



HUMAN RESOURCES & EMPLOYMENT LAW

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Avoid the \$8 Million Jury Verdict: Employers Can Minimize Large Jury Verdicts by Preserving Evidence, Conducting Investigations and Making Timely Decisions

By Jonathan A. Siegel, Principal, Jackson Lewis P.C.

In California, a well know restaurant chain was recently subject to an \$8 million jury verdict for retaliation and wrongful termination largely based on a spoiled internal investigation. Since the start of the “Times Up” and “Me Too” movements, there has also been a bright spotlight focused on the sexual harassment and gender-based wage disparities.

Now more than ever, California employers must invest in the human resource function. Employers must properly train managers not just on the minimum legal obligations in the workplace, but also on the importance of timely reporting of workplace concerns, conducting investigations, and the preservation of possible evidence.

In the fast food giant case, the jury found the employer had fired the plaintiff in retaliation for her filing a worker’s compensation claim. It also found the employer falsely accused the plaintiff of stealing money to disguise the unlawful motive. At the core of the employer’s liability were missteps in its internal investigation regarding the plaintiff’s alleged stealing.

How can employers avoid missteps in their internal investigations? An employer should have a system to preserve evidence when claims arise. First, take appropriate steps to preserve evidence. The employer’s surveillance camera automatically taped over itself after 45 days and the footage of the plaintiff allegedly pocketing \$636 was lost. Evidence may be on cell phones, in emails, in forensic data from a computer, or, as in this case, on a surveillance video. Do not wait until litigation is filed and rely on your attorneys to gather all of the documentation after-the-fact. Management should be trained to preserve evidence when claims arise.

Second, timing is key. The timing of employment decisions can have major consequences. Here, the employer took too long to make its decision. Not only do companies have to act thoroughly, they must act timely in making decisions related to employee misconduct.

Finally, know when to ask for help. To avoid potentially costly blunders, any difficult employment investigation should be conducted and reviewed by experienced human resource professionals with direction from experienced California employment counsel.

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31 Flavors!

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Just like at the ice cream parlor, employee recognition comes in many flavors, from most to least desirable. There's recognition for good work (chocolate – yum!), not-so-good work (bubble gum – ugh!), and downright disasters (garlic – ick!). The not-so-good and the disasters tend to melt away on their own. But how can you recognize the good work beyond offering chocolate every time something positive happens?

To compete for high-performing employees, companies are crafting non-cash recognition programs, in effect, their own 31 flavors. But just any flavor won't do! A successful program must have rules and goals – identifying the achievements and behaviors that should be recognized, how and when rewards will be presented. The recognition program should also reach employees who get the job done every day, not just the high-profile performers.

With the rules and goals defined, get creative with your rewards menu and determine your favorite flavors:

- ▶ Temporarily rename a conference room after an employee or team.
- ▶ Create a brag board in the lunch room that lets employees post brags about others or themselves.
- ▶ Send a thank-you eCard to an employee; an unexpected "treat" at their morning login.
- ▶ Create an employee holiday, such as Accounting is Awesome Day.
- ▶ Go "Old School" and say "thanks" when you see something collaborative happening, skip the campy high fives through.

These are a few ideas to start building your own 31 flavors of recognition! Don't forget the most important part—recognition doesn't need six scoops or sprinkles, it just needs to happen. Your employees will appreciate acknowledgment of their efforts. Chocolate is good AND a cherry on top ... fantastic!

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Robert Frost wrote, "Good fences make good neighbors." At Ferruzzo we add: "Smart business partners build custom fences at the beginning of their business venture, and then tend and mend the fences throughout the relationship." Why? Ranchers do not manage their herds without fence perimeters circumscribing their grazing valley. Similarly, savvy business owners should seek counseling to guide the birth of their enterprise and thereafter. Despite the almost ubiquitous and endlessly available supply of "form agreements" and a seemingly, and unfortunately misguided view that counseling should await conflict, a custom business agreement provides structure, delineates responsibilities, and accounts for the "what ifs." The agreement should not be viewed merely as a "check-the-box" form to download, fill in, and forget. While not exhaustive, below are a few common issues that owners should consider in drafting such an agreement.

Who Owns the Widget?

One owner brings intellectual property, expensive equipment, or the "wonder widget." Did the owner contribute the intellectual property to the company or license the property? Is the company's use exclusive, or does it terminate when the contributor departs? Can the departing owner use the property to compete against the company? What happens when the contributor "wants to take her ball and go home?" Owners should consider including provisions that address the fate of non-cash investments or contributions into the business.

Just the Two of Us - For Now

For all business owners, the issue of equity dilution following additional capital infusion is critical to address. If the owners' interest percentages are a function of initial or additional capital contributions, what happens if the money runs out while operational expenses need funding? If an owner adds additional cash, does his equity increase relative to the other owners? Instead, should the business seek financing from one or more of the owners or from a third party, and at what terms? How does the equity dilution affect management decisions? Wise owners address funding shortfalls before they almost certainly occur.

Why Are You the Only One Getting Paid? Don't I Get a Vote?

"You make it, I sell it," is a good script, but in and of itself, is not a practical management structure. Does an investor owner have any say in the operations of the business or hold a veto power for major decisions? Does the operations owner receive a paycheck when the business is losing money? What is the owners' agreement regarding deferred compensation or accrual of other benefits? Owners should agree from the outset as to the rights and responsibilities of each owner.

Buy Me Out - You Can't Go On Without Me - Let's End It

Owners may exit an entity in a number of different ways with death, disability, retirement, voluntary withdrawal, and termination of employment being the most common. They may also agree to terminate the business altogether upon the occurrence of certain events. Some owners may be comfortable with a departing owner continuing to hold her equity interest after her departure, which is often the case with family-owned businesses where family members are willing to share distributions with "passive" owners. However, it is typical for the entity or the remaining owners to purchase (or have an option to purchase) the departing owner's equity interest. One resonant surprise in counseling owners is having one owner hear the other say for the first time, "I may want to leave at some point and do my own thing." Addressing the rights of each owner to exit the business, and the terms by which such exit will occur, mitigates potential adverse consequences in the event of a falling out.

How Much am I Worth to You?

While owners may agree on the, "I buy you out or you buy me out" concept, owners often disagree as to the value. A well-drafted agreement should spell out in detail either (i) the value of the equity interest, or (ii) a methodology to determine the value of the interest. Depending on the industry involved, it may be possible to value the entity (and thus the departing owner's equity interest in the entity) by applying an agreed multiple of gross revenue. For other entities, it may make more sense to utilize an outside appraisal process in which each owner may have input. Some owners feel that a discount on the value is warranted upon the occurrence of certain events (i.e., upon voluntary termination or good cause expulsion). Further, the valuation mechanism in the agreement could address the special role that an owner plays on behalf of the business, such as a rainmaker or a chief inventor. By addressing this valuation in advance, owners can avoid the most common (and most costly) dispute that arises on a departing owner's exit.

A Better Mouse Trap

Preventing a departing owner from competing against the business is only effective if the restriction is reasonably crafted in scope and application. Do not use boilerplate that will tarnish and crack the first time you try and enforce it. Consider provisions that identify and value customers or accounts so that misappropriation or solicitation claims are mitigated and costly litigation avoided.

Let's Agree to Disagree and How

Owners are going to disagree, so their agreement should provide a structure for resolving conflict. For some, mandatory mediation followed by arbitration makes sense. Others agree that a deadlock between the owners should trigger court relief, the right to a buy-out, or an outright third-party sale. A well-drafted conflict resolution provision will help the owners resolve conflicts without destroying the value of the business.

Seek Professional Help Now

However tempting it may be to select an off-the-shelf agreement, it is the engagement and interactive process of the owners working together with their trusted counselor to develop the agreement where owners gain the greatest benefit and learn most about each owner's values. This knowledge best positions long-term relational success. By discussing the issues identified above at the commencement of their business relationship, owners construct sturdy fences that provide certainty and predictability under otherwise tumultuous circumstances.



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Immigration Tips for Employers Under the Current Administration

By Mitch Wexler, Managing Partner and Blake Miller, Associate, Fragomen Worldwide

The administration's "Buy American, Hire American" policies has led to increased scrutiny and denial of some of the most common visa petitions companies file for their foreign-born workers. A report issued by the National Foundation for American Policy, which analyzed data released by United States Citizenship and Immigration Services (USCIS), found a 300 percent increase in "Requests for Evidence" between the third and fourth quarters of fiscal year 2017, as well as an increase in denials by 41 percent over the same period. Ultimately, this means the administration is making it more difficult for companies to hire foreign workers (although highly educated and skilled). Based on the current administration's policies and priorities towards US immigration, employers hiring foreign nationals should keep in mind the following:

- **More time/effort on immigration petitions:** the drastic increase in requests for additional evidence requires more detailed job descriptions and supporting evidence to give visa petitions their highest chance of success. Work closely with your immigration counsel to strategize the case from the outset and be prepared to provide more documentation than previous visa petitions.

- **Visa Extensions are not assured:** the repeal of a USCIS memo which granted deference to prior adjudicators' favorable decisions was repealed under the current administration. Every case is now closely scrutinized, even for beneficiary's who have been issued the visa many times before. Get extensions filed at the earliest time possible, most often six months in advance of the current visa petition's expiration.

- **Expect Site Visits:** USCIS conducts site visits to worksites where foreign workers are employed. Site visits are more and more common – ensure staff is prepared to meet with fraud investigation officers, including receptionists who should know where to direct the officer.

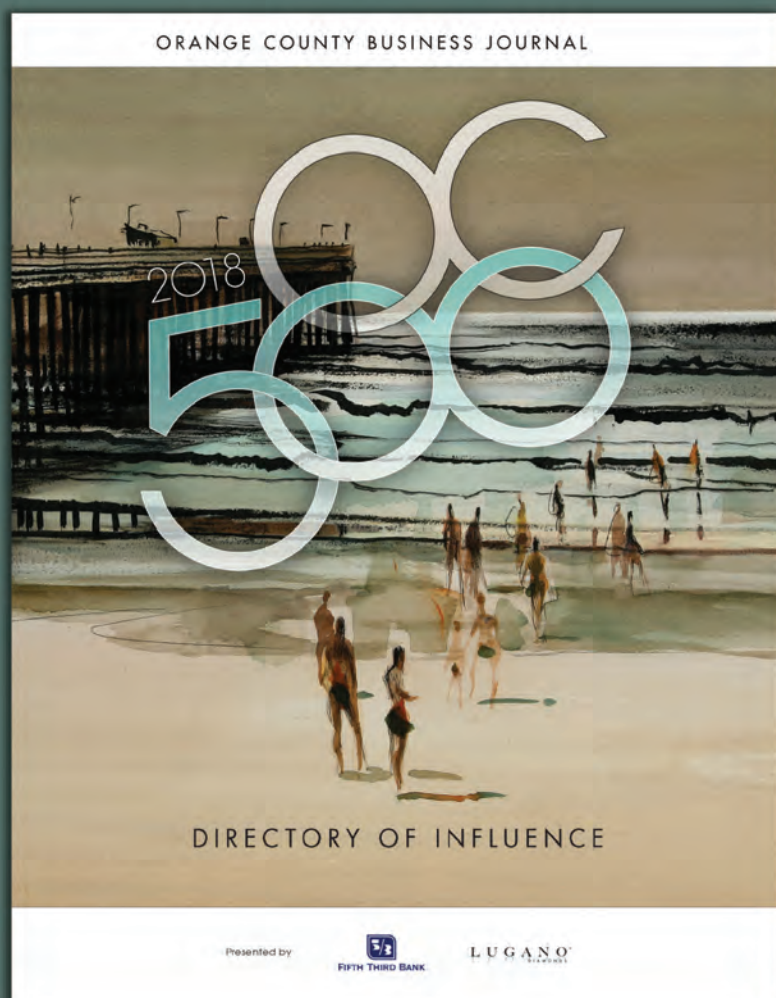
- **Get your I-9s in order:** Form I-9, used to record the US work authorization and identity of employees, is often incorrectly completed by staff. Repetitive errors across a company's I-9s can quickly lead to steep fines for employers. Conduct an audit of your I-9s with assistance from employment or immigration counsel to assess the quality of the I-9s, and whether any measures can be taken to ameliorate errors before an audit from Immigration and Customs Enforcement (ICE).



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