

EMPLOYMENT & Labor Law

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Background Checks, Regulations and Avoiding Litigation

by Claudia Perez, Senior Vice President of Operations, Marquee Staffing

Given the increase in litigation against businesses using background checks, now is a good time for employers to review and strengthen their compliance practices when it comes to applicant screening. Every company must be aware of class action litigation against employers for violating rules in obtaining and using a background report.

Those rules specifically include the federal Fair Credit Reporting Act (FCRA) and in California, the Investigative Consumer Reporting Agencies Act (ICRAA).

Non-compliance with FCRA can result in multi-million dollar settlements. Willfully violating the FCRA's Mandated Adverse Action Process has become one of the primary targets for class action litigation.

Employers who use the results of a background investigation for their hiring, promoting, suspending or termination decisions need to understand **Adverse Action** and its procedures.

Under the FCRA, employers are obligated to follow a **two-step adverse action process** (pre-adverse action and adverse action). This process provides the candidate the opportunity to review and dispute information on the report. Once the applicant has undergone a background check, and if the report that the employer receives from the background screening company has information that may be used to make a negative hiring decision, the pre-adverse action process begins.

BEFORE taking any adverse employment action, the employer must provide the applicant with:

- ▶ Pre-Adverse Action letter
- ▶ A copy of the consumer report
- ▶ A description in writing of the rights of the consumer under the FCRA, and if in California, a copy of CA Civil Code 1786.22.
- ▶ Provide a reasonable opportunity to dispute the information before rendering the adverse employment decision.

After "reasonable time" has passed for the candidate to contact the background screening company to dispute or explain the contents of the report, the employer must notify the applicant that **Adverse Action** has been taken and must include:

- ▶ The Adverse Action letter containing the name, address and phone number of



the background screening company that furnished the report.
 ▶ A statement that the background screening company did not decide to take the adverse action and is unable to provide the consumer with specific reasons for the action, and notice of the applicant's/employee's rights to obtain another free copy of applicant's report from the background screening company

within 60 days.

- ▶ A copy of the report you relied upon to make your decision.
- ▶ A description in writing of the rights of the consumer under the FCRA, and if in California, a copy of CA Civil Code 1786.

Marquee Staffing partners with Americhek, an Orange County-based background screening company.

Information for this article was adapted from Americhek's Business Development Manager, Julie Bailey. Always contact your employment attorney for direction and legal advice.



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Claudia Perez Sr. Vice President of Operations

As the Sr. Vice President of Operations, Claudia oversees day-to-day strategic operations, including spearheading marketing projects, employee training and development programs for Marquee Staffing's contingent workforce. With her strong background in business development, she continuously strives to build lasting partnerships with clients and candidates. As a result, her team focuses on quality, customer service, compliance and strategic placements.



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New Protections for Gender Identity, Expression Mean New Requirements for Employers

by Jared Bryan, Principal, Jackson Lewis P.C.

California's Department of Fair Employment and Housing (DFEH) has approved new regulations, effective July 1, 2017, expanding protections available for gender identity and gender expression and for people who identify as transgender.

Under the regulations, gender expression is a person's gender-related behavior or appearance, or perceived behavior or appearance, regardless of conformity to stereotypical behavior and appearance for the individual's sex assigned at birth. Gender identity is a person's understanding of their gender, or perception of their gender identity. This may include male, female (or a combination of both, or neither of those), a gender differing from the one assigned at birth, or transgender.

DFEH's regulations add a definition for "transitioning," or "the process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth." Some activities that may occur during the transition period include alterations in name or pronoun usage, facilities use, or undergoing hormone therapy, surgery, or other related medical procedures. Employers may not discriminate against a person who is transitioning, has transitioned, or is perceived to be transitioning.

Employers may not ask an employee to disclose information related to sex, including gender, gender expression, or gender identity, unless requested on a voluntary basis for recordkeeping purposes. Employers also are barred from inquiring about or requesting documentation of an employee's gender, gender expression, gender identity, or sex.

The regulations also expand employee rights related to work conditions and job



performance. Employers must allow employees to use facilities that correspond with their gender identity or gender expression. Single-occupancy facilities under the employer's control must be labeled with gender-neutral terms. Finally, employers must allow employees to carry out duties that correspond to the person's gender expression or gender identity, regardless of their sex assigned at birth.

To ensure full compliance with the expanded regulations, employers should promptly review their policies and implement a comprehensive Transgender Policy addressing gender transition plans, legal name changes and personal pronouns, restroom and locker room usage, privacy and medical records, and training. In consultation with experienced employment law counsel, employers also should evaluate their practices with respect to pre-hire and post-hire documentation, gender-transition talking points, LGBTQ sensitivity training, and related company policies.


Jared Bryan

Jared Bryan is a Principal in the Orange County office of Jackson Lewis P.C., an AmLaw 100 firm dedicated to representing management exclusively in workplace law. Contact Jared at 949.885.1360 or Jared.Bryan@jacksonlewis.com.



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“Ban the Box” Is A Bad Idea

By: James J. McDonald, Jr., Fisher Phillips



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“Ban the box” laws prohibit employers from inquiring on an employment application about job applicants’ criminal convictions. These laws already apply to public sector employers in California

and to private sector employers in Los Angeles and San Francisco. Assembly Bill 1008, passed by the California Assembly and pending in the state Senate, would extend the prohibition to all California employers with five or more employees.

AB 1008 was apparently written by someone who has never had to hire in a competitive job market. It would prohibit employers from asking about a job applicant’s criminal history until after a conditional offer of employment is extended. Then if a criminal conviction turns up, the employer would first have to make an “individualized assessment” of whether the criminal conviction “has a direct and adverse relationship with the specific duties of the job” such that withdrawal of the job offer is warranted. In making this assessment the employer would have to consider (1) the nature and gravity of the offense, (2) the time that has passed since the offense, and (3) the nature of the job.

If the employer decides to withdraw the job offer after making this assessment it would not be allowed under AB 1008 immediately to do so. Rather, it would have to inform the applicant in writing and give the applicant at least five business days to challenge the accuracy of the conviction record, submit evidence of rehabilitation or mitigating circumstances, or both. The employer would have to consider such information before making a final decision. If the decision is still to withdraw the job offer, the employer would have to so advise the applicant in writing, along with disclosing any rights to appeal the decision and the applicant’s right to file a complaint with the state’s Department of Fair Employment and Housing.

By the time this process is completed, two weeks or more are likely to have elapsed before the employer could resume the selection process, and by then other top candidates may no longer be available. Moreover, the same process will have to be completed even in cases where it is obvious that a conviction will disqualify an applicant, such as a convicted child molester applying for a playground monitor job or a convicted embezzler applying for an accounting position.

In addition to extending the recruitment process, AB 1008 will almost certainly lead to more lawsuits. Until now, wrongful failure to hire suits have been uncommon. That will change if AB 1008 becomes law. Anyone with a criminal conviction will have a license to sue every time he or she does not get hired. Also, noticeably missing from AB 1008 is a provision exempting employers that hire convicted criminals from lawsuits by third parties injured by those criminals on the job.

Finally, the question on the job application about prior criminal convictions is as much an honesty test as a background check. A promising candidate is one who honestly discloses a prior conviction. Candidates who lie about not having prior convictions are generally disastrous hires. You not only hire a criminal but a dishonest one at that. Similarly deceitful are applicants who “forget” to answer the question about prior criminal convictions. Really, how many people are uncertain whether they have been convicted of a crime?

Clearly, not every applicant with a criminal conviction should automatically be excluded from consideration. State and federal regulations already require that employers only reject candidates whose convictions are relevant to the job. Indeed, an applicant with a prior criminal conviction not related to the job may be the best hire. Such people might be harder working, more motivated to succeed and more grateful for the opportunity (and less likely to leave) than employees who lack a criminal history.

AB 1008, however, if enacted, will only add delay, gamesmanship and litigation to the hiring process. It will provide employers that have a choice with one more reason to leave California.

James J. McDonald, Jr. is managing partner of the Irvine, California office of the labor and employment firm Fisher & Phillips LLP. He is author of *California Employment Law: An Employer’s Guide*, published by the Society for Human Resource Management.



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Missed Meal and Rest Breaks Can Cost Employers Millions

It is true, and not surprising, that California's laws (which are more protective of employees than federal laws) governing meal breaks and rest periods are complex and can be difficult to manage. Failure to comply can result in significant financial penalties for large and small companies. For example, in 2017 TJ Maxx paid \$8.5 million for failure to provide meal breaks and pay for time spent waiting for managers to close up shop after hours, and in 2015, Il Fornaio paid \$1.5 million to settle wage and hour allegations, including missed meal and rest breaks.

Who Is Entitled to Meal and Rest Breaks

With few exceptions, non-exempt employees are entitled to meal and rest breaks, depending on the number of hours they work in a shift. To complicate matters, it's not just about the employee taking an off-duty meal break, but when it must be taken. If taken even one minute after the start of the fifth hour, the employer must pay one hour of premium pay to the employee. It's important to note that the first hour of work occurs when the employee has worked between 0 and 60 minutes. So, an employee who starts at 8:00 a.m. must take a meal break no later than 12:59 p.m., regardless of circumstances, or the employer must pay the employee an additional hour of pay at the employee's regular rate. Each violation requires extra pay. This can trigger additional penalties for missed pay and inaccurate wage statements. As you can imagine, if you are not following the labor code, this can get very expensive, very quickly.

Employer Requirements

Employers must relieve their employees of all duties and relinquish control over how employees spend their meal and rest breaks. Employers must not interfere or discourage their employees from taking breaks. Managers and supervisors should not interrupt an employee's break with work-related questions or issues. If you

require your employees to stay "on call" during their meal or rest periods, you are more than likely violating the labor code. However, if an employee works six hours or less, the meal period can be waived by mutual consent. Under *very limited* situations and with mutual consent, in writing, an on-duty meal period may be permitted. If an employee insists on working through a break and your business has relinquished control over the employee, given them the opportunity to take an uninterrupted break, and not discouraged them from doing so, your business is satisfying its obligations.

For more information on meal and rest break requirements, including proper documentation, time keeping procedures, and recording keeping processes, we recommend contacting a labor attorney experienced in this area.

Lisa Pierson

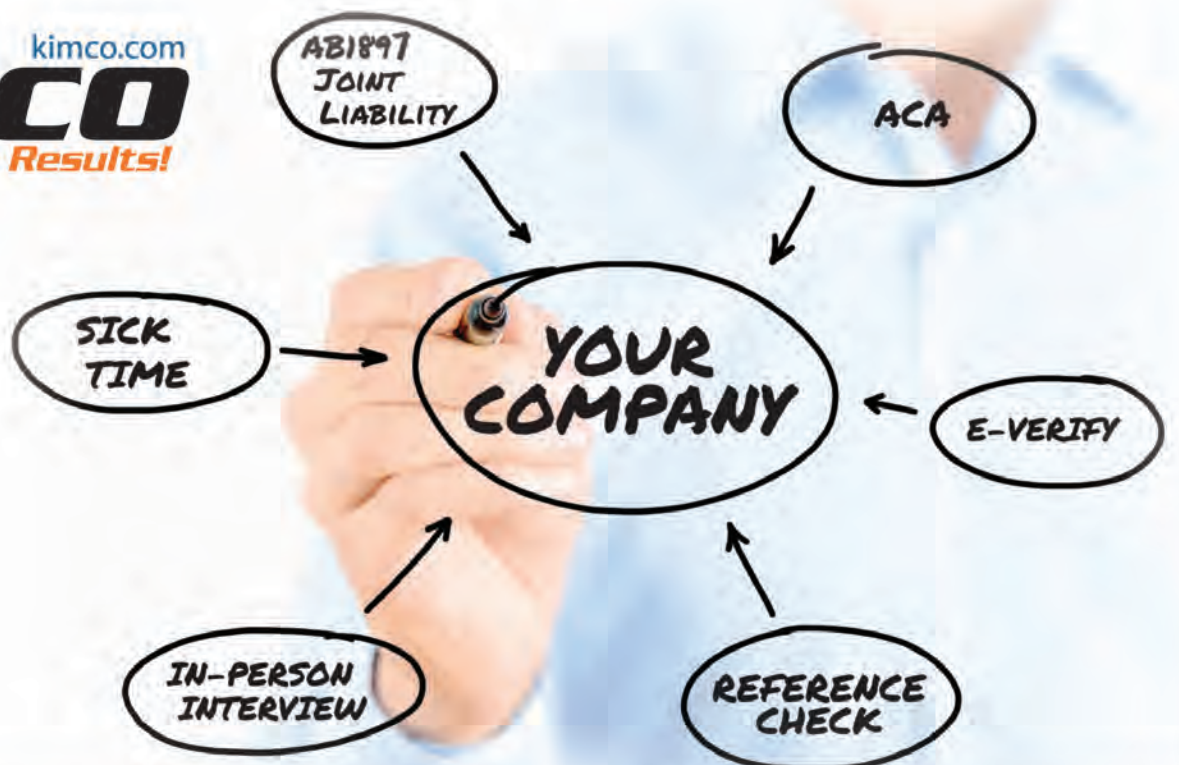
Lisa Pierson is the President of Advantex Professional Services, a recruitment firm specializing in finance and accounting, IT and engineering; Kimco Staffing Services, which includes office professionals, technical support, accounting operations, industrial, and on-site managed services; and MediQuest Staffing which focuses on healthcare positions. In the past 30 years, the companies have employed 212,512 people, serviced 21,941 clients, and filled 687,192 positions. You can reach Lisa at lperson@kimco.com or 949.331.1102.



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New California Supreme Court Decision Serves as Reminder for Employers to Conduct Ongoing Wage and Hour Compliance Audits

by Stephen L. Berry, Partner, & Blake R. Bertagna, Associate, Paul Hastings LLP

In 2004, the California Private Attorneys General Act (“PAGA”) – the so-called “bounty hunter” law – became effective, authorizing “aggrieved” employees to bring a lawsuit against their employer to recover penalties for Labor Code violations not only on behalf of themselves but also as the representative of all other alleged aggrieved employees, both current and former. Though the PAGA lawsuit look-back period is shorter than a traditional class action (one year vs. generally four years), PAGA lawsuits increased more than 400% from 2005 to 2013 as plaintiffs’ attorneys have experienced difficulty satisfying the rigorous requirements for maintaining a traditional class action.

In *Williams v. Superior Court*, No. S227228 (Cal. July 13, 2017), a PAGA action arising from the alleged failure of the employer to provide compliant meal and rest breaks, the California Supreme Court held that the broad scope of discovery allowed in traditional California class actions applies in PAGA actions as well.

The plaintiff in *Williams* sought contact information (home address and phone number) for all of the defendant/employer’s California employees (approximately 16,500 individuals). The employer refused, but the trial court issued a compromise order: the employer initially would be required only to provide contact information for the named plaintiff’s work location, and providing any further employee contact information would be conditioned upon the plaintiff being deposed and proffering evidence showing that his company-wide PAGA claims had merit. The appellate court denied the plaintiff’s request for review, effectively affirming the trial court order.

The California Supreme Court reversed, holding that – as in class actions – the contact information of those a plaintiff purports to represent in a PAGA action is discoverable “as an essential prerequisite to effectively seeking group relief, without any requirement that the plaintiff first show good cause.” The Court rejected all of the employer’s arguments in support of the process approved by the lower courts, including that the plaintiff should first be required to make some showing that he is a proper representative of others since he worked at only one location, and that giving the information would violate the privacy rights of the



other employees. On this latter point, the Court concluded that the privacy interests could be protected by giving them written notice and an opportunity decline to have their information disclosed, as is routinely done in class actions.

The *Williams* decision likely will sustain the trend of using PAGA to challenge alleged Labor Code violations on a representative, group basis. The best way for an employer to prevent and successfully defend against PAGA and other employment-related claims is to have compliant wage and hour policies in place and conduct periodic audits to ensure that practices are consistent with the policies in at least the following areas: (1) off-duty meal periods; (2) off-duty rest breaks; (3) payment of one-hour’s pay for non-compliant meal periods and rest breaks; (4) prohibition of off-the-clock work; (5) use of independent contractors; (6) classification of employees as exempt from overtime pay; (7) accurate recording and pay for all time worked; and (8) complete and accurate wage statements.

Stephen Berry

Stephen Berry is a partner and Chair of the Employment Law Department in the firm’s Orange County office, and represents employers in all aspects of employment law and labor relations, including defense of wage and hour class actions. Contact him at 714.668.6246 or stephenberry@paulhastings.com.



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Businesses Subcontracting for Workers: Beware of Increased Liability and Increased Litigation

Companies who hire staffing agencies, subcontractors, or other businesses to perform work, believing that they don't need to be concerned about employee problems, should think again. In a recent news release issued by the Department of Industrial Relations (News Release No.: 2017-55), the California Labor Commissioner declared that for the first time since AB 1897 was enacted on January 1, 2015, the Labor Commissioner has held a general contractor responsible for wage theft by its subcontractor. In that case, a general contractor was held liable for its subcontractor's payment of workers with checks drawn on insufficient funds and failure to pay minimum wage and overtime wages, among other violations.

California Labor Code section 2810.3 obligates certain employers to share the employee liabilities of its contractors. The statute was enacted based on the legislature's concern about client employers evading liability for wage and hour and working condition violations for subcontracted workers, given the increased prevalence of this type of working arrangement in California.

Generally speaking, any business with a workforce of 25 or more workers that obtains or is provided with five or more workers to perform labor within its usual course of business by any temporary service or "labor contractor," can expect to be held legally responsible for the payment of wages and to ensure there is valid workers compensation coverage for such workers.

The stated mission of the Division of Labor Standards Enforcement is, "to ensure a just day's pay in every workplace in the state and to promote economic justice through the robust enforcement of Labor Laws." California Labor Code section 90.5(a) specifically provides that, "It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation."

The Division of Labor Standards Enforcement has its own Bureau of Field Enforcement that conducts onsite inspections of industries to ensure compliance. Violations of minimum wage laws and overtime pay requirements are given high priority for investigation.

Labor Code section 2810.5 requires that any staffing agency, temporary service agency, employee leasing company or professional employer organization provide specific written notice to the employee of the name, address, and phone number of the hiring (client) employer for whom the employee will perform work.

If the temporary employee is not properly paid in compliance with all labor laws or is not provided valid workers compensation insurance by the temporary agency, the employee may report the business to the Labor Commissioner. Business owners can expect these complaints to be vigorously investigated and prosecuted.

In addition to complaints reported to and investigated by the State Labor Commission, there are additional avenues by which California employers can expect to be legally responsible for the

acts of temporary staffing agencies or other labor contractors. Plaintiff lawyers may utilize this rule to pursue civil actions against employers under California's Private Attorneys General Act (PAGA). This law allows aggrieved employees to file civil lawsuits to recover substantial civil penalties on behalf of themselves, other employees, and the State of California for violations of the Labor Code. The law provides that any proposed settlement of a PAGA claim must be received and approved by the court.

Employers cannot avoid liability under PAGA by obtaining a waiver from employees or labor contractors. The statute provides that, "A waiver of this section is contrary to public policy, and is void and unenforceable (see Labor Code section 2810.3(m)). However, the statute provides that the employer and labor contractor may establish by contract that one must defend or indemnify the other. (See Labor Code section 2810.3(g) and (h)).

Businesses who enter into arrangements using subcontracted workers should take extra precautions to protect themselves. Asking for the subcontractor's proof of workers' compensation insurance is a good start. Follow up with contact to the insurance carrier to make certain that the policy of insurance is current and covers those workers who provide work for the business. Ask many questions about safety programs and training implemented by the worker supplier. Obtain details about the company's wage and hour practices and ask to see copies of their overtime and meal and rest break policies, as well as any other policies that impact the workers who are performing work on behalf of the business. Require the subcontractor to demonstrate compliance in the areas of workers' compensation insurance, Cal/OSHA regulations, and wage and hour laws. Another consideration is whether having the work outsourced makes the most sense in light of the potential liability, or whether it makes more sense to have the work performed in-house. Finally, make certain the written agreement with the subcontractor providing employees contains an indemnity clause and duty to defend in case any liability arises. Be persistent in obtaining this information and if the price for the service seems too good to be true, it probably is.



Colleen M. McCarthy, Esq. is a Partner and chairs the Firm's Employment Practices Group. She has dedicated her practice to representing and protecting employers, through preventative counseling and sound practical advice. Ms. McCarthy has counseled employers about the complicated employment laws that impact their businesses to ensure that they are in compliance, and to reduce the chance of costly litigation.



Gregory J. Ferruzzo is a Partner and chairs the Firm's Civil Litigation Practice Group. He has 20+ years of civil trial experience defending employers in litigation filed in State and Federal Courts.

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BUSINESS & INVESTMENT IMMIGRATION LAW

L&E Visas: Excellent Options for Foreign Businesses or Investors Looking to Open a U.S. Office

by David Hirson, Managing Partner, & Emily Singer Hurvitz, Associate Attorney, David Hirson & Partners, LLP

Two important non-immigrant visa categories to contemplate when considering opening a business in the United States are:

1. The L Intracompany Transferee Visa
2. The E-1 Treaty Trader/E-2 Treaty Investor Visa

The L visa category enables a U.S. employer to transfer either an executive, managerial, or specialized knowledge employee from one of its foreign offices to one of its offices in the U.S. The L visa category also enables a foreign company, which does not yet have an affiliated U.S. office, to send an employee to establish a U.S. office or create a start-up entity in the U.S. The E-1 and E-2 visas allow a national of a treaty country—a country with which the United States maintains a treaty of commerce and navigation—to come to the U.S. to either engage in international trade or to invest a substantial amount of capital into a U.S. business.

L Intracompany Transferee Visa

The L visa classifications require that the business has a qualifying relationship with a foreign company (parent, branch, subsidiary, or affiliate) and is currently, or will be, doing business as an employer in the U.S. and in at least one other country while the employee is in the U.S. on an L-1 visa. The L visa also requires that the employee has worked abroad for the business for one continuous year within the three years immediately preceding his or her admission to the U.S. The L-1A visa requires the employee to come to the United States to serve in an executive or managerial capacity for the business, while the L-1B visa requires the employee to come to the U.S. to serve in a specialized knowledge capacity for the business.

The L visa may be a good option for a business abroad that wants to open a U.S. office, acquire an existing business, or create a start-up entity in the U.S. to employ foreign nationals as managers, executives, or individuals with specialized knowledge. The L-1A status can be renewed for seven years while the L-1B status can be renewed for five years. Additionally, there is an immigrant visa with similar requirements to the L-1A visa. By allowing foreign businesses to open a U.S. office, the L visa continues to provide sources of foreign direct investment into the U.S.

E-1 Treaty Trader/E-2 Treaty Investor Visa

Both E-1 and E-2 visa classifications require that an individual be a national of a country with which the U.S. maintains a treaty of commerce and navigation. The E-1 visa requires that the foreign national conduct substantial and principal trade between the U.S. and the treaty country. While the E-2 visa requires that the foreign national has invested, or be actively in the process of investing, a substantial amount of capital in an enterprise in the U.S. and be seeking to enter the U.S. solely to develop and direct the investment enterprise—this is established by showing at least 50% ownership of the enterprise or possession of operational control through a managerial position or other corporate device.

The E-1 and E-2 visas may be a good option for entrepreneurs who want to open a business and work in the U.S., but the individual must be a national of a country with the appropriate treaty with the U.S. Certain employees of such a person or of a qualifying organization may also be eligible for the E-1 or E-2 classification. There is no limit on how many times this visa status can be extended, so a foreign national can retain this status for however long he or she

chooses. The E-1 and E-2 visas provide foreign direct investment into the U.S. and increase trade between the U.S. and the treaty countries.

Alternative Financing Option Combined with Immigration – EB-5 Immigrant Investor Visa

One interesting alternative to the above-mentioned non-immigrant visas is the EB-5 immigrant investor visa. This unique visa provides a path for new or troubled businesses to obtain foreign sources of capital in exchange for creating at least ten new full-time U.S. jobs per immigrant investor (or maintaining ten full-time U.S. jobs in a qualifying troubled business) all while starting the immigrant on the path towards permanent U.S. residency. The EB-5 program has many regulations which must be followed, but tens of thousands of U.S. jobs have successfully been created through this program, benefitting local economies along the way. Currently, the minimum investment amount for the EB-5 program is \$500,000 for an investment made in a Targeted Employment Area (“TEA”) or \$1,000,000 for a non-TEA investment. The U.S. Congress is contemplating changing the EB-5 program, including increasing the minimum investment amount and increasing transparency in the projects that use EB-5 funding.

Contact an Experienced Immigration Lawyer

There are critical nuances in each of these visa categories and it is extremely important to obtain expert advice and to plan ahead. If you are looking to open a business in the U.S., consult with one of our experienced immigration lawyers at David Hirson & Partners, LLP.

Telephone: 949.383.5358 E-mail: info@hirson.com Website: www.hirson.com

The information provided in this article is for informational purposes only and is not to be considered as legal advice. Please consult with a licensed attorney regarding your specific circumstances.

David Hirson, Esq. is the managing partner of David Hirson & Partners, LLP. David has more than 35 years of experience in the practice of immigration law. Although he practices in almost all areas of immigration law including family law immigration and all aspects of business law immigration, his specialty is EB-5 investment immigration law. He has been certified as a Specialist in Immigration and Nationality Law by the State Bar of California, Board of Legal Specialization continuously since 1990.



Emily Singer Hurvitz, Esq. recently joined David Hirson & Partners, LLP. Prior to this position, Emily gained experience with employment and family-based immigration with a large business immigration firm. Emily has extensive experience in corporate immigration law, including filing high-volume immigrant and nonimmigrant visa applications for clients working in a variety of industry areas and handling a range of visa types.





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