THE GROWTH COMPANY

Human RESOURCES

2016 NOVEMBER/DECEMBER NEWSLETTER

411 WORKPLACE ANSWERS

911 REVELATIONS FOR WORKPLACE CHALLENGES & FIREFIGHTS

NEW OT RULE
Overtime Rule - Steps to take now!

EEOC
Transgender Employment Rights

LEADERSHIP
Supervisor Academy Courses 3 & 4

907.276.4769
www.thegrowthcompany.com

FEATURED TOPICS

a NEW FLSA OVERTIME RULE

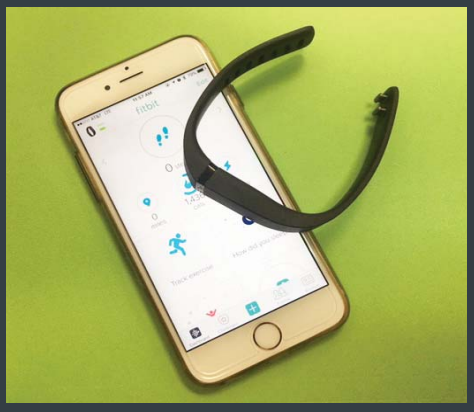
By: Richard Birdsall, The Growth Company, Inc.

b TRANSGENDER EMPLOYMENT RIGHTS FRONT AND CENTER

By: Richard B. Cohan, FisherBroyles LLP

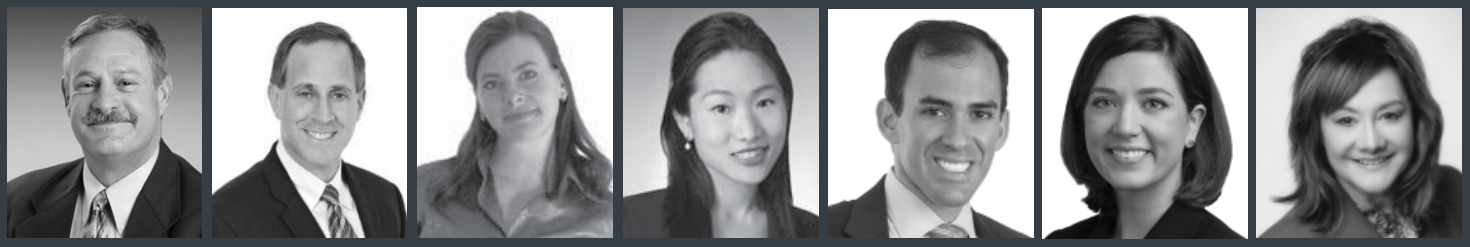
c WEARABLE DEVICE DATA IN EMPLOYMENT LITIGATION

By: Karla Grossenbacher & Selyn Hong, Seyfarth Shaw LLP



FEATURED AUTHORS

The below authors are featured in this bi-monthly newsletter. Author details are included on each page.



NEWSLETTER CONTENTS

NEW FLSA OVERTIME RULE

WILL IMPACT EMPLOYEES - STEPS EMPLOYERS NEED TO TAKE NOW by Richard Birdsall, J.D.

A NEW OVERTIME RULES EFFECTIVE DECEMBER 1st!

For some employers, this will require significantchangesto current job classifications.

By way of general background, the Fair Labor Standards Act (FLSA) requires overtime pay for non-exempt employees (hourly) when they work in excess of eight hours in a day or forty hours in a week. There are positional exceptions to this overtime requirement called "exemptions" which is where the label "exempt" (salary) employee comes from. There are certain qualifications or legal "tests" to determine whether a particular person duties appropriately qualifies for the exempt status. The most common exemptions are the "Administrative", "Executive", "Professional" (learned and creative), "computer" and "outside sales." One of the qualifying criteria for the exempt status is called the "salary basis" test. This is a minimum salary threshold that must be met to qualify. Currently an employee must be compensated at a rate of not less than $455 per week. This is in addition to meeting the specific criteria necessary for each particular exemption. For example, an employee classified as "exempt" based on the Administrative exemption must be performing office or non-manual work directly related to the management or general business operations of the

(continued on page 4)

FLSA OVERTIME RULE

On May 18, 2016, President Obama and U.S. Department of Labor Secretary Perez announced the publication of the Department of Labor's final rule updating the Fair Labor Standards Act and overtime regulations. These final rules have been approved after the proposed regulations were first published on July 6, 2015 followed by the required comment period. The final rule takes effect on December 1, 2016.

NEW FLSA OVERTIME RULE cont.

WILL IMPACT EMPLOYEES - STEPS EMPLOYERS NEED TO TAKE NOW by Richard Birdsall, J.D.

employer or the employer's customers. There are other factors that must be considered for this particular exemption as well. Highly compensated employees (HCE) performing office or non-manual work are also exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee. These are usually specialized employees that meet some of the exempt "tests" or criteria but not all of them. Currently an employee that earns $100,000 or more per year qualifies for this broader exemption.

Effective December 1, 2016, the salary basis test and the HCE will change. The minimum salary to qualify for the exempt status has been increased to $913 per week ($47,476 annually). If you have employees that are currently exempt but earn less than this amount – they will be improperly classified effective December 1, 2016.

Furthermore, the HCE amount has been increased to $134,004 annually as well. Accordingly, if you have salaried employees that make less than this amount and they do not meet all of the elements required for a particular exemption status, they too will be improperly classified effective December 1, 2016.

So, what steps do you need to take?

First, you must identify those salaried employees that earn less than $913 per week. If you have employees that fall into this category you have several options:

1. Increase their salary to the minimum; or 2. Convert them to non-exempt and pay them hourly.

Of course reorganizing or modifying job duties along with the above options must be considered as well.

Second, identify those employees that currently are classified as exempt and earn in excess of $100,000. You need to reevaluate their job duties and responsibilities to see if they meet all of the elements of a particular exempt status. If they don't, you either have to adjust salary or convert them to a non-exempt status. Employees that fall into this category will be relatively rare.

ABOUT THE AUTHOR

Richard Birdsall, J.D. and Senior Associate at The Growth Company, Inc. brings TGC clients years of legal experience with special emphasis and training in legal compliance, risk assessment, settlements, mediation and alternative dispute resolution. Connect with Richard on LinkedIn or follow him on twitter: @rick_birdsall.

TRANSGENDER EMPLOYMENT RIGHTS

FRONT AND CENTER FOR EEOC by Richard B. Cohen, FisherBroyles LLP

Last month I wrote about "a strange juxtaposition in employment discrimination law today: The EEOC has just sued to, effectively, expand the rights of transgender people, while 23 states have just sued to, effectively, limit those rights. A unified country this is not; cracks and fissures have become the norm. ... As always, the workplace is the perfect battleground, the perfect microcosm for society's political and cultural battles. The workplace always sits on society's many fault lines."

The EEOC has taken the position (currently before the courts) that "Title VII of the Civil Rights Act of 1964, protects employees from sex discrimination, including harassment based on gender identity and sexual orientation," as the EEOC said in a recent press release.

Title VII does not explicitly forbid discrimination based upon gender identity and sexual orientation, so the EEOC bases its gender identity and sexual orientation cases upon sex discrimination.

The EEOC is actively pursuing these cases: it just filed a *second* sex discrimination case, in Illinois, on behalf of a transgender employee, after an "administrative investigation [by the EEOC] revealed that the company's managers disapproved of the employee's gender transition and found a pretext for firing her."

The EEOC suit which I wrote about last month alleged a hostile workplace at Bojangles based upon repeated offensive comments made by a manager and assistant managers to a transgender employee about her gender identity and appearance. They demanded that the employee "who identifies and presents as a woman, engage in behavior and grooming practices that are stereotypically male, because that is the sex ... [she] was assigned at birth."

The employee complained and shortly thereafter was fired. The EEOC alleges that this was retaliation.

The EEOC regional attorney in Chicago said about the latest case that "All people deserve the opportunity to earn a living and be judged on the quality of their work, rather than on sex-based considerations. That includes transgender employees, and the EEOC is committed to making sure such individuals' rights under Title VII are protected."

Richard B. Cohen

Richard B. Cohen is a partner in the New York City office of FisherBroyles LLP, the "Next Generation Law Firm," and has litigated and arbitrated complex corporate, commercial and employment disputes for more than 35 years. He created and authors his firm's "Employment Discrimination" blog, and received the American Bar Association's "Top 100 Law Blog Award" for 2014. His blog is here: http://employmentdiscrimination.fisherbroyles.com/

WEARABLE DEVICE DATA

IN EMPLOYMENT LITIGATION by Karla Grossenbacher and Selyn Hong, Seyfarth Shaw LLP

Synopsis: *Wearable device data may be the next big thing in the world of evidence for employment cases. Given the nature of the information captured, it is easy to see how this type of data may be relevant to claims of disability discrimination, workers' compensation and even harassment*

Wearable device data may be the next big thing in the world of evidence for employment cases since social media. Given that it has already been used in personal injury and criminal cases, it is only a matter of time before wearable device data is proffered as evidence in an employment case.

From Fitbit to the Nike FuelBand to a slew of others, the worldwide wearable market has exploded in recent years. In a world increasingly obsessed with health and fitness, wearable devices offer instantaneous and up-to-the-minute data on a number of metrics that allow the user to assess his or her own health and fitness. Wearable devices can track information like heart rate, calories, general level of physical activity, steps taken, diet, blood glucose levels and even sleep patterns. Given the nature of the information captured, it is easy to see how wearable device data may be relevant to claims of disability discrimination, workers' compensation and even harassment.

ABOUT THE AUTHORS

Karla Grossenbacher
is a partner at Seyfarth Shaw LLP and chair the labor and employment practice in Seyfarth's Washington D.C. office and also head Seyfarth's National Workplace Privacy team.

Selyn Hong
is an associate in Seyfarth Shaw LLP's San Francisco office and a member of the Labor & Employment Practice Group.

http://www.laborandemploymentlawcounsel.com/2016/09/wearable-device-data-in-employment-litigation/

Evidence of What?

Wearable device data has been used in at least two nonemployment cases to date. In 2014, a personal trainer in Calgary, Canada, used wearable device data in her personal injury case to demonstrate the extent of her injuries. She wore a Fitbit during an "assessment period" to show that, as a result of her injuries, she maintained activity levels under a baseline for someone of her age and profession.

And in 2015, police in Lancaster, Pennsylvania used Fitbit data to support criminal charges against a woman who they asserted had made a false report to law enforcement that resulted in a manhunt for her alleged assailant. The woman had claimed that a man had broken into the house in which she was staying while she was asleep, pulled her out of bed and sexually assaulted her. But her Fitbit told a different story. It revealed that she had been awake and walking around at the time she claimed to have been attacked while sleeping. The Fitbit data, along with other evidence, led investigators to conclude that the woman was lying and charges were brought against her.

You Are What You Wear

In the employment litigation context, wearable device data could help a factfinder determine whether a plaintiff is "disabled," has a "serious medical condition" or suffered a workplace injury. Data such as heart rate, physical activity level, number of steps taken, and sleep patterns could all be probative of an individual's physical and mental state. Employers facing disability discrimination claims could use wearable device data much like they would use medical records and social media postings — to investigate and, if appropriate, discount a plaintiff's claim that his or her "major life activities" like walking or sleeping have been substantially limited.

In harassment cases, wearable device data could show whether a plaintiff's heart rate went up when the claimed harassment occurred. It could also provide probative evidence of whether harassment was severe and pervasive during the relevant time period. Wearable device data could also help prove or disprove any claimed emotional distress damages. For example, wearable device data could help demonstrate sleep loss or even an increased heart rate as probative evidence of anxiety.

WEARABLE DEVICE DATA

IN EMPLOYMENT LITIGATION continued

To Admit or Not to Admit

Despite its obvious probative value, the admissibility of wearable device data as evidence in employment litigation is not a foregone conclusion. Wearable devices come with inherent reliability issues. For instance, devices that count steps based solely on arm movements may erroneously count fidgeting while lying in bed as steps taken. In 2015, a California man filed a class action suit against Fitbit, alleging that the company's sleep tracking is inaccurate and constitutes false advertising. Additionally, a user may forget to wear the device or neglect to change the battery. And there is always the possibility of data manipulation whether by jostling to create false readings or having someone else wear the device.

But that is not to say that wearable device data should not be admissible. Courts and legal practitioners alike regularly work with flawed forms of evidence. They know all too well that eye witnesses have faulty memories, that experts in the same field may reach vastly different conclusions based on identical data, and that witnesses may possess their own innate biases that color their testimony. Yet, this does not stop such evidence from being admissible.

Similarly, the aforementioned reliability issues will not stop wearable device data from making its way into courtrooms across the Unites States. Theoretically, permitting such information may even remove potential biases from the human lens and offer some objectivity. In addition, a court could find wearable device data admissible and then determine what weight to give it based on the quality of the data provided.

Objection! Privacy ... Right?

The information gathered by an individual's wearable devices is inherently personal. Wearable device data can be obtained from either the wearable device manufacturer or directly from the individual's device. From a privacy perspective, the threshold issues are whether or not the user has a reasonable expectation of privacy in the wearable device data, and if so, whether or not the user has consented to or authorized the disclosure of the data.

In terms of statutory protections, at first blush, heart rates and glucose levels seem like information that would be considered "protected health information" in the normal sense of the term. However, the Health Insurance Portability and Accountability Act covers only certain information maintained by certain medical entities, and it does not protect data stored on an individual's wearable device.

Even if medical privacy laws did cover wearable device data, it would likely fall under an exception to HIPAA for certain legal requests. A number of wearable device companies have privacy policies that explicitly state that data may be released in the event of litigation. For example, Fitbit's privacy policy states that it will release data "reasonably necessary to comply with a law, regulation [or] valid legal process[.]" And Jawbone's policy similarly states that it "may disclose your personal information to... comply with relevant laws, regulatory requirements and to respond to lawful requests, court orders and legal process[.]"

Under common law, given the personal nature of the information on a wearable device, an individual could interpose an objection based on invasion of privacy to the disclosure of data from his or her wearable device. The best way to avoid such a claim is to obtain the individual's consent or assert that there is no expectation of privacy with respect to the data on the device. In the Lancaster, Pennsylvania criminal case, the police claimed that the alleged victim of the sexual assault had consented to their review of the data from her Fitbit. In the Calgary case involving the personal trainer, she put the information on the device at issue herself and offered it into evidence to support her case. In an employment case, defense counsel could argue that, by bringing the claim regarding a workplace injury or a disability or requesting emotional distress damages, the plaintiff is putting the information on the wearable device at issue.

Strategies for Use of Wearable Device Data In Employment Cases

Take the time to learn about the various types of wearable devices and how they work. Some may count moving your arms around as walking (which is a great morale booster, at best). Others will not register cycling as activity. Know what you are working with so you can determine whether the information is relevant and helpful to your case.

Just as you would include requests for social media information in your discovery requests, include requests for wearable device data.

Be prepared to address objections based on privacy interests and determine how you will show consent or authorization for the disclosure.

Consider engaging a qualified expert who can reliably explain and interpret the wearable device data.

Get to know your local analytics companies now; you are bound to need one in an employment case coming near you soon.

POLITICS & ELECTION LAW IN THE WORKPLACE:

"ARE YOU SERIOUSLY VOTING FOR THAT CANDIDATE?!" by Noah Frank & Allison Sues, SmithAmundsen

With the 2016 general election heating up, discussions about politics and candidates will inevitably enter the workplace. Employers should be aware of several critical legal issues when responding or reacting to politics in the workplace, as well as understanding workers' rights to engage in the political process.

Imposing a blanket ban on political discussions may run afoul of the National Labor Relations Act.

The NLRA, which applies to private unionized and non-unionized workplaces, protects non-supervisory employees' discussions about terms and conditions of employment. As such, employers may not prohibit all political discussion in the workplace because some political speech could intersect with work-related matters (e.g., immigration reform, equal pay, or the minimum wage) and therefore may be protected. The same is true for an employer's ban of political insignia in the workplace. While an employer can prohibit buttons, signs, or clothing bearing pure political speech in the workplace (e.g., "Vote for Candidate X!"), a ban on similar insignia sufficiently connected to employment issues (e.g., "Vote for Candidate X to raise the minimum wage!") may violate the NLRA.

Political speech in the workplace may also implicate anti-discrimination and harassment protections.

As seen in the most recent election cycle, hot political issues may overlap with an employee's protected status. For example, impassioned conversations about political platforms related to immigration and terrorism may be deemed discriminatory or harassing to an individual based on race, religion, national origin, or ancestry. Views on abortion could be deemed harassing or discriminatory to employees based on gender or religion.

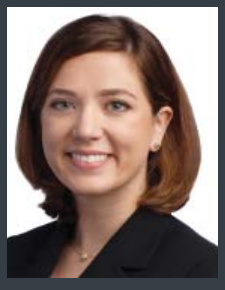
Employers must be careful that political discourse in the workplace does not create a hostile or discriminatory work environment for other employees or otherwise implicate various equal employment opportunity and civil rights laws.

For public employers, First Amendment protections may be implicated.

The First Amendment prohibits the government's restriction of free speech. As such, *public* employers may not terminate or otherwise discipline employees because of their political views or activities. Many local ordinances similarly protect county, municipal, and other public agency employees' political speech. That said, it is prohibited for public employees to perform campaign activities on taxpayer time or by using public resources.

On the other hand, private employers are not limited by the First Amendment from banning political discussion in the workplace (subject to the above). But proceed with caution! Some states and local laws (such as D.C., California, and New York) prohibit discrimination based on political affiliation and political activity outside of the workplace. Additionally, some states (like Illinois) prohibit employers from gathering or keeping record of employees' associations, political activities, publications, communications, or non-employment activities. Similarly, many states (like Illinois, Wisconsin, and Missouri) protect an employee's privacy surrounding their off-duty political speech on the internet, including speech on social media sites like Facebook or Twitter.

ABOUT THE AUTHORS



Two of SmithAmundsen's Chicago-based frontline labor and employment attorneys, **Noah A. Frank** and **Allison Sues** advise and represent management on a nationwide basis in complex matters ranging from wage and hour compliance to single plaintiff and class-based discrimination and retaliation cases. They may be reached at nfrank@salawus.com, asues@salawus.com or 312-894-3200.

POLITICS & ELECTION LAW IN THE WORKPLACE:

"ARE YOU SERIOUSLY VOTING FOR THAT CANDIDATE?!" continued

Of course, both private and public employers have a legitimate and lawful interest in ensuring that employees are productive and that political discussions or activities do not impede the normal operation of an employer's business. Policies and rules implemented to address this lawful interest should be neutral without favoring a certain political view.

Private employers may persuade only a "restricted class" of individuals to vote for or against a political candidate.

Federal election laws define this restricted class as "executive or administrative personnel" who receive a salary and have policymaking, managerial, professional, or supervisory responsibilities. However, a corporation may not advocate for a particular candidate or political party in its communications to employees outside of the restricted class, including hourly employees.

In many states, employees have the right to voter leave.

For example, **Illinois** employees are entitled to two hours of leave when the polls are open to vote. The employee must request the leave at least the day before the election (note: requests made on election day can be denied). The employer may dictate the hours of leave. However, employers must permit a two hour absence during one's actual work day where an employee's working hours begin less than two hours after polls open and end less than two hours before the polls close. For example, if the polls are open from 6:00 a.m. to 7:00 p.m., then:

- An employee working a 16-hour "double" shift from 5:00 a.m. to 9:00 p.m. would be given two hours of paid leave to vote, at a time chosen by the employer.
- An employee scheduled to work a 12-hour shift from 6:00 a.m. to 6:00 p.m. either would need to be (a) released from work by 5:00 p.m. (and paid for the one hour of missed work from 5:00 p.m. to 6:00 p.m.) to have a two-hour period to vote, or (b) allowed any other two-hour period off work while the polls are open, with pay, to vote.
- An employee working from 6:00 a.m. to 3:00 p.m. may be directed to vote after work, and no time after 3:00 p.m. needs to be compensated.

In **Missouri** employees may take up to three hours of paid leave to vote – but only if the employee actually votes. **Wisconsin** permits up to three hours of unpaid leave. Like Illinois, Missouri and Wisconsin employees must provide notice before Election Day, and the Employer may dictate the time of leave. Unlike its Midwest sisters, Indiana has no specific employment voting leave rights.

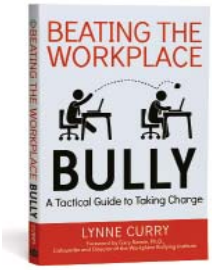
It should not surprise readers that California has its own unique provisions. Employees must be granted "enough" leave so that they will actually be able to vote. Fortunately, only two hours of working time taken off needs to be paid. Employees must give at least two working days' notice. Also, California employers must post a "Time Off to Vote" Notice at least ten days before any state-wide election (failure to post would likely excuse employees from providing the requisite notice of their need for voting leave).

The Bottom Line

Election law is state (and sometimes county and city) specific. If the election cycle is creating any sort of workplace tension, employers should revisit conduct standards, anti-harassment / bullying policies, and reporting procedures. Experienced employment counsel may assist with implementing sound policies and practices to help manage workplace issues that may arise during election season.

BOOK RESOURCES

Beating The Workplace Bully



A tactical guide to taking charge, survive, manage and turn the tables on a workplace bully. **AVAILABLE NOW at Amazon and Barnes & Noble**

Solutions

Offers you strategies, insights, answers and revelations to workplace situations. **AVAILABLE NOW at Amazon and Barnes & Noble**

Join Our Supervisor Academy!

Are you a supervisor or manager? Or maybe a professional aspiring to be a leader?

WE HAVE THE PROGRAM FOR YOU!

An accredited six course leadership development program that teaches the key components of effective and successful leadership by teaching underlying principles derived from decades of experience.

TUESDAY, NOVEMBER 15th - COURSES 3 & 4

Course 3:
Effective Hiring & Retention

Course 4:
Protocol for People Problems

WEDNESDAY, DECEMBER 14th - COURSES 5 & 6

Course 5:
Performance Reviews & Coaching for Success

Course 6:
Advanced Leadership & Adapting to Communication Styles

SHRM SHRM-CP™ / SHRM-SCP™ RECERTIFICATION PROVIDER 2016

HR CERTIFICATION INSTITUTE APPROVED PROVIDER 2016

To register, please visit www.thegrowthcompany.com and reserve your seat today. Seats are $85 per person. The six courses can be taken in any order. Two courses are offered each month. Receive a 10% discount when you register for all six courses by calling 907-276-4769.

Handling Work Relationships:

WHEN YOU THINK THE ROMANCE IS O-V-E-R by Karen Casanovas, Senior Associate at TGC

People problems. The Honeymoon is over, and each time you interact with certain co-workers, they give you heartburn. Research reveals that interpersonal work relationships account for 28% of stress-induced health issues. Heart attacks, strokes, ulcers, gastrointestinal disorders, anxiety, or panic attacks are often a result of personality or organizational troubles. And those are just a few of the health-related results. Coping efforts, both behavioral and psychological allow us to overcome, tolerate, reduce or minimize stressful situations. If you're required to deal with the "Know-it-all" or "Argumentative" or "Insulting" colleague, how can you cope? Here are a few strategies that will prepare you for your next interaction:

YOUR RESPONSE MATTERS

You must rise above the temptation to reply in a defensive or attacking manner. Your response controls the situation, therefore, realize you hold the power to escalate or de-escalate the situation. Pause, then either agree or disagree. Keep calm and remain as upbeat as possible.

ASK QUESTIONS

What is the real issue? Is there an important decision at stake, or are they just flexing their muscles and showing off? Give the know-it-all or insulter time to answer then side-step the attack which instead moves toward a solution, not a back and forth banter. Get them to move in the direction you want them to go, and avoid being boxed in a corner with unproductive conversation.

SAY SOMETHING POSITIVE

Communicating in a non-intimidating way keeps the flow going and may get the attacker off balance. The provoker often expects you to strike back, so by avoiding a response with snappy remarks, but asking questions like "Tell me more" or "What can I do to resolve this situation?" narrows the conversation to the heart of the matter.

EXCHANGING INFORMATION

Discussing the issue based on factual information without emotion provides greater resolution success. Conversing about the situation specifically, neutrally, descriptively and briefly paves the way in working toward a plan and agreeing on a solution.

FUTURE ANTICIPATION

While you're tempted to run the other direction when you see the difficult co-worker headed your way; accept the interpersonal discord for what it is. Acknowledge that you may not always see eye-to-eye, but if you want results it's best to look past the previous problems and work toward future improvements.

The Growth Company's CONSULTANTS

DR. LYNNE CURRY, SPHR

President

President of TGC, Lynne brings her clients a track record in management consulting; Board, manager and employee training; human resources and organizational strategy consulting. Curry has provided more than 55,000 consulting projects to more than 3,700 organizations. Founder of the Workplace Coach Blog & Bully Whisperer Blog.

Richard Birdsall, J.D.

Senior Associate

Rick brings 20 years of trial experience representing the California DOT and its engineers; 3 years in the legal field of environmental remediation; 9 years of criminal investigation experience; and, 2 years conducting investigations for the Alaska State Commission for Human Rights. Serves as a coach on TGC's Workplace Coach Blog.

Karen Casanovas, B.A.

Senior Associate

As TGC's corporate talent development and business coach, Karen's expertise in organizational performance, leadership success, team dynamics, transitional change and confl ict resolution optimizes capacity for building diverse and innovative work cultures. Her articles on accountability, leadership and motivation appear in media outlets.

FEATURED WEBSITES

THE GROWTH COMPANY, INC.

Our mission is to change the world, one workplace at a time. Visit our website for details on how we can be a resource for your workplace needs.

www.thegrowthcompany.com

WORKPLACE COACH BLOG

Your source for insights, solid information, on-target solutions and answers to your workplace questions. Send your questions to our coaches today!

www.workplacecoachblog.com

HELP

COMING SOON! An online learning environment where professionals can take courses online from anywhere at any time.

www.thegrowthcompany.wiziq.com

BULLY WHISPERER BLOG™

Looking for a resource on how to handle the bully in your workplace? Find articles, tools, and proven techniques here! Need advice? Ask our experts!

www.bullywhisperer.com

THE GROWTH COMPANY 907.276.4769 www.thegrowthcompany.com