

LABOR & EMPLOYMENT

WHAT BUSINESS OWNERS AND EXECUTIVES NEED TO KNOW



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With the unique and uncharted scenarios that we have faced so far in 2020, businesses have been forced to face a whole new landscape in terms of labor and employment issues. This has left many executives struggling to find answers to crucial questions.

To address these issues and concerns, as well as other topics pertaining to employment law, 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 in the wake of the current pandemic crisis.

Here are a series of questions the Business Journal posed to these experts and the unique responses they provided – offering a glimpse into the state of business employment in 2020 – from the perspectives of those in the trenches of our region today.

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LABOR & EMPLOYMENT ROUNDTABLE

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SUE M. BENDAVID



What are the most significant new employment laws taking effect in 2020?

BENDAVID: One of the most significant laws that took effect in 2020 is the Families First Coronavirus Response Act (FFCRA). This requires many employers to provide paid leave for certain COVID-19 related reasons (e.g., for illness; quarantine; or childcare purposes). The law was written very quickly and required employers to move fast in understanding how it applies. If done right, employers can obtain a tax credit for some of the paid time off.

GABLER: The most significant change imposed by California's 2020 legislation was AB 5, addressing the classification of independent contractors and codifying the “ABC Test” established in 2018 in *Dynamex Operations West, Inc. v. Superior Court*. With the complex flow chart of businesses and professions in AB 5, the legislature created a detailed and somewhat inexplicable analysis of contractor classifications. This caused widespread panic among business owners at the beginning of 2020, as they considered whether sweeping reclassifications of their workers would be required. Of course, we could not have anticipated at the end of the 2019 legislative session that 2020 would bring with it the COVID-19 pandemic, leading to a series of complicated federal legislative efforts to provide benefits, financial relief and tax credits to businesses and employees alike as our country attempted to stem the tide of losses caused by the coronavirus. Between the FFCRA, EPSL, EFMLA, CARES, PPP and PPPFA, employers and their employment law counsel have had to work more closely together than ever before to understand, analyze and apply the rapidly-changing laws governing our “new normal.”

ROSENBERG: My list of labor laws that went into effect on January 1st are:

- Anti-Harassment Training Deadline Extended: SB 778 allows employers with 5+ employees until January 1, 2021 to train all non-management employees. The state offers a free on-line training program. Seasonal or temporary employees hired to work for less than six months must be trained within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first.
- Longer Time Period to Sue for Discrimination: AB9 extends the statute of limitations from one year to three years when suing for job bias.
- Arbitration Agreements Curtailed: AB 51 says that employers may no longer require an employee or job applicant to sign an agreement to arbitrate claims for violations of the state job bias laws or the Labor Code.
- “No Rehire” Provisions Outlawed: AB 749 prohibits employment dispute settlement agreements from containing a provision that prohibits or restricts the right of an employee from seeking reemployment with their former employer or its parent or affiliates.
- Cannabis Labor Peace Agreements. AB 1291 requires every cannabis licensee in California to enter into a “labor peace agreement” within 60 days of employing its 20th non-management employee.
- Lactation Room Enhancements: SB 142 enacts some significant new requirements related to what needs to be in a lactation room.
- Arbitration Penalties: Employers that do not timely pay fees relating to arbitration of employment disputes face stiff penalties under SB 707 and may lose the right to arbitrate the dispute.

What implications will the COVID-19 situation have on employment law?

GABLER: The most significant shift in employment practices is likely to be a greater move toward remote work on an ongoing basis, even after the pandemic has passed. Numerous employers are

now looking at long-term remote work options wherever possible, whether that is intended to protect employees, promote business efficiencies or reduce overhead costs. The courts and legislature have been slow to address the impact of technology advances upon current business models. Future legislation and cases will likely have to address the employer's obligation to provide or pay for hardware, software and data access for remote workers, the impact of California's burdensome wage and hours laws upon the flexibility and deregulation desired by remote workers, and the safety of a remote workplace over which the employer has no real control, among other questions posed by remote work options. Workplace health and safety will become more critical as well, as we explore methods by which to reduce exposure to airborne illnesses and the obligation to maintain a safe workplace. Similarly, leaves of absence and benefits for employees in crisis are likely to be the subject of legislative debates going forward. California is already more expansive than any other state in providing protected leave and benefits to employees, and we should expect that this movement will continue in the future.

ROSENBERG: The impact is huge and is only beginning to be felt. Employers will face COVID-19 related legal compliance challenges and legal claims for years as plaintiff's lawyers fashion new legal theories to hold employers accountable for worker safety and other matters. Initially, staff cutbacks due to the sudden business closures under the state's Safer-At-Home Order meant that thousands of employers had to issue state mandated WARN Notices. WFH arrangements added new wage-hour compliance challenges. The CARES Act brought us new federal laws on unemployment compensation, emergency paid sick leave and expanded paid Family Leave (with federal tax credits), then local governments got into the mix passing ordinances of their own on paid sick leave and rules for how employers must recall laid off workers. Add to that PPP loan forgiveness and the ever changing array of employee safety recommendations and guidelines from CDC, Cal/OSHA and state and local health officials that must be followed to operate during the pandemic or reopen. Finally, federal and state job bias agencies have issues an array of new rules and requirements on job bias, workplace COVID-19 testing and the like.

BENDAVID: Now more than ever, it's important for employers to ensure they have compliant wage and hour practices and leaves of absence policies. With more employees working from home, employers need to pay close attention to time keeping, expense reimbursement, off the clock work, meal/rest breaks, exempt vs. non-exempt status when employees work reduced hours, and other wage issues. Further, when employees need time off due to COVID-19 (for themselves, a family member, or child care), employers should consider the myriad leave laws including the new FFCRA, FMLA/CFRA, workers compensation, local and state paid sick leave laws, as well as laws protecting disabled workers. For companies that are now reopening, it is critical that they comply with all State, County, and City rules for social distancing, face masks, posters, and preventative measures to prevent the spread of the virus. Employers should download all applicable orders and protocols and make sure they put procedures in place. There are potential fines and liability if these are not followed.

For organizations who have undergone furloughs and layoffs, what are some of the legal challenges to consider?

GABLER: In considering furloughs, the most significant legal challenge is a prior DLSE opinion stating that a furlough of up to ten days is not considered a termination, thus implying that a furlough of more than ten days could be deemed a termination. In Califor-

nia, employers must pay out final wages and vacation benefits to terminated employees, or risk waiting time penalties of a day of pay for each day this pay is late (up to a cap of 30 days). If an employee is furloughed for more than ten days, employers should consider paying out available vacation pay (along with any wages due), to avoid a claim for waiting time penalties, even if the employer hopes to reinstate the employees in the future. In considering layoffs, employers must be able to demonstrate (1) the business case for the layoff, and (2) the legitimate business reasons for selecting the impacted employees. Although the need for layoffs during COVID-19 may seem obvious, the employer still must be prepared to demonstrate the business or financial reasons that a specific number of employees must be removed or specific positions must be eliminated. This is particularly the case in light of the availability of tax credits and federal benefits designed to assist employers in maintaining headcount and payroll during the pandemic. Then, the employer must be able to show that the employees selected for layoff were chosen for legitimate, non-discriminatory and non-retaliatory business reasons. Even in a crisis situation, employers must analyze and document their layoff decisions, particularly to avoid unnecessary liability in an already-challenging business environment.

BENDAVID: Make sure you can justify why some workers were laid off, as compared to their similarly situated co-workers. You should be in a position to explain why some employees were selected, to reduce the risk of discrimination claims. Be aware of state and federal WARN Act rules which require notices to employees and government officials when mass layoffs or plant closures occur. Make sure you understand the new requirements under Governor Gavin Newsom's Executive Order for California's WARN Act (Order N-31-20). The Order temporarily suspended the 60-day advance notice requirement for COVID-19 related layoffs, but employers must still give as much notice as possible and inform laid off employees of their eligibility for unemployment insurance benefits, among other things.

ROSENBERG: The safety guidelines for reopening are very complex and can easily trip up even the most careful employer. In addition, many cities have passed ordinances that require employees to recall their laid off employees in a certain order and make it a crime if these rules are not followed. Job bias laws can also trip up employers when deciding which employees to recall, how to implement required employee health screening and avoiding workplace harassment claims. Management training on all of this is a must. Also, Cal/OSHA COVID-19 rules require employers to update their Injury and Illness Prevention Plans to account for the aerosolized transmission of COVID-19.

What feels different, if anything, about the types of legal questions and issues coming up during this pandemic?

GABLER: As with any widespread public crisis, employers responding to the COVID-19 pandemic have been forced to make swift decisions to protect employees and business interests. Decisions made in the course of a public emergency must necessarily put health and safety first, and employment law compliance second. Whereas our typical efforts as employment lawyers are always intended to ensure legal protection while supporting business promotion, responses to pandemic questions must instead prioritize the health and safety of employees (and the general public) while avoiding business destruction. As an employment lawyer, it is always important to be flexible and creative in advising clients, so that legal compliance doesn't impair business efforts and goals. This is even more critical when day-to-day decisions could mean

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life or death in urgent situations. Questions such as “what policies should I put in my handbook” and “how do I handle this employee complaint” pale in comparison to questions such as “what do I do when my key employee is in the ICU on a ventilator” and “how do I protect my employees from their co-worker who just tested positive for COVID-19?” There is also a need to be even more compassionate than usual. While there will always be those employees who will try to take advantage of their employers, the majority of employees offering “excuses” for avoiding a return to work are doing so out of legitimate fear and concern for themselves and their loved ones, rather than a desire to play games. Employment issues are typically impacted far more by human psychology than legal analysis, and this is even more apparent during the current pandemic climate. What has been most noticeable (and heartwarming) in my discussions with business owners over the past several months is the clear desire to take care of employees as much as possible, even when the business outlook is bleak. The inherently human drive to overcome difficulty and to support each other in crisis gives me great hope.

ROSENBERG: There's very little that's familiar. There is a dizzying array of new federal, state and local laws and guidelines that employers must master and follow to get this right. Many of them are not consistent or are so new that there are no clear answers. One sign of trouble is the plethora of lawyer training classes on how to sue employers for violating these laws and regulations.

BENDAVID: When the pandemic first started, and shut down orders imposed, clients were forced to take immediate action and send employees home. We received panicked questions like, “now what do I do?” Clients asked about how employees can work from home; how they should be paid; what expenses the employer needs to reimburse, about partial unemployment insurance; about mass layoffs and Paycheck Protection Program (PPP) loans and more. With new laws being passed, we received numerous questions about leave laws, paid time off, tax credits, etc. Now that we are reopening, the questions are focused on safety measures, including part time scheduling, reopening policies and procedures, and what to do if an employee is infected by the virus, and how and when they can return to work after infection. What is different now is the sense of panic that employers have in dealing with this virus, as actions must be taken immediately.

Do you expect collective bargaining agreements to change in the future as a result of the crisis?

ROSENBERG: Yes. It's already happening. Unions in almost all industries are making bargaining demands around COVID-19 safety and staffing issues, recalling employees from layoff and expanded health benefits.

What advice do you have for employers that want to maintain a collaborative relationship with unions?

ROSENBERG: Get out in front of this. Work with your union to come up with a plan to address the myriad issues that arise from COVID-19 related matters.

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

BENDAVID: Pandemic or not, wage and hour laws will always be a key concern for employers. Employers should ensure they are properly paying their employees, reimbursing employees for nec-

essary business expenses and that employees are provided proper meal and rest breaks. Assembly Bill 5 which created the new ABC test for independent contractors vs. employees, is still a big issue for employers, particularly as companies look to downsize because of COVID-19. Employers should continue to be aware of the dangers of misclassifying workers as independent contractors. And, with the increased focus on the Black Lives Matter movement, we are seeing an increase in race discrimination claims. Companies should continue to train employees regarding their equal employment opportunity and anti-harassment policies.

What can employers expect from the California legislature this year?

BENDAVID: The legislature is continuing to look at the independent contractor classification issue and whether other professions should be exempted from the ABC test created by Assembly Bill 5. We also expect to see new statutes that are COVID-19 related, including statutory paid sick time.

What effect does the increasing number of millennials have on a company's approach to employee relations?

ROSENBERG: For most employers, a multi-generational workforce is a fact of life. Experts on generational issues tell us that the needs and objectives of the Millennial workforce is vastly different from other. With employee turnover being so expensive, it is critical for businesses to understand how each generation differs and to find the currency that will motivate them. Employers saw that big time with the rapidity by which this generation embraced (and caused employers to react to) the “Me Too” movement, issues of gender equity, LGBTQ rights, parental and family leave and the current racial justice issues that are bringing thousands to the streets all over the world. For companies to attract and retain these employees, they must be responsive to the needs of their workforce by coming up with policies and workplace practices that address their unique concerns.

BENDAVID: A multi-generational workforce can be both ideal and fraught with conflict. Millennials now make up the largest portion of the American workforce – about 35 percent. Employers need to understand that communications with each generation may need to be different. While the Baby Boomers may feel more comfortable with face-to-face meetings, Millennials may prefer electronic communications instead. The blunt approach of a Gen Xer may give offense to someone much younger. A Millennial's impatience with an older employee who is not so tech savvy could be construed as age discrimination. The key to avoiding these issues is to conduct regular training, and to reiterate which behaviors won't be tolerated, via company handbook, periodic email reminders, and other modes of communication.

How have the changes in marijuana laws affected your clients?

GABLER: From a practical standpoint, the legalization of recreational marijuana created 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

medical 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 need 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, but in the interim, the safest approach for employers is to define “under the influence” as a positive test result in employee policies, rather than attempting to discern whether an employee is actually impaired. Beyond these legal issues, there continue to be hotly-debated questions about the viability and efficacy of marijuana use (or derivatives thereof) for a variety of medical issues, and future legislation will have to consider where the use of marijuana may be more useful than detrimental, and whether there is a way to balance marijuana use with workplace safety and productivity.

BENDAVID: Many employers understand they have the right to a drug-free workplace because of federal prohibitions on marijuana. What employers struggle with, however, is how their actual company policies should be written and implemented. Should they turn a blind eye so long as marijuana use occurs off company property, and not during working hours? Or, should they have a zero tolerance policy, such that if a prospective employee tests positive, they are rejected and an employment offer rescinded? While employers have the right to drug test, you must ensure you comply with the law. Applicants and employees have certain privacy rights. However, if you have proper procedures in place you can make offers of employment conditioned on passing a drug screen for job applicants. Similarly, if you have proper policies in place, you can send existing employees to be drug tested if you have a “reasonable suspicion” they are under the influence. You should be able to articulate your suspicions. Carefully worded policies can help establish your requirements and describe under what circumstances drug testing will take place.

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 far less than it would cost to win the case. 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 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 in fee recovery to make settlement worthwhile. In some cases, hotly-contested litigation is necessary, such as when an opposing party is wholly unreasonable, or when other employees are waiting in the wings for their bite at the apple.

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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 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: When employees bring claims, mediation can be a cost-effective alternative to litigation, as it takes less time, energy and money. An experienced mediator can perform “shuffle diplomacy” and help each side realize that settlement may be better than the pain and costs of litigation. A good mediator can emotionally connect with the employee and help the employee understand they are not going to strike it rich by suing their former employer. The mediator can show the employee (and their attorney) the weaknesses in their case, legally and factually. Also, if the mediator is effective, the mediator can explain to the employer if they have any holes in their defenses and why settlement may be a more economical or better course of action depending on the facts.

ROSENBERG: Mediation works and in most cases proves to be a much better method of conflict resolution than going to court. Court statistics show that fewer than 5% of all employment cases actually go to trial. That means that almost nearly 95% of all cases will eventually settle. Mediation is a voluntary process that will enable parties to explore resolution confidentially before they have run up a drawer full of legal bills. Legal claims are costly to defend and time consuming. Mediation can be a great escape valve allowing the company and the employee to move forward while minimizing the cost and hassle of the litigation process. We recommend that the concept be introduced early in any dispute and that employers consider mediation as an internal HR process for lawsuit avoidance.

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

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, an employee is not permitted to use the trade secrets of the former employer to compete, nor to benefit himself or others. The same applies to solicitation of co-workers and customers. Employers should have clear non-solicitation and non-competition agreements which 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 or financial data in order to do it. Similarly, an employee can encourage a former co-worker to apply for an opening at his new company, but he cannot inform the co-worker that the new company provides greater compensation and benefits than what he 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.

ROSENBERG: I tell clients to be very careful and to be sure any contemplated restriction is lawful. California law is very protective of employee mobility, so most “non-compete” agreements are unenforceable. The law also permits employers to vigorously protect proprietary and trade secret information by having employees sign agreements which prohibit them from taking, using or making unauthorized disclosure of the employer's confidential or trade secret information. The key is taking a proactive approach to identify what information is legally protectable, having employees sign an agreement that properly protects that information and the employer consistently enforcing those secrecy rules.

BENDAVID: With limited exceptions, non-competes are unenforceable in California. If the exceptions do not apply to you, and if you have confidential information or trade secrets that you want to protect (e.g., the Coca-Cola recipe for example), then at a minimum, you should have strong confidentiality agreements with a trade secret protection plan in place. This includes having policies describing employee obligations, locked cabinets

or safes to contain confidential information with access given to only those employees with a need to know, among other steps. Note that non-competes in other states may be valid. So, if you are looking to hire an applicant from another state, make sure they are not subject to any restrictions that could land you in court. Your offer letters or employment agreements can include representations and warranties where employees affirmatively tell you the employee is not subject to any contract which would impact the employee's ability to work for you, such as a non-compete with a former employer.

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

GABLER: There is no question that the arbitration process is substantially less expensive and far less burdensome than the civil litigation process. Arbitration can be half the cost and may take half the time of a civil litigation matter. Arbitration is beneficial to employees, who typically are the most personally impacted by an employment dispute and need rapid resolution of their complaints to avoid ongoing disruption to their lives and careers. Arbitration is also beneficial to employers, as an arbitration agreement can include a class action waiver and serves to avoid a jury trial where the outcome may be skewed by personal bias and subjective opinions instead of an in-depth analysis of the applicable facts and law. Ultimately, there is no question that efficient, expedient and meaningful resolution of disputes serves all parties, allowing everyone involved to put the conflict behind them and move forward in a more productive and peaceful manner. When parties are unable to resolve their conflicts informally or through mediation, arbitration is far more effective than civil litigation in reaching that productive and peaceful outcome as quickly and efficiently as possible.

BENDAVID: Arbitration has both benefits and costs to consider. With a private arbitration, the case can be over and done with more rapidly, without public access, like in the court system. However, employers should weigh costs, time, the lack of an appeal if the decision goes against the employer, etc. Employers should also consider the benefits associated with class action waivers, while understanding that plaintiffs still may sue in court for wage and hour penalty claims under the Private Attorneys General Act (PAGA). Before employers elect arbitration, a serious discussion on the issues should take place so the employer can make an informed decision that best fits its circumstances. There are also potential legislative hurdles to arbitration that must be considered.

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

ROSENBERG: The biggies are: (i) not documenting performance problems in real time; (ii) not giving the employee a fair chance to succeed before being fired; (iii) not understanding that an employee's testimony about conversations with management is “evidence” that a jury can rely upon when making an award; (iv) not being consistent when meting out discipline (i.e., not treating likes alike); and (v) failing to understand that in certain cases (such as disability or religious accommodation), an employer must bend the rules and treating likes alike could get them in trouble.

GABLER: The most significant error made by employers is neglecting to document performance issues and any 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 him, and the employer promptly finds itself 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 and instead must invest additional resources in recruiting, hiring and training when the relationship doesn't work out. On the other hand, some

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‘Ever since the passing of California's mandatory paid sick leave law, as well as various cities' versions, we are recommending that employers have separate vacation and sick leave policies.’
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SUE M. BENDAVID



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.

BENDAVID: If you have participated in any of my trainings you may have heard me say the following: “If it is not in writing, it didn't happen.” And, “if it's not written well, then don't bother putting it in writing.” Not properly documenting the discipline is the number one mistake; and most employers know this. I frequently receive employer calls asking about a prospective termination, only to be told that they never documented the prior performance problems and even provided raises or positive performance evaluations. Even if you verbally counsel an employee, you should follow up in an email or other writing, preferably to the employee, to confirm the conversation took place and to identify what your expectations are. Do not discipline an employee for something they are legally entitled to do. For example, you should not discipline employees for taking protected time off.

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

BENDAVID: When preparing an independent contractor agreement, you want to ensure the agreement is first, defensible in court, and second, clearly demonstrates the contractor is NOT an employee. Make sure you look at Assembly Bill 5 (Labor Code Section 2750.3) and satisfy yourself that the individual qualifies as an independent contractor. Further, in addition to describing the basics, e.g. work to be done, total compensation, schedule for compensation, deadlines, etc., companies should make clear that independent contractors are responsible for paying their own income taxes, paying their own employees or subcontractors, and are responsible for their own expenses. The agreement should clearly state that the worker is an independent contractor and not an employee, is free to take on other work or projects for other employers, provides services to others, and that the independent contractor will defend and indemnify you if are sued as a result of the independent contractor's acts or omissions (e.g., if they harass someone else). You should also see if you can be named as an additional insured on the contractor's insurance policies, in the event claims are pursued.

ROSENBERG: Under AB 5, you must have a written agreement with every independent contractor. And, the agreement will be valuable evidence if the worker's contractor status is ever challenged. The best agreements are those that clearly lay out the facts demonstrating why the service provider qualifies to be treated as an independent contractor under the many requirements of AB 5. Employers also should add tight protections for the protection of the trade secrets that a contractor may encounter when doing the contracted-for work. Finally, be sure there is strong indemnity language that protects the company if the company is sued on account of something the contractor does.

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. This has become even more important in light of the California Supreme Court's 2018 Dynamex decision, which created a three-part “ABC Test” regarding the classification of workers as independent contractors,

and AB 5, effective January 1, 2020, in which the legislature codified the Dynamex decision and added a complex analytical process not only to the determination of whether a worker is a valid contractor, but which legal test should be applied to make that decision. Ideally, contractor agreements should include, without limitation, reference to the worker's status as a contractor (without calling the worker an "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), 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 qualified employment law counsel.

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

BENDAVID: The most common wage claims are failure to provide proper meal breaks; rest breaks; overtime; misclassification (exempt/non-exempt or employee/independent contractor); and corresponding claims for pay stub violations and waiting time penalties. We are seeing an increase in individual claims, as well as class actions and representative claims under California's Private Attorneys General Act (PAGA). Sometimes terminated employees will talk to a plaintiff's lawyer to complain about their "unfair" termination. And, even if their termination was not unlawful, it becomes apparent that the employer's wage practices were not in compliance. Even the smallest unintentional mistakes can lead to huge claims for wages, penalties, interest, attorneys' fees and costs.

GABLER: Class actions can arise from a wide variety of wage and hour violations, and every employer in California will have violations from time to time 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 paystub, 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 demonstrates that the company was aware of the law and made every effort to enforce it. Claiming that the employee "chose" not to take a meal or rest break is risky; any employee can argue that they were too busy with work to be able to do so even if management though the break was "provided." Then, the employer must track compliance and take action on any violations. Courts have held that a company with no penalty payments to any employee at any time has likely violated 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 if the company records and pays for the occasional penalty, so that you can show the court that you are aware of the rules and any violations of those rules, and are fully prepared to pay the applicable penalty to the employee in the normal course of business.

ROSENBERG: Surprisingly, we still see a slew of wage-hour class actions over the basics, like meal/rest period compliance, recording work hours, off the clock work (such as paying employees for required COVID-19 health screenings and security checks), overtime pay miscalculations (i.e., those that don't properly include all required payments such as bonuses, piece rates and other additional payments) and pay stubs that don't have all of the required information. In addition, just as COVID-19 came upon us, we were beginning to see class action lawsuit under AB 5 challenging a business's classification of workers as independent contractors. The new law created a presumption that all workers are employees and places the burden on the employer to prove otherwise. Under the new so-called "A-B-C" test, it is now much harder for employers to meet this burden. This affects hundreds of thousands of CA workers.

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

BENDAVID: No. Ever since the passing of California's mandatory paid sick leave law, as well as various cities' versions, we are recommending that employers have separate vacation and sick leave policies (i.e., two separate "buckets" of money that they can withdraw from, when taking time off). The sick leave rules are very strict, and you want to ensure you comply. Since there is limited flexibility on paid sick and more flexibility with vacation

- we suggest you separate the two. Further, vacation and PTO must be paid on separation. PTO thus can result in a higher pay out since PTO usually accrues at a higher rate than just vacation. With new statutorily required paid sick leave for COVID-19 purposes (e.g., FFCRA), having a combined PTO policy means you would potentially be required to provide even more time off, so separating out vacation and sick makes even more sense now.

GABLER: You would think so, 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 implemented in 2015). 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 pay-out 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, requiring additional sick leave hours in certain locations. 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 before the bank of paid time off has been exhausted. For these reasons, employers may wish to separate vacation and sick time, thereby saving money and reducing unanticipated absenteeism, instead of using a combined PTO policy.

ROSENBERG: It used to, but not any longer. Unlike paid vacation, unused earned paid sick leave does not have to be paid out when an employee leaves the company. That is, unless the sick and vacation is bundled together in a single PTO policy.

How has the worker's comp landscape changed in recent times?

ROSENBERG: One big change is the recently enacted COVID-19 presumption that employees who come down with the illness while they are working are presumed to have contracted the illness at work. This presumption goes away on July 5th.

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

BENDAVID: Make sure you have access to an HR professional who knows what they know and, perhaps more importantly, who knows what they do NOT know so they can reach out to attorneys who handle employment law matters. That HR professional should regularly attend seminars, read updates on employment laws, and keep their finger on the pulse as laws are changing. Our clients also read our blogs and attend our regular webinars and seminars during which we describe the changes in the law and the practical implications of those law changes.

ROSENBERG: Read our client bulletins, join industry associations and invest in a good Human Resources executive charged with the responsibility for legal compliance. Gone are the days when you can go it alone. Also, don't do your own legal research. There is an old saying that she who has herself for a lawyer has a fool for a client. Labor law compliance is too complicated to get your answers from the Internet. We are defending seven lawsuits right now that arose from an employer following advice gleaned from the Internet.

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

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‘Mediation works and in most cases proves to be a much better method of conflict resolution than going to court.’
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RICHARD S. ROSENBERG



every week, and regular education is critical to keeping up with new laws and workplace trends. Ignorance of the law is not a valid excuse for employment law violations, and continuing education goes a long way toward protecting the workplace. 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.

How does a law firm specializing in labor and employment differentiate itself from the competition in 2020?

ROSENBERG: The key ingredients are having lawyers who are attuned to: (i) taking the time to really know the client, their business, their needs and their goals; (ii) having a mindset of being a deal maker, not a deal breaker; and (iii) charging a fair fee for your services. There are lots of lawyers who are well versed in the basics, but very few have substantial trial experience. Also, you want someone who is adept at creative problem avoidance techniques. The lawyers and law firms that stand out are those who possess substantial industry expertise, are creative problem solvers and who take the time to really understand a client's goals and objectives. If you are going to court, you want someone who is battle tested and ready for the challenge.

GABLER: To be truly effective, it is not enough to be an employment law expert or to provide quality legal advice (although both are critical). Business owners should want and expect their employment law counsel to be an external team member of the organization, working closely with management to develop the most productive and efficient workforce as well as protecting against legal violations and resolving employee disputes. A law firm should invest in its clients' business needs and goals, rather than merely serving its own interests. As an example, since 2009, LightGabler has provided twice-monthly complimentary seminars, designed to provide ongoing guidance along with tips and strategies to ensure legal compliance. By actively investing our time and resources into our clients' businesses, we gain a deeper understanding of how we can best serve their needs when thornier issues arise, and we can share in the joy of their successes as much as we do our own.

BENDAVID: We represent employers only and provide consulting services on daily employee issues that are impacting them. We also defend employers in all types and all stages of employee litigation. This includes defending individual lawsuits, or class action/representative claims. We assist clients in mediation, arbitration, and trial. Even before we get to the stage where an employee makes a claim, we are intent on helping employers reduce the risk of claims being made in the first place. That means helping businesses manage challenging and often frustrating employee situations, training their staff, managers and HR professionals, auditing policies and pay practices, and advising clients when laws change, and regarding major court decisions affecting the way they do business. Additionally, unlike small employment law boutiques, we have the benefit of having lawyers in house with overlapping practice areas in a variety of business areas. Whether you're wrestling with the details of the CARES Act and Paycheck Protection Program, calculating tax costs and benefits, or worried about industry-specific compliance matters, we have a multitude of legal resources to help.