

PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

140 Geary Street, Seventh Floor ■ San Francisco, CA 94108-4635
Phone: (415) 433-1099 ■ Fax: (415) 433-9434 ■ www.sfcounsel.com

Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.



New Common Interest Development Act Signed by Governor

On August 17th, Governor Jerry Brown signed into law Assembly Bills 805 and 806. These bills were part of multi-year effort to reorganize, simplify, and relocate California's Davis-Stirling Act (the "Act") which governs all Common Interest Developments ("CIDs") in California. CIDs, which include condominium developments, stock

October 2012

In This Issue

[New Common Interest Development Act Signed by Governor](#)

[Keeping Up with the Times - Brand Monitoring Ideas for the Current Marketplace](#)

[Employer Alert: New Legislation for 2013](#)

[Partner Notes](#)



cooperatives, and planned developments, house an increasing number of Californians, which has attracted an increasing amount of legislation over the years.

Since the Acts enactment in 1985, it has been amended so many times as to become a Frankenstein monster of add-ons, restrictions, and law designed to legislate “good government” within the associations that govern CIDs. As a result, the Act has become very confusing to many and inconsistent as well.

The reorganization of the Act has been a multi-year effort involving multiple drafts, revisions, and discussion. As enacted, AB 805, which comprehensively reorganizes and recodifies the Act, runs 63 pages, and AB 806, which deletes all of the existing cross-references to the Act in other code sections and replaces them with the new code sections created by AB 805, runs 73 pages.

The new law does not take effect until January 1, 2014, which is intended to give all parties with a stake in CIDs time to familiarize themselves with the reorganized Act. The new Act will be codified at Civil Code §4000-6150, rather than its current place at Civil Code §1350-1378.

We believe that our CID clients should generally be happy with the recodification of the Act rather than worried about it. The overall intention of this recodification was to clarify definitions, make the law more “user friendly,” and simplify provisions in order to provide greater certainty in connection with governance of common life within, CIDs.



Denis S. Kenny

Halloween, Thanksgiving, Christmas, 2013, a New Year. . . It's hard to believe but the Holiday Season is already upon us. Not only that, but we are in an election year. No matter what your political leaning, interest, or knowledge, it is in times like these we are reminded of how lucky we are to live in the United States.

Our system is far from

In summary, the bill (a) revises and recasts provisions regarding notices and their delivery, (b) standardizes terminology, (c) establishes guidelines on the relative authority of governing documents, (d) establishes a single procedure for amendment of a CID declaration, (e) establishes an express list of conflicts of interest that may disqualify members of a CID Board of Directors from voting on certain matters, (f) revises provides related to elections and voting, (g) establishes standards for the retention of records, and (h) broadens the requirements that liens recorded by the association in error be released.

During the next year, this office will carry out several initiatives to introduce our clients to this new law. Until the law becomes enacted, the old provisions of the Act will remain effective. From a practical perspective, our clients may wish to hold off on updating, restating, and amending their governing documents pending their comprehension of the new law. Although, there is no reason that governing documents may not be amended during the interim period between the Acts demise and the new law's enactment.

For more information, please feel free to contact Bill Scherer at wms@sfcounsel.com.

- *Written by Bill Scherer*



Keeping Up with the Times - Branding

perfect, but at least we have the opportunity and freedom to engage in debate, dialogue and open elections. The result is that we are provided exposure and access to many divergent points of view. And even if you are apolitical, you may, if you like, go about your life virtually unaffected by the zaniness of day to day campaigning. I was reminded of this fact one early Saturday morning on my drive to meet a group of friends I run with. I flipped through the pre-set radio stations to find a debate about Proposition 36 which seeks to amend the Three Strikes Law to require a penetrator

Monitoring Ideas for the Current Marketplace

As most of our trademark clients understand, it is essential to take adequate steps to monitor and protect your brand. Your brand is one of your most valuable assets. It is the face you present to the public. It is the way the public identifies you with your goods and services. As a trademark owner, if your mark or brand is not properly monitored, you risk unwelcome consequences in the form of unlawful infringement and unfair competition, not to mention the loss of control over the reputation of your brand in the relevant community.

Unfortunately, we have had clients go to battle over these issues too late, which can cause a protracted financial and emotional toll on you personally, your company, and the brand itself. For this reason, if any client is not actively engaged monitoring its brand(s) online, we highly encourage them to start doing so.

In today's day and age, monitoring your brand entails more than just conducting searches on the United States Patent and Trademark Office website and "Google-ing" your brand every so often. Your brand can be mentioned in different forms and by much more Internet-savvy consumers who blog, tweet and Yelp about your business. In this environment, it is important to ensure you are on the front lines of brand mentions, that you are there to respond to each unique situation, and that you are ready to handle any potential problems related to your product or service.

If you are not actively engaged monitoring your brand online, here are some ideas that may be useful:

require a perpetrator to have three as opposed to two prior violent felony convictions in order to impose the underlying sentencing for the "third strike" - which is the foundation of the Three Strikes Law - 25 years to life imprisonment.

The proponent of the amendment was an articulate Professor of Law at Stanford who had years of experience representing offenders viewed to be wrongfully included in the three strikes sentencing - namely, offenders whose third strike was a relatively minor, non-violent felony such as possession of drugs or burglary and theft.

“Me on the Web” Google Alerts

Google allows you to monitor the web for content through their “Me on the Web” program, which sets up Google Alerts so that you will receive notifications when you are mentioned on websites or in news stories. It also automatically suggests search terms you may want to keep an eye on. You simply plug in a search query you wish to monitor, and Google Alerts will email you updates of the latest relevant Google results (web, news, etc.).

“Me on the Web” also provides resources on how to control third-party information, including tips like reaching out to the webmaster of a site to ask for the content to be taken down, or publishing additional information on your own to help make less relevant websites appear farther down in search results.

<http://support.google.com/accounts/bin/answer.py?hl=en&answer=1181793>

Blogs

Blogs are a pervasive form of communication, whether it’s personal interest, marketing, business, or otherwise. Today, anyone with a computer can blog about anything under the sun, including your business. In addition, many businesses blog as a means of reaching their consumers on a personal level, to encourage patronage and facilitate the dissemination of information.

As a brand owner, if you have a blog currently, then websites such as Technorati (<http://technorati.com/>) can help you monitor your name in

The idea is that these offenders had been rehabilitated so to speak from engaging in a life of violent crime to simply engaging in crime but ultimately, they were not the type of criminal the Three Strikes Law was intended to keep off the street- -the habitually-violent offender who will continue killing or hurting people if not kept off the street. And the other key goal, according to the proponent, is to avoid prison overcrowding, a perpetually-thorny issue in cash-strapped California.

The opponent of the amendment was one of the leaders in getting the original Three Strikes Law on

the blogging world. Technorati is a blog search engine which tracks blog reaction or blogs that link to your blog. You can search for your brand, subscribe to RSS alerts so that you find out when someone blogs about you and conduct other forms of blog tracking using this services. According to Technorati's website, it indexes more than a million blogs, and is the most comprehensive and current index of what is popular in the blogging world.

Social Mentions

Social media is the foremost means of participating in the current marketplace, and even the least tech-friendly businesses are subject to its influence. Facebook, Twitter, and Yelp are three of the more prevalent forms of social media for modern businesses. Each of these sites has the potential to make or break your brand if not properly monitored and policed.

At a high level, there are various free online tools available for business owners to monitor their brands in social media. For example, Social Mention (<http://socialmention.com/>) is a search and analysis platform that aggregates user generated content from across the universe into a single stream of information. It allows businesses to track and measure what people are saying about their company, a new product, or any topic across the web's social media landscape in real-time. Social Mention monitors over 100 media properties directly including: Twitter, Facebook, FriendFeed, YouTube, Digg, Google etc.

In addition to high level search engines, there are steps you can take within each platform as well:

the books: the father of a teenager murdered by an individual with a rap sheet a mile long. And, consistent with statistical trends in similar cases, this perpetrator's crimes escalated in severity over time leading to two prior violent felony convictions within five years of this particular murder. The perpetrator robbed this man's daughter and for no apparent reason, put a gun to her head and shot her execution style.

Whatever your viewpoint on the substance of the debate outlined above, for me, it highlighted the tremendous opportunity our

Twitter

Many businesses today use Twitter to interact with their customers in real time, share information quickly with their followers, and gather real-time information. Unfortunately for some businesses, Twitter is a user dominated forum; there is no real authoritative body policing users from using, blurring, tarnishing or stealing other business' brand names. Rather, it is up to the brand owner to monitor Tweet feeds and police their marks.

As a baseline measure, trademark owners should be monitoring their brands @name or their @username via Twitter replies, regular Twitter searches, and hashtag key word searches. The hashtag is a valuable Twitter tool which allows users use to categorize Tweets by keyword. Whenever the hashtag symbol # is placed before a relevant keyword or phrase (no spaces) (i.e., #sfrestaurants) in a Tweet, the hashtagged word in the message will show you all other Tweets marked with that same keyword. Using Twitter's keyword or hashtag search function, you can search your name, your company's name, or various topics that you are interested in and then follow or subscribe to other accounts to monitor activity.

We also recommend using "Monitter (<http://monitter.com/>)," a real time Twitter search tool that enables you to monitor a set of keywords on Twitter. It also allows you to narrow the search to a particular geographic location, allowing you to find out what's going on in a particular part of the world.

Facebook

country offers its citizens. We are free to express our opinions and, in the process, may play a role in the creation of laws which directly impact our society for years to come. Or, we also have the choice to avoid, very serious, heavy, issues impacting society as a whole and, instead, turn the channel and listen to Hooked on Golf or the betting lines for College Football on sports talk radio. The question for you is: which station would you choose at 5:30am on Saturday morning (or, perhaps, more importantly, why would anyone in their right mind be up at that time on Saturday morning). Either way

Monitoring your brand on Facebook is a little trickier because users can place very restrictive privacy settings on Facebook. Depending on the setting preferences, there may be little you can do to track your online brand through Facebook other than see a snapshot page of the Facebook page and some identifying information.

Notwithstanding, at a minimum trademark holders should be signing into Facebook and searching their brand name in public profiles or pages on Facebook. This gives brand owners some idea of potential competing brands or infringers out there, and may provide just enough information to conduct a more diligence over the web.

Yelp

Finally, Yelp is the renowned user critique forum, where laypersons can spread word to the world, either positive or negative, regarding products and services. There is no special trick to searching Yelp or tracking user comments on the site, but the results can be very useful for brand owners, especially to monitor local business activity by searching competing local businesses and similar sounding names on the Yelp search tool.

Brand Reputation

In addition to simply monitoring your brand for competition and infringement, you should also be using the above social media platforms to build and maintain the reputation surrounding your brand. It is imperative that the above-mentioned sites be monitored for false, negligent or other damaging content. You, as a brand owner, should not only police unlawful use of your trademarks and brand names, but should also consider responding to lawful but

nothing): Either way, what no one can take away is that we, as United States citizens, have virtually unlimited choice and opportunity. We have the opportunity to spend time with our families and loved ones over the Holidays and, in my case, to have a business where I enjoy coming to work every day and building something which will hopefully exist beyond my years.

So, for all of you, the friends, family, colleagues and clients of Scherer Smith & Kenny LLP, be thankful for what we all have and do not forget the impact we all can make.

negative feedback to try and build consumer trust in your goods and services. This type of consumer communication can be key in building valuable good will in your brand.

Conclusion

If you would like more information on how to effectively monitor your brand or would like to discuss any general trademark or branding issues, please contact Brandon D. Smith at bds@sfcounsel.com or Heather G. Sapp at hgs@sfcounsel.com for more information.

- Written by Heather G. Sapp



Employer Alert: New Legislation for 2013

It wouldn't be a New Year in California without new labor and employment legislation. And let me tell you, 2013 will be a doozy. We discuss a sampling of the more notable employment legislation below. Consistent with best business practices, employers are advised to consult with trusted legal counsel to ensure that your policies and procedures comply with the ever-changing California labor and employment environment. Scherer Smith & Kenny LLP remains available to assist you in this regard and, of course, will continue to provide updates in our ongoing client communications. So, without further ado:

AB 2675 - Written contracts for commission pay: exceptions

*- Written by Denis S.
Kenny*

As reported in our May 2012 edition of Perspectives, California Governor Jerry Brown recently signed Assembly Bill 1396 into law which created Labor Code Section 2751. This new statute requires California employers to enter into a written contract with any employee who receives commissions in payment for services rendered within California. Further, any commission contract must include the method by which the commission wages will be computed and paid. An employer must provide each affected employee with a copy of the contract and retain a copy in its files with a signed acknowledgement of receipt from each employee.

Furthermore, the commission contract is presumed to remain in force until the contract is superseded or the employment ends, even if the commission contract itself expires on its own express terms. In our past article, we raised a potential issue regarding this burdensome provision. What happens if an employer wishes to end their commission pay structure altogether? A strict reading of this provision would require that any affected employee consent in writing to ending the commission structure. Consequently, if an employee refused to sign a new contract, the employer would either have to allow the old commission contract to stay in place or terminate the employee. Neither of these options is preferred.

However, on September 30, 2012, the Governor signed Assembly Bill 2675 into law, which clarifies Labor Code Section 2751 and added an exemption to the meaning of “commissions.” “Commission wages” is defined as “compensation paid to any person for services rendered in the sale of an employer’s property or services and based proportionately upon the amount or value thereof.” Cal. Lab. Code § 204.1. Originally, only two categorical

exemptions to this definition were included, but AB 2675 adds a third, which are “temporary, variable incentive payments that increase but do not decrease, payment under the written contract.” This means that any incentive-based payments which only have the possibility of granting additional pay to an employee and cannot negatively affect the employee’s contractual pay base are exempt.

Thus, employers may wish to use a pay scale that sets an unmovable minimum salary plus bonus incentives that do not change that base salary, as opposed to using a traditional commission pay scheme. It will be important to keep up-to-date with how the courts interpret this new statute and how it affects commission based industries.

AB 2103: Overtime rate for non-exempt, full-time salaried employees

On September 30, 2012, Governor Brown signed Assembly Bill 2103, amending Section 515 of the Labor Code. The bill accomplishes two of the Legislature’s goals. First, it bans payment of a fixed salary to any non-exempt employee who is compensated for both regular and overtime hours. Second, it overrules *Arechiga v. Dolores Press, Inc.*, a controversial decision which held that an employer and a non-exempt employee *could* enter into an agreement to have a certain defined salary compensate that employee for all regular and overtime hours worked.

Current California overtime law, with certain exceptions, establishes eight hours as a day’s work and a 40-hour workweek, and requires payment of prescribed overtime compensation for any additional hours worked. Any violation of these provisions constitutes a crime.

The California Legislature aimed to cure a common problem in which an employer would pay a misclassified employee a flat monthly salary which accounted for both regular and overtime hours. This often leads to disagreements over what the actual hourly and overtime rates were for the employee. This bill requires that payment of a fixed salary to a non-exempt employee must only account for his or her regular, non-overtime hours worked, regardless of any contrary private agreement.

With the passage of AB 2103, the Legislature has placed even more emphasis on employers properly classifying their employees. It will be important for employers to keep an eye on this law as it may be challenged as unconstitutional based on an individual's freedom to contract.

AB 1844: Employer Use of Social Media

On September 27, 2012 Governor Brown signed Assembly Bill 1844 into law which aims to increase privacy protections for social media users in the state of California. Through the creation of Labor Code section 980, this bill prohibits an employer from requiring or requesting an employee or applicant for employment to disclose a username or password for the purpose of accessing personal social media, to access personal social media in the presence of the employer, or to divulge any personal social media information.

Furthermore, an employer is prohibited from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand by the employer that violates the bill's provisions.

The term “social media” means an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet web site profiles or locations.

Importantly, however, the new bill does not preclude an employer from requiring or requesting an employee to disclose a username, password, or other information for the purpose of accessing an employer-issued electronic device. Similarly, an employer still has the right and obligation to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations; provided, that the social media is used solely for purposes of that investigation or a related proceeding.

Although the practice of employers demanding or requesting, from employees or potential employees, passwords does not seem to be a common problem, California now joins Maryland and Illinois as the only states that explicitly ban it. Currently, other states, such as New Jersey and Michigan, have similar legislation pending. As this sort of legislation becomes more widespread and known to the public, employers must be even more conscious that it is restricted by law.

AB 1964: Discrimination in employment: reasonable accommodations

On October 8th, 2012, Governor Brown signed Assembly Bill 1964, which amends Sections 12926 and 12940 of the Employment Code,

into law, extending protection from religious discrimination to “Religious Dress Practices” and “Religious Grooming Practices”.

Under existing law, the California Fair Employment and Housing Act protects and safeguards the right and opportunity of all people to seek, obtain and hold employment without discrimination or abridgment on account of religious creed. Specifically, an employer or other covered entity is required to reasonably accommodate the religious belief or observance of an individual unless the accommodation would be an undue hardship on the conduct of the business of the employer or other entity.

However, this bill includes a religious dress practice or a religious grooming practice as a belief or observance covered by the protections against religious discrimination, and would specify that an accommodation of an individual’s “Religious Dress Practice” or “Religious Grooming Practice” that would require that person to be segregated from the public or other employees is not a reasonable accommodation. This bill would further provide that no accommodation is required if an accommodation would result in the violation of specified laws protecting civil rights.

“Religious Dress Practices” includes wearing or carrying religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed. Additionally, “Religious grooming practice” shall be construed broadly to include all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed.

With the California Fair Housing and Employment Act carrying

severe penalties for most violations, it is very important that employers understand this nuance to the law.

Please contact Denis S. Kenny at dsk@sfcounsel.com or Ryan W. Stahl at rws@sfcounsel.com for more information.

- *Written by Denis S. Kenny*



Areas of Practice

[Business; Real Estate; Intellectual Property and Employment Law;](#)
[Litigation and Dispute Resolution; Nonprofit; Estates and Trusts](#)

©2007-2012 Scherer Smith & Kenny LLP. All Rights Reserved.

[Disclaimer/Privacy Statement](#)

For more information: www.sfcounsel.com