



THE CONSIGLIERE

FALL 2019

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FROM THE CO-CHAIRS

Let us know your ideas and suggestions for **THE CONSIGLIERE**:

- Call or email Brittany Smith at 218-1235 or brittany.smith@siemens-healthineers.com;
- Paul E. Wehmeier at 546-700 or pwehmeier@adhknox.com; or
- Tammy Sharpe at 522-6522 or tsharpe@knoxbar.org.
- Submit an article for consideration.
- Give us your feedback on this newsletter.
- Tell us about CLE topics or networking events you would like the Section to sponsor.

FROM THE CO-CHAIRS

By: Marcia Kilby, DeRoyal

If you have been to the mall or any retailer lately, you probably noticed that the holiday season is upon us. While I think that the “holidays” start earlier every year, it’s not too early to start thinking about that one holiday event that may put a damper on any corporate counsel’s holiday cheer: the office holiday party. Here are my top 5 tips for keeping your holiday parties merry and bright and, hopefully, your employees out of the lawyer’s office.

- Limit Alcohol. While some amount of alcohol is often necessary to make it through the party, (i) don’t offer an open bar, (ii) consider hiring a professional server, and (iii) always serve food if serving alcohol.
- Invite Their Better Half. There’s no better watchdog or ride home than a spouse or significant other...just saying.
- Lose Your Religion. Avoid religious themes and instead focus on the company’s successes during the past year.
- Bah, Humbug. Your employees should be encouraged to have a good time, but it wouldn’t be the holidays without a little Grinch. Make sure everyone knows that the company’s standards of conduct, such as policies against discrimination or harassment, apply at the party. It also wouldn’t hurt to use a professional photographer at the event to discourage the posting of any embarrassing videos or photographs on social networks.
- Oh, No, The Mistletoe. Always remember that alcohol (which lowers inhibitions) and mistletoe (which invites unwanted touching) don’t mix...seriously!

**FROM THE
CO-CHAIRS
CONTINUED**

While there is always risk involved in holding any company-sponsored function, I hope you can reduce your legal liability by observing as many of the above recommendations as possible. Want to learn more? Join the Corporate Counsel Section tomorrow, November 5, at Patricia Nash Designs for holiday shopping and one hour of general CLE on employment law topics, including holiday party liability.

Wishing you the best this Holiday Season,

Marcia A. Kilby
Co-Chair

P.S. I want to take this opportunity to thank the following people for their significant efforts on behalf of the Corporate Counsel Section over the last year: David Headrick, Section Co-chair; Peter Brewer, Section CLE Committee Chair, Paul Wehmeier, *The Consigliere* Co-Editor; Brittany Smith, *The Consigliere* Co-Editor; all contributors to *The Consigliere*, and last but not least, Tammy Sharpe and the rest of the wonderful KBA staff.

**UPCOMING
EVENTS**

UPCOMING EVENTS

KBA Corporate Counsel Section presents:

Tis the Season: An Update on Employment Issues for In-House Counsel

Tuesday, November 5, 2019

Patricia Nash Designs - 1132 N. 6th Ave., 37917

5:30 p.m. - 6:30 p.m. CLE

6:30 p.m. - 7:00 p.m. **Enjoy holiday shopping while the store is closed!**

Approved for 1 hour of General CLE

Cost: \$20 KBA Members; \$30 Non-KBA Members; No charge for KBA Members not seeking credit; No charge for Non-Attorney guests of KBA Members

Featuring: Brandon L. Morrow, Kramer Rayson LLP

Our presenter will cover an employment law update and best practices for in-house counsel. Topics will include but will not be limited to wage & hour developments, sexual harassment, discrimination due to race, gender, age or other factors, holiday party liability, hostile work environment, and enforcement of confidentiality and non-compete covenants

*A reservation is required in advance of the program - \$ 5 dollar additional fee the day of the program. You do not need to be a member of the section in order to attend the CLE program.

Register by clicking on November 5 in the event calendar at www.knoxbar.org

U.S. DOL Unveils Final Overtime Rule

By: Sarah R. Johnson, Holifield Janich & Ferrera, PLLC

On September 24, 2019, the United States Department of Labor (“DOL”) announced a Final Rule amending the overtime pay exemption requirements under the Fair Labor Standards Act (“FLSA”). The new Final Rule updates the salary level required for exemption from overtime pay of time-and-a-half for all hours worked over 40 in a workweek to \$684 per week or \$35,568 annually. Under the previous rule, set out in 2004, the salary threshold was set at \$455 per week or \$23,660 annually. The Final Rule is effective on **January 1, 2020**.

What is new?

- The salary threshold in the Final Rule is within a few dollars of the salary threshold proposed by the DOL in March 2019.
- The Final Rule increases the total annual compensation for highly compensated employees (“HCEs”) from \$100,000 to \$107,432, provided HCEs are paid at least the standard salary level of \$684 on a weekly basis.
- The Final Rule revises the special salary levels for workers in the U.S. territories and in the motion picture industry. Specifically:
 - Special salary level for workers in Puerto Rico, U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands is \$455 per week.
 - Special salary level for workers in American Samoa is \$380 per week.
 - “Base rate” threshold for employees in the motion picture industry is \$1,043 per week.
- The Final Rule allows employers to make a “catch up” payment within one pay period after the end of the 52 week pay period if an employee does not earn enough in nondiscretionary bonuses and incentive payments (including commissions) in a given 52-week period to retain his or her exempt status. If the employer chooses not to make the catch-up payment, the employee would be entitled to overtime pay for any overtime hours worked during the previous 52-week period.
- The Final Rule allows employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard salary level.

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- The Final Rule does not include automatic adjustments over time to the salary threshold.
- The Final Rule does not update the “duties test.”
- According to the DOL, the salary threshold increase expands overtime eligibility to 1.3 million additional U.S. workers.

What Should You Do to Comply?

- Increase salary level for exempt employees:
 - Through straight pay by increasing salaries to a minimum of \$455 per week or \$35,568 annually.
 - With non-discretionary bonus (only up to 10% of the standard salary level or \$3,556.80 for employees not classified in special salary levels).
- Determine if nonexempt salaried employees should be converted to an hourly pay basis.
 - Pros: tracking and paying overtime will be easily facilitated.
 - Cons: may be viewed by the affected employees as a demotion.
- Adopt protocols to ensure that nonexempt salaried employees are paid overtime at the proper rate.
 - Revise Employee Handbooks and policies relating to overtime and time keeping.
 - Implement time clock system.
 - Travel time incurred by newly reclassified employees should be analyzed to assess whether and to what extent that time should be considered compensable time and if adjustments to travel schedules should be implemented.
- Evaluate telecommuting and other alternative work arrangements to determine whether compensable time can be realistically managed and tracked from remote locations.
- Remind employees about when they are permitted and not permitted to engage in work-related activities outside of scheduled work hours.

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- i.e. employees checking and responding to work-related emails and texts outside of their normal work hours.
- Analyze whether the fluctuating workweek approach is beneficial, which can result in a substantial reduction in overtime pay costs.
- Analyze whether the size of payroll should be reduced.
- Analyze whether the compensation of employees should be reduced.

IN-HOUSE TIPS

TEN THINGS: ATTRACTING, TRAINING, AND RETAINING IN-HOUSE LEGAL TALENT¹

By: Sterling Miller, Hilgers Graben PLLC

While general counsel and senior members of a legal department usually spend a significant amount of their time focused on the legal issues facing the company, they rarely give the proper amount of attention to the core feature of the department: the talent. Without talented individuals, none of the legal work gets done or gets done well. And the cost of replacing someone who leaves can be dramatic in terms of time-to-hire, expense, and impact on the ability to get work done. Consequently, all general counsel and department managers need to understand the importance of how to attract, train, and retain top-level legal talent in their organization. Here are some **interesting statistics**: in 1980, about 26% of licensed attorneys in the US were under the age of 35. In 2018, only 4% are under the age of 30, with an expected **15% decrease** in the number of 35 to 44-year olds in the marketplace! The pool of in-house candidates is shrinking and as our population ages and lawyers leave, finding *and retaining* legal talent will – if not already – become a big part of the general counsel’s job (which means it will also become part of the job of everyone reporting to her). This edition of “Ten Things” discusses how to attract, train, and retain in-house legal talent:

1. It’s not always about money. The most important thing for anyone to remember about attracting legal talent to an in-house department is that it is not always about the money. In **one recent survey**, only 26% of responders claimed that money as the driving factor for working in-house. Generally, in-house

¹ *Ten Things: Attracting, Training, and Retaining In-House Legal Talent*, originally published May 16, 2019, is published with the permission of Sterling Miller, the author, *available at* <https://sterlingmiller2014.wordpress.com/>.

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candidates already know that they would likely make far more in salary if they worked at a law firm, especially at one of the AmLaw 250. Candidates for in-house positions, however, are typically driven by other factors such as being deeply ingrained in the business, not having to keep track of their time, getting large amounts of responsibility, getting meaningful work and satisfying work, career development, and interaction with the board of directors/senior management. Start your recruiting efforts by focusing on the non-monetary benefits of your in-house practice. While you cannot ignore the money factor, these are the things that will ultimately win the day.

2. Prepare an informative job description. Surprisingly, in-house departments often spend little time thinking about or preparing the job description – the first thing a potential recruit reads. Even worse is letting the recruiters in HR put it together without your input and review. This is a wasted opportunity to tout the role, the department, and the company. Recruiting is *selling*, and you can't sell a boring product. Use the job description to get people excited about the role and about working with your team and company. **Be sure to include:**

- A detailed description of the primary duties (show them what the day-to-day is about).
- Any secondary duties or opportunities (show them what other opportunities await).
- Experience and educational background required (be honest about what you want but don't get hung up on *only* people from Top 20 law schools and law review editors). And don't automatically skip over candidates with lots of experience. They are likely sincere in their interest in the role even if they have vastly more experience than you set out in the job description. You might get very lucky and hire a superstar for a bargain.
- The type of person you are looking for (e.g., energetic, self-starter, etc.).
- Why the company, the department, and the role are exciting (set the hook).

3. Start recruiting! Rarely does great legal talent just show up on your doorstep looking for a job. You must get out there and recruit it. This leads to your biggest decision, i.e., recruit on your own or hire a recruiting firm? There are **pluses and minuses** to either path. With a recruiter, you will spend less time sifting through resumes and interviewing dead ends. You'll also pay a lot of money. If you do it yourself, it will likely take longer to fill the role and you may miss out on so-called "passive" candidates, i.e., those who are not actively looking but whom a recruiter might reach out to (though LinkedIn is starting to change this dynamic). Regardless of the path you choose, don't forget your biggest recruiting asset – your own connections as well as those of your team. The best choice and fit is often someone you or your team already know (including promoting from

IN-HOUSE TIPS CONTINUED

within). Finally, don't get caught in the trap of replacing people who leave with someone with the exact same skills. If you have an opening, take your time thinking about what the department really needs the open head for. It may be the same role or it may be something different. Fill your needs, not your past. And don't forget the on-boarding process. When I started in-house it was definitely "sink or swim!" That's okay but it greatly lengthens the time it takes new lawyers to get up to speed and it can also be a turn-off for some lawyers. Most companies have a one-to-two day formal new-hire orientation. Developing something similar specifically for the legal department is a great way to help new lawyers feel at home and at ease right away.

4. Create a great work environment. No one wants to hate going into the office. That's why it's so important to create and sustain a great work environment as part of your plan to attract and retain talent. The first rule here is "no jerks." It's your responsibility to hire the right types of people. Jerks will quickly create a toxic work environment, so don't hire them and if you have made a mistake, get rid of them. And don't be one yourself – which is just as toxic and usually worse. Additionally, focus on developing an open-communication style about what's going on in the company and in the department, along with honesty about what you expect from everyone on the team. People want to understand the big picture and where they fit in. Listening, inclusion, and consistency are also important. Likewise, understanding that balance between work and home is critical. As is flexibility, which is something most in-house lawyers crave, i.e., the ability to leave early to attend their child's play or to work from home on occasion as needed (and, believe it or not, most law firms are ahead of in-house departments on this front). Your employees want to earn your trust and feel assured that you know they are taking care of business regardless of where they are working or when they leave the office. And if anyone is not earning your trust, you need to get rid of that person quickly as nothing drives inter-office turmoil like your team feeling someone is getting away with not working hard. Finally, have fun. Being a lawyer doesn't have to mean drudgery. Lighten up, make fun of yourself, laugh at the craziness you deal with every day and watch how your team responds.

5. Build a diverse team. A key to attracting and retaining legal talent going forward will be your ability to build a diverse team of players. Many corporations already understand the benefits of diversity (e.g., hearing different viewpoints, different experiences, looking at issues and problems through a different lens, language skills, and many more), which mean in-house legal departments tend to be head of the curve on the issue vs. law firms as legal departments typically embrace corporate initiatives and drive them forward. There are four keys to building diversity in-house:

- A consistent and dedicated approach to finding diverse talent for open positions.

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- Working outside the department in the community to find ways to assist diverse talent find opportunities (e.g., internships, scholarships, and similar programs).
- [Encouraging outside law firms and vendors](#) to bring on diverse legal talent which, ultimately, increases the available pool of such candidates for you.
- Providing strong mentoring to the diverse candidates you bring on board so you are invested in their success (see No. 7 below).

You don't have to lift the world on your shoulders to do something in each of these categories. Every step forward helps, even the little ones. For more on this, check out a great article on "how" to build a diverse legal team written by Mark Roellig and Marc Walters back in 2011 entitled simply enough, [How to Build Diversity and Inclusion in the Corporate Legal Team](#). It's still one of the best pieces on legal department diversity I have read.

6. Ensure a career path for everyone. This may be the hardest task of all. Most legal departments are small, meaning there is not a traditional series of steps to climb up the ladder. In [one study](#), 75% of in-house lawyers realize promotion was rare but are still satisfied with their jobs. So, this may not be the problem you think it is. The trick here is to find ways to allow your team to grow professionally, be it by increased responsibilities or areas of practice, access to senior management, "owning" a project or area, being part of the team that operates the legal department, [proper delegation](#), rotations (if the department is big enough or more "generalization" if not), or whatever else you can think of (for example, "[desk titles](#)" can be a lifesaver here). Moreover, many legal departments fall into the trap of having the same people support the same business units for the same issues. While this is uber-efficient, it means lawyers get in a rut and others get shut out of interesting work and opportunities to meet and work with different parts of the company. Changing this up can have a dramatic impact on morale and engagement. It also means opportunities to join and participate in professional organizations, attend training courses to enhance a skill or develop new ones. This all underscores the importance of annual reviews that both the manager and employee take seriously (vs. the "keep doing what you're doing" review I have seen so many times). In the in-house world, try to focus more on *performance* vs. *productivity*, i.e., results and client feedback vs. sheer number of hours in the office. Everyone works differently and you cannot apply a cookie cutter review process and expect a great response from everyone. You also need a continuously updated [succession plan](#) which is your bible when it comes to career development for your team. Doing all of this properly requires two things: first, working out the necessary skills sets and experience levels needed to define entry-level, mid-level, and senior-level attorneys in your department; and second, a "build" vs. "buy" mentality for the General Counsel, i.e., it's better to mould what we have vs. trying to continuously find and train new people.

IN-HOUSE TIPS CONTINUED

7. Establish a mentoring program. I have been asked to be a mentor a number of times over the course of my career. I always approached the process with enthusiasm and a willingness to go above and beyond. But it's a two-way street. Some of my mentees took advantage of everything I had to offer. Some just wanted to tick the box that they had met with me (and got it over with as soon as possible). But, for those who took it seriously, I think we both learned a lot from each other – for me especially about working with younger employees (see No. 10 below). And those who took it seriously tended to stick around while the others usually left (on their own or with a push). Regardless, one of the best things you can do is establish a mentor program for the attorneys in the department. While typically they are, the mentors do not need to be other lawyers in the department, they can just be savvy and successful people you have met in the business (or even outside the company). Some companies already have formal mentor programs available. Make sure that the legal department takes advantage of these programs – at least offer it to your team. I think I can probably dedicate an entire post to this topic so I'll just set out some resources you can check out if you're interested in exploring this further. And remember, if you're the mentee the responsibility (and benefit) sits equally on your shoulders to make it work and get the most out of the opportunity:

- [*Mentoring and the Implementation of a Mentoring Program.*](#)
- [*How We Built a Mentoring Program that Actually Works.*](#)
- [*Mentoring Plan Templates for In-House Counsel.*](#)
- [*5 Corporate Mentoring Programs Worth Imitating.*](#)
- [*Above the Law – Mentoring*](#) (series of articles).

8. It's not always about money... until it is. Above I wrote that it's not always about money... but sometimes it is. If you want to attract and retain top talent you at least need to be “competitive” when it comes to compensation. If you're able to pay the “well,” even better. Here are the components of compensation that you should consider as part of the pay-plan for your talent:

- Salary.
- Equity (options, restricted shares, performance share, phantom stock, employee stock purchase plans, etc.).
- Annual bonus.
- Spot bonus.
- Signing bonus.

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- Retention bonus.
- Deferred compensation plans.

Work with HR to make sure you understand everything available to you here. Don't forget benefits when creating your compensation packages. Things such as matching 401K contributions, sabbaticals, vacation days, stock purchase programs, health/dental/eye insurance, subsidized/free lunches, snacks, relocation packages, public transportation reimbursement, parking, and so forth. All these elements need to be front and center when you are discussing compensation with incoming or existing talent. Lastly, be sure you are paying men and women, minorities and otherwise, the same overall compensation for the same job. You can also make this a selling point as most companies have some catching up to do in this area.

9. The little things make all the difference. The most powerful words in the universe are “thank you.” It costs you nothing to say it or write it, but it means the world to the person on the receiving end. This underscores the power of the “little things” as a retention tool. Little things are small rewards or recognition that cost little but which send a powerful positive message to your employee. A birthday card or a call out to the larger team at a staff meeting about someone's work anniversary or work accomplishments. A team movie afternoon sneak away, a surprise pizza lunch, a monthly traveling award rotated among your team, a sporting event with spouses/significant others, a massage/spa gift certificate, a joke a day on the team's Slack channel, learning the names of their significant other and children, not looking at your phone when meeting with them, or a thousand other small but meaningful gestures that show that you, as a manager, care about them as people as much as employees. More than money, more than great work, the little things are like *Gorilla Glue* when it comes to retaining talent. They may be able to get more money somewhere, but can they duplicate the feeling of belonging they get when you consistently take the steps needed to show you care and that they are valued? Generally, not. Make leaving the department a *very hard* decision with just a few low-cost gestures.

10. Millennials. If you paid attention to statistics in the introduction, you understand that the sheer number of available lawyers is going to shrink. While fewer lawyers may be a good thing to some extent, it means that in-house lawyers in charge today will likely need to change their behaviors and expectations when it comes to recruiting and retaining the next wave of lawyers – the Millennials (i.e., employees born in the eighties and nineties for the most part). Millennials already comprise about 33% of the overall workforce and, to be blunt, many of the things important to my generation of lawyers are far less important to Millennials. While a generalization, Millennials tend not to plan on staying at one company for their entire career. They love technology and value flexibility, creativity, and diversity. Work-Life balance is key, and vacations and weekends

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matter, as do experiences. There is often impatience around the speed of advancement and – to some extent – an adverse reaction to criticism. This is not to say that they don't want to work hard or do good work, they do. They just want to do it differently than many of us have done over the past 20 years. How you deal with these new expectations will go a long way to determining how your department will staff and retain lawyers in the future. While you may need to manage them differently, you do not need to coddle them or acquiesce to every demand. And they do need to be trained on how to do things as no one comes into any job fully-formed and fully functional. This means a lot of emphasis on No. 6 above and probably a lot of explaining the “why” behind what you're doing. But, get used to it because this is the next wave.

The good news is that the above applies pretty much to any legal department anywhere in the world (and be sure to check out the hyperlinked articles for more). How much of the above applies to your department depends on the circumstances. It may be all of it, it may just be a few nuggets. Regards, as important as the legal needs of the company are to the management of a legal department, ensuring you can attract, train, and retain top talent is even more so. General counsel and senior in-house management need to up their game when it comes to all three. Are you doing all you can do? Are you ready to embrace change with a death hug? If not, you may see people walk out the door or never come in the door in the first place – both of which are the last thing any general counsel or hiring manager needs to see or deal with.