EMPLOYMENT & LABOR LAW ROUNDTABLE 2014

What Owners and Executives Need to Know

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As the legal landscape continues to evolve in terms of labor and employment, the San Fernando Valley Business Journal 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 law in 2014 – from the perspectives of those in the trenches of our region today. Thanks to our superb panel for their expert insights.

EMPLOYMENT & LABOR ROUNDTABLE

'There has been an ongoing and continuing progression in California labor laws to expand coverage and workers' rights beyond Federal standards. ... California is effectively saying that the Federal standards aren't sufficient.'
HOLLY SCHROEDER

◆ In terms of employment law, what new legislation has gone into effect with the start of 2014 and how meaningful will it be to business owners?

ROSENBERG: There are many new California employment laws. Some of the most significant: new overtime pay requirements for domestic workers; a new law allowing same sex sexual harassment cases to be filed where the alleged harasser had no sexual designs on the plaintiff; new anti discrimination protections for military reservists and for undocumented alien workers; new time off requirements for reserve peace officers and rescue personnel; expanded time off and other accommodations are required for employees who are crime victims or related to a crime victim; new penalties for employers who fail to proved heat recovery breaks to employees who work outdoors; and significantly expanded whistleblower protections.

BENDAVID: Wage and hour is a continued focus of our legislature, so compliance continues to be critical. The legislature granted the Labor Commissioner the right to create a lien on an employer's property for wages due. The legislature limited an employer's right to recover attorneys' fees when it prevails on a wage claim (employer must prove the claim was in bad faith). The legislature expanded penalties on a Labor Commissioner's citation for minimum wage violations to include liquidated damages (double the unpaid wages). Also, certain domestic workers are entitled to overtime under the new Domestic Worker Bill of Rights. Discrimination/harassment rules were also amended. The Fair Employment and Housing Act now protects military and veteran status. Employers should edit policies to recognize this new protected status. Also leave of absence rights were extended to victims of stalking and for workers to train for emergency duty and other leave rights. Employers should edit leave policies to comply with these new laws.

◆ What is the current situation with minimum wage? Will minimum wage related laws be changing this year? If so, how will businesses need to adjust?

MINKOW: Increasing wages for minimum wage earners has been a hot political topic this year, with many industries lobbying intently for a significant increase (remember the fast food picket line?) However, last fall, Governor Brown signed a bill increasing minimum wage in California. This will require all employers to analyze the salaries of their exempt employees, to ensure they are continuing to earn two-times the minimum wage in order to maintain a valid exemption.

BENDAVID: California's minimum wage will increase from $8 to $9 on July 1, 2014 and to $10 as of January 1, 2016. The increase impacts not only nonexempt employees, but also salaried exempt employees. To be exempt, the employee must earn at least twice minimum wage on salary (as well as meet other elements). Effective January 1, 2014, the minimum salary for exempt employees will be $37,440. In January 2016, the minimum salary will be $41,600. This bill also impacts certain inside salespersons. Under Wage Orders 4 and 7 inside commissioned sales employees may be exempt from overtime if they earn 1.5x minimum wage (and meet other elements). With the increase in minimum wage, this increases the amount they must earn to qualify. Employers should post the new minimum wage poster, which can be obtained from the Department of Industrial Relations (http://www.dir.ca.gov/iwc/MW-2014.pdf).

LIGHT: In connection with increasing the minimum wage rates for applicable employees, employers will have to consider the ripple effect of the wage increase on other employees who already make more than minimum wage: they may need a similar raise to keep their compensation above subordinate employees who are receiving a raise. In addition, the increased minimum wage impacts the salary basis of "two times the minimum wage" that must be paid to exempt employees.

SCHROEDER: It is helpful for businesses to have time to prepare for wage increases, but also concerning when individual cities seek to raise the wage in advance of the state timelines. While everyone can understand the legislative desire to increase worker pay, what is unfortunate about these new laws is that they are each passed individually and independently, without evaluation and consideration of the many other regulatory requirements and constraints that are being simultaneously imposed. Ultimately, the minimum wage increase and the many other new regulations going into effect this year will drive up costs across the entire workforce for an employer. Over time, businesses will be forced to raise prices to cover these costs, which will ultimately affect consumers.

ROSENBERG: It is important to note that the effect of these increases will not be limited to hourly employees. The new law also will increase the minimum "salary" required for an employee to be properly classified as overtime-exempt (the salary must be at least two times the state's minimum wage). California employers should verify that the salaries of any lower paid "exempt" employees meet the new minimum. Also, two other overtime exemptions also are affected by the new minimum wage. The exemption for certain commissioned sales employees requires total compensation of at least 1.5 times the minimum wage (i.e., $13.50/hr.) for all hours worked. And, the overtime exemption for union represented employees covered by a union contract requires that they be paid hourly rates which are no less than 130% of the minimum wage.

◆ In your view, in what ways has the labor and employment law landscape changed over the past decade? Have these changes benefitted or hindered California businesses?

BENDAVID: Starting in 2004, we began to see an increase in meal/rest break class action litigation and other wage and hour disputes. The litigation increased not only in courts, but at the Labor Commissioner's office as well, where employees have filed claims most typically without counsel. We have also seen an increase in the number of disputes pertaining to employees' medical conditions (disability-related claims), including a failure to accommodate, disability discrimination and failure to engage in an interactive dialogue. In contrast, claims asserting sexual or racial harassment have seemed to decline over the past ten years, though we still see these as well. Given the court delays, many cases are now being "tried on paper" meaning plaintiffs (or their attorneys) are opting instead to write demand letters in the hopes of resolving claims more expeditiously and with less expense than actually filing suit.

SCHROEDER: There has been an ongoing and continuing progression in California labor laws to expand coverage and workers' rights beyond Federal standards. For example, California's Fair Employment and Housing Act contains 19 different and distinct protected categories, where as the Federal statute has protections for six categories. California is effectively saying that the Federal standards aren't sufficient.The result is that California law is significantly more complex than anywhere else in the Country. That severely affects operations for a company that operates in multiple states. In addition, because these changes have been added over time, the rules are often patched together and often create internal inconsistencies or even conflicts. The approach taken by California therefore opens up greater opportunity for costly litigation, which makes employers reluctant to hire and causes them to delay hires as long as possible.

◆ Have you observed any new trends in the last year or so regarding class action lawsuits? If so, what are they?

ROSENBERG: Lately, we are seeing a lot of: a) "rounding" cases (challenging well established time clock rounding practices); b) cases where employees are being asked to work "off the clock;" c) cases where employees are not being paid for all "compensable" time (such as changing in/out of uniform, completing necessary paperwork); d) cases were employees using smart phones and other electronic devices to stay "connected" are claiming that they are "working," but not getting paid for it; and e) "regular rate" miscalculation cases where employers do not include all monies paid each week when determining an employee's "regular hourly rate"

36

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'It seems filing a claim as a "class" is still recognized as a viable method for pursuing wage and hour claims against employers, even if the underlying damages claim is difficult to prove. ... Thus, continued review of employer policies and practices is as important as ever.'
SUE M. BENDAVID

Continued from page 34

for calculating overtime pay. Lawsuits by unpaid interns are another hot area.

MINKOW: Employers who fail to update their wage and hour policies and procedures, including those in the Employee handbook, will be exposed to class certification if a class action lawsuit were brought against the Company. In 2013, the California Courts of Appeal regularly affirmed the grant of class certification in cases where common policies exist. While an employer may attempt to defeat the merits through evidence of a legally compliant practice, and plaintiffs this past year have met these defenses with difficulty as statistical evidence is routinely challenged, the bottom line is that an outdated policy can lead to costly class action litigation.

BENDAVID: The new trend appears to be that trial courts are more readily granting class certifications (i.e., on meal and rest break claims and other wage and hour disputes) and those rulings are being upheld on appeal. It seems filing a claim as a "class" is still recognized as a viable method for pursuing wage and hour claims against employers, even if the underlying damages claim is difficult to prove. If an employer has a company-wide policy or practice, that fact is being used by employees to argue class certification is proper for the entire group of affected employees. Thus, continued review of employer policies and practices is as important as ever.

◆ What role does piece-rate compensation play in terms of wage and hour problems?

MINKOW: Piece rate compensation is permitted in California but employers choosing to pay employees in such a manner must keep in mind the minimum wage requirements and how to properly calculate overtime. Employees paid on a piece-rate basis must earn at least the applicable minimum wage for all hours worked. Moreover, the employee's overtime rate should be calculated based on the employee's regular rate of pay during the workweek, calculated by dividing the pieceworker's total earnings by the hours worked. The biggest wage and hour problem we see with piece-rate earners is the failure to record all hours worked, including time off for meal periods. This failure often leads to costly minimum wage, overtime and missed meal period claims that can be very difficult to defend without the proper records evidencing the actual hours worked by the piece-rate worker.

LIGHT: Employers often mistakenly assume that paying a piece rate is an acceptable alternative to paying overtime rates, or that standard meal and rest breaks can be ignored. They need to be aware that piece rate payments don't replace the requirement to pay overtime if a piece rate worker works more than 8 hours in a day or 40 hours in one workweek. Overtime must be calculated based upon that piece rate just as if the employee was working on a standard hourly wage. In addition, employers with piece-rate employees must ensure that their employees are receiving appropriate meal and rest breaks throughout the day, and that meal breaks are recorded on written or electronic time records.

BENDAVID: Due to recent court decisions, employers who pay on a piece-rate basis (a common pay method in the garment manufacturing, transportation, mechanic and health care industries) are being forced to rethink compensation structures and potentially modify compensation plans. Employers who pay on a piece-rate basis have to ensure they are paying minimum wage for all non-piece rate work, including rest breaks and other nonproductive paid time. This results in changes in record-keeping, payroll, time-cards and also changes in the employees' pay stubs. Some employees are opting to resort back to a straight hourly pay plan, which has a negative impact on employee efficiency and morale.

◆ What are some common mistakes growing businesses make, and what are some good points to consider before these businesses enter the hiring process?

MINKOW: The most common mistake new and growing business make is to neglect implementing proper policies and procedures in the workplace. Often a new company will not spend the time and money to have an employee handbook prepared or reviewed by an experienced employment attorney, nor will they see an immediate value in analyzing compliance with California's ever-changing employment laws. Putting solid employment policies in place, and maintaining a practice of complying with and enforcing those policies, will give a growing business a good foundation in the effort to avoid costly lawsuits down the road. Spending a few dollars on the front-end to obtain the proper guidance regarding employment law compliance can result in future savings by avoiding costly future litigation.

ROSENBERG: Perhaps the biggest mistake is the failure to properly set up the human resource function before your first hire. This can lead to significant off balance sheet liabilities related to labor law non-compliance. ADA compliant job descriptions are a must, as is a well written employee handbook, which contains state of the art policies that will protect the company and permit the company to unload underperforming talent. A well-written non-disclosure agreement (that all employees sign) will be invaluable in protecting the company's IP and its valuable trade secret and proprietary information. Also, it is important to establish vendor relationships to enable you to do background check s and a post-offer drug screen. Finally, think carefully about the profile of your employees and develop forms like an employment application and reference release authorization form, which will allow you to thoroughly check references.

LIGHT: Wage and hour requirements are the most typical danger zones for new businesses. Common mistakes include: 1) paying employees a salary when they should be paid an hourly rate and failing to pay overtime when it is worked; 2) ensuring that meal and rest break rules are and that meal breaks are recorded in time records; and 3) complying with proper wage and hour requirements regarding timing of pay, pay stub content requirements and other "paperwork" details that are often missed. Spending an hour or two with your employment law attorney to ensure that you have the correct paperwork and policies in place can provide far greater protection for new business owners, who are typically the most vulnerable to seemingly minor (but extraordinarily costly) mistakes.

◆ What is the legal community doing to help employers avoid lawsuits and provide employee risk management?

MINKOW: The legal community is investing a significant amount of time and money in providing training to human resource professionals and in-house counsel 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.

LIGHT: The best way to manage employment-related risks in the workplace is to connect with a quality employment law attorney and educate yourself on the basic policies, practices and documentation required to ensure compliance with current laws and to defend against employee claims. LightGabler LLP provides monthly complimentary seminars in two locations to business owners, managers and human resource professionals, to provide key information on employment laws as well as tips and tricks to ensure legal compliance and workplace productivity.

◆ What are your clients most worried about in terms of labor laws today?

ROSENBERG: Becoming named in an employee lawsuit or becoming the object of a government

38 ➔

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'While broad protection against employee abuse is certainly important, today's employment laws impose such an extraordinary burden on employers that it becomes nearly impossible to run a compliant business in a cost-efficient manner.'
JONATHAN FRASER LIGHT

Continued from page 36

investigation that will tie up hundreds of management hours and be costly to defend.

BENDAVID: Our clients seem concerned about the ever increasing number of labor laws they must comply with on a daily and weekly basis. As a result, each year more and more of the client's time and money is spent on employee relations and compliance, than on the actual running of the company's business. Clients are increasing reliance on HR personnel and employment law counsel to ensure they stay up to date on the changing laws. Clients are also more reliant on outside legal support to ensure terminations are properly implemented so they won't be exposed to potential employee lawsuits.

LIGHT: As with past years, California employers continue to be concerned about the myriad of employment laws, the hidden "gotchas" that the average business owner can't reasonably track or internalize, and the red tape of documentation necessary to defend against often baseless claims. While broad protection against employee abuse is certainly important, today's employment laws impose such an extraordinary burden on employers that it becomes nearly impossible to run a compliant business in a cost-efficient manner. Unfortunately, when we make it undesirable to maintain a business in California, we lose revenue and opportunity at all levels of society.

SCHROEDER: At the SCV Economic Development Corporation, our clients are business owners who are looking to expand or relocate their business. When meeting with our clients we perform a retention survey that often turns into a conversation about improving labor laws. Wage and hour laws now are a major factor in how businesses decide to organize and staff their operations – they are making their decisions based on regulatory restrictions rather than on what makes sense from an operations or production point of view. Worker's compensation costs remain a major issue for California businesses. California rules will place companies into broad categories that often overestimate their worker's compensation risk. Other states do a better job of fine-tuning their categories so the rates are more appropriately assessed. The lack of understanding of what a business' true risk is causes California to lose companies to other states, just because their rates are lower.

◆ How important is it to have harassment and discrimination training in the workplace?

BENDAVID: For companies with 50 or more employees, training on unlawful harassment and discrimination is required by law. But, even for smaller employers, training is important and the right thing to do. By law, employers must take steps to prevent harassment and discrimination in the workplace. We often see claims for "failure to prevent" being included in employee harassment lawsuits. Having policies and training personnel about what harassment is (and what it isn't) and about how the company will respond to harassment allegations can not only help prevent claims, but can also be used to defend allegations as well. Training also opens the dialogue and acts as a reminder to employees that this is an important issue and that harassment and discrimination will not be tolerated.

SCHROEDER: Training is essential. AB 1825 requires two hours of training for any employee that manages, supervises or oversees the work of other employees. The training must be repeated every two years. It is highly recommended that smaller employers (<50) also provide training and reinforcement of their existing anti-harassment/discrimination/retaliation policies on a regular basis.

ROSENBERG: In my estimation, it's *the* most important element of any risk management program and the surest way to avoid a costly employment lawsuit. Since employers in California are legally responsible for whatever their supervisors say or do, it stands to reason that the company is better off if less offending behavior goes on. And, much of what the law requires is counter intuitive, so if managers aren't given the tools they need to navigate the litigious workplace minefield, they are apt to make costly mistakes that lead to big exposure. Also, the training is legally *mandated* for all people managers at least once every two years (and for new supervisors, within six months of being assigned supervisory responsibilities). What's more, California law requires employers to take *all* steps reasonably necessary to insure that a discrimination free work environment exists in the first place. The failure to train is exhibit "A" in a so-called "failure to prevent" discrimination claim. The lack of training can also be relevant for punitive damages insofar as it shows that the employer didn't care enough to take minimal steps to protect their employees.

LIGHT: Conducting harassment and discrimination training is a critical element of avoiding unlawful or inappropriate workplace conduct and defending against employee claims. Training is required for the supervisors of employers who have 50 or more employees; but it's a good idea for all supervisors as well as for rank and file employees in companies of any size, so they fully understand the risks to themselves and their jobs by harassing others in the workplace. Providing information about the complaint process and encouraging employees to come forward with any concerns can promote early detection of potential issues, which may avoid lawsuits later on. Conducting training also reminds employees at all levels that the company takes harassment and discrimination seriously, and intends to be proactive in keeping it out of the workplace.

MINKOW: Harassment and discrimination training is essential in the workplace. We typically recommend that all employees regardless of rank attend regular harassment and discrimination training. Increasing employee awareness of prohibited conduct is one step in preventing discrimination and harassment from occurring in the workplace. Regular training serves as a reminder to employees that the company is committed to providing a harassment and discrimination free workplace. Moreover, employees who feel they have been subjected to unlawful conduct in the workplace will be educated on how to bring the issue to the attention of management. Importantly, regular training is one piece of evidence an employer can use in defending a harassment or discrimination claim by demonstrating that the company took all reasonable steps to prevent such conduct in the workplace, as required by California's Fair Employment and Housing Act.

◆ What are some legal issues that companies overlook during the hiring process?

LIGHT: Employers often fail to check educational and professional references, question gaps in employment, and conduct any necessary pre-hire testing (including drug and alcohol testing and physical examinations where appropriate). Many problem employees would never have been hired in the first place if the employer "knew then what it knows now." Employers also disregard the benefits of pre-hire paperwork: applicants should be required to fill out an employment application, and employers should send written offer letters to new hires. Documenting the representations made by the applicant at the outset and the specific offer extended to that applicant can often avoid miscommunications and ensure quality hiring decisions.

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

ROSENBERG: Most employers erroneously assume that you can lay off whomever you want because layoffs aren't subject to legal scrutiny like a termination. Nothing could be further from the truth. In every layoff there are two significant legal questions that must be addressed BEFORE implementing a cutback. The first question is "why now?" — meaning what are the economic decisions driving the layoff. Second, "why me?" This is where the rubber hits the road. If the employee claims they were picked for an illegal reason, like race or age or gender, how will the company prove otherwise? Giving

40

'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.'
NICOLE G. MINKOW

Continued from page 38

a lot of thought to the answers to these questions in advance will pay big dividends if a layoff is challenged. Also, in a large layoff, there may be advance notice requirements under the federal and state so-called WARN laws.

MINKOW: There are many issues an employer should consider prior to terminating an employee. First, employers should base all employment-related decisions 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. Third, employers might consider obtaining a valid release in exchange for some amount of severance from a departing employee when there is a risk of a possible legal challenge to the termination. Fourth, companies in the process of conducting a "mass layoff" must keep in mind the California and Federal WARN notice requirements.

LIGHT: Employers often look solely at the needs of the business and ignore the potential legal ramifications of a layoff decision. When selecting employees for layoff, document the objective business reasons for the decision and look for potential discrimination and retaliation issues: have you selected (even inadvertently) a large number of minorities? People over 40? Employees who have made prior complaints? Employees are usually employed "at will," but that is not a defense when the employee claims he or she was fired for a discriminatory reason such as age, race, ethnicity, disability, etc. Whether the layoff decision is based upon seniority, restructuring or performance issues, documentation of that thought process prior to layoff can establish the good-faith, lawful basis for the selection process and avoid lawsuits by employees who claim their layoff was a subterfuge for a discriminatory decision.

◆ What are some of the most common leave of absence related mistakes that employers make?

BENDAVID: Employers often forget that many leave of absence laws overlap and have different requirements. For example a serious work related injury may trigger a workers compensation injury leave, and also require leave under the federal and state medical leave acts (Family and Medical Leave Act/California Family Rights Act) for employers having 50 or more employees. Also, time off for a work related injury may be a reasonable accommodation under the Americans with Disabilities Act and similar state law. Employers often forget to document that the time off is being provided as a reasonable accommodation and also being counted as FMLA/CFRA during which health benefits continue for 12 weeks.

LIGHT: Disability cases can be the most challenging to defeat, because they involve a complex series of state and federal legal requirements, and can often turn on subtle nuances of human communication. The most common employer mistakes include the failure to obtain clear medical documentation, insufficient communication with the disabled employee, prematurely terminating the employee while on leave and failure to provide arguably reasonable accommodations. Disability laws are usually intertwined in a manner often misunderstood by employers. For instance, contrary to popular belief, the expiration of an employee's FMLA or pregnancy leave does not end the employer's obligation to reasonably accommodate a disability by extending the leave where possible. Employers should seek the advice of employment law counsel before terminating a disabled employee, to ensure that all legally-mandated options have been exhausted and the documentation establishes fair and reasonable efforts by the employer to work with the disabled employee.

ROSENBERG: The single biggest mistake is not recognizing when a time off request is legally protected and must be accommodated. The next biggest mistakes are attempting to dissuade employees from using the allotment of time off which the law grants to them or giving them a hard time if they do. The leave laws outlaw retaliation (for having asked for or using legally mandated time off) and "interference" with leave rights (making employees feel the request is inconvenient or unwanted). Managers often unwittingly say or do things in response to time off requests which create legal liability simply because they don't know the rules of the road or the legal significance of what they say and do. Finally, terminating employees while on leave or upon their return is fraught with risk as well.

MINKOW: Managing employee leaves is one of the trickiest areas of employment law. Employers must comply with several leave statutes, including the Family Medical Leave Act, the California Family Rights Act, California's Pregnancy Disability Leave Law, the Fair Employment and Housing Act and the Americans with Disabilities Act. Moreover, those leave entitlements do not always run concurrently. This confusion leads to the following common leave mistakes: 1) failing to properly designate the leave of absence under the appropriate statute; 2) failing to send out FMLA/CFRA notices to an employee injured on-the-job and out on a workers' compensation leave of absence; 3) failing to provide "unpaid time off" as a reasonable accommodation to a disabled employee who has exhausted his or her job protected leave under the FMLA/CFRA; and 4) failing to properly engage in the interactive process with an employee returning to work from a leave of absence with work restrictions or requiring a further leave.

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

SCHROEDER: It is of critical importance that businesses in California maintain relationships with good employment law attorneys. Companies should hire great lawyers and build an understanding of the company's operations and potential legal risks *before* the company faces an employment law issue. The laws are changing frequently and court cases regularly provide new interpretations of existing laws, so it is wise for employers to attend seminars periodically in order to learn about the latest information. Organizations such as ours host these types of seminars, as do local chambers of commerce and other business support associations.

LIGHT: Keeping up with the constant stream of employment legislation, case law and administrative decisions is a daunting task for any business owner. Connecting with the right professionals and using them as regular resources allows business owners and managers to focus on running the business rather than researching legal issues. Employers should also be cautious about using materials or information gleaned from the internet or from the documents used in other companies, as each company is unique and specific laws or forms will not apply equally to all businesses. To keep our clients, business owners and human resource professionals informed, LightGabler LLP provides twice-monthly complimentary seminars on a myriad of employment law topics, providing substantive information and forms on the most common workplace issues.

◆ Looking to the future, do you anticipate more changes to the legal and employment law landscape in the coming years?

SCHROEDER: California is typically at the forefront of pro-employee legislation and boasts a judiciary that often leans in a pro-employee direction, and we have no reason to believe the next few years will be any different. Regulatory complexity will only increase. In the immediate future, employers will be challenged by implementation of the Affordable Care Act as they make changes to staffing profiles and benefit packages. As more components of the law go into effect there will likely be opportunities for interpretation of the law by the Courts. Collec-

42

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EMPLOYMENT & LABOR ROUNDTABLE

Continued from page 40

tively, these changes add to the difficulty businesses face as they work to expand their workforce in California. Unfortunately, our legislative process tends to look at these issues in a piecemeal fashion, never looking at the collective set of requirements businesses must comply with and creating a maze that all-too-often boxes the company out of common-sense approaches to business growth.

◆ What is one of the most important things employers should do to prevent a lawsuit from occurring?

BENDAVID: In my view there are two things an employer should do to reduce the risk of an employee lawsuit. First, fix any noncompliant payroll practices. Even employers who believe they are 100% compliant are likely to err given the constant changes in the law and the overwhelming number of steps needed to stay in compliance. Second, the employer should document why it is terminating an employee. Even though most are at-will, employees may believe they are terminated for unlawful reasons even when they are not. The documentation can be via email, memo, letter, discipline form, board of directors' minutes, termination memo or any other document to prove the real and lawful reasons for the termination. As a rule of thumb, a "good" termination is one that does not come as a surprise to the terminated employee.

ROSENBERG: Train, train and train again. Not only managers, but also line employees. Companies need to establish a culture where any behavior that runs afoul of the employment laws simply won't be tolerated. And, it starts from the top. If high level executives don't take these obligations seriously and model the correct behaviors, subordinates won't do so either. This not only goes for harassment and discrimination, but also the rudimentary compliance rules such like the wage-hour laws. It seems that hardly a day goes by where we don't see yet another class action filed accusing an employer of working people off the clock, cheating them out of overtime or some other compliance violation. And, it should go without saying that managers who ask or require employees to do something illegal when carrying out their work duties (or to cover up the manager's efforts to do so) really put the company at risk for a major lawsuit.

LIGHT: Document, document, document! In most employment cases, the key questions are "what happened and why?" Without documentation, the employer's only recourse is to put witnesses on the stand to tell their "story" and hope that a jury believes their testimony. With clear documentation, the actual events that occurred — and, more importantly, the motivation behind the employer's decisions — can be clarified and confirmed in a more objective (and defensible) fashion. All problems with employees should be documented in some fashion, whether on company forms, calendar entries, e-mails or post-it notes. Employees should be given multiple opportunities to address problems whenever possible, and employers should be clear about their expectations and whether the employee is meeting those expectations.

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

LIGHT: The best employment attorneys provide practical advice targeted to the specific business industry and environment in which the client works, taking into consideration the employee "audience" who will be on the receiving end of decisions made and policies implemented. Many disciplinary memos, policies and agreements can be written in less than an hour. Clients regularly call about disciplinary questions, and we can often draft the necessary language while on the telephone with our clients and email it to them at the end of the call. Talking or writing in "legalese" and confirming "the law" doesn't help the business owner – we work with our clients as a "silent partner" of the management team, to understand the needs of the business, the risk tolerance of the business owner, and the workforce we are addressing. Employment issues involving human interactions can often be stressful and urgent, and responsiveness at all hours, while working efficiently and effectively, is critical to our business owner clients.

BENDAVID: Our firm has a department specializing in labor and employment law defense. We also have the benefit of attorneys who practice in other areas of the law, like corporate, tax, real estate, and even family law. Often, issues will arise that require the expertise of a lawyer in another field. For example, we have property management clients with employees that were terminated and refused to vacate. Our real estate lawyers can step in to help expedite the eviction process. One of our partners (Barry Harlan) likes

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RICHARD S. ROSENBERG

to state his best assets are his "feet" – meaning if his clients have a question on another area of the law, he can simply walk down the hall and get the answer.

◆ What do businesses need to know about finding, interviewing and hiring the very best attorney?

ROSENBERG: First of all, look for experience, and lots of it. We are hired *because* we have presided over or litigated literally hundreds of thousands of personnel transactions. From that experience, we can handicap the likelihood of success and recommend alternative strategies that are more likely to get the desired result, or at the very least, avoid a catastrophe. Our job is to prevent problems if we get in on the front end or minimize the negative outcome if we sign on to the matter after all of the decisions have been implemented. Recommendations form others in your industry can be a good indicator of competence. Peer ratings are also helpful. The "Best Lawyers" designation and "Super Lawyer" listings mean that their colleagues place them at the top of his or her field. Finally, look at the firm's website to see if the lawyer has published articles in the field.

SCHROEDER: When it comes to handling an issue before it becomes litigation, it is important to remember that not all attorneys who profess to be employment or labor counselors have experience in the practical or pragmatic application of that law. Reading and understanding the "black letter law" is not the same as having the ability to translate that into real world scenarios or urgent employment-related decisions. Common sense goes far, but practical business sense is a tremendous asset for an employment law counselor. Businesses should also evaluate whether the lawyer has worked within their industry or with companies similar to theirs. Such attorneys will be better at assisting the risk and exposure of a business or of the case, if the employer has been sued.

LIGHT: Find the attorney who is willing to go above and beyond to protect and become personally invested in your business. Your employment attorney should understand your industry and your company, and should be willing and prepared to provide practical and understandable legal advice with an eye toward what will work for you, given your budget, your business goals and your workforce. Look for attorneys well known in the industry, who conduct regular seminars and publish ongoing updates and articles to educate and serve their clients on an ongoing basis. When speaking with your attorney, make sure that he or she makes every effort to understand exactly what you are trying to achieve and why, provides advice that avoids business risk and unnecessary legal expenses, and serves your best interests, not the lawyer's interests.