As the landscape for the Orange County job market continues to evolve, there are a number of unanswered questions and significant topics to address. The Orange County Business Journal has asked some of the community’s top experts in the field to share their insights, concerns and predictions for employers and businesses today.
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620 Newport Center Drive, Suite 200
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present one of these licenses. Employers have a stronger basis to refuse discrimination claims by people providing these licenses if they use E-Verify, because E-Verify provides an additional level of separation and scrutiny to determine whether the employee is authorized to work.

What criteria should you use when selecting an employment partner?

Bruce May, Stuart Kane: Whenever an employer engages a payroll service, temp agency or staffing company, the first critical issue is the scope of work. Exactly what services is the partner going to deliver? Is it just payroll administration, or does it also include the time-keeping system? The contract needs to spell that out in detail.

A second crucial issue is legal compliance. Personnel working through an agency are considered “joint employees” of the company and the partner, so the parties need to specify who will comply with specific legal obligations. This gets tricky when they have joint obligations. For example, if the employer does not accurately report overtime hours worked, the temp agency can still be on the hook, and if the temp agency fails to pay for reported overtime hours, the employer can still be liable. This leads to the issues of indemnification and insurance. Employers should push for language that maximizes the partner’s responsibility for non-compliance, and partners will do the same in reverse.

The overriding point is that the parties must discuss these and other subjects in advance, clearly allocate responsibility and liability, and memorialize who is responsible if things go wrong.

Lisa Pierson, Kimco Staffing Services: Ultimately, your employment partner should protect you and your business. You need to select an employment partner who is financially stable and understands the Orange County marketplace, your business and your culture; one with tenured and knowledgeable recruiters who can identify both the technical and intangible skills required to help make your company a success. You should look for a partner who conducts proper testing (if needed), personally interviews and E-Verifies all employees to ensure an effective and compliant workforce. It’s also important that they are proactive in addressing changing labor laws affecting insurance and wages, such as AB1897 (the new law states that private employers who use staffing companies are liable for a staffing company’s failure to pay all required wages or to secure workers’ compensation insurance) which went into effect Jan. 1, 2015, and AB 1522, the new sick-pay law which goes into effect July 1, 2015. They should provide you with independent audits to ensure compliance with these laws. You should also look for an employment partner who can provide you with insight through educational webinars and seminars, salary surveys, legal updates, case studies and like.

We often hear that California is an increasingly employee-friendly state. What advice would you give a new employer/business owner looking to set up operations and staffing in Orange County?

Lisa Pierson, Kimco Staffing Services: The term “employee-friendly” is often interpreted as “employer-unfriendly.” This does not have to be the case. With an understanding of labor rules and regulations, along with proper policies and procedures, Orange County employers can prosper. Having proper legal representation by an individual or firm who specializes in employment law is essential to craft the necessary documents that ensure both employee and employer are properly protected. Items such as professionally reviewed employment handbooks and thorough employee orientations make expectations clear for the employee while ensuring that the employer adheres to the necessary rigors of California’s various employment laws. In addition, trade organizations such as the National Human Resources Association (NHRA) and Professionals in Human Resources Association (PHR) provide regular updates with valuable information on the changing legal landscape.

We understand there are crucial issues before the NLRB regarding the use of company email to discuss ways to improve working conditions and the obligations of franchisees.

What should employers do to prepare for, or comply with, these issues?

Bruce May, Stuart Kane: In the Purple Communications case, a divided NLRB struck down a rule forbidding employees from using the company email system for non-business purposes because it infringed their right to communicate about work-related issues during non-working time.

The Board said an employer can justify a blanket ban on off-duty email use only by demonstrating that “special circumstances” make the ban necessary to maintain production or discipline. The opinion also states that this would be a “rare case” and implies that employers can still monitor and access all email use if they do not target union activities. The decision does not address email access by nonemployees such as union organizers.

In addition, the NLRB General Counsel filed complaints against McDonald’s, alleging it was jointly liable with franchisees for alleged discriminatory and unlawful practices against franchisees’ employees, including statements and policies that could be found to be wage and hour violations by franchisees.

It remains to be seen whether the Courts agree with these far-reaching decisions by the NLRB, but policy reviews are warranted.

continued on page B-42

With an understanding of labor rules and regulations, along with proper policies and procedures, Orange County employers can prosper.

Lisa Pierson, President
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California employers having 50 or more employees must provide their supervisors with at least two hours of classroom or other “effective interactive training and education” regarding sexual harassment.

Robyn Frick, Newmeyer & Dillion: Under the Federal law, i.e., the Fair Labor Standards Act (“FLSA”), inside salespersons qualify for an overtime (but not minimum wage) exemption when (a) the employee’s regular rate of pay is greater than one and one-half times the federal minimum wage, (b) more than half of the employee’s compensation for a representative period derives from commissions on sales, and (c) the employee qualifies as a “retail or service establishment.” (29 U.S.C. §207(i)). Although the FLSA does not specifically define “retail or service establishment,” the Department of Labor has promulgated extensive regulations on the subject. (See 29 CFR §§ 779.300 – 779.388). In general, the business must sell goods or services that are not for resale and the business must fit within traditional notions of a retail concept, e.g., selling goods to the general public, serving the everyday needs of the community and standing at the end of the stream of distribution.

California’s inside sales exemption applies to employees engaged in inside sales whose earnings exceed one and one-half times the state minimum wage (currently $9.00 x 1.5 = $13.50 per hour), and who receive more than half of their compensation through commissions. (Wage Order 4-2001, §3(D), 8 Cal. Code Regs §11040(3)(D); Wage Order 7-2001, §3(D), 8 Cal. Code Regs §10703(3)(D)). Although California law does not impose the “retail sales or service establishment” requirement, California’s inside sales exemption is only available to employees regulated under occupational Wage Order 4 (Professional, Technical, Clerical, Mechanical and Similar Occupations) or industry Wage Order 7 (Mercantile Industry). The inside sales exemption is not available to California employers whose businesses fall under another Wage Order.

Bruce May, Stuart Kane: This is a real trap for the unwary employer. California law recognizes a partial exemption from overtime pay (but not record-keeping) for inside salespersons who (1) make at least twice the State minimum wage for every hour worked and (2) earn more than half their monthly income in commissions.

The first element can be satisfied by paying either an hourly wage of at least $18 per hour ($20 as of Jan. 1, 2016) or by paying a base amount that equals or exceeds that rate for all hours worked. The employer must keep track of daily hours worked.

The second element is tricky because new salespersons typically need time to ramp up before their commissions will exceed their base pay. But the real trap is that the federal Fair Labor Standards Act allows this exemption only at “retail or service establishments,” like a department store or auto dealership selling goods to the end user. If you are selling business to business, you must pay overtime to inside salespersons. You can still pay them commissions as well, but those commissions then must be incorporated into the overtime rate.

Robyn Frick, Newmeyer & Dillon: Is your employment partner committed to a robust Safety and Risk Management Program?

Lisa Pierson, Kimco Staffing Services: Your employment partner should team with your senior management and safety manager to create a customized safety program with detailed action plans designed to reduce the number of injuries and costs associated with those injuries. Your staffing company should employ full-time and part-time, field-based safety managers and coordinators to provide you with safety and hazard risk analysis of your facilities. This is accomplished via random and pre-scheduled safety walkthroughs, safety committee meetings, safety incentive programs, equipment certification, accident investigation and root cause analysis, trend analysis and detailed written reports. A professional, proactive approach to safety results in decreased accidents and increased cost savings.

Bruce May, Stuart Kane: The new sick pay law effective July 1 is the biggest development of 2015. It applies to virtually every employer, and to any employee who works full- or part-time for 30 calendar days. The law has a unique structure: Employers can either allow paid sick leave to accumulate over time at the rate of 1 hour per 30 hours worked (which equates to 8.67 days per year) or the employer can credit each employee with three paid sick days up front. In all cases, the employer can require the employee to have worked at least 90 days before using any sick leave, and can limit the use of paid sick to three days per year.

Employers must include the amount of sick leave in available to each employee on their pay stub or other written notice, and display a poster in the workplace. The Labor Commissioner is responsible for enforcing the new law, and new penalties apply. Every employer should review their sick pay policy right now, even if they currently offer three or more sick days each year. Special rules for unused vacation, and concerns about social media, employee classification and technology, will continue to present important issues.