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Company Holiday Party Catastrophes: Practical Guidance for Planning Parties That Won't Get You Sued

by Brandon Sylvia, Partner, Rutan & Tucker

For many employees, the company holiday party is one of the most eagerly-anticipated events of the year. From an employer's perspective, these events combine a year's worth of simmering workplace tensions with the liberating effects of alcohol, to unpredictable and occasionally disastrous results.

For every reason to host a holiday party there are numerous stories of the company's well-meaning efforts going awry, sometimes catastrophically. While the *idea* of a holiday party is appealing, in reality, some employees interpret the annual invitation to "let their guard down" in stunningly inappropriate ways that can seriously impact the company. Case in point: the vice-president who confused "letting his guard down" with letting his *pants* down on the dance floor at the company holiday party, leading to a lawsuit and public ignominy for himself and his soon-to-be-former employer.¹

This article identifies the potential downsides to throwing holiday-themed parties. The Scrooge-like cynicism you may detect is not without foundation; it is informed by years of defending harassment and discrimination lawsuits, and is buttressed by examples of hard-lessons learned by others. For companies wishing to host a holiday party in spite of the cautionary tales that follow (hopefully, all of you), we recommend measures designed to minimize potential liability.

The Catastrophe: Alcohol Overconsumption

It should be of little surprise that the primary catalyst for company party mayhem is the consumption of alcohol. Even a well-meaning, mild-mannered employee might indulge in an inappropriate joke or comment after a few drinks. As courts have made clear, employers are not protected by "social host" immunity laws. Thus, even if the party ends without incident, employers can *still* be liable for harm caused afterwards.

Years ago, a Southern California employer learned firsthand the consequences of sponsoring unbridled drinking. In that instance, a San Diego Hooters restaurant decided to throw a holiday party at a local hotel.² In the words of the court, "[t]he behavior of some of the Hooters employees and their guests was not exemplary...There was heavy alcohol consumption, underage drinking and drug use." Although Hooters had provided a bar where invitees could purchase drinks, many employees supplied their own drinks by mixing them in their hotel rooms and bringing them into the party. The hotel staff noticed, and informed a Hooters manager. The manager's sage advice to the employees was to better conceal their contraband.

In a turn of events, anyone could have predicted, the party got out of hand. Specifically, there was a confrontation with a party guest and a number of Hooters employees. The fracas soon escalated into a no-holds-barred street fight, complete with head butts and knees to the groin – 'tis the season, indeed. A hotel security guard sustained serious injuries in the altercation, sued Hooters, and was eventually awarded more than \$800,000 in damages.

In another case, an employer learned that the consequences of allowing its employees to become intoxicated were far-reaching.³ The company's annual party was meant as a "thank you" for all employees, and the employer graciously served alcohol to those in attendance. One employee drank heavily during the party – including repeatedly draining a flask he brought for himself – then safely caught a ride home with a few coworkers. About 20 minutes later, however, the employee decided to leave his house and attempt to drive one of his co-workers to their home. En route, he caused a fatal car crash. The employer was sued, and sought to dismiss the case; but, this request was denied. As the court explained, by allowing the employee to get drunk at a company-sponsored event, the employer could properly be viewed as the cause of the harm flowing from his intoxicated state – even harm occurring *after* the employee safely made it home.

Recommendations

Alcohol consumption is not foremost on our list of "humbugs" by accident; it is probably the most sensitive issue an employer must consider in planning a holiday party. Of course, employers can always opt to have a Prohibition-style, nonalcoholic gathering (without the bathtub gin). Short of a completely dry party, there are a number of steps that employers can take to minimize liability, including:

► Limit Consumption

Limiting the amount of alcohol consumed is key. Having an all-cash bar staffed with a professional bartender will promote moderation, and cutting off the flow of

alcohol well before the party ends can help prevent impaired driving. Providing guests with a limited number of redeemable "drink tickets" can also limit consumption, although these will almost certainly be bartered between employees like prison cigarettes. Employers should also consider limiting the type of alcohol available – *i.e.*, beer and wine only – and should make plenty of nonalcoholic available. And, providing plenty of food can help mitigate the effect of the drinks.

► Provide an Alternative to Driving

Employers should also provide ample opportunity for employees to avoid drunk driving. An employer might opt to provide for company-paid taxis to ensure a safe trip home for any employees who drink at the holiday party, or offer door prizes to employees who volunteer as designated drivers.

► Invite Deterrents

Consider opening the party invitation up to non-employees. Sometimes, something as simple as the presence of a spouse or significant other can help employees keep their behavior – and their drinking – under control.

► Be Proactive

Finally, holiday party hosts should be on the prowl for any revelers who have overindulged, and take whatever steps are appropriate, including ensuring that no further alcohol is consumed by such employees and arranging for transportation. Companies can also deploy a high-level management employee at the exit to wish everyone goodnight and monitor for tipsy partygoers.

The Catastrophe: Entertainment Options

The choice of entertainment can also be a fertile area of liability for the unwary employer. For example, one employer learned the seemingly obvious lesson that it is not appropriate to hire a stripper to perform at the office holiday party.⁴ The stripper in this case was male, because the company was mostly (though not entirely) comprised of female employees. When the show began, Henry Lahey – the company's only male employee – promptly left the party. However, days later poor Mr. Lahey was still unable to fully escape the gyrating, scantily-clad Santa, since photos of the stripper had been posted throughout the office. This cheery incident formed the basis of a Title VII gender discrimination lawsuit.

Another employer hosted a holiday skit where Santa's helpers were portrayed by white children with their faces painted black. Unsurprisingly, the racial stereotypes inherent in the use of the "blackface" characters were not lost on the plaintiff, who was one of the company's few African-American employees. He promptly brought a discrimination suit against his employer.⁵

Recommendations

Aside from avoiding strip shows and arguably racist skits, employers should use common sense. If a particular act or show would be inappropriate for a breakfast meeting, it should probably be avoided. If in doubt, don't do it.

The Catastrophe: Gift Giving

"Secret Santa" or "White Elephant" gift exchange programs can often be a source of hilarity and banter at a holiday party. They can also form the basis of embarrassing litigation. Oftentimes, an attempt at humor in a gift exchange looks much less funny to a jury.

For example, one plaintiff attempted to construe her boss's gift – red lacy panties – as part of an ongoing pattern of his sexual harassment.⁶ Although the court

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2017-2021 Business and Investment Immigration Under President-Elect Donald J. Trump

by David Hirson, Managing Partner, David Hirson & Partners, LLP
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On November 8, 2016, the United States and the rest of the international community held their breath as the 45th U.S. President was announced. In the late evening, it was official, Donald Trump was appointed the President-elect of the United States. After 18 months of campaigning and making strong comments on various topics, including immigration policy, minimal specifics had been stated except for talking about a wall being built by Mexico, stronger deportation policy, and promise to bring back jobs to the United States. His strong anti-immigration rhetoric has left immigration attorneys with many questions regarding our current immigration system. In the Business Immigration world, questions relating to the EB-5 Investment Immigration Program, H1B's and Optional Practical Training (OPT) are all topics of focus and concern.



BUSINESS & INVESTMENT IMMIGRATION LAW

EB-5 Investment Immigration

As an EB-5 attorney, our office has been bombarded with questions relating to how investors and businesses alike will be impacted by a Trump Presidency. For some background on the program, in 1992, Congress launched a pilot program, the Immigrant Investor Regional Center Program, which increased the boundaries of the 1990 direct-hire EB-5 Program. The Regional Center Program has been renewed every few years, including a new expiry date of December 9, 2016, which is likely to lead to an additional extension of the program for an uncertain period. With the uncertainty of another extension, EB-5 insiders expect changes to be made, include changes to the minimum investment amount, changes to defining Targeted Employment Areas (TEA's), (unlikely) retrogression, a backlog of cases, and heightened transparency requirements.

There are several projects in Orange County and even more in Los Angeles County that are financed with EB-5 money. The EB-5 program has brought into the United States billions of dollars in foreign direct investment capital and created hundreds of thousands of jobs all at no cost to U.S. taxpayers

While the Trump team has not directly commented on the EB-5 program, EB-5 stakeholders remain confident that while there may be a tougher stance on immigration, including greater transparency requirements, there are hopes that the program will be favored by the Trump administration.

Greater Transparency

It is expected that there will be greater requirements for transparency, including control of funds by independent parties and full disclosure of funds spent for whatever purpose. Regional Centers (RC's) will also be required to comply with stricter rules, including filing a business plan, offering documents, marketing materials and an economic report for investments that must include significant information such as any material; litigation or bankruptcies in the last 10 years, fees paid to agents or broker dealers, potential conflicts of interest, and certification that all parties participating in the project are also in compliance with relevant federal and applicable state securities laws. The bill also proposes that anyone directly or indirectly involved (ie. officers, board members, managers, general partners, and others with substantive authority) with the RC must be a lawful permanent resident of the US or US citizen. These greater proposed restrictions provide a more streamlined approach as well as greater transparency for investors, RC's and the government.

Increase in Filing Fees

While there is much uncertainty on what laws will and will not become effective. It is certain that there will be an increase in filing fees related to the EB-5 program. United States Citizenship and Immigration Services (USCIS) has announced that they will increase filing fees for the following EB-5 forms on December 23, 2016 ("Effective Date").

As such, Regional Centers or EB-5 investors may want to consider submitting the below petitions before the Effective Date to avoid paying the increased filing fees if possible.

Changes to USCIS Fees Effective 12/23/2016

Immigration Benefit Request	Existing Fees	New Fees as of 12/23/2016	% Increase
I-485 Application to Register Permanent Residence or Adjust Status	\$985	\$1,140	16%
I-526 Immigrant Petition by Alien Entrepreneur	\$1,500	\$3,675	145%
I-829 Petition by Entrepreneur to Remove Conditions	\$3,750	\$3,750	0%
I-924 Application for Regional Center Designation Under the Immigrant Investor Program	\$6,230	\$17,795	186%
I-924A Annual Certification of Regional Center	\$0	\$3,035	

Source: <https://www.uscis.gov/forms/our-fees>

H-1B Visas and OPT

Trump's decision to team up with Senator Sessions has led to unfavorable commentary on both the H-1B and OPT Programs.

► **H-1B Visa:** The H-1B visa has been steeped in controversy since its inception. Senator Sessions has drawn repeated attention to the global outsourcing companies' use of H-1B workers to replace U.S. IT workers. While campaigning for President-elect Donald Trump, Senator Sessions told voters in Iowa he is willing to "eliminate" the H-1B program.

In a speech in Ohio in October, Trump called the outsourcing of jobs for "college-educated kids a tremendous threat." He said at this rally, "Companies are importing low-wage workers on H-1B visas to take jobs from young college-trained Americans [...] We will protect these jobs for all Americans, believe me." During the Republican debate on CNN on March 10th, Trump stated, "I know H-1B very well. And it's something that I...shouldn't be allowed to use it. We shouldn't have it. Very, very bad for workers." As a solution, Trump proposed increasing the prevailing wage for H-1B visas and adding a recruitment requirement to find American workers before hiring foreign ones.

► **Optional Practical Training (OPT):** Currently, the OPT program allows college students the 12-month period of work authorization after completion of a U.S. degree and an additional 24 months for graduates with Science, Technology, Engineering and Mathematics (STEM) degrees. In 2015, Senator Sessions, along with Senator Ted Cruz, introduced "The American Jobs Frist Act of 2015" bill. This bill proposes to eliminate the continued use of the OPT program, arguing that the program does not offer a legitimate opportunity for student training. Rather, they argue that it affords employers an opportunity to hire foreign workers more cheaply than qualified and willing U.S. workers, thus displacing or leading to the non-hire of such U.S. workers. Senator Sessions has said in the past that the OPT for F-1 visa students is "a backdoor method for replacing American workers."

► **Other visa categories:** there are several other visa categories that have not been highlighted during the election campaign. No doubt they will all be addressed when the new President takes office and deals with immigration reform.

With Senator Sessions' continued participation as Trump's key advisor on immigration policy, we anticipate that certain changes will likely be made in the fiscal year 2018 cap filing season.

In conclusion, the authors believe that President Trump, being a successful business man, will utilize his experience when making any changes to business and investment immigration categories so that foreign investment and job creation will be continued. Where technology and other industries require the services of professionals where there is a shortage of U.S. workers, jobs will remain available to foreign professionals, particularly those who have graduated from U.S. colleges and universities. Many industries will be severely impacted shall the H-1B category be closed technology, bio research, research and development, engineering, medicine, and medical appliance manufacturers. Without legal employment of immigrants, the U.S. may not be able to maintain its number 1 position in the world.

While the business immigration community and the rest of the United States speculate, what changes will and will not take place during the Trump administration, it will remain to be seen once President-elect Trump is sworn into office on January 20th 2017.

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The Rise of the Gig Economy - Is HR Ready?

The trend towards a gig economy has begun. According to a study by Intuit, it is predicted that by 2020, 40% of American workers will be independent contractors. In accordance, nearly 40% of top performing firms today have more than 30% of their labor workforce composed of contract/freelance workers. This rise in hiring contingent employees can be explained based on three key factors: (1) employers are seeing the value in having a flexible and blended workforce, (2) the immediate availability of these contractors and (3) the ability to access niche skills which might be too expensive to keep on a permanent payroll.



wide communications, clearly defining job descriptions along with measures for success would allow contractors to quickly fit into their new role. In addition, many companies are having their freelancers complete various behavioral and cognitive tests (typical assessments that they would conduct for internal employees) to assess overall culture fit.

► **Legal or regulatory uncertainty:** employers need to be aware of certain liabilities including misclassification, compliance liabilities, any additional paperwork needed and contractual obligations that may arise.

What is Gig Economy?

The "gig economy" typically falls under two categories. On the one hand, we have what is called the "uberfication" of work which includes the buying and selling of services via online platforms such as Uber, TaskRabbit and Airbnb (to name a few popular ones). On the other hand, we have what is called "portfolio working" which includes skilled workers taking on various consulting projects for different organizations.

There is no denying that more and more employees are finding value in "Gig work" as this new trend allows them more flexibility, work-life balance and the opportunity to be selective of their chosen projects. As a result, we are moving towards an employment trend that is very much candidate driven. It is thus crucial for employers' to adapt HR initiatives towards this growing phase.

How will this trend affect HR?

A PwC report found that less than one-third of employers are basing their talent strategies on the rise of the portfolio career. However, HR professionals also report that they expect 20% of their workforce to be contingent workers by 2020.

Let's look at some key challenges that HR will encounter with this new trend on the rise:

- **Managing Quality Control:** according to a CIPD survey, many HR leaders are concerned with the quality of work of non-permanent staff. Performance evaluations, Training Programs and encouraging two-way feedback would be effective tools to drive engagement and increase quality of work.
- **Cohesion of workflow and cultural fit:** involving consultants with organization

While some may argue that the rise of the Gig Economy is merely a business fad, there is no denying that there has been a substantial increase in freelance work in the past couple of years. This trend will cause for an even more blended workforce and additional challenges for HR and Business leaders. As a result, it crucial for organizations to prepare for this global shift in the talent landscape in order to be strategically well positioned for future growth.

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COMPANY HOLIDAY PARTY CATASTROPHES

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disagreed with that particular plaintiff, other cases have turned out differently. Another court viewed a sexually-charged holiday gift exchange – where gifts included panties, shirts with sexually suggestive slogans, and a box of condoms – as direct evidence of sexual harassment.⁷ In yet another case, the court refused to dismiss plaintiff's sexual harassment claim where plaintiff presented evidence that her supervisor organized a sexually-themed holiday gift exchange where gifts included G-strings, cards depicting men and women dressed in their underwear, condoms, whips, and a penis-shaped Eskimo.⁸ Plenty of creativity here, but no common sense.

Other issues can arise if the employer provides gifts to its workers. Depending on the value of the gift conferred, the employer might be required by the IRS to count the gift as wages to the employee. In other words, if you give an employee too nice a box of See's Candies, the government will want at least a raspberry truffle. Employers should check with counsel to determine the threshold on gifts.

Recommendations

Employees should have the *option* of participating in a gift exchange. If enough employees are interested, the employer should implement some simple rules governing the gift exchange – particularly, a restriction on gifts involving inappropriate subject matter. Gag gifts can be great fun, but such presents should steer clear of protected categories – gender, race, religion, etc. Employees ought to be reminded – in a not-too-heavy-handed way, of course – that the Company's policies prohibiting harassment still apply at holiday events.

The Catastrophe: Holiday Decorations

As incredible as it sounds, even something as innocuous as holiday decor has formed the basis of lawsuits. For example, one company's holiday party table decorations were used as evidence of a sexually hostile workplace.⁹ (The objectionable decorations consisted of bare-breasted mermaid figurines – an interesting take on the holiday season.)

Other employers find trouble with over-zealous attempts to celebrate the season. For example, one overeager employer demonstrated the Christmas spirit by suspending an employee who refused to wear a Santa hat while at work.¹⁰ The employee's refusal was not merely due to workplace fashion concerns; as a practicing Jehovah's Witness, the employee asserted that her religious beliefs precluded her from celebrating Christmas. The court refused to dismiss the employee's case, and held that she stated a valid basis for recovery. In another case, an equally-enthusiastic employer mandated that each of its employees

answer the phone with a "Merry Christmas" greeting.¹¹ When an employee explained that she could not do so without compromising her religious beliefs (again, a Jehovah's Witness), she was fired. She sued, and her employer was found liable for religious discrimination.

Recommendations

Companies must realize that one person's Christmas season is another's Hanukkah, yet another's Kwanzaa, yet another's Festivus, and is simply December to others. As such, employers should attempt to keep the company's celebratory spirit secular. The U.S. Supreme Court has held that wreaths, Christmas trees, lights, Santa Claus, and reindeer are "secular" symbols, which ought to make them fair ground for your workplace.¹² And, if an employer decides to tolerate a Santa hat or manger scene, it must also tolerate displays of menorahs and kinara candles.

Conclusion

Hosting a company holiday party can be a workplace disaster waiting to happen. As the holiday party horror stories above make clear, there is no end to the innovative and unique ways in which employees will ensure that the new year brings with it the promise of litigation. The only way to guarantee that no liability arises from a company holiday party is to not hold one. That, however, may be too Grinch-like for many employers.

For those whose hearts are not two sizes too small, there are ways to at least limit the potential for legal exposure. Employers should be sure to appropriately communicate (and *document* the communication) that the business's standards of conduct – including the policy against harassment – remain in effect, even during the party. Additionally, by careful planning – and spending a few minutes conversing with legal counsel – employers can curtail the possibility that the company could be deemed liable for wrongdoing occurring during or after the event. A successful and enjoyable party can bolster employee morale and stockpile goodwill that lasts long into the new year. But, if someone gets sloshed on eggnog and starts streaking through the office, don't say you weren't warned.

¹ *Rogers v. Carmike Cinemas*, 211 Ga. App. 427, 428 (1993).

² *Johnson v. Hooters of America, Inc.*, 2004 Cal. App. Unpub. LEXIS 6355 (2004).

³ *Purton v. Marriott Int'l, Inc.*, 218 Cal. App. 4th 499, 513 (2013).

⁴ *Lahey v. JM Mortg. Servs.*, 2000 U.S. Dist. LEXIS 5221 (N.D. Ill. 2000).

⁵ *Pickens v. Shell Technology Ventures Inc.*, 118 Fed. Appx. 842, 850 (5th Cir. 2004).

⁶ *Babcock v. Frank*, 783 F. Supp. 800, 806-07 (S.D.N.Y. 1992).

⁷ *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205, 1208 (D.R.I. 1991).

⁸ *Rosa Angela Gonzalez-Santos v. Angel G. Torres-Maldonado, et al.*, 839 F. Supp. 2d 488,498 (D.P.R. 2012).

⁹ *Jones v. Flagship Int'l*, 793 F.2d 714, 716-17 (5th Cir. 1986).

¹⁰ *Velez-Sotomayor v. Progreso Cash and Carry, Inc.*, 279 F. Supp. 2d 65 (D.P.R. 2003).

¹¹ *Kentucky Comm'n on Human Rights v. Lesco Manuf.*, 736 S.W. 2d 361 (Ky. App. 1987).

¹² *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).



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Kiesha is a trusted advisor and a dedicated HR professional continually striving to set high standards of excellence and integrity. She has a strong track record of developing and implementing programs designed to improve efficiency, productivity, communication, and positive employee morale while reducing employer-related risks and helping to increase the company's bottom line.

She is a member of The Society of Human Resource Management which certifies her as a Professional in Human Resources.

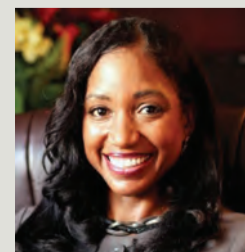
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Work Place Law Under President Trump: What to Expect

by Michael A. Hood, Jackson Lewis P.C.

The inauguration of Donald Trump as President in January 2017 promises substantial changes in employment law across the Country, as for the first time in decades, the traditionally more employer friendly Republican Party will control the Congress and the executive branch. In addition, the judiciary is likely to take a much more conservative bent as President Trump begins to appoint federal judges to interpret the employment laws. For employers in California who may be rejoicing at the prospect of relief, however, not so fast! California has its own panoply of employment laws that its courts have consistently interpreted to provide greater protections for employees than federal law provides. Still, however, there are some areas where the election of President Trump is likely to make a difference for employers here.

Government Enforcement

Federal agencies under President Obama have been aggressive in their enforcement of a number of employment laws. With President Trump's appointments to those agencies, that aggressiveness may be tempered.

During President Obama's tenure, the National Labor Relations Board has been extremely activist in a



Michael A. Hood

number of areas. For example, the Board has weighed in on the legality of social media policies, determining that employers cannot regulate employee behavior on social media

sites. The NLRB has also established rules for quickie union elections, and extended voting units to include employees of joint employers and temporary workers. More important for California employers, the Board has taken the position that class action waivers in arbitration agreements violate the National Labor Relations Act. The Ninth Circuit Court of Appeals has recently affirmed this view, placing many employers in jeopardy of being embroiled in class actions despite having implemented such waivers. A Trump NLRB (there are currently two positions on the NLRB for him to fill) may well reverse or temper some of these controversial rulings.

Similarly, the EEOC and Department of Labor under President Trump are likely to be less activist than they were under President Obama. For example, the EEOC may retreat from its systemic discrimination enforcement activity. Likewise, the DOL may revisit proposed or implement regulations on wage/hour matters.

Judicial Appointments

President Trump has at least one Supreme Court Justice to appoint (the Supreme Court has been at eight Justices since the passing of Justice Scalia). In addition, there are numerous other lower court vacancies to be filled. These positions will probably be filled with judges that are more employer friendly than were President Obama's appointments. Although the more conservative enforcement of federal labor laws may not have a direct impact on California law, many California courts look to federal court



decisions regarding federal law for guidance in how to interpret similar California laws, such as the Fair Employment and Housing Act and the Industrial Welfare Commission Orders. With President Trump's impact on the judiciary, there may be more employer friendly federal decisions for the California courts to look to in interpreting California law.

Conclusion

The Trump Presidency will likely provide some relief to California employers. However, it is not likely to be a panacea, as California laws will continue to be interpreted by California laws in ways that have been problematic for California employers.

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Bridging the Soft Skills Gap

Companies often hire people who have the technical skills they need, but the challenge, at times, is hiring people with the right soft skills. Soft skills are broadly defined as the traits and abilities that affect human interaction and make it possible for a company to maximize its professional expertise. With the economic shift from manufacturing to a service-based economy, the demand for soft skills is on the rise. In the 2016 Bloomberg Skills Report, recruiters hunting for top talent reported that creative problem solving, leadership skills, strategic thinking, and communication skills were the most important but hardest-to-find attributes valued in managers.

With well-developed soft skills, people can excel as leaders: problem solving, delegating, motivating and team building are all easier with good interpersonal skills. So how do you know if you have a gap? According to Paradigm Learning, if any of the following statements sound familiar, you may have a soft skills gap:

- ▶ You are good at getting clients but not so good at retaining them
- ▶ You experience higher-than-average turnover and are constantly training new people
- ▶ You have plenty of managers but no real leaders

Strategize and prioritize soft skills in hiring as well as continued training programs. Make it as easy to learn and improve soft skills as you would technical skills:

- ▶ Identify the high-priority soft skill behaviors that are most important to your business and focus on them
- ▶ Evaluate job profiles – be sure to include the necessary soft skills as well as technical skills in your job descriptions
- ▶ Use behavioral testing to get a quick baseline of a candidate's aptitude in key areas of the job, including high-priority soft skills
- ▶ Arrange for prospective candidates to meet with multiple people in your company to ensure a good cultural fit with team members, not just HR and/or the

hiring manager

- ▶ Build soft skills training into onboarding processes – explain what is expected and how performance will be measured
- ▶ Explain that good soft skills are not just good for business, but for the individual, too
- ▶ Invest in training and development programs in areas such as personal accountability, conflict resolution, collaboration, and creative thinking
- ▶ Recognize and reward development

The risks of not making soft skills a “must have” can be severe, resulting in increased operating costs, problems with quality, loss of business to competitors, and delays in introducing new products or services. The bottom line is that soft skills matter, so employees and businesses have to look for practical ways to increase their development. After all, businesses are made up of people, so people skills will always be important.

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. Our approach to staffing focuses on individualized service, customized solutions, and a commitment to deliver “Hire Results”! You can reach Lisa at lperson@kimco.com or 949.331.1102.



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FRAGOMEN WORLDWIDE

H-1B Visa Cap Season Rapidly Approaching!

by Mitch Wexler, Partner, Fragomen Worldwide

We are heading into the fun time of year for business immigration lawyers and companies that employ foreign nationals with critical skills. It is like April 15th for accountants. In a nutshell, there are only 65,000 new H-1B visas available each fiscal year. There are an additional; 20,000 for foreign national with advanced US degrees. The Federal government fiscal year begins on October 1st. US employers can file H-1B petitions on behalf of identified foreign national candidates six months early, ie; April 1st. Last fiscal year, there were approximately 244,000 H-1B petitions filed during the first week of April. USCIS receipts all H-1B filings during the first week of April and in the likely event demand exceeds supply, a random lottery is conducted. The lucky "winners" can apply for their H-1B visa stamps at the nearest US Consulate abroad or if in the US, will assume H-1B status as of October 1st. It is anticipated that this year's receipt will far exceed last year's.

Not all H-1B petitions are subject to the cap. H-1B extension petitions with the same employer or new H-1B petitions for a current H-1B visa holder to work for another employer are NOT subject to the annual cap. The most common population of foreign national that is subject to the annual cap are foreign student that have recently graduated with university degrees. They are typically issued a one year work permit as part of their student visa status. If employers want to secure their services beyond that one year period of time, a cap subject H-1B visa petition needs to be filed.

Another common "cap subject" class of applicant are those foreign nationals in the US pursuant to another type of work visa with their current employer and where only an H-1B is an option for a new employer. For example, some work visas are nationality driven and some are only for multi national companies transferring key people from affiliates abroad. To then seek employment with another US company, often times, the H-1B is the only option.

Since H-1B applications can take some time to analyze and prepare for filing, employers are reviewing their current work force and future needs now in order to be ready when the filing window opens in a few months.

Mitch Wexler

Mitch Wexler is a Partner with Fragomen Worldwide, the world's leading immigration law firm. He manages the firm's Irvine and Los Angeles offices and is a member of the firm's national Executive Committee. Mitch is also a California State Bar Certified Specialist in Immigration Law and has been practicing immigration law for over 30 years. He can be reached at mwexler@fragomen.com.



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FRAGOMEN WORLDWIDE

Wage and Hour Pitfalls: What California Employers Need to Know in 2017

by Shane Criqui, Partner, Stuart Kane LLP

It is a privilege to live and do business in the great state of California. However, California employers face significant regulatory burdens, not the least of which is the California Labor Code. Non-compliance with the Code can result in significant damages and penalties for employers.

California's detailed wage and hour laws regulate minimum wage and overtime, equal pay, and paystubs, among other things. While certain statutory violations may seem trivial, they may nonetheless result in significant liability. This is especially true given the increasing use of the Private Attorneys General Act (PAGA) by plaintiffs' lawyers, a statutory scheme which creates additional civil penalties for labor code violations above and beyond the statutory penalties, which have long been available to plaintiffs. Employers should be aware of the new developments in these areas.

Minimum Wage Requirements And Exempt Employees

Employers must pay hourly employees (non-exempt, non-union employees) the minimum wage. The California minimum wage is currently \$10.00 per hour, but (for employers with 26 employees or more) it will increase to \$10.50 per hour on January 1, 2017 and to \$11.00 on January 1, 2018, with an increase of \$1.00 every year thereafter until it reaches \$15.00 per hour on January 1, 2022. Employees who work more than 8 hours in a day or 40 hours in a week are also entitled to overtime compensation at the rate of 1.5 times the normal rate of pay, or 2.0 times the normal rate of pay for work in excess of 12 hours per day. Certain executive, administrative and professional employees are exempt from overtime laws, but California law requires that exempt employees earn at least two times the state minimum wage for full time employment (40 hours per week) in addition to meeting other requirements.

In 2016, the Federal Department of Labor issued new regulations which would have preempted California law, effective as of December 1, 2016, and required employees to earn \$47,476 per year (more than two times the current state minimum wage) in order to qualify as exempt. However, on November 22, 2016, a federal judge in Texas granted a nationwide preliminary injunction blocking the Department of Labor's rule from taking effect. The ultimate outcome of the federal regulation is now uncertain.

However, California employers still must comply with California laws. Based on a minimum wage of \$10.50 per hour in 2017 and full time employment, exempt employees in California must make at least \$43,680 per year in 2017. Higher levels of annual compensation will be required in each successive year until 2022 based on the minimum wages stated above. Accordingly, California employers should be careful to examine the compensation levels of their exempt employees each year to ensure compliance with these changing standards.

The Fair Pay Act

Another hot topic is California's Fair Pay Act, which was amended effective January 1, 2016, and is now perhaps the most stringent such law in the country. The law requires equal pay for

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employees of the opposite sex performing "substantially similar work, when viewed as a composite of skill, effort and responsibility." While women and men certainly deserve equal pay for equal work, the amended law eliminates certain defenses for employers, including making it more difficult for employers to satisfy the "bona fide factor other than sex" exception. Additional amendments to the Fair Pay Act will go into effect on January 1, 2017 which will expand the law to apply to pay disparities based on race or ethnicity as well. While relatively few cases have been brought under the amended act, many legal experts believe that this is the next frontier of employment litigation. Employers should conduct an internal review of wage rates paid to employees performing substantially similar work in order to ensure compliance with the law.

Litigation Regarding Paystub Records

Paystub records also continue to be a heavily litigated area of employment law. California requires paystubs to include a long list of information, including gross wages, hours worked, the name of the employee and only the last four digits of his or her social security number, and the name and address of the employer, among other things. Statutory penalties of up to \$4,000 per individual are available for such violations. Plaintiffs' attorneys often seek additional PAGA penalties regarding the exact same violations. The result is that very minor and seemingly insignificant omissions on employee paystubs may add up to very significant liability, especially in the class action context. Employers should periodically review the information contained on paystubs to ensure that it is compliant with California law.

For more information on any of these topics, please feel free to contact me directly at scriqui@stuartkane.com.

Shane Criqui

Shane Criqui is a partner with Stuart Kane LLP where he focuses his practice on employment, business and real estate litigation. Mr. Criqui has significant experience with both jury and court trials as well as arbitrations and Labor Commissioner hearings. He has worked with clients involved in multiple business verticals including technology, healthcare, retail, real estate, banking, legal services, manufacturing and distribution. Mr. Criqui has continuously been selected to the Southern California "Rising Stars" list by Super Lawyers magazine. Mr. Criqui can be reached at 949.791.5126 or scriqui@stuartkane.com.



The Battle for the Iron Throne ... Coming to a Cubicle Near You!

by Kathi Guiney, GPHR, SPHR, SCP President of YES! Your Human Resources Solution and Jocelyn Schamber, Fuzzy Red Pen

Cersei Lannister said it best: "When you play the game of thrones, you win or you die." It may often feel much the same at work. Whether you want to play or not, it's called *office politics*. Some days are filled with conflict, alliances and intrigue: all in the row of cubicles you call *work home*. So how can you play without losing your head...so to speak?

Put the Kingdom—er, Organization—First

Yes, advancement is important, and you're in competition for limited opportunities. And you should talk about your accomplishments, but not at others expense. A laser-focus on personal gain can undermine the team's objectives and hurt the big picture. You're all working toward creating a successful organization!



Observe

Be your organization's wise-one: observe, listen and learn how decisions and influence are managed. What are the organization's core values? Are short- or long-term results more valued? Knowing these priorities will help match your skills to the organization needs.

Choose Allies

While a strong central support can help you gain ground now, a better long-term strategy is to build allies across the organization. Be interested in what everyone does – it's a business not just a department. Don't affiliate with one group only; a key individual's departure can change the organization map and wipe out that promotion you wanted.

Thwart Enemies

Anyone can be a victim of character or accomplishment sabotage. Occasional complaining may earn you the label, "problem child," but inaction can hurt your advancement. Stay calm, investigate and talk about a resolution with your boss or Human Resources. There are peace treaties to be had with folks in your office.

In the words of King Robert: "...sitting on a throne is a thousand times harder than winning one." If office politics get too ruthless, you can always cross the sea to new lands. And who knows, you might come back with a dragon.

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