LABOR & EMPLOYMENT

ROUNDTABLE DISCUSSION

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Inside The Valley has turned to some of the leading employment attorneys and experts in the region to get their assessments regarding the current state of labor legislation, what changes have come to the labor law landscape in light of recent challenges, the new rules of hiring and firing, and the various trends that they have been observing, and in some cases, driving. Here are the unique insights they provided.

Which of California's new employment laws are most likely to lead to legal action?

HREN: In prior years, employers were not required to accommodate an employee's use of medical or recreational marijuana. This meant than an employer could deny employment to an applicant that tested positive for marijuana or terminate an employee who tested positive. Effective January 1, 2024, a new law prohibits employers from discriminating against an individual who tests positive for non-psychoactive cannabis metabolites in their urine, hair or bodily fluids. This does not mean that employers can no longer test for marijuana, it just means an employer must use a more sophisticated test that can determine whether the employee is currently under the influence of marijuana, as opposed to simply having cannabis in their system. Practically speaking, this new law will likely result in much less employer drug testing given the costs associated with a more sophisticated testing procedure. Employers need to be sure that if they are testing, they do not disqualify an applicant from employment, or terminate an existing employee who tests positive for non-psychoactive cannabis metabolites. We will likely see a lot of litigation surrounding these issues.

BENDAVID: Senate Bill 497 creates a new "rebuttable presumption" if an employer takes "adverse action" within 90 days of certain protected employee activities. Now more than ever, documentation of the employee's performance problems resulting in the termination decision is key to rebut that presumption. This can help if the terminated employee claims retaliation or wrongful termination. Several new laws create new and expanded leave entitlements for employees. This includes California Senate Bill 616 (expanded paid sick leave) and SB 848 (time off for reproductive loss). Local, state and federal leave laws sometimes overlap and contradict – to comply with all laws requires vigilance.

LIGHT: The most likely new employment laws in this category are actually coming from the National Labor Relations Board (NLRB). This federal agency, which covers union and non-union companies, is cracking down on company policies that tend to inhibit potential union organizing, as well as complaints about wages, hours and working conditions. Cameras in the workplace are an example, as any such placement would be presumed illegal unless the Company has a compelling business purpose for their use and does not have a less restrictive means of accomplishing that purpose.

> "CALIFORNIA EMPLOYERS HAVE BEEN FORCED TO JUGGLE DIFFERENT MINIMUM WAGE RATES IN MULTIPLE JURISDICTIONS."
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> –SUE M. BENDAVID

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

KANTOR: Employment disputes bring along with them uniquely messy emotions, and often times an employee's attorney is not able or willing to get through to them to convey weaknesses in the case. At mediation, an employee can have a chance to tell their story and feel heard, while also hearing objective facts and law from a third party neutral, enabling the parties to have a chance at resolution based on the realities of the litigation, rather than the feelings surrounding it. As an employer, litigation – no matter how righteous your defense – is going to be disruptive, expensive to defend and taxing. It is usually worth it to take advantage of this confidential process to see if you can get back to doing what you do best – running a business.

LIGHT: It's an effective way to resolve class action and PAGA cases, as probably 95% or more of these cases resolve at mediation or court-mandated settlement conferences. They are equally effective in one-off wrongful termination cases. The courts will force mediation at some point, so getting to that stage sooner than later is worth it to save on attorney fees that result from protracted and unnecessary fights, often over document production. Be prepared for a hefty mediator's fee, as much as $18,000-$25,000 per day in class action cases. But in cases in which seven figures may be at stake, the employer's half share of that amount is worth it.

What are some of the latest developments in minimum wage?

BENDAVID: For several years now, California employers have been forced to juggle different minimum wage rates in multiple jurisdictions. Now we're seeing a trend of higher pay rates for different industries. For example, California's minimum wage is now $16 per hour as of January 1st. If an employee works in the City of Los Angeles the minimum is $16.78, and in certain parts of Los Angeles County it is $16.90. (Those latter rates will rise in July 2024.) However, certain fast food workers, health care workers and hotel workers will have different minimum wage requirements depending on the jurisdiction and their jobs. Employers must now consider industry, location, whether or not employees travel through various jurisdictions to perform work, and minimum salary thresholds when calculating minimum wage. When new rates go into effect – the dates vary by industry and jurisdiction.

KANTOR: New California laws impact minimum wage requirements in the health care and fast food industries. Under Senate Bill 525, certain covered health care employees of certain health care facilities will receive substantial increases in minimum wage ranging from $18-$25 per hour based on their grouping and according to a schedule that begins June 1, 2024. Under Assembly Bill 1228, fast food employee minimum wages will rise to $20 per hour on April 1, 2024 at national fast-food chains operating in California. Numerous cities throughout California have local ordinances that place the minimum wage above that which California requires. Employers need to be sure they are reviewing local and industry ordinances to ensure they are correctly paying employees.

LIGHT: They are likely going to continue to rise. The Governor may impose a 3.5% increase annually per the statute, and local jurisdictions are raising rates even higher. As those rates increase, it puts pressure on wages for workers already at or near that low rate of pay; thus, employers need to plan for that domino effect. Federal minimum wage continues to languish at $7.25 an hour, which is irrelevant in California, however.

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

KANTOR: Stay away from non-competes. In fact, the California legislature, in addition to recently confirming that most non-compete provisions are unlawful and void, and providing that employees can now even directly sue an employer that enters into or tries to enforce a non-compete, also just added an urgent obliga-

tion that employers need to be aware of. By February 14, 2024, employers must notify all current employees and former employees employed after January 1, 2022, who had non-complete clauses in their contracts or non-compete agreements, that the noncompete clause or agreement is void. The notice has to be a written individualized communication to the employee or former employee, and delivered to both their last known address and email address. Be sure to get these notices out right away! Note also that these news laws clarify that non-competes are not enforceable in California even if the contract was signed or the employee worked outside of California.

"EVERY EMPLOYER WITH AT LEAST 25 CURRENT EMPLOYEES ALMOST CERTAINLY SHOULD HAVE ARBITRATION IN PLACE.

–JONATHAN FRASER LIGHT

BENDAVID: Two new laws impact an employer's ability to include restrictive covenants in employment agreements. Under SB 699 California-based employers may not enforce noncompetes no matter where or when the provisions were written. Assembly Bill 1076 states "any noncompete agreement in an employment context…no matter how narrowly tailored," is considered void. Additionally, AB 1076 requires employers to inform former and current employees hired after January 1, 2022, who are subject to noncompete clauses and agreements, that such language is now void. Employers must notify these employees and former employees in writing before February 14, 2024. Before an employer uses any form of restrictive covenant like a noncompete, the employer should assess whether an exception to these rules applies.

LIGHT: For California employees, there's not much the employer can do. True non-competes are not enforceable unless it's an owner selling their business. A company's top salesperson can move to the company's worst nightmare competitor, and the company can't stop that move. The company can restrict that person's use of its proprietary information to "solicit" its customers, but that top salesperson is allowed to "announce" their new location and contact information without encouraging a move by the customer. Even federal law may be tightening on this issue in favor of employees, which will dramatically affect workers in other states that allow some form of true, but limited, non-compete clauses.

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

HREN: Utilizing arbitration agreements in the employment setting poses many advantages and disadvantages. One of the biggest benefits is that the arbitration agreement can contain a class action waiver which precludes an employee from bringing a class action, and would require the employee to individually arbitrate their own claims. This is very desirable for larger employees. Additionally, arbitration offers a confidential and quicker process to adjudicate employee claims and arbitration awards are typically smaller than jury verdicts. However, perhaps the biggest disadvantage to arbitration is that by law, the employer must pay for the cost of arbitration. Considering that an arbitration can last days or weeks, this will result in thousands of dollars or arbitrator fees for the employer. As such, each employer needs to access whether arbitration is right for their particular organization.

LIGHT: Every employer with at least 25 current employees almost certainly should have arbitration in place. It prevents participation in a class action, and most plaintiff attorneys will back off class cases and pursue only PAGA claims (one year versus four years of claims is well-worth the arbitration clause). We also much prefer arbitration of one-off plaintiff harassment and discrimination cases, primarily to avoid a runaway jury. If the employer is small and does not have Employment Practices Liability Insurance (EPLI), however, then perhaps arbitration is not appropriate. The employer is required to pay for the arbitrator, which could be $10,000 a day or more, but the EPLI policy will pay for it if it's in place.

BENDAVID: There are pros and cons with arbitration. It's not a one-size fits all option. On the one hand, arbitration proceedings are confidential and faster than a jury trial and can be an effective tool in the event of a class action claim. And an arbitrator's decision is binding – plaintiffs usually can't appeal the decision. On the other hand, arbitration agreements are often challenged in court and have limited impact on representative Private Attorneys General Act (PAGA) claims for wage and hour violations (i.e., where the plaintiff is representing other workers). Fees for arbitration can also be expensive. It's important to ask employment counsel whether it's worth it to enforce arbitration agreements, which may depend on the nature of the claim, the company's financial resources and the parties and counsel involved.

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

LIGHT: Meal break violations are the easiest to prove because they are reflected on time cards. Rounding of time is a hot topic these days, and should be avoided completely in light of the legal trends against rounding (which in our experience generally favors the employer over time). Clients sometimes assume they are not rounding, when in fact they are; and we only discover it after they get sued in a class action. Employers should check with their payroll service or compare time cards to paystubs. The other big-ticket item is a company's failure to include non-discretionary bonuses (you'd be surprised what's in this category) in calculating overtime, sick time and meal/rest break premiums. Even if the bonus is monthly, quarterly, or annually, rather than weekly or by pay period, employers must do the math and gross up those categories.

BENDAVID: Fortunately, we rarely see outright wage theft as most employers we know try to do the right thing. The wage and hour claims we frequently see are based on allegations that employers deprived employees of proper meal and rest breaks, failed to properly pay meal and rest period premiums, failed to pay overtime, rounded employee work time, and miscalculated the "regular rate of pay" (which is more than just the hourly rate). We also see expense reimbursement and "off the clock" claims. For some employers, they are simply not aware of current rules, or have managers, HR, or payroll staff who inadvertently misstep. Employers should conduct wage and hour audits, to find and correct any inadvertent errors before a lawsuit comes their way.

HREN: California's wage-hour obligations are tough for even the savviest companies to navigate. For example, employees should not perform

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any work, or any task which benefits the employer, prior to clocking in or after clocking out. Often times employers have a lengthy process for employees to complete before the timeclock captures their time, such as lengthy electronic timekeeping process, turning off alarms, unlocking doors, etc. All such time must be compensated. Additionally, meal and rest periods continue to be a hot topic and appear in almost every employment class action. Employers need to be sure employees receive the requite number of breaks and the appropriate times, and if violations occurs, employers should be paying the penalties ("premium pay") associated with the violation. Even if a company gets all of that right, often they will fail to include all requisite information on the employee wage statements, such as premium-pay and sick time. Another surefire way to get sued in a wage-hour class action is to misclassify non-exempt employees as exempt. We encourage you to run your exempt job descriptions, and wage-hour policies, practices, and paystubs, past competent employment attorneys.

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

LIGHT: Using a paddle. But, seriously folks, FAILURE TO DOCUMENT EARLY AND OFTEN. It's frustrating to see the lack of progressive discipline when we get the panicked call that the lousy employee needs to go NOW, despite them being in a protected category such as age or disability. Even an email exchange would be useful as "paper." Employers assume that because California is an "at-will" state, they don't need a reason. Not true. As soon as the employee claims discrimination, harassment or retaliation, which they always do, at-will is no longer a viable defense and the employer must demonstrate the valid reasons for termination. Hence, the need for paper.

BENDAVID: The biggest mistake is failing to document the discipline – even if it is as simple as an email to the employee after a verbal counseling. That email should then be printed out and put in the employee's personnel file. Termination of employment should not come as a surprise to an employee. The next biggest mistake is disciplining an employee for something the employee is legally entitled to do – like using accrued paid sick time. Employers get into trouble when they write up an employee for absenteeism or tardiness, when the absence or tardy was actually protected medical leave under FMLA, CFRA, paid sick, etc. Last, being fair in the administration of discipline can reduce the risk of claims for discrimination. And fairness is better for morale.

What are some of the practical challenges employers face when implementing California's paid sick leave law?

LIGHT: One challenge we still haven't quite figured out, and for which the state has not provided guidance, is the following. The new amendment requires employees to have 24 hours of sick leave on the books by the 90th day, and 40 hours by the 200th day. The phrasing and location of this requirement in the statute suggest that this requirement only applies if the employer is using an "alternative" method, such as PTO accrual (lumping vacation and sick time). Otherwise, if the statute's approved "accrual of sick time" method is used, many employees, particularly part-time people, won't have accrued enough to satisfy this requirement. To give this accrual method legitimacy, the only plausible intent of the 90 and 120 day requirements is when PTO or some other "alternative" method is used to accrue sick time. The statute isn't clear on that point, however.

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

HREN: Prior to the enactment of California's paid sick leave law, a single PTO policy was very desirable for employers. However, since enactment of the paid sick leave laws, a combined PTO bank is less desirable for a variety of reasons. First, an employer is not required to pay out paid sick leave upon separation of employment, whereas accrued but unused vacation must be paid upon separation of employment. Similarly, unused PTO must also be paid out upon separation of employment. As such, combing the banks can increase the cost to employers. Second, vacation can be paid out at the employee's base rate of pay. However, paid sick leave must be paid at the employee's "regular rate of pay" which includes additional compensation such as commissions, or different rates of pay. Combining sick and vacation would require PTO to be paid at the regular rate of pay, not the base hourly rate of pay, when PTO is used for an event covered under the paid sick leave law. Lastly, the paid sick leave law has strong anti-retaliation provisions for employees who take time off for one of the stated reasons. When combing sick and vacation into a PTO policy, it becomes more difficult for an employer to discipline employees for excessive absences relating to use of PTO.

What are the key differences to consider when a potential team-member is either an employee or an independent contractor?

BENDAVID: The US Department of Labor has a new worker classification rule which includes six separate factors to determine whether a worker is an employee or an independent contractor. However, California has much stricter standards per our state's ABC Test, and employers must prove all three elements. The worker may be an independent contractor if they are free from the control and direction of the hiring entity; perform work outside the scope of the hiring entity's business; and is customarily engaged in independent work of the same nature as that of the work performed.

"CALIFORNIA'S WAGE-HOUR OBLIGATIONS ARE TOUGH FOR EVEN THE SAVVIEST COMPANIES TO NAVIGATE.

–KATHERINE A. HREN

LIGHT: It's all about the ABC test for California-based workers. That's not going to change any time soon. The A test, "who controls the means of production," is not usually an issue. It's the "B" test that's usually the big problem, because the question is whether the worker is providing services that are not part of the general offerings of the company. I still see companies hiring an "independent contractor" (IC) to be their national sales manager, for example. That will never fly. The "C" test requires the worker to have a separate business, preferably servicing other clients. If companies properly apply the ABC test in all evaluations of worker status, it will be much easier to determine whether the IC label will withstand legal scrutiny.

Can an employer use social media in recruiting?

BENDAVID: California prohibits employers from requesting or requiring applicants or employees to provide access to social media accounts.

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Employers can't ask to see or review accounts, let alone ask for usernames or passwords. Employers should also exercise caution in looking for applicants on social media as part of the recruiting process, as this could trigger potential discrimination claims. For example, if the job applicant posted that they are expecting a baby, or that they have particular religious beliefs, or that they are of a particular race or national origin – will the applicant conclude these factors resulted in the decision not to hire them? In the face of this kind of claim, employers may have to explain why one candidate was selected over the other.

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

KANTOR: Be protective of employees' chosen names and pronouns. Understand that employees have the right to use and be addressed by the name and pronouns that correspond with their gender identity or gender expression, and make sure that these are respected by management and non-management alike, including when preparing things like schedules and work-badges. Let employees dress in accordance with their gender identity and expression. When hiring, be careful not to ask questions that could implicate a person's gender identity or gender transition history, like why someone changed their name. Where possible, provide an easily accessible, gender-neutral single user facility for optional use. Make sure your policies and training also protect against harassment, discrimination, or retaliation towards transgender employees, vendors, and/or customers.

LIGHT: Take pronouns like "he/she" out of policies. Be sensitive to the restroom designations and related situations. Get rid of traditionally male v. female positions (one client asks its staffing agency to send over a "heavy" [male] and a "light" [female] based on the position to be filled). Continue to provide education and sensitivity training on the subject as part of overall harassment training. Deal harshly with bullies and others who are not respectful of transgender or transitioning employees.

How have employee handbooks evolved over the last five years?

BENDAVID: Employee handbooks are certainly longer than ever. One reason is that the legislature keeps creating new employee entitlements, like more protected leaves and time off. The legislature also created new protected classifications in our civil rights laws. And, as wage and hour lawsuits keep coming, employers are adding expanded policies on meal breaks, rest breaks, recordkeeping, and the like. Employee handbooks should be updated regularly to address these changes. Though many employers are switching to electronic versions circulated via email or on an electronic platform, I still prefer to have handwritten acknowledgments of receipt placed in each employee's personnel file. This has proven helpful in defending claims when the employee's own handwriting confirms receipt of the company's policies.

> **"WHEN HIRING, BE CAREFUL NOT TO ASK QUESTIONS THAT COULD IMPLICATE A PERSON'S GENDER IDENTITY OR GENDER TRANSITION HISTORY.**
>
> –STEPHANIE KANTOR

LIGHT: The most significant changes have come in the last several months as the federal National Labor Relations Board (NLRB) has decided that ANY policy that could have a chilling effect on employee communications is presumptively illegal. The employer is then tasked with justifying the reasons for the policy to rebut the presumption. That's why we have begun papering our handbooks with language making it clear that the policy "is not intended to violated Section 7 of the NLRA… [etc.]"

HREN: Employee handbooks continue to be an effective tool for employers and can be extremely helpful, or harmful, if litigation ensues. An employee handbook should be viewed as a tool for employers to provide guidelines and expectations for employees as well as language that is helpful in defending against employment claims. While handbooks in general have not changed much in overall purpose and style over the last few years, what needs to be included in them has changed. Over the last several years, California has enacted new anti-discrimination provisions, numerous leave laws and many other laws that impact language in employee handbooks. It is important for employers to make sure all of these new laws are included in the handbook and that the written policies mirror the letter of the law. As such, Employers should update their handbooks annually.

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

KANTOR: Companies should be mindful of the risk of potential litigation whenever they separate an employee, and be ready to defend the legitimacy of their decisions, specifically, why this particular employee is getting separated, and why now. Indeed, a new bill, SB 497, even creates a 90-day retaliation presumption that if an employee is terminated within 90 days of having made certain complaints under the Labor Code (like claims for unpaid wages or unequal wages), it will be presumed that the employer engaged in unlawful conduct. It will then be up to the employer to provide evidence that it did not take this action because of the employee's complaints. Should a company decide to offer a severance agreement upon separation, it should be mindful that California law puts limits on non-disclosure language, and requires that employees be given five business days to review the agreement with an attorney if needed, among other requirements.

BENDAVID: The legitimate business reasons for termination should be clearly stated to the terminated employee. Though kindness is recommended, employers should not sugar-coat the reasons. To avoid wrongful termination, retaliation, and discrimination claims, employers should ensure decisions to layoff or terminate are not made arbitrarily. Employers conducting reductions in force should look at who is selected for layoff and ask why that person is selected over others similarly situated. Does the layoff decision adversely impact protected groups – i.e., age, race, gender, etc.? When terminating an employee, employers should always remember to pay final wages and accrued vacation/PTO on the last day of work, and provide separation documents like the EDD Brochure "For Your Benefit," "HIPP Notice to Terminating Employees," "Notice to Employee as to Change in Relationship form." If the employee participates company health insurance plans, employers should arrange for COBRA documentation to continue insurance benefits at the employee's expense.