CUSTOM CONTENT
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Labor & Employment

A Roundtable Discussion

WHAT OWNERS AND EXECUTIVES NEED TO KNOW

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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, and in some cases, driving. 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 2019 – from the perspectives of those in the trenches of our region today.

LABOR & EMPLOYMENT ROUNDTABLE

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RICHARD S. ROSENBERG

◆ What are the most significant new employment laws taking effect in 2019?

BENDAVID: Not surprisingly, some of the more significant new laws relate to California's attempt to prevent workplace harassment. Governor Brown signed Senate Bill 1343, which expands requirements for harassment prevention training. The bill affects even small employers and requires training for nonsupervisory, temporary, part time, and seasonal employees. By January 1, 2020, and every two years thereafter, employers with five or more employees must provide two hours of harassment training to all supervisory employees and at least one hour training to nonsupervisory employees. If you have seasonal or a temporary workforce (hired to work six months or less) you must provide training within 30 calendar days after hire or 100 hours worked, whichever occurs first. For temporary employees, the temp agency is to provide the training. Employers should check the Department of Fair Employment and Housing website. The DFEH is to develop online training courses to help employers comply with this requirement. Other bills, including SB 1300, SB 820 and AB 3109 impact releases of claims, confidentiality, non-disparagement clauses in settlements, the right to testify and expand potential liability of employers for harassment claims. Employers may be held liable for all forms of harassment by nonemployees, meaning, employers have an obligation to protect workers from vendors, clients, independent contractors, and the like.

ROSENBERG: There were numerous employment laws that took effect January 1, 2019. Many of them focused on the #Metoo movement to provide greater protections for victims of harassment and break the culture of silence surrounding the issue. My top pick for 2019 is AB 820. This new law forbids so-called non-disclosure (confidentiality) provisions in settlements involving claims of sexual assault, sexual harassment, workplace harassment or discrimination (based on gender) unless the employee (victim) wants confidentiality. Notably, AB 820 does not apply to the settlement of pre-litigation disputes (like an employee separation agreement) and only applies once a claim has been filed in court or with an administrative agency.

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

BENDAVID: Harassment claims are on the rise, but wage and hour lawsuits will always be a staple of employment litigation. We've seen several recent notable wage and hour cases. For example, in Troester v. Starbucks, a plaintiff filed a class action against Starbucks arguing employees should be paid for de minimis work. De minimis is a Latin phrase indicating something insignificant – Starbucks employees claimed they should be paid for time spent on "close store procedure," such as shutting down computers, activating alarms, locking doors, etc. Starbucks claimed this uncompensated time was so limited that it did not have to pay employees under the de minimis doctrine. In examining this "de minimis" rule, the Court found that nothing in our State's Labor Code or wage orders permits application of the de minimis rule. California law generally expects employers to compensate employees for all hours worked on a regular basis. What does this mean? While there are exceptions, employers must compensate employees for all time worked, even if that time appears minimal. Such time may include: time to change into or out of uniforms while at work, time to open or close stores or the businesses' physical premises, or time to complete other seemingly minor tasks. Another significant case was Alvarado v. Dart Container Corp. In Dart, the plaintiff filed a class action concerning the method of calculating overtime when employees receive a flat sum bonus (such as a flat amount paid as an attendance bonus). After extensive analysis, the Court determined that overtime on a flat sum bonus should be calculated differently than other types of incentive bonuses. This decision illustrates there are various methods for calculating overtime, dependent on the type of bonus, and confirms the need to include all such compensation when calculating the regular rate of pay for overtime and meal/rest premiums. Of course, most employers have heard about the Dynamex Operations case and the impact on potential misclassification claims for independent contractors. We continue to see claims for misclassification (whether for independent contractors or exempt/non-exempt), missed meal and rest period premiums, minimum wage, and overtime. We also see an increase in penalty and PAGA claims that arise out of the alleged failure to comply with California's extensive network of wage and hour claims. We strongly recommend a wage and hour audit of every employer's pay practices.

◆ What effect has the #MeToo movement had on businesses?

BENDAVID: We are seeing an increase in sexual harassment, whistleblower and similar claims, which we attribute to an increased focus on employee rights in that area of the law. Employers should be aware of the new laws enacted to prevent harassment in the workplace and make sure they comply. Companies should review policies, train their staff, and respond promptly and thoroughly should claims arise. All in all, the California legislature was very focused on eliminating sexual harassment and related claims this past year. We expect that trend will continue with more new legislation in the upcoming years.

◆ What role does sensitivity training play in the workplace in 2019?

ROSENBERG: It's huge. So much so that the California legislature passed a new law effective this year that requires employers with just 5 or more employees to provide sexual harassment prevention training to all of its employees (not just supervisors) every two years. Employers need to find qualified individuals to provide this training and provide it to all existing employees by the end of 2019, and then again every two years. Training is one of the most effective ways to educate employees about appropriate workplace behavior and help reduce claims of unlawful conduct in the workplace.

BENDAVID: It seems nearly every week we see video in the news where someone in a place of business was a victim of discrimination and these incidents are all "caught on tape." This occurs much to the dismay of the business owners, but is a new reality given this social media trend. With this type of exposure, businesses would be well advised to provide more sensitivity training for their employees to stop discrimination and better position themselves to defend, should an incident like this occur. Sensitivity training serves a three-fold purpose. It helps staff understand how off-hand comments, gestures and behaviors can be perceived as biased or discriminatory. It allows managers to more easily spot potential issues (and potential litigation), thus better enabling them to nip problems in the bud. It also provides everyone a basic understanding of the law and employer liability, thus affording an opportunity to explain company policy and corrective actions that will be taken when an employee violates the company's discrimination policy.

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

LIGHT: A few simple things are a start: Neutral single-stall restroom designations (as I saw in a D.C. restaurant, "Men, Women & Everyone Else"); educating the workforce as part of harassment or cultural diversity training (familiarity does not breed contempt)—whatever you think of Caitlyn Jenner, for example, she has brought more awareness to the issue; using "they" as a pronoun in company materials; stop reliance on traditional gender roles in particular jobs (men work in the warehouse and women work in admin).

BENDAVID: The FEHA protects employees from discrimination based on, among other things, sex, gender, gender identity and gender expression. Transgender employees are to be treated according to the gender the individual identifies with, even if that is a different gender than the one assigned at birth. This creates conflict when non-transgender workers don't want to share a locker room or restroom with coworkers who are in the process of transitioning, have already transitioned or who have completed sex reassignment surgery. Employers are expected to make reasonable accommodations. Employers should maintain an ongoing dialogue with the individual to ensure the employee's reasonable needs are met, provided they will not result in undue hardship. This includes the employee's needs for privacy, specific form of address, and other considerations.

ROSENBERG: There are a number of new laws and regulations addressing the transgender workforce. The California Department of Fair Employment & Housing website is a good place to start. After familiarizing yourself with the new law, the first step is to be sure that current policies are adequate to address the unique needs of this community. Part of that process likely will include sensitivity training for senior leadership and other people managers. Most of the claims are avoidable where management shows leadership and sets clear expectations for employees about protecting the rights of this community and being sensitive to their particular needs. Too often, top management's silence is seen as tacit approval of offending behavior. In my opinion, this is the single best investment a company can make toward insuring that these matters stay out of court.

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LABOR & EMPLOYMENT ROUNDTABLE

◆ Would you say that a company's employee handbook is still vital in this day and age or have they become a thing of the past?

LIGHT: It still has value. Employees still look to that document as the Bible on how the company handles certain issues or benefits. It can protect the employer in the event of a lawsuit – at-will language, for example, still has limited value. It's sort of like the 90 day introductory period—it's an anachronism in some ways, but still has value. Where else is the company going to lay out specific policies such as vacation and sick time, hours of work, etc.?

BENDAVID: In almost every lawsuit we defend, we rely on a company's policies in an effort to demonstrate compliance with the law. If a policy expressly informs employees of the company's expectations, and if the employee failed to meet those expectations, the handbook violation can be used as a justification to fire the employee and reduce the risk of a wrongful termination claim. Additionally, handbooks provide guidelines for management regarding procedures and compliance with local, state and federal laws – regarding meal breaks, rest breaks, time keeping requirements, etc. Signed acknowledgements by the employees of receiving and understanding the information provide critical, additional protections. These are the employers' first line of defense.

◆ How have the changes in marijuana laws affected your clients?

ROSENBERG: This is a huge source of concern. Cannabis use remains a federal offense even in states like California where voters have legalized its medicinal and recreational use. Also, the new CA law specifically preserves the right of a company to insure that employees do not come to work under the influence and are not using, possessing or distributing the drug on company premises. However, there is no uniform drug testing standard for evaluating whether a person is impaired. And, since cannabis remains in a user's system and is detectable in a drug test weeks even after its ingestion, employers will have to work with local authorities and their drug testing labs to develop defensible standards for measuring impairment.

BENDAVID: Being under the influence while on the job can still be a violation of company policy and can still result in a lawful termination. We recommend that handbook policies on drug testing and being under the influence be reviewed so that employees are apprised of this. Just because an employee may use marijuana during their free time, does not mean they are immune if that usage impacts their work. Also, given the potential for injury, employers in industries where machinery, heavy equipment, or driving is involved should consider zero tolerance policies.

LIGHT: They are much more mellow. The real challenge is not employees smoking marijuana, as the law hasn't changed there. One challenge is dealing with ancillary products such as creams or other medical remedies containing marijuana oils, etc., that have proven effective with things like rheumatoid arthritis, for example. There is an evolving awareness of these products, such that employers should be more tolerant or accepting of such products if they have no substantive effect on performance. The marijuana industry will likely promote campaigns to educate employers and employees, so time will tell whether California employers become more tolerant. Given that the feds still treat marijuana as a serious and illegal drug, however, it may be more difficult for many California employers to embrace a more tolerant view of the "demon weed."

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

ROSENBERG: Court statistics show that fewer than 5% of all employment cases 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 to move forward while minimizing the cost and hassle of the litigation process.

BENDAVID: Mediation allows employers and employees an opportunity to resolve disputes without the heavy costs and risks of going to trial. The most effective mediators consider the facts from all parties as well as the law – then generally work with the parties in an effort to have them agree to a settlement figure without admission of liability. By showing each side the weaknesses and risks of their arguments, a good mediator can help each party agree to a compromise.

LIGHT: Mediation is a great tool for resolving matters before litigation is filed and before legal fees begin to escalate. It is much more common now to go to mediation after receiving a demand letter, rather than waiting for the lawsuit to be filed and the matter is then public, expenses begin to mount, and the parties' positions begin to harden. But early resolution still requires that employers and their counsel do their homework on the facts and the law prior to engaging a neutral third party to resolve the dispute. It's just done informally to educate senior management, their attorneys and, often most important, opposing counsel about their client and the client's case.

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

ROSENBERG: California law on this subject is a bit schizophrenic. On the one hand, the law is very protective of employee free movement and most non-compete agreements are unenforceable. However, the law also permits an employer to vigorously protect its proprietary and trade secret information by having employees sign agreements which severely restrict them from making unauthorized use or disclosure of their employer's confidential or trade secret information. It behooves employers to take a proactive approach to identify what information is protectable and have employees sign appropriate agreements protecting that information. Employers must understand that while they cannot prohibit employees from leaving and competing, they can prohibit former employees from misusing the company's confidential and trade secret information to unfairly compete.

BENDAVID: Under California law, non-compete agreements are generally unenforceable. With limited exception, employers cannot lawfully restrict employees from engaging in a trade or business once they leave the job. That being the case, we advise clients to use strong confidentiality or trade secret agreements instead. If the employer has such an agreement and if an employee uses a confidential trade secret customer list to unlawfully compete, that conduct can be actionable both as breach of contract and a violation of the Uniform Trade Secrets Act. To prevail on this claim, the employer should show it took steps to protect its trade secrets from improper use, disclosure or dissemination. Apart from written confidentiality agreements, there should be internal practices, such as locked cabinets, limiting access to only those who need to know, policies in handbooks, etc.

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

LIGHT: I'm a big fan. I've had clients say that their prior attorney doesn't like arbitration because arbitrators "split the baby." That has not been my experience in arbitrations I've participated in. It's MUCH less expensive, faster, and less risky to be in arbitration. The employer must pay for the arbitrator, so that's the only downside in my view, but if the employer has Employment Practices Liability Insurance (EPLI), that cost is covered by the policy. I have arbitration agreements in place for all of my employees, including all attorneys. I don't want a jury in a highly emotional tort case like harassment or discrimination, and now that the U.S. Supreme Court has confirmed that class action waivers are enforceable, a company with a sizeable workforce would be foolish not to implement arbitration for that reason alone.

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

BENDAVID: When it comes to taking corrective action, record keeping is key from the first offense all the way up to termination. For example, when terminating an employee who is consistently late (for no good or lawful reason), it's important that employers communicate with the employee. Termination should not come as a surprise. The employee should know upon termination that her/his unjustified absence was noted and what the employer intended to do if the unexcused tardiness continued. All this should be documented with a memo, email or other note to the employee and the employee's personnel file. Word of caution: Ensure you do not discipline employees for matters that are

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legally protected (such as when an employee takes a sick day for his or her self, or to care for a family member).

LIGHT: Frequent mistakes include: failure to document; failure to address issues and document them in a timely fashion; failure to provide examples of the bad behavior or performance; failure to give an employee notice of the problems and an opportunity to improve; and failure to properly assess the risk of termination of employees in protected categories or who may have hidden wage and hour claims (suggesting that even poor performers should be given severance agreements in return for a release of claims).

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

LIGHT: One simple tip: strike out any language that references that the work to be performed by the IC is a "work for hire" or "work made for hire." The California Labor Code and the California Unemployment Insurance Code both have provisions that reference this language as creating an employment agreement for purposes of unemployment insurance. The EDD has enforced these provisions with companies who have come to me after the fact. Business lawyers are starting to understand this flaw and to draft language that still gives the employer ownership of the work being created, but through a sale or license without using the offending language above.

BENDAVID: Employers should remember the ABCs of *Dynamex Operations West, Inc. v. Superior Court*, which was decided last year. Before this Supreme Court decision, California courts relied on a number of tests to determine which workers were independent contractors and which were actually employees. The *Dynamex* decision clarified the issues with respect to the IWC Wage Orders:

a) Independent contractors should be free from control and direction of the hiring entity, regarding performance of the work. So a company hiring IC drivers should not require the drivers to drive a particular route, require them to wear a company uniform, etc.

b) The work an IC is performing should be outside of the hiring entity's normal business. For example, if the entity is a graphic design studio, drivers retained by the studio to deliver an item could likely be considered ICs rather than employees.

c) An IC should have its own business and work for others. For example, a driver may deliver packages for the hiring entity as well as other entities.

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

LIGHT: Meal breaks that are commenced after the end of the 5th hour of work, failing to acknowledge that a second meal break is available if an employee works over 10 hours (but which can be waived), and third rest breaks required after 10 hours (which can't be waived). One client received a PAGA letter and immediately cleaned up their massive five-hour break problem, or so they thought. A month later, after human resources was sure that they were in compliance, they audited a two week pay period and found 1,000 meal break violations among 400 employees. The problem was that the lowest-level supervisors and leads were not educated sufficiently on the importance of compliance and either forgot or ignored these rules.

BENDAVID: Though clients often say they are paying correctly, upon a closer review, we uncover inadvertent errors. For example, employers must pay overtime based on the "regular rate of pay" and not just the regular hourly rate. That means incentive bonuses, commissions and other forms of compensation must be included when calculating overtime and meal/rest premiums. With the Private Attorneys' General Act (PAGA), we are seeing more penalty claims included in class actions as well as individual lawsuits. A close audit of an employer's wage and hour practices, along with corrective action, is highly recommended.

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

BENDAVID: California's sick leave law is just one of many that may apply to an employee. Local jurisdictions may have their own particular regulations for the amount of sick time awarded, as well as how that sick time should be calculated and provided. Additionally, a variety of leave of absence laws come into play for child care, kin care, pregnancy leave, workers' compensation, FMLA/CFRA – it all gets very confusing for employers, especially when they have employees working in more than one jurisdiction.

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

ROSENBERG: Combining these policies into a single "Paid Time Off" (PTO) program was very popular a few years ago. However, with the onset of mandatory paid sick leave benefits, many companies have opted to unbundle these benefits to insure that only the sick leave hours will be subject to the onerous carryover, pay stub reporting, anti-retaliation and usage rules which govern sick leave. Also, by law unused accrued sick pay do not have to be paid out to employees when they leave. But, if vacation and sick hours are combined, then the entire balance is treated as vacation and must paid out at termination.

LIGHT: It is simpler to track only PTO, but separating vacation and sick time has two practical benefits. First, unlike vacation and PTO, employers don't have to pay out sick time at termination. Second, if an employer wants to discipline an employee for excessive absenteeism, it's easier to do once the employee has run out of 24 hours of sick time (or 48), rather than waiting for the employee to exhaust, for example, 10 days or 80 hours of PTO.

BENDAVID: Once paid sick leave became a legal requirement, we started advising employers to have separate vacation and sick leave policies because sick time is highly regulated by local, regional and state laws. Since there is limited flexibility on paid sick time and more flexibility with vacation time, we suggest you separate the two in an effort to show compliance. Further, vacation and PTO must be paid on separation. A Paid Time Off policy thus can result in a higher pay out since PTO usually accrues at a higher rate than just vacation time.

◆ What accommodations must an employer offer to employees who are parents of school age children if there is a school closure due to a violent threat?

ROSENBERG: California's Family-School Partnership Act gives employees of school age children up to 40 hours of time off per year time for matters relating to parenting such as attending school functions. That law also specifically provides for emergency leave for parents to address "child care provider or school emergency" situations such as a school closure due to a "violent threat." To mitigate the impact on employers, the law permits employers to limit usage of this time off to just 8 hours per month. However, that limit is suspended in a real emergency situation. And. even if your employee has already used all 40 hours, we would still recommend giving the employee whatever time they need to address the emergency. And deal with the attendance issue later. No employer wants to defend a case where an employee's child was placed in danger because the employer would not allow the employee to leave work.

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

LIGHT: No. Both state and federal law have what the EEOC has dubbed "Green Rules," which require employers to analyze the nature of the job sought compared to the circumstances surrounding the conviction. Several factors may apply, including the age of the worker when the crime was committed, the nature of the crime as it relates to the job to be performed (embezzlers don't get bank jobs), whether there was successful employment after the conviction, whether the employee will be closely supervised, have access to customer or credit information, leaves the premises, etc. Two clients had warehouse operations and a Meghan's Law registered sex offender they wanted to terminate. Given that the employees were closely supervised, had no access to records, never left the premises, there was no day-care on site, no school nearby, and (for one of the employees) he was very young at the time of the conviction, the Green Rules required that they not be terminated.

ROSENBERG: Employers in California with just five or more employees must comply with the State's "Ban the Box" law. This law prohibits these private employers from even asking a job applicant to disclose prior criminal convictions until after a conditional offer of employment is made. Where an employer wishes to delve into the applicant's criminal record and deny employment based upon that information, the employer must provide the applicant a mandated "fair chance process" which allows the applicant time to respond to the employer's concerns before filling the position. Employers in this situation must be prepared to show there is sufficient connection between the criminal offense and the applicant's

intended job duties to justify revoking the job offer.

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

BENDAVID: Be consistent. Establish and document the criteria used when 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. If possible, your reasons 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.

LIGHT: Failure to analyze the departing workers for patterns of discrimination, such as a high number of older workers in the layoff group, or an inordinate number of disabled or recently disabled workers in the layoff group. It's not illegal to include a worker on leave in a layoff group, but there should be substantial written justification for the decision. All decisions should be thoroughly documented so the employer has something to point to should a government agency or an attorney claim discrimination. For example, why was one employee picked over another: were they the lowest rated on reviews; did others have multiple skill sets due to cross-training; was there excessive absenteeism unrelated to a disability; had there been discipline issues? Inviting comment from supervisors is also helpful, though these documents should be reviewed by counsel before becoming an "official" part of the record. Lastly, the employer should also document how the work is going to be redistributed in a job elimination situation, so it doesn't look like the employer is using "layoff" as a subterfuge for a worker they want gone, but don't have ample justification and intend to replace the worker as soon as possible.

ROSENBERG: Many employers believe that a company can layoff whoever it wants without legal recourse. That's simply not true. Person's selected for layoff can sue (and win) if: (i) they were selected for layoff on account of a protected status (such as their age, gender, race); (ii) because they were a whistleblower who opposed a practice that the employee reasonably believed was illegal; or (iii) if they are selected in retaliation for having availed themselves of a legal rights (e.g., taking a pregnancy or work injury leave) . It's incumbent on the business to develop and use a clear set of legitimate criteria when evaluating which employees to layoff. A well-documented layoff file is worth its weight in gold if you have to fight an employee claim or you are trying to convince an inquiring lawyer to turn down your former employee's case. Timing is also critical (for example, laying off someone who just returned from maternity leave or recently complained about workplace harassment). Even if you have a good reason for the layoff, such timing often results in a legal inquiry.

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

ROSENBERG: Watch out about taking advice from the Internet. As they say, you get what you pay for. Hardly a week goes by without a new rulings or interpretation that impacts some aspect of legal compliance. Companies should invest in a top-notch human resources executive who is charged with keeping the company current and partner with a labor law firm that knows your business and provides regular updates on legal developments.

LIGHT: Frequently review their employment lawyer's website and email information and attend their seminars!

BENDAVID: Hire top-notch human resources professionals dedicated to keeping abreast of the changes to laws by attending employment seminars, reading articles and blogs, and being aware of major, pending court cases. Business owners not in a position to hire an HR pro, should add these tasks to a never-ending to do list. Following HR pros and organizations, employment lawyers and business groups on social media can help – you'll at least be aware of the major events occurring on the employment law landscape.

◆ How does a law firm specializing in labor and employment differentiate itself from the competition in 2019?

LIGHT: Work efficiently at a reasonable billing rate, return calls and emails timely (not within 24 hours; but more like within 2 hours). Give them immediate access to an alternate attorney in the office if you are not available. Keep clients apprised of developments specific to their business.

ROSENBERG: The key ingredient is knowing your client, their business, their needs and their goals. Taking the time to invest in getting to know your client can be the most important factor in providing the client with sage advice. There are lots of lawyers who are well versed in the nuances of the labor and employment laws. However, the lawyers and law firms that stand out are those who possess industry expertise, are creative problem solvers and who take the time to really understand a client's needs.