

Welcome to the 2015 San Francisco Management Liability Insights Conference!

Opening Remarks



Bill Keogh
CEO
Advisen

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- the **right** information into
- the **right** hands at
- the **right** time

to *power* performance.



For the Management Liability Community

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Welcoming Remarks

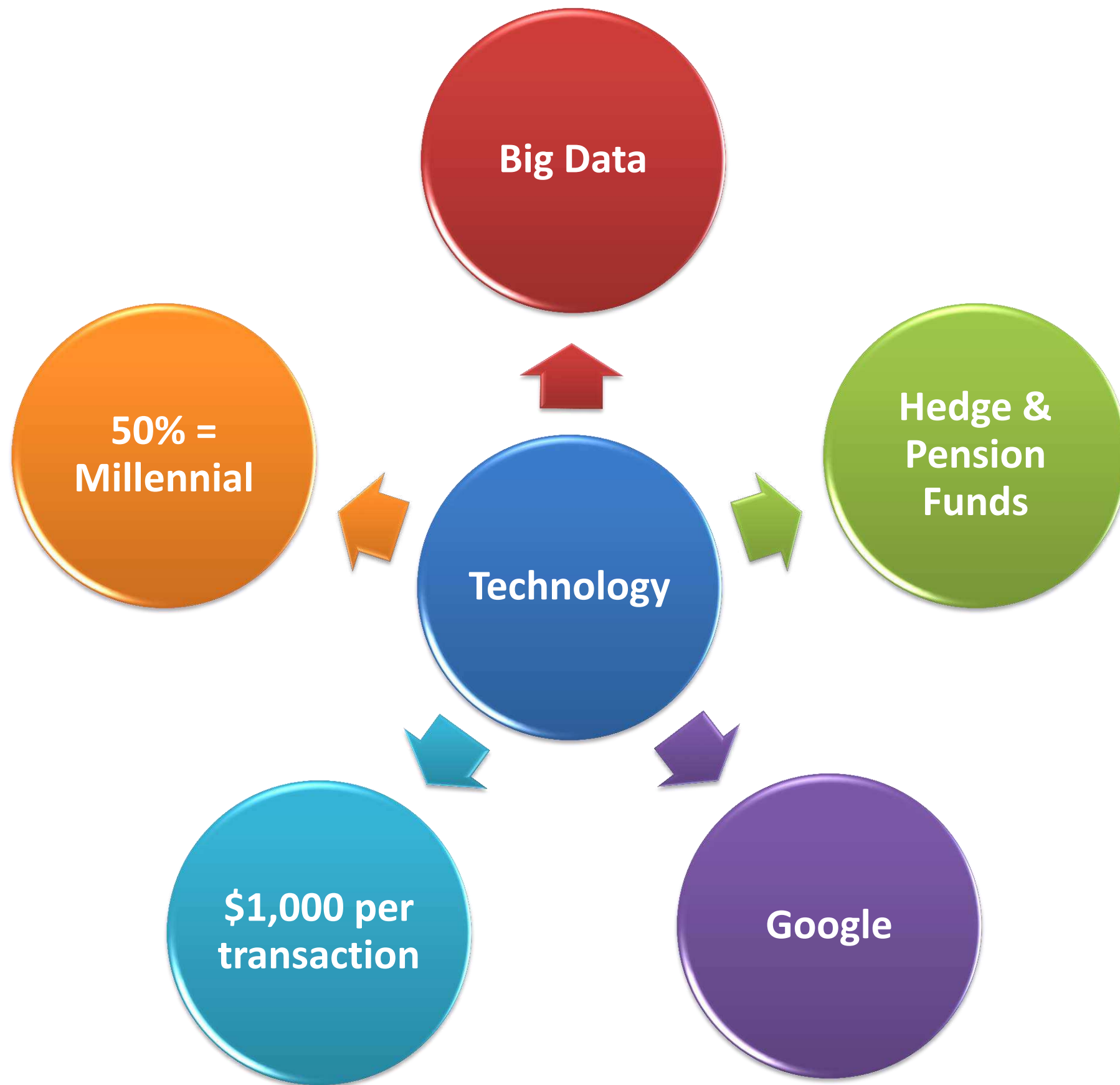


Stephen Prymas

VP & Head of Hartford Financial Products

The Hartford

[2015 Conference Chair]



Keynote Address



Lou Ann Layton

Managing Director and the PacNorth Partnership Leader
Marsh

Advisen Data West Coast Overview



Jim Blinn

Executive Vice President, Information & Analytics Division
Advisen



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Slides from the Advisen Data- West Coast Overview are available to Executive Risk Network members only.

For more information about subscriptions contact Jim Delaney at jdelaney@advisen.com

D&O Issues

D&O Issues



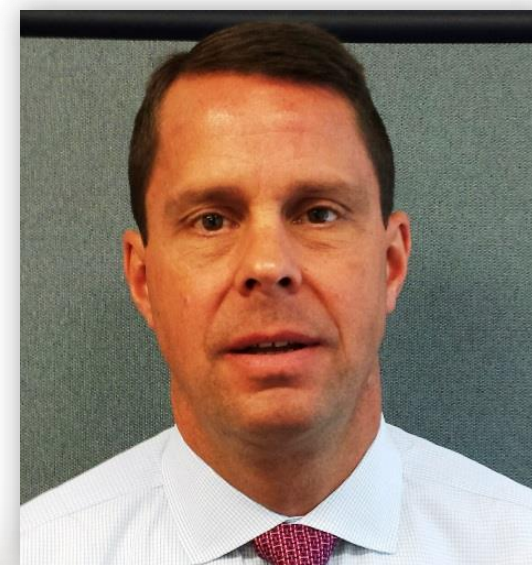
David Bradford

President, Research & Editorial division, Advisen
Moderator

D&O Issues

- **David Bradford**, President, Research & Editorial division, Advisen (Moderator)
- **Thor Beveridge**, Lead Underwriter of Commercial D&O, The Hartford
- **Mary McCutcheon**, Partner, Farella Braun & Martel LLP
- **Carolyn Polikoff**, SVP & Partner, Corporate & Executive Protection Practice Leader, Woodruff-Sawyer
- **Brian Robbins**, Partner, Robbins Arroyo

D&O Issues

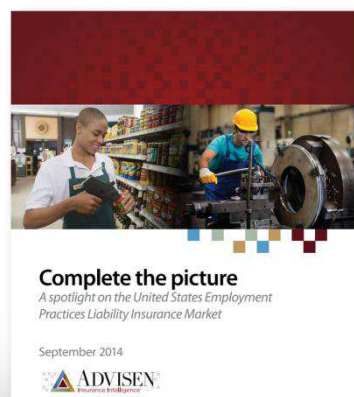


15 Minute Program Break



For the Management Liability Community

Coming up –



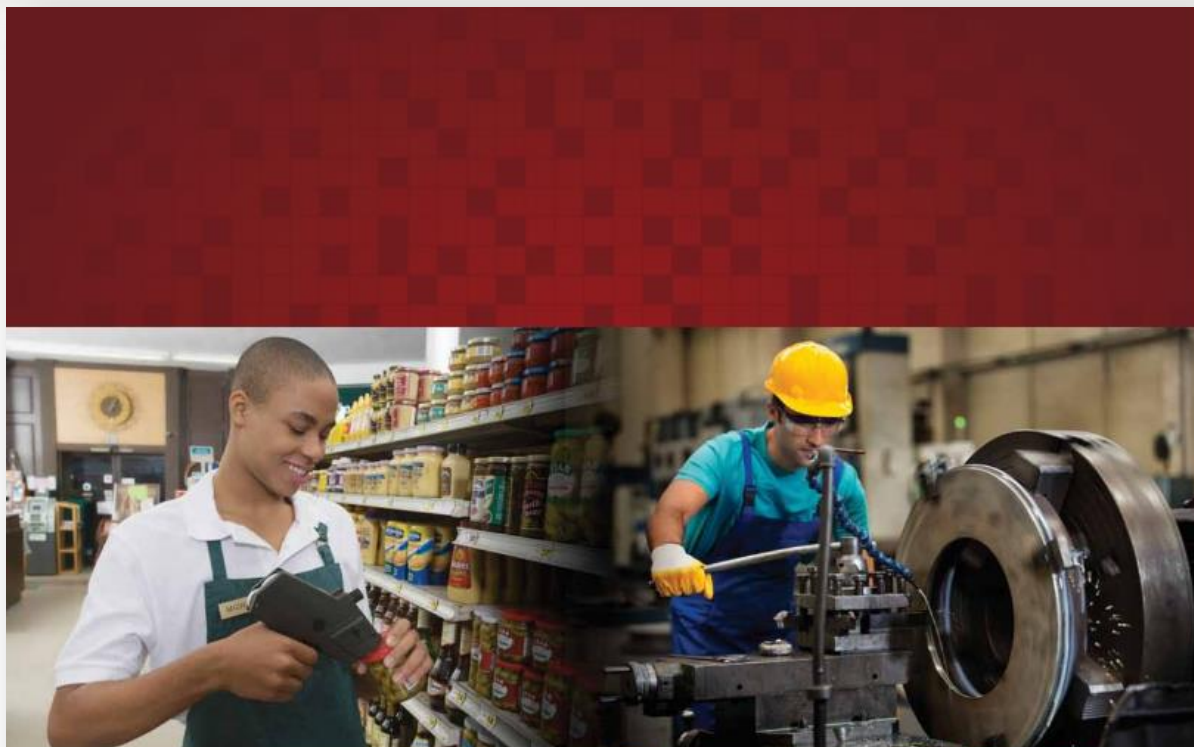
EPLI

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Rebecca Bole

Director of Editorial Strategy & Products, Advisen
Moderator



Complete the picture

*A spotlight on the United States Employment
Practices Liability Insurance Market*

September 2014



Download our free,
36-page EPL paper:
“Complete the Picture”

<http://www.advisenltd.com/2014-09-18/spotlight-epli-market/>

EPLI

- **Rebecca Bole**, Director of Editorial Strategy & Products, Advisen (Moderator)
- **Trudy Hardin**, Senior Vice President, EPLI Practice Leader, Aon
- **Aaron Hayes**, Claims Manager, Employment Practices Liability, Beazley
- **Melody Silberstein**, SVP, Human Resources, Woodruff-Sawyer

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California Legal Headlines



The business of relationships.™

A light gray world map is centered on the slide. A red five-pointed star is placed over the state of California in North America.

California Legal Headlines Advisen Management Liability Insights Conference San Francisco

Presented By: L. Julius M. Turman, Esq., Reed Smith LLP
Kevin D. Whittaker, Esq., Reed Smith LLP

4 March 2015

For Educational Purposes Only

California's Expanding Wage and Hour Laws

Minimum Wage Update

- On July 1, 2014, California's state-wide minimum wage increased from \$8.00 per hour to \$9.00 per hour.
- On January 1, 2015, the minimum wage in the following cities increased as follows:
 - San Francisco will increase to \$11.05 per hour.
 - San Jose will increase to \$10.30 per hour.
 - San Diego will increase to \$9.75 per hour.
- On March 2, 2015, the minimum wage in Oakland increased to \$12.25 per hour.
- Hotels for employees in the City of Los Angeles, the minimum wage will increase to \$15.37 per hour on July 1, 2015, or July 1, 2016, depending on the number of hotel rooms.

Penalties For Minimum Wage Violations Will Now Include Waiting Time Penalties (AB 1723)

- Labor Code section 1197.1 previously allowed penalties against employers for failing to pay minimum wage.
- While the Labor Code previously provided three forums to pursue such violations (e.g., through a Labor Commissioner Hearing, a civil action, or a Labor Commissioner citation), waiting time penalties only applied to the first two mechanisms (i.e., not for Labor Commissioner citations).
- AB 1723 authorizes waiting time penalties to be awarded in all three forms.

Rest And Recovery Periods Count As Hours Worked (SB 1360)

- Labor Code section 226.7 precluded employers from requiring employees to work during any meal, rest, or recovery period, and to pay an additional hour of pay at the employee's regular rate of pay for each workday a meal, rest, or recovery period is missed.
- Responding to concerns that employers were not sure if rest or recovery periods needed to be paid, SB 1360 amends section 226.7 to specify that rest or recovery periods required under state law shall be counted as hours worked for which there shall be no deduction from wages.
- This law specifically states it is declarative of existing law, and therefore is immediately effective and applies retroactively.

Longer Statute Of Limitations: Recovery Of Liquidated Damages For Unpaid Wages (AB 2074)

- California law permits an employee to pursue a civil action to recover unpaid wages or compensation, and Labor Code section 1194.2 permits a successful employee to also recover liquidated damages equal to the unpaid wages plus interest in civil actions regarding minimum wage violations.
- Responding to recent cases suggesting that actions for recovery of penalties must be filed within one year, whereas actions to recover unpaid wages have a three-year statute of limitations, AB 2074 amends section 1194.2 to specify that the statute of limitations to pursue liquidated damages is the same as in an action for wages from which the liquidated damages arise.

Discrimination, Harassment, Unlawful Acts

“Client Employers” Share Liability With Contractors

AB 1897

- Specifically, client employers will share with the labor contractor the responsibility and civil liability for the workers of the labor contractor for:
 - the payment of wages; and
 - the failure to secure valid workers compensation coverage.
- A worker must give employer thirty (30) days notice of violations of any shared obligations.
- No retaliation by the employer or the labor contractor for providing notification of violations or filing a civil action.

“Client Employers” Share Liability With Contractors

AB 1897

- Client employers cannot contract around these provisions, such as by shifting these responsibilities solely to the labor contractor.
- Employer and labor contractor may contract regarding certain remedies, including indemnification for the other party’s violations of this section.
- Client employer cannot shift to the labor contractor any legal duties or liabilities to provide a safe workplace with respect to workers supplied by the labor contractor.

FEHA: Harassment Training Must Include Prevention Of “Abusive Conduct”

AB 2053

- California law, which requires employers to provide at least two hours of sexual harassment training for supervisors located in California.
- Must have training within six months of an employee’s assumption of a supervisory position, and once every two years thereafter.
- AB 2053 now requires harassment training also include the prevention of “abusive conduct.”
- Abusive conduct is defined as “conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests.”
- Such abusive conduct “may include 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, or the gratuitous sabotage or undermining of a person’s work performance.”
- However, this law specifies that “a single act shall not constitute abusive conduct, unless especially severe and egregious.”

FEHA: National Origin Discrimination Expanded

AB 1660

- AB 1660 amends the FEHA to prohibit discrimination against an individual because he or she holds or presents a drivers license issued under Vehicle Code section 12801.9, (non-citizen driver's license) with certain exceptions.
- AB 1660 also adds subdivision (v) to Government Code section 12926, specifying that national origin discrimination includes discrimination on the basis of possessing a non-citizen driver's license.
- AB amends to Vehicle Code to make it discrimination against a person holding a non-citizen driver's license, and a violation for an employer to require a person to present a driver's license, unless possessing a driver's license is required by the employer and the employer's requirement is otherwise permitted by law
- AB 1660 specifies that it does not affect an employer's rights or obligations to obtain information required under federal law to determine identity and authorization to work.
- AB 1660 also provides that actions taken by an employer that are required by the federal Immigration and Nationality Act would not violate this law.

FEHA: Unpaid Interns

AB 1443

- AB 1443 amends the FEHA in response to several court rulings suggesting interns and volunteers are not “employees” for purposes of harassment and discrimination laws.
- Employers are now prohibited from discrimination based on protected characteristics in the “selection, termination, training or other terms” of unpaid internships.
- Employers are prohibited from harassing unpaid interns based on protected characteristics.
- Employers may be held liable for sexual harassment of unpaid interns by non-employees if the employer knew or should have known of the conduct, but failed to take appropriate corrective action promptly.
- Employers may not take adverse actions against unpaid interns based on religious beliefs, and must provide reasonable accommodations for religious observance unless it would pose an undue hardship on the employer.
- AB 1660 also specifies that driver’s license information obtained by an employer shall be treated as private and confidential, and exempt from disclosure under the California Public Records Act, and shall not be disclosed to any unauthorized person or used for any purpose other than to establish identity and authorization to drive.

“Ban-the-Box” Laws Sweep California and the Nation

- States and cities are adopting legislation aimed at removing barriers to employment for individuals with criminal records.
- The measures called “Ban-the-Box” laws eliminate the common job application form check box that asks about an applicant’s criminal history.
- Depending on the law, employers may be barred from asking about criminal history on the job application, in job interviews, and even until after a job offer is made to an applicant.
- As of September 2014, 13 states, the District of Columbia, and 67 local jurisdictions have adopted Ban-the-Box ordinances.

Social Media Impacts Employers

- A staggering **75%** of employees access social media using their PD's at work.
- **60 %** of workers admitted to checking personal social media more than 1x a day; **3 out of 4** checked once a day or more.
- **64%** access non-work related websites each day, according to a 2013 survey by Content Watch.**
- Most frequently accessed sites: **Twitter, Facebook, Tumblr & Instagram, LinkedIn and SnapChat.**

SilkRoad Technology - *The Social Media and Workplace 2012 Report was conducted from July-August 2012 through an online survey amongst a sample of 1,105 employees of corporations and not-for-profit organizations across the United States.

**This survey was not limited to the use of personal mobile devices.

Time is Money!

- Employee social media use during work hours affects:
 - ✓ *Productivity*
 - ✓ *Efficiency*
 - ✓ *Quality of work*
 - ✓ *Increases likelihood of work-related posts*
 - ✓ *Increases likelihood of misuse/abuse*
 - ✓ *Increases exposure to employer*

Employee Decisions Based on Social Media Content

- Employers may not “crash” private social media groups and fire employees for their ranting
- *Pietrylo v. Hillstone Restaurant Group*
 - Jury finds managers who surreptitiously monitored employees' postings in MySpace violated state and federal laws by knowingly accessing a private chat-group on a social media website without authorization
- *Espinoza v. County of Orange*
 - \$820,000 judgment for EE for disability harassment where co-workers posted offensive social media blogs about his “claw” hand (birth defect).
- *Ward v. Cisco Systems, Inc.*
 - Employer liability for defamatory statements made by EE on internet blog accusing plaintiff of criminal behavior.
 - Case settled for undisclosed amount

NLRB Multi-prong Attack

- Protected activity – “Facebook Firing” cases
 - Social media and electronic use policies
 - Cannot limit discussion about wages, hours and working Conditions (rank-and-file employees)
 - Confidentiality, anti-bullying, decorum in workplace policies – often too broad
 - Unions embracing social media (developing models for collective action)
 - Employees may use employer-provided email systems during non-working hours for organizing and other concerted activity
-

Americans with Disabilities Act: Reasonable Accommodations, Employer's Good-Faith Effort Interactive Process

The EEOC's guidelines state that . . . "The appropriate reasonable accommodation is best determined through a **flexible, interactive process** that involves both the employer and the [employee] with a disability."

- Meeting with the employee
- Requesting information regarding employee's condition and limitations
- Asking what accommodation the employee wants
- Showing signs of having considered employee's request
- Offering and discussing available alternatives if requested accommodation is too burdensome
- Consulting outside resources

Consider Most Everything to Find a Reasonable Accommodation

- Job restructuring
- Part-time/modified work schedules
- Reassignment to vacant positions
- Acquisition or modification of equipment
- Modification of policies
- Job coaches
- Readers, interpreters
- Unpaid leave

Employer Considerations for Job Restructuring

- Don't have a blanket policy prohibiting all employees from working unless they have no restrictions (a "full release")
- Make an individualized assessment of an employee's restrictions and the job's essential functions to determine whether you need to eliminate an essential job function (which need not be done)
- Consider eliminating marginal job functions, shifting non-essential functions among employees, and redesigning job procedures
- No obligation to create the job

Reasonable Accommodations Excludes:

- Elimination of essential functions
- Reduction in production standards
- Creation of new position
- Creating light duty work
- Hiring permanent helper
- Extended leave of absence

California's New Paid Sick Leave Law AB 1522

California's New Paid Sick Leave Law

Accrual Rules

- After July 1, 2015, employees who work in California for thirty or more days within a year from the commencement of employment will accrue paid sick leave at a rate of no less than one hour for every 30 hours worked.
- Exempt employees will be deemed to work 40 hours per week for accrual purposes, unless their normal workweek schedule is less than 40 hours, in which case they will accrue paid sick leave based upon their normal workweek.
- Employees will be entitled to use accrued paid sick days beginning on the 90th day of employment, after which they may use paid sick days as they are accrued.
- Employers will also have the discretion to lend paid sick days to an employee in advance of accrual.
- Employers cannot require employees to locate a replacement worker to cover days on which an employee uses paid sick days.

California's New Paid Sick Leave Law Accrual Rules

- Employers will not be required to compensate employees for unused sick days upon separation of employment.
- **However**, employers must reinstate the previously unused balance if they rehire the employee within one year of their separation.
- In this instance, the rehired employee shall be entitled to use those previously accrued and unused paid sick days and to accrue additional paid sick days upon rehiring.

California's New Paid Sick Leave Law

Usage Rules

- Employees will be entitled to use paid sick time for preventive care for themselves or a family member, as well as for the diagnosis, care, or treatment of their or their family member's existing health condition.
- For purposes of the PSL Law, "family member" means a (1) child (as defined), (2) parent (as defined), (3) spouse, (4) registered domestic partner, (5) grandparent, (6) grandchild, or (7) sibling.
- Employees will also be entitled to use paid sick time if they are a victim of domestic violence, sexual assault, or stalking.
- Employees may determine how much paid sick leave they need to use, but employers may set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave.
- In response to employer concerns that sick leave is more unpredictable than many other forms of leave (e.g., FMLA, CFRA), this law requires employees to provide "reasonable" advance notification if the need for paid sick leave is foreseeable.
- Where the need for paid sick leave is unforeseeable, the employee shall provide notice of the need for leave as soon as practicable.



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Emerging Risks



Emerging Risks



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Emerging Risks

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- **Steve Shappell**, Chief Legal Officer, JLT
- **Soraya Wright**, VP – Global Risk Management & Crisis Management, The Clorox Company

Emerging Risks



Closing Remarks



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[2015 Conference Chair]