds the minimum salary requirement. Third, the Fair Employment and Housing Act was modified to protect employees from retaliation who simply "request" accommodations for disabilities or religious beliefs. Fourth, the California Labor Code also protects employees from retaliation who are related to an employee who has engaged in certain protected activities. Fifth, there have been some changes to the way employees who receive wages on a piece rate basis must be paid. Of course this is only a summary of some of the changes and employers should consult with their legal team to analyze how policies should be amended and to implement practices to remain in compliance.

ROSENBERG: My top four: (1) California employers now face fines of up to $10,000 if they use the federal E-Verify system to check the employment authorization status of existing employees or applicants who have not yet received an offer of employment; (2) California's Family-School Partnership Act (requiring 40 hours of job protected time off for parents each year) was greatly expanded; (3) California's Equal Pay Act requiring pay equity for men and women who do the same job in the same location now also requires pay equity for jobs that are "substantially equal" (whatever that means) and now affords job protection for employees that inquire about their co-workers' pay; and (4) new and more onerous pay obligations for the many thousands of employers that utilize a piece rate pay system.

BENDAVID: Wage and hour laws continue to dominate the legislature's attention. The new laws expose employers who are not in compliance to even more liability. California's minimum wage is now $10/hour. This impacts non-exempt employees, as well as certain salaried exempt and inside salespersons. The City of Los Angeles also established its own minimum wage and corresponding notice, recordkeeping and penalties for noncompliance. Assembly Bill 1513 adds new rules for employers who pay by piece rate. These complicated calculation rules will create headaches for payroll personnel. Further, the state passed the California Fair Pay Act, which is expected to result in claims by employees who feel they are not paid the same as their female/male counterparts. This law eliminates the requirement that the pay difference be "within the same establishment" and eliminates use of the terms "equal work" for "equal skill, effort and responsibility."

NEBENS: California now has one of the strongest equal pay laws in the USA: California Fair Pay Act SB 538. There is a bigger burden on the employer for sex discrimination. This law broadens current laws by prohibiting employers from paying employees of the opposite sex differently for jobs that are in a similar light, even if employee titles are different or they work at different locations. For example, a female maid that cleans hotel rooms should be paid the same as a male janitor that cleans the same hotel's public areas.

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

NEBENS: The new minimum wage rate change affects the classification of employees as exempt or nonexempt. To qualify for an overtime exemption, in addition to all the other legal requirements, an employee must earn a minimum monthly salary no less than two times California's minimum wage for full-time employees. In the case of computer software professionals, in order to be considered exempt, these employees must be paid a minimum of $41.85 an hour or $87,185 salary, among other things. A computer software professional not earning that amount would be subject to time and a half.

ROSENBERG: Without a doubt, the changes to our pay equity law are most likely to land employers in court. It's rife with ambiguity and employer gotchas. While no one can rationally argue against "equal pay for equal work," the new law expands who can sue by also requiring the same pay if the work is "substantially similar," allowing employee suing for gender-based pay discrimination to compare themselves with employees holding different job titles and with different responsibilities who are working in different locations of the company. Job one for every employer should be to proactively examine pay practices for gender inequities in "substantially similar" positions and evaluate whether those differences can be legally justified.

BENDAVID: Apart from the myriad wage and hour rules that are resulting in an ever-increasing number of claims, California's Fair Pay Act has the potential to create legal havoc for employers for years to come. We all understood the concept of "equal pay for equal work," but that concept is now outdated. Senate Bill 358 requires equal pay for "substantially similar" work, covers employees at different locations of the same company, mandates justifications in compensation differences for males and females and makes it illegal to prohibit employees from discussing wages. Employers should conduct wage audits (under the attorney client privilege) and ensure employee pay is based on factors other than gender (e.g., on factors like merit, seniority, education or productivity).

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

ROSENBERG: Vigorous enforcement of labor law scofflaws and even more job protections. The prevailing view in Sacramento is that too many workers still aren't able to enjoy the benefits of the state's labor regulations. One the biggest reasons is the misclassification of workers as independent contractors. According to the law, most workers are employees and independent contractor status is the rare exception. Employers who misclassify workers as contractors face stiff fines and compliance lawsuits. In addition, competitors who shoulder the full economic burden of employment compliance are suing those who don't in an effort to level the playing field. And, unions seeking to expand their ranks are doing the same.

MINKOW: There has been a significant amount of discussion regarding legislation regarding workplace bullying and additional paid leave for employees beyond what California already provides, such as for baby bonding. Many lawmakers have made efforts to introduce laws in this regard, to no avail. We also expect to receive additional guidance and clarification regarding classification of employees and independent contractors. Also, another effort to increase minimum wage is likely. Finally, there may be some efforts to bar mandatory employment arbitration agreements. It will certainly be an interesting year.

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

MINKOW: Depending on the size of the organization, employers can remain current in many ways but continuing education is simply the key. There are many training and education opportunities available to human resource professionals and company executives. In fact, local law firms and human resource organizations invest a significant amount of time and money in providing seminars and training regarding employment law compliance. The focus of these seminars is always litigation prevention. By attending regular training sessions, employers and management can learn best practices in handling a variety of issues that could lead to litigation if handled poorly. We find that most employers intend to comply with the law and mistakes are made simply when the decision makers are unaware of the applicable regulation or requirement, or they are relying on an outdated personnel manual without any guidance from counsel. Indeed, many of these seminars are free for employers.

NEBENS: A great way for employers to stay on top of trends and regulations is to partner with a professional services team. A shameless plug, but at Equis Staffing we are well versed in complying with employment laws and many employers hire us to help them navigate new regulations. An employer can also seek out an experienced attorney or human resources consultant to help them through dicey waters. Surrounding yourself with good staff is the first step to being ahead of the law and ensuring that you're handling your business by the books.

◆ How important is sensitivity training in the workplace – and should it be something for management or for all employees?

BENDAVID: According to the EEOC, retaliation litigation is on the rise. Additionally, we anticipate more discrimination and harassment claims stemming from the recent shootings in Paris and San Bernardino, and political comments

14

'In almost every lawsuit we defend, we rely on a company's policies in an effort to demonstrate compliance with the law. The handbook is a tool employers can use to help defeat employee claims for missed meal and rest breaks, harassment, discrimination, etc. '
SUE M. BENDAVID

'There is no downside to maintaining an employee handbook. In fact, keeping your handbook and policies current can be a great way to stay up-to-date on new and upcoming state and federal requirements.'
CARRIE NEBENS

about those of the Muslim faith. We also anticipate increased focus on transgender employees either by those who are transitioning or self-identifying with a gender opposite the one they were born with. Generational clashes between Boomers, Gen-Xers and Millennials also complicate how employers handle employee disputes. It's the employer's responsibility to provide a safe work environment. Now more than ever employers need to be proactive and provide management training to ensure employees are not mistreated and so that employees understand they must act respectfully to others, even if they are different from themselves.

ROSENBERG: In my opinion, it's vital for any business seriously interested in lawsuit avoidance and morale building, and should be done throughout the organization. Experience shows that a great many employee lawsuits begin with employees believing that management supports (or at least tolerates) behavior they view as discriminatory or hostile towards them on account of a legally protected characteristic such as their race, gender, religion, sexual orientation or ancestry, to name a few. Letting everyone know exactly where the company stands on these issues and then proactively managing complaints whenever they arise is the most effective insurance policy to keep the company out of court.

◆ How has the sexual harassment training mandate worked in your experience, and how will it change with the new requirement to include the topics of abuse and bullying?

LIGHT: I've conducted hundreds of these trainings and overall I think they help, but it's not the end-all. Regular follow-up by management and, most importantly, leading by example, reinforces the points raised in the trainings. We've been including a bullying component for years because it clearly affects relationships in the workplace and often such conduct is based on a protected category such as sex/gender. So there shouldn't be much change in the overall message because, whether it's harassment or bullying, it's all based on the concept that someone is abusing their power in the workplace.

ROSENBERG: It's hard to accurately measure the effect. Like so many HR issues, success in this endeavor is measured by the absence of something bad happening. I can tell you this. I have trained thousands of managers and the awareness level is much higher in 2016 than even just five years ago. So, to the extent that these educated managers change their behavior, then I have to think that the law is doing exactly what the lawmakers intended in terms of providing a greater percentage of the State's workers with a harassment free work environment. I suspect that the exact same thing will happen with workplace bullying now that this important subject is part of the training dialog for larger companies (50+ employees). This is terribly important because numerous studies have shown that abusive work environments can have serious effects on targeted employees and drive up workers compensation and other costs.

MINKOW: The new training mandate regarding abusive conduct has not significantly impacted or changed an employer's obligations to provide mandatory sexual harassment training to supervisors every two years. We have found that most training providers have modified their programs to include information regarding abusive conduct and the definitions set forth in the statute. However, employers should certainly ask the question to ensure their training provider's materials are current with the new mandate.

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

ROSENBERG: It starts with education about what is a very complex and emotionally charged topic. And, dialogue with employees in that community to understand their needs and concerns. This reminds me of the discussions when the AIDS epidemic first hit and most employers didn't have a clue how they were supposed to handle the matter. Many acted out of fear and ignorance. The LBGT community, and the transgender community in particular, has seen a tremendous boost in awareness with the media attention given to the subject in the past two years. Employers are going to have to proactively engage this issue as they would any other diversity matter. The most immediate issues are likely to be co-worker harassment and facilities usage.

BENDAVID: The FEHA protects employees from discrimination based on, among other things, sex, gender, gender identity and gender expression. Accommodating transgender employees creates a new challenge for employers. Transgender employees are expected to be treated according to the gender s/he identifies with; not the one s/he is born with. This creates conflict when non-transgender workers don't want to share a locker room or restroom with coworkers who are contemplating transition, in the process of transitioning or have already completed sex reassignment surgery. Employers are expected to make "reasonable" accommodations. If converting a bathroom into a "unisex" bathroom is achievable, the employer should take that action. Employers should maintain an ongoing dialogue with the individual to ensure the employee's reasonable needs are met, provided they will not result in undue hardship.

◆ 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?

MINKOW: At this point, the employee handbook is here to stay, whether it is in paper form or electronic form. It is vital for employers to make sure policies and procedures are in place and distributed to employees. In fact, when we defend litigation, the first place we look is to the handbook as it sets the foundation for the company's practices. Moreover, maintenance of certain policies is a legal requirement so keeping everything in a handbook is an easy way to remain compliant.

NEBENS: There is no downside to maintaining an employee handbook. In fact, keeping your handbook and policies current can be a great way to stay up-to-date on new and upcoming state and federal requirements. You learn as you revise, and a good handbook ensures there are no "gray areas" for employees. Employers should also feel free to ditch their old handbooks and upgrade to a digital version that employees can access from their computers and smartphones. Employees will be more likely to take advantage of an interactive or searchable digital handbook that they can pull up at their convenience rather than a clunky binder that gathers dust in a desk drawer.

BENDAVID: Handbooks are even more important today than ever before. In almost every lawsuit we defend, we rely on a company's policies in an effort to demonstrate compliance with the law. The handbook is a tool employers can use to help defeat employee claims for missed meal and rest breaks, harassment, discrimination, etc. If a policy expressly informs employees of the company's expectations, and if the employee failed to meet those expectations, the handbook violation can be used to justify a firing in the face of a wrongful termination claim. Apart from the benefit of having all the rules and regulations in a centralized spot, handbooks are a good tool to help employers learn and understand the laws that apply to them. These should be spelled out, in policy format, in the company's handbook which should be regularly updated as laws change.

◆ In light of recent events in San Bernardino and a Planned Parenthood clinic in Colorado, what can employers do to keep their employees safer?

BENDAVID: Violence in the workplace can originate from many sources, including employees; outside assailants with political grudges; robberies; and abusive friends, relatives or acquaintances of employees. Employers should review and maintain their security measures. If there are concerns about a disgruntled terminated employee, the employer should take steps to protect its people by changing locks, incorporating key coded locks, updating video tech and alarm systems, and the like. Keep front office personnel trained on policies of visitors being permitted to enter into the work area. Employers should consider LEGAL background checks (there are significant laws on this topic). If there is a potentially violent situation, the employer can seek a temporary restraining order, consider engaging security guards and notify the legal authorities (police) so they are put on notice. Also, train management to recognize and stop harassment, bullying and discrimination.

ROSENBERG: Every employer ought to consider adopting a formal workplace violence prevention plan containing 5 key components: (1) a workplace violence policy; (2) crisis management team; (3) supervisor training; (4) customer/client/vendor compliance; and (5) an "Active Violence" plan. Sadly, after virtually every one of these unfortunate incidents, employees come forward to say that they saw something, but didn't put the pieces together. A coordinated approach can save lives. Consult with your labor attorney about finding the resources to develop your program.

16

'Have employees sign arbitration agreements that prevent them from participating in class action lawsuits. Those clauses are still enforceable and federal law keeps pushing back on California's efforts to eliminate them.'
JONATHAN FRASER LIGHT

◆ 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?

NEBENS: The Family School Partnership Act SB 579 was amended to expand the reasons why an employee can leave to attend to a child in school. The law now includes leave for school and childcare provider emergencies, including closures, natural disasters, behavioral/discipline problems, and requests that the child be picked up from school. It also includes leave for finding, enrolling, or reenrolling a child in school or with a licensed childcare provider. The law now better coordinates with California's paid sick leave law. Employers are now prohibited from discharging or discriminating against employees for taking off up to 40 hours per year to engage in these child-related activities.

MINKOW: Effective January 1, 2016, Labor Code 230.8 was modified to require employers to provide unpaid protected time off to address a "child care provider or school emergency." This means when the child cannot remain in school or with a child care provider due to: the school or child care provider requesting the child be picked up, behavioral or discipline problems; unexpected closure; or natural disaster. An unpaid leave for a "school emergency" requires an employer provide more than the 8 hour a month maximum as previously set forth in the statute.

ROSENBERG: If the recent LAUSD school closure had occurred after January 1st, the amendments to California's Family-School Partnership Act would have required employers to allow employees leave work to pick up their kids or not come in at all that day if they had to care for their kids. In recognition of the exigencies of parenting, the new law added an *emergency leave* provision requiring employers to allow parents time off to address child care provider or school emergency" situations such as whenever an employee's child cannot remain in a 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, usage rules (max 8 hours a month) don't apply, allowing the employee to use as many of the 40 hours per year granted by law for these purposes. The same is true with the law's advance notice requirement due to the unplanned nature of the event.

◆ What is the impact of the NLRB's Browning-Ferris decision (Case No. 32–RC–109684), and what is going to change with the advent of this new joint-employer standard?

NEBENS: The decision states that two or more companies are considered "joint employers" of an employee if they share the ability to control the employee's terms and conditions of employment, such as salary and working conditions. Previously, to be considered an employer, it was required for the company to exercise their power over a worker to be considered one of the worker's employers. Now, even if a company does not choose to exercise their power, they can still be held liable for the negative impact of other joint employers since they ultimately still have control over the employee. Joint employment can cut both ways and both members should have a similar company culture. No company is above the law, so employers need to be confident their joint employment is with a co-employer that meets all state and federal requirements.

◆ How will the Browning-Ferris decision affect staffing agencies?

NEBENS: Many staffing agencies will need to step up. People expect that staffing agencies are going to do the right thing, as compliance will be monitored at a higher level. Staffing agencies need to confirm that their employees are protected and ensure they are in compliance with all state and federal regulations, including the ACA. Employers in California also need to adhere to the Healthy Workplaces, Healthy Families Act of 2014 that entitles employees to paid sick leave after working in California for 30 or more days within a year.

LIGHT: Staffing agencies were already in the joint employer category in most instances, so that decision shouldn't have a large impact on them. It's their clients who now will have a tougher time claiming that they aren't a joint employer; they no longer can successfully point to the staffing agency as the sole employer. The client ("host") employer in fact controls the work environment as far as harassment situations, decisions on termination, work schedules, and adherence to meal and rest break rules, so it logically follows that the host employer would get tagged as a joint employer in most situations. That's already been occurring so this new decision won't greatly impact these relationships. The same holds true for PEOs or employee leasing companies. They clearly are joint employers.

◆ With the NLRB continuing to prosecute employers who have employees sign mandatory arbitration agreements, what should an employer do?

ROSENBERG: This is a huge problem and there is no good answer. We have a federal agency (the NLRB) pushing its own enforcement agenda in the face of federal court decisions saying they are dead wrong. So, employers with mandatory arbitration agreements have two Faustian choices: either abandon the practice altogether even though several federal courts have OK'd it or keep the policy until the U.S. Supreme Court weighs in on the subject and risk an NLRB prosecution. While this seems terribly unfair, the National Labor Relations Act permits the NLRB to push on with prosecuting employers until the U.S. Supreme Court says otherwise.

LIGHT: Employers should get signed arbitration agreements. The federal case law in favor of arbitration is contrary to the NLRB's position in many cases and the NLRB is not the last word on the subject.

◆ What should employers know about employee arbitration and PAGA?

MINKOW: Currently, employment arbitration agreements containing a class action waiver are still viable and recommended in California, especially with the continued increase in wage and hour litigation. However, both the California Supreme Court and federal appellate courts have ruled that claims under the Private Attorney General's Act ("PAGA") cannot be forced into arbitration. Employers should ensure that their arbitration agreements exclude PAGA claims from any class action waiver currently in place. While this may lead to the problem of employers potentially having to litigate an employee's claims both in arbitration and civil courts, arbitration agreements with class action waivers are generally preferred.

BENDAVID: Under the Private Attorneys General Act (PAGA), employees may file a lawsuit against their employers, while acting as "deputies" for the State of California. They can seek penalties for labor code violations, 75% of which goes to the State, 25% to the employees (who can also seek attorneys' fees). The California Supreme Court's 2014 ruling in *Iskanian v. CLS Transportation Los Angeles LLC* determined that arbitration agreements with mandatory class action waivers are generally enforceable *except* in PAGA claims. Last September, in *Sakkab v. Luxottica Retail North America* (more commonly known as LensCrafters) the Ninth Circuit decided that the Federal Arbitration Act (FAA) does not preempt the *Iskanian Rule*. Thus, PAGA claims can and will continue to be asserted in courts. We have seen a rise in PAGA claims and in view of the recent cases, we expect this to continue.

LIGHT: It's pretty simple. Have employees sign arbitration agreements that prevent them from participating in class action lawsuits. Those clauses are still enforceable and federal law keeps pushing back on California's efforts to eliminate them. Employees can still bring and be part of PAGA claims, but the one-year statute of limitation under PAGA is far better than up to four years in class action. Make sure that the arbitration agreement is enforceable and is issued PRIOR to the employee beginning work. Existing employees can't be forced to sign an agreement, but consider incentivizing them with a day of vacation or PTO. Almost all will sign.

◆ When should employers make accommodations?

BENDAVID: Employers are obligated to provide "reasonable accommodations" in a variety of contexts. This can occur when an employee is disabled, pregnant, or has a religious dress or practice that needs accommodating. Another type of accommodation is providing a private room for employees who need to pump breast milk at work. Employers should conduct "interactive dialogues" with employees when these situations arise, to discuss what accommodations the employees are seeking, whether those accommodations are reasonable and whether the accommodations can be provided or will result in undue hardship for the employer. Reasonable accommodations that do not result in undue hardship to the employer (which defense carries a high burden of proof) should be made to avoid discrimination claims. These rules come into play under the Americans with Disabilities Act, the Fair Employment and Housing Act (FEHA), Title VII of the Civil Rights Act of 1964, the Pregnancy Disability rules and others. Some of these can apply to not only employees, but others as well (e.g., a job applicant may need an accommodation in order to fill out the job application form). It has long been the rule that applicants must be provided an equal opportunity to participate in the application process.

18

◆ What are the implications of SB 358, the California Fair Pay Act, which prohibits an employer from paying an employee at a wage rate less than that paid to employees of the opposite sex for doing substantially similar work?

ROSENBERG: The new law places the burden squarely on the backs of employers to prove that a wage difference between substantially similar jobs is *not* due to gender. The only way to legally justify a wage differential is to prove it is based upon a seniority or merit system, a system which measures earnings by quantity or quality of production or a "bona fide factor other than sex, such as education, training or experience." Employers need to know that a deep dive will be made into any employer claim that the wage difference is justified by "the market" or linked to the prior earnings history of the comparators because the legislature believed that the market may be inherently biased. Among the very common sense questions employers are asking: (1) How can I be sure that different jobs (at different locations) won't be deemed "substantially similar" enough to require equal pay? (2) Can a company still safely peg pay to the market or what a new hire was earning in a previous position? And; (3) what does it take for an employer to justify a pay difference under the guise of it being "job related" and "consistent with business necessity?" The legal framework is fraught with ambiguity and a veritable tsunami of new equal pay litigation is likely.

LIGHT: Until the regulations are firmly established, we don't know the impact. If I have a three- year female lawyer performing essentially the same work as a five-year male lawyer, do I have to pay them the same? Are experience, seniority, educational background, and other factors relevant and legal to rely on? If I have male workers in San Francisco versus female workers in Lancaster, and the cost of living is vastly different, may I pay them differently? We just don't know what the standards will be, so we're in a wait and see situation. In the meantime, employers would be smart to audit their employee compensation based on gender (and other protected categories) to determine where the hot spots might be; and do this with your attorney involved to maintain privilege and confidentiality over sensitive information that could otherwise be discoverable later in a lawsuit.

◆ What's the latest from the federal government on its salaried exempt employee test and the proposed $51,000 salary threshold?

BENDAVID: The U.S. Department of Labor's proposed rule for salaried exempt employees is still in the consideration stage. The Notice of Proposed Rulemaking was published on July 6, 2015 and interested parties were permitted to comment by September 4, 2015. There were 293,370 comments received and the final rule is expected to take effect in or around July 2016. If passed, employers will need to ensure their salaried exempt employees meet the *federal* minimum salary requirement, which is more than the California state requirement (currently $41,600).

NEBENS: The Department of Labor's proposed rule to extend overtime pay was issued in June. With this proposal, workers classified as exempt professionals who earn $970 per week would need to be reclassified as nonexempt hourly employees and be paid overtime. It would alter the Fair Labor Standards Act's salary-level test by changing the salary threshold from $23,660 per year to $50,440. Having an annual salary above $50,440 doesn't automatically classify an employee as exempt – they must meet certain requirements and tests regarding job duties. However, the Department of Labor may revise the duties test in the final rule in 2016.

◆ If a business has misclassified some of its employees as exempt salaried workers, how can that company fix the situation without buying a lawsuit?

LIGHT: It's problematic. There is no easy answer. Some clients just pay and move on. Others make clear that it's too much money and they can't pay. Options then are to bury the change in other actions such as: It's a new year and new policies; your job description is changing; we have a new handbook and new policies; hey, now you get overtime; the lawyers made us do it. Also, when setting an hourly rate, don't lower the hourly rate from their existing salary in order to absorb the expected overtime. Employees really hate that and you're buying a claim in that situation. Try to manage the overtime and slow play bonuses and raises to absorb the extra expense.

MINKOW: When employees are misclassified, the exposure is typically unpaid overtime and premiums for missed meal periods and rest breaks. Fixing this problem and minimizing litigation risk is difficult, unless the employer makes the employee "whole" with regard to the unpaid wages. To do this, we recommend the employer estimate the actual wages and penalties owed to the affected employee and cut them a check. Obtaining a release in connection with this payment is also advised and the parties must acknowledge in that release that a good faith dispute exists with regard to the unpaid wages. Without this language, there is a risk the release could be invalid as releasing wages that are owed to an employee is generally a violation of public policy. Simply changing the employee's status to non-exempt, without any explanation or payment, can be risky.

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

BENDAVID: The terms "employee" and "independent contractor" are very two distinct concepts. If a worker truly qualifies as an independent contractor, the company retaining the contractor should ensure its contract clearly confirms the contractor status. It should include defense, indemnification and hold harmless provisions, among other terms. Caution should be used when it comes to "work made for hire" provisions. Including those that might result in a finding that the contractor was actually an employee (see e.g., Labor Code Sections 3351.5(c), 686 and 621(d). The EDD states that, in some cases, including a work made for hire provision in a contract can create a statutory employee.

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

LIGHT: Failure of supervisors (who aren't trained properly) to follow meal and rest break rules; pay stubs missing one or more of the nine pieces of information required; Off the clock work such as travel time or preparatory/end-of-day work (e.g., putting on multiple pieces of clothing or equipment); failure to reimburse for personal equipment use (e.g., cell phones); improper time card rounding practices; improper classification of supervisors as exempt from overtime (e.g., fast food and retail). A properly drafted arbitration agreement can cut down on the exposure by eliminating class action—but not PAGA claims that carry a one-year statute of limitation. Still, that's better than four years in class action.

BENDAVID: Employers are most likely to violate wage and hour laws due to lack of knowledge, rather than conscious efforts to game the system. It gets complicated considering different city ordinances affecting compensation. For example, some San Fernando Valley employers may not realize they must comply with higher City of Los Angeles minimum wage standards, which increases to $10.50 per hour on July 1, 2016 or 2017, depending on company size. Also remember that minimum thresholds for exempt employees increased, and may rise significantly at the federal level shortly. Add the complications of meal and rest breaks rules, which spur more claims, notwithstanding the favorable Brinker ruling which held that employers need not play "meal police." Questions debating WHY employees didn't take breaks and whether employer practices caused them to be denied are making the rounds in Courts. Additionally, employers should be very careful regarding the reimbursement of employee expenses, ensuring leave is administered properly, and that employees and independent contractors are properly classified.

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

LIGHT: It depends on what the goal is. PTO is much less labor intensive because an employer doesn't have to track the basis for the absence and there's only one category to track. If you don't want to pay out sick time at departure you don't have to; but if it's lumped in with vacation as PTO, then of course it all must be paid. So, bottom line, is it convenience or expense that you are concerned about?

ROSENBERG: Under the new paid sick leave law, the usage rules only apply to actual paid sick days. That's a good reason to segregate them from PTO. Otherwise, *all* of the company's PTO benefits will be subject to the sick pay law's onerous 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 paid the employees the employment and the 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. This is yet another reason to separate the sick pay benefits from other PTO.

◆ How meaningful are online photos of people when it comes to the hiring process?

NEBENS: Photos are usually one of the first things that pop up when an employer searches for a prospective employee online. Online screening can be a great way to quickly gather additional information from an applicant that isn't available in their normal application materials. A candidate's activity online can be a great way to identify their involvement within your industry and get a glimpse at their work attitude or their expertise. However, it's important to note that online photos and searches can reveal sensitive or discriminatory information, such as age, religion, marital status, etc. It is important

20

not to misuse the information you glean from an applicant's online presence. Online searches can be a great tool for gaining insights about applicants, but proceed carefully.

◆ What are your thoughts on AB 1017, which proposed that employers may not request compensation history from applicants?

LIGHT: It was vetoed, so that's good news. Compensation history is relevant to the hiring process but it wouldn't be fatal for employers not to have that information. "Salary requirements" do help weed out candidates who may not fit the budget, but you'll learn that soon enough when your offer is rejected. Still, would be useful to have that information at the front end and hopefully we won't see that bill resurface.

ROSENBERG: If AB 1017 had passed, it would have outlawed the practice of asking a job applicant for their salary history and prohibited employers from pegging an applicant's salary offer to what he or she made in their last position(s). Proponents of gender pay equity argue that the law was necessary because the market is rigged against women and that setting wages to past salary simply locks in the previous pay inequity. The other side argues that ignoring the market makes no sense at all and that a current prospective employer can't be responsible for a previous employer's decisions about pay.

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

ROSENBERG: Yes, but employers have to use extreme caution whenever inquiring into criminal background. California law prohibits employers from asking about (or using) arrest and certain conviction records when evaluating job applicants. Employers must know these rules and scrub employment application forms for prohibited inquiries. The simple question found on many job application forms, *"Have you ever been convicted of a crime?"* is illegal in California. Further, EEOC has stated that a ban on the hiring all convicted criminals is illegal. Rather, EEOC demands a more nuanced process that requires an employer to show that there is a real connection between the criminal offense and the applicant's intended job duties. Finally, the answer may very well depend on which city the employee will be working in or the type of job. Several municipalities have passed their own restrictive ordinances on the subject. On the other hand, certain jobs like law enforcement, teachers, nurses, and those involving minors or the mentally impaired may mandate extensive criminal background checks.

BENDAVID: Generally, if an employer has a complete bar on hiring applicants with criminal records, the employer may be accused of discrimination. Caution should be used to ensure that the conviction is related to the job for which the applicant is seeking to be hired. For example, a driving under the influence conviction may be a bar to hiring for a driving position.

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

MINKOW: There are many issues an employer should consider prior to terminating an employee. First, employer must make sure that employees are paid all wages due and owing at the time of termination, including all accrued and unused vacation. Believe it or not, many employers overlook this basic requirement. Employers should also ensure that all employment-related decisions are based on legitimate, non-discriminatory reasons and have appropriate documentation to support such decisions should they be challenged. Second, all decisions should be made consistently. For example, if a company decides to terminate an employee for excessive absences, the decision makers should feel confident the attendance policy is applied consistently to all employees, otherwise the affected employee might claim he or she was singled out for some discriminatory reason. If the layoff or termination may expose the company to some risk, the employer might consider obtaining a valid release in exchange for some amount of severance from a departing employee.

LIGHT: An age discrimination claim is the most common result of a layoff or reduction in force. Employers should conduct a census of the "before and after" of their workforce composition to determine if they have too many older workers in the layoff group (or workers in other protected categories). Adjustments may need to be made as a result. Also, don't overlook that employers may lay off employees on leave if handled properly. Those employees aren't immune from layoff just because of that status. Document the legitimate business reasons for all layoff decisions. You may need that later to defend a claim.