



A HOLLYWOOD

How a Cast of Characters Won a
Landmark Victory for the Staffing Industry

By Sherri Alms

"One of the best stories I've heard in a long time," say critics. "A triumph for the staffing industry," say knowledgeable insiders.

What are they raving about? Let's just say it's a thrilling story we've titled "Payday." It could happen anywhere. It could happen to you.

Our story features a model, a movie star, and a cast of actors well known to the staffing industry. Not to mention several heroes, lawyers, lobbyists, and more than one unexpected twist.

So read on to find out how ASA and association members large and small joined together to protect the staffing industry. ►

Illustration by Kevin McFadin

L'Oreal Lawsuit

January 2005. It was a sunny day in Alexandria, VA, when the phone rang in the office of Ed Lenz, ASA senior vice president for public affairs and general counsel. But it was cloudy in Chicago, where Gerald Maatman, a senior partner with the law firm Seyfarth Shaw, which also has offices in California, was waiting for Lenz to pick up. He had bad news.

A L'Oreal model in California was suing her employer for failure to calculate overtime properly. Also at issue was whether temporary employees who are not paid the right amount on their final paycheck for an assignment are eligible for waiting time penalties. A California appellate court said no, holding that the ending of a temporary assignment after it runs its full course is not a "discharge" for purposes of Labor Code Section 201, and thus employees are not entitled to immediate payment of wages. But the state Supreme Court had just granted a review of that decision.

As soon as Lenz heard about the review, he knew the industry would have to act. Working with the ASA legal and legislative committee, he and partners from Seyfarth Shaw decided to file an amicus curiae, or friend of the court, brief

to explain that it would be an impossibly heavy burden to expect staffing companies to pay temporary employees immediately after each assignment.

The phone clicked down after the call and Lenz breathed more easily. Surely, the court would understand the burden it would be placing on companies. Yes, a little hard work on the brief and in a few months ASA could announce a victory in California.

But it would take more than a conference call, a brief, and a few experienced and wise heads to make it to the end of our story. Indeed, as you will read, it would take a whole coalition of folks, including ASA members, to give "Payday" a happy ending for the staffing industry. But we're getting ahead of the story.

Friend of the Court

ASA filed its amicus brief in July 2005. With input from ASA-affiliated chapter California Staffing Professionals and members of the ASA legal and legislative committee, attorneys from Seyfarth Shaw detailed the industry's legal argument and explained the hardship that the ruling would impose on staffing firms in California.

In the brief, ASA argued that "discharge" means firing or dismissing an employee and does not include an employee simply completing an assignment. Lenz pointed out that temporary employees understand that assignments are generally short-term and often unpredictable in length and, except for day labor workers, have no expectation of being paid immediately upon completion of an assignment.

ASA also pointed out that if staffing firms had to pay their employees at the end of each assignment, they would have to convert their payroll periods from weekly to daily to take into account that assignments end on every day of the week. In addition, their payroll and billing processes would have to be separated so that client invoices could continue to be issued weekly. Such a result, ASA argued, would be bad public policy and would injure a large segment of the California economy without providing offsetting benefits to California employees.

Unfavorable Ruling

Despite the efforts of ASA, its legislative and legal committee, California Staffing Professionals, and Seyfarth Shaw, in July 2006, the state's high court,

What Happened When: From the Courtroom to the Capitol

2005

January

Seyfarth Shaw brings the *L'Oreal* case to the attention of ASA.

July

ASA files a friend of the court brief in the case.

2006

July

California's high court rules that completion of a finite project or assignment constitutes a "discharge" under the California Labor Code, requiring immediate payment of wages.



without acknowledging any exception for temporary staffing, ruled that completion of a finite project or assignment constitutes a "discharge" under the California Labor Code, requiring immediate payment of wages.

The problem, explains Tom Kaufman, a Seyfarth Shaw attorney who worked on the brief, was that limiting "discharge" and "quit" to their natural, plain meaning created a situation in which the day laborer field worker, who gets picked up for one day of work, could be exploited and not receive pay for months and months. "The court handled that tension by stretching to find a meaning of 'discharge' that swept within it the mere expiration of a one-day employment agreement," he says.

Joe Mackey, CAC, CSP, president of XL Staffing Service Inc. and XL (Excell) Security Inc., who was president of California Staffing Professionals at the time, recalls how he felt when he heard about the ruling: "Even though the decision itself did not involve staffing companies, labor commissioners could have applied the decision to our industry. If it was applied across the board, it could have crippled many companies, if not put them out of business."

"Even though the decision itself did not involve staffing companies, labor commissioners could have applied the decision to our industry."

Joe Mackey, CAC, CSP, XL Staffing Service Inc.

Avalanche of Lawsuits

The staffing coalition, which consisted of ASA, California Staffing Professionals, representatives from some large staffing companies in California, the ASA legal and legislative committee, the ASA termination pay working group, and attorneys from Seyfarth Shaw, swung into action, little realizing that, in some ways, their work had just begun.

Since the California Supreme Court had refused to clarify the law, what they needed, explains Lenz, was clarification by the state legislature and expertise to guide the proposed fix through the legislative process. They turned to Edelman, Gilbert, Robson & Smith, ASA and CSP's longtime

lobbying firm in Sacramento, which found a bill to piggyback the proposal onto—to no end.

"Despite our efforts, there wasn't enough time to get the support we needed before the legislative session ended, especially when the unions strongly opposed it," Lenz says.

As the end of 2006 approached, three class-action lawsuits already had been filed against staffing companies based on the *L'Oreal* ruling, and more were coming. The class actions alleged that the companies had failed to pay wages immediately upon completion of assignments. Ultimately, 10 class actions were filed against staffing firms based on the *L'Oreal* ruling. ➤

2007

August

ASA and California Staffing Professionals seek to amend the California Labor Code to clarify that staffing firms can pay employees who have completed assignments on their "next regular payday."

Unions oppose the amendment

Legislative session ends without a bill for the staffing industry. A few legislators promise to work with the staffing coalition on a new bill in 2007.

January

State assemblyman Mark Leno agrees to introduce an amendment on behalf of the staffing industry.

Staffing coalition representatives meet with Assemblyman Leno and members of the California Labor Federation, which represents several California unions.

February

ASA is now aware of at least four class-action lawsuits based on the *L'Oreal* ruling

Despite concessions by the staffing coalition, union opposition to the amendment continues. Assemblyman Leno withdraws his support because he needs union backing in his campaign for re-election.

Three legislators, Sen. Leland Yee, Assemblyman Mike Davis, and Assemblyman Mervyn Dymally, introduce separate bills in support of the staffing industry.

ASA and California Staffing Professionals ask their members to contact their legislators in support of the bills. ➤

Star in Your Own Legislative Thriller

The ASA online grassroots action center is built around the concept of democracy—that every individual voice is important, especially when it comes to protecting your livelihoods and those of your employees. Although ASA tracks legislative activity on Capitol Hill and in the statehouses, the industry relies on the voices of staffing professionals to represent the industry and its needs to legislators. The shorthand: What you have to say matters.

Speaking up is easy with the grassroots action center. You can find your federal, state and local officials; get information on current federal legislation and key votes; read a primer about how to communicate with government representatives; and find out about national and local elections.

The center has been created to make everything as simple and quick for you as possible. Add your voice to those of your colleagues to make sure the staffing industry is represented nationally and locally. Just visit americanstaffing.net. Click on Legal & Government Affairs, then Contact Your Legislator.

This was exactly what the staffing coalition had feared—an avalanche of lawsuits that could require staffing companies in California to pay their employees as soon as their assignments were completed.

A Bill for the Staffing Industry

While the storm clouds of litigation gathered on the horizon, the members of the staffing coalition clung to their hope

that the law could be clarified. Supportive members of California's legislature had invited the coalition to revisit the issue in the next legislative session. What the industry needed was a bill of its own, and the coalition was determined to get it before the lawsuits decimated the industry in California.

Mike Robson, one of the two partners at the lobbying firm Edelstein, Gilbert, Robson & Smith who worked with the

staffing coalition, took legislators up on their offer to revisit the issue.

"Often, when they say that, they don't necessarily mean that they will help us. In this case, with labor strongly opposed, that was likely the case," says Robson's partner Alan Edelstein, who also worked with ASA and CSP throughout the process.

But the staffing coalition was determined. Several California staffing firms met with their legislators to let them know how concerned they were about this issue and to make sure their representatives understood the role the staffing industry plays in employment.

Members of the ASA legal and legislative committee—a standing committee that provides guidance on legal and legislative issues to the ASA board and staff, and makes recommendations on policy positions taken by ASA—worked with Lenz to draft the language for the proposed bill. ASA's termination pay working group, a larger group consisting of interested members of the industry, provided input and shared information as well. "I can't remember any other proposed industry legislation that was more thoroughly vetted by companies that would have to live with that language.

2007, continued

April

Senate and Assembly committees hold hearings on the bills.

California Staffing Professionals holds its annual legislative day April 17 and encourages members to stay for the hearings on April 18 and 25.

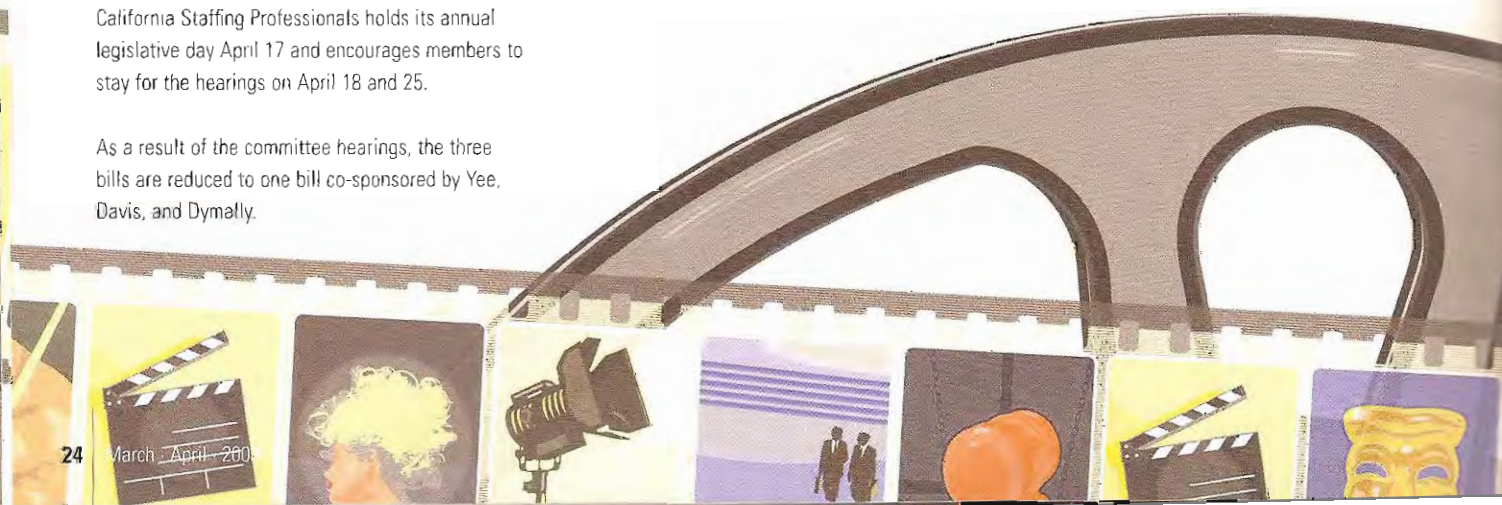
As a result of the committee hearings, the three bills are reduced to one bill co-sponsored by Yee, Davis, and Dymally.

May

The staffing coalition and the California Labor Federation return to the table to discuss the bill. Negotiations ensue.

June

The staffing coalition and the California Labor Federation reach an agreement.



The consultative role both groups played was invaluable," says Lenz.

A Big Problem

The coalition had a bill, and it had support. But it also had a big problem. Union opposition.

"That was the principal reason why we were unsuccessful in getting our amendment through in 2006, and the union representatives continued to be highly skeptical of our proposal in 2007," Lenz explains.

The California Labor Federation—which consists of 1,200 affiliated unions with a presence in California—expressed particular concern that an amendment providing that completion of an assignment is not a discharge requiring immediate pay could encourage some day labor firms to pay their daily workers less frequently than they already were. Though union representatives acknowledged that ASA members weren't the problem, they asked for a provision to be added to the bill to protect day labor workers.

Working with the ASA legal and legislative committee, Lenz added the provision to the bill. But the labor federation continued to oppose the bill

without explaining why. State Assemblyman Mark Leno had agreed to sponsor the bill, but in the middle of a re-election campaign, he needed the union's support. He bowed out.

"Now what?" was the question on everyone's mind as they wondered exactly how the staffing industry would survive the growing number of lawsuits.

Friends in Sacramento

The phone rang. Lenz, watching the sun peek out from behind clouds, picked up to hear Edelstein on the other end.

"Good news, Ed. We've got some new sponsors," he said. And not just one sponsor but three. Edelstein and Robson had put their experience and expertise to work to bring two California legislators, Sen. Leland Yee and Assemblyman Mike Davis, into the cause. A third legislator, Mervyn Dymally, brought his own bill in favor of the industry.

This is where the word "indispensable" comes into our story. Trying to get a bill passed without the guidance, support, and expertise of lobbyists like Edelstein and Robson would have been impossible, says Lenz. "We needed them to give us a good political sounding of what was

doable, who we needed to talk to, where the resistance was. There is no way that an outside party, like us, could know who the players in Sacramento are. We needed somebody who had everyday experience in the halls of the capitol and knew the process inside out. Edelstein, Gilbert, Robson & Smith gave us that experience and knowledge."

The bills proposed by Sen. Yee and Assemblyman Davis provided that payment for a staffing employee would be due at the next regular payday if the assignment ends but within 24 hours if the employee is unconditionally terminated. Assemblyman Dymally's bill exempted staffing firms from any requirement of immediate payment (even in cases of unconditional termination) as long as wages are paid weekly.

Though no one could have predicted the roller-coaster ride that this story turned out to be, one of the most surprising parts, says Mackey of XL Staffing Service, is that the staffing industry's bill was carried by Democrats, which is usually not the case. "Because we got Democratic legislators to understand the bill so well, they became our leaders and led the bill through the

September

The Senate and Assembly pass the bill.

October

Gov. Arnold Schwarzenegger vetoes the bill. In his veto message, the governor says he supported the wage provisions of the bill but could not support the provision—demanded by labor unions—that would have allowed injured workers to sue staffing firms and their clients in cases where neither staffing firm nor client maintains workers' compensation coverage.

Staffing coalition lobbyists initiate contacts with the California Labor Federation to determine its willingness to work with the industry to resolve the workers' compensation issue. ►

process. Republican support would not have been enough on this bill because the legislature is 66% Democratic. We needed the Democratic support, so that's what we worked on."

Edelstein agrees that the Democratic support was key. "Because we did have Democratic bill authors, the leadership in both houses got involved to say that this has to be worked out so everyone is happy. The leadership asked the chairman of the labor committee to be lead author and chief arbiter. He really wanted to strike a fair compromise. When we met an impasse, he was able to nudge both the labor federation and our side to say when one side or the other had to give a little bit."

Grassroots Action

ASA and California Staffing Professionals got the word about the bills out to their members. Immediately. "Get in touch with your legislators," they urged staffing firms who had a presence in California. "You need to take action to save your industry." And the members responded, from companies whose only offices were located in the state to multilocation companies with branches there. They wrote, they called, they e-mailed. They told

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categorically rejected ASA's
contention that staffing firms be
required to pay weekly only
at the end of an assignment.

"No deal," they said.

legislators about their business experience and described what would happen to their businesses if the legislation didn't pass. On April 17, 2007, CSP held its annual legislative day the day before the Senate and Assembly labor hearings in Sacramento. Staffing professionals came for the day and stayed for the hearings.

"The biggest obstacle we faced was the power labor has in the legislature," Edelstein explains. "For many Democratic legislators, labor is their chief constituent. That's why the grassroots support that ASA and CSP brought played such a key

role. Both associations have good systems to alert people, and we got a really good response when we needed it."

Negotiations With Organized Labor

During the committee hearings, the committee chairmen whittled the three bills down to one with Sen. Yee and Assemblymen Davis and Dymally named as co-authors. Would the bill meet with everyone's approval? Would there be more negotiations?

The answer to the first question was no and the second was yes. It was back to the table for more meetings with the California Labor Federation and Ben Ebbin, the chief consultant for the Assembly Labor and Employment Committee.

But, as Mackey explains, it's not unusual for staffing companies and unions not to see eye to eye. Now, Mackey says, it was time for the staffing industry to work with the labor unions so that they would understand the importance of the court decision and the consequences of legislation to the industry. "It was really a process of education that we undertook with the California Labor Federation as well as with the legislators we worked with."

2008

January

The bill passes the Senate.

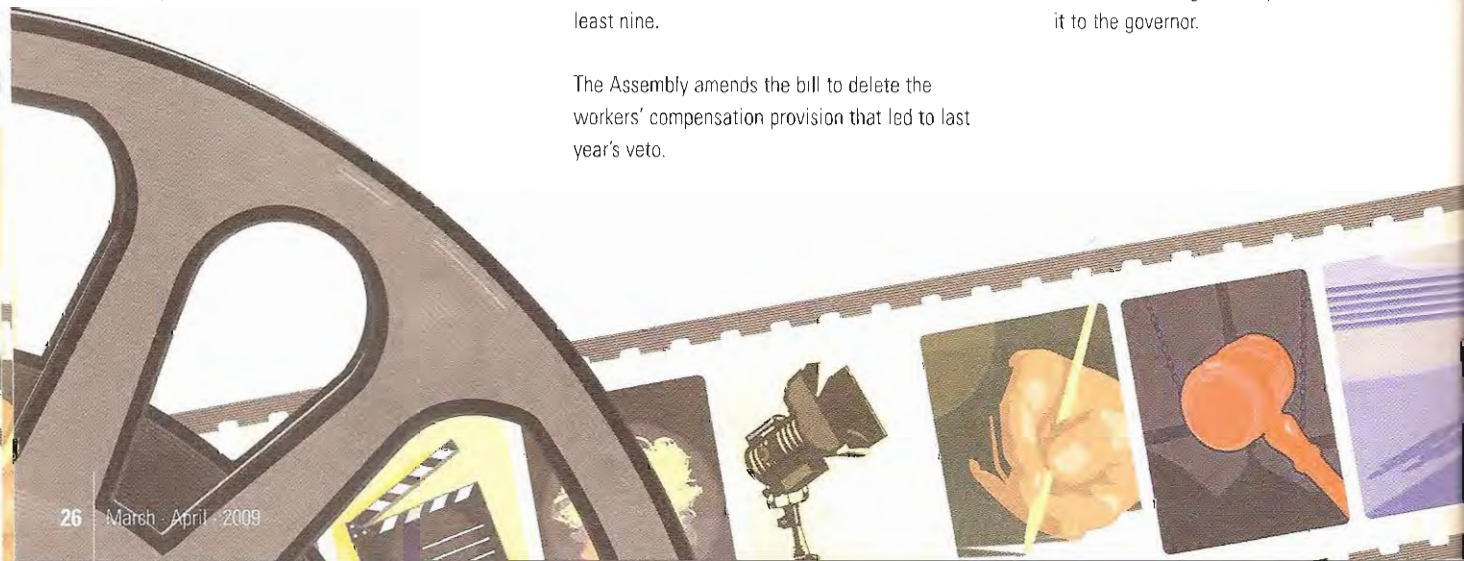
April

The number of class-action lawsuits has risen to at least nine.

The Assembly amends the bill to delete the workers' compensation provision that led to last year's veto.

June

The California legislature passes the bill and sends it to the governor.



After the last of the meetings with the federation in June 2007, the parties agreed that, with certain noted exceptions, "an employee of a temporary services employer who is assigned to a client shall be deemed to have been timely paid the wages owed for labor performed by the employee during any calendar week, including wages owed upon completion of an assignment (where the employee remains eligible for reassignment and has not quit within the meaning of Section 202), if such wages are paid not later than the regular payday of the following calendar week. An employee whose wages are paid as provided in this subsection and whose assignment with a temporary services employer ends, and who remains eligible for reassignment by the temporary services employer, will not be considered to have been discharged within the meaning of Section 201."

Weekly Pay and Workers' Comp

During the negotiations, the two key sticking points involved the issue of "weekly pay" and a provision dealing with workers' compensation liability. The federation categorically rejected ASA's contention that staffing firms be required

to pay weekly only at the end of an assignment. "No deal," they said.

They wanted a promise that temporary employees would be paid weekly throughout their assignments and not just at the end, and that the provision would apply to all temporary employees across the spectrum of categories and despite the hardship this would impose on health care and information technology staffing companies, many of which pay biweekly or semimonthly. Federation representatives also wanted a provision giving employees whose assignments end short of a full work week a guarantee of payment within seven calendar days.

"If the federation insisted on that provision and we tried to go forward without it, Alan and Mike told us we had less than a slim chance of getting a bill passed," Lenz says. "But in the end, we agreed that temporary employees would be paid weekly throughout their assignments, and the unions agreed to drop the seven-day language."

The union proposal dealing with workers' compensation would have imposed joint liability, in tort, on staffing firms and clients if neither maintains coverage for temporary workers. "We

argued that this was already the law in California, but the union representatives were unbending," Lenz recalls.

ASA reluctantly agreed to the workers' compensation language, and the members of the staffing coalition thought they could see a law coming down the tracks. Still, this is a story with a lot of twists. Will the staffing industry get its bill? Could it finally happen? The answer, as it turned out, was yes and no. In September 2007, the bill passed the California legislature. But champagne corks didn't pop.

Gov. Arnold Schwarzenegger vetoed the bill. In his veto message, the governor said he supported the wage provisions of the bill but could not support the provision—demanded by labor unions—that would have allowed injured workers to sue staffing firms and their clients in cases where neither staffing firm nor client maintained workers' compensation coverage. The California Chamber of Commerce and other business groups opposed the bill because of concerns that this provision would have eroded the principle of exclusive remedy and expanded liability.

"After two years, we were empty-handed," says Lenz. ▶

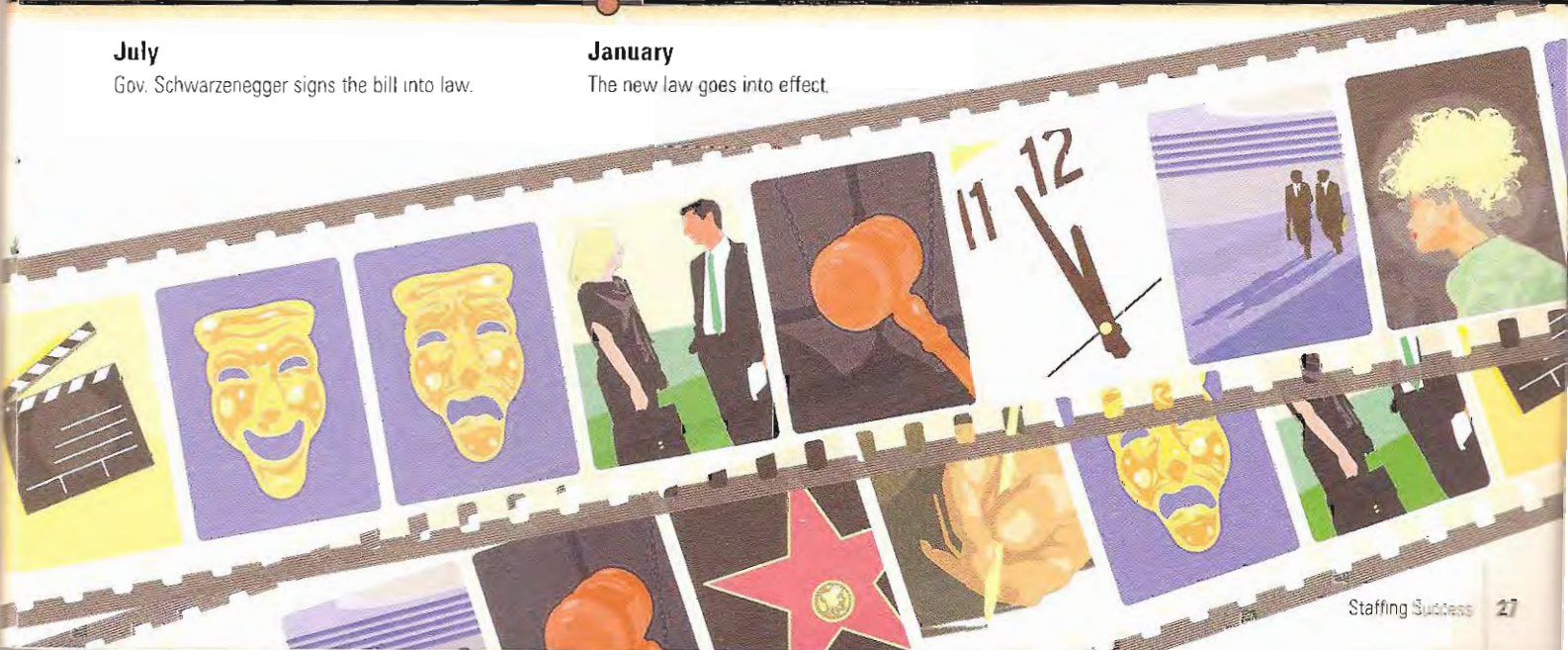
2009

July

Gov. Schwarzenegger signs the bill into law.

January

The new law goes into effect.



Back to the Bargaining Table

It was back to work. Mackey says, "We had to go back to the table to persuade the California Labor Federation to support the bill without that language." The staffing industry representatives had to convince the union representatives that the workers' compensation liability issues weren't issues.

"I knew we had removed the major obstacle to getting the bill signed when

they agreed to remove that language," Mackey says. Now the Chamber of Commerce would be satisfied, the California Labor Federation agreeable, and the sponsors ready to get behind the bill again.

It wasn't time to celebrate yet, however. The information technology and health care sectors of the staffing industry were still concerned about the need to pay their employees weekly, which was not the standard in their sectors.

"Spencer Karpf of Software Management Consultants had previously worked with Angie Wei, the legislative director at the California Labor Federation, on another issue involving IT staffing firms in California, and they worked out an amendment so that longer-term assignments would not have that weekly requirement," says Lenz. Because the segment is an important business sector in California, the labor federation agreed

Finally, the staffing coalition was looking at something that looked quite a bit like resolution. The staffing industry got most of what it wanted and avoided a major crisis in the state.

The Cast

Without the following cast of staffing professionals, lawyers, lobbyists, and others, the staffing coalition would never have succeeded in passing the California law that now protects staffing companies. This list does not include the many staffing professionals who called, wrote, and telephoned on the industry's behalf in California. Their role was critical.

American Staffing Association

- Ed Lenz, senior vice president for public affairs and general counsel

ASA Legal and Legislative Committee

- Jim Essey, CSP, president and chief executive officer of the TemPositions Group of Cos., committee chairman

California Staffing Professionals

- Joe Mackey, CAC, CSP, president of XL Staffing Service Inc., chapter president

Law Firm Seyfarth Shaw

- Gregg Fisch, associate
- Thomas Kaufman, partner
- Gerald Maatman Jr., senior partner

Lobbying Firm Edelstein, Gilbert, Robson & Smith

- Alan Edelstein, partner
- Mike Robson, partner

At the Capitol

- Mike Davis, state assemblyman
- Mervyn Dymally, state assemblyman
- Ben Ebbink, chief consultant, Assembly Standing Committee on Labor and Employment
- Mark Leno, state assemblyman
- Leland Yee, state senator

California Labor Federation

- Barry Broad, principal, Broad & Gusman
- Angie Wei, legislative director

Payday

On July 22, 2008, Lenz's phone rang. It was Robson calling with the good news that Gov. Schwarzenegger had signed the bill. After more than three years of effort, the industry had a law that protects staffing companies from the *L'Oreal* case by providing that staffing firms will be considered to have paid their employees upon completion of an assignment in a timely manner if they pay them weekly and that the payment is not a discharge. If a staffing company terminates its relationship with an employee, the company must pay the employee immediately. If the employee voluntarily quits, the company must pay wages within 72 hours. The law went into effect Jan. 1 of this year.

"There is no way that this legislation would be in place today if we hadn't worked as a coalition," Mackey says emphatically. "Working together gave us access to far more resources than we would have had otherwise."

"I expected that our biggest problem would be organized labor, but the unexpected aspect was that we went to them to get legislation that would help us. We're fighting legislation they wanted that was adverse to our industry, which is not usually the case." That doesn't mean the

Read the Book

If you want to know more about the law, read the ASA issue paper *California Law Clarifies Wage Payment Obligations When Temporary Assignments End*. The two-page paper describes the new law, important exceptions, and the effect it will have, including the weekly pay exceptions and a daily pay provision. To read it, visit americanstaffing.net. Click on Legal & Government Affairs, then Issue Papers. A link to the text of the law is also provided on the Web page.

process was painless, he is quick to point out. "We ended up adding amendments and changes that they wanted."

For Lenz, the most challenging aspect of the process was negotiating with the labor unions. While they certainly weren't interested in helping the staffing industry, they were willing to work with the industry in return for some concessions.

"We didn't have a close relationship with the California Labor Federation and therefore didn't know what their concerns were until we got into the same

room with them," he says. "As a result of the give-and-take, we came away with a better mutual understanding."

"Getting this bill passed and signed into law was arguably the biggest legislative win in the industry's history. We've killed hundreds of bad bills over the years. But it's much harder to pass a bill—especially a pro-employer bill in a pro-labor state over union opposition."

Bringing a bill to law, as the staffing coalition did in California, also serves as protection for staffing companies across

the country, says Lenz. "In many ways, California is a bellwether state. If we hadn't fixed the issue in that state, other states may have picked up the concept that the end of an assignment is a termination."

In California, staffing companies can now conduct business pretty much as usual, providing jobs for people and employees for clients. Payroll processes roll on uninterrupted. Paychecks arrive in bank accounts on their regular schedules. It's a happy ending that wouldn't have happened if the staffing industry hadn't stood up to protect its interests. ■

Sherri Alms is a freelance writer working through ASA member company the BOSS Group. To comment on this article, e-mail success@americanstaffing.net.

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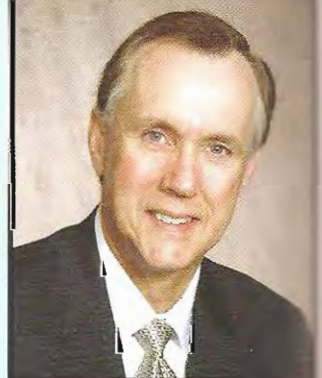
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