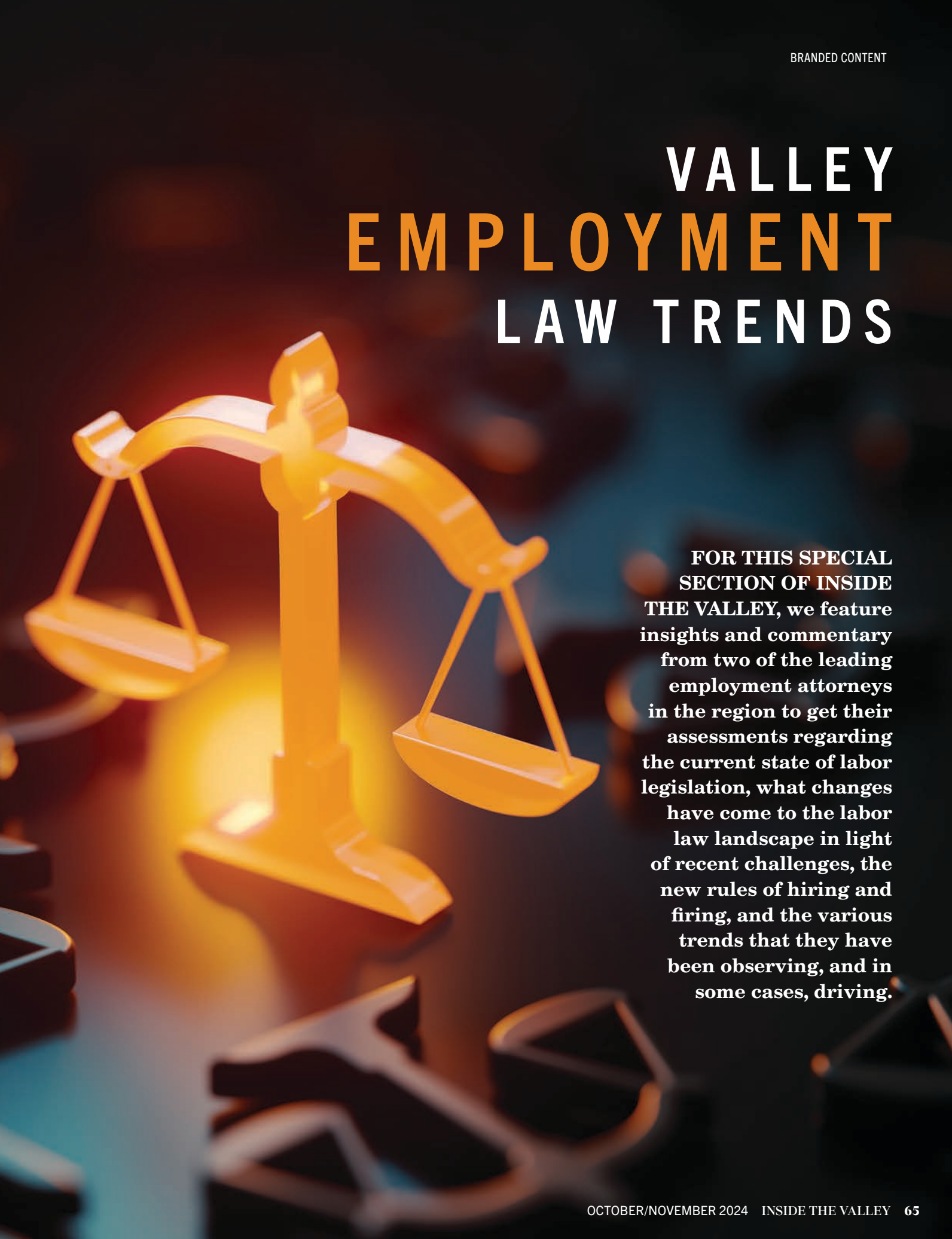
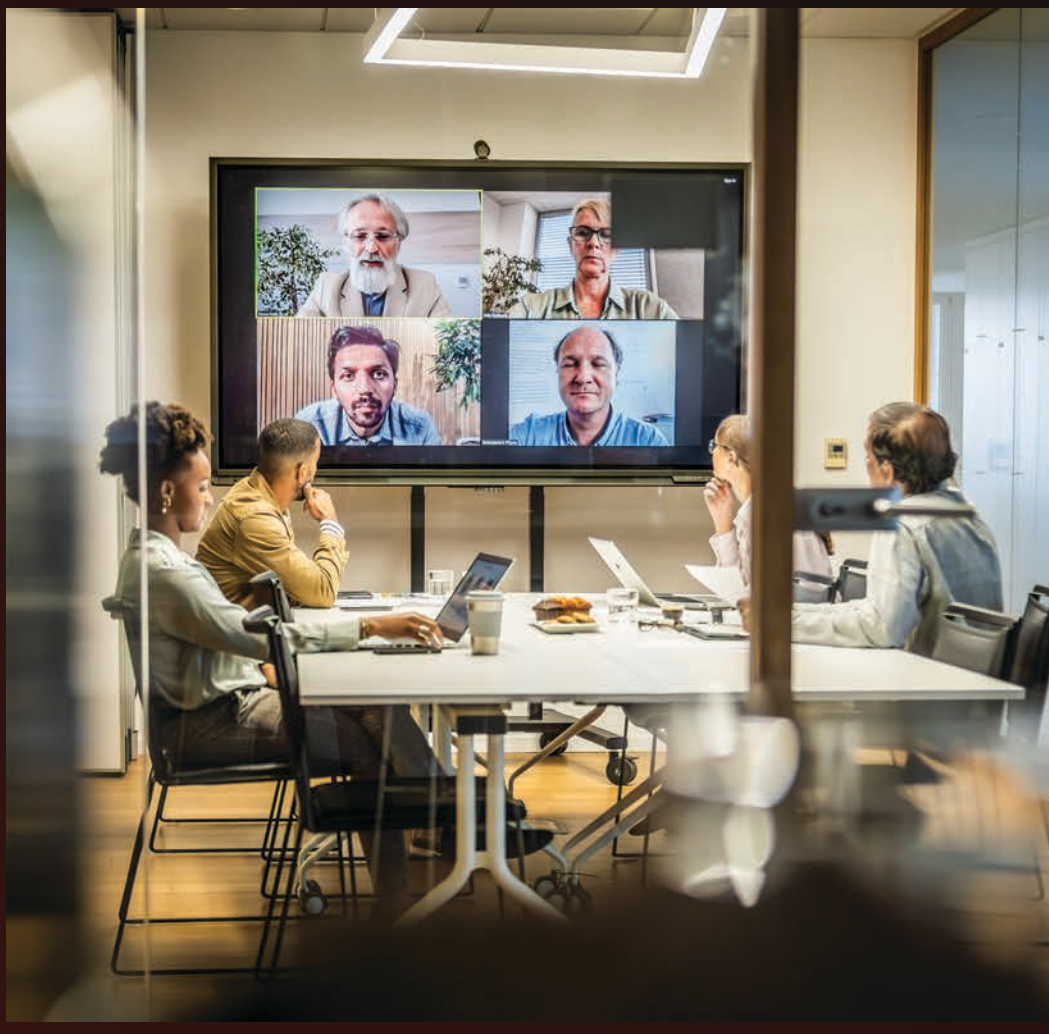
VALLEY EMPLOYMENT LAW TRENDS



FOR THIS SPECIAL SECTION OF INSIDE THE VALLEY, we feature insights and commentary from two of the leading employment attorneys 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.

Employer Obligations When Overseeing Hybrid Work

By STEPHANIE KANTOR



In overseeing a remote or hybrid remote workplace, employers must still ensure that a myriad of labor law obligations are followed. For example, employers must have a process to enable overtime eligible remote employees to track all of their work time and state mandated meal and rest breaks, just as they would if the employees were working on-site.

California employers also must reimburse employees for any "necessary" expenses incurred while working from home, which might include reasonable costs for internet access (even if the employees already subscribe to unlimited data plans), cell or landline phone service and home office equipment and supplies. In addition, California workers' compensation and job safety laws apply fully to remote workers as do the laws requiring employers to post certain labor law requirements.

Further, according to an Enforcement Guidance on Harassment in the Workplace released earlier this year by the United States Equal Employment Opportunity Commission (EEOC), conduct within a virtual work environment, such as offensive conduct conveyed using company email, instant message systems, or videoconferencing technology, could potentially contribute to the creation of an illegal hostile work environment. Examples might include offensive comments based upon a legally protected category (e.g., race, gender, religion) made during a Zoom or Teams video meeting or on a group slack, or offensive imagery visible in an employee's workspace during a video meeting. Employers should keep this in mind in putting together their policies, as well as in conducting workplace investigations.

The EEOC Guidance even suggests that posts on an employee's personal social media pages about coworkers might contribute to the creation of an illegal hostile work environment, and a recent federal appeals court in San Francisco held similarly. However, employers should be aware that another federal agency, the National Labor Relations Board (NLRB), takes the position that an employee's use of the internet or social media to criticize their employer or discuss working conditions can be a form of legally protected activity under the National Labor Relations Act (NLRA), and comments that may be deemed offensive to management receive wide protections.

In navigating the remote and virtual work environment, employers must keep labor law compliance top of mind just as they would in the physical work environment, albeit with some unique applications.

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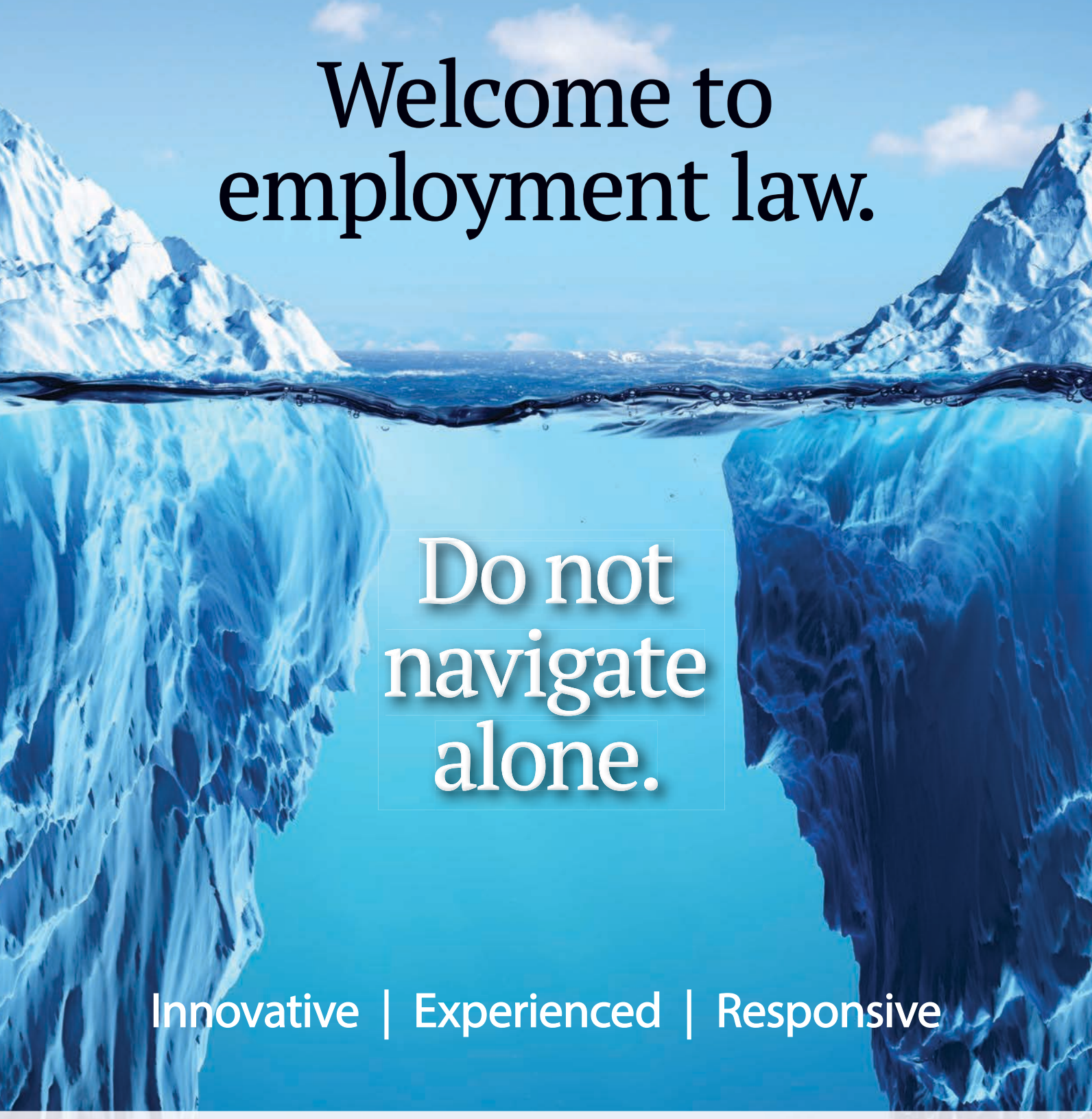

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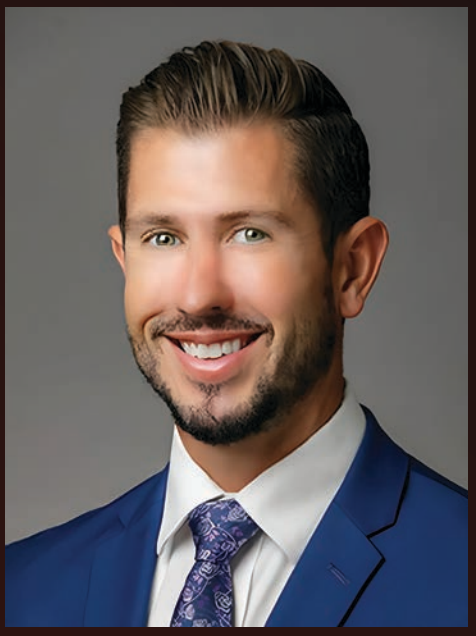
Labor & Employment: What You Need to Know

A Q&A with the Expert

Inside The Valley has once again turned to a leading employment attorney and expert in the region, Ryan M. Haws, a partner at LightGabler LLP, to get his assessments regarding the current state of labor legislation, what changes have come to the labor law landscape, the new rules of hiring and firing, and the various trends that he has been observing.

Here are a series of questions we posed to Haws and the unique responses he provided – offering a glimpse into the state of business employment in 2024.



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

HAWS: Let me cover three. The first mistake is the most egregious – they don't do it! They avoid conflict with their employees until things reach a boiling point. Then I get calls describing their "worst employee ever," but there's no supporting documentation. Second, when employers verbally counsel employees, they fail to document that counseling. After a verbal counseling session, send a quick e-mail, "Thank you for meeting and agreeing to do better [then list the agreed-upon improvements]. It's an easy way to document without being overly harsh. Third, employers delay terminating bad-apple employees. If I had a dollar for each time I've heard, "I was just about to fire [name], and now they're out on leave," I'd be retired. Follow the proverb, hire slow, fire fast.

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

HAWS: We generally recommend arbitration agreements for employers, but each employer should consult with their employment counsel about their individual set up. Arbitration can be a great way to shut down class action claims. For one-off individual claims, especially for discrimination cases, as defense counsel, we would much rather be in front of an arbitrator than a layperson jury. It's less risky and ultimately less time-consuming and expensive to defend those cases in arbitration. The main downside of arbitration is that the employer must pay for all unique costs of the arbitration, including the costs of the arbitrator. That can run as much is $10,000-$12,000 a day (or more). If you have Employment Practices Liability Insurance (EPLI); however, that policy will typically cover those costs.

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

HAWS: In most cases, I would say no. PTO blends vacation and sick leave into a single lump. This makes PTO subject to both paid sick leave and vacation rules. From my perspective, these two rule sets don't play nicely together in the employment sandbox. As one example, sick leave is not required to be paid out by law (unless your policy says otherwise), but vacation (and correspondingly, PTO) must be paid out at termination. As a second example, PTO, because it covers sick leave, must be paid at the "regular rate of pay," which can include different kinds of compensation, like hourly earnings, piecework earnings, bonuses, and commissions. Thus, employers who use incentive pay models must do extra accounting work to pay PTO correctly.

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

HAWS: Let me briefly address prong B of the ABC test. Prong B asks, in simplistic terms, does the contractor do what you do as a business? Employers must evaluate how integrated the contractor will be into their business model. Do they operate in the same space as you? Do they do the same type of work you have other employees doing? One example is an independent sales rep. The company is in business to sell various products, and the sales rep is engaged to sell the company's products. I don't have an easy answer here, but anytime companies use contractors that are heavily integrated into their business model, misclassification claims are a risk.

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

HAWS: My comment more so addresses smaller layoffs, those not implicating state or federal WARN. In general, however, I tend to see a lack of documentation. Employers identify the likely candidates, but they don't take the next step to prepare documentation to the file that summarizes the key business reasons why those people were chosen. Document! When you think you've done enough, do some more. Get input from their supervisors or department managers. Include how their jobs will be absorbed by others, the reason why they were selected over other candidates in the same department (e.g. same job, or whatever else is relevant). You can reference things like attendance, performance review issues, warnings, discipline, and other business reasons relevant to your decision-making.

Ryan M. Haws is a partner at LightGabler LLP. Learn more at lightgablerlaw.com.