EMPLOYMENT & Labor Law

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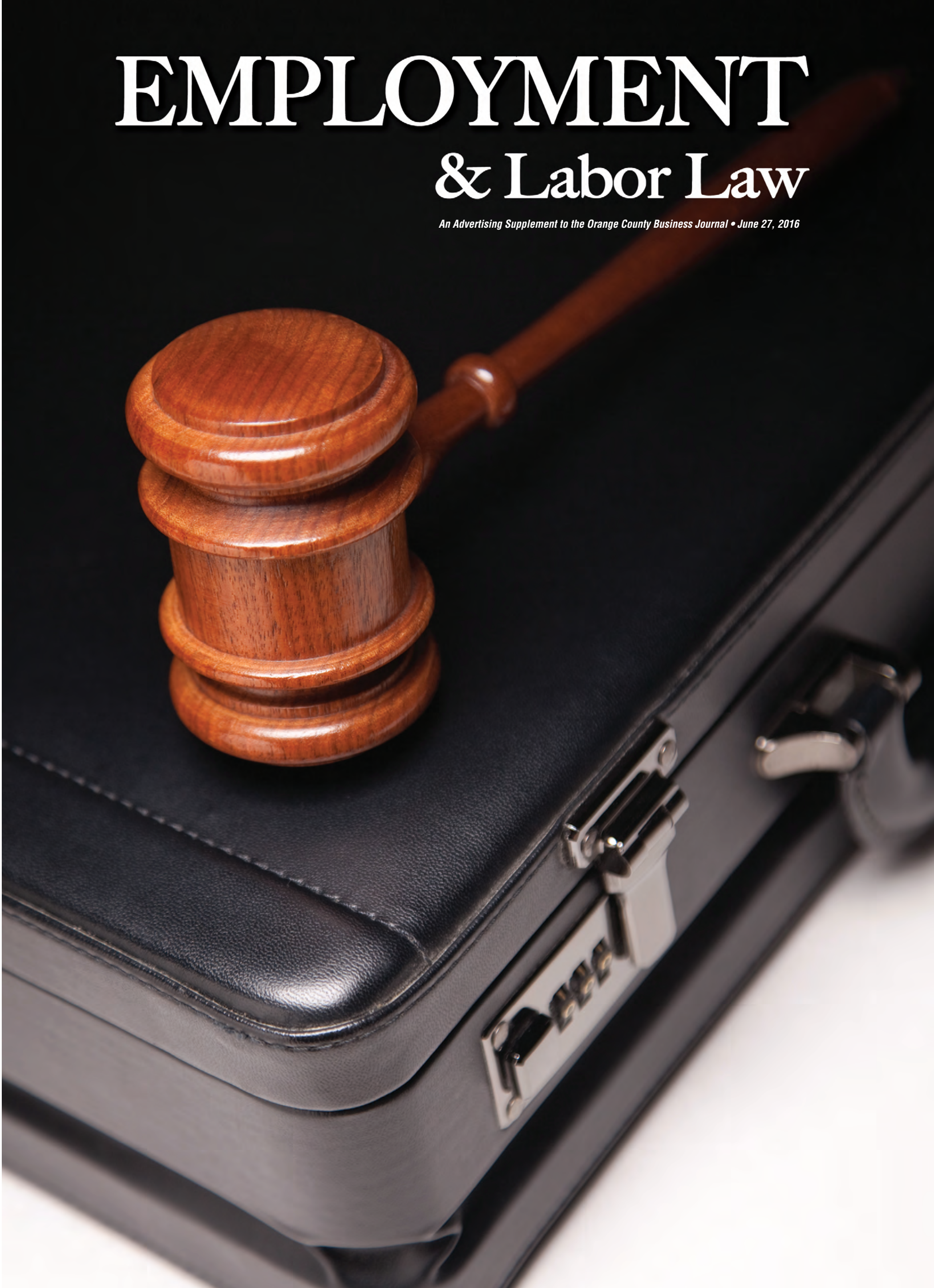

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First Paid Sick Leave and Now You're Telling Me Some Employees May No Longer Be Exempt from Overtime

by Christy D. Joseph and Erin D. Leach, Snell & Wilmer

A series of changes and new rules at the state and federal level over the last few months have compelled employers to re-evaluate and update their policies and practices. One of the latest changes, which takes effect on December 1, 2016 and is expected to affect 4.2 million workers, is a change to the standard for classifying white-collar employees as exempt from overtime under the federal Fair Labor Standards Act (FLSA).

You may be asking yourself, "why does that matter to me?" After all, California law is typically more generous to employees than federal law. The answer – this is one instance where federal law is actually the more generous of the two.

While most employers in California need to comply with both California and federal law when determining whether employees are properly classified as exempt from overtime compensation, the FLSA does not apply to all employers or all employees. Subject to the FLSA are employees of entities with annual revenues of at least $500,000, measured by volume of sales or receipts, as well as individual employees who engage in interstate commerce or in the production of goods and services for interstate commerce. This interstate commerce requirement can be satisfied by such activities as regularly making out-of-state phone calls, receiving and sending mail or email, ordering goods from out-of-state suppliers or handling credit card transactions.

While the overtime exemption test under both state and federal law has two components – a salary test and a duties test – what makes up those components is a bit different. Under either test, if an employee does not earn a high enough salary, or does not qualify under the duties test, the employee cannot qualify as exempt under either California or federal law and must be paid overtime pay under the applicable law. Under California law, employers must pay non-exempt employees overtime pay for all hours worked over eight in a workday and over 40 in a workweek. Under the FLSA, overtime pay is only required to be paid on hours worked over 40 in a workweek.

At this time, there are no changes to the California overtime exemption test. The federal rule, however, has changed. The new FLSA rule includes the following changes in the overtime rules:

1. Currently, the effective salary test to be exempt from overtime compensation eligibility, as long as all other applicable "duties tests" are also met, is $455 per week, which equates to a $23,600 minimum annual salary. Under the new rule, the minimum salary level will more than double. It will increase to $913 per week, or a $47,476 minimum annual salary – setting the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South.

2. Under the new rule, employers may count nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new salary exemption level above. The nondiscretionary bonuses and incentive payments must be paid on a quarterly or more frequent basis in order to apply.

3. The total annual compensation requirement for the highly compensated employees overtime exemption, subject to a minimal "duties test," will be raised from $100,000 to $134,004 under the new rule – setting the standard to the annual equivalent of the 90th percentile of full-time salaried workers nationally.

4. The new rule establishes a mechanism every three years, beginning on January 1, 2020, for automatically updating the minimum salary test level and the highly compensated employee compensation level.

The new FLSA rule does not change the standard duties tests.

The analysis to determine whether an exempt employee is properly classified is detailed and complex, especially given the many differences between the California and federal requirements. Therefore, it is imperative that California employers understand which laws apply to their employees and ensure that they follow all applicable laws. The set of rules that provides the employee with more rights and protections is usually the law that governs. For example, to qualify as an overtime exempt employee under California law, the employee must be paid the equivalent of two times the state minimum wage for full-time employment. As of January 1, 2016, with the state minimum wage at $10 per hour, the annual salary must be at least $41,600 to qualify for the California white-collar exemptions. This is less than the annual salary of $47,476 or $913 per week as set by the new FLSA rules. Accordingly, in order to avoid paying overtime for work over 40 hours in a week, assuming the duties test is met, California employers will need to pay the higher salary required by federal law by the December 1, 2016 deadline.

Employers should use the new FLSA rules as an opportunity to audit their workforce to determine if employee classifications need to be altered prior to the December 1, 2016 implementation date of the new rules. Where applicable, employers may need to increase individuals' salaries in order to maintain their exempt status. In addition, while the Department of Labor changed the salary level required to qualify as exempt, employers must also remember that exempt employees must meet the requirements of the duties test, which generally requires employees to perform high-level managerial, administrative or professional duties for a substantial portion of their worktime. For employers with concerns regarding an exempt employee's exempt status, this is also an ideal time to reclassify those employees as nonexempt without raising questions as to why the reclassification is taking place.

Accordingly, in anticipation of the December 1, 2016 changes, it is time to reevaluate how you classify your employees to ensure they are properly classified as exempt or non-exempt under both the federal and state duties test and the salary test to comply with applicable state and federal law.

Christy D. Joseph

Christy D. Joseph is a practice group leader for the firm's labor and employment law group and is a partner in the Orange County office of Snell & Wilmer. Her employment-related litigation experience includes representation of employees in federal and superior courts, as well as before administrative agencies in matters involving wrongful termination, discrimination claims, sexual harassment, ADA and medical condition claims, wage and hour claims including class action, tortious interference, unfair competition, breach of fiduciary duty and trade secrets. Christy's practice further includes counseling employers not involved in litigation regarding contractual, statutory and legal rights and employment obligation matters. Reach Christy at 714.427.7028 or cjoseph@swlaw.com.

Erin D. Leach

Erin Leach's practice is concentrated in employment litigation and counseling. She provides clients with ongoing counseling on a wide range of personnel matters including hiring and termination decisions, employment agreements, policy drafting, wage and hour issues and employee medical leave. Erin represents employers in state and federal courts and arbitration, as well as before administrative agencies, in disputes regarding wrongful termination, discrimination, sexual harassment, unfair competition, trade secrets, reasonable accommodation of disabilities, retaliation, wage and hour (individual and class actions) and other types of employment matters. Reach Erin at 714.427.7008 or eleach@swlaw.com.

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Los Angeles and San Diego Impose Higher Local Minimum Wage and New Sick Leave Laws

The cities of Los Angeles and San Diego have joined Pasadena, Santa Monica, and at least 12 Northern California cities by enacting legislation to increase the minimum wage above California's state standards. Employers with employees working in the City of San Diego must pay those employees a minimum wage of $10.50 per hour when they perform work in the City of San Diego, regardless of the number of employees that the business may have. Employees qualify for the increased minimum wage if they perform at least two hours of work in the City of San Diego in one or more calendar weeks of the year. Effective January 1, 2017, San Diego's minimum wage will increase again to $11.50 per hour and thereafter, will be adjusted in accordance with the consumer price index.

On July 1, 2016, employers with 26 or more employees in the City of Los Angeles must begin paying those employees a minimum wage of $10.50 per hour. The minimum wage is scheduled to increase each July 1 until the minimum wage reaches $15.00 per hour in 2020. Minimum wage increases for employers with 25 or fewer employees are delayed one year. The minimum wage will be adjusted for inflation on July 1, 2022 and every year thereafter.

Additionally, employees who work in the City of Los Angeles at least two hours in a particular week must be provided 48 hours of paid sick leave per year beginning July 1, 2016. Affected employers have the option of providing the leave: (a) in a lump sum at the beginning of each year of employment, on a calendar year basis, or another 12 month period, or (b) in increments of one hour of paid sick leave for every 30 hours worked. Accrual of paid sick leave may be capped at 72 hours. Under the new law, employees may use the leave to care for an individual related by blood or "affinity whose close association with the employee is the equivalent of a family relationship."

The City of San Diego's paid sick leave ordinance was approved by voters in June and covers all employers regardless of size. Employees who work in the City of San Diego will accrue one hour of paid sick leave for every 40 hours worked. Unused paid sick leave carries over to the next year with no maximum accrual cap permitted; however, employers may limit use to 40 hours per year. Employers may require employees to provide reasonable notice of an absence and documentation of absences in excess of three days. The minimum wage and paid sick leave laws have some additional requirements and nuances, so be certain to review the new laws carefully.

Recommendations for Employers:

1. Update paid sick leave and/or paid time off policies to ensure compliance with California state law and the local ordinance(s). Employers must comply with the law that provides greater benefits to employees. Employers are not required to pay employees for accrued but unused sick days upon separation of employment.

2. Post the local city minimum wage and paid sick leave poster(s) and provide information in writing to all new employees at the time of hire.

3. Review payroll systems to ensure compliance with recordkeeping.

If you have any questions about these new regulations and how they may affect your business, you may contact the employment attorneys at Ferruzzo & Ferruzzo, LLP.

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, with a particular emphasis on risk mitigation through preventative counseling and sound practical advice.

For 15 years, Ms. McCarthy has counseled employers about the complicated employment laws that impact their businesses to ensure compliance, and to reduce the chance of costly litigation.

Ms. McCarthy may be reached by phone at (949) 608-6900 or email at cmccarthy@ferruzzo.com

Risk Assessment / Employer Counseling Our team of employment attorneys is dedicated to representing and protecting businesses through preventative counseling and sound practical advice. Our attorneys have extensive experience drafting and negotiating agreements and policies required by employers, including severance agreements, personnel policies, employee handbooks, and employment and commission agreements. We work with our clients side-by-side to understand their needs and help them navigate the complicated employment laws that impact their business to ensure that they are in compliance, and to reduce the chance of costly litigation.

Litigation / Employer Defense We have successfully defended employers in litigation in state and federal court, as well as arbitration. Our attorneys represent employers in mediation and before the U.S. and California Departments of Labor, Division of Labor Standards Enforcement, Division of Occupational Safety and Health, and the Equal Employment Opportunity Commission. Our experience includes the defense of claims of discrimination, wrongful termination, class action wage and hour violations, PAGA claims, harassment, unfair business practices, and violations of Title VII, the FEHA, FMLA, CFRA, ADA and the ADEA.

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Will the Elections Impact EB-5 Visas?

Where does the EB-5 program go from here?

by David Hirson, Managing Partner, David Hirson & Partners LLP; assisted by Shayda Naeim Moradzadeh, Associate, David Hirson & Partners LLP

With the upcoming presidential elections making headlines throughout the United States and the globe, many questions will be unanswered until after the elections. One such question includes—what will happen to the EB-5 program and current pending legislation? To answer the latter question, it is unlikely that pending bills will be passed during the election year. To answer the former, it is unclear what all the changes to the EB-5 program will be.

In 1990, Congress created the direct hire EB-5 program to benefit the U.S. economy by attracting investments from foreign investors. Under the 1990 program, each investor is required to demonstrate that a minimum of 10 new jobs are created as a result of an EB-5 investment of $500,000 or $1 million, depending on whether the funds were invested in certain high-unemployment or rural areas.

In 1992, Congress launched a pilot program, the Immigrant Investor Regional Center Program, which increased the boundaries of the EB-5 program by allowing the designation of Regional Centers (RC's) to pool EB-5 capital from multiple investors into targeted employment areas (TEA's), which include high-unemployment or rural areas. Since its inception, the RC program has been renewed and not allowed to expire. The September 30, 2015 sunset date was extended to December 11, 2015, and then to September 30, 2016, resulting in great turmoil within the EB-5 industry. While it is expected that the EB-5 program will continue, it is not clear what additional changes Congress will make.

There will likely be an increase in the minimum investment amount, more rigorous security and reporting requirements, and unified definition of TEA's. Major potential changes are discussed briefly below:

Increase in the Minimum Investment Amount – While the current EB-5 investment in a TEA requires a minimum investment of $500,00 per investor and $1 million in a non-TEA designated area, the new legislation will likely result in an increase to $800,000 in TEA areas and $1.2 million in non-TEA areas. This increase may be done by either USCIS regulation or by Congress.

More Rigorous Security and Reporting Requirements – Regional Centers (RC's) will be required to comply with stricter requirements, including greater compliance for business plans, offering documents, marketing materials and economic reports. If an RC learns of non-compliance, it must report the information. Parties involved with a RC either directly or indirectly may also be subject to government agency review.

Unified Definitions of TEA's – The proposed legislation will probably result in TEA definitions being state uniform. Additionally, a TEA designation as a "high-unemployment" or "high-poverty" area will now be valid for two years instead of one year, starting on the date an application for approval of an investment in a commercial enterprise.

As 20,000 applicants currently wait for adjudication of their cases, with dependents added, there are 50,000 cases in the pipeline. Many wonder how the election will impact their futures and those of the EB-5 program. Will the quota be changed? Will the quota counting methodologies be changed? Will old and new quota numbers from prior years be recaptured?

David Hirson

David has more than 35 years of experience in the practice of immigration law. His focus is on 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. David was a practicing attorney in Johannesburg, South Africa from 1970 to 1980. He immigrated to the U.S. in 1980, and was admitted to the U.S. California Bar in the same year. If you request further information, please contact him at dhirson@hirsonimmigration.com or call 949.383.5358.

So You Lost The H-1B Lottery ... Now What

At this time of year, many employers are receiving the unfortunate news that their valuable foreign workers were not selected in the H-1B lottery. Many of these employees are recent graduates working as student visa holders under the optional practical training (OPT) program. In some cases, the employee's 12-month OPT (and corresponding work authorization) will expire within the next few months.

As has been the case the last four years when the H-1B program has been oversubscribed, employers that lose the lottery panic and scramble to find ways to keep these dynamic, young, foreign workers. In an effort to address the H-1B problem, DHS has changed the regulations regarding OPT. Historically, students on OPT were allowed 12 months of work authorization. In 2008, students with STEM (Science, Technology, Engineering and Math) degrees were permitted to extend their work authorization for an additional 17 months. On May 10, 2016, the STEM OPT extension was increased an additional seven months, allowing STEM degreed students a total of 36 months of optional practical training.

Although the new STEM OPT rules allow employers and their would-be H-1B employees multiple bites at the lottery apple, they also impose several new requirements. The following provides a brief description of a few of the new features.

Employers Must Be E-Verify

As with the 2008 STEM OPT extension, the employer must participate in the E-Verify program for the STEM employee to obtain the 24-month OPT extension. A newly imposed amendment requires that the specific worksite employing the worker must use E-Verify.

Employer Must Develop a Training Program for Each STEM OPT Employee

As part of the new extension application, the employer must create a training program that states the specific goals for the STEM OPT period and how the employer and employee plan to achieve them. The plan should identify the skills, knowledge and techniques the employer intends to teach the worker and explain how the training and job duties are tied to the employee's STEM degree.

The employer must provide compensation details and certify that the alien worker's compensation aligns with similarly situated U.S. workers.

Evaluations

Initially, the Department of Homeland Security aimed to have the employer and student provide evaluations every six months; however, the final rule reduced this requirement to 12 months. At the conclusion of the first 12 months of STEM OPT, the employer and employee must provide a performance evaluation to the designated school official (DSO) of the student's school. At the end of the 24-month STEM OPT, a second evaluation must be completed.

On-Site Inspections by ICE

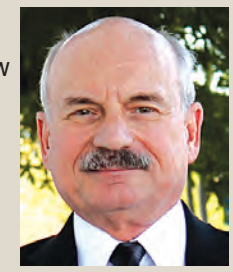
As part of the new rule, Immigration and Customs Enforcement (ICE) has the authority to inspect employer worksites to ensure implementation of the training program and conformity with all applicable regulations. ICE need only provide 48 hours' notice prior to inspection. If the inspection results from a complaint, the 48-hour notice requirement is waived.

The 24-month STEM OPT extension program is a much-needed band-aid to temporarily help the employers and alien workers affected by the H-1B oversubscription problem; however, employers considering the new program must understand the added requirements and the consequences for not abiding by them.

To extend your STEM OPT employee's work authorization, contact John Nelson or Jay Nuñez at 949.833.2616.

John Nelson

Co-Founder of the Orange County Bar's Immigration Law Section, John's practice has focused entirely on immigration law for 35 years. John has been a certified immigration specialist since 1993 and is the former chair and commissioner of the California State Bar's Board of Legal Specialization for Immigration Law - the governing body for immigration specialists in California.



Jay Nuñez

Jay's practice focuses solely on immigration and nationality law with an emphasis on deportation defense, complex naturalizations and consular processing. For the past ten years he has earned a reputation for always treating his clients with respect and compassion whether they be investors, families or corporations.

About Nelson & Nuñez, P.C.

Protecting and Advancing Your Immigration Rights

Nelson and Nuñez specializes solely in immigration and nationality law. With over 45 years of experience, we have helped clients from over 50 countries in more than 25 states. Our comprehensive knowledge of all aspects of U.S. immigration law allows us to carefully consider our clients' objectives and fashion a strategy to accomplish their goals.

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Should You Still Be Worried About Meal and Rest Breaks?

By: Boris Sorsher, Fisher Phillips

The answer is an unqualified yes.

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Meal and rest breaks are important because missed breaks create significant liability. An employee who misses a meal period or takes a late meal period or a short meal period is owed a penalty. The penalty is equal to one hour of pay. One penalty is owed for each day in which a break is missed. Five missed, late or short meal periods in one week can mean that employee is owed an additional 5 hours of pay. The same is true for missed, short or late 10 minute rest breaks. As a result, one employee who works 5 days a week and fails to take proper breaks could cost the business 10 hours of pay in penalties (5 hours for meal breaks and 5 hours for rest breaks). However, these penalties are just the beginning. Additional penalties can be assessed if the employee leaves the company (voluntarily or otherwise) and he or she was not paid for missed breaks. These penalties are known as "waiting time" penalties and they generally equal 30 full days of that employee's wages. Also, if the employee worked off the clock during his or her meal break, the missed or interrupted meal break could create a claim for underpayment of minimum wage or overtime. Other penalties can also be assessed for inaccurate wage statements. This happens when the employee claims that the pay stub did not accurately reflect hours worked because it did not account for missed breaks. All of these penalties will add up to thousands of dollars of liability for just a few missed breaks on the part of one minimum wage employee.

However, those who have been watching the headlines know that the real threat is not the solitary employee who alleges that he missed his breaks. The true threat is class and representative actions in which one former employee alleges that every co-worker also missed their breaks. This employee then uses the class or representative action to ask for penalties on behalf of himself and all of his or her co-workers for a number of years. This is the form in which most meal break claims will arrive at your door - as a class or representative action. The class and representative actions multiply the exposure many times over and convert a claim worth several thousand dollars to a claim worth several hundred thousand dollars.

Do not despair. While the potential exposure is significant, there are a number of steps you can take to safeguard your business.

First, ask your current and former employees to sign an arbitration agreement. This agreement, if properly drafted, should prevent your employees from bringing a class action. This step alone could cut any potential liability by close to 75%.

Second, have your attorneys prepare a written meal and rest break policy and have all employees review and acknowledge receipt of this policy in writing. Do not just pull a policy from the internet, as there are a number of key components which need to be included. A policy which is mostly right but not 100% correct could be just as bad as not having a policy at all.

Third, implement training for your managers and supervisors on the meal and rest break policy and make sure that they fully understand and comply with the policy.

Fourth, schedule regular training sessions with the employees at which you review the policy and have them acknowledge in writing that they attended each session.

There are a number of other measures which can be taken and should be discussed with your counsel. However, following the four steps outlined above should prevent future lawsuits and help you prove your defenses if any lawsuits are filed.

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Surfing the Silver Tsunami

According to the Pew Research Center, every day 10,000 baby boomers (individuals born between 1946 and 1964) reach the traditional retirement age of 65. This trend began in 2011 and is expected to continue until 2030. While many boomers chose to postpone retirement during the great recession, primarily for economic reasons, they merely delayed the inevitable and are now beginning to retire. The retirement wave (dubbed the "Silver Tsunami") is coming. When the boomers retire, they will take decades of experience with them. Surprisingly, most companies are not prepared.

A SHRM-AARP survey found that many organizations are largely unprepared for the knowledge gap that talented, retiring older workers will leave:

▶ 72% of human resource professionals described the loss of talented older workers to be a problem or a potential problem
▶ 71% said their company has not conducted a strategic workforce planning assessment to analyze the impact of workers age 50 and older who will leave their organizations
▶ 60% have not identified their company's workforce needs over the next five years

One of the greatest challenges currently facing U.S. businesses is a lack of skilled workers. In the 2015 ATD Skills Gap Survey, 84 percent of respondents said there is currently a skills gap in their organization. This skills gap will become substantially greater if boomers retire without sharing what they have learned from decades on the job. The crisis reaches from skilled trades such as electrical and electronics engineering technicians to senior positions at the management and leadership level. An example of how serious the situation is can be found in the book "Critical Knowledge Transfer" (Leonard, Swap and Barton 2014) where one organization reported that its next anticipated wave of nearly 700 retirements would mean the loss of 27,000 years of experience.

Identify Your Strengths and Weaknesses

In order to get ahead of the retirement wave, organizations should take stock, now, of their human capital and prepare themselves for fierce competition for replacements from a smaller candidate pool. Start by conducting a workforce demographic assessment to understand how retirements will affect critical roles. Then ask what critical knowledge does each retiring employee have? This will allow you to prepare a knowledge risk assessment and prioritize areas for knowledge transfer.

Consider using talent assessment tools to identify and document the talents of your top boomer performers. According to Gallup, talent (defined as the natural capacity for excellence) is the most critical element to consider when hiring and developing employees. If you can determine the traits that make your current boomer employees successful, it will make it easier to recruit and hire the next generation of talented employees. Companies need to be prepared not only to replace older workers, but must also be able to recruit, manage, motivate and retain a multigenerational workforce. Now is a great time to assess your younger staff to determine which employees are interested in learning new skills and who may prove suitable for promotion, when the time arrives. It's less expensive to promote from within in both time (existing employees are already familiar with company culture and processes) and salary (according to The Wall Street Journal, salaries for outside hires are 18 to 20 percent higher than those promoted internally). Promoting from within is also great for morale and may encourage younger employees to stay with the company. Once you understand your workforce, you can begin implementing strategies and tactics to minimize gaps.

Create Opportunities to Minimize Risk

In order to minimize the "brain drain" that can occur with boomer retirement, it is critical to formalize a knowledge transfer program as quickly as possible. Some methodologies can start immediately, such as documentation. Others, such as collaborative training programs, may require more effort initially, but will pay off substantially in the future and will directly contribute to a company's continued success.

▶ Document processes and procedures – It's important for retiring subject matter experts to document their knowledge either via face-to-face meetings, in writing or via short how-to videos. This could take the form of an operations manual or a two-to-five minute video describing how to create a pivot table in Excel or how to use a voltage tester properly on a piece of industrial equipment.
▶ Create a mentoring program – Align boomers (1946-1964) with generation Xers (1965-1980) and millennials (1980-2000) to create relationships among generations. According to a survey by PGi, 71% of millennials want their co-workers to be a second family and 75% want a mentor and deem it crucial for success. In the same survey, 70% of boomers said they are open to reverse mentoring, realizing they may have something to learn from the younger generations.
▶ Foster in-house talent – Establish leadership training/career development programs to cultivate your high-potential in-house talent and prepare them for managerial roles.
▶ Technical training and apprenticeship programs – Collaborate in the development of local and regional Career and Technical Education (CTE) programs. The Industry Workforce Needs Coalition views today's robust CTE programs as "the cornerstone of building a pipeline of skilled workers and closing the skills gap across the country." Several California community colleges have heard the call and now offer bachelor's degrees in specific high-needs technical fields such as automotive technology and industrial automation.
▶ Learn what the next generation is thinking – Bring them on as interns or in part-time job shadow positions. Get to know them and let them get to know you – they are smarter than you realize and are full of promise and ideas.
▶ Offer boomers flexibility – Many boomers are not ready to fully retire; they enjoy their jobs, but they may be ready to dip a toe in the retirement pool. Keep them engaged by offering part-time work and/or flexible hours; telecommuting; etc.
▶ Stay open-minded – Do not fall prey to the idea that older workers are less productive, do not have much to offer, or will not be able to make significant contributions to the future of the company. To the contrary: cognitive neuroscience studies have shown that successful older workers use their brains differently and by doing so, are doing just as well as younger employees. "Strategies for Engaging and Retaining Mature Workers," a paper by SHRM and the Society for Industrial and Organizational Psychology, cites increased organizational citizenship behavior and reduced tardiness, absenteeism and counterproductive work behavior among boomers. Not to mention the decades of accumulated "know how" they possess.

The wave of boomer retirements will continue for the next decade. For companies to remain viable and make a successful transition during this critical period, they must emphasize and prioritize talent management, succession planning, and knowledge transfer. You can either surf the silver tsunami or be overpowered by it.

For more information, please contact Lisa Pierson, President of Kimco Staffing Services, at 949.331.1102 or lpierson@kimco.com.