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California Landscape Contractors Association
Representing the Landscaping & Irrigation Industry

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INFORMATION

Evan Moffitt, 805-616-9858
Email: EMoffitt@SiteOne.com

†Students must be currently enrolled full-time students at Cal Poly in the Landscape or Turf concentration and a current Student Member of CLCA.

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Should You Consider a Cell Phone Time Keeping App?

Steven Cesare, Ph.D. The Harvest Group, Landscape Business Consulting | harvestlandscapeconsulting.com

A landscaper contacted me to talk about tracking non-exempt employees' work time. Given the increased frequency and cost of wage and hour lawsuits due to inaccurate employee time tracking (e.g., start of work shift, end of work shift, start of meal period, end of meal period, unpaid overtime), this issue is of paramount importance to all detail-oriented business owners.

Like many small businesses, this Company has considered paper time sheets, time clocks, and various GPS products to address this complex and imperfect issue. At the time of our conversation, the Company had decided to track non-exempt employee work time by requiring all non-exempt field employees to install a time keeping application on various electronic devices including Company-issued cell phones and tablets, as well as on employees' personal cell phones. With the application in place, affected employees would simply have to activate the application at appropriate times (e.g., start/end of work shift, start/end of meal period), to document all work time that would be forwarded easily to the payroll system, thereby ensuring accuracy, expediency, and compliance.

Well, maybe two out of three...

Upon hearing the facts of this process, I offered the following points of caution, review, and counsel.

- Verify that tracking employees' work time using this type of technology is legally compliant with existing state law. While intuitively, we think we know the answer, it is always best to be more safe than sorry, when dealing with wage and hour issues.
- Ensure the Company Employee Handbook contains a policy of GPS tracking, employee surveillance, and

electronic time keeping to remain transparent to the workforce.

- Since the application was required to be installed on employees' personal cell phones, several nuanced issues become immediately noteworthy.
- Did the employees sign a formal, written consent form or waiver statement allowing this application to be installed on their personal cell phones?
- Were the employees informed that the application would also track their time and whereabouts on non-work time?
- Could the application be deactivated at the end of the work day on each employee's personal cell phone to prevent surveillance of them on personal time?
- Which Company managers would have direct access to the employees' GPS time keeping (e.g., location, time, duration) reports, which may also include information about their locations during personal time (e.g., home, night club, friend's residence).
- Much like an employee using a personal vehicle for Company-related business, the use of an employee's personal cell phone for Company-related

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Protect Workers from Unhealthy Air

Cal/OSHA Mandates Worker Training, Respiratory Protective Equipment

As the air quality goes down as the number of wildfires goes up, the California Landscape Contractors Association encourages all green industry professionals to monitor unhealthy air quality and provide all outdoor workers Cal/OSHA-mandated training and respiratory protection.

Key recommendations:

- Review worker safety and health in regions with wildfires guidance from the California Department of Industrial Relations and Cal/OSHA.
- Communicate with your employees.
- Provide N95 respirators.

How Bad Is The Air?

California's protection from wildfire smoke standard applies to workplaces where the Air Quality Index (AQI) for fine particles in the air is 151 or greater and where workers may be exposed to wildfire smoke. To find your jobsite's AQI, enter its ZIP code or city at airnow.gov.

Mandated Communication With Employees

Cal/OSHA mandates that employers inform employees about wildfire smoke hazards in a form readily understandable by all affected employees, including provisions designed to encourage employees to inform the employer of wildfire smoke hazards at the worksite without fear of reprisal.

CLCA strongly encourages all employers to review Cal/OSHA's safety order Wildfire Smoke Information to Be Provided to Employees (Mandatory).

Mandated Respiratory Protective Equipment

Although employee use is voluntary, employers are mandated to provide respiratory protective equipment, such as N95 respirators.

According to Safety Order 5141.1 Protection from Wildfire Smoke, "Where the current AQI ... is equal to or greater than 151, but does not exceed 500, the employer shall provide respirators to all employees for voluntary use in accordance with section 5144 and encourage employees to use respirators."

~KURAPIA~

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Labor Law Update:

What You Need To Know About New Ruling on Families First Coronavirus Response Act

Giuliana Gabriel, J.D. of the California Employers Association

On August 5, 2020, a federal district judge ruled that the U.S. Department of Labor exceeded its authority with respect to certain paid-leave eligibility requirements when interpreting the Families First Coronavirus Response Act. Although the decision was issued by a federal district court in New York, employers in California should follow its interpretation until an appellate court reviews the decision or other courts weigh in on the issues.

Employers Must Provide FFCRA Leave Even When There is No Work Available

The court found that if an employee was not working due to a COVID-related reason as defined by the FFCRA, they are still entitled to emergency paid sick leave (ePSL) or emergency family leave (eFMLA) as applicable — even if the employer has no work available — so long as the employee is still employed by the employer. This supersedes the DOL rule which stated that an employer need not provide emergency paid sick and family leave when the employer “does not have work” for the employee.

Therefore, employers should:

- Consider whether it makes sense for their business to retain its employees and pay for FFCRA leave, or layoff/terminate employees, when there is no work available,
- Consider retroactive payment for eligible FFCRA leaves during any previous business closure or furlough, and
- Proceed with caution and consult counsel, until additional courts weigh in on this issue.

Employers May Only Ban Intermittent Leave When It Poses a Higher Risk of Infection

The court also struck down the department’s blanket rule requiring employer consent for intermittent leave (i.e., leave in separate periods of time, rather than one continuous period). Now, an employer is only permitted to reject an intermittent leave request when it correlates with a “higher risk of viral infection.” Therefore, if an employee requests intermittent leave

to care for their child whose school or place of care is unavailable because of COVID-19, the employer must allow it. Employers are permitted to refuse intermittent leave for the other covered reasons under the FFCRA, such as when the employee is subject to a stay-at-home order or experiencing symptoms and seeking a medical diagnosis.

Employers May Not Impose Documentary Requirements as a Precondition to Leave

The court further held that employers may not require employees to submit documentation, such as a doctor’s note or stay-at-home order, prior to taking FFCRA leave. Therefore, employers should revise their FFCRA leave policies to the extent they require documentation as a precondition to leave. Employers should request notice and documentation from the employee “as soon as practicable.”

The Department’s Definition of “Health Care Provider” Too Broad

The FFCRA states that an employer of a “health care provider” or “emergency responder” may elect to exclude such employees from FFCRA benefits. The court struck down the department’s definition of “health care provider,” finding it is too broad. The department conceded that its definition included an “English professor, librarian or cafeteria manager at a university with a medical school.” Because the court did not provide a new definition, health care industry employers should consult counsel in determining who qualifies as a “health care provider” for purposes of exemption from the FFCRA.

What You Need to Know

For now, employers should follow the court’s interpretation regarding work availability, intermittent leave, documentation requirements, and the definition of a “health care provider.” Employers may refer to DOL guidance regarding all other FFCRA issues.

Questions?

Confused? CLCA’s HR Hotline - an exclusive CLCA member benefit - is here to help. Contact them at clca.org/hr or call us at (800) 399-5331.

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Finding Inspiration During the Year 2020

By Daniel Mazawa, General Manager, Madrone Landscapes

All of us are looking for something, and sometimes inspiration is all we need. At our design-build landscape construction company in the beautiful San Luis Obispo County of California, we are an inspired group that deal tranquility and beauty as our fare. One of the downsides to caring so much about landscapes is that we are a little snobby about our profession, cringing at the demeaning term of “landscaping” as a shrub-it-up afterthought. Now in the midst of 2020, we find ourselves a little lost, like everyone in the pandemic, on how to keep the stoke up and do what we do best.

We work from home now, remoting into our CAD production software with the amazing technologies that allow us to keep working safely among the ever more cautious world. We have everything we need on paper, work to do, people to do it, and eloquent technology. But something is missing.

Designing landscapes in a self-imposed echo chamber can be a lonely and frustrating process. We are finding the need to reinvent our methods to get a dose of inspiration from the world without the in-person team comradery of the now defunct design studio. Limitations have forced us to look within ourselves to find new sparks of inspiration.

Acceptance

At some point we have all settled on some level of acceptance; we can't just go back and pretend nothing happened. We can reminisce about the way it used

to be: the morning greeting to a group of co-workers turned friends, high-fiving when we get a contract signed, and sitting shoulder to shoulder working out a plan problem. But clinging to the way it was is no way to find inspiration, and at some point we need to evolve into our new reality.

Embrace the Tools

Technology is always colder than true human interaction, from emails to video conferencing. We all put on the smile to try to keep everyone else's spirits up, but like looking at a photo of a good memory, we just wish we were there.

That being said, a 90% feeling of human interaction is still something. We can keep it light, talk about how we are doing, bring up silly jokes like we would if we walked by someone's desk, or talk about something cool we found. We tend to focus on the business at hand in a video conference meeting, but being ourselves and making idle chit chat is what opens us up to finding inspiration. In fact, I was inspired to write this piece by just asking my fellow designers, what do you do when you get stuck on a design? I was inspired by the answers.

Zoom Out

The literal nature of our video conferencing software is to “Zoom” in to the little boxes with talking heads and focus on the task at hand. Sitting at a computer all day can be a strain on the eyes as well as the search for inspiration. Get up! Walk around, look outside, go outside, see what's going on out there! I find a lot of inspiration in my garden. A 10 minute break to go prune some tomato plants can break the inspiration block, allowing me to unintentionally brainstorm my work with free mind while performing an idle task with my hands. Not to mention the feeling of the sun, the sounds of the birds, and the smell of the tomato vine. You can take this further by walking your neigh-



borhood, taking a hike or driving around the town. Being a landscape designer, it is impossible to turn off the manufacturing of stoke from visual stimuli, sometimes we just need to get out of our own way.

You can also embrace the internet to find inspiration from the comfort of your own chair. One of our all-star designers, Megan Savage, keyed us into looking at real-estate websites. It is a great way to look at homes or properties from the perspective of the consumer. So often we are looking at construction details or diagrams, and it is eye-opening to just see landscapes from the eye of someone looking to buy a property. The access allows us to look at very nice properties with professional photography, and the perspective allows us to zoom out and react, "wow that is a peaceful setting!" Undoubtedly, we will see something that emulates the vibe we want to create in our design, and we will change our design from the new inspiration. For planting design, looking at local California Central Coast landscapes gives us great ideas on plant material that will grow here.

Reach Out

In a design studio setting, we are right there next to inspired experts ready to help solve problems and give inspiration. At home, calling someone for what feels like a dumb question seems like an undue burden on the other, and that becomes the excuse

to stay stuck in the mud. We have quickly found that everyone is in the same boat and getting a call is far from unwelcome. Reach out to those you work with early, often, and willingly. You also may have people you live with, or friends and family sitting home bored who would love a mundane question about a design, so they can feel valued and useful. You don't need to be an expert to give a great perspective!

Appreciation

This is it, folks! Here we are in it, so deal with it! Maybe the most important tool for inspiration is an internal perspective shift to appreciate what we have.

The wise Taylor Boyle once told me he loves being out working on the hottest day of the year, or being outside in the middle of a giant storm. Why? Because you can't escape being present in the moment and that is truly living. With the current pandemic, I don't mean to be stuck in the news or the happenings of the world, I mean be present in your home with your work at hand, in one of the greatest places to live. We are lucky to be here in a place that surrounds us with natural beauty. We are lucky to have the space to be outside safely while many do not.

We can find inspiration all around us, and if we look a little closer with a freed-up mind, we can create inspiration from ourselves. Inspiration can be contagious... in a good way!

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