LABOR & EMPLOYMENT ROUNDTABLE 2015

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 in 2015 – from the perspectives of those in the trenches of our region today.

LABOR & EMPLOYMENT ROUNDTABLE

'The most significant change for 2015 that affects every employer is the mandatory paid sick leave requirement.'
NICOLE G. MINKOW

'We see many growing companies that do not have an employee handbook or any other policies giving rise to exposure on meal and break and harassment claims, amongst others.'
TOBIAS KENNEDY

◆ What are the most significant new employment laws that are taking effect in 2015?

MINKOW: The most significant change for 2015 that affects every employer is the mandatory paid sick leave requirement. This new law requires every company to analyze their existing sick leave and/or PTO policies to ascertain compliance. Most companies will need to revise their employee handbook and some may have to implement new leave policies where none previously existed. Also, FEHA's expansion to unpaid interns, volunteers, and individuals in apprenticeship training programs should not be ignored. Employers should be aware of this new law and take all reasonable steps necessary to prevent harassment and discrimination from taking place.

KENNEDY: Well, 2015 is really the first year of the PPACA's penalties being enforced for the employer shared responsibility provision. The law has been on the books since 2010, but we are finally in the year where non-compliance can cost companies money if they are an eligible employer. We have all heard so much about the ACA, but the one thing I personally like to stress to employers that I talk to is that they should be aware the freebie years are ending. For employers of greater than 100 employees, this renewal will be the one that they need to be compliant on, and for employers of 50-99 employees, it's next year's renewal, so the time really is upon us. Additionally, there are ACA reporting requirements that employers will really want to familiarize themselves with.

ROSENBERG: My top six new CA labor laws: (1) A new law requires almost every employer (regardless of size) to provide a paid sick leave benefit which accrues at the rate of 1 hour for every 30 hours worked. That law also mandates a detailed accounting of sick leave balances each pay period. (2) The extension of harassment and discrimination protections to unpaid interns and individuals in a limited duration program providing unpaid work experience. (3) Employers who use a temp agency to supplement staff are now liable to these workers for the any labor law compliance shortfalls of their agency. (4) Employers must add training on abusive conduct prevention to their existing mandatory sexual harassment training. (5) Undocumented workers who suffer workplace retaliation can sue for new penalties. Employers (and their advisors) who report these workers to the government can be held liable as well. (6) Stiff new penalties for employers who fail to abate workplace safety hazards.

BENDAVID: The most significant new employment law this year is the Healthy Workplaces, Healthy Families Act, which requires employers to provide paid sick days for California workers. Employers will be required to provide a minimum of three paid sick days for their own care or for a family member. Employers must consider whether to use a lump sum or accrual method. Even employers who already have a policy will likely need to make procedural changes due to strict recordkeeping and notice requirements. There are also unique provisions on how sick days may be used and on the amount of money payable to employees when taking time off. There are strict penalties for noncompliance. Other significant changes include expanded protections for unpaid interns, volunteers, undocumented persons and Medi-Cal recipients. And, Assembly Bill 1897 makes the client employer responsible for wage violations caused by a contractor who provides laborers (e.g., temporary staffing companies).

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

KENNEDY: There was one little quark in the PPACA legislation that ended up incongruent with State law, which California has fixed. In the Healthcare Reform bill, there is a maximum waiting period of 90 days for employers to add any new full timers to their benefits. Interestingly however, California came behind that and passed an even more restrictive law making the maximum waiting period just 60 days. In a somewhat rare piece of good news in the changing health care landscape, California walked back the 60 limit to come in line with the ACA's 90 day waiting period for 2015. What's important to note, however, is that most waiting periods are structured to be the "first of the month following X days" so do know it's a hard 90 days you need to be careful not to run over.

BENDAVID: There are three pending bills that employers should keep on their radar. Senate Bill 3 proposes to increase minimum wage from $10 to $11 per hour as of January 2016; and from $11 to $13 per hour as of July 2017. Assembly Bill 11 proposes to amend the Healthy Workplaces, Healthy Families Act to provide paid sick days to providers of in-home support services (who are currently excluded). Assembly Bill 67 would enact the Double Pay on the Holiday Act – requiring an employer to pay twice the regular rate of pay for work performed on a family holiday (Christmas and Thanksgiving).

◆ How will the new paid sick leave law impact employers?

ROSENBERG: Beginning July 1st, employers who don't provide paid sick leave benefits will be required to offer a minimum paid sick leave benefit to all employees (1 hour for every 30 hours worked). Employers who already provide paid sick leave or PTO benefits will need to be sure that the policy is compliant, both in terms of the amount of sick leave offered and the accrual rate (There is a limited exemption for certain unionized employees). Employers also must account to employees for sick pay accrual and usage each pay period on the employee's pay stub or another document distributed with each pay stub. Finally, employers must post a new paid sick leave benefit poster from the State and provide all overtime-eligible new hires with an updated Wage Theft Protection Notice.

MINKOW: For companies that already provide sufficient sick leave or paid time off, the new law will have a minimal impact and may only require some policy revisions and reevaluation of the accrual and carry-over requirements. However, many small businesses do not provide paid sick leave to their employees so these companies must now implement a new policy that complies with the law. Failure to do so may give rise to litigation that could be extremely detrimental to these small businesses.

◆ The new "wage theft" initiatives have been getting a fair amount of publicity. What are they and should businesses be concerned about them?

BENDAVID: The term "wage theft" has been used in connection with off the clockwork, overtime violations, paying less than minimum wage, or refusal to pay wages owed when an employee quits or is terminated. The California Controller and Labor Commissioner are cracking down on employers who don't properly pay their workers – by demanding restitution or filing lawsuits. The collected wages are transferred to the state treasury, to be doled out to affected employees by the Controller. Employers should ensure they establish accurate records of all hours worked and wages paid. Employers should provide accurate pay stubs in compliance with Labor Code Section 226. Employers who pay in cash are most at risk for being accused of wage theft. Also, all employees who are entitled to overtime must receive written notice stating the employees' regular and overtime rates. If employees earn incentive bonuses or commissions, those must be spelled out as well.

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

KENNEDY: As businesses grow, they need to be sure they are working intimately with their broker as their growth may see them arrive at different thresholds in the ACA. Hopefully, the broker is tracking their growth and being proactive in business forecasting, but it's prudent to be in conversation with the consultant as you see growth. Did you just get yourself over 50 employees? There are dramatically different expectations on your business in regards to PPACA compliance for being over 50 employees versus under 50. How about the 100-employee threshold? Once you hit that you see another round of new regulations. Are you getting to the point where you're issuing 250 W-2's now? There are several different sets of rules in the reform bill that are dependent on your size, so you want to be sure you keep an eye on that as you grow and hire.

MINKOW: The most common mistake a growing business makes is not implementing policies and procedures from the start. We see many growing companies that do not have an employee handbook or any other policies giving rise to exposure on meal and break and harassment claims, amongst others. While small businesses may not see the benefit of spending the money to have a good handbook prepared and implemented, putting solid employment policies in place, and maintaining a practice of complying with and enforcing those policies, will give these growing businesses a good foundation in the effort to avoid costly lawsuits down the road.

LIGHT: New businesses often categorize many of their employees as "exempt" salaried people not entitled to overtime, meals or rest breaks. Later on when they become larger and more sophisticated they learn the easy way (their new HR

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CARRIE NEBENS

'All members of supervision should be trained on labor law compliance because the law holds the company strictly liable for their behavior.'
RICHARD S. ROSENBERG

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Director enlightens them) or the hard way (lawsuit) that they shouldn't have classified the employee as exempt. A thorough HR review early on by a professional consultant or attorney can save headaches, and money, later.

NEBENS: In line with what you hear in the news we see some companies "low balling" salaries thus creating a minimal salary growth. When employees are being paid at the low end of the scale companies run the risk of losing good people. Offering a low salary creates ill will at the start. Either employees will not accept positions or the will but have a poor impression of the company. More importantly a "good" employee should easily pay for themselves and if they are not "earning their keep" companies shouldn't retain them. Employees are the life line of a growing company and paying them fairly will get a lot more in the long run.

ROSENBERG: A big mistake is not realizing that job bias laws impose strict limits on what interviewers may ask a job applicant in an interview and on a job application and restrict what information you can look into about an applicant's background. Since these rules are counterintuitive, it's imperative that people doing the hiring receive training on what's permissible. Second, all compensation practices should be reviewed to insure compliance. Many common practices are not legal. This leads to a huge liability exposure for the company, and perhaps its owners as well. The fact that an entire industry does something is no defense whatsoever. Third, all members of supervision should be trained on labor law compliance because the law holds the company strictly liable for their behavior. Expensive litigation often results when supervision is clueless about the legal implications of their behavior toward employees on and off the job.

BENDAVID: The fastest way for growing businesses to get into trouble is to ignore or put off good record keeping. One way to get into trouble fast is by mismanaging time keeping. Don't allow employees to work "off the clock" or as "independent contractors" or you may later face wage claims. Another key point is to timely document performance problems, including verbal warnings and subsequent disciplinary measures. When an employer sugar-coats performance evaluations, it makes it difficult to terminate when necessary – and you run the risk of the employee claiming s/he was fired for an unlawful reason (wrongful termination). The same applies to employee references. If you provide a glowing review, that former employee may question why s/he was let go in the first place. Growing business would be well advised to create legally compliant policies and distribute to employees. If necessary, these can be used as evidence in defending employee claims.

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

MINKOW: There are many issues an employer should consider prior to terminating an employee. First, 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: I still see companies fail to document the reasons for the termination, whether performance, malfeasance, attendance or something else. Employers need to prepare a memo to the file (with backup documentation) and a shorter version to the employee as to the reasons for the termination. "At-will" is not a defense to claims of discrimination, harassment or retaliation, and the failure to document the reasons will weaken the employer's defense later. It's helpful to be able to send to the employee's attorney or the government agency (DFEH or EEOC) a pile of paper to show that "no, we didn't terminate for age or disability, here are all the reasons," well documented beforehand.

BENDAVID: Establish and document criteria for identifying workers to be laid off. Determine whether the decision is based on seniority, experience, job performance, or disciplinary history. 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. Look at the layoff list as a third-party might and see if there are any potential problems (e.g. statistically high number of older workers). Apply similar rules to terminations: your reason should be established via policies (such as in a handbook). Demonstrate your reasons with documented facts (in writing). Don't "sugar coat" and don't call a termination for cause an elimination of a position if that's not what occurred. Keep in mind that employees who claim wrongful termination often say they were surprised – because an employer gave them consistently positive reviews.

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

NEBENS: Workers Compensations had been extremely challenging prior to 2003. During the Republican administration from 2003-2010 several reforms where put in place that helped improve the California workers comp landscape. Since 2011 those improvements have been eroding. The system is mired in bureaucracy and fraud and is not business friendly. Not only is the current workers compensation challenging but my concern is could get worse before it gets better.

◆ How serious a legal issue is social media in the workplace?

ROSENBERG: Very serious. The National Labor Relations Board has issued numerous decisions against employers who discipline employees over their social media content. Many of these decisions call for the reinstatement of these workers with back pay. The NLRB gives employees a very wide berth to openly criticize management and the company on social media. And, it's illegal to have a written social media policy that unduly restricts employees' social media activity, even if no one has ever been disciplined under it. Employers are urged to: (i) have an NLRB expert review these policies; (ii) train managers on these rules; and (iii) use extreme caution before disciplining or terminating an employee for their on line communications.

MINKOW: Social media is here to stay and employers should embrace it. The biggest risk to employers is when they take action based on a social media comment or conduct as this could give rise to several challenges. For example, an employer who terminates an employee for complaining about a manager on social media could be exposed to liability for prohibiting the employee from discussing the terms and conditions of employment. Employers are cautioned to make these decisions with counsel.

BENDAVID: Social media can be a huge problem for employers. To start, employees are spending more of their workday logging onto social media websites and not performing their required job duties. Further, social media posts made by your employees are often breeding grounds for discrimination and hostile work environment harassment claims. And, sometimes hiring supervisors may be accused of unlawfully weeding out applicants if they check social media websites (e.g., based on race, religion or sexual orientation). Apart from that, there have been some interpretations of the law stating that employees are allowed to engage in union organizing efforts through the use of social media even if that means they publicly disparage their supervisor or their employer, so terminating an employee for that reason could be problematic.

◆ Should employers be considering any changes to their email/electronic communications policies following the recent NLRB ruling allowing employees to use their employer's email system for union organizing purposes?

ROSENBERG: Yes. The NLRB ruled that employees have a presumptive legal right to use the company email system to communicate about union organizing or to engage in other so-called "protected activities" on the employee's non working time (i.e., lunch and rest breaks, before/after work). Decades of NLRB legal precedent make clear that the term "protected activity" broadly extends to grousing about wages, hours and working conditions, including saying uncomplimentary things about the company and it's management. Most computer access policies don't comport with the ruling because they either contain a blanket prohibition on employee use of company email for non-business messages or limit personal use based upon content. Employers will need to revise their policies to insure employees understand that they

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JONATHAN FRASER LIGHT

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are permitted to send non-business email during their non-working time or to engage in other so-called protected activities. To be sure you get it right, employers must consult with a specialist with extensive NLRB experience.

◆ How important is a digital footprint, from the prospective employee's perspective?

NEBENS: Every person embarking on a job search thinks they have all the bases covered: resume, cover letter, and good references. But many forget about how important their digital footprint is. In today's connected world a candidate's online activities are only one small search away. This means that everything you do online has the possibility of being seen by a potential employer. Not only can these employers see what a candidate gets up to in their free time (and however scandalous that may be), they can also find out about the candidate's attitudes about work and consider just how suitable for the job the candidate might be. As more companies turn to researching their candidates online, it's becoming more important for job seekers to understand their online presence as well as how to improve it.

◆ What are some key ways employees can optimize their digital footprint?

NEBENS: The first step to evaluating and improving your online presence is to learn what other people see when they look for you online. Go to the most popular search engines and do a search for your name – preferably the name you list on your resume or job applications. What results are returned? Are they positive? Is there anything that needs to be remedied? Privacy is important too. Many social networks' default privacy settings are set to public. The settings you choose will most likely be on a case-to-case basis. Maybe you want to fully protect your personal Facebook page while keeping your professional Twitter account available publicly, for example. Candidates should be careful to go through each of your profiles and adjust the privacy settings accordingly.

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

BENDAVID: We often hear how difficult and time-consuming it is to keep up with California employment laws since they change so frequently. Many of our HR contacts stay abreast of the new laws by attending seminars at various venues (HR associations or at our law firm). Other associations also provide updates (including chambers of commerce and bar associations). There are also webinars and easy reading material from attorney blogs who often post updates on the latest court rulings, and changes in labor law. Make sure you have a good HR team and/or a good employment attorney. These are the people whose job it is to keep up.

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

◆ With California law now requiring employers to add "abusive conduct" training to their mandatory sex harassment training, how serious a legal issue is "abusive conduct" in the workplace?

LIGHT: The problem lies not only in the obvious morale problems created by a bullying co-worker (bad) or abusive supervisor (worse), but it opens the door to employee claims that they are being bullied because of their race, age, disability, etc. The failure to rein in an abusive employee allows the employee to claim discrimination, harassment or retaliation, which carry several types of damages and attorney fees. So "supervisor Bob just being Bob" is no longer acceptable because of the serious legal implications such behavior creates beyond just being a jerk.

BENDAVID: Abusive conduct, or bullying, can be either verbal or physical. Both forms take a toll on your employees' physical and emotional health. The legal repercussions can manifest into hostile work environment (harassment) or retaliation claims – not to mention low morale and productivity. If an employee files suit for harassment or retaliation, they will often add claims of "Infliction of Emotional Distress" against the employer and the individual employee accused of abusive conduct. This type of conduct can also increase an employer's risk for workers compensation stress claims.

ROSENBERG: According to the author of the bill, numerous studies have shown that abusive work environments can have serious effects on targeted employees, including feelings of shame and humiliation, stress, loss of sleep, severe anxiety, depression and many other stress-related disorders and diseases. Workplace bullying is not just an employee issue. Abusive work environments can reduce productivity and morale, which may lead to higher absenteeism rates, frequent turnover, and even increases in medical and workers' compensation claims. While current job bias laws already protect employees from abusive treatment at work on the basis of race, color, sex, national origin, age, sexual orientation, gender identity and the like, "bullying" does not always qualify under any of these categories, leaving targeted workers vulnerable. The new law aims to hopefully reduce the incidence of workplace bullying by requiring larger companies (50+ employees) to include training and education about "abusive conduct" when doing their mandatory sexual harassment training.

◆ Domestic violence has been in the news a lot lately. Does the law impose any requirements on employers who employ someone who is a domestic violence victim?

BENDAVID: Employees who are victims of domestic violence may request time off. The time off may be used to handle most of the consequences of a domestic violence incident, including to seek medical care, psychological counseling, restraining orders, or finding new accommodations. Employers are prohibited from firing, discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault, or stalking for taking time off from work. Under the new paid sick leave law, employees will be legally entitled to use their sick leave time if they need time off because of domestic violence. If employers learn of domestic violence, they should make sure that the privacy of the individual is protected.

ROSENBERG: Yes. Employers must afford victims of domestic violence or sexual assault support and time off as required by law. In companies with 25+ employees, the employer may not discharge, discriminate against or retaliate against a domestic violence or sexual assault victim for taking time off from work: (i) to seek medical attention for injuries; (ii) to obtain services from a domestic violence shelter, program or rape crisis center; (iii) to obtain psychological counseling; (iv) to participate in safety planning; or (v) take other actions to increase safety from future domestic violence or sexual assault, including temporary or permanent relocation. These employees are also allowed to use any paid sick leave benefits for such absences. It's also really important that managers and even co-workers be sensitized to the unique challenges these employees face. It's easy for co-workers and manages to express disdain toward these employees for taking this time off.

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

LIGHT: Document, document, document. Even a simple email summarizing a conversation is helpful. If the employee refuses to sign, don't sweat it, just note she refused to sign. Tell your managers to write things down and email them to HR or to the employee. They can't be afraid of that confrontation. They're managers, so suck it up and take on that responsibility. It can save a lot of money at the back end if things go badly with that employee later. Paper, whether electronic or hard copy, is the manager's best friend (but please, don't circulate jokes to your staff!).

ROSENBERG: Many lawsuits arise from the simple fact that 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 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 the file 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 before a gov-

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ernment agency or trying to convince an inquiring lawyer not to take the case. Also, be sure no one in management has asked the employee to do something illegal or asked the employee to cover up for management's doing so. That's a recipe for an expensive lawsuit.

BENDAVID: Employers cannot "prevent" all lawsuits. They are an unfortunate reality in California and are often brought by disgruntled employees who were fired for good reasons. But an employer can reduce the likelihood of being sued and help defend if they are. Document everything. Before firing an employee, make sure you have lawful reasons, and that the reasons are on record. A good termination is one that does not come as a surprise. Make sure your company policies are clearly written, whether you're outlining your expectations of your employee's work performance, your meal/rest break policies, your leave of absence policies, or your dress code. If an employee makes a complaint that you or a co-worker violated the law, thoroughly investigate and record the findings. Properly worded emails, signed letters and interoffice memos are absolute musts. If you are firing for cause, make sure you have or prepare documentation that can be used as evidence to support the termination decision.

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

ROSENBERG: No. California law has long prohibited employers from asking about (or using) arrest and certain conviction records when evaluating job applicants. Employers must know these rules and scrub employment application forms for prohibited inquiries. Further, since statistically there are more criminal convictions among minorities and persons of color, EEOC recently issued enforcement guidance on the subject. The guidance prohibits an outright ban on hiring all convicted criminals in favor of a more nuanced job application process that requires an employer to evaluate the criminal offense against the job duties. According to EEOC, before rejecting an applicant because of a criminal conviction record, the following must be considered: (i) the nature and gravity of the offense or conduct; (ii) the time that has passed since the offense, conduct and/or completion of the sentence; and (iii) the nature of the job held or sought. EEOC places the burden squarely on the employer to demonstrate that there is a real connection between the criminal offense and the applicant's intended job duties.

LIGHT: No. State and federal law prohibit this, and in fact the job application must contain language specifically indicating that a conviction is not an automatic disqualifier. San Francisco has added "ban the box," which prevents this question until later on in the hiring process (after an offer). In addition, the EEOC has issued its "green rules," designed to force employers to scrutinize convictions to determine with greater certainty and to a higher standard whether the conviction will truly impact the workplace. An old conviction, a conviction unrelated to the employer's work, a job that will be closely supervised and doesn't involve independent work away from the facility, all may suggest that the conviction is irrelevant to the job.

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

NEBENS: Savvy candidates for employment should always remember to do an image search of themselves from the beginning. If you are applying for a job, you'll want to look closely at any photos of you that are public. Do they accurately represent how you want to be seen by potential employers? Your digital footprint is more than just words. Either delete questionable photos or hide them with strict privacy settings. You may also need to ask friends to delete or un-tag photos of you that they have on their profiles.

◆ With wellness programs all the rage, what are the legal issues employers face when implementing such a program?

LIGHT: Employers need to be wary of obtaining, even inadvertently or innocently, personal health information that may have HIPAA privacy implications. A wellness program generally requires employees to offer up such information, or there may be pressure to join the program; and then less healthy employees are singled out and perhaps ostracized or ridiculed. There is also a federally imposed cap of 20% of the employee's medical insurance premium as to the bonus payable to a participating employee. Just as medical plans can't discriminate against less healthy employees in premium payment levels, wellness plans need to ensure that no discrimination occurs.

◆ What are some of the most common

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Leave of Absence related mistakes that employers make?

MINKOW: The most common leave-related mistake is failing to provide unpaid time off as a reasonable accommodation to a disabled employee who is unable to return to work after the expiration of his or her protected leave under the FMLA and/or CFRA. Both California's Fair Employment and Housing Act and the Americans With Disabilities Act require employers to provide a reasonable accommodation to a disabled employee, unless such accommodation would pose an undue hardship upon the employer. The cases confirm that a leave of absence is a reasonable accommodation under the law. Implementing a hard and fast cap on the length of that leave (i.e. maximum of 6 months beyond FMLA exhaustion) is also a grave mistake as each employee's situation must be analyzed on a case-by-case basis.

ROSENBERG: Most LOA lawsuits issues arise from a lack of education on the employer's part about: (i) which absences are legally protected; (ii) how much time off the law affords to employees; and (iii) how absence requests must be handled. The law gives employees wide latitude to be absent or tardy and it's illegal for employers or co-workers to give them a hard time for it, or worse yet, discipline employees for having used legally protected time off. Doing so gives rise to expensive claims that the employer unlawfully "interfered with" the employee's rights or discriminated against the employee. These laws also require employers to communicate these legal rights in writing via a workplace poster and in the employee handbook. Most handbooks we review are legally deficient in this respect. For risk management, we urge employers to: (i) be sure time off policies are legal; (ii) post the posters; and (iii) train management on these complex rules.

LIGHT: When the 12 weeks of FMLA time runs out (or the employee isn't eligible for FMLA), employers often forget that they still must assess whether they can reasonably accommodate additional time off under the ADA or similar state laws. Employers should bend over backward to accommodate additional time off, as these decisions are routinely second-guessed because the employer probably could have done more to accommodate the time off. Also, employers need to document every encounter with the employee regarding the "interactive dialogue" to determine if there is a reasonable accommodation available.

BENDAVID: The most common leave of absence mistake is not realizing that many leaves overlap. For example, a workers compensation leave may also trigger rights under the Family and Medical Leave Act/California Family Rights act (FMLA/CFRA). It may also have overlapping protections under the Fair Employment and Housing Act and Americans with Disabilities Act (FEHA/ADA) if the leave is for a disabled worker. Though employers sometimes grant extended time off, they often fail to document that the time off falls under these laws. Another frequent mistake is to fail to engage in and to document the "interactive dialogue" with an employee who is disabled. Such a dialogue is required so that the employer can discuss the essential job functions of the employee's position and any reasonable accommodations the employer can provide (such as a leave of absence).

Any tips for the modern employee candidate?

NEBENS: Showcasing your portfolio and past works online can be a great way to impress potential employers. Think of your online presence and portfolio as a supplement to your resume. Show employers what you are capable of and what you can bring to their team. To further optimize your digital footprint you can register your name as a domain or get your own website to host your profile on. Having your own website means you'll have at least one property online that you have complete and total control over.

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

BENDAVID: Most clients are worried about being sued, even if they know they had good intentions and were trying to do the right thing. Most clients understand they should have documented performance problems, but acknowledge their failings in doing so. Many clients are also troubled on learning that a practice they have been utilizing for years (with no problems at all) is actually unlawful or has now become unlawful due to law changes. Clients can avoid some of these problems by staying abreast of the law and by periodically amending policies and procedures when needed.

MINKOW: Most companies are simply worried with "getting it right." There are so many rules and regulations to keep track of, especially with regard to wage and hour issues. This is one area that even the good intended company can make

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LABOR & EMPLOYMENT ROUNDTABLE

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an honest mistake, leading to significant exposure. This is why having the employee handbook reviewed regularly by competent counsel is key. Also, consistent enforcement of these policies is necessary.

◆ What are the biggest off balance sheet liabilities employers face?

LIGHT: Class action wage and hour claims that are hidden for years; and then a single unhappy employee finds a lawyer and makes a class action claim involving hundreds of (or just a few dozen) employees going back four years. A single claim for just two missed, short, or late meal breaks per week (or rest breaks) at, say, $20 per hour is $8,000 over four years (2 per week x 50 weeks x 4 years = 400 meals x $20 = $8,000); and that's before adding another $8,000 in penalties, plus interest and attorney fees. Multiply that by the number of affected employees and that could cripple a company. Do an HR audit ASAP!

ROSENBERG: The top three are: (i) non-compliance with wage-hour laws; (ii) the employment of unauthorized workers and (iii) absolute corporate liability for the errant behavior of anyone in supervision for acts of workplace harassment, discrimination and retaliation. None of these are obvious, yet each poses a huge threat to the company's bottom line. And, the first two items on the list are uninsurable. With six and seven figure jury awards and agency prosecutions becoming almost commonplace, employers are urged to do three things right away. First, audit compliance and come up with a plan to address any compliance deficiencies. Second, train all managers on the rules of the road for hiring and how to properly fill out the mandatory Form I-9. Third, train all levels of supervision about their role and responsibility in regard to the company's labor law compliance.

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

LIGHT: Answer the phone and email promptly. Provide clear, simple advice without sounding like a long-winded cover-every-contingency-even-the-less-than-1%-possibilities attorney. Learn about businesses and how they work. Be practical and offer solutions, not just alternatives. Clients want to know what you would do, not three recommendations and they have to pick. There's risk in every decision, but as a practical matter one solution may work great and be relatively low risk; but some attorneys won't take any risk in their advice and that's not how business works.

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

MINKOW: There are so many experienced and qualified attorneys in the Los Angeles area that finding the right one can be a daunting task. Look for attorneys that are experienced in the practice area but also take the time to learn about your company and your business. Employment law advice is not always a "one size fits all" solution. Each business is different and your attorney should appreciate the nuances of your company and your industry. Look for attorneys who conduct regular training seminars, as they are also typically known in the industry. Our clients like the personal attention they receive, as they feel like their issues are our top priority. The bottom line is that a company needs to trust their counsel.

BENDAVID: Ask for referrals from those you know and trust. Look for someone with experience in handling employment law and who can understand you and your risk-tolerance level. Interview the person to make sure you are a good match. Not all attorneys are the same and lawyers have different strategies based on their personal experiences. Beyond that, find an attorney who's knowledgeable and capable of reviewing your current policies and procedures – in all aspects of your dealings with employees, not just someone who only wants to deal with hearings and litigation. Make sure they understand the big picture of your company and your short and long-term goals.

LIGHT: Don't be afraid to ask if the attorney has specific experience in the category of work you need. Have them provide examples. Find out, for example, if they are primarily a business lawyer dabbling in employment law (always a dangerous category), or whether they have hands-on experience advising companies on day-to-day employment issues. It's a bonus if they have had trial experience: they can see what the back end of a bad situation looks like, and can provide even better preventative advice because they will be able to answer the question, "How's this going to look to a jury in a year if this goes badly?"