

EMPLOYMENT & Labor Law

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What to Consider When Hiring Employees and Contractors

While employing independent contractors may be an attractive solution to accordion staffing needs and administrative headaches, there are a number of pitfalls if you are not careful. In California, the Employment Development Department (EDD) requires businesses to report any new employee within 20 days of the start-of-work-date to the New Employee Registry (NER) Program. Lesser known is the EDD's requirement for any employer that is required by law to file a federal Form 1099-MISC for services performed by an independent contractor, to also report the independent contractor's information to EDD's Independent Contractor (IC) Program.

The EDD's NER and IC Programs were established in response to the Deadbeat Parents Punishment Act of 1998. They are confidential Programs that receive information on all new hires of all employees and independent contractors within California. This information is used by state and federal agencies to locate parents who are delinquent in their child support payments as well as establish, modify and/or enforce any child support obligations that your employees may have. As independent contractors, these deadbeat parents can easily fly under the radar and you would never even know; just like any common criminal, they want to keep it that way.

Recognizing this, EDD implemented the IC Program in order to monitor these deadbeat parents and ensure that they meet their legal and moral obligations. In order to comply, you have to use EDD's Report of Independent Contractor(s) (DE-542) form that can be found in any EDD office location. Should you fail to

report any new employee to the NER Program or any independent contractor to the IC Program, you could face a fine of \$24 for each failure to report or \$490 if the failure to report is as a result of an intentional agreement between you and the employee to not supply the information or to supply a false or incomplete report.

Current news is replete with reference to independent contractors, on every topic from the gig economy to the new independent contractor test established by the California Supreme Court. This EDD paperwork requirement is one more item to track.

Shannon M. Jenkins represents employers in disputes from pre-litigation through jury or bench trial, individual, class action, administrative and ADR. Her 20 years of experience includes successfully defending virtually every type of employment claim as well as drafting employment documentation, conducting trainings and workplace investigations and counseling employers on best practices. For more information contact her at (949) 756-0684 or sjenkins@tldlaw.com.





How Is the Talent Shortage Affecting Your Business? Ways to Attract and Retain Top Human Talent

Human Talent is driving the job market in Orange County these days.

A recent study by the *Center for a Competitive Workforce and the Los Angeles County Economic Development Corporation* looked at anticipated job demand across Orange County as well as L.A. County, and determined that the demand for certain categories of skilled positions is about to skyrocket, with few candidates in place to fill the open positions.

In fact, 42 percent of the demand for positions in certain fields, including IT, Engineering, Medical Device, and more, is expected to go unfilled within the next five years. These numbers put employers at a distinct disadvantage when trying to hire the staff they need to grow their companies.

This talent shortage, which has been growing for years, poses two key dilemmas for employers; you have to find the talent you need and you have to keep that talent under your roof.

Finding the Talent You Need

When you don't have the talent you need on board, you run the risk of missing deadlines and failing to meet your clients' expectations. Employee morale also suffers when you're short-staffed, which can in turn lead to loss of additional key employees.

You might spend months unable to fill an important position during a talent driven market. If what you've been trying isn't working, here are a few suggestions to close that gap:

1. Use a Recruiting Firm to Hire Interim or Contract Professionals

Often when you can't find the permanent employees you need, you can cover talent shortages by bringing in contract staff on an interim basis. This can be particularly useful in areas like IT, Accounting, Engineering, HR and Healthcare, where it's fairly easy to assess whether a candidate has the very specific skills you require to complete a given project. Working with a top-notch staffing firm can give you the access you need to the contract staff who can get the job done.

2. Use a Recruiting Firm for Direct Hire Positions

Qualified candidates often prefer a direct hire position, especially when their skills are in high demand.

When you use a staffing partner, you're able to conduct a nationwide search, giving you access to a far wider pool of qualified candidates than you'd have if handling the search in-house — and it should be no surprise that more than a few talented professionals are attracted to the idea of moving to Orange County. A recruiting firm can also leverage its deep network of relationships across the country to find excellent candidates you'd be unlikely to access any other way.

In addition, recruiting firms have great expertise in persuading passive candidates to throw their hats in the ring when they aren't actually seeking a new position. Finally, using a staffing partner also frees up your HR department, since the agency handles all the vetting, references and screening that take up so much time.

3. Look at In-House Talent

Promoting from within always has one significant advantage: You already know that the person in question is a good cultural fit with your company. When you're facing a talent shortage, training promising employees to take on more challenging responsibilities may be a way to fill at least some of those open positions. It's also a key element in building staff loyalty and retaining your most skilled employees, as they can visualize their own continued future and advancement with your company.

4. Speed Up Your Time to Hire

When your hiring process is fast and efficient, you send a great message to prospective candidates about the benefits of working for your company. In a talent shortage, be prepared to accommodate the candidate's preferences for interview times and travel. Any delays could result in losing a promising applicant to one of your competitors. If you're working with a staffing partner, ask how they can help you speed up your entire hiring process.

Retaining Talented Employees

If you promote from within, you're already taking one vital step to encourage talented employees that their future lies with your company. If you're in a field like IT or Healthcare that's affected by the current Orange County talent shortage, you may have to go the extra mile to hold onto your in-demand talent. Take a look at these ideas:

1. Reward Good Performance and Good Ideas

All too often, employees put all their effort and heart into their work, only to find that they don't get the credit for their contributions. If these employees have coveted skills that are in high demand, they may end up going somewhere they're better appreciated. Keep this brain drain from occurring by praising your employees in front of their peers and giving them full credit for the ideas that have benefited your company.

Monetary appreciation in the form of bonuses is of course always appreciated and your high-potential employees (who know what they're worth) may even be watching to see if you'll compensate them appropriately.

2. Talk Honestly With Your Talented Employees

Open and transparent communication is crucial if you want to retain your top talent. Keep an open door, and make sure they're always in the loop regarding changes in the company. That way, you're in a position to counteract rumors while helping key employees feel important. In addition, when your top performers feel that they're getting to weigh in on issues regarding corporate direction, they're more likely to feel a sense of loyalty and attachment to your organization.

Make sure you listen during these discussions as well. You may be surprised to learn that your expectations regarding employee advancement don't match up with those of your employees. You could even learn that someone important to your organization has one foot out the door already. Use what you learn in these discussions to make the changes you need to hang on to top talent.

If you're located in Orange County, you may already be noticing the shortage of top talent to fill IT, Accounting, Human Resources, Banking, Medical and Engineering/Design roles. Marquee Staffing has done the ground work to help you bring your staffing up to par. Contact Marquee for help with direct hire or contract staffing so that you're prepared to face the growing competition for top talent. To learn more please visit us at www.marqueestaffing.com

As the Sr. Vice President of Operations, Claudia Perez's responsibilities include managing the Orange County territory, overseeing all operations and driving success by providing excellent service to all customers, clients and colleagues. Claudia can be counted on to spearhead any project; she is a strong valued contributor to the overall success of the company and an excellent partner for your success planning.
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With a strong commitment to building long term relationships with his clients, Chris Kappes, Sr. Executive VP, shares a solid understanding of each of their unique staffing needs which has led to outstanding partnerships. Chris's strong acumen within the Engineering and Technical fields, brings full circle the outstanding level of support that Chris and his team provide.
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Avoid Common Employee Claims in Seven (Easy) Steps

Employee complaints are virtually inevitable, but the effort that an employer invests in prevention will pay dividends. Employers can avoid many of the common employee claims that we see filed in state and federal courts daily by taking preventative steps to treat their workforce correctly and in compliance with federal, state, and local law. Awareness of California's increasingly technical labor laws allows businesses to stay ahead of potential claims.

ONE: Provide Legally-Compliant Meal and Rest Breaks

It can't be overstated. Every employer with non-exempt employees should examine its meal and rest break policies and implement good timekeeping practices. Employers must provide non-exempt employees who work more than five hours in a workday with a minimum 30-minute unpaid, uninterrupted meal break, starting no later than the end of the fifth hour of work. Each day that an employer fails to provide an employee with a meal or rest break, the employee is due a premium equal to one additional hour of pay at the employee's regular rate. Failing to provide compliant meal and rest periods exposes a business to a potential class action and Private Attorneys General Act (PAGA) lawsuit. Keep good records of the employee's time worked, including the actual time the employee began and ended her meal period. Avoid making automatic deductions for meal times, which are generally problematic.

TWO: Classify Employees and Independent Contractors Correctly

Knowing when to classify a worker as an employee or independent contractor will go a long way in preventing potential claims. The California Supreme Court dealt a severe blow to businesses earlier this year, restricting the manner in which workers may be classified as independent contractors. Under the new analysis adopted by the Court, workers are presumed to be employees unless all of the following tests are met: (A) Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?; (B) Does the worker perform work that is outside the usual course of the hiring entity's business?; and (C) Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity? Businesses should conduct a review of their independent contractor arrangements to determine whether they meet the new ABC test. Potential liabilities for misclassification include liability for unpaid payroll taxes, unemployment benefits, disability insurance, workers' compensation claims, and wage and hour claims. Significant civil penalties may be imposed by state and federal agencies as well.

THREE: Understand the Difference Between Exempt and Non-Exempt Employees

Employees are not exempt from state or federal overtime laws unless one or more of the exemptions apply. Employers should become familiar with the Wage Order that regulates their business and review the job duties of each position to determine whether an overtime exemption applies. If an exemption does not apply, the employee must be treated as a non-exempt employee who is entitled to overtime pay.

FOUR: Remain Aware of Ever-Increasing Local City and County Ordinances

More and more local city and county governments are enacting ordinances that affect employees working within their boundaries,

including minimum wage and sick pay laws. If you have employees working in Northern California, and some Southern California cities including Los Angeles, Malibu, Pasadena, San Diego, and Santa Monica, you may need to revise your policies. Even when an employee works in a location with a local ordinance for a short time, those local rules may apply.

FIVE: Consider Implementing Arbitration Agreements

If your company employs non-exempt employees, consider implementing arbitration agreements with class action waivers. Having an enforceable arbitration agreement in place can mean the difference between an individual arbitration and a class action lawsuit. Although the company is responsible for paying the arbitrator's fees, if it is determined that the employee waived her right to participate in a class action, there is significantly less risk and ultimate cost to the employer and many employers have enjoyed tremendous protection by implementing arbitration agreements with class action waivers.

SIX: Double-Check Sick Leave Compliance

Although California's paid sick leave law has been in place for a few years, many employers are still struggling to catch up with their obligations. California law requires all employers to provide paid sick leave to employees in an amount that is the greater of three days or 24 hours each year, including part-time and temporary employees. Employers may elect to use an accrual method of at least one hour of paid sick leave for every 30 hours worked, or another approved method. Check local jurisdictions where your employees perform work as well, as paid sick leave laws under some local ordinances provide even greater employee benefits.

SEVEN: Don't Ignore Employee Issues

Employee problems often start small, but can escalate very quickly. When an employer learns of an employee complaint, address the issue quickly to diffuse the situation and investigate where necessary. Ignoring the problem generally doesn't make it go away, and employees who feel that their issue has been heard and addressed are less likely to seek legal assistance.

Take steps to protect your business from employee lawsuits. Set up policies and practices that comply with local, state and federal law and then implement those policies and practices correctly and vigilantly. Stay knowledgeable about changes to the law, and with a little luck, you'll be able to stay one step ahead of employee claims.



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, through preventative counseling and sound practical advice. Ms. McCarthy has counseled employers about the complicated employment laws that impact their businesses to ensure that they are in compliance, and to reduce the chance of costly litigation. Ms. McCarthy may be reached at (949) 608-6900 or cmccarthy@ferruzzo.com



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The Trump Administration's Crackdown on Legal Immigration Continues

by Mitch Wexler, Managing Partner and Jenna Robinson, Associate, Fragomen Worldwide

A series of Policy Memoranda sent shock waves throughout the business immigration world last week; the latest of the current Administration's move towards their "Buy American, Hire American" agenda.

The first of the memos is set to change the process of how U.S. Citizenship and Immigration Services (USCIS) can adjudicate cases. Under previous guidance, USCIS was restricted from denying a case without first allowing the applicant an opportunity to provide more evidence to prove the case. Starting September 11, 2018, USCIS adjudicators will now be provided wide discretion to deny an application from the get-go if they determine the submission lacks initial evidence to establish the requested benefit; thus, denying the applicant a chance to correct the flaw, provide clarity or provide additional supporting evidence.

This policy change comes just days after USCIS published additional guidance on the circumstances in which it can enforce the dreaded notice to appear (NTA) order before an immigration judge. The new memo, which is said to be intended to implement the Trump Administration's enforcement priorities within the immigration environment, lists numerous scenarios in which an NTA may be issued. Perhaps the most devastating for companies employing highly educated and skilled foreign nationals and foreign national applicants includes USCIS' ability to issue an NTA where, upon issuance of an unfavorable decision on an application, petition, or benefit request, the individual is no longer lawfully present in the United States, which brings with it a number of draconian implications. USCIS has already begun making it more and more difficult to have cases approved, and if a case is now arbitrarily denied, a foreign worker may immediately be placed in deportation proceedings, even

while lawfully challenging the denial.

Read together, it is apparent that the current Administration is attempting to convert USCIS into a quasi-enforcement entity, contrary to the agency's originally-intended mission to adjudicate applications for a variety of immigration benefits. Although the real impact from these changes is yet to be seen, U.S. employers and applicants will certainly need to revisit their immigration strategies moving forward.



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Missed Meal and Rest Breaks Can Cost Employers Millions

It is true, and not surprising, that California's laws (which are more protective of employees than federal laws) governing meal breaks and rest periods are complex and can be difficult to manage. Failure to comply can result in significant financial penalties for large and small companies. For example, in 2017 TJ Maxx paid \$8.5 million for failure to provide meal breaks and pay for time spent waiting for managers to close up shop after hours, and in 2015, Il Fornaio paid \$1.5 million to settle wage and hour allegations, including missed meal and rest breaks.

Who Is Entitled to Meal and Rest Breaks

With few exceptions, non-exempt employees are entitled to meal and rest breaks, depending on the number of hours they work in a shift. To complicate matters, it's not just about the employee taking an off-duty meal break, but when it must be taken. If taken even one minute after the start of the fifth hour, the employer must pay one hour of premium pay to the employee. It's important to note that the first hour of work occurs when the employee has worked between 0 and 60 minutes. So, an employee who starts at 8:00 a.m. must take a meal break no later than 12:59 p.m., regardless of circumstances, or the employer must pay the employee and additional hour of pay at the employee's regular rate. Each violation requires extra pay. This can trigger additional penalties for missed pay and inaccurate wage statements. As you can imagine, if you are not following the labor code, this can get very expensive, very quickly.

Employer Requirements

Employers must relieve their employees of all duties and relinquish control over how employees spend their meal and rest breaks. Employers must not interfere or discourage their employees from taking breaks. Managers and supervisors should not interrupt an employee's break with work-related questions or issues. If you

require your employees to stay "on call" during their meal or rest periods, you are more than likely violating the labor code. However, if an employee works six hours or less, the meal period can be waived by mutual consent. Under *very limited* situations and with mutual consent, in writing, an on-duty meal period may be permitted. If an employee insists on working through a break and your business has relinquished control over the employee, given them the opportunity to take an uninterrupted break, and not discouraged them from doing so, your business is satisfying its obligations.

For more information on meal and rest break requirements, including proper documentation, time keeping procedures, and recording keeping processes, we recommend contacting a labor attorney experienced in this area.

Lisa Pierson

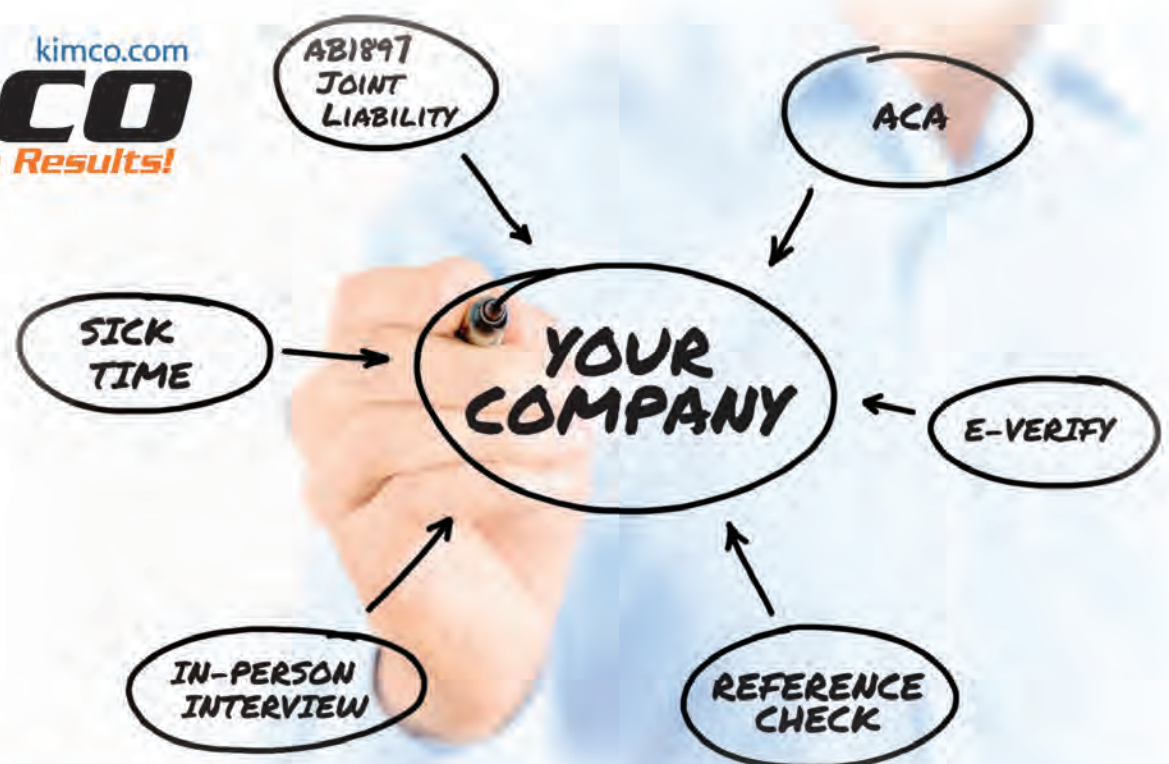
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