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BKCG
BURKHALTER KESSLER CLEMENT & GEORGE LLP

California Enacts Further Restrictions Upon Transportation Network Services in 2017 to Make Your Post-Holiday Party Ride Home Even Safer

As the holidays approach, employers are faced with crafting responsible ways to reward their employees for a job well-done, while at the same time limiting liability for any holiday celebrations gone awry. A common way for an employer to celebrate the past year's successes and to foster continued good morale among its employees is to host a holiday party, which oftentimes include holiday spirits. As BKCG has advised its readers in the past, it is essential to follow simple rules to ensure your holiday party does not turn into a Krampus-sized disaster.

One of many ways to avoid holiday party liability is to gift your employees with vouchers for the use of a car service, such as Uber or Lyft, to provide transportation to and from the event. Just a few years ago, in *Purton v. Marriott International, Inc.* (2013) 218 Cal.App.4th 499, the California Court of Appeal found that an employer could be held liable for the consequences of an employee's intoxication at a company party. In that case, because Marriott provided alcohol as a "thank you" to

its employees, and, "the party and drinking of alcoholic beverages benefitted Marriott by improving employee morale and furthering employer-employee relations," the Court concluded it was possible for a jury to find the employee's intoxication at the party occurred within the scope of his employment, thus exposing Marriott to liability for a fatal vehicle crash caused by the intoxicated employee after the party.

While vouchers for car services are a useful tool to avoid such a result, the use of a car service presents its own risks. Indeed, the increasingly widespread use of such services has led to incidents of violent crime committed against passengers of these services by the drivers. The California legislature responded by requiring more stringent background checks for drivers of these "transportation network companies." The law, which takes effect January 1, 2017, will prohibit these companies from hiring drivers who are registered sex offenders or who have had a violent or terrorism-related felony conviction at any time in their past. California currently requires transportation network companies to perform background checks spanning only seven years. The seven year requirement will still apply to prohibit the hiring of drivers with other misdemeanors such as domestic violence and driving while under the influence. In addition, these companies face criminal fines of $1,000 to $5,000 for each banned driver still on the road after January 1, 2017.

If you have questions about any of the issues discussed in this article, or about employee-employer liability in general, please contact Amber M. Sanchez at asanchez@bkcglaw.com or at 949-975-7500.

When Can An Employer Require Employees Speak Only English?

Businesses in California often employ a diverse pool of employees who speak a variety of languages in addition to English. While employers should create an inclusive work environment where all cultures feel welcome and no one is discriminated against on the basis of their national origin, sometimes questions arise as to whether an employer can require employees to speak English only while they are on the job. The answer is yes, but only if for a valid purpose approved under Government Code Section 12951.

Government Code Section 12951 prohibits an employer from adopting or enforcing a policy that limits or prohibits the use of any language in the workplace unless both of the following conditions are met: the language restriction is justified by business necessity; and the employer has notified its employees of the circumstances and the time when the language restriction is required to be observed, and the consequences for violating the language restriction.

Government Code Section 12951 defines a qualifying "business necessity" to mean "an overriding legitimate business purpose such that the language restriction is necessary to the safe and efficient operation of the business, that the language restriction effectively fulfills the business purpose it is supposed to serve, and there is no alternative practice to the language restriction that would accomplish the business purpose equally well with a less discriminatory impact."

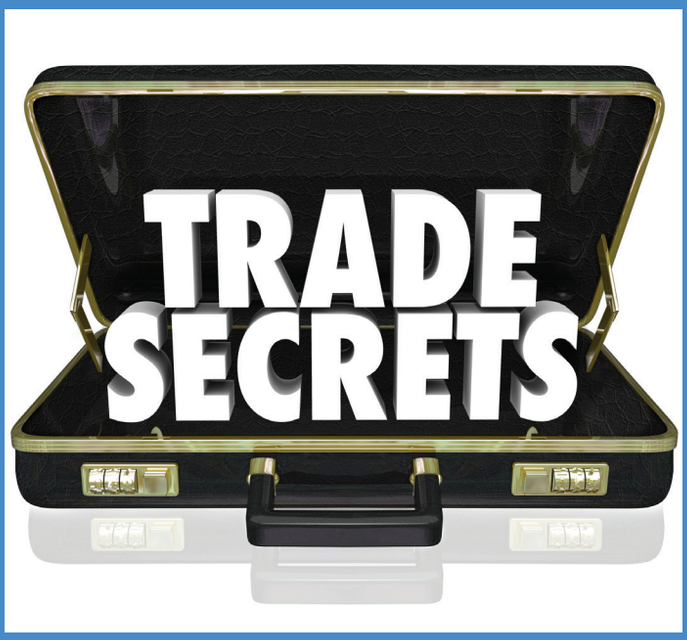
A provision similar to California's statute exists under Federal law and, therefore, the United States Equal Employment Opportunity Commission has provided some general examples of when an "English Only" rule might be legal. They are:

- Situations where the employee is communicating with customers who speak only English;
- During emergencies or other situations in which workers must speak a common language to promote safety;
- During cooperative work assignments, in which the rule is needed to promote efficiency; or ... continued on page 2

In This Issue

Things You Should Know About the New Federal Defend Trade Secrets Act

On May 11, 2016, the Defend Trade Secrets Act ("DTSA") was signed by President Obama, creating a new federal cause of action, to supplement those already available under state trade secret laws, including California's. The DTSA uses a similar definition of trade secrets to California trade secrets law, a three-year statute of limitations, and it authorizes remedies similar to those found in current state laws.



The DTSA will, for the first time, create a uniform body of federal law that applies nationwide to protect trade secrets, in much the same way as federal law already protects patents, copyrights and trademarks. It will also make discovery in trade secret litigation easier, because discovery in a federal lawsuit can be conducted across state lines, whereas subpoena power in a state court action is limited to the state where the action is brought, which can lead to costly delays and complications when parties with relevant evidence or documents reside in other states.

An important and potentially powerful new tool offered by the DTSA, which is not part of California trade secrets law, is an ex parte seizure procedure which a victim of trade secret abuse can use in extraordinary circumstances where the party against whom the seizure is ordered "would destroy, move, hide, or otherwise make such matter inaccessible to the court, if the applicant were to proceed on notice to such person…" While the seizure may be carried out immediately, the DTSA provides for the court to set a hearing at least 7 seven days after the seizure order has been issued.

Employers also have to be aware that the new statute includes provisions regarding whistleblower immunity and obligates employers to notify employees and contractors of such immunity.

BKCG advises its clients to consider the following actions in light of the DTSA:

1. Update your employment and confidentiality agreements to disclose the whistleblower immunity provisions in the DTSA. The penalty for failing to provide the required notice is that the injured party cannot collect the punitive damages and attorneys' fees that might otherwise be available against the transgressor under the DTSA in trade secret litigation.

2. Initiate a policy or reconsider your company's policy regarding bringing trade secrets claims. Federal courts can provide a much speedier and more streamlined forum in which to bring such a claim than a clogged California state court, with its territorial discovery limitations, as discussed above.

3. Inventory your company's trade secrets and re-examine your current efforts to safeguard them. Are your consistent about having all key vendors and all employees sign NDAs? Do you password protect sensitive documents or otherwise limit access to them? Do you have any way to detect whether employees are misappropriating sensitive data to use for the benefit of a future employer? Remember that prevention is far more effective – and cheaper – than cure and, also, sloppy protection policies can even eliminate your ability to protect your trade secrets as such.

4. Consider formulating a plan of action to respond to suspected misappropriation so that your company and its lawyers can act quickly to protect the company's crucial information and secrets if they are stolen, including obtaining a seizure order. This plan may include designating the person responsible to spearhead the necessary remedial action and to work with your company's lawyers to move for a seizure order as quickly as possible. Some of this legwork can be done up front, such as documenting in advance the steps you take to protect your trade secrets and why they qualify as such. Swift response to misappropriation is of vital importance in trade secrets litigation. Furthermore, a plan should also contemplate your company's response if it is on the receiving end of a wrongful DTSA seizure order.

In conclusion, while the DTSA largely overlaps with California's and other states' trade secrets laws, it also offers victims of trade secret theft some important new advantages over state court actions, such as the availability of an ex parte seizure order and a federal court forum with nationwide discovery jurisdiction.

Please contact Greg Clement at (949) 975-7500 or gclement@bkcglaw.com if you would like to have your company's current employment and confidentiality agreements reviewed or updated, or have questions about this or any other aspect of trade secrets law.

When Can An Employer Require Employees Speak Only English? continued from page 1

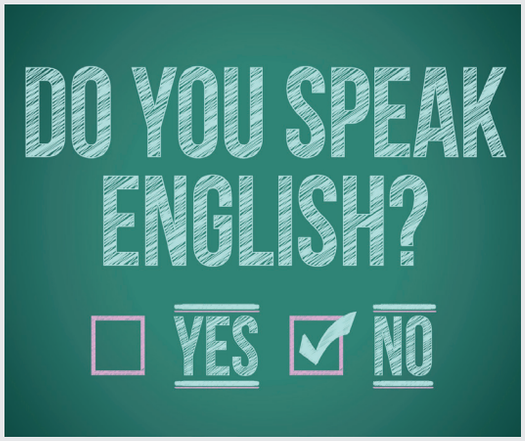
• In order for an english-speeaking supervisor to monitor the performance of an employee whos job duties require commmunication with co-workers or customers.

A review of the few Californian cases addressing Government Code Section 12951 make one thing clear – any restriction of an employee's right to speak a language other than English while at work must be narrowly tailored to address specific concerns covered by Section 12951. For example, it would certainly be impermissible to require English only simply because English speaking employers do not like their co-workers speaking a different language.

Remember, in order to comply with California law, the employer also must be able to clearly notify its employees when English only is required and the consequences for not following the rule.

As you can see, this issue is complicated so a business should discuss what it wants to do and why it wants to do it with an employment attorney before implementing any policy at work that limits an employee's ability to speak in her or his native tongue.

Please contact Ros Lockwood at (949) 975-7500 or rlockwood@bkcglaw.com if you have questions about any issue discussed in this article, or any other related matter.



Partition: A Brief Primer on a Statutory Remedy for Disputes Among Property Owners

What do you do if you are a part owner of a piece of real estate and you want to sell the property, but your co-owners do not? Under California law, your remedy is to seek partition, a legal process by which a property owner asks the court to either: 1) order that the property be divided up according to each owner's respective interest percentage ("partition in kind"), or 2) order a forced sale of the entire property ("partition by sale").

Partition in kind is the preferred remedy in California. If a property can be divided in such a manner that each owner receives a viable, useable piece of the property equivalent to his/her ownership percentage interest, the Court will order that division. Partition in kind works best for undeveloped land.

There are many circumstances where, due to the particular situation of the land, the partition in kind of the land would substantially diminish the value of each party's interest. For example, it would be extremely difficult to physically divide property improved with a multi-tenant shopping center. In those cases, partition by sale will be ordered if the court determines that the sale of the property and division of the proceeds would be more equitable than division of the property.

Partition by sale has a couple of obvious drawbacks. First, any time a property is being sold under "duress" of a court order, the selling price tends to be depressed. Second, the court typically orders an independent "referee" to handle the sale of the property, and that referee's fees may be deducted from the sale proceeds.

Finally, California law recognizes a third "remedy", partition by appraisal. In a partition by appraisal, the property is appraised by an agreed-upon third party, and the owner(s) wishing to keep the property buy out the interests of the owner(s) wishing to sell, at a price determined by the appraiser. While this would seem to be the most logical approach to resolving disputes among property owners, partition by appraisal is a wholly voluntary remedy, meaning that the court cannot require this process unless every owner agrees to it.

Partition lawsuits often concern properties whose current owners inherited their interest from family members and for which there is no written partnership or operating agreement establishing a protocol for resolving ownership disputes. Sometimes, the ownership interests may be subject to a written trust that expressly states that the property can never be sold by the trustee. Under California law, trust provisions prohibiting the sale of property are not necessarily enforceable, meaning that partition claims can still go forward. Code of Civil Procedure section 872.840 gives the trial court discretion to order that the property still be sold, notwithstanding a trust provision forbidding it.

A property owner opposing partition stands in the face of a slowly-moving train. There are virtually no defenses to partition – when there is an ownership dispute, the property will be sold or divided (unless cooler heads ultimately prevail and a buyout is arranged). Anyone can force partition – even someone with a very small ownership interest – and the court can award the owner seeking partition her attorney fees if the matter proceeds through trial. When served with a summons and complaint for partition, the best course of action is to get all owners to the negotiating table as quickly as possible. Every effort must be made to obtain a mutually-agreeable valuation of the property in question, which can serve as the springboard for a buyout process or an agreed-upon sale that does not take place under the duress of a court order.

Please contact Michael Oberbeck at (949) 975-7500 or moberbeck@bkcglaw.com if you have questions about any issue discussed in this article, or any other related matter.

US Supreme Court Clarifies Rules Prohibiting Illegal Insider Trading

Federal securities laws prohibit illegal "insider trading", which refers to buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, nonpublic information about the security. Insider trading violations also include "tipping" such information, where the person who receives the tip trades on the insider information.

The criminal penalties for illegal insider trading are steep: up to 20 years imprisonment in a federal penitentiary and a maximum fine of up to $5 million.
Martha Stewart and Jeff Skilling were both convicted of illegal insider trading, while Mark Cuban and Phil Mickelson were investigated. Cuban went to trial and won; Mickelson avoided prosecution by agreeing to repay the money he earned ($931,000) from his purchase of stock prior to a material public announcement. These differing outcomes are due to unique facts and circumstances as well as the murky nature of this area of the law.

In *Salman v United States*, the US Supreme Court recently clarified that the prohibition on insider trading also applies to a "tippee", which is a person who receives inside information from a "tipper" with knowledge that its disclosure breached the tipper's duty of trust and confidence not to exploit such information for personal advantage. Salman was convicted of federal securities-fraud crimes for trading on inside information he received from a friend and relative by marriage, Michael Kara, who, in turn, received the information from his brother, Maher Kara, a former investment banker at Citigroup. On appeal, Salman argued that a gift of confidential information to a friend or family member alone was insufficient to establish the personal benefit required for tippee liability, claiming that a tipper does not personally benefit unless the tipper's goal in disclosing information was to obtain money, property or something of tangible value.

The Court rejected the distinction, finding that the tipper personally benefitted because giving the gift of trading information to a trading relative is the same thing as trading by the tipper followed by a gift of the proceeds. The lesson learned from Salman is that even "gifts" of inside information can lead to criminal prosecution.

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THE NARROW CONSTITUTIONAL INTERSECTION:

Where Political Activity Under the Guise of Free of Speech Threatens to Create an Inherently Hostile Work Environment

At an extraordinary level, the candidates campaigning for the 2016 U.S. Presidential Election voiced unadulterated views on race, religion and immigration. Their remarks suggest the freedom of speech is unconditional, no matter how offensive to individuals of various races, religions, sexual orientations and persons suffering from various medical conditions and disabilities. More importantly, the candidates' remarks incited many of the electorate to take to social media and the workplace, to voice their own views on these topics.

Emboldened by the election and the media's liberal exercise of free speech, many employees believe their remarks are unconditionally protected by the first amendment, even if discriminatory or harassing to others in the workplace. This line of thinking endangers equal protection of all employees under the law. Employers weary of violating the constitutional right to free speech and hoping to avoid legal action are likely to tolerate unlawful discrimination and harassment in the workplace. However, they should not allow the current political climate to morph the workplace into an inherently hostile work environment. If they do so, employers would end up disregarding an even more important constitutional provision: the equal protection clause. Notably, they would also end up disregarding state and federal laws prohibiting employment discrimination and harassment.

To avoid this dilemma and pass through the narrow intersection of competing constitutional rights, employers simply need to understand the limitations of the constitution and the bounds of the state and federal laws governing their employees' rights.

Understanding First Amendment Implications In The Workplace

In part, the First Amendment prohibits the government from making any laws that limit or prohibit free speech. In 1957, U.S. Supreme Court beautifully summed up the purpose of the First Amendment's freedom of speech clause, stating: The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.[1]

Employers must understand this purpose and the limitations on the freedom of speech. The First Amendment does not apply to private employers. In fact, California courts have expressly held that an employee has no wrongful termination claim against an employer where he or she is terminated for exercising free speech. This is critical, as private employers need not worry themselves with whether adverse employment action they take violates the First Amendment.

Government employers do need to comply with the First Amendment. In every scenario implicating First Amendment concerns, Employers should start off by determining whether their employees' conduct/activities amount to protected speech. The First Amendment does not protect seven particular categories of speech, including speech that constitutes "fighting words" or incites a breach of peace. It is difficult to imagine that insensitive and offensive remarks about race, religion, gender, sexual orientation and other protected traits would not incite a breach of the peace, but that is the critical determination for government employers. On the other hand, merely offensive remarks that do not incite a breach of peace will unfortunately be protected as free speech.

However, whether or not employers are required to ensure freedom of speech for their employees, the equal protection clause and its principles are paramount and require a lot more of employers.

The Paramount Importance Of The Equal Protection Clause

The Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the federal and state governments from denying equal protection of the laws to all persons. Again, the Supreme Court artfully explained the purpose of the equal protection clause: The matter of primary concern of framers of this amendment was establishment of equality in enjoyment of basic civil and political rights and preservation of those rights from discriminatory action on part of States based on considerations of race and color, and the provisions of this amendment are to be construed with such fundamental purpose in mind.[2]

Like the freedom of speech clause of the First Amendment, this clause only applies to government employers, all of whom must keep in perspective, the clear limitations on the freedom of speech and the open-ended nature of the equal protection clause. The freedom of speech is one of many rights afforded by the laws of this county, but the equal protection clause aims to ensure that the freedom of speech, along with all other rights and privileges, are equally available to all persons. In other words, the equal protection clause encompasses the freedom of speech. The importance of this clause is evident from the many state and federal employment laws prohibiting employment discrimination. This is how the equal protection clause has cleverly reached private employers.

Employment Laws With Underlying Free Speech And Equal Protection Goals

In California, employers face civil liability for discriminating, retaliating against, or harassing any employee because of his or her race, color, ethnicity, national origin, religion, gender and disability. Employers also have to take reasonable steps to prevent such discrimination and harassment. The purpose of these laws is to ensure employers treat their employees equally at work, regardless of race, religion, gender and other protected characteristics. Clearly, the equal protection clause looms large in the workplace, although it expressly only applies to government employers.

Private employers faced with speech offending employees of a particular race, ethnicity, gender, sexual orientation, or with disabilities, need not tolerate them because of the First Amendment. The aforementioned laws *require* swift employer action to prevent discriminatory or harassing remarks and conduct and to protect their recipients.

Just because the First Amendment binds them, government employers do not have to perform a juggling act. In the face of discriminatory or harassing conduct towards employees because of their protected characteristics, government employers must remember that the equal protection clause is paramount to the freedom of speech. Their first obligation is to ensure all employees are equally protected in the workplace. Naturally, this includes enforcing state and federal anti-discrimination laws.

[1]*Roth v. U.S.* (1957) 354 U.S. 476 [2]*Shelley v. Kraemer* (1948) 334 U.S. 1, 23.

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RALPHS GETS THE LAST WORD IN EXPENSIVE LEASE DISPUTE

What started as a dispute over lease terms, turned into a long and convoluted court battle that ended with a definitive win for BKCG client, Ralphs Grocery Company.

The underlying lease dispute centered around whether Ralphs' discounted club card prices should be used when calculating income for Ralphs' revenue-based percentage rent lease payments. Ralphs' landlord for one of its Central Los Angeles stores, Midtown Associates, took the arbitrary position that the full, non-club card retail price should be used for all calculations (regardless of whether or not the customer was a club card customer and regardless of what the sale price for items the customer actually paid at the register). This theory, of course, would translate to much larger percentage rent lease payments to Midtown as it was established that the overwhelming majority of Ralphs' sales are to club card customers.

Ralphs obviously disagreed with Midtown's theory, contending that revenue-based percentage rent payments should be based on actual income charged and received under Ralphs' two-tiered pricing system (reduced prices for club card customers and full retail for non-club card customers). Litigation ensued, and Ralphs engaged a large national law firm. Unfortunately, the trial court ruled in favor of the landlord, Midtown, and awarded Midtown back rent of over $300,000 and attorney's fees of more than another $300,000.

Clearly, this result was a setback for Ralphs, but the stakes were too high to leave it be. Thus, Ralphs appealed the trial court decision to the California Court of Appeal challenging the trial court's interpretation of the lease. The Court of Appeal completely reversed the decision of the trial court and Ralphs was completely vindicated on the legal issue of the proper interpretation of the lease. Ralphs, however, was not left nearly whole after this favorable decision. Indeed, after paying the original trial court award, plus years of over-paying percentage rent lease payments based on the trial court's incorrect interpretation of the lease, Ralphs was out of pocket over $1 million. Not only that, Ralphs incurred over $1.2 million in legal fees paid to its own counsel from trial through its successful appeal.

Looking to recoup its wrongful losses, Ralphs retained BKCG to handle its remaining claim for restitution (to recover the amounts paid to Midtown) and its large attorney's fees request against Midtown. BKCG's challenge: To convince the very same trial judge whose ruling against Ralphs was reversed by the Court of Appeal to make Ralphs whole again.

In light of the unequivocal reversal, BKCG immediately made a demand on Midtown to voluntarily pay the amounts already paid by Ralphs, plus its attorney's fees. Midtown refused. And so, BKCG litigation head, Daniel J. Kessler, and his team prepared the fee motion to recoup the fees Ralphs paid to all of its prior counsel since the beginning of the litigation. After extensive briefing, the parties argued their positions at the Los Angeles Superior Court. Midtown's principals were present for the argument in which Midtown incredulously argued that Ralphs should recover no more than $300,000 in fees. The court took the matter under submission after counsel for both argued their cases.

In the meantime, Midtown's lawyers contacted BKCG–finally ready to pay back the amounts paid by Ralphs pursuant to the now-defunct trial court ruling. Midtown agreed to pay Ralphs over $1.25 million as restitution for 100% of the amounts already paid by Ralphs plus interest. Soon thereafter, Ralphs received the decision of the trial court on the attorneys' fees issue, awarding Ralphs an additional $1.1+ million in fees to be recovered from Midtown.

Based upon the skillful handling of the restitution and attorney's fee issues by BKCG, Ralphs will end its year with an additional $2.3+ million rightfully back on its books.

Please contact Dan Kessler at (949) 975-7500 or dkessler@bkcglaw.com if you have questions about any issue discussed in this article, or any other related matter.

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Where Political Activity Under the Guise of Free of Speech Threatens to Create an Inherently Hostile Work Environment

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Of course, the complication arises when employees invoke their right to political speech and activities pursuant to specific state and/or federal laws. For example, the California Labor Code makes it unlawful for employers to prohibit employees from participating in political activities. Employers also cannot terminate or threaten to terminate their employees as a means of influencing them to engage or refrain from engaging in political activities. This is where the freedom of speech has slowly crept into the private realm and this is where the two constitutional freedoms intersect once again. Once again, however, the solution for employers is clear: understand the purpose of the statutes and reconcile them with the purposes of their underlying constitutional rights. These laws absolutely do not permit free speech or political activity at the expense of anti-discrimination laws.

Ultimately, state and federal anti-discrimination laws have equal protection goals in mind while state laws such as California Labor Code Sections 1101 and 1100 have first amendment principles in mind. The labeling may have changed, but an employer's response should not. Employers should approach political speech and free speech in the workplace with this in mind and ensure that equal protection of their employees is a priority.

Please contact Suren Weerasuriya at (949) 975-7500 or sweerasuriya@bkcglaw.com if you have questions about any issue discussed in this article, or any other related matter.

ACCESS TO DIGITAL ASSETS

Nearly every individual reading this article, whether they realize it or not, has digital assets. A digital asset refers to an electronic record in which an individual has a right or interest.

The term does not include an underlying asset or liability, unless the asset or liability is itself an electronic record. To illustrate, an individual's user name and password utilized to access financial accounts online are digital assets, not the actual funds in the account. Digital assets would also refer to Facebook, Instagram, Snapchat, LinkedIn and other similar accounts.

A new area of law that legislatures are attempting to deal with is who has the legal right to access these accounts for an individual when that individual passes away. Effective January 1, 2017, California has passed the Revised Uniform Fiduciary Access to Digital Assets Act, in an effort to provide mechanisms that individuals may use in order to grant access to these types of assets to an appointed representative.

The new law authorizes a person to use an online tool to give directions to the custodian of his or her digital assets regarding the disclosure of those assets to a third person. The custodian of an individual's digital assets must provide the use of this online tool in order to use this section. If an individual has not used an online tool to grant that access, he or she may give direction regarding the disclosure of digital assets in a will, trust, power of attorney or other record.

Consequently, if a client wants to grant a third party access to their social media accounts or financial accounts, they must first determine whether the particular company/custodian has the online tool which would allow the individual to designate the person they would want to have access to their accounts. If no online tool is utilized, it is important to designate that individual in your estate documents. If neither of these options are used, a family member may find themselves frozen out of the accounts with little or no remedy.

Please contact Bill George at (805) 373-1500 or wgeorge@bkcglaw.com if you have questions about any issue discussed in this article, or any other related matter.

INTRODUCING THE NEWEST BKCG TEAM MEMBER

Suren N. Weerasuriya joins BKCG's Irvine, California office as a litigation associate. Suren brings an aggressive yet practical approach to the table, having represented an assortment of clients including employers, employees, consumers, insurance carriers and clients in attorney-client fee disputes. Suren has extensive experience litigating cases in state and federal court. He is federally admitted in all districts for the United States District Court of California and the Bar for State of California. Suren received his J.D. from Southwestern University School of Law and his undergraduate degree from Virginia Tech. Suren was born in Colombo, Sri Lanka and raised in Irvine, California.

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