

# EMPLOYMENT

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## *RESOURCES & SOLUTIONS*

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## 5 Things You May Not Know About California's New Paid Sick Leave Law

By now, you probably have a good sense of how your company will satisfy the requirements imposed by the new Healthy Workplaces, Healthy Families Act of 2014. But with the July 1st date fast approaching, following are some lesser-known quirks about the new law:

1. The law requires employers to provide "three days or 24 hours" of paid sick leave. But what does that mean for your part-time employees or those who work an alternative schedule? The Division of Labor Standards Enforcement (DLSE) has interpreted the legislative intent to mean the greater of three days or 24 hours with regard to part-time employees. For example, if a part-time employee is normally scheduled to work six hours per day, she will receive four days of paid sick leave (24 hours of sick leave divided by the six hour workday). One might anticipate that in order to remain consistent, the DLSE will require an employer to provide an employee who is normally scheduled to work a 10-hour workday under an alternative schedule with 30 hours of paid sick leave (three full days of sick leave).

2. An employer cannot require a doctor's note from an employee taking time off under the new law. Existing sick policies often require an employee to provide a doctor's note during an absence of three days or longer, make the payment of sick pay benefits contingent on the receipt of a healthcare provider's note. The new law makes it clear that this practice must be eliminated for time taken under the new law.

3. Take care when paying commissioned employees or those who work by piece rate. The new law requires employees to be paid at their "regular hourly rate." If an employee's pay fluctuates due to a bonus, commission, or piece rate, for example, the employer must divide the employee's total compensation for the previous 90 days by the number of hours worked in order to determine the employee's regular hourly rate. This rate should be used when compensating the employee for paid sick leave.

4. If you are using the "lump sum" where you front load the paid sick leave, you may define the "year" starting on July 1st, the calendar year, or the employee's anniversary date. The "year" for sick pay purposes, does not need to be defined in the same way for all employees. Employers may choose to use July 1st for their current employees, for example, and then use an anniversary year for all new employees.

5. Finally, do not forget to issue a new notice to all non-exempt employees under the Wage Theft Prevention Act and Labor Code section 2810.5. The notice must be distributed to employees no later than July 8, 2015. The new form is available at [www.dir.ca.gov/DLSE](http://www.dir.ca.gov/DLSE).



**Colleen M. McCarthy** chairs the Firm's Employment Practices Group and has been representing and protecting employers for 15 years, with a particular emphasis on risk mitigation through practical guidance. Ms. McCarthy advises employers in every aspect of the employment relationship, including hiring, employee discipline, leaves of absence under state and federal law, proper job classification (exempt versus nonexempt) and independent contractor status, as well as terminations, layoffs and WARN compliance.

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# FRAGOMEN WORLDWIDE

## Terminating Temporary Foreign Workers

by Mitch Wexler, Partner, Fragomen

Generally, U.S. employers must “sponsor” a foreign national to work in the U.S., pursuant to a temporary “visa” – H-1B, L-1, O-1, etc. Often, employers are unaware that termination of a temporary employee, prior to expiration of the visa, may require additional action by the employer.

First, there is no “grace” period – the employee’s visa status ends when the employer-employee relationship ends. If a new immigration petition (i.e., from a

new employer) is filed prior to the termination date, the employee can remain in the U.S. Where there is no advance notice, an employee may be forced to depart the U.S. after termination.

Second, employers must notify the U.S. Immigration Service and Department of Labor when an H-1B worker has been terminated. Employers who do not withdraw H-1B approvals may be penalized and ordered to pay back wages, from the date of termination to the date of notice of the DOL, or, through the expiration date of the H-1B approval.

Finally, an employer is responsible for the “reasonable costs” of return transportation for the H-1B employee to his/her country of last residence. Immigration has defined this as a (coach) one-way airline ticket for the H-1B employee, not including family members or goods. Of course, an employer is always able to provide additional funds for transportation or relocation, if desired.

As a result of the above, an employee may ask for a “postponement” of the termination date, in order to gain additional time to have a new application filed on his/her behalf, and to avoid making a departure from the U.S. Post-termination severance payments, whether paid in a lump sum or over time, are not sufficient to extend an employee’s status in the U.S. “Unpaid leave,” where the employee remains on the books but does not provide productive services and is not paid, may be sufficient to extend the employee’s visa status but again creates exposure for the company (see above regarding back wages).

Employers should be aware of additional requirements imposed by immigration laws and regulations that accrue when a temporary employee is terminated.



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### Mitch Wexler

Mitch is a partner with Fragomen, the world’s leading immigration law firm. He manages the firm’s Los Angeles and Irvine offices and has been practicing immigration law for nearly 30 years. Mitch represents high net worth foreign nationals, families and employers from startup to Fortune 500 companies in all of their visa and immigration related matters. He is a specialist in Immigration & Nationality Law, certified by the State Bar of California, Board of Legal Specialization. Mitch is a member of the firm’s national Executive Committee. He also teaches an annual module on business immigration law at the University of California, Irvine Law School and is a prolific author and frequent speaker on various immigration law topics. Contact Mitch at mwexler@fragomen.com.



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## Taking the Stress Out of Employee Claims of Disability Caused by the Stress of Working for a Particular Supervisor

by Jessica Linehan, Partner, Labor & Employment, Dorsey & Whitney

**N**avigating an employee's claim of stress-related disability continues to challenge employers. Recently, the California Court of Appeal provided helpful guidance for employers when an employee claimed to be unable to work under a particular supervisor due to the anxiety and stress triggered by that supervisor's standard of oversight of the employee's job performance.

In *Higgins-Williams v. Sutter Medical Foundation*, (May 26, 2015), the Court of Appeal held that an employee's inability to work for a specific supervisor is not a cognizable mental disability under the Fair Employment and Housing Act. In this disability discrimination case, an employee sought an extended medical leave, and requested permanent reassignment in order to return to work, arising out of her stressed interactions at work with both her supervisor and human resources. Higgins-Williams, a clinical assistant, complained to her treating physician regarding stressful interactions at work. Her physician diagnosed her with having adjustment disorder with anxiety, as a result of "dealing with her Human Resources and her manager." Her employer, Sutter Medical Foundation ("Sutter"), granted the plaintiff her requested stress-related leave of absence under the California Family Rights Act and the Family and Medical Leave Act.

After exhausting her leave, Higgins-Williams returned to work. A month later, Higgins-Williams suffered a panic attack after new interactions with her supervisors, left work, and never returned. Instead, she submitted a disability accommodation request, seeking a permanent transfer to different department, and an additional leave of absence. Sutter granted the additional leave of absence. Higgins-Williams' physician advised Sutter that if she was transferred to a different supervisor, Higgins-Williams would be able to function without limitations.

After an extended leave of absence period, Sutter informed plaintiff, among other things, (1) that her medical provider did not provide any information as to if or when plaintiff would be able to return to her position as a clinical assistant, (2) that there was no information to support a conclusion that additional leave as an accommodation would enable to her to return as a clinical assistant, and (3) that she would be terminated if she did not provide such information. She did not provide the requested information, and was terminated.

Higgins-Williams sued for claims including disability discrimination, failure to engage in the interactive process, and failure to provide reasonable accommodation. Her only alleged disability was her adjustment disorder with anxiety. In rejecting these disability-based claims, the Court of Appeal held that inability to work under a particular supervisor because of the anxiety and stress related to the supervisor's oversight does not rise to the level of a disability recognized under the Fair Employment and Housing Act.

The law in this area continues to require careful attention by employers, and the duties owed to employees requesting accommodation of a disability cannot be underestimated. However, the inability to work for the current supervisor, by itself, will not be treated as a disability in the first place.

To learn more about Dorsey's Labor and Employment practice and how we can help protect your business, visit [www.dorsey.com/labor\\_and\\_employment](http://www.dorsey.com/labor_and_employment).

### Jessica Linehan

Ms. Linehan's practice focuses on employment litigation, including the defense of individual and class action wage and hour claims, discrimination, harassment and wrongful termination actions. She provides advice and counsel on a wide variety of matters, as well as representation in administrative enforcement actions. To learn more, please visit: [www.dorsey.com/linehan\\_jessica](http://www.dorsey.com/linehan_jessica).



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## Employment Branding Starts Before Candidates Walk Through Your Door

by Lisa Pierson, President, Kimco Staffing Services

In the same way you make decisions about the brands you buy, candidates are making decisions about the companies for which they want to work. In today's candidate-driven marketplace, it is vital that your company differentiates itself among your competition as an employer of choice. Any good candidate will make a judgment about your organization before they decide to walk through your door for an interview. They will have done their research; including visiting your company's website, as well as LinkedIn, Twitter, Facebook and other social media accounts. According to Potentialpark (online talent communication experts), 74% of job seekers use companies' career websites as their most important source of information online. They also have the ability to access the opinions of past and present employees through sites such as Glassdoor and CareerBliss; sites that provide job hunters direct access to ratings and reviews on what it's really like to work for your company.

Developing a proactive, structured, employment-branding program leads to a better experience for the candidate; reduces time-to-fill and cost-to-hire for the organization; improves candidate quality; and increases employee engagement and retention. Employment branding can have a dramatic effect on employee referrals. If your employees feel positively about working for your company, they are more likely to share their experiences and invite others to work there. In addition to helping an organization and a candidate determine the right fit, employment branding allows organizations to compete on something other than compensation. Paying top dollar for candidates is often not sustainable in the long-term; but having a strong employment brand can give your company a unique edge that makes a real difference to a candidate. According to CareerBuilder, 67% of job seekers said they would accept a lower salary if the company had exceptionally positive reviews online.

You don't need a big employment-branding budget to be successful, but you do need to commit to transparency, decide on your goals, and design a strategic plan focused on your objectives. To help improve transparency, simple steps such as posting photos or videos of the actual work environment and employee bios or "day-in-the-life" stories can give candidates a feel for what it is really like to work in your organization. A successful program typically includes human resources and marketing working in tandem, along with buy-in from senior management and participation from engaged employees across the company. The team should establish metrics to measure success and make necessary adjustments.

The effects of employment branding are far reaching. It begins with talent acquisition and flows through hiring, onboarding, engagement and retention. If your organization takes a proactive approach to employment branding, you have a distinct and long-lasting competitive advantage—your people.

### Lisa Pierson

Lisa Pierson is the president of Kimco Staffing Services. Headquartered in Southern California since 1986, Kimco has the market expertise to help companies find top talent and the business acumen to help our clients navigate California's unique employment environment. We listen, we learn and we work diligently to earn our clients' business with each order. Our unique approach to staffing focuses on individualized service, customized solutions, and a commitment to deliver "Hire Results!" You can reach Lisa at [lperson@kimco.com](mailto:lperson@kimco.com) or 949.752.6996.



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# Stuart Kane LLP

## Using Social Media Policies to Protect Your Proprietary Customer Information

by Peter Wucetich, Partner, Stuart Kane LLP

**M**any companies are investing increased time and resources making sure their key employees have a presence on all the relevant social media platforms, but what happens when those key employees leave? Their connections, friends, and followers resemble a de facto customer/target list, and their social media account provides a built-in way to communicate with everyone on that list at the touch of a button.

If you do not have a sufficient social media policy in place, the departing employee might be able to leave and take their social media accounts, including all contacts and content, with them when they go.

In a recent case, an employee with a company-based Twitter account had grown to over 17,000 followers left his employer. Upon leaving the company the employee changed the Twitter handle and took the account, and its followers, with him. Since the employer did not have a social media policy in place establishing that it owned the Twitter account, the employer was left arguing that, by taking the account, the employee had misappropriated its trade secrets that the employer had not bothered to protect in a contract and that were, to some extent, available to the public. This is a weak position that could have been avoided.

However, it is a tall order to successfully establish that anything on social media constitutes a trade secret. First, the *content needs to be "secret"* in order to qualify for protection as a trade secret. It is going to be difficult to convince a court that information that is made available to all of your online connections, friends, and followers — and whoever they grant access to their accounts — constitutes a secret.

Second, you have to show that you have taken *reasonable precautions to maintain the confidentiality* of the secret. If you do not have a social media policy in place, it can be argued that you did not take reasonable precautions to protect the secret.

Additionally, a California statute creates some hurdles to obtaining login information for employees' social media accounts if the accounts were used for personal matters. California Labor Code § 980 prohibits an employer from requiring that employees disclose the username or password for the purpose of accessing their personal social media. As such, an employer needs to have a social media policy that requires that work related social media accounts be used for work purposes only, and not include personal material. If personal matters are allowed to be included as part of the mix, the employer might be unable to get the login information from the departing employee.

Employers can avoid many of these headaches by adopting a social media policy that gives them a contractual right to any work related accounts and content. The policy should make it clear that the employee is to use the account for business purposes only and require that the employee provide you with the login information when the account is created.

By adopting a legally sound social media policy, employers can create a contractual right to the account and work related content, and avoid certain burdens to prove that the account belongs to the employer or contains the employer's intellectual property.

### Peter Wucetich

Peter Wucetich is a partner with Stuart Kane LLP where he focuses his practice on employment and business litigation. He routinely handles employment litigation, including trade secret misappropriation, wrongful termination and class actions. In addition, he provides employment counseling on issues relating to employee mobility, non-competition and non-solicitation agreements, and the protection and assignment of intellectual property rights developed during the course of employment. Mr. Wucetich can be reached at 949.791.5174 or [pwucetich@stuartkane.com](mailto:pwucetich@stuartkane.com).



*What keeps you up at night?*

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## Employee Retention Strategies - Keep Your Top Talent!

**A**t the heart of every good company are its people. According to a recent survey conducted by CareerBuilder, the biggest challenge faced by most companies is retaining top talent (2015). Employee retention is thus crucial in the strength of an organization; if one is looking, you can be sure others are as well!

Here you are some employee retention strategy tips:



**Hire right in the first place.** Ensure that employment interviews are focused on not only job skills but personality fit. Have the candidate meet with your team and provide realistic job descriptions. Spend the time and effort on recruiting!

**Opportunities for growth.** Professionals are constantly seeking acknowledgement for their work; recognize individual skills and capitalize on them by providing key tasks/responsibilities. Ensure timely employee performance appraisals and promote from within whenever possible.

**Internal communication.** Employees need to know and be reminded on a regular basis on where the company is at; make them feel as though they are part of the "in-crowd!"

**Evaluate your benefits package.** Benefit packages need to properly meet employee needs and be competitive; ensure that all employees are truly satisfied with what is being offered including health, life and a retirement plan.

**Create a positive work environment.** Strong leadership, open door policies and company events help create a space in which employees feel safe and comfortable.

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For more information about Marquee Staffing and our services, please visit [www.marqueestaffing.com](http://www.marqueestaffing.com).

## Is Your Company ACA Compliant?

**E**mployers, ask yourselves the following questions: Are you keeping up with the ever-changing regulations of the Patient Protection and Affordable Care Act (ACA)? Are you gathering the **correct** data to complete new IRS forms for Sections 6044 and 6056?

If you answered "no"...do not worry. You are not alone! A recent survey conducted by HubInternational indicates that nearly 90% of employers have not implemented a solution for ACA recordkeeping compliance and may not have even thought about doing so. Yikes!



You may not be aware that 2015 marks the implementation of the Employer Shared Responsibility's Employer Mandate provision. If your business has 50 or more full-time equivalent (FTE) employees, you **need** to provide health insurance to at least 95% of your staff and dependents or pay a non-compliance fee of \$2,000 per non-covered employee.

Here are a few ways you can confirm compliance with ACA regulations and avoid paying the penalties:

- ▶ **Understand the definitions.** A full-time employee is an individual employed at least 30 hours per week and at least 120 days in a calendar year. A part-time employee works less than 30 hours per week.
- ▶ **Calculate your FTE numbers.** You can calculate your FTE employees by taking the total number of full-time employees and adding the combined number of part-time employee hours divided by 30.
- ▶ **Provide affordable insurance.** Non-compliance fees are levied on employers that do not provide coverage or provide coverage that is unaffordable, typically more than 9.5% of employee income.

Emplicity is here to assist in your understanding of these new regulations and aid in alleviating the burden of implementing insurance policies that meet all applicable ACA standards. By integrating your HR functions with our company, your business will have access to big-company benefits that shrink costs and retain good employees. **Reduce your compliance risks and get back to running your business.**

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Visit [www.bit.ly/1BcfkvM](http://www.bit.ly/1BcfkvM) to learn more about our California Workplace Law Breakfast Seminar taking place in Anaheim on April 14, 2015.



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## “Blacklisting” Rules for Government Contractors Proposed by Federal Agencies

by Jared L. Bryan, Shareholder, Jackson Lewis

Implementing President Barack Obama’s Executive Order 13673, often called the “Blacklisting” or “Bad Actors” executive order, the U.S. Department of Labor has issued proposed “Guidance” and the Federal Acquisition Regulatory (“FAR”) Council has issued proposed regulations requiring government contractors and subcontractors to report regularly on workplace law violations found by administrative agencies, courts and arbitrators. The government would take an employer’s record of violations into account when deciding whether to award future contracts, cancel existing contracts or demand remedial action to address a pattern of violations. The rule proposals have public comment periods closing on July 27, 2015.



Bryan

Signed by President Obama in July 2014, Executive Order 13673’s stated goal is to ensure that federal agencies contract only with “responsible” contractors that comply with workplace laws. Once final, the new regulations will add an employer’s workplace law compliance record as a criterion in determining an employer’s eligibility for federal contracts.

Employers bidding on new contract solicitations with an estimated value greater than \$500,000, after the effective date of the regulations, must report “violations” of 14 federal laws (and equivalent state laws) as part of the bid process and, if awarded the contract, at six-month intervals thereafter for the duration of the contract. The contracting officer and a designated “Labor Compliance Advisor” will review the employer’s violations data to determine whether the contractor has committed violations of a serious, willful, repeated and/or pervasive nature. The DOL Guidance on the meaning and application of these terms is complex and, at times, unclear.

The proposed rules also require that contractors provide detailed information to workers regarding their classification as employees or independent contractors and, for employees, about their pay and exempt or non-exempt status.

Finally, employers with a contract exceeding \$1 million are prohibited from requiring employees to enter into mandatory pre-dispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act or torts related to sexual assault or harassment.

For more information about the Executive Order and the proposed implementing documents, please contact the author or the Jackson Lewis attorney with whom you regularly work.

Jared L. Bryan is a shareholder in the Orange County office of Jackson Lewis, an AmLaw 100 firm dedicated to representing management exclusively in workplace law. Contact Jared at 949.885.1360 or [bryanj@jacksonlewis.com](mailto:bryanj@jacksonlewis.com).



## Does Your Pension Plan Need an Audit? A Closer Look at the 80-120 Rule

by Maria Arriola, Shareholder, ELLS CPAs

Generally speaking, pension plans with fewer than 100 participants at the beginning of the plan year are considered small employee pension plans and eligible for the Small Pension Plan Audit Waiver. However, the Department of Labor (DOL) has identified the range of 80 – 120 participants (at the beginning of the plan year) as a grey area where the company has the option to continue as a small employee pension plan or elect large employee pension plan status. Please note all large plans are required to be audited annually. The following chart illustrates the choices a company has when it falls into the 80 – 120 participant range:

Number of Participants at Beginning of Current Year	Requirements Followed for the Previous Year Form 5500	Requirements to Be Followed for the Current Year Form 5500
80 – 99 (inclusive)	Small plan	Small plan
80 – 99 (inclusive)	Large plan	May elect to file Form 5500 again as a large plan or switch to a small plan
100 – 120 (inclusive)	Small plan	May elect to file Form 5500 again as a small plan or switch to a large plan
100 – 120 (inclusive)	Large plan	Large plan
More than 120	Large plan	Large plan
More than 120	Small plan	Large plan

The number of participants at the beginning of the current year is determined by the number that was reported on Line 7 of Form 5500 in the prior year.

For a plan to be eligible for the Small Pension Plan Audit Waiver, the following conditions must be met:

1. At least 95% of the plan assets are “qualifying plan assets.” Qualifying plan assets are participant loans or shares issues by a registered investment company.
2. The plan’s summary annual report must contain additional disclosures.
3. If requested by a participant or beneficiary, the plan administrator makes available for examination, or upon request furnishes copies of, each regulated financial institution statement and evidence of any required bond.

There are more qualifying conditions, for a more detailed list call ELLS CPAs & Business Advisors.

Plans filing the Form 5500 as a large plan are generally required to have an annual audit. This is true even if the plan has, for example, 81 participants but has elected to file Form 5500 as a large plan under the 80 – 120 participant rule discussed above.

ELLS CPAs has providing pension plan audit services to companies in Orange County over 15 years. For more information about getting your pension plan into compliance call Maria Arriola, ELLS CPAs Shareholder, at 714.569.1000.

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# Breaking News: Senate to Consider Bipartisan EB-5 Reform Bill S. 1501

by David Hirson, Managing Partner, David Hirson & Partners, LLP

## EB-5 Reauthorization Bill – S. 1501

On June 4, 2015 Senators Grassley (R- IA) and Leahy (D – VT) introduced a bipartisan bill (S.1501) to extend and significantly amend the Regional Center Immigrant Investor Program that is set to expire on September 30, 2015. The bill would extend the EB-5 regional center program, for a period of five years. Note that the original EB-5 program that was passed in 1990 is a permanent program and does not sunset. The program relates to direct hires of creating or saving at least 10 jobs per investor. The 1992 regional center law that is set to sunset relates to direct, indirect and induced job creation.

### Investment Amount

The minimum investment amount will increase from \$500,000 to \$800,000 for investments in a Targeted Employment Area (TEA), and \$1.2 million from \$1 million for investments not in a TEA. The amounts will adjust every five years in proportion to the using CPI.

### Targeted Employment Area

i. The definition of a TEA has been amended to include single census tracts that have 150% of the national average unemployment rate, a closed military base, or a rural area.

ii. For TEAs in a Metropolitan Statistical Area (MSA) or Combined Statistical Area (CSA), at least 50% of a project's job creation must be within that MSA or CSA to be counted. If the TEA is outside of a MSA or CSA, then at least 50% of the jobs must be created within the county in which the TEA is located. If not, the total number of jobs will be reduced until the 50% threshold is met.

### Job Creation

The new bill clarifies ambiguities regarding which jobs can be counted an EB-5 case. Proposed changes include:

- ▶ Jobs created as an indirect result of an investment into a commercial enterprise affiliated with a regional center can account for up to 90% of the job creation requirement.
- ▶ A maximum of 30% of the total jobs that are created can be created as a result of non-EB-5 investment, even if the non-EB-5 investment represents more than 30% of the project's funding.

### Changes in Processing

To care inconsistent adjudication times and standards of review for proposed investment projects. In an attempt to the bill mandates the following:

- ▶ Pre-approval of projects is mandatory. Premium processing with an additional fee is authorized
- ▶ Processing times for different stages are mandated between 120 and 180 days.

### Source of Funds

Additional requirements for tracing the lawful source of investor funds include:

- ▶ Administrative fees must be sourced.
- ▶ 7 years of tax returns mandatory for investors.
- ▶ Gifted funds can only be used for EB-5 investments if gifted by a spouse, parent, child, sibling, or grandparent.
- ▶ Capital based on loans to be collateralized on investor's personal assets.
- ▶ Loans must be obtained from a reputable bank or lending institution that is properly chartered or licensed under laws of applicable jurisdiction. "Reputability" determined by consulting relevant commercial and government databases, including OFAC, TFFC, and FinCEN.

### Concurrent Filing and Age-Outs



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The children of EB-5 investors may qualify with their parent's approved application until they reach the age of 21. The prolonged processing times has often caused families whose children have turned 21 during the adjudication of these petitions to be separated. The bill attempts to alleviate this by providing:

- ▶ Allows for concurrent filing of I-526 petition and I-485 adjustment application if a visa number is immediately available.
- ▶ In certain cases, conditional residents who obtained such

status as the derivative child of an EB-5 investor, whose application to remove the conditional status is denied can remain a derivative "child" of the EB-5 investor in a subsequently filed EB-5 petition.

### Regional Center Oversight and Compliance

The bill also provides the following provisions to ensure projects and investors remain in compliance with applicable securities and reporting laws:

- ▶ Imposes additional major reporting, self-certification, and compliance requirements;
- ▶ Establishes an annual fee of \$20,000 fee must be paid by regional centers to support an EB-5 integrity fund, which will be used for audits, site visits, and investigations, both in the U.S. and abroad;
- ▶ Affords U.S. Customs and Immigration Service (USCIS) the authority to suspend, terminate and fine regional centers and NCEs affiliated with regional centers, and broad authority to permanently bar individuals from participating in the program;
- ▶ Promoters of EB-5 projects will be required to register and follow a standard of conduct and other regulations imposed by USCIS.
- ▶ Requires compliance with securities laws, certification of compliance, and maintenance of policies and procedures for ensuring the compliance of parties affiliated with the regional center or NCE (defined broadly to include attorneys, promoters, and others);
- ▶ Allows for a wide variety of grounds for the denial or revocation of a regional center approval, project approval, investor petition approval, or even permanent residence;
- ▶ Provides the Secretary of DHS with unreviewable discretion over most grounds for denial or revocation based on the Secretary's reasonable belief that the affected party has committed an offense;
- ▶ If a regional center or new commercial enterprise (NCE) is terminated, investors who have already obtained conditional residence can either affiliate with a new regional center, make a new investment in a new NCE, or make a new investment through an NCE affiliated with a different regional center, restarting the two-year conditional residence period.
- ▶ Allows for investors to file for removal of conditions on permanent resident status even if the two year conditional residence period lapses.
- ▶ Requires that regional center and NCE principals must be permanent residents or nationals of the U.S. and excludes individuals with previous securities violations or various civil or criminal judgments involving fraud, deceit, securities violations from being regional center or NCE principals.

### Effective Dates

The bill will mostly be effective from the date of enactment.

### Summary

Although some ambiguities remain, the proposed bill should be a game changer in determining how regional centers will operate. Most notably, how new TEA guidelines will affect projects in urban areas, and heightened oversight, reporting, and commitment requirements for regional center principals.

## Move to EB-5 Financing for Quick Service Restaurants and Other Franchises

Quick Service Restaurant (QSR) is the restaurant industry's term for fast food restaurants. QSR's and many other categories of franchises (including retail, manufacturing and service businesses) are regular investment vehicles under the EB-5 investment program (Green Card) after undergoing a microscopic review of their background and the lawful source and path of the investment funds. In order to qualify for this program, an investor must demonstrate that his/her investment has resulted in a minimum of ten new full-time jobs.

Most EB-5 investor franchise cases satisfy this job creation requirement by utilizing the direct on-payroll employment model. However, there is a growing trend for investors to pool their investments under an approved regional center. The advantage to using the regional center umbrella for the project is that in addition to counting direct hires, jobs created indirectly or by inducement utilizing approved methodologies and econometric reports will also be counted. Allowing for a much larger job creation number. This large job number could potentially support two or more investors per location. Afford the opportunity for investors with limited funds to attract and engage the more expensive franchise brands using additional EB-5 funds.

To begin, the foreign investor makes a \$1,000,000 investment (or \$500,000 investment for targeted employment areas (TEA) to open and operate a franchise<sup>1</sup>. In general, franchises are attractive for EB-5 investments because the operation of the business aligns with the EB-5 program regulations.

The investment may cover the franchise fee, leasehold, tenant improvements,

furniture, fixtures, and equipment (FFE), as well as insurance, marketing (excluding marketing for investors and finders fees), payroll, operational reserves, employee training and inventory.

Once approved, a Green Card is issued conditionally for a period of two years from date of arrival in the US or date of adjustment of status of the investor. In the three month window from month 21 to 24 a substantive application has to be filed to remove the condition by demonstrating:

- ▶ The investment was in fact made;
- ▶ Funds were continuously invested throughout the duration of the immigration process; and
- ▶ As a result the investment, the business created the requisite number of jobs.

Although a bipartisan Bill introduced in the Senate on June 4, 2015 proposes to increase evidentiary requirements for both direct investment and EB-5 investments made to the regional center, these franchise structures continue to draw considerable interest from foreign investors looking to take advantage of the EB-5 investment program.

<sup>1</sup> A TEA is defined as a rural area surrounding a town with a population of less than 20,000, or an area which has experienced high unemployment of at least 150% of the national average.

**David Hirson** is the Managing Partner at David Hirson & Partners, LLP. There he leads a dedicated team of EB-5 attorneys and legal professionals to provide a full scope of investment and business immigration law services including EB-5 cases for investors, projects, and regional centers. +1.949.383.5355; dhirson@hirsonimmigration.com; www.hirsonimmigration.com



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\* Certified by the State Bar of California, Board of Legal Specialization as a Specialist in Immigration and Nationality Law.

# True G.R.I.T.

by Kathi Guiney, SPHR, GPHR - President, **YES!** Your Human Resources Solution

As a lover of Westerns, the word “grit,” as personified by John Wayne and Jeff Bridges in the classic movie saga *True Grit*, brings to mind resilience, perseverance, confidence and focus—all qualities needed to heroically save the day before sundown. But since we can’t exactly ride through a small cow town rescuing children and kittens, how can we translate these “save the day” attributes into success in the modern work force?



Guiney

### G.R.I.T. = Get Results In Time

On the road to success, we get timely results by harnessing the traits embraced by our Western movie heroes:

**Resilience:** Instead of wallowing in failure, learn from it and move on! Don’t make the mistake of thinking a failure should end your effort; failure is just an invitation to try a different approach the next time. The quicker you bounce back from mishaps, the quicker you will find success.

**Perseverance:** Talent alone is not enough to get you where you want to go—you need to stick to a plan. Try writing down your weekly goals and tracking the action steps to get there. Sometimes breaking the big picture into bite-size pieces will foster feelings of accomplishment and provide the encouragement to keep at it.

**Confidence:** Trusting your abilities will help you perform at your best. And confidence is contagious! So even when you do not feel confident, project an image of confidence by standing up straight and making eye contact. Smile when appropriate. Positive responses to your “confidence” will work to build your self-trust.

**Focus:** It’s OK to be nervous about a presentation or project outcome! Nerves don’t mean that you don’t have it together or that you won’t do your best. Often nerves are just your internal self saying, “I am getting ready to do this thing.” And remember, you cannot stay 100-percent focused all the time, so be sure to take breaks when you need to.

It doesn’t take a lasso and a cowboy hat to wrangle True G.R.I.T. results. Through resilience, perseverance, confidence and focus, you can **Get Results In Time** on your personal road to success!

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## Deferred Compensation: Are You in Compliance with Sec. 409A?

by Curtis Campbell, CPA, MST

The IRS announced last year a limited audit initiative to evaluate compliance with Sec. 409A, which prohibits deferred compensation arrangements that give participants (including employees, directors and independent contractors) undue control over the timing of benefits. Violations can subject participants to immediate taxation of vested benefits plus a 20% penalty and interest.

Sec. 409A applies to most *nonqualified* deferred compensation arrangements, including bonus plans, supplemental executive retirement plans, certain severance pay plans, and equity-based incentive compensation plans — such as stock options, stock appreciation rights (SARs) and phantom stock. The requirements don’t apply to *qualified* retirement plans (such as 401(k) plans) or to most welfare benefit plans (such as vacation, sick leave, compensatory time, disability and death benefit plans). Also exempt are short-term deferrals (bonuses paid within 2½ months after year end, for example) and undiscounted stock options and SARs (see below).

For covered arrangements, Sec. 409A governs the timing of deferral elections and restricts the ability of participants to alter the form or timing of the payments. Some of the main requirements include:

- ▶ Employees must make deferral elections *before* the beginning of the year in which they earn the compensation being deferred (except for certain performance-based compensation).
- ▶ Benefits must be paid either: 1) on a specified date, 2) according to a fixed payment schedule, or 3) upon the occurrence of a specified event, such as death, disability, termination of employment, change in ownership or control of the employer, or an unforeseeable emergency.
- ▶ Plans are prohibited in which the CEO or board of directors has discretion over the timing or form of payment of vested benefits.
- ▶ Once compensation is deferred, payments can be delayed (by five years or more) but not accelerated.

These are just a few of the requirements. The law and regulations are complex, so it is important to review your deferred compensation plan documents and practices for compliance.

### Curtis Campbell

Curtis Campbell, CPA, MST is partner-in-charge of the Tax Services department at HMWC CPAs & Business Advisors ([www.hmwc CPA.com](http://www.hmwc CPA.com)), one of Orange County’s largest local accounting firms. Contact him at 714.505.9000 to discuss how your company or client could benefit from HMWC’s services.



# July 4th BBQ

Aquarium of the Pacific

Join us for a July 4th evening BBQ! Experience the ambiance of the Aquarium at night, view the Long Beach fireworks, and enjoy some fresh grilled BBQ this Independence Day. Be sure to check out our newest sea jellies now on exhibit, included with admission. Reserve your spot for this event today as space is limited.

**SATURDAY, JULY 4** **FRONT LAWN**  
6PM-8PM

**BBQ**  
Includes Aquarium admission

**General Public:** Adults: \$59  
Child 3-11: \$25

**Members:** Adults: \$49  
Child 3-11: \$15

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## Aquarium of the Pacific

### Fourth of July BBQ

Join the Aquarium of the Pacific in Long Beach for a July 4th evening BBQ! Experience the ambiance of the Aquarium at night, view the Long Beach fireworks, and enjoy some fresh, grilled BBQ this Independence Day. Be sure to check out the newest sea jellies now on exhibit, included with admission. Reserve your spot for this event today as space is limited.

BBQ (includes admission) – **Public:** Adult \$59 / Child (3-11) \$25 | **Member:** Adult \$49 / Child (3-11) \$15. RSVP 562.590.3100. [Aquariumofpacific.org](http://Aquariumofpacific.org)

