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The holiday season can be a difficult time even for Santa. Sadly, events have changed his jolly Ho-Ho-Ho's into an endless series of woes at his New Jersey facility. The other eight (8) reindeer are subjecting Rudolph to differential treatment which, according to a note from Doc Holiday, has caused Rudolph severe episodes of anxiety and depression requiring time off from work during Santa's busiest time of the year. Santa's fifty-five (55) elves (thirty-five (35) of whom are hired solely for the five (5) month period straddling the holiday season) want Hermie fired due to his incessant whining over dental school costs. The elves, who work industriously for fifty-five (55) to sixty-five (65) hours per week and have grown tired of enduring the temperature extremes at Santa's shop caused by battling family members Heat Miser and Snow Miser, have threatened to call OSHA. Some young copycat, new to the holiday delivery business, named Kris Kringle is trying to squeeze Santa for territory. A crime spree swept the small town of Who-ville and the sole eyewitness, little Cindy Who, fingered Santa for the twisted caper. Not only was Santa required to post bail, Mrs. Claus, the reindeer and elves have been subjected to repeated questioning and constant surveillance as detectives attempt to locate Santa's "fence." While in lockup, Santa ran into longtime friend, Frosty D. Snowman, who was sweating his arrest for stealing some old silk (allegedly "magic") hat and public nudity. Although the Teamsters were certified through an NLRB election as the exclusive bargaining representative for all reindeer only four (4) months ago, the reindeer aren't satisfied so far with the representation and a rival organization, The Knights Templar, are mustering some of the reindeer in front of Santa's shop with picket signs that read: "Join A Different Kind of Union and Put Christ back into Christmas!" Some guy named Charlie is claiming that Santa's shop does shoddy work based on a defective Christmas tree. And if all that's not enough, the union is telling Santa that he has to comply with Obamacare as well as posting and distribution deadlines that are quickly approaching in January of 2014. More than ever, Mrs. Claus wants to move to sunny Mexico.

This year, lets help Santa!

Is Santa required to comply with Obamacare? Explain.

Can Kris Kringle encroach on Santa's business?

Must Santa tolerate the Templar's picketing?

What should Santa do and/or not do regarding the elves' threat to complain to OSHA?

What posting or distribution requirements must be met in January 2014?

Armando V. Riccio, Esq., earned his M.S. in Industrial Relations & Personnel Management prior to pursuing his law degree which equips him with extensive practical and legal experience in his representation of management in the public and private sectors for various employment matters such as negotiations, arbitrations, discrimination and harassment claims as well as matters pending before the EEOC, NLRB, Division on Civil Rights, PERC, and federal and state courts and administrative agencies. He also conducts investigations of employee complaints and claims, training sessions on numerous workplace issues including anti-discrimination, anti-harassment and anti-retaliation matters, and advises clients regarding employment issues, practices and procedures.



John Baldino, SPHR, President of Humareso, is a 23-year human resources industry veteran with deep experience in all facets of employee engagement and business development, providing strategic direction to help employers manage

### ***Answer by Gregory Grimaldi:***

Santa needs to be aware of the following regarding Obamacare:

1. If group health coverage is offered to workers, many of the provisions of PPACA (a/k/a Obamacare) will apply to the group health plan. Some provisions of PPACA apply to group health plans of all sizes (so the size of Santa's workforce doesn't matter) such as the dependent to age 26 mandate (assuming coverage for dependent children is offered), the prohibition on pre-existing condition exclusions, the prohibition on lifetime limits and the restriction and later prohibitions on annual limits on essential health benefits, and the prohibition on excessive waiting periods (generally over 90 days). Other provisions of PPACA apply based on the size of the employer such as the employer shared responsibility mandate, which requires employers to offer health coverage that meets PPACA requirements to full time employees (a term defined by PPACA that generally means an employee who works an average of 30 hours per week or 130 hours per month) or pay a penalty if one of their full time employees gets a premium subsidy for health through the Marketplace (a governmental marketplace to buy health insurance). Since understanding the various compliance obligations under PPACA may be challenging, Santa may want to work with a health care reform expert, such as an attorney or an employee benefit consultant to fully understand his obligations under the vast PPACA law.

2. With regard to the employer shared responsibility mandate (also referred to as "play or pay"), only applicable large employers are subject to this provision. Santa will be considered an applicable large employer if he employs 50 or more "full time equivalents" (workers). Generally, the full time equivalents determination means that the hours worked by both full-time and part-time employee have to be considered as well as seasonal employees if they work more than 120 days in the year. Based on the scenario described above, the 35 elves that are working for a five month period would not be considered seasonal employees since they are working more than 120 days of the calendar year. Therefore, they would be included in the employee count to determine if Santa's corporation is a large employer, subject to the shared responsibility portion of PPACA. Since the 35 elves plus the remaining full time elves (working 12 months) is "50 or more", Santa's company would be considered a large employer and subject to the "play or pay" provision of PPACA.

3. Since Santa's company is a large employer, he must now determine which elves must be offered coverage to avoid paying a penalty tax under "play or pay", unless Santa prefers to pay a

talent, recruit for skills gaps, assess markets for growth, assess competition, increase employee performance, develop long-range succession plans and influence an enthusiastic, innovative culture.

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penalty. If health coverage that meets the requirements of PPACA is not offered to the 20 full-time "12 month elves", who work on average, 30 or more hours per week, Santa will be subject to a "play or pay" penalty if one of the elves gets a premium subsidy to buy health coverage through the Marketplace. Santa will have to track the hours for the seasonal workers to determine if he is at risk for paying a penalty if coverage is not offered to the seasonal workers. Santa may use the safe harbor method for tracking employees provided by the government. This safe harbor method uses measurement and stability periods to determine if employees are full time under PPACA standards. The employer may be subject to a penalty if these employees are determined to be full time in the measurement period but are not offered health coverage that meets PPACA standards if the employee gets a premium subsidy for Marketplace coverage. Santa would not have to pay a penalty for the 35 "5 month elves" if Santa uses a 12 month measurement period since the average number of hours worked within the 12 month measurement period would be less than 30. But if any worker did work an average of 30 or more hours per week during the measurement period, to avoid potential penalties, Santa must offer these workers health coverage that meet PPACA standards.

***Answer by Armando V. Riccio, Esq.:***

While there doesn't appear to be an actionable hostile work environment claim (no protected class has been identified above), there is certainly a human resources problem concerning the behaviors directed at Rudolph which need to be promptly addressed by Santa. That said, Santa must determine whether his enterprise is a covered entity as well as whether Rudolph is eligible and entitled to time off under the Family Medical Leave Act ("FMLA"). Whether Santa's business is a covered entity depends upon, *inter alia*, whether his organization employs 50 or more employees during 20 or more calendar weeks. Once a covered employer meets that requirement the employer remains covered until a point when it no longer has 50 or more employees during 20 or more calendar weeks. Keep in mind that there is no undue hardship exception to the FMLA. Assuming Rudolph is not covered by the FMLA, Santa must also consider time off as a potential reasonable accommodation and whether the request constitutes an undue hardship. Notably, the foregoing leave issues are fact sensitive.

The extreme temperatures at Santa's shop clearly create a concern and the potential for an OSHA violation. Santa should take prompt action to quickly remedy the problem. Santa should also be reminded that the Conscientious Employee Protection Act prohibits an adverse employment action against an employee who threatens to complain to an outside agency based upon the employee's reasonable belief that the employer is violating the law. Whether Santa can take action against his new competitor

depends on the manner in which Kris Kringle competes with Santa. Not all forms of competition are legal. Beyond the common law or statutory protections that may be available, Santa may want to consider entering into contracts with his non-union employees which include restrictive covenants such as non-solicitation, non-competition and non-disclosure provisions.

The reindeer must stop picketing or risk an unfair practice charge. Section 8(b)(7) of the National Labor Relations Act prohibits recognitional or organizational picketing by a non-certified union when a valid election has been conducted within the preceding 12 months. That prohibition applies regardless of whether the picketing union (The Templars) was a participant in the recent election. In fact, The Templars owe an obligation to exercise reasonable diligence to determine whether a certification election was held within the last 12 months within the bargaining unit (reindeers).

Santa must post a new gender equity poster by January 6, 2014 as well as provide a copy of the notice to anyone hired on or after that date. Current employees must be provided the notice by February 5, 2014. A copy of the posting is available at [http://lwd.state.nj.us/labor/forms\\_pdfs/EmployerPosterPacket/AD-290GenderEquity1-14.pdf](http://lwd.state.nj.us/labor/forms_pdfs/EmployerPosterPacket/AD-290GenderEquity1-14.pdf).

### ***Answer by John Baldino, MSHRD SPHR***

One thing is for sure, Santa is not feeling the holiday spirit from those around him! The culture has downgraded quickly as evident by the complaining, teasing and picketing underway. Lost is the desire for healthy communication and constant improvement of working conditions.

As the answers above tell the tale of the legal requirements and compliance that face Santa and his organization, it's the "between the lines" dilemmas that will continue to plague Santa, even if he adheres to Obamacare and the required labor law postings. His team has crumbled into ineffectiveness and frustration. The basic construct of team has eroded.

Start with purpose. Does everyone know what their purpose is? Do they see just the individual effort or do they see the whole? It seems that Santa's team has lost their way and substituted other things to fill in the space of time. Each day that used to be filled with song as labor occurred to make each child's dream come true in the toy of their dreams has been replaced with negative evaluations and counter-productive measures.

Raise the banner on skills. Be sure each employee knows his/her skill set and that the team is aware of how that fits within the overall purpose. When employees see how it works, they tend to be much more gracious with each other. The benefit of the doubt is easily extended when there is confusion about a delivery or a process. Santa sets the tone for this and it's something he has done before - time to do it again!

And being accountable to the process is vital for each employee. When too much time is spent complaining, very little time is spent producing. Each employee is responsible for himself/herself. Santa and the reindeer & elf management team need to hold employees accountable to each piece of the process. The purpose of Santa's Workshop is to produce toys for kids around the world, not to produce aggravation for the employees inside. Being accountable pushes thinking back to self rather than to the lack assessed in others.

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*If you are a pass-a-long reader and would like to receive a copy of future mailings, please send an email to [dangelo@rclawnj.com](mailto:dangelo@rclawnj.com).*

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