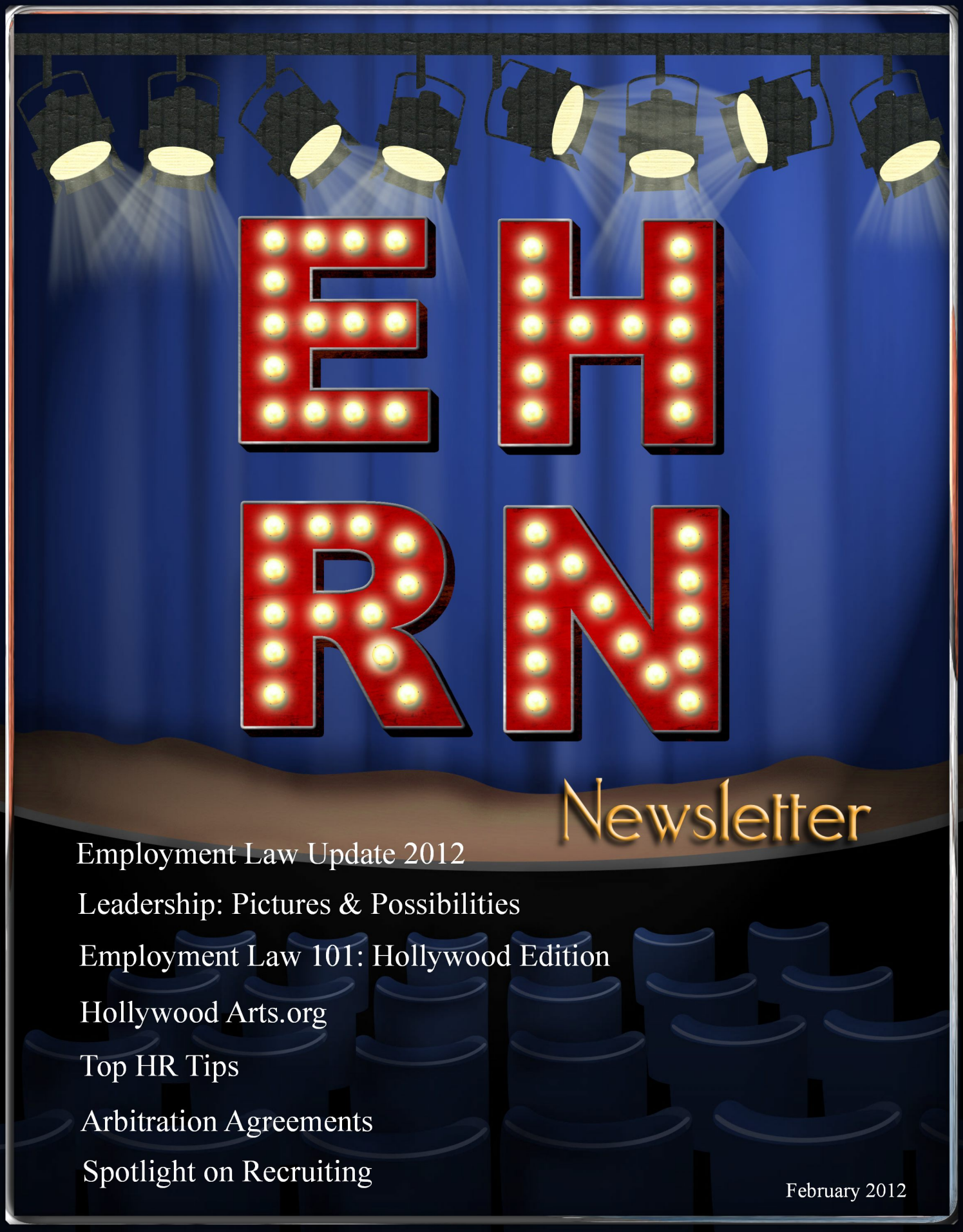


Employment Law Update 2012

Leadership: Pictures & Possibilities

Employment Law 101: Hollywood Edition

Hollywood Arts.org

Top HR Tips

Arbitration Agreements

Spotlight on Recruiting

February 2012

Entertainment Human Resources Network

Hello EHRN,

Last month the EHRN group had a fantastic time at our holiday party at the Local Peasant (January 12th). We raffled prizes, met new friends and re-acquainted with old friends and colleagues. The next two pages of this newsletter shows pictures of this fun event. For those who could not attend, we hope to see you next year.

Attached below are the results of the EHRN survey that I sent to the group a few months ago. Thank you for your responses. We will use the feedback information to help us improve the quality of the newsletter and to make sure planned activities and shared best practices will be of value to the group.

One of the ideas the EHRN Steering Committee is looking into is stress reduction tools for the workplace. Massage therapist Sarah Taylor explains "when companies think of wellness for their employees, they think of physical wellness. Exercise programs and incentives can help with many things, including the effects of stress on the body. But why not address where stress starts - in the mind. When a stressful situation occurs, it's not the stressful situation, per se, but rather the thoughts, stories and emotions that arise that heighten our stress levels. People have a difficult time stopping the train of thoughts and emotions that take off when they're faced with a stress trigger." Sarah Taylor will be sharing her stress reduction strategies in the April edition of the EHRN newsletter.

The EHRN contact list with the latest company names and e-mail addresses was recently sent to the group. Please send future company contact information changes to grace.mosqueda@disney.com.

We are in the planning stages of putting together an event for our members. More on this will follow in the coming weeks. If your company would like to host an EHRN meeting, please contact us. This is a great way to share information about your companies to the group members. And if your company would like to host a meeting, we can help you find a guest speaker.

We can use your help with the newsletter. You can write articles, participate in an interview, write quizzes or assist with production. All ideas are welcome.

Several weeks ago I asked EHRN members to send me your success stories, indicating how the EHRN group enabled you to be successful at your jobs or careers. I received several responses and a few of them are included on this page. We plan to publish all your responses in the April edition of the newsletter but we need many more of your stories. Tell us how EHRN has helped you or what EHRN means to you or how we can make the network better.

Help us keep the momentum moving forward.

- Sarah Tilley

***EHRN Survey Results Attachment**

For questions about EHRN or the newsletter contact:

Sarah Tilley
sarah.tilley@disney.com

Amy Baker
abaker@itvstudios.com

Tim Wright
twright1984@sbcglobal.net

EHRN Success Stories

EHRN reminds me that it's special to be a part of this crazy world of entertainment and that I'm lucky to be doing something I love within this exciting realm. It also allows me to connect with other individuals who are talented and interesting and that I find to be very useful when I need information, to share ideas, or to just commiserate and let off some steam…the highs and the lows are sometimes unique to this industry and I like being around people who can speak the same language on this…not to mention the entertainment gossip.

Sarah Tilley
Walt Disney Co.

I actually have a success story from networking through EHRN. A couple of years ago, we were recruiting for an Organization Development Manager. I networked with EHRN via an email blast and received a referral. I recently placed this person, and since placing her, she has given me 3 additional referrals who I was also able to place here at WB! Talk about a success story – 4 placements ultimately through one email blast to EHRN!

Tracy Eng
Warner Bros.

Over the years I have successfully leveraged EHRN to identify several strong recruitment and HR candidates, several of whom were ultimately placed at the company.

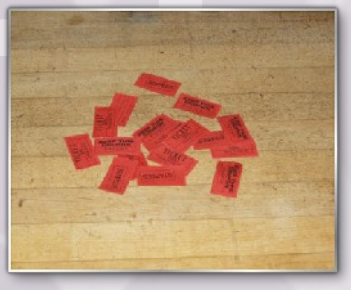
- Nate Constantine, Warner Bros.

I have found almost all of my consulting assignments through EHRN. I am leaving Square Enix to head on over to Activision.

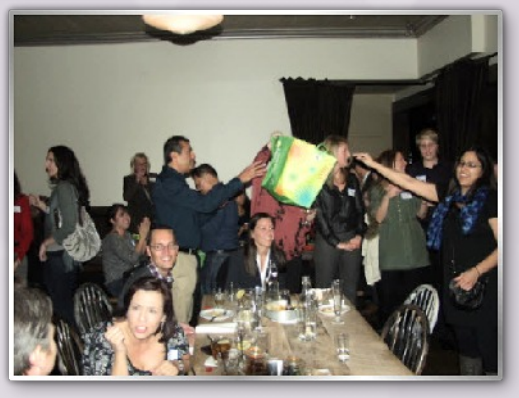
- Marta Voda, Activision

Holiday Party

January 12, 2012



Raffle Prize Drawing



Holiday Party














Click here to see all party photos.

Employment Law Update 2012

(Or..."Should Auld Employment Laws Be Forgot?")

by Karen L. Gabler, Esq.

Each year, California employers are faced with the task of assimilating a myriad of new laws to ensure legal compliance and avoid workplace disputes. Here are some of the highlights for 2012:

COMMISSION AGREEMENTS IN WRITING (AB 1396)

By January 1, 2013 (not 2012), employment contracts that incorporate commission payments must be reduced to writing, signed by employer and employee. The document must specifically detail the method by which the commissions will be calculated and paid. Often missed in commission agreements is clear reference to the payment of commissions after termination; in particular, what will be paid to the departing employee and for how long. One breath of employer-friendly air: the new law repeals the provision of the Labor Code that subjects an employer to triple damages for violating this rule.

CREDIT CHECK FOR JOB APPLICANTS (AB 22)

Effective January 1, 2012, California joins six other states that prohibit most employers from procuring a credit report for most applicants. Except for certain financial institutions, employers may only obtain a credit report in connection with applications submitted for or promotion decisions pertaining to eight categories of positions. For most private employers, the most relevant categories are managerial positions (as defined by the statute), positions for which a credit report is required by law, positions with regular access to private information (bank or credit card accounts, social security numbers, dates of birth), positions where the employee will be a named signatory on employer accounts or will be authorized to transfer funds or enter into contracts on behalf of the employer, positions with access to confidential or trade secret information (as defined by law), and positions with regular access to $10,000 or more in cash. Even where a credit report is authorized, the employer must still provide the requisite disclosures prior to ordering the credit report.

GENDER IDENTIFICATION AND EXPRESSION (AB 887)

This law amends the Fair Employment and Housing Act (among others) to clarify rules against discrimination on the basis of gender identity and gender expression. Gender expression refers to a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth. The new law also requires employers to allow an employee to appear or dress consistently with the employee's gender expression. Watch for gender-based dress codes, such as permitting women to wear skirts or earrings, but not men.

INDEPENDENT CONTRACTOR MISCLASSIFICATION (AB 459)

Employers who "avoid employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor" will be subject to penalties ranging from $5,000 to $15,000 for each violation. If the employer has engaged in a "pattern or practice" of willful misclassification, the penalty range increases to $10,000 to $25,000 for each violation. How the term "willful" is defined is not clear. Employers found to have violated the law will also be required to post a notice in an area accessible to all employees and the general public regarding the violation (which may trigger other claims in the workplace). Of concern to business buyers: violations of this law will be the responsibility of any successor owner of the business. In California, workers who are subject to the control of the employer (even minimal control) and workers who perform the services your business exists to perform are not typically independent contractors.

HEALTH INSURANCE PREMIUMS FOR PREGNANCY DISABILITY LEAVE (SB 299 and AB 592)

As of January 1, 2012, employers must continue paying their usual portion of group health insurance premiums for employees out on pregnancy disability leave. Employers are not required to provide medical insurance to employees that do not have it in place when a doctor certifies that pregnancy leave is necessary, nor do they have to pay more of the premium than they would pay an employee not on leave (even if the employer's usual contribution is 0). This new requirement overlaps with the 12 weeks of payments required under the FMLA for employers with fifty or more employees.

UNION "RIGHT TO ORGANIZE" POSTER

This law requires that all employers covered by the National Labor Relations Act ("NLRA") post a notice informing employees of their right to organize and listing a litany of unlawful employer conduct. Failure to post the notice is an unfair labor practice and may be considered as evidence of unlawful motive in proceedings before the NLRB. A failure to post may also toll the statute of limitations for unfair labor practices allegedly committed during the period in which an employer fails to post the notice. The requirement to post originally was to become effective on November 14, 2011, but has been continued several times. The current deadline to post this notice is April 30, 2012, although it is currently under challenge and may be voided or postponed once again.

WAGE INFORMATION NOTIFICATION (AB 469)

As of January 1, 2012, the newly-issued Wage Theft Prevention Act requires private employers in California (if not governed by a collective bargaining agreement) to provide non-exempt employees with written notice of various payroll information, ranging from the rate of pay to any DBAs of the employer at the time of hire and within seven days of any changes during employment.

The California Division of Labor Standards Enforcement ("DLSE") released a notification form designed to provide the required information to employees. Employers may use the form or may create their own method of providing the written notice. For existing employees with a change in pay or other conditions, you can satisfy your notice obligation by reflecting that change on the pay stub. Notice may be sent electronically, as long as the employer retains proof of acknowledgement.

(See http://www.lightgablerlaw.com/pdf/12/Notice-To-Employee.pdf for a copy of the DSLE notification form.)

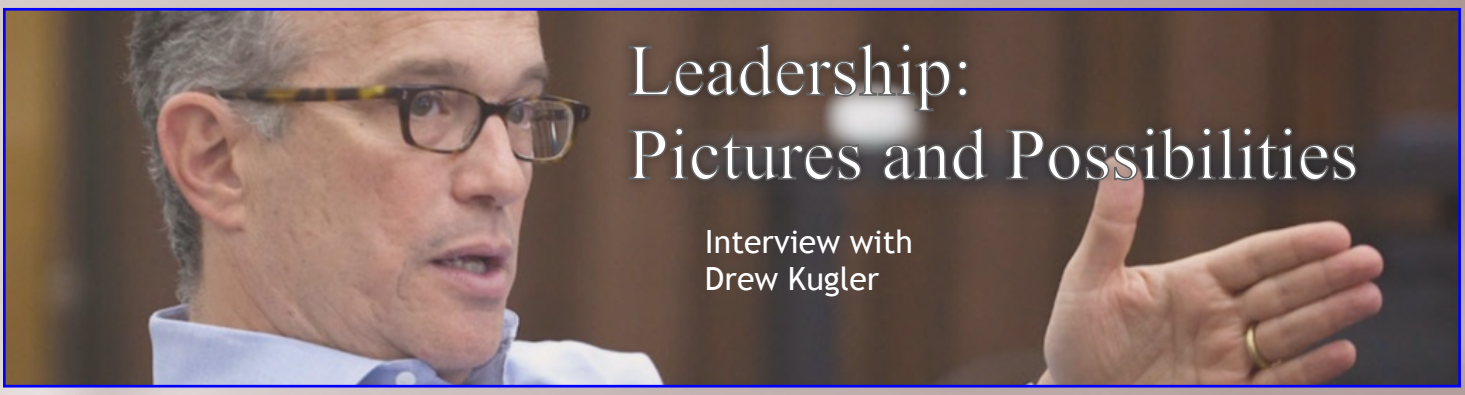
When using the DLSE form, watch out for the question asking whether the employment agreement is "written or oral." Most employees are hired "at-will," avoiding any suggestion of a binding employment agreement, and this concept is referenced both orally and in various places in the company's written or electronic employee handbook. To protect at-will status, consider adding (or replacing the employment agreement question with) at-will language, stating: "This notice confirms that your employment is at-will, meaning that either you or the Company can end the employment relationship at any time, without or without cause or notice."

For those employers who have leased or temporary employees, work with those entities to develop appropriate information for the form, as each company will need to be identified. If the other company is merely a payroll processing service, it need not be identified. Don't delegate responsibility for the notice to a payroll service or temporary agency – provide as much information as you can to the employee and reference the agency's information if appropriate.

If you switch workers compensation carriers, provide notice of that change in written or electronic form. Make sure employees continue to contact the claims administrator rather than the carrier by also providing the contact information for the claims administrator, with a notation that claims may be directed to that resource.

Contact Karen L. Gabler at 805.248.7207 or kgabler@lightgablerlaw.com for further information regarding the 2012 new laws, or other employment law issues.

Karen L. Gabler is an employment attorney and co-founder of LightGabler LLP, a business law firm specializing in employment law, intellectual property and business litigation. Further information regarding Karen's practice or the firm's services, legal updates and articles and seminar events can be found at www.lightgablerlaw.com.



Leadership: Pictures and Possibilities

Interview with Drew Kugler

As an internationally regarded counselor and founder of the Kugler Company, Drew Kugler advises executives and professionals on the always-challenging issues of communication, collaboration, and leadership. He serves the senior ranks in an array of industries and enterprises, including professional services, entertainment, and consumer products, among others. The purpose of his practice is to create conversations with his clients so that they, in turn, will work more productively with others. Drew delivers this work in personal, team, and speech settings.

With his coaching practice now in its fourth decade, Drew has also held management positions in the Hotel, Textile, and Retail sectors, all following a Master's Degree in Communication Studies and three years of University teaching. He has also provided comment on ABC and NPR Radio and CBS News, along with guest lecturing at Stanford University, The School of Jewish Nonprofit Management at Hebrew Union College, and NYU.

With interests in figuring out the worlds of golf and food and wine, Drew lives in Los Angeles with three people even more important than his clients, his wife Lisa and their daughters Alexandra and Marissa. EHRN interviews Drew Kugler below.

EHRN: There are many books and seminars on the subject and topic of successful leadership. How do you define effective leadership? And how does leadership differ for small companies versus large companies?

I believe Leadership lives in two ongoing actions. 1) Engaging the Imagination and 2) Extending Invitation to Others.

Imagining is the foundational act. As a human, the ability to see pictures in your head and behave toward those pictures is what separates you from every other specie on Earth. When you are able to tap your pictures of what is possible and better, you have begun to Lead. Imagination is also, depending on your pictures, the root of cynicism, complaining, and blaming. Those who create pictures that leave us feeling optimistic and energized are those who have the potential to Lead.

If you believe, though, that somehow your smarts, skills and ambitions will bring your imagination to reality, you will soon fail. That's the importance of Invitation. The word "invitation" is deliberate. Once you capture your vision of what is possible, you must invite other people to join in your idea of the future. The trap I see so many mediocre executives fall into is when they believe that they must "get others to change," "motivate others to do the work," or "get people to buy-in to the company vision." Candidly, Leaders who believe that to be their charter are at best going to struggle, and at worst delude themselves that they are somehow imbued with some superhuman capability to change others. I believe you ultimately succeed as a Leader by respectfully and firmly challenging others to join you to make something better. Leadership is treating them with the dignity of telling them the truth as you see it and assuring them that it will only be by their collective choices that success will come. Such dignity and humility is so rare today. It is, though, the only way to bring your imagination to reality.

To me, the fundamental difference between large and small company leadership is the practical challenge to genuinely connect with those you need to. In a small company, the reach is shorter. You are far more able to have credible visibility and conversation with others. It is those conversations that have the potential to change your culture and how people feel about you, your ideas and their role in living them out. In a larger organization, it becomes much more about creating a critical mass of communicators who carry out the conversations. The challenge for leaders there is in developing and trusting others to help spread the invitation and follow up on the responses over time.

EHRN: Has the concept of developing managers to be good leaders through training programs become obsolete in today's business climate? Will strong leaders emerge through the natural course of conducting business?

No matter how much "inherent" talent you may think is at your company, I don't believe it will be enough. Today's best human resource investment will be expanding the potential of EVERY person to learn and contribute. Who says that Imagination and Invitation can't guide everyone's thinking and learning at your company? It's bordering on boring and cliché to say we need all of the people in our organizations to do more with less. Of course we do. The real grace in learning will come when you can help create an environment where each employee sees their own contribution optimistically and doesn't sit silently waiting for some magic voice from the boss to move them. Each person should be encouraged, even respectfully provoked to show up like they matter and be willing to bring that strength to share with others. The model of a Special Few as the future of Leadership is flawed and uninspiring.

EHRN: Company vision is a very internal and conceptual notion. What's the best way to take a conceptual idea like "company vision" and make it operational company-wide?

Vision compels people to action only when it can be seen and creates an emotional connection to those who have to do the work. There are way too many examples of visions and missions strewn with jargon, numbers, and goals that are disconnected from anything truly worth doing hard work for. People will nod their heads, but do not mistake head movement for what you call "buy-in." Unless you are going to create emotional connection to the work, please drop the phrase "buy-in" After all; it's a reference to purchasing a product. People buy products not for what the product does, but how it FEELS to own it. Individual ownership of a vision is incredibly powerful, but only when created by **consistent**, **respectful**, and **candid** conversations between the people who are doing the work. Is that what you have at your company? Then you have a credible vision. Only then. Everything else is just jargony noise.

EHRN: In organizations where the top leadership is not overly controlling, what's the best way middle level managers can carry out company vision or build momentum to address company-wide problems?

Regardless of the controlling nature of senior executives, the most successful organizations today are able to create space and time for the right kind of conversations to happen at the individual, team and cultural level. These conversations are characterized equally by their optimism and by their candor. They are about the "why and how" of getting better and also about what the real obstacles are to doing that over time. Each person, no matter what they do in the company, leaves those conversations with clarity on what is next and what they can do to contribute to that. Is that hard to create? Yes it is. Can it be done? It depends on your answer more than it does mine.

EHRN: From a needs assessment perspective, what's the best way human resources can determine when to bring in outside teaching to address problems within their organization or to implement training programs?

It comes down to your assessment of the level of bravery in your company. If you can objectively say that there is a high level of bravery to have conversations that engage imagination and invite people to find and make their contribution to the work then you don't need help (nor will you want it). Just go have those talks and get at the problems in a brave way.

The places I get to go sense that there is a better, more productive way to be and are willing to take some strategic risk by opening up their thinking and learning. As a trusted HR executive, you should ideally reflect that openness in how you approach your colleagues; invite them to pursue a better, more productive place to work. Ask them genuine questions that make them a little uncomfortable. Then you're leading.

For additional information, Drew Kugler can be reached at dk@drewkugler.com.

Employment Law 101: *Hollywood Edition*

by Rachel Wilkes Barchie

Unfortunately, as careful as an employer may be in California, employment laws tend to favor employees, and like any employer, Hollywood employers are vulnerable to employment lawsuits when they don't cross their T's and dot their I's (and sometimes even when they do).

A recent lawsuit that made the entertainment news, brought by a former employee on a reality show, is a good test case for a variety of employment claims that may arise in the entertainment industry. According to the complaint, the employee was a production coordinator who traveled to a foreign country in connection with her work on the show. There, the complaint alleges, she was allegedly pressured with drugs, sexually harassed, and forced to work long hours until she "broke down" from exhaustion. According to the online docket, the case recently settled, so we will never know how a jury would rule. But I'm going to put on my employment litigator hat for a moment to analyze Plaintiff's claims.

Sexual Harassment and Hostile Work Environment

First, Plaintiff alleges sexual harassment and hostile work environment, based on a series of incidents involving two local men purportedly employed by the network. To win on this claim, she first has to prove that the harassment was "severe and pervasive." Isolated or trivial incidents aren't enough. And an employer isn't automatically responsible for all actions of its employees — there is no strict liability for sexual harassment, unless the alleged harasser is a supervisor or an executive in the company. So absent that, Plaintiff would have to prove that the higher-ups at the network knew or reasonably should have known of acts constituting sexual harassment and failed to stop it.

In addition, Plaintiff would have to show that her employer failed to take reasonable steps to prevent harassment from occurring. In practice, an employer should have a well-crafted anti-harassment policy, train its supervisors about harassment, and implement procedures for an employee to report harassment when it occurs.

Intentional Infliction of Emotional Distress

The complaint also alleges a cause of action for intentional infliction of emotional distress. While these claims are a law school exam favorite (I still have an elevator phobia based on an infamous UCLAw hypothetical for negligent infliction of emotional distress caused by an elevator crash), they are notoriously difficult to win in the real world. Plaintiff would have to prove that her employer's conduct was extreme, outrageous and done with an intent to cause emotional distress or a reckless disregard for the probability of causing emotional distress, a pretty high bar. (For example, a California court has found that a statement by a trustee of decedent's trust to decedent's former wife that "I'll get you on your knees eventually" and "I'm going to ---- you one way or another" does not satisfy this requirement.)

Wage and Hour Claims

And finally, Plaintiff adds some wage and hour claims: specifically, allegations of overtime and meal and rest break violations. Unless they hold an administrative, executive or professional position, employees in the motion picture industry in California (which includes TV production) are subject to very specific work rules, even without the added complication of guild requirements applicable to certain cast and crew.

Regardless of industry, all California employees must be paid one-and-a-half times their base rate of pay for every hour worked over 8 hours in one day or 40 hours in one week, and double their base rate for every hour after 12 per workday. In the motion picture industry specifically, employees may only be employed up to 16 hours per workday (including meal breaks), employees working more than five hours must be provided with one 30-minute meal period, and employees working more than ten hours must be provided with a second 30-minute meal period. Employees must also be authorized and permitted to take a 10-minute rest break for each four hours worked.

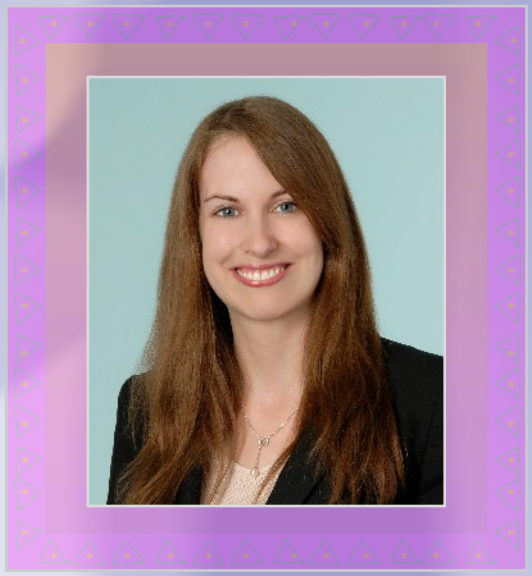
Currently, there is an open question on the issue of whether employers must simply provide the opportunity to take meal and rest periods, or whether employers must actually ensure that the employee takes her meal and rest periods. Any day now, the California Supreme Court will be issuing a decision in the much-anticipated *Brinker Restaurant* case. Based on the court's line of questioning during oral arguments, it appeared skeptical of plaintiffs' argument that employees must take breaks and may be punished if they don't. One justice even referred to this level of monitoring as "coercive." Whatever the court decides will have a significant impact on meal and rest break claims in general.

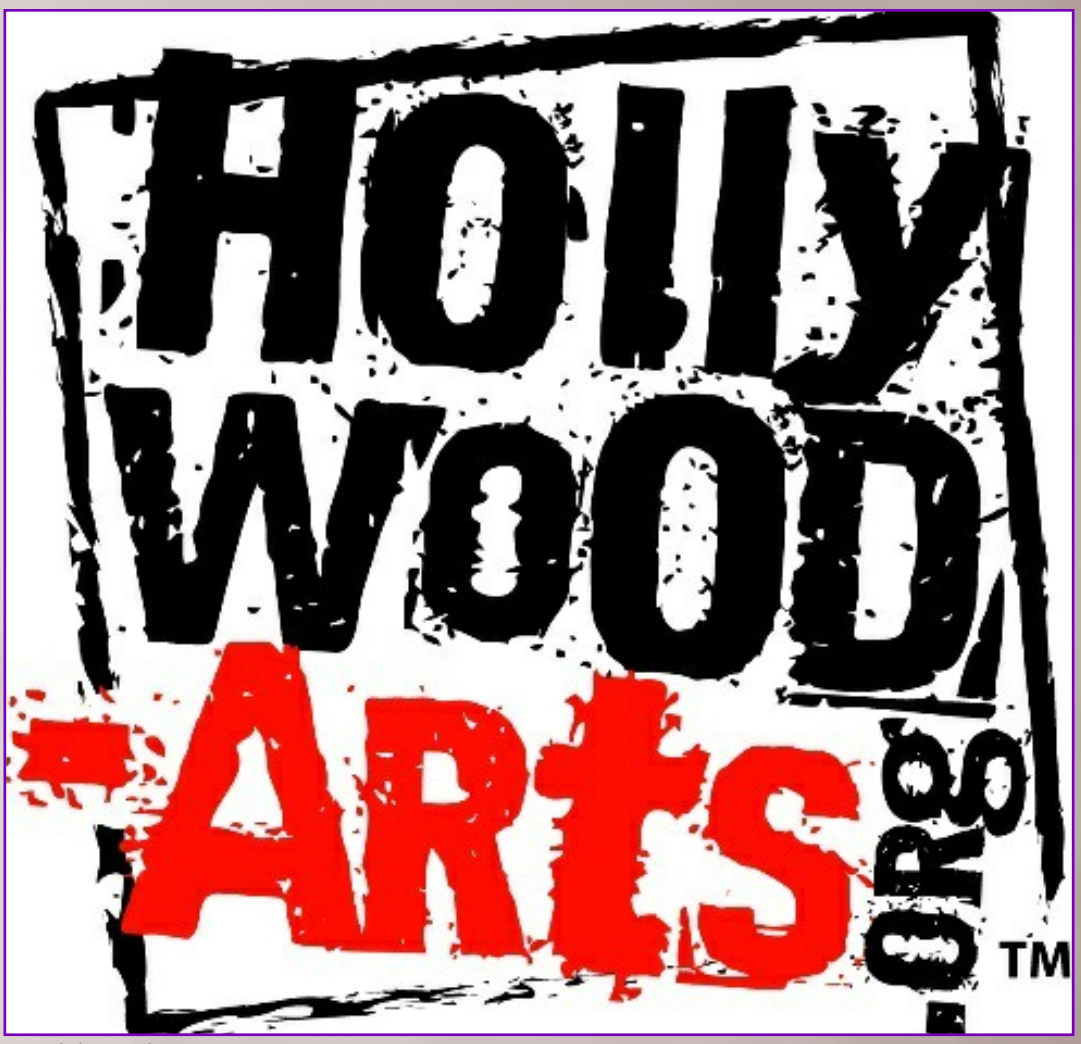
And if You're Wondering How Lowly Employees Can Afford to Bring These Cases in the First Place…

Whatever their foundation, employment claims pose difficulty for employers because of the built-in protection for plaintiffs (and incentive for their lawyers), in the form of attorney fees. If a plaintiff in a discrimination or wage and hour case wins, the employer is typically on the hook for her attorney fees. (The one silver lining is a recent case holding that where the plaintiff is awarded less than $25,000, the judge or arbitrator has discretion to decline to award fees, but there is no guarantee what the judge will decide to do.) On the other hand, even if the defendant employer wins a complete victory and defeats all claims, the plaintiff will only be on the hook for the defendant's attorney fees if the judge finds the case was "unreasonable, frivolous or vexatious." This is good news for employees whose employers violate labor laws, and great news for their attorneys, but bad news for even the most careful employers.

So in the employment context, the best practice for employers vis-à-vis litigation is to take every precaution to prevent it. In the context of harassment, this means creating an employee handbook containing anti-harassment policies, training one's employees, adopting reporting procedures, and enforcing the policies. In the context of wage and hour laws, that means complying with all the rules, including those regarding minimum wage, overtime, and meal and rest breaks. It all may seem daunting, but engaging in these practices on the front end can save time and money in the long run.

Rachel Wilkes Barchie is a litigator at LA-based law firm Greenberg Glusker. She represents employers in a variety of employment litigation matters, including claims for wrongful termination, discrimination, harassment and wage and hour violations. Ms. Barchie is also a regular contributor to her firm's entertainment law blog at www.lawlawlandblog.com. You can reach her at (310) 201-7475 or RBarchie@greenbergglusker.com.





Logo links to website.

Directly Impact Your Community and Company with an Innovative Internship Program

Since its internship program began, six Hollywood Arts students (emancipated foster youth/homeless young adults) have had successful paid internship placements with partners such as Comcast at E! Entertainment Television, the Style Network, G4, and NBC Universal as well as The Second City, and Squeak E. Clean Productions. Two thirds of these are currently employed by their former intern hosts.

Students become eligible to interview for paid internships after successful completion of the Job Readiness Program. Hollywood Arts interns are provided monthly bus passes and cell phone services for the duration of their internships.

If your agency is interested in hosting a Hollywood Arts student for a 12 week paid internship or if you are interested in being a guest speaker at their Job Readiness class on Monday, April 2, at 3 PM, please contact Executive Director Rachel Romanski by telephone at 323/896-7275, e-mail rachel@hollywood-arts.org, or go to www.hollywood-arts.org.

TOP HR TIPS

FOR CALIFORNIA EMPLOYERS

By
MATT BARTOSIAK
SENIOR STAFF CONSULTANT - EMPLOYERS GROUP

A little knowledge can be a dangerous thing when it falls into the wrong hands! Consequently, as HR professionals we have to be very cautious about sharing many of our "little secrets," so as to ensure that the process of carrying out some of our more creative strategic solutions is handled properly.

To assist with this, following are some of the Top HR Tips we regularly share with our members based on the most common issues faced on a daily basis. Some of the ideas and approaches may be somewhat unique.

ALTERNATIVE WORK SCHEDULES – SWITCHING DAYS
An alternative work schedule is a schedule, voted on by employees, whereby they agree to work longer than eight hours a day at straight time. The general rule is that once the schedule is accepted by a 2/3 employee vote, then the days of the week must be listed along with how many hours are to be worked each day. If the schedule is not adhered to, then the exception to "after 8 overtime is lost for that workweek. However, many employers do not know that the state allows an employer to switch the scheduled days worked (e.g. Thursday for Friday) once every quarter without losing the "after 8" overtime exception. This is especially useful to know so the employer can be more flexible in holiday weeks. Also, an alternative schedule that is voted on may include alternate weeks that are" 5/40's."

VACATION POLICIES
Because some employees who won't take vacations, (usually a problem with managers), the employer has two choices:
(1) Pay off the liability and do not give them time off; or
(2) Give plenty of notice that if vacation is not taken, then it will be scheduled for the employee.

PAYROLL STUBS – FAILURE TO REPORT ACCURATE DATA
Know that claims regarding this infraction are a growing goldmine for plaintiffs' attorneys. Remember, now that the payments for missed meal periods and rest periods are deemed a "wage," they must be included in the pay stubs boxes "gross wages earned" and "net wages earned." Aggregate penalties can go up as high as $4,000 per employee.

MISSED MEAL AND REST PERIOD PAYMENTS
These must be paid at the "regular rate" (that rate on which overtime must be based). Once the regular rate is determined, it is payable to the employee. There is another step you must include that "regular rate" payment in a second calculation of the "regular rate" for the purposes of determining the overtime premium. Lastly, remember the payment made to the employee for a missed meal or rest period is not considered an hour worked when calculating total hours worked for the day or week.

CALCULATING OVERTIME---SAVE MONEY!
Maybe your overtime bill can be less…In California, if you pay a salary to a nonexempt employee, and also pay incentives, then you will liable for a larger overtime payment then if you had paid the nonexempt employee a hourly rate.

Employers Group's Helpline Consultants field approximately 60,000 calls per year addressing every conceivable (and some inconceivable!) nuance of employment practices. It is the Employers Group role to share their knowledge and insights with the HR community.

Arbitration Agreements:

U.S. Supreme Court Opening New Possibilities

By Ivan B. Perkins & Dan Handman

In California, over the past 15 years, arbitrating employment disputes has grown laborious and expensive. Some employers have given up, choosing not to create arbitration agreements or to have their employees sign them.

But in the past few years, the U.S. Supreme Court has been providing some enticing incentives to get back in the game. As long as the Court retains its current five-justice majority, this trend will probably continue. California employers, in particular, should take note.

The California Supreme Court's Perspective

California courts, led by the California Supreme Court, view arbitration as a risky proposition, whereby employers may use their superior bargaining power to undercut employees' ability to vindicate their legal claims, thereby leading to injustice and inefficiency. Therefore, the California courts see it as their duty to create certain minimal standards for arbitrations, and to police arbitration agreements for unfairness.

In 2000, for example, the California Supreme Court set down rules in the *Armendariz* case for arbitrating basic "non-waivable" employment protections (such as wage and hour laws and non-discrimination laws). *Armendariz* required any such arbitration agreements to provide for a neutral arbitrator, adequate discovery, all types of relief otherwise available in court, a written arbitration award that permits limited judicial review, and to require the employer to pay all arbitration fees and costs.

Recent cases have extended this perspective. In 2010, the Court reversed an arbitrator's error that denied the plaintiff a hearing on his Fair Employment and Housing Act ("FEHA") claim. By doing so, of course, the Court undermined the finality of arbitration.

The U.S. Supreme Court's Perspective

The U.S. Supreme Court, on the other hand, has been looking at arbitration from a different angle. Rather than monitoring the fairness of arbitrations, the Supreme Court has been emphasizing freedom of contract. Arbitration agreements are like other contracts, the Court reasons, and the role of the courts is to enforce them.

One result is a shift in focus—from the *judge* to the *arbitrator*. If arbitration agreements empower an arbitrator to decide certain basic questions—such as whether the dispute can be arbitrated—then the U.S. Supreme Court enforces those agreements, and hands those questions over to the arbitrator.

Another result is probably more important to many employers: if parties agree that they will arbitrate their disputes individually, rather than in "class action" arbitrations, the U.S. Supreme Court enforces those provisions as well. This was the result in 2011's momentous *AT&T Mobility* case. This can make a dramatic difference: with appropriate arbitration agreements, employers can turn class-action lawsuits—which can easily cost tens of millions of dollars—into small, single-plaintiff arbitrations.

Which Perspective Prevails?

Understandably, employers might assume that the California philosophy prevails, at least within California. After all, many California employment laws are more protective of employees than their federal counterparts, and thereby set a new and higher "floor" for the treatment of California employees. Moreover, arbitration agreements are contracts—and contract law is determined at the state level, not at the federal level.

In fact, though, the U.S. Supreme Court has the final word on enforcing arbitration agreements. This is because the Federal Arbitration Act, or FAA, explicitly pre-empts state law. The FAA covers all employees whose work is connected in some way with "interstate commerce." In this day and age, the vast majority of employees work within "interstate commerce," by placing goods or services into the flow of commerce, by using interstate telecommunications (like the internet, telephone, and U.S. Mail), or by serving out-of-state or traveling customers. In the recent *AT&T Mobility* case, for example, the U.S. Supreme Court explicitly overturned the California Supreme Court's prior rule on this basis. Just a few months later, on Halloween, the U.S. Supreme Court vacated another California Supreme Court arbitration decision, *Sonic-Calabasas*, and remanded for reconsideration in light of *AT&T Mobility*.

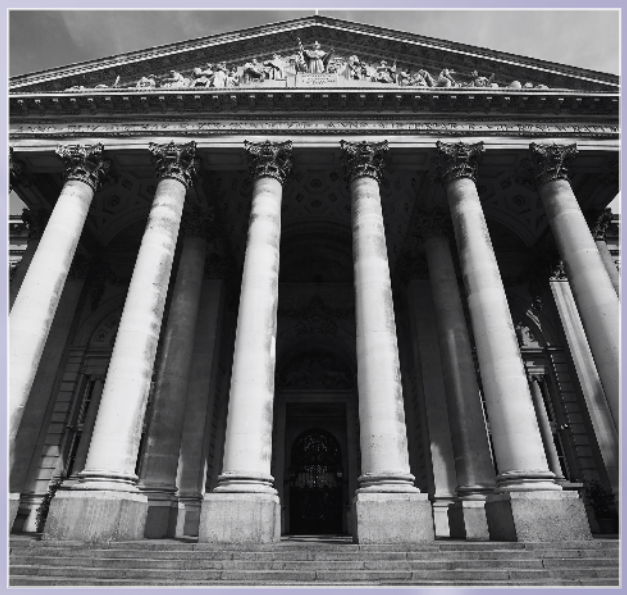
Of course, California courts have repeatedly demonstrated a Houdini-like ability to wiggle out of apparently iron-clad federal case law. But as long as the current five-justice majority remains intact, watch for the U.S. Supreme Court to repeatedly reverse the California high court on arbitration issues.

Employers: Looking at the Bottom Line

California employers should understand that their freedom to maneuver in the field of arbitration is being rapidly expanded. The U.S. Supreme Court is affirming the use of class-action waivers (agreements to arbitrate on an individual basis only), and employers concerned about class-action lawsuits should be particularly attentive. If only one class-action lawsuit can be transmuted into a single-plaintiff arbitration, the savings are likely to be substantial.

Please contact Dan Handman at dhandman@chklawyers.com or (310) 255-1820 for further information or assistance with drafting a strong and employer-friendly but enforceable arbitration agreement in the current legal environment.

Mr. Perkins is an associate, and Mr. Handman is a partner, at the law form of Curiale Hirschfeld & Kraemer LLP in Santa Monica. The firm's website is at www.chklawyers.com.



Test Your Knowledge of *Global HR*

1. A totalization agreement's main benefit to assignees is:

A) Eliminates double taxation
B) Social security tax will be paid by neither country
C) Assures social security tax is paid by more than one country
D) Only one country pays social security tax

2. U.S. citizens working abroad are protected by the Civil Rights Act of 1991's EEO laws except when:

A) EEO laws protect all U.S. citizens regardless of the host country's laws
B) When the laws are similar or equal to the laws of the host country
C) There is no conflict with host country laws
D) When business necessity dictates the best course of action

3. A global mobility policy's most important goal is to:

A) Encourage transfers by offering incentives
B) Be an extension of your company culture and general practices
C) Make sure your plan is competitive by exceeding the offering of your competitors
D) Strictly monitor costs across the board

1. D, 2. C, 3. B

Spotlight on Recruiting

As the economy slowly recovers, recruiting and staffing will likely be one of the most important HR activities for the next several years. The LAAHRP group is pleased to interview Laury Martin. Laury recently served as Director of Recruitment for GolinHarris, Rogers & Cowan, The Axis Agency and Weber Shandwick at $6 billion conglomerate, IPG's Constituency Management Group (CMG). Specializing in talent acquisition, Laury has also managed recruitment teams and placements for Universal Sports, Warner Bros. Studio Facilities, Coca-Cola Enterprises, MindShare, Ogilvy & Mather, Dreamworks, and The Walt Disney Studios.

EHRN: There was an article in a popular New York publication where job seekers criticized human resources for an uncaring attitude, specifically regarding not returning phone calls and not following up quickly or not at all, in some cases, after being interviewed. How do you respond to unsolicited resumes and phone calls and what's the best way to inform applicants they did not get the job?

LM: For unsolicited resumes, I use a standard template. The messaging differs based on the company/brand I work for. For example, Coca-Cola's style is more formal, so candidate replies follow suit. For CMG, the target audience is more creative, so the messaging is more conversational.

There isn't a "one-size fits all" approach when it comes to informing candidates they didn't get the job. A good rule of thumb is to reciprocate the time/attention a candidate gives to the company. Let's say a candidate has taken a whole day off of work to interview with 10 people and didn't get the job. At the minimum, this person deserves a phone conversation. They may not be right for the specific opening, but might fit further down the line. They could also be a good resource for referrals. If you don't make time to get back to candidates, why should they take time to apply? People remember the little details.

If a candidate was only phone screened then an email is appropriate. When in doubt, send an email. If you don't have an applicant tracking system, create a "copy and paste" template and mail merge! Are the standard form notices that are typically sent to job applicants to let them know they did not get the job, still the best option? Standard works during the initial application process, if they are interviewed in any way, they are looking for a little more than a standardized message.

EHRN: Despite high unemployment, are qualified candidates easy to find? If so, what methods are you using to source candidates? What resources or sites have you had the most success with? And what resume or candidate resources have you not had success with?

LM: Linkedin is by far the best resource for sourcing candidates. Technique is key and spamming candidates will not get you the response you are looking for (unless your company's brand sells itself). I do believe that job postings work, but in a different way in this market. In the early days of job postings, candidates would see a job and apply. Nowadays, the job postings serves as an "advertisement". A candidate will see this "advertisement" then go into their networks to see who they know. Referrals are key in this job market. I strongly believe in referrals and recruiting passive job seekers. So remember, if you are seeking referrals, it's important that you get back to folks (addressed in question number 1).

EHRN: There is a provision of President Obama's Jobs Bill that prohibits discrimination against the long-term unemployed. Some opponents of the Jobs Bill believe the long-term unemployed are abusing unemployment benefits or are not diligently looking for work. Other companies will not hire the long-term unemployed due to skill erosion. What are your thoughts on hiring applicants who have been out of work a year or longer?

LM: There are hiring managers who won't see a candidate that is out of work for over a year, and make assumptions based on personal biases. I believe that you should interview a candidate based on their competencies and accomplishments that match the needs for a position, regardless if they are employed or unemployed. I have made successful placements with people who were unemployed because they fit the job and I was able to sell them into the organization. Many of these hires are top performers.

Everyone has a story and the company risks losing a significant source of their talent pool by passing unemployed candidates. Empirical data shows a trend of good employees leaving jobs without another so that they could have the time to pursue change. Since the economy tanked, people have taken on additional responsibilities due to RIFs and have regularly worked 13+ hour days, wanting change, but don't have time to look so they resign. My point is, there are many reasons why people are out of work and we as recruiters need to take the current job/working climate into consideration before passing on a good candidate.There are many tools, blogs, and networking events to attend in this market to keep one's skills "updated". If anything, the person who is unemployed would have more time to enhance their skills because they have the time to hone them.

EHRN: How would you describe social media's role and impact on the recruiting process? How have you used social media? And do you believe that the selection process can remain unbiased when recruiters use background information found in social media sites to eliminate potential candidates without interviewing them?

LM: Social media is an additional platform to existing sourcing strategies. The selection process can remain unbiased as long as the screening and selection process is consistent across the board. Eliminating a candidate based on social media sites without interviewing them is similar to passing on an unemployed candidate without interviewing them. I once had a final candidate disqualified during the "reference" stage of an interview process, because of racial slurs found on their Twitter profile.

EHRN: Some recruiters criticize the interviewing process within their own companies as being negatively impacted because multiple interviewers are involved in the selection process. In situations where there is more than one interviewer, how should HR recommend the interview be conducted so that the candidate is not being asked the same interview questions repeatedly?

LM: Plan, plan, and plan some more. The department head should partner with the recruiter to determine the list of competencies and accomplishments that will define success in the position. The recruiter should share with the hiring manager, the pros and cons (areas to probe further) of their interview. Pros should support why you are presenting them and the cons should be probe further by the hiring manager/department. I'm a firm believer that a hiring manager will make the best hire if they understand "how the applicant thinks", not by "what they know". For multiple interviewers, I recommend conducting a panel interview whereby each person asks a competency question. Debrief after the interview and then rate each candidate on overall fit. Just make sure all of the candidates are interviewed and asked the same set of questions for consistency.

Thank you Karen L. Gabler very much for your outstanding *just what the doctor ordered* recap of the new 2012 employment laws.

EHRN would like to thank leadership coach Drew Kugler for the interview on the topic of the pictures of and possibilities of leadership.

First time contributor Rachel Wilkes Barchie, from Greenberg Glusker, has submitted an important article on the topic of employment law in the entertainment industry. We thank her and Jonathan Fitzgarrald.

Dan Handman and Ivan B. Perkins from Curiale Hirschfield & Kramer LLP have provided us with a great article clarifying the federal and state laws surrounding arbitration agreements.

We are very pleased to provide information about *Hollywood Arts*. Rachel Romanski is doing a fantastic job helping the homeless in our community by providing training and internships. We hope EHRN members join this very important organization.

Thank you Matt Bartosiak and Bill Stephens, from the Employers Group, for providing fantastic tips for HR professionals.

Laury Martin has done a fantastic job recognizing the important role staffing and recruitment will play as the economy gets better.

EHRN Members, please get involved with the newsletter or host a meeting. We need your help to keep this effort moving forward.

Thank you.