EMPLOYMENT
Resources & Solutions
Effective July 1, 2015, California employers must provide paid sick leave to any employee who works at least 30 days in the state. Companies that already offer paid sick leave or paid time off ("PTO") should carefully audit existing policies against the requirement of the Healthy Workplaces, Healthy Families Act of 2014 (the "Act").

Accrual and Caps on Paid Sick Time
It is important to note that the Act applies to all employers, regardless of size and allows all employees (even part-time workers) to accrue paid sick leave. Non-exempt, hourly employees will accrue paid sick time at a rate of not less than one hour per every 30 hours worked. Employees who are exempt from overtime requirements will be deemed to work 40 hours per workweek for accrual calculation purposes (unless the employee's normal workweek is fewer than 40 hours). Employees covered under qualifying collective bargaining agreements and employees in very limited industry segments are excluded from the Act.

Employers may limit an employee's use of paid sick days to 24 hours or three days in each year of employment. While accrued but unused sick days can carry over to the next year, an employer may cap total accrual at six days (48 hours), provided that an employee's rights to use and accrue sick leave are not otherwise limited.

On What Occasions May Paid Sick Time Be Used?
Employees may take paid sick time in connection with the diagnosis, care and treatment of an existing health condition, or preventive care, of an employee or an employee's family member. The Act expansively defines family members, and includes the employee's spouse, domestic partner, children (even adult children), siblings, parents, grandparents and grandchildren. Victims of domestic violence, stalking, and sexual assault may also take paid sick leave for the purposes described in California Labor Code Sections 230 and 230.1.

The Act does not provide an option for the employer to request documentation substantiating the need for such paid sick days. Similarly, an employee must provide notice of the need for paid sick leave, where the need is foreseeable. However, if the need is unforeseeable, notice need only be provided as soon as practicable.

What if my Company Already Offers Paid Sick Leave or Paid Time Off ("PTO")?
An employer is not required to provide additional paid sick days if: (a) the employer already has a paid leave or PTO policy, (b) the employer makes available an amount of leave that may be used for the same purposes and under the same conditions as specified in this section, and (c) the policy does either of the following:

- Satisfies the accrual, carry over, and use requirements of the Act; or
- Provides no less than 24 hours or three days of paid sick leave, or equivalent paid leave or paid time off, for employee use for each year of employment or calendar year or 12-month basis.

It is important to note that even where an existing PTO or sick leave plan meets the accrual minimums imposed by the Act, it may not satisfy the Act if it is too restrictive in the carry-over provisions, or the employee's freedom to use paid sick leave is more limited than his or her options under the Act.

Existing policies should be reviewed for some common provisions and practices that may run afoul of the Act. For example:

- Does the existing policy require a doctor’s note for illness-related absences? The Act is silent on whether an employer can require a note. Workplace policies often require that an employee provide a doctor’s note for absences of three or more days. Under the Act, if the employee uses three or more days of paid sick leave, it is debatable whether the employer can require a note.
- Does the existing policy penalize employees if they fail to call in sick within a certain window of time before the scheduled start of their shift? The Act obligates employers to provide reasonable advance notification of their need to use paid sick time. However, if the need is unforeseeable, the employer cannot punish the employee for not providing notice before the start of the employee’s shift.

Are part time employees excluded from the existing paid sick leave or PTO plan? All employees, regardless of whether they are full-time, part-time, temporary or seasonal, may accrue paid sick leave.

- Under the existing policy, must paid sick time be used in full-day or half-day increments? Under the Act, the employer can set a minimum increment of two hours of paid sick time usage. Beyond adhering to any minimum increment requirements, employees are otherwise entitled to determine how much sick leave he or she needs to use.

Unused sick time does not have to be paid out to the employee upon termination. Employers should remember, however, that if they use a PTO plan to satisfy their requirements under the Act, all accrued and unused PTO must be paid to the employee upon termination.

Notice, Posting and Recordkeeping Requirements
In connection with wage payments, either as part of the itemized wage statement or in a separate writing, the employer must provide written notice to each employee of the amount of paid sick leave or PTO available to the employee.

In addition, the Act requires a new workplace poster providing specific details and disclaimers about paid sick time. The Labor Commissioner’s Office has created a posting that is to be displayed in the workplace. The Act also prompted an update to the information contained in the California Wage Theft Protection Act’s Notice to Employees. The Labor Commissioner’s Office recently issued an updated Notice to Employee that complies with the revised requirements of Labor Code section 2810.5. The Labor Commissioner’s Workplace Poster and the Notice to Employee can be found online at http://www.dir.ca.gov/dise.

The Labor Commissioner’s workplace poster advises employees that retaliation or discrimination against an employee who requests paid sick days or uses paid sick days is prohibited. It also reminds employees that they may file a complaint with the Labor Commissioner against an employer who retaliates or discriminates against the employee. Employers should be mindful of the Act’s express anti-retaliation provisions, and should train managers about their employees’ right to use paid sick leave.

Finally, employers are required by the Act to maintain for at least three years records documenting the hours worked and paid sick days accrued and used by an employee.

Penalties and Recommendations
The Act contains a series of penalties for non-compliance. Thus, a careful review of the Act’s requirements and your company’s existing policies is critical. All California employers should review and update existing policies, and where necessary, implement a compliant paid sick leave policy.

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Tis the season to be jolly. Employer-sponsored holiday parties are meant to be fun morale boosters for a company. However, Santa Claus can quickly turn into the Grinch if certain precautions aren’t taken when a company throws a holiday party. Holiday parties should be unforgettable because of the festivities and fun, not because of the legal consequences that follow.

Holiday parties are at the root of many employment lawsuits. As one court stated in Place v. Abbott Laboratories (7th Cir. 2000) 215 F.3d 803, “At the risk of playing the Grinch—we note that office Christmas parties also seem to be fertile ground for unwanted sexual overtures that lead to Title VII complaints.” Employer-sponsored holiday parties can lead to claims beyond just sexual harassment—they can lead to claims of religious harassment or discrimination, respondent superior or vicarious liability, wage and hour violations, and for workers’ compensation benefits. These claims come from a variety of typical holiday party scenarios. For example, an employee gets in an accident driving home from the holiday party after drinking, a manager or a co-worker touches another employee inappropriately or makes lewd comments, or an employee feels left out or forced to participate.

The case of Harris v. Trojan Fireworks Co. (1981) 120 Cal.App.3d 157 told a tragic holiday party story. The employer held a holiday party at its manufacturing plant during business hours where large quantities of alcohol were served. Following the party, an employee drove home intoxicated and was involved in an auto accident, killing one and injuring two others. The victims sued not just the driver, but also the employer under a “respondent superior” theory. The court found that the drinking occurred in the course of the employee’s employment; therefore the employer could be financially responsible for the injuries caused by the employee’s accident.

The same result was reached more recently in Purton v. Marriott International, Inc. (2013) 218 Cal.App.4th 499. There, an employee started drinking at home prior to coming to the company’s holiday party. Bartenders (company employees) at the party were supposed to serve only beer and wine, but later in the evening they also began serving liquor. Bartenders also apparently failed to enforce the two drink limit set by the company. During the party the employee at issue consumed liquor provided by the company and also drank from a flask he brought from home. The employee got home safely but then got in the car and drove to another employee’s home. It was during this trip that he struck another vehicle, killing the driver. Again, the court found that the drinking occurred during the course of the employee’s employment, and the case proceeded against the employer.

The facts behind Brennan v. Townsend & O’Leary Enterprises, Inc. (2011) 199 Cal.App.4th 1336 are not tragic, but still lead to serious financial consequences for the employer. In that case, a female employee sued her employer alleging sexual harassment arising in part out of incidents at two separate employer-sponsored Christmas parties. At one Christmas party, a supervisor dressed as Santa Claus asked three female employees to sit on his lap while asking them personal questions about their love lives. Then, at another Christmas party, the chief executive officer wore a red and white Santa hat with derogatory language written across the brow. An Orange County jury returned a quarter-million dollar verdict for the employee based on these and other allegations. While the verdict was later overturned because the conduct was not sufficiently severe or pervasive to constitute sexual harassment, the employer likely spent hundreds of thousands of dollars defending the lawsuit.

Consider the following holiday party best practices when trying to protect your company and your employees from a big holiday bah humbug:

1. Avoid using religious terms when describing office celebrations. Rather than referring to a party as a “Christmas party,” it should be referred to as a “holiday party” or “annual celebration.”
2. Make clear that employee attendance at the holiday party is voluntary and that employees are not required to attend.
3. Schedule the party outside of work hours and off work premises to make it clear that the party is not in the “course of employment.”
4. Invite spouses, significant others and families. Inviting employees’ families can change the atmosphere of a company party and discourage inappropriate behavior. A spouse’s watchful eye is more powerful than a printed anti-harassment policy! Including families can also bolster the argument that the event was not attended “on the clock” or in the “course of employment.”
5. The time and place of the party will go a long way toward setting the tone, and choosing wisely can help eliminate problematic behaviors. A daytime event may be less likely to result in excessive drinking, or otherwise result in employees behaving inappropriately. Additionally, an event on a weekday, when employees know they have to work the next day, is likely to be tamer than one on a weekend. As far as location goes, if alcohol is being served at the party, the employer is better off hosting an event offsite.

6. Don’t let anyone sit on Santa’s lap and don’t decorate with mistletoe. Holiday parties can present situations for unwanted sexual overtures that could also lead to complaints of sexual harassment. Employers have a legal duty to prevent harassment at holiday parties, just like they have a legal duty to prevent harassment in the office. Therefore, publish or re-publish your sexual harassment policy before holiday parties take place. Remind employees that holiday festivities do not offer an excuse for violating a sexual harassment policy. If you do not have a written policy, implement one. In addition, give the instant access to social media sites such as Twitter, Instagram, and Facebook, employers should be aware of, and take immediate action to prevent, any “techno harassment” at holiday parties and in the office.

7. Beware of alcohol! It is the root of most evil at holiday parties. If alcohol is served, keep consumption in check. Limiting access to alcohol by placing restrictions on the type served (only beer and wine), the time available (close the bar well before the party ends) or the number of drinks served (use drink tickets) may reduce the possibility that employees will drink to excess. But as the Marriott case described above shows, these restrictions must actually be enforced. Providing food is important, as it typically slows the absorption of alcohol into the bloodstream. Providing plenty of non-alcoholic beverages is also a wise choice.

8. Hire professional bartenders and require IDs from guests who do not appear to be 21 years of age or older. Ask the bartenders to keep their eyes open for obviously intoxicated employees.

9. Arrange designated drivers or cabs to ensure that all persons have a safe way to get home. Consider offering incentives to employees who offer to be designated drivers and reimbursing employees who wisely take a cab home.

10. Most importantly, if there is a problem, deal with it promptly! Every act of harassment—whether by a co-worker, client or supervisor—should be taken seriously. Prompt action designed to stop any further harassment not only demonstrates that the employer does not condone such behavior, but may prevent certain behavior from being imputed to the employer. Also, a record of consistent and effective response to incidents is important because the employer’s entire record of dealing with such matters is considered when evaluating liability.

Conclusion
When getting ready for the holidays, do not forget the potential for liability, as compliance with the law takes no holiday. Have a safe and enjoyable holiday season. We have made the list to help you achieve that goal—now it’s up to you to check it twice!

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businesses that use workers supplied by other companies (such as staffing agencies) are now directly responsible for paying wages and providing valid workers’ compensation insurance to those workers. On September 28, 2014, Governor Jerry Brown signed A.B. 1897 into law, which adds Section 2810.3 to the California Labor Code effective January 1, 2015. This new statute creates a direct avenue of liability for California employers to pursue what will inevitably be the “deep pocket” company to which they are assigned. Prior to this law’s enactment, a worker was required to prove that a joint employment relationship was formed, which involves a fact-intensive legal test. As of January 1st, there is no need for an employee to meet that burden; Section 2810.3 makes the “client employer” automatically liable for civil liability for all violations committed by its “labor contractor.” California businesses should pay close attention to the statute’s definitions and exceptions to determine when they may be liable under this statute.

**Statutory Purpose**

Section 2810.3 arose from the Legislature’s perception of a trend away from traditional employment and towards business models that use subcontracted or contingent workers. These “non-traditional” relationships take on many forms, and include the use of staffing agencies, “seasonal” workers, “contract” employees, and other structures whereby the main company—the company that is producing the widgets, for example—utilizes a workforce comprised in whole or in part of employees obtained from another entity. Section 2810.3 is intended to encourage the use of reputable suppliers of labor by making the company that benefits from the borrowed employees liable for wage-and-hour and workers’ compensation compliance.

**Key Terms**

Section 2810.3 provides that “[a] client employer shall share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that contractor” for wage-and-hour and workers’ compensation violations. The key terms from this quoted language illustrate the breadth of the new law.

A “client employer” is defined as any business entity that “obtains or is provided workers to perform labor within its usual course of business from a labor contractor.” All employers in all industries are subject to the law, except for (1) employers with fewer than 25 total workers, including those supplied by a labor contractor; (2) employers with fewer than five workers supplied by a labor contractor; and (3) the state and any political subdivision thereof. A company’s “usual course of business” is defined circularly as the “regular or customary work of a business” on the client employer’s premises or worksite.

A “labor contractor” is defined as an individual or entity who supplies workers to perform labor within the client employer’s usual course of business from a labor contractor. Specifically excluded from this definition are (1) bona fide nonprofits; (2) bona fide labor organizations, apprenticeship programs, or hiring halls; and (3) motion picture payroll services companies. The new law also does not apply to individuals who satisfy the burden of proof that they are an employee of the client employer. Section 2810.3 specifically exempts the following from liability under the statute:

- Labor and services provided to home-based businesses at the home;
- The bona-fide use of independent contractors other than labor contractors;
- Cable operators, home satellite service providers, and telephone companies that use another company’s workers to build, install, maintain, or perform repair work;
- Motor clubs that use a third-party contractor; and
- Various exclusions for motor carriers.

**Scope of Liability and Notification Requirement**

Section 2810.3 imposes strict liability on a client employer in two situations: (1) wage violations; and (2) the failure to secure workers’ compensation coverage. Unlike previous drafts, the final bill does not impose joint liability in two other areas, which would have greatly expanded its already considerable scope: (1) failure to report and pay all required employer contributions, worker contributions, and personal income tax withholdings; and (2) the obligation to provide a safe work environment.

Before workers may pursue a civil action pursuant to Section 2810.3, they must first provide notification of the impending lawsuit at least 30 days before filing the action. The statute prohibits retaliation against workers who provide notification of violations, or who file a claim or civil action.

**Implications of A.B. 1897**

Section 2810.3 represents the latest in California’s expansion of employee protection. The new law provides a direct avenue to recover unpaid wages and penalties, so that employees can recover even if the staffing agency or other “labor contractor” which directly employed them is unable to pay a judgment. The legislative history of the bill explains that Section 2810.3 is designed to “incentivize the use of responsible [labor] contractors, rather than a race to the bottom” (i.e., the use of the cheapest labor available). Unfortunately for California businesses, even responsible labor contractors can make mistakes—especially in the “gotcha” realm of wage-and-hour laws—which can spawn costly lawsuits.

The statute also poses difficulties with its less-than-lucid definition of “usual course of business.” Section 2810.3 arguably does not apply to the use of workers from a labor contractor if those workers perform work that is ancillary to the business. However, it is unclear how far from the “usual course of business” a task must be in order for Section 2810.3 to not apply. For example, if the main business purpose of a manufacturer is the creation and sale of products, would Section 2810.3 make the business liable for its customer service call center employees whom it obtained from a labor contractor? These and similar questions will likely be answered in the coming years through litigation.

California companies that use staffing agencies or which are otherwise “client employers” must carefully weigh the amount of oversight they want to engage in when using workers provided by staffing agencies. Determining whether the labor contractor has valid workers’ compensation insurance should be fairly straightforward. Attempting to oversee the labor contractor’s wage-and-hour compliance practices is trickier. On one hand, client employers now share joint liability for payment of wages, and so may wish to ensure that the labor contractor has good practices in place. On the other hand, too much oversight could expose a company to arguments that it has a joint employment relationship with the labor contractor, which could give rise to liability for other employment claims.

Perhaps the best way to avoid this “heads I win, tails you lose” territory is for client employers to contract for contribution and indemnity from the labor contractor. Although a waiver of the protections provided by Section 2810.3 is void and unenforceable, the statute provides that a client employer may enter into a contract that creates a remedy for liability created by the labor contractor (and vice-versa). Thus, careful contract drafting at an early stage of the relationship can provide some peace of mind for a client employer.

Although the unanswered questions abound, one thing is clear: Section 2810.3 has raised the stakes of using “alternative” employment arrangements. Companies using workers supplied by other companies should be wary of the risks that such arrangements may pose, and should carefully consider strategies to mitigate these new risks.

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from the ubiquitous wage-and-hour class actions to expansions in the California Employment and Housing Act’s protections of paid sick leave benefits for employees. California employers have been beset by a multitude of problems in recent years. To avoid these problems, some California employers have turned from employing workers to using employees from temporary agencies or professional employer organizations (“labor contractors”). Properly utilized, this strategy can shift potential liability from the employer to the labor contractor. New California law making these entities jointly responsible for violations of certain laws, however, will blur the distinction between employers and labor contractors.

I. ASSEMBLY BILL 1897

Prior to 2015, employers effectively could limit employment law responsibility for temporary workers by avoiding having joint employer status for employees supplied by labor contractors (i.e., by avoiding having any say over their compensation and avoiding direct supervision of them). That will change for certain types of temporary workers.

Governor Jerry Brown signed into law Assembly Bill 1897, creating new Labor Code Section 2810.3. Effective January 1, 2015, the new law makes employers and labor contractors jointly responsible for compliance with certain employment laws as to temporary workers. Liability for wage-and-hour compliance and workers’ compensation benefits will be shared between employers and labor contractors for any non-exempt temporary workers who perform work in the usual course of the employer’s business (i.e., those who provide the regular and customary services performed for the employer and on the employer’s premises or work site) — regardless of whether the employer and the labor contractor might otherwise be regarded as joint employers of the workers.

II. LIMITING LIABILITY

There are three things employers can do to limit liability for temporary workers, under the new law and generally.

- Employers should continue to avoid joint employer status where they can. There should be no joint supervision of workers, and the employers should have no say in how temporary workers are compensated.
- Employers need to know the policies the labor contractor has for its workers in terms of meal-and-rest periods, overtime, and recording of time worked. They also need to know the labor contractor’s worker’s compensation insurance information.
- An effective written agreement with the labor contractor establishing liability and indemnification, where appropriate, is critically important.

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Out With the Old, In With the Newbie: Working With Younger Bosses in 2015

You may not “get” your new boss, but you’ll have to get used to their love of text messaging, and get over that their college graduation year is same as one of your kids! More than a third of U.S. workers already report to someone younger, and by 2015, millennials will outnumber baby boomers in the workforce. And while most of these May-December relationships get along, they can struggle with misconceptions that young bosses lack experience, and that mature staffers prefer typewriters to tablets.

So how can you jive with a boss who was born during your corporate career?

- **Become tech savvy.** Find out what “the cloud” is and how to use it. Know your way around social media sites. Embrace instant messaging and text messaging, because your boss will contact you this way. A demonstrated willingness to learn is always a welcome trait.
- **Find your boss’s strengths.** Older or younger, birthdates don’t determine employment value. Senior management saw something in your new boss – exceptional leadership qualities, brave new ideas – so trust that decision, and do your best to see the strengths they saw.
- **Be yourself.** Squeezing into skinny jeans or posting selfies of you and coworkers won’t help you relate to your younger boss. You’ll find plenty of common ground through mutual interests, sense of humor or shared goals. So instead of impressing with a hip, new style, impress with your attitude and performance!
- A younger boss can open your mind to new ideas in 2015, and you may find you’re professionally better for it! Just don’t say, “When I was your age...” unless you want to be reminded of other things your boss thinks happened back then, like the invention of fire.

Kathi Guiney

Kathi Guiney, SPHR, GPHR President YES!HRSolution, and Jocelyn Schamber, President, Fuzzy Red Pen

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Tax return preparation – Periodic and annual tax return filings, as well as payroll and sales tax returns, are technical and detailed tasks. It is a tremendous asset to have these done by personnel who perform these functions on a regular basis and are specifically trained and kept up-to-date on changes in tax law.

Outsourcing Accounting & Bookkeeping

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