BUSINESS LAW ROUNDTABLE

How You Can Avoid Traps in New Labor and Employment Laws

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

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◆ What would you say is the most significant new law affecting businesses in 2017?

ROSENBERG: California's Fair Pay Act is one of the most controversial employment laws on the books today. We predict a veritable tsunami of new equal pay litigation because the legal framework is fraught with ambiguity and the payoff for plaintiffs and their lawyers could be huge. The Fair Pay Act places the burden squarely on the backs of employers to prove that any wage difference between substantially similar jobs is not due to an employee's gender, race or ethnicity. The law says that for an employer to legally justify any wage differential between persons of different genders, etc. performing substantially similar work, the employer must be able to prove that the wage differential is based upon: (i) a seniority or merit system; (ii) a system which measures earnings by quantity or quality of production; or (iii) a "bona fide factor other than sex, such as education, training or experience." Since the legislature believed that the market is inherently biased, employers need to know that any employer claim that the wage difference is justified by "the market" or linked to the prior earnings history of the comparators will be viewed with skepticism.

GABLER: Although many of California's employment laws have a significant (usually adverse) impact on California businesses, the implementation of city-specific sick leave laws has the most detrimental effect, in practice as well as in concept. When the State of California first enforced mandatory sick leave in 2015, employers struggled to understand and implement the law with its myriad of options and requirements. When individual cities began implementing their own sick leave laws throughout 2016, employers were faced not only with providing a costly paid benefit to employees, but also with providing a different paid benefit to employees depending only upon how many hours any individual employee might spend in any individual city over the course of the workweek. To date, six cities (Los Angeles, Santa Monica, San Diego, San Francisco, Oakland and Emeryville) have implemented their own unique sick leave rules, and others are considering similar rules. Each city has a different method of providing the sick time, different accruals for varying sizes of employer, different caps on total sick time earned, and even inconsistent rules on how many hours must be spent in the city before that city's sick leave is triggered. Unfortunately, when individual cities review and implement their own employment laws, they rarely seek consistency with what other cities are providing, nor do they consider the incredibly burdensome impact that city-specific laws will have on employers with employees traveling in and out of various cities. The prospect of unique city-to-city employment laws is daunting: employers are often unaware of pending action items on city agendas, and city councils do not receive sufficient public input to understand the dire consequences of their decisions on employers that seek to do business in that city. California businesses face more burdensome employment laws than any other state, and California cities now seem determined to make it even more challenging, thus creating an even greater threat to economic development in the state.

BENDAVID: One significant new law is the "Ban the Box" rule implemented in Los Angeles as well as other cities. The rules create new restrictions and affirmative obligations when advertising and during the pre-hire process for new employees. We expect this will be expanded to other cities and/or the State for broader restrictions on an employer's ability to make pre-hire or other employment decisions based on an applicant's or employee's criminal records. This will require employers to change their employment applications and restrict questions that can be asked of an interviewee.

◆ Which of California's employment laws are most problematic for businesses today?

GABLER: Wage and hour laws continue to be the greatest threat to business security and viability in California today, with meal and rest period issues having the most significant impact, followed closely by misclassifications of exempt employees or independent contractors. The wage and hour laws are incredibly detailed and burdensome. Compliance depends not only upon clear policies and solid management practices, but often upon the cooperation of employees who do not understand the impact of simple violations (or who seek to take advantage of the employer by deliberately violating basic rules). Class actions and claims under the Private Attorneys General Act (PAGA) carry not only significant compensatory damages for violations, but also substantial additional penalties for minor errors. Based upon the penalties potentially available when numerous wage and hour laws are violated, an employee with only $5,000 in compensatory damages could receive up to $20,000 or more in PAGA penalties for relatively simple violations. When you multiply those numbers by tens or even hundreds of employees, the financial impact can easily bankrupt a small company and severely harm the viability of a larger company. In addition, when an employee recovers any amount in a wage and hour action, the employer is obligated to pay the employee's attorneys' fees in full, making wage and hour litigation an easy hit for plaintiff's counsel. It is highly unlikely that any business in California could avoid at least a few wage and hour violations here and there, given the human element. Since liability in some amount is often almost guaranteed, early resolution of wage and hour claims is critical to avoiding what can be astounding financial risk.

BENDAVID: Wage and hour laws continue to cause employers grief and are regularly the focus of employee lawsuits. Employers are often accused of "wage theft." Though sometimes wage theft is deliberate, more often it is not and is as a result of lack of knowledge or accidental miscalculations. Accidental wage errors are more common than one would think and can happen when an employer erroneously misclassifies a worker as exempt or as an independent contractor. Other times there are allegations that employees worked off the clock, e.g. claiming a supervisor pressured employees to work just a few minutes after hours to meet a deadline. Then there are the numerous meal and rest break violations. It's easy for employers to misunderstand or misapply the various and often conflicting labor code provisions and wage order rules. Unfortunately, ignorance of the law is no defense to these claims.

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

BENDAVID: Managers should be trained on the rules pertaining to harassment, discrimination, retaliation as well as anti-bullying. Employers should instruct supervisors to report any complaints to a designated company representative such as a human resources manager, so the company can resolve the claim internally, if possible. California law requires employers with 50 or more employees to include this in the mandated sexual harassment prevention training. The objectives are to assist employers in changing or modifying behaviors that create or contribute to harassment; to provide information related to the negative effects of abusive conduct; and to develop, foster, and encourage a set of values in supervisory employees to assist them in preventing, and effectively responding to incidents of sexual harassment. The training should discuss mechanisms to promptly address and correct wrongful behavior. Sensitivity training about diverse employees can also be used to help rebut claims of discrimination or harassment. Mismanagement can lead to a lawsuit or charges before the Equal Employment Opportunity Commission (EEOC) or the Department of Fair Employment and Housing (DFEH).

ROSENBERG: Sensitivity training is absolutely vital for any business seriously interested both in lawsuit avoidance and morale building. That's why the training is mandatory for larger employers (50+ employees). We have handled way too many cases over the years that were completely avoidable had the participants known that the behavior in question was both offensive to others and against company policy. Another reason to do the training is that management's silence on the subject can be seen as a tacit approval of the offending behavior. This training should be done throughout the organization so everyone has a clear understanding of exactly where the company stands and what will happen if someone's behavior crosses the line. In my opinion, this is the single best investment a company can make toward insuring that it stays out of court.

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

GABLER: First, work with qualified employment law counsel (not your CPA or corporate lawyer) to update the employee handbook and other human resource documents each year, and distribute those documents to employees. A fully compliant employee handbook serves as a risk management treatise for employers as well as a guide for employees. Second, attend the myriad of employment law seminars available today, both online and in person. New laws, cases and administrative opinions are released every week, and regular education is critical to keeping up with new laws and workplace trends. Third, develop and maintain a relationship with a skilled employment law attorney to address ongoing workplace issues and disputes. Although the Internet has a wealth of information about employment law issues, much of it is inaccurate, overly generalized, inapplicable to California employers or inappropriate for your business. There is no substitute for solid legal advice from a trusted advisor who knows you and your company.

◆ 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: Yes, and here's why. First of all, certain policies must be given to employees in writing. The handbook is the perfect place to do so to insure that they are properly disseminated. Second, a well-written handbook will be your best friend in employee litigation. Third, the handbook is an important orientation tool to acquaint new hires with company policy and culture. 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.

BENDAVID: An employee handbook can be the first tool of employment defense – we often cite it and the plaintiff's acknowledgement of receipt of the handbook in depositions and in court. It's difficult for a plaintiff to say s/he didn't know about a particular policy when the employer can provide proof via the employee's signature of receipt, reading and understanding of the handbook. But aside from that purpose, 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 help confirm at–will employment and provide the employer discretion to change the terms and conditions of an at-will employee's employment.

GABLER: The employee handbook continues to be the most significant document an employer should have in the workplace. When prepared properly and updated regularly, handbooks can protect the employer, bind the employee, defend against a claim and support management efforts. Handbooks are one of the first documents requested in any employment law claim, and can provide clear evidence of the employer's policies and practices. They satisfy the employer's obligation to provide clear notice of employee rights and benefits, both to protect employees and to avoid claims of "you didn't tell me!" They set the standard for the employer expectations against which employees will be measured. Detailed and complete handbooks can serve as a treatise for management and human resource professionals as well, providing day-to-day guidance on the employment laws that must be followed (thus reducing ongoing attorneys' fees). They also provide a solid basis for management to discipline or evaluate employees. Most managers struggle with having to inform employees of performance deficiencies, and pointing to specific and objective policy violations is far easier than merely offering a negative comment based upon the manager's subjective opinion.

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

ROSENBERG: California's Family-School Partnership Act recently added a so-called emergency leave provision which requires employers to allow parents time off to address «child care provider or school emergency" situations. This includes when an employee's child cannot remain in a school or with a childcare provider because the school or child care provider has requested that the child be picked up. State law gives employees a maximum of 40 hours per year for time off relating to parenting (i.e., attending school functions and the like). To mitigate the impact on the company, employers may limit usage to just 8 hours per month. However, these usage rules are suspended in a real emergency situation. Even if the employees already has used all 40 hours, we would still recommend giving the employee whatever time they need to address the emergency. The optics of doing otherwise could be awful if something bad happened to the child after the employer refused to allow the parent to pick up their child.

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

BENDAVID: Historically, courts have been ruling in favor of the employer when plaintiffs claimed they were wrongfully terminated because of marijuana use, mainly because possession and use of marijuana remains illegal under federal law. However, employers should continue to monitor this because court rulings may be undergoing a change as more states begin legalizing the drug. For now, employers may still make possession or use of marijuana a violation of company policy, especially if the drug is used on company property, or an employee is under the influence while working. Use caution, however, when sending an employee out for a drug test as there are protocols that must be followed prior to doing so (e.g., generally an employer must have a reasonable suspicion that a current employee is under the influence).

GABLER: From a practical standpoint, the legaliza-

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tion of recreational marijuana creates a need for substantial updates to the employer's substance abuse policy. Most drug and alcohol policies address unlawful drugs, alcohol, and prescription drugs. Marijuana, while still unlawful under federal law, is no longer an "unlawful drug" under California state law. Thus, policies must be re-written to incorporate this newly legal drug to ensure clear policy language. Nevertheless, despite the legalization of marijuana for medicinal or recreational use, California employers still need not permit employees to use or be under the influence of marijuana in the workplace (although medicinal use implicates the obligation to consider reasonably accommodating the employee with a leave of absence or other options until he can stop using marijuana). This naturally calls into question the issue of "what does it mean to be under the influence?" Alcohol provides an easy answer, as it may temporarily impair the employee and then quickly leaves the body. Marijuana can remain in the user's system for many weeks, creating positive test results long after the user is no longer discernibly impaired. We can expect to see litigation and future legislation on this issue, and employers must be sure to define the term "under the influence" in their substance abuse policies. Beyond these legal issues, there are hotly debated questions about the viability and efficacy of the use of marijuana (or its derivatives) for a variety of medical issues, and future legislation will have to consider where the use of marijuana may be more productive than detrimental.

ROSENBERG: There is a lot of confusion about the reach of the new law. For example, while recreational marijuana use amongst adults (over age 21) at home is no longer a crime in California, it remains a federal offense. Also, the new law specifically preserves the right of a company to insure that employee s are not coming to work under the influence of the drug and not using, possessing or distributing the drug on company premises. However, unlike alcohol, there is no uniform standard for measuring when a person is "under the influence." And, the drug stays in the system and is detectable in a drug test weeks after its ingestion. Thus, advance coordination with the drug testing facility is recommended so that everyone has a clear understanding about what constitutes a policy violation.

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

GABLER: Employers often believe that mediation, or any other form of alternative dispute resolution, is an indication of "rolling over" or "being extorted." In fact, one of the most significant expenses in any litigation matter is the attorneys' fees incurred to defend against the employee's claim, and, in most cases, early settlement will typically cost the employer far less than it would cost to win the case (even when the employer is insured). Most employment disputes have far more to do with psychology than with employment law, and are often the result of miscommunication, assumptions, hurt feelings and other aspects of human communication that fall outside the law. Bringing both sides to the table can resolve those issues, make people feel heard on both sides, and create a path to resolution that allows both parties to move forward without further stress or expense. Unfortunately, the mandatory attorneys' fee awards associated with most employment law matters can prompt employers to settle disputes merely to avoid financial risk that has little to do with actual wrongdoing or potential liability. Waiting until the eve of trial to put maximum pressure on the opposing party merely means that the opposing party's attorney now requires tens of thousands of dollars in fee recovery to make settlement worthwhile for his law firm. In some cases, hotly contested litigation is necessary, when an opposing party is wholly unreasonable, or when other employees are waiting in the wings for their bite at the apple. In most cases, however, an attorney who insists on fighting with his opposing counsel, and who exacerbates a case for personal gain rather than to serve the client, is simply lacking in skill or finesse. Business owners should seek out not only attorneys who are skilled litigators, but litigation attorneys who also can truly act as counselors, serving the interests of the client rather than themselves, and negotiate viable resolution options that allow the employer to focus its resources on the business instead of on its former employees and its legal counsel.

BENDAVID: In mediation, a neutral third party engages in "shuffle diplomacy" between the parties to see if matters can be resolved. It virtually always means employers will pay agreed upon sums of money to employee plaintiffs and their attorneys. But mediating typically costs less than defending claims in court, and risking potentially large judgments if there is liability exposure. A good mediator will demonstrate to both sides the weaknesses in their respective cases so that the parties can understand the risks if they continue in the litigation process. Oftentimes employees will come in to mediation with large demands that make no sense given the damages analysis and the claims. A neutral mediator can help bring them down to reality about the value (or lack of value) of their case. Similarly, mediators can be expected to tell employers how juries or judges may perceive cases and defenses in an effort to convince employers to buy their peace.

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

BENDAVID: Non-competes in California are generally unenforceable, with limited exceptions. In contrast, an employer has a right to protect trade secrets and other confidential information -- that means creating policies, confidentiality agreements and implementing other procedures to protect that information from improper use, disclosure or dissemination, including to the employee's new employer.

GABLER: Non-compete clauses are generally unenforceable in California, except in certain limited circumstances (such as in the sale of a business). While employers can prohibit competition during employment, a departing employee has the right to work with any employer of his choice in the future. However, employees are not permitted to use the trade secrets of the former employer to compete, nor to benefit themselves or others. The same applies to solicitation of co-workers and customers. Employers should have clear non-solicitation and non-competition agreements that prohibit the employee from taking, disclosing or using the employer's trade secrets to unfairly compete, or to solicit others to leave. In other words, a salesperson can sell the same widgets for another company, but he cannot take the former employer's customer lists or contact information, marketing plans, business models, financial data, and similar information in order to do it. Similarly, the employee can encourage a co-worker to apply for an opening at his new company, but he cannot inform the employee that the new company provides greater salary and benefits than what he already knows is provided at the old company. While this is a fairly narrow protection for employers, the side benefit is that there need not be any geographical or chronological limitations on these prohibitions. Many agreements state that the employee cannot compete or solicit for two years, or within a certain radius. By adding "by use of the company's trade secrets" to the restriction, the prohibition can continue indefinitely, as there is no time period when the company's trade secrets are suddenly open season for competitive purposes.

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

BENDAVID: Inconsistency is a primary problem leading to employees feeling they were discriminated against by their supervisor as a result of their race or other protected characteristic (e.g., when one employee is terminated while another is simply written up for the same policy violation). If there is a history of bad behavior and the termination is because of a "straw that broke the camel's back situation," ensure there is a record of previous transgressions. Employers should also ensure that the discipline is not as a result of the employee exercising a legally protected right. For example, an employee who has a work related injury should not be disciplined for submitting a workers compensation claim. Keep in mind the protected activities and the numerous leave laws

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and federal laws before writing up an employee.

GABLER: The most significant error made by employers is neglecting to document performance issues and resulting disciplinary action. Employers must remember that "if you can't prove it, it didn't happen!" When the employer fails to document its reasons for discipline or termination, the employer loses the chance to tell that story, and thus loses control of the situation: the employee is now able to tell the story of what the employer did to her, and the employer promptly finds himself on the defense. Additional mistakes include: (1) being too nice, and (2) being too mean! Some employers fail to convey any negativity, for fear of rocking the boat, hurting the employee, causing a fight, or simply to avoid confrontation. When employees are not given clear information about where they are falling short, they lose the opportunity to grow, improve, and progress in the job. Similarly, the employer who fails to convey its dissatisfaction to the employee loses the opportunity to train and support an existing employee, instead having to invest additional resources in recruiting, hiring and training new employees when things don't work out. On the other hand, some employers express too much personal opinion, frustration, anger or other negative emotions, and the discipline becomes a personal attack rather than a productive discussion of areas of growth. When an employee is attacked and deemed to be incompetent, he simply becomes resentful and shuts down. At that point, improvement is unlikely, and the relationship will continue to deteriorate.

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

GABLER: Although the existence of an independent contractor agreement will not automatically create a contractor relationship, it is nevertheless critical to have an enforceable agreement in place to defend the worker's contractor status. Ideally, contractor agreements should include, without limitation, reference to the worker's status as a contractor (without calling the worker "employee" in the agreement!), the contractor's right to set the work schedule and hire its own staff, the contractor's obligation to pay its own expenses, the contractor's obligation to invoice the company for services rendered and the timing of payment for services (without using company payroll!), the contractor's obligation to pay its own taxes and procure its own insurance, the contractor's right to work with any other clients (provided there is no conflict of interest of competition), indemnification for the acts or omissions of the other party, and the obligation to arbitrate disputes under the agreement. Random buzzwords or misstated phrases can severely undercut the contractor classification, and employers would be well served to develop the agreement with the assistance of employment law counsel.

'Employers have to use extreme caution whenever inquiring into criminal background. Because our state law does not permit employers to ask about (or use) arrest and certain conviction records when evaluating job applicants. The simple question "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. 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.'
RICHARD S. ROSENBERG

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

ROSENBERG: Meal and rest break class actions are still a huge problem for California employers. Matters got even worse when the California Supreme Court ruled last December that rest breaks must be absolutely duty free. In other words, an employer may not require (or even ask) employees to remain on premises or to remain on call in the event of an emergency. The ruling involved a security guard service where the employees were asked to leave their radios "on" during their 10 minute paid rest break just in case an emergency occurred and they were needed. Though it rarely happened, the Court said that the requirement of keeping the radios turned on converted the rest break to work time and the employees were entitled to a rest break penalty equal to one hour of ay for every day that the offending rule or practice was in place (there is a 4 year statute of limitations). The ruling upheld a $100 Million verdict in favor of the security guards.

BENDAVID: Employers must pay overtime based on the "regular rate of pay" and not just the regular hourly rate. That means incentive bonuses, commissions and potentially other sums must be included when calculating overtime for a nonexempt employee. We are seeing employers make errors about this due to lack of knowledge, and expect to see more claims on this in the future. Other trouble areas include piece-rate pay practices, not prohibiting off-the-clock work; misclassification, and not providing for or paying for missed meal and rest breaks. With the Private Attorneys' General Act (PAGA), we are seeing more penalty claims included in class actions as well as in individual lawsuits. A close audit of an employer's wage and hour practices, along with corrective action is highly recommended.

GABLER: Class actions can arise from a wide variety of wage and hour violations, and every employer in California will have violations due to simple human error. The most common class action claims arise from meal and rest period violations. Claims for "off the clock" work, failure to properly itemize the pay stub, failure to record all used or accrued paid time off, failure to pay overtime and the corresponding failure to pay minimum wage are common as well. To protect the company, the employer must develop clear, enforceable policies on wage issues, which can show the court that the company was aware of the law and made every effort to enforce it. Then, the employer must track compliance and take action on any violations. Interestingly, a 2015 case held that a company with no penalty payments to any employee at any time must be in violation of the wage and hour laws, because every employee misses a break or a meal period or fails to accurately record their time at some point. It is actually a better defense to record and pay for the occasional penalty, so that you can show the court that you are aware of the rules and any

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violations of those rules, and are fully prepared to pay the applicable penalty to the employee in the normal course of business.

◆ What should an employer do when it receives an internal complaint of discrimination or harassment?

BENDAVID: Promptly investigate (consider using a third party to do so, depending on the circumstances). Obtain statements from the accuser as well as the accused, any potential witnesses and supervisors. Review relevant documents. Carefully document everything thoroughly and throughout the process. Assess the situation and determine whether or not the allegations can be substantiated and if so, ensure corrective action is taken. Inform the complainant about the responsive action taken. Consider reaching out to counsel for compliance guidance along the way.

ROSENBERG: Take it seriously and do a thorough good faith investigation. That's what the federal and state laws require and that's what employees have come to expect. We also recommend reviewing the matter with expert labor counsel to be sure that the legal standards have been met and that the employer has done enough to address the matter. This is especially important because the California law holds employers responsible for the acts of management even if the company leaders were unaware of the offending conduct.

GABLER: An employer must investigate every complaint of discrimination or harassment, no matter how small and no matter how seemingly frivolous. Employees can bring claims for failure to investigate, failure to prevent, and failure to remedy discrimination and harassment. Taking the necessary steps to look into the situation will protect the employer, but will also provide critical information as to where problems may exist and how best to address them before an employee files a formal claim. Investigations may be conducted by internal personnel, or by a third-party licensed investigator (typically, an attorney or licensed private investigator). If claims of bias or favoritism in the investigation process are likely, using an outside investigator is more productive to support the effectiveness of the investigation process and the reasonableness of the outcome. The investigation may be very simple, consisting of meetings with the complainant and the alleged wrongdoer, or may be more complicated and expand into interviews with witnesses to any relevant events. Once the involved personnel have shared their stories, the investigator should prepare a written report on the investigation activity and the outcome, both to summarize the findings as well as to prove that a reasonable, timely and thorough investigation was conducted. The employer should then respond in writing to the complainant as well as to the accused, to provide a short summary of the investigator's findings and any next steps to be taken to remedy the situation.

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

ROSENBERG: Under the new paid sick leave law, the usage rules only apply to actual paid" sick" days. That's a good reason to unbundle 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.

GABLER: You would think combining vacation and sick time into a single PTO policy would make sense, but perhaps not! PTO policies are easier for employers to track, and employees enjoy the flexibility of taking time off without explaining the specific purpose of their absence. That said, a combined PTO policy must comply with both the vacation rules and the sick leave rules (which are more burdensome under the state's mandatory sick leave laws). As with vacation rules, the PTO policy must provide for accrual and carry over of up to a minimum of 1.50 times the annual leave, and payout of accrued time at termination. As with the sick leave rules, the employer must frontload the PTO (making it fully available at the outset of employment) or accrue a minimum of 48 hours (or six days, whichever is greater), which often means the employer is granting more PTO at the outset of employment than it might otherwise prefer. City-specific sick leave laws impose even greater burdens. In addition, an employer can require advance notice of vacation and may deny a request for vacation time off, but employees can use sick time unexpectedly and intermittently, with the employer having limited ability to discipline an employee for using available time. For these reasons, employers may wish to separate vacation and sick time, thereby saving money and reducing absenteeism, instead of using a combined PTO policy.

BENDAVID: With the new city ordinances on sick leave, we are recommending that employers not use combined Paid Time Off policies, unless they have a separate standalone sick leave policy that complies with the city's rules. Also, remember that accrued, unused PTO must be paid on separation from employment, unlike sick leave.

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

GABLER: A blanket prohibition against applicants with criminal records is unlawful discrimination. Employers may consider certain felony convictions only to the extent that the conviction is reasonably related to the job position, among other factors. For instance, applicants with felony child abuse convictions could be rejected for a preschool position, and applicants with felony embezzlement convictions could be rejected for an accounting position. On the other hand, applicants with felony DUI convictions could not be rejected for a job that does not involve driving. Application questions regarding convictions must include a variety of disclaimers, and the potential for discrimination claims is high. With the growing trend in "ban the box" legislation prohibiting employers from asking about convictions in the application process, employers should eliminate the "conviction question" from applications and interviews entirely, and instead make job offers contingent upon passing a background check. If a conviction appears in that process, analyze whether the timing, nature, scope and outcome of the conviction are sufficiently relevant to the job position that the offer can be lawfully revoked.

ROSENBERG: If you are located within the City of Los Angeles, then you must comply with the City's new "Ban the Box" ordinance. It restricts private employers in Los Angeles from asking about or requiring the disclosure of criminal history until after a conditional offer of employment is made. If the employer does a post offer crimi-

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SUE M. BENDAVID

'Take any internal complaint of discrimination or harassment seriously and do a thorough good faith investigation. That's what the federal and state laws require and that's what employees have come to expect. We also recommend reviewing the matter with expert labor counsel to be sure that the legal standards have been met and that the employer has done enough to address the matter.'
RICHARD S. ROSENBERG

'The most common class action claims arise from meal and rest period violations. Claims for "off the clock" work, failure to properly itemize the pay stub, failure to record all used or accrued paid time off, failure to pay overtime and the corresponding failure to pay minimum wage are common as well. To protect the company, the employer must develop clear, enforceable policies on wage issues, which can show the court that the company was aware of the law and made every effort to enforce it. Then, the employer must track compliance and take action on any violations.'
KAREN L. GABLER

nal background check and then wishes to deny the employment based upon that information, then the employer must provide the applicant a so-called "fair chance process" before declining employment and give the employee time to respond before filling the position with someone else. Employers are also required to post a notice informing applicants of the ordinance, and to remove questions from job applications about criminal history. If your company is not in the City of Los Angeles, you are permitted to deny employment based upon a criminal conviction unless your local law says otherwise. However, employers have to use extreme caution whenever inquiring into criminal background. Because our state law does not permit employers to ask about (or use) arrest and certain conviction records when evaluating job applicants. The simple question "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. 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.

◆ How can businesses in the retail sector best respond to overtime and minimum wage pressures?

BENDAVID: Retail employers should keep this rule of thumb in mind: Most of the time, the local ordinances carry a higher burden than state regulations, and California laws will generally be stricter than federal law. That isn't always the case, but most of the time it is true. For example, San Francisco has specific laws regarding scheduling predictability for retail employees; the state does not. San Francisco also has one of the highest minimum wage standards, increasing to $14.00 per hour on July 1, 2017; while Los Angeles will raise wage rates to $12.00 per hour for employers with 26 or more employees on July 1st ($10.50 per hour for companies with 25 or fewer employees). Then there are the meal and rest break issues – though employers are not obligated to ensure their employees take them, they are obligated to provide these breaks – even during busy, holiday shopping times. Ensure employees are not performing "off the clock" work. Meeting sales goals on a deadline can sometimes create pressure for management, who will sometimes turn a blind eye when employees punch out, but then ask the employee to ring up one last customer, clean up the selling floor, or tally up receipts. This can only lead to litigation. Last, remember the 7th day of rest rule. A California Supreme Court recently issued its opinion in Mendoza v. Nordstrom, clarifying requirements. Employers must provide one day of rest for each workweek. The Court clarified that employees are not entitled to one day off on a rolling basis for any seven consecutive days worked in a row (thus periods of more than six days of work that stretch across more than one workweek are not necessarily prohibited). In addition, the day of rest rule does not apply when an employee's work hours do not exceed 30 in any workweek or 6 in any workday. This exception only applies to those who never exceed six hours of work on any day of the workweek. Thus, if on any one day an employee works more than six hours, a day of rest must generally be provided during that workweek.

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

ROSENBERG: Many employers erroneously believe that a layoff cannot be legally challenged. The many hundreds of layoff lawsuits filed each year prove otherwise. In every layoff, decisions are made about who to retain and who to let go. Those selected for layoff can sue if they think they were selected for an illegal reason such as their gender, race and the like or because they opposed some employer practice that was illegal. In most of the performance termination lawsuits we handle, the employer did an inadequate job in communicating job expectations (best to do so in writing) and the employee's failure to meet them (also best to do in writing). A simple question I ask in every termination review discussion is "will the employee be surprised?" 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 not to turn down your former employee's case. It's also important to verify that no one in management asked the employee to do something illegal or cover up for management's doing so. That's a recipe for an expensive lawsuit.

GABLER: Employers often assume that laying off an employee is a "safe" move, but this is not always the case. Employers must be able to justify the legitimate business reasons for the decision – then, actually justify it with written documentation. Why is the employee losing his job? Is his position being eliminated? If so, will you re-open the position later? Is he a poor performer? If so, has he been warned about any deficiencies and given an opportunity to improve? If not, why not? Is the decision in line with internal memoranda and prior performance reviews? Does he fall into any protected categories that will give him a reason to complain that his separation from employment was discriminatory or retaliatory? Is he one of a group of similar employees and, if so, why was he chosen over others? If asked, how will we prove that we had a legitimate, non-discriminatory reason to remove him? Falling back on "at will employment" is not enough – failing to provide the reason for the separation from employment allows the employee to fill in that blank with an unlawful reason, creating legal risk and cost for the employer.

BENDAVID: There are some rules of thumb to reduce the risk of litigation for unlawful termination or retaliation when downsizing through layoffs. First, establish and document criteria for identifying workers to be laid off – determining whether the decision will be based on seniority, experience, job performance or a disciplinary history. Next, ensure the layoff candidates meet your criteria and that you have supporting documentation. Review personnel files to ensure there are no "red flags" that might cause employees to believe they were selected for unlawful reasons, e.g. previous complaints of harassment, in which case a layoff may be misconstrued as retaliation. That doesn't mean a person who previously made a complaint can't be laid off – it just means employers should ensure they have legitimate reasons for their decisions. The same basic rules apply for terminations. Document the reasons and ensure an employee is fired for lawful reasons. Don't sugar coat performance reviews and exit interviews. Telling an employee s/he is doing a wonderful job and then firing him or her leads to shock, anger and potentially, employee lawsuits.

◆ What kinds of trusted advisors should growing businesses seek out?

GABLER: At a minimum, every business should have a trusted employment law attorney, experienced business or corporate law attorney, quality insurance agent, and skilled financial professional. Each category is critical to a healthy business, and all four are necessary to the protection and growth of the business. Each of these professionals can advise on the best methods to protect the significant investment every business owner makes, but they all carry their own areas of expertise and skills, all of which overlap but none of which replace each other. Beware of the CPA or the business lawyer who offers advice on employment law issues (and vice-versa!) – the best professionals "know what they don't know" and are willing to seek input from other specialists. Make sure that each of these professionals can provide insightful and creative ideas on growing the business, internally as well as externally. A trusted advisor is proactive as well as reactive, and can support and guide (as well as protect) the business owner. Most importantly, make sure the professional cares more about the success of your business than her own. A trusted advisor doesn't merely instruct the client on next steps; she asks where the business wants to go, and then finds a way to take it there.

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'A blanket prohibition against applicants with criminal records is unlawful discrimination. Employers may consider certain felony convictions only to the extent that the conviction is reasonably related to the job position, among other factors.'
KAREN L. GABLER

'With the new city ordinances on sick leave, we are recommending that employers not use combined Paid Time Off policies, unless they have a separate standalone sick leave policy that complies with the city's rules. Also, remember that accrued, unused PTO must be paid on separation from employment, unlike sick leave.'
SUE M. BENDAVID

'Many employers erroneously believe that a layoff cannot be legally challenged. The many hundreds of layoff lawsuits filed each year prove otherwise. In every layoff, decisions are made about who to retain and who to let go. Those selected for layoff can sue if they think they were selected for an illegal reason such as their gender, race and the like or because they opposed some employer practice that was illegal.'
RICHARD S. ROSENBERG