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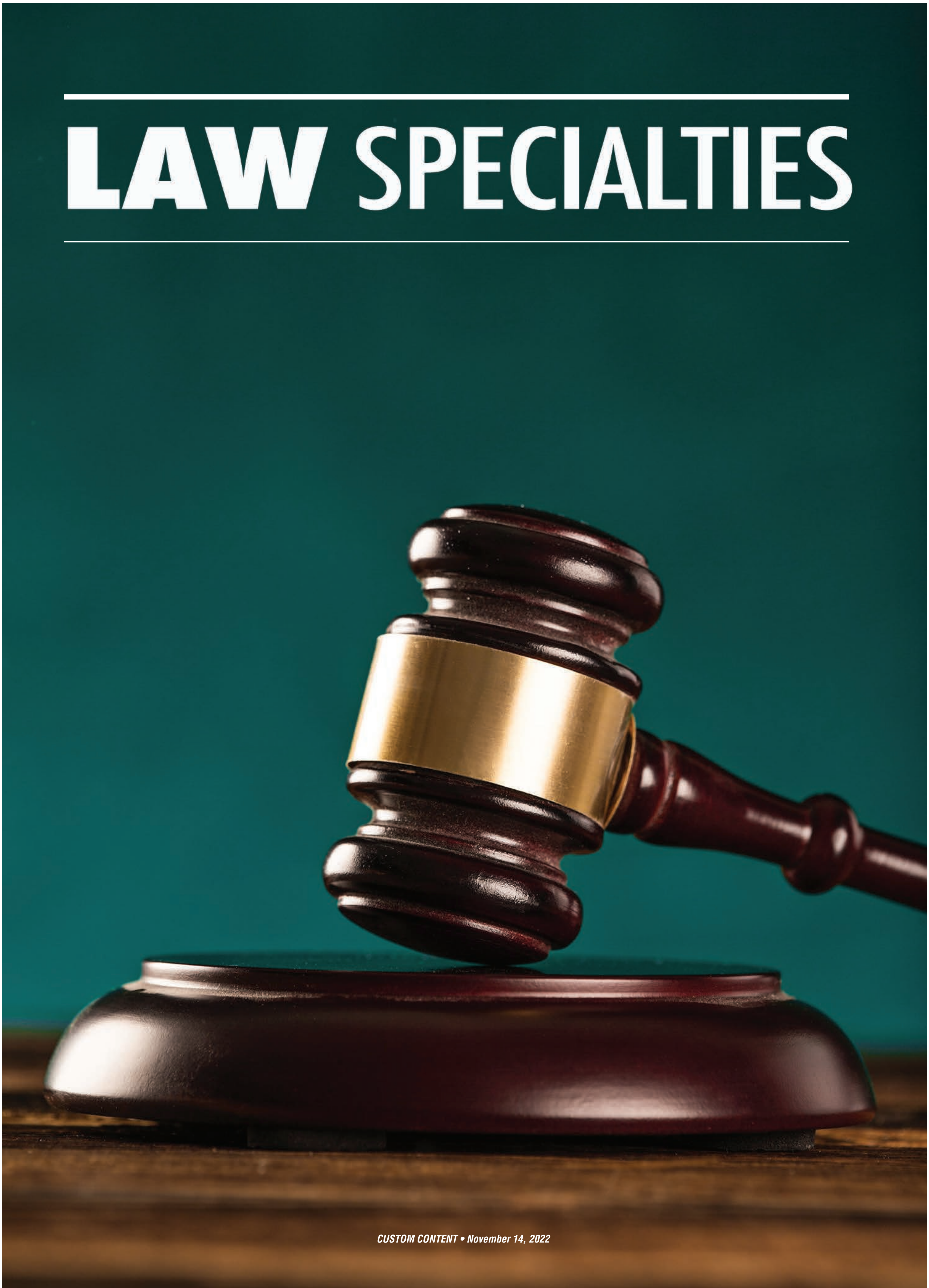

CUSTOM CONTENT • November 14, 2022

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Letters of Intent – A Roadmap for Success

The first legal document a business owner encounters in connection with the sale of her business is the letter of intent (LOI). Too often, sellers execute the LOI without first consulting professionals to advise them regarding the many legal implications of the document. Properly structuring the LOI at the outset of the transaction can fix the important deal terms in place to aid subsequent negotiations, maximize ultimate value received by the seller via favorable tax treatment of the sale and can weed out difficult buyers early in the process.

Asset Sale verses Stock Sale
The first key decision in negotiating the LOI is whether to structure the transaction as a sale of the assets of the business, or as a sale of the equity ownership interests in the entity itself (e.g., the stock of a corporation or the membership interest in a limited liability company). Generally speaking, it is more tax advantageous for the seller to sell the equity ownership interests because she will be able to pay federal income tax at the lower long-term capital gains tax rate (currently a maximum 20% federal rate) or the gain may be excluded altogether if the entity is a C corporation and the stock in the corporation qualifies as Qualified Small Business Stock. Conversely, an asset sale may result in the payment of a broad array of higher tax rates depending on the makeup of the assets of the business being sold. Every seller should consult her accountant to perform a pro forma tax analysis to fully understand the tax treatment of the different transaction structures before signing the LOI.

Tax Treatment of Transaction
In some cases, the buyer may need to purchase the equity interests in the entity –for example, if the entity has contracts or licenses which cannot be assigned to a new entity. In those cases, the buyer may desire to make a tax election to treat the sale as an asset sale solely for income tax purposes. Because of the increased seller tax bill associated with such an election, an LOI should address whether the buyer will gross-up the purchase price to make the seller whole for agreeing to cooperate with the buyer's election.

Due Diligence
During the due diligence process, the buyer needs to thoroughly review the seller's important documents pertaining to the operations of the business, including the seller's tax returns, financial statements and the corporate minute book. If not otherwise addressed in a separate nondisclosure agreement, the LOI should limit the buyer's use of the confidential information to evaluating the purchase and sale transaction. The LOI should also put restrictions on the disclosure of customer and vendor lists until closing and should limit all contact between the buyer and the seller's employees until there is some degree of confidence that the transaction will close.

Indemnification
The definitive purchase agreement entered into between the seller and the buyer will contain pages upon pages of representations and warranties the seller must make concerning the business, including that the business has operated in accordance with laws and regulations, that there are no unpaid tax liabilities and that there is no pending or threatened litigation. While it is not necessary to negotiate in the LOI the breadth of these representations, the LOI should address how long the buyer has to make these claims against the seller and the extent to which the seller will be financially on the hook for such claims.

Exclusivity
The process of selling a company can be costly and time-consuming, as can the process of evaluating whether to purchase a business. For this reason, most LOIs contain an exclusivity provision restricting the seller from simultaneously marketing the business to multiple parties. The seller should be cautious that the restriction be reasonable in duration so as to not unduly prevent her from selling the business if the present deals fall apart.

Enforceability
In evaluating whether the LOI creates binding legal obligations between the parties, courts look to the expectations of the parties and the circumstances surrounding the transaction. The more the LOI resembles a contract, the more likely a court will determine that it creates binding obligations. While an agreement to enter into a written agreement in the future is not enforceable, if all the material terms are present in the LOI, save a final reduced writing, a contract may have been created and a later refusal to "sign" may be futile. In contract interpretation, only material terms matter to create an enforceable contract; other deal points can be filled in by courts or commercially reasonable terms under the California Uniform Commercial Code. Thus, word choice in the LOI is very important. If the parties desire that the LOI be non-binding, the LOI should expressly state the non-binding nature and specify that the binding agreement between the parties will only be finalized in the definitive agreement to be negotiated, approved and signed at a later date.

Most of the LOI terms are specified to be non-binding - allowing either party to walk away from the deal at any time (excluding certain LOI terms like confidentiality and exclusivity that may continue to be enforceable for a period of time after the LOI is terminated). Notwithstanding the non-binding nature of the agreement, executing the LOI does 'green light' conduct by both sides, which conduct may have significant consequences for the parties. For instance, if the seller operates her business from a leased location, before closing the transaction, the seller will need to reach out to her landlord for consent. Further, the seller may need to inform her employees regarding the pending deal at some point prior to closing. If the buyer subsequently fails to proceed in good faith toward closing the transaction, the seller may have irreparably damaged her relationship with her landlord and her employees. In these scenarios, California courts have awarded due diligence costs and lost opportunity costs to stem these potential abuses.

Conclusion
A seller must carefully evaluate all the economic factors in determining whether now is the right time to sell her business. She should carefully consider engaging professionals (including accountants, business consultants, brokers and attorneys) to aid her in this decision. Engaging an attorney to assist the seller in negotiating the LOI will help the seller better understand all aspects of the transaction and ensure that her interests are safeguarded in the process. If you have any questions or concerns regarding the content of this article, the attorneys at Ferruzzo & Ferruzzo, LLP are available to provide such guidance.

This article is not meant to provide specific legal advice. For advice specific to your circumstance, please contact any of the attorneys in our Corporate Practices Group who are ready to assist you.

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Protect Your Home from Unforeseen Lawsuits

The H.E.L.P Trust™ can play a pivotal role in protecting the equity of your home.

By Jeffrey M. Verdon, Managing Partner, Jeffrey M. Verdon Law Group, LLP

Entrepreneurs often provide essential groundbreaking advancements for industry and society. Unfortunately, not all of those who follow this path are happy with some of the side effects that go along with being a successful businessperson. They can put the entrepreneur at risk for lawsuits, both legitimate and frivolous. Steve is just such an entrepreneur.

Successful in his pursuits, Steve now has a large estate he wants to protect for his children. He is especially interested in safeguarding his $10 million-plus Silicon Valley residence. On advice from counsel, Steve set up a **Home, Equity, and Lifestyle Protection Trust (H.E.L.P)** using Nevada's more protective laws.

Steve transferred the title of his home to the trust. Then he rented it back at the fair value rent removing the value of his home from his estate. And more importantly, he becomes a tenant (and not an owner) so the home will not be at risk in case of an unforeseen lawsuit.

The H.E.L.P. Trust Brings Peace of Mind

After doing this, Steve feels secure that his business can continue breaking new ground while protecting his existing estate from future misadventures.

What Happens When Lawsuits Crop Up

As time goes on, Steve's company ends up having to recall a defective product, and lawsuits ensue.

While his business does take some hits, the significant equity in Steve's personal residence is out of harm's way because he transferred the ownership to an irrevocable dynasty trust and then leased back the house from the trust. Thus, as a tenant, the equity in the residence is not liable for any of the business's legal claims absence of a fraudulent transfer. Litigants considered attacking the trust, but after determining that road would be expensive and uncertain, he was able to settle the personal liability of the lawsuit with a very modest monetary settlement instead. Steve's home was never at risk.

Are You a Candidate for a Lease-Back?

If you are sitting on substantial equity in your residence or vacation homes and fret over the potential loss of these valued real estate assets from lawsuit risk presented by your business activities, consider implementing a H.E.L.P. Trust.

JEFFREY M. VERDON
LAW GROUP, LLP

The Fusion of Planning and Protection.

Jeffrey M. Verdon, Esq. is the Managing Partner of the Jeffrey M. Verdon Law Group, LLP, a Trusts & Estates boutique law firm located in Newport Beach, Calif. With more than 30 years of experience in designing and implementing comprehensive estate planning and asset protection structures, the law firm serves affluent families and successful business owners in solving their most complex and vexing estate tax, income tax, and asset protection goals and objectives. Please call us for a complimentary consultation.

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Protect Your Home – Protect Your Family

Consider a Home, Equity, and Lifestyle Protection (H.E.L.P) Trust™

What if you or your business were attacked by an unforeseen lawsuit?

A **H.E.L.P. Trust** protects your residence and/or vacation home(s) by securely placing them in the trust. This safeguards your home from unforeseen lawsuits, creditors, and predators protecting your family, your home, and your legacy.

Questions? Contact our office to schedule a complimentary discussion.

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5 Tips to Meet California Employers' January 1 CCPA/CPRA Obligations

*By Sharon R. Klein, Esq.**

Ringing in the 2023 New Year, employers subject to the California Consumer Privacy Act ("CCPA"), enacted in 2020 and amended by the California Privacy Rights Act ("CPRA"), must comply with new data privacy obligations affecting employment and job applicant data.

Employees, job applicants, and independent contractors will be able to exercise the rights afforded to other consumers under the CCPA and CPRA. Employers should begin preparing now to be in compliance with the complex data privacy laws starting January 1, 2023.

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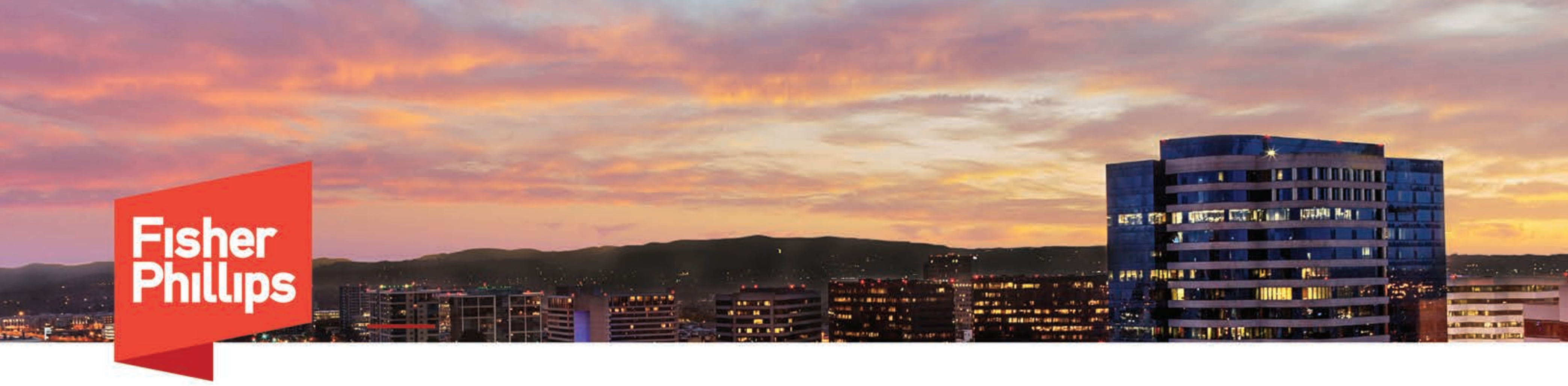
*Based in Orange County, Sharon R. Klein advises businesses on mitigating risks related to the privacy and security of personal data; implementing privacy, security, and data protection policies and "best practices;" compliance with privacy and security laws, regulations, and rules; data governance; and breach response, crisis management, and remedies for non-compliance. She is certified as an information privacy professional by the International Association of Privacy Professionals.

5 Ways to Jumpstart Your Employer CCPA/CPRA Compliance

1. **Thoroughly inventory your employee and job applicant data**, including mapping where the data was collected, where it is stored, what it is used for, and who (internally and externally) it is shared with. Importantly, identify which data is "sensitive personal information" under the CPRA.
2. **Review HR and IT service provider contracts**. Human resources and information technology service provider contracts should be reviewed and updated to include terms required by the CPRA to avoid "sales" of personal data.
3. **Implement or update your data retention policy**. CCPA notices to employees and job applicants must include how long personal information will be retained. The CPRA prohibits businesses from retaining personal information longer than is necessary to achieve the purposes disclosed in the business' privacy notice.
4. **Update CCPA notices and privacy policies for employees and job applicants**. New notice requirements include the categories of sensitive personal information that are collected, how long the categories of personal information will be kept, and if personal information is sold or shared, a web address to opt-out of the sale or sharing of personal information.
5. **Develop processes to exercise CCPA and CPRA rights**. Employees, job applicants, and independent contractors must be able to request to know, delete, opt out of the sale of, opt out of the sharing for cross context behavioral advertising of and/or correct personal information, and to limit the use of sensitive personal information. Your business will need processes to receive, act upon, and timely respond to these requests.



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Jeffrey Thurrell
Regional Managing Partner, Irvine, CA

Patrick Randall
Associate, Irvine, CA

COMMON WAGE & HOUR PITFALLS THAT BITE EMPLOYERS

Put bluntly, there are literally hundreds of Plaintiffs' attorneys that circle above just waiting for employers to stub their toe while trying to comply with California's hyper-technical wage and hours laws. These claims have taken over the court filings and even the most minor violations can expose employers to significant liability in the form of attorneys' fees. Here are the top technical wage and hour rules employers struggle with:

1. **Include All Required Information on Paystubs**
   Employers need to include a variety of information on an employee's paystub. Don't assume a payroll company will automatically include the correct information. In fact, payroll companies often have contractual clauses relieving them of liability for these violations. The information that an employer needs to have on their paystubs includes:
   - The employer's name and address,
   - The employee's name and last 4 digits of their social,
   - Inclusive dates for which the employee is paid,
   - Gross wages earned,
   - Applicable hourly rate (including overtime),
   - Total hours worked,
   - Deductions, and
   - Net wages earned

2. **Provide Employees with Timely Rest and Meal Periods**
   Employees are entitled to uninterrupted meal and rest periods. An employee's first meal period must occur within the first 5 hours of work and last 30 minutes. Employees are owed a second meal period after working 10 hours. Employees are also owed 10-minute rest periods depending on hours worked: 1 for 3½-6 hours, 2 for 6-10 hours, 3 for 10-14 hours, and 4 for 14-18 hours. An employer must pay an employee 1-hour of pay at their regular rate for a missed meal or rest period and include it on the employee's paystub. Employers should ensure they have a written policy in place, that employees clock in and out for their lunches, and use meal period waivers for shifts 6 hours or less.

3. **Avoid Rounding**
   Prior to technological advances it was more convenient for employers to round time to the nearest 15 minutes. Today, many employers still utilize rounding and are exposed to potential significant liability. Based upon recent case authority, rounding for 30-minute meal periods is not permitted and the whole issue as to whether rounding is permissible in any circumstance is up before the California Supreme Court. There is no real upside to continuing with the practice.

4. **Ensure "Regular Rate" of Pay is Calculated Correctly**
   When calculating the appropriate overtime rate for any given week the employer must determine the proper "regular rate" of pay. This is a fairly complicated issue but generally speaking the regular rate needs to include bonus and commission payments in addition to the hourly rate.

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FRAGOMEN WORLDWIDE

H-1B Visas: Do You Feel Lucky?

Within the employment based work visa options, the most common avenue is the H-1B visa. This program allows companies and other employers in the US to temporarily employ foreign nationals in occupations that requires relevant bachelor's degree or higher in the specific specialty, or its equivalent. H-1B specialty occupations may include fields such as architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts.

The US has imposed a cap on the number of new H-1B visas allowed per fiscal year: 65,000 H-1B visas that require at least a bachelor's degree and 20,000 additional H-1B visas that require at least a master's degree. Because so many people apply for the H-1B visa, the US has an annual H-1B lottery to determine who is lucky enough to have an H-1B petition filed on their behalf.


Huang

Last year, registration for the lottery occurred between March 1 through March 18. Like all other lotteries, US based employers registered their intended foreign national workers in the H-1B lottery by submitting that person's passport information. After a random selection, employers were notified of their selections the last week of March. H-1B petitions were then allowed to be filed beginning April 1.


Wexler

Last year, 483,927 H-1B registrations were submitted. Of this amount, the US initially selected 127,600 registrations in the lottery. The reason more than 85,000 were selected is because not all selections have a petition that is subsequently filed, and some petitions also get denied or withdrawn. By selecting more than 85,000, the US ensures that they meet their numerical allocations each year.

It's a crazy system but there you have it!

Christopher Huang is an Associate of Fragomen's Irvine office with several years of business law, and more than 3 years of exclusive immigration, experience. Christopher can be contacted at christopher.huang@fragomen.com.

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