EMPLOYMENT & LABOR LAW ROUNDTABLE

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As the landscape for the Orange County job market continues to evolve, there are a number of unanswered questions and significant topics to address. The Orange County Business Journal has asked some of the community's top experts in the field to share their insights, concerns and predictions for employers and businesses today.

Employment & Labor Law Roundtable Participants

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What keeps you up at night?


HR Policies
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▶ What is your employment partner's responsibility with the Affordable Care Act? What do business owners need to know and what advice would you give them regarding the current healthcare reform and dealing with their employees?

Lisa Pierson, Kimco Staffing Services: The Shared Responsibility component of the Affordable Care Act (ACA), known as the Employer Mandate, went into effect on Jan. 1, 2015. It requires companies, employing 100 or more employees, to offer affordable and ACA-qualified insurance to 70 percent of its eligible employees or pay significant penalties. While this new mandate will not affect a client's ability to secure temporary or contract staff, it's important to know if you are partnering with a staffing firm that is compliant with ACA requirements. If your staffing partner is not fully prepared to support and comply with ACA requirements, they may find themselves facing stiff penalties and may not be able to sustain their business. Conversely, employment partners who are financially stable and are well-versed in ACA requirements can be a good source of information for your ACA compliance questions.

▶ Why is E-Verify important?

Robyn Frick, Newmeyer & Dillion: E-Verify can provide benefits to employers that use the system. For instance, employers that properly use E-Verify in good faith are entitled to a presumption that they did not knowingly hire an unauthorized worker. Thus, if the employer is ever subject to a government audit, E-Verify puts the employer in a better position to defend against claims of hiring unauthorized workers. Using E-Verify also eliminates the problem of receiving "No Match" letters from the Social Security Administration ("SSA") because E-Verify checks the SSA's databases to confirm that the employee's name and social security number match.

Once employers are properly enrolled and trained to use E-Verify, employers can save time by no longer having to complete the otherwise onerous I-9 paperwork. Additionally, recent legislation allows illegal immigrants to obtain special driver's licenses, and prevents employers from discriminating against employees that present one of these licenses. Employers have a stronger basis to refute discrimination claims by people providing these licenses if they use E-Verify, because E-Verify provides an additional level of separation and scrutiny to determine whether the employee is authorized to work.

▶ What criteria should you use when selecting an employment partner?

Bruce May, Stuart Kane: Whenever an employer engages a payroll service, temp agency or staffing company, the first critical issue is the scope of work. Exactly what services is the partner going to deliver? Is it just payroll administration, or does it also include the time-keeping system? The contract needs to spell that out in detail.

A second crucial issue is legal compliance. Personnel working through an agency are considered "joint employees" of the company and the partner, so the parties need to specify who will comply with specific legal obligations. This gets tricky when they have ***joint*** obligations. For example, if the employer does not accurately report overtime hours worked, the temp agency can still be on the hook, and if the temp agency fails to pay for reported overtime hours, the employer can still be held liable. This leads to the issues of indemnification and insurance. Employers should push for language that maximizes the partner's responsibility for non-compliance, and partners will do the same in reverse.

The overriding point is that the parties must discuss these and other subjects in advance, clearly allocate responsibility and liability, and memorialize who is responsible if things go wrong.

Lisa Pierson, Kimco Staffing Services: Ultimately, your employment partner should protect you and your business. You need to select an employment partner who is financially stable and understands the Orange County marketplace, your business and your culture; one with tenured and knowledgeable recruiters who can identify both the technical and intangible skills required to help make your company a success. You should look for a partner who conducts proper testing (if needed), personally interviews and E-Verifies all employees to ensure an effective and compliant workforce. It's also important that they are proactive in addressing changing labor laws affecting insurance and wages, such as AB1897 (the new law states that private employers who use staffing companies are liable for a staffing company's failure to pay all required wages or to secure workers' compensation insurance) which went into effect Jan. 1, 2015; and AB 1522, the new sick-pay law which goes into effect July 1, 2015. They should provide you with independent audits to ensure compliance with these laws. You should also look for an employment partner who can provide you with insight through educational webinars and seminars, salary surveys, legal updates, case studies and the like.

▶ We often hear that California is an increasingly employee-friendly state. What advice would you give a new employer/business owner looking to set up operations and staffing in Orange County?

Lisa Pierson, Kimco Staffing Services: The term "employee-friendly" is often interpreted as "employer-unfriendly." This does not have to be the case. With an understanding of labor rules and regulations, along with proper policies and procedures, Orange County employers can prosper. Having proper legal representation by an individual or firm who specializes in employment law is essential to craft the necessary documents that ensure both employee and employer are properly protected. Items such as professionally reviewed employment handbooks and thorough employee orientations make expectations clear for the employee while ensuring that the employer adheres to the necessary rigors of California's various employment laws. In addition, trade organizations such as the National Human Resources Association (NHRA) and Professionals in Human Resources Association (PIHRA) provide regular updates with valuable information on the changing legal landscape.

▶ We understand there are crucial issues before the NLRB regarding the use of company email to discuss ways to improve working conditions and the obligations of franchisors. What should employers do to prepare for, or comply with, these issues?

Bruce May, Stuart Kane: In the *Purple Communications* case, a divided NLRB struck down a rule forbidding employees from using the company email system for non-business purposes because it infringed their right to communicate about work-related issues ***during non-working time***.

The Board said an employer can justify a blanket ban on off-duty email use only by demonstrating that "special circumstances" make the ban necessary to maintain production or discipline. The opinion also states that this would be a "rare case" and implies that employers can still monitor and access all email use if they do not target union activities. The decision does not address email access by nonemployees such as union organizers.

In addition, the NLRB General Counsel filed complaints against McDonalds, alleging it was jointly liable with franchisees for alleged discriminatory and unlawful practices against franchisees' employees, including statements discouraging protests. This decision is surprising because McDonald's does not control day-to-day personnel decisions made by individual franchisees. In a similar case last year, the California Supreme Court reasoned that franchisors are not liable for wage and hour violations by franchisees.

It remains to be seen whether the Courts agree with these far-reaching decisions by the NLRB, but policy reviews are warranted.

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▶ What role do you see technology playing in the job market and/or in the workplace? Are there new issues arising that employers should consider? For example, social media, remote working scenarios, etc.

Lisa Pierson, Kimco Staffing Services: Technology has had a dramatic impact on the job market from finding a job or candidate to how we work each day. A few years ago, social recruiting did not exist. Today, social media is a tool often used by recruiters and job seekers alike. With the advent of companies such as TweetMyJobs and the continued growth of LinkedIn, recruiters are more easily able to identify both active job seekers and passive candidates. Job seekers can evaluate potential employers by visiting company websites, corporate social media sites and job sites to see if the prospective company is a good fit. Companies should review and monitor their online reputation via websites such as Glassdoor, a job site with an online database of company reviews. After candidates are identified, technology steps in again with applicant tracking systems and remote video interviewing to streamline the hiring process. Once hired, many employees are able to work remotely as effectively as they would in a physical office thanks to seamless telephony systems, video conferencing and virtual access to computer systems. If employees work remotely, it's a best practice for the employee handbook to reference the remote location as a job site and delineate expectations accordingly.

▶ When are inside sales personnel exempt under State and Federal law?

Bruce May, Stuart Kane: This is a real trap for the unwary employer. California law recognizes a partial exemption from overtime pay (but not record-keeping) for inside salespersons who (1) make at least twice the State minimum wage for every hour worked and (2) earn more than half their monthly income in commissions.

The first element can be satisfied by paying either an hourly wage of at least $18 per hour ($20 as of Jan. 1, 2016) or by paying a base amount that equals or exceeds that rate for all hours worked. The employer must keep track of daily hours worked.

The second element is tricky because new salespersons typically need time to ramp up before their commissions will exceed their base pay. But the real trap is that the federal Fair Labor Standards Act allows this exemption only at "retail or service establishments," like a department store or auto dealership selling consumer goods to the end user. If you are selling business to business, you must pay overtime to inside salespersons. You can still pay them commissions as well, but those commissions then must be incorporated into the overtime rate.

Robyn Frick, Newmeyer & Dillion: Under the Federal law, i.e., the Fair Labor Standards Act ("FLSA"), inside salespersons qualify for an overtime (but not minimum wage) exemption when (a) the employee's regular rate of pay is greater than one and one-half times the Federal minimum wage, (b) more than half of the employee's compensation for a representative period derives from commissions on sales, and (c) the employer qualifies as a "retail or service establishment." (29 U.S.C. §207(i)). Although the FLSA does not specifically define "retail or service establishment," the Department of Labor has promulgated extensive regulations on the subject. (*See* 29 CFR §§ 779.300 – 779.388). In general, the business must sell goods or services that are not for resale and the business must fit within traditional notions of a retail concept, e.g., selling goods to the general public, serving the everyday needs of the community and standing at the end of the stream of distribution.

California's inside sales exemption applies to employees engaged in inside sales whose earnings exceed one and one-half times the state minimum wage (currently $9.00 x 1.5 = $13.50 per hour), and who receive more than half of their compensation through commissions. (Wage Order 4-2001, §3(D), 8 Cal. Code Regs §11040(3)(D); Wage Order 7-2001, §3(D), 8 Cal. Code Regs §11070(3)(D)). Although California law does not impose the "retail sales or service establishment" requirement, California's inside sales exemption is only available to employees regulated under occupational Wage Order 4 (Professional, Technical, Clerical, Mechanical and Similar Occupations) or industry Wage Order 7 (Mercantile Industry). The inside sales exemption is *not available* to California employers whose businesses fall under another Wage Order.

▶ Is your employment partner committed to a robust Safety and Risk Management Program?

Lisa Pierson, Kimco Staffing Services: Your employment partner should team with your senior management and safety manager to create a customized safety program with detailed action plans designed to reduce the number of injuries and costs associated with those injuries. Your staffing company should employ full-time and part-time, field-based safety managers and coordinators to provide you with safety and hazard risk analysis of your facilities. This is accomplished via random and pre-scheduled safety walkthroughs, safety committee meetings, safety incentive programs, equipment certification, accident investigation and root cause analysis, trend analysis and detailed written reports. A professional, proactive approach to safety results in decreased accidents and increased cost savings.

▶ We are planning to provide our supervisors with online sexual harassment training. Is this a good idea?

Robyn Frick, Newmeyer & Dillion: California employers having 50 or more employees must provide their supervisors with at least two hours of classroom or other "effective interactive training and education" regarding sexual harassment. (Cal. Gov. Code, § 12950.1, subd. (e)). While using online training may appear attractive at first glance, shortfalls with this option are often overlooked.

Having supervisors passively listen to unknown computer voices at separate workstations (perhaps while they perform other tasks in the background) is hardly "interactive," as supervisors are likely more concerned with finishing the program as soon as possible rather than understanding its contents. Conversely, in-person training that occurs in a group session facilitates discussion, understanding through real-life hypotheticals and experiences, and allows supervisors to ask questions directly to the trainer on the spot. Employers are also required to train supervisors about the employer's specific harassment policy, but this cannot be done through an online session that purports to apply to multiple audiences.

Ultimately, employers bear the burden of proving that all supervisors received timely and appropriate training. If the adequacy of the training is challenged, testimony from a live witness about the content of the training, and the trainer's qualifications, can be strong evidence that the employer satisfied its obligations.

Bruce May, Stuart Kane: Online training can work, and it is often the best alternative for salespersons and field personnel who work off-site. The training must still be interactive, meaning the employee must be able to pose questions and get a prompt answer. Most online programs have other interactive features, like quizzes to assure the participant is progressing.

But I still think the best forum for anti-harassment training is in a group in a classroom setting. We have provided this service to clients for years because the message carries more weight coming from outside legal counsel rather than in-house HR or a website. Classroom training also allows for peer interaction, which can be critical. Live questions and comments from the audience can reveal misconceptions, and provoke lively discussion.

Lastly, remember that California added a curious requirement to the curriculum last year—the training must also address "abusive behavior" meaning extremely offensive verbal or physical conduct even if not based on sex or other protected classifications.

▶ What are the most crucial issues facing employers and HR executives in Orange County in 2015?

Bruce May, Stuart Kane: The new sick pay law effective July 1 is the biggest development of 2015. It applies to virtually every employer, and to any employee who works full- or part-time for 30 calendar days. The law has a unique structure: Employers can either allow paid sick leave to accrue over time at the rate of 1 hour per 30 hours worked (which equates to 8.67 days per year) ***or*** the employer can credit each employee with three paid sick days up front. In all cases, the employer can require the employee to have worked at least 90 days before using any sick leave, and can limit the ***use*** of paid sick to three days per year.

Employers must also include the amount of sick leave available to each employee on their pay stub or other written notice, and display a poster in the workplace. The Labor Commissioner is responsible for enforcing the new law, and new penalties apply. Every employer should review their sick pay policy right now, even if they currently offer three or more sick days each year. Special rules for unused vacation, and concerns about social media, employee classification and technology, will continue to present important issues.