Private industry employers spent an average of $31.39 per hour worked for employee compensation in June 2015, the U.S. Bureau of Labor Statistics reported recently. Wages and salaries averaged $21.82 per hour worked and accounted for 69.5 percent of these costs, while benefits averaged $9.56 and accounted for the remaining 30.5 percent. Total compensation costs for state and local government workers averaged $44.22 per hour worked in June 2015. Total compensation costs for civilian workers, which include private industry and state and local government workers, averaged $33.19 per hour worked in June 2015.

Employer Costs for Employee Compensation (ECEC), a product of the National Compensation Survey, measures employer costs for wages, salaries, and employee benefits for nonfarm private and state and local government workers. Current employment weights are used to calculate ECEC cost levels, whereas fixed employment weights are used in the Employment Cost Index (ECI).

Retirement and savings costs in private industry In June 2015, average costs in private industry for retirement and savings benefits were $1.24 per hour worked, or 4.0 percent of total compensation. The average cost per hour worked for defined benefit plans—retirement plans that specify a benefit typically based on age, years of service, and earnings—was 55 cents or 1.8 percent of total compensation. The average cost for defined contribution plans—retirement plans usually based on employer contributions to individual employee accounts—was 69 cents or 2.2 percent of total compensation.

Employer costs for retirement and savings plans are affected by several factors, including the percentage of employees that participate in the plans offered by their employer. Retirement and savings costs vary widely by major occupational group. Costs for management, professional, and related workers were $2.56 per hour worked (4.6 percent of total compensation), compared to $1.94 for natural resources, construction, and maintenance workers (3.7 percent) and 24 cents for service workers (1.6 percent).

Retirement and savings costs were higher in amount and as a proportion of total compensation for union workers ($2.91 and 6.3 percent) than for nonunion workers ($2.04 and 3.5 percent) and all major industry groups ranging from $2.75 in the information industry to 21 cents in leisure and hospitality. Retirement and savings costs increased both in cost per hour worked and proportion of total compensation with establishment employment size. Establishments with fewer than 100 workers averaged $2.72 per hour worked (4.7 percent of total compensation), significantly less than establishments with 500 workers or more, averaging $2.78 (6.0 percent).

Benefit costs in private industry Private industry employer costs for paid leave averaged $2.15 per hour worked or 6.9 percent of total compensation, supplemental pay averaged $1.10 or 3.5 percent, insurance benefits averaged $2.57 or 8.2 percent, and legally required benefits averaged $2.50 per hour worked or 8.0 percent.

Employer Costs for Employee Compensation (ECEC) data on total compensation, wages and salaries, and benefits in private industry are produced annually for 15 metropolitan areas.
How to Select the ‘Right’ People for the Job

How do you select the right person for your business? There is no perfect answer, but the interview process can be a tremendous help if you use it effectively. In other words, you may encounter a few interactive dialogue and reasonable accommodation can be handled in a way that is not a defense to claims of discrimination, harassment and retaliation; and just about every claim has one or more of those elements. You need to provide legitimate business reasons to the employee and in your file before the termination. I still hear employers say that their last lawyer told them not to say much and not to put anything on paper. This is incorrect advice.

These are just a few ways employers can stay ahead of the multiple traps that await them when a disgruntled ex-employee seeks legal advice for perceived wrongs. A little preventative litigation can go a long way to thwart costly lawsuits and, even worse, devastating class actions.

Jonathan Fraser Light is with LightGallagher, which specializes in representing employers in all aspects of employment consulting and employment litigation.

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LABOR AND EMPLOYMENT

Five Quick Tips for Assessing Your Employment Law Risk

Employers often find it daunting to keep up with the myriad of employment laws that sometimes don’t know where to begin in assessing risk. Here are five quick tips:

1. Review your pay stubs. Labor Code section 226(a) lists nine items you must have on your pay stub, along with the state and federal income tax withheld. New legislation is being proposed to give employers one free pass for some violations, but that isn’t signed into law yet and won’t cover all violations.

2. Review the status of your lower-level salaried employees. Exempt and nonexempt employee categories are difficult to decipher and often seem confusing based on the employee’s job description. Simplify the task by setting aside all high-level salaried people and all hourly people.

Focus on that narrow band of salaried exempt employees who may appear not to qualify for an exemption. Make sure they spend more than 50% of their time doing higher lever tasks. Have them agree to a job description in writing that qualifies percentages spent on higher level work responsibilities. This will insulate you later if they claim they were actually non-exempt and entitled to lots of overtime and missed break penalties.

3. Review meal break rules. This topic continues to bite even sophisticated employers who think they’ve got this one dialed in. Do your lower level supervisors or leadpersons, who are often the weak link, know the rules and stick to them? Are employees starting (but not completing) meal breaks by the end of the 30th hour of work? Does work start at 7 a.m., are they eating by noon? Check time sheets to see if they are recorded at the proper times. Are employees working more than 10 hours in a day offered a second meal? Almost none will ever take one, but you need to show evidence in your handbook and in your actual practice that they know about the option. If you’re running multiple shifts, is the night shift taking their meals on the same type of schedule as the day shift? I’ve seen companies get into trouble because the graveyard crew was taking its meal breaks differently than what was prescribed by company rules.

4. Check your “leave of absence” protocols. Many HR people really know how to handle leaves of absence? Do they know when the Family and Medical Leave Act (FMLA) overlaps with workers’ comp? Or how to mesh the alphabet soup that is FMLA, CFRA, SDI, PDL, and PFL when they have a pregnant employee?

Do your HR people really know how to handle leaves of absence? Do they know when the Family and Medical Leave Act (FMLA) overlaps with workers’ comp? Or how to mesh the alphabet soup that is FMLA, CFRA, SDI, PDL, and PFL when they have a pregnant employee?

5. Review your termination process. Most critically, is there documentation of the termination reasons? Even new employees need to have documentation as to why they are being let go. At-will is not fail safe. Even for new employees, at-will is not a defense to claims of discrimination, harassment and retaliation; and just about every claim has one or more of those elements. You need to provide legitimate business reasons to the employee and in your file before the termination. I still hear employers say that their last lawyer told them not to say much and not to put anything on paper. This is incorrect advice.

In order, the key steps to finding the right person for a position include:

• Determining your need to hire a new employee. Are you properly utilizing the skills and talents of your current employees? Do you know what needs to be done? Can your business growth support a new employee?

• Conducting a thorough job analysis. What are the job’s essential functions and key performance criteria?

• Determining the job qualification and job specification for the position based on the job analysis.

• Comparing the salary for the position, based on internal and external equity. Is the salary comparable and proportional with the salaries and responsibilities of other positions inside your company as well as similar positions out in the marketplace?

• Deciding where and how to find qualified applicants. What are the recruitment techniques to be used and what is the time frame for conducting your search? Remember, advertising is not the only, or necessarily the best, way to recruit. Sometimes, the best way to recruit is to let your current employees know you are looking for a new hire.

• Collecting and reviewing a fair amount of applications and resumes and then selecting the most qualified candidates for further consideration.

• Interviewing the most qualified candidates for the position, based on the job’s description and specification.

• Checking references.

• Hiring the best person for the job.

Hopefully, after reviewing all of the resumes, you will be able to pick and choose a select number of qualified applicants to be interviewed. (If not, you may want to expand your time frame and re-visit any ad copy and/or look at another recruitment technique)

Now that you know where the interview process fits into the hiring process, let’s take a look at the “do’s” and “don’ts” of conducting a Successful interview.

Conducting the Successful Interview - What to do:

1. Prepare in Advance for the Interview

• Know what you want in a candidate before you begin the interview. Review the job specifications and requirements that have been prepared.

• Know the job and its responsibilities. Review the job description.

• Prepare a list of standard questions you will ask the candidate’s abes and past work performance that you want him/her to answer.

• Prepare a list of prioritized and measurable criteria, either in the form of a worksheet or other method, for analyzing and comparing the candidates.

• Review the candidate’s resume prior to the interview.

• Set specific appointment times and reasonable time limits.

• Be prepared to justify the use of any required employment test. Typically, the most legally defensible tests are those that involve a “piece of the job.”

2. Collect Pertinent Information During the Interview

• Since past behavior predicts future behavior, look for the candidate’s behavior “patterns” as you collect information. For example, has the candidate enjoyed “big picture” work or detailed analysis more? Is he/she more of a generalist or more of a specialist? Oftentimes, by listening to how the candidate responds to your questions about previous jobs, you will be able to get a very good idea of what their behavior will be like in the future.

• Try not to offer too much detailed information up front so that the candidate will be able to formulate answers that exactly fits your company’s needs. Don’t put the right words in his/her mouth. Remember, the candidate (hope-fully) views the job and will be looking to say the right thing to impress you.

• Ask questions that focus on the candidate’s past performance. For example, if the job, as such an office manager, demands an individual who is well-organized and handles paper work easily, you may want to ask, “How do you keep track of your own schedules and desk work in your current position?”

• Ask specific, structured questions in regards to specific problems that the job holder may face. Focus on past behavior and the results of the candidate’s actions in that situation. For example: “As the customer service repre- sentative, you may encounter a few unhelpful campers who will yell and scream at you over the telephone or in person. Have you had any experience dealing with difficult customers? Who was the most difficult customer you had to deal with? What was the situation? How did you resolve the problem?”

• Notice how well the candidate lis- tens and responds to the questions asked.

• Note the candidate’s choice of words and non-verbal behavior. Are they answering your questions clearly?

• Listen to the questions the candi- date asks. Clarify the reasons why the questions are being asked. Notice questions he/she asks first as they may be his/her primary concerns.

• Take detailed hand-written notes concerning any answers that will help you distinguish the candidates from one another (especially if you will be conducting several interviews). Help yourself remember each candidate and each interview clearly.

• Record your reactions pertaining to the set criteria that will help in the evaluation of candidates.

• Organize and analyze the informa- tion immediately after the interview.
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Workplace Bullying – Is It Illegal?

By NICOLE G. MINKOW

Workplace bullying is unfortunately on the rise and victims typically have no legal recourse as bullying is technically not against the law. Unlike sexual harassment, workplace bullying is not illegal, so long as it is not protected class like race, religion, or sexual orientation. However, most organizations are wise to take disciplinary actions against the offending employee, which could likely end the employment relationship.

Not only does workplace bullying lower company morale and deprive good employees of a safe and comfortable place to work, if ignored, a workplace bully can easily evolve into someone violating the company policies against harassment and discrimination. Moreover, many states are contemplating adopting laws protecting employees from workplace bullying. While no such law exists in California, it is wise to address these issues before they turn into costly and damaging harassment and discrimination claims. Implementing policies against workplace bullying can boost employee morale, increase employee satisfaction and create a culture against this unprofessional behavior.

Workplace bullying is when an employee is singled out by others for unreasonable, embarrassing, or intimidating treatment. Usually the bully is a person in a position of authority who feels threatened by the victim, but in some cases the bully is a co-worker who is insecure or immature. Workplace bullying can occur at the hands of a single individual acting as a bully or through a company culture permitting negative behavior in the workplace. Bullying is not always easy to spot and can be committed verbally, physically, through gestures or by excluding or humiliating the victim. Employees being bullied typically feel threatened, embarrassed and hopeless because they often have no recourse.

While bullying may fall into categories described as improper under a company’s code of conduct policy, a policy specifically prohibiting workplace bullying may be more effective in dissuading unprofessional behavior and teaching bullying victims how to resolve issues of concern. Anti-bullying policies should include the following:

- A clear definition of bullying;
- Descriptions of prohibited behavior;
- An explanation of the complaint procedure;
- An explanation of the company’s anticipated response to complaints (i.e. investigation, etc.);
- A description of the consequences of engaging in bullying behavior; and
- A policy against retaliation for those who complain or participate in an investigation.

Pursuant to newly revised Government Code section 12950.1, employers with 50 or more employees are also required to train managers and supervisors regarding “abusive conduct” when conducting the mandatory training on sexual harassment prevention. The previous incarnation of the law required a two-hour, interactive training on sexual harassment prevention to California supervisors every two years or within six months of the employee’s assumption of a supervisory position. Now this training must include prevention of abusive conduct as a component of the education. According to the law, abusive conduct is behavior that “a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interest.” These acts can include:

- A threat of harm;
- Verbal or physical conduct that is disruptive and harmful;
- Repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets;
- Verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating;
- The gratuitous sabotage and under-mining of a person’s work performance.

According to the law, a single act shall not constitute abusive conduct, unless especially severe and egregious. While this new law makes great efforts to define and explain abusive conduct, there is no remedy under California law for a victim of this behavior. Indeed, the law does not include its own cause of action permitting an employee to file a lawsuit based on workplace bullying that is not tied to an already-protected category for illegal discrimination or harassment – such as age, gender, ancestry, race, religion or disability. However, we can expect employees to point to this new law as a public policy in California in an effort to support new theories of litigation. Thus, it is critical that employers understand that bullies don’t belong in the workplace and their conduct should be addressed before it creates a larger problem.

Nicole G. Minkow is Senior Employment Counsel with Pearlman, Borska & Wix.
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The Administration’s War on Independent Contractors

By RICHARD S. ROSENBerg

Business owners need to know that the Obama Administration has declared war on the independent contractor relationship: reclassify most workers as “employees” (who will be taxed and covered under the myriad of federal and state labor laws).

Earlier this summer, the U.S. Department of Labor issued an official “Administrator’s Interpretation” on the topic. The DOL boldly declared that most workers will be employees, not independent contractors. This admonition couldn’t be any clearer. Any company using independent contractors is now on official notice that the federal government considers most companies that engage independent contractors to be labor law scofflaws. This is meant to be a fair warning that the federal wage-hour agency intends to bring an end to the practice.

Companies that mistakenly classify employees as independent contractors face a world of hurt if they are sued. Compliance audits by any one of the myriad federal and state labor law regulators are expensive and time consuming to resolve. And, class action lawsuits over worker misclassification are hugely popular these days.

And, just this month, a federal judge in San Francisco certified a class of Uber drivers in a class action suit claiming that Uber misclassified them as independent contractors and unlawfully withheld tips. Both rulings are huge setbacks for the “the model is centered on a flexible workforce designed to evaluate whether the contractor is truly an independent contractor.

From a risk management perspective, the only way to be sure you get it right is to start with the basic proposition that every worker is an employee unless you are sure that the independent contractor relationship will pass muster, in court.

And, don’t get lulled into complacency because you have a contract stating that the worker is a contractor. When it’s the good times, the contracts won’t worth the paper they’re written on unless the actual relationship comport with the law.

When doing your analysis, you should keep one very unsettling reality in mind. There is no such thing as a safe harbor. Case law makes clear that one agency’s findings on the matter is not binding on another. To make matters worse, different agencies and courts weigh different factors and often ascribe to them different levels of importance.

For example, defeating the claim of a contractor who files for unemployment insurance doesn’t insulate the company from a case brought by that same person before the EEOC for discrimination or a claim for an industrial injury before the Workers Compensation Appeals Board.

Keep in mind that if the situation is a close call, you are sticking your chin out big time and risking costly litigation, fines, back wages, taxes and the like.

At its core, these DOL guidelines, as well as other agency and court rulings are designed to evaluate whether the contractor is an employee or truly an independent contractor with all of the trappings of business ownership.

Some agencies and courts use at what’s referred to as the “right to control” test, examining whether the company retains the right to tell the putative contractor what to do, how to do it, when to do it and where to do it. Layered on to that test is an assessment of where the work is done, whose equipment and materials are used and whether the contractor has a financial stake in the venture.

Control over the methods and means of how the work is done indicates employment, as does the use of equipment owned by the company. And, if the contractor has no risk of financial loss if the project doesn’t go well, this also leans in favor of employment.

By issuing these guidelines, the Obama Administration is throwing down the gauntlet when it comes to worker misclassification. Business owners should heed this warning and evaluate all independent contractor relationships before legal complications arise.

Richard S. Rosenberg is a founding partner of Ballard, Rosenberg, Golper & Switt LLP.

LABOR AND EMPLOYMENT

Continued from page 18 when memory is fresh. Don’t try to remember everything, it’s impossible. One idea is to “rate” each candidate on each of the criteria immediately following the interview.

3. Look and Act Professionally During the Interview. A candidate will be impressed, if possible, conduct the interview without interruptions.

4. Treat All Candidates Fairly. Be courteous, respectful and honest.

5. Be Courteous and Respectful. • Conduct the interview in a private place away from distractions.

• Begin the interview on schedule.

• If possible, conduct the interview with a welcome, formal and professional demeanor.

• Be prepared to discuss the candidate’s accomplishments.

• Be prepared to be honest.

• Be prepared to discuss the candidate’s accomplishments.

6. Facilitate Open Communication. • Immediately attempt to establish a rapport with the candidate by breaking the ice; for example, ask about their experiences in a particular industry or geographical location (refer to his/her resume).

• Promote a relaxed environment with free-flowing conversation.

• Do not dominate the discussion by talking too much. Many experts use a 80/20 rule - you talk 20% of the time and the candidate talks 80% of the time.

• Politely probe the candidate for information by asking open-ended questions that will provide insight into the candidate’s values and traits.

• Ask structured questions that will require some thought on the part of the candidate.

• Listen carefully to the candidate’s answers. If they do not provide you with specific results, probe until you do.

• Explain the selection process to the candidate. Offer realistic time frames and stick to your word!

The Successful Interview - What not to do: The following list is comprised of subjects that are widely regarded as “off-limits” for discussion in an interview by employment experts. Most of these subjects relate directly to federal and state employment laws. Legislation covering equal employment opportunity is extensive and complex. Check not only federal laws, but also your state’s laws and guidelines. Remember, state laws vary.

• Concerning the age of the candidate. Be careful using the words “over qualified” with older candidates.

• Concerning their arrest record (this is different from convictions - in most states, it is permissible to ask if the candidate has ever been convicted of a crime).

• Concerning the candidate’s citizenship of the U.S. prior to hiring (it is permissible to ask, “Will you be able to provide proof of eligibility to work in the U.S. if hired?”).

• Concerning the candidate’s ancestry, birthplace or native language (this is permissible to ask about their ability to speak English or a foreign language if required for the job).

• Concerning a candidate’s health and weight if it does not affect their ability to perform the job.

• Concerning their marital status or religious or political beliefs.

• Concerning a candidate’s credit history or financial situation. In some cases, credit history may be considered job-related, but proceed with extreme caution.

• Concerning education or training that is not required to perform the job.

• Concerning their sex or gender.

• Concerning pregnancy or medical history. Attendance records at a previous employer may be discussed in most situations as long as you do not refer to illness or disability.

• Concerning the candidate’s family or marital status or child-care arrangements (it is permissible to ask if the candidate will be able to work the required hours for the job).

• Concerning the candidate’s membership in a non-professional organization or club that is not related to the job.

• Concerning physical or mental disabilities (asking whether the candidate can perform the essential job duties is permitted.) The ADA allows you to ask the applicant to describe or demonstrate how they would perform an essential function (s) when certain specific conditions are met. Check the “yes” test, and hire the candidate if they are qualified.

Remember—When in doubt, ask yourself if the question is job-related; if not, don’t ask it!
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Respect and Professional Learning Must Come Hand in Hand

By GEORGE ROCKWELL

Too many adult education instructors or management trainers treat adult learners as if they are “high school” level students. It is essential to always treat professional learners as the adults they are.

Good management trainers or adult education specialists should apply knowledge of the following fundamentals of adult learners:

• Adults are people with years of experience and a wealth of information. Focus on the strengths learners bring to the classroom, not just gaps in their knowledge. Provide opportunities for dialogue within the group. Tap their experience as a major source of enrichment to the class. Remember that you, the teacher, do not need to have all the answers, as long as you know where to go or who to call to get the answers. Students can be resources to you and to each other.

• Adults have established values, beliefs and opinions. Demonstrate respect for differing beliefs, religions, value systems and lifestyles. Let your learners know that they are entitled to their values, beliefs and opinions, but that everyone in the room may not share their beliefs. Allow debate and challenge of ideas.

• Adults are people whose style and pace of learning has probably changed. Use a variety of teaching strategies such as small group problem solving and discussion. Use auditory, visual, tactile and participatory teaching methods. Reaction time and speed of learning may be slow, but the ability to learn is not impaired by age. Most adults prefer teaching methods other than lecture.

• Adults relate new knowledge and information to previously learned information and experiences. Assess the specific learning needs of your audience before your class or at the beginning of the class. Present single concepts and focus on application of concepts to relevant practical situations. Summarize frequently to increase retention and recall. Material outside of the context of participants’ experiences and knowledge becomes meaningless.

• Adults are people with bodies influenced by gravity. Plan frequent breaks, even if they are 2-minute “stretch” breaks. During a lecture, a short break every 45-60 minutes is sufficient. In more interactive teaching situations, breaks can be spaced 60-90 minutes apart.

• Adults have pride. Support the students as individuals. Self-esteem and ego are at risk in a classroom environment that is not perceived as safe or supportive. People will not ask questions or participate in learning if they are afraid of being put down or ridiculed. Allow people to admit confusion, ignorance, fears, biases and different opinions. Acknowledge or thank students for their responses and questions. Treat all questions and comments with respect. Avoid saying “I just covered that” when someone asks a repetitive question. Remember, the only foolish question is the unasked question.

• Adults have a deep need to be self-directing. Engage the students in a process of mutual inquiry. Avoid merely transmitting knowledge or expecting total agreement. Don’t “spoon-feed” the participants.

• Individual differences among people increase with age. Take into account differences in style, time, types and pace of learning. Use auditory, visual, tactile and participatory teaching methods.

• Adults tend to have a problem-centered orientation to learning. Emphasize how learning can be applied in a practical setting. Use case studies, problem solving groups, and participatory activities to enhance learning. Adults generally want to immediately apply new information or skills to current problems or situations.

Note: New information and skills must be relevant and meaningful to the concerns and desires of the students. Know what the needs are of individuals in your class. Students do not wish to learn what they will never use. The learning environment must be physically and psychologically comfortable.

George Rockwell is a freelance writer.