

## Updates

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Pop-Up for the Holidays



With the holidays just around the corner, many retailers are focused on how to

best engage shoppers. Pop-ups are a fun and effective way to engage new clients and increase brand awareness while keeping overhead costs low. While these temporary retail stores have been embraced by both retailers and consumers, the approach has the following significant legal considerations that should be kept top of mind.

### **Brick-and-Mortar Leasing**

For retailers who do not want the financial obligations or constraints of a long-term lease, a pop-up store may provide a chance to test a new market line, try a new area or demographic, or simply try a physical store when the retailer has existed only in e-commerce. Although pop-up stores are not as much of a legal commitment as a traditional lease, certain factors should be taken into consideration when negotiating a pop-up store arrangement.

Pop-up stores are usually structured as a license instead of as a lease. A license is generally the right to use a space for a short period of time, at a set fee, and for a specified use. Because a license does not convey to the occupant an interest in real property (unlike a lease), the retailer will need to carefully negotiate signage, changes to the storefront, rights to fixture the store, hours of operation and the surrender condition when the license expires. Generally, the rent is fixed or "gross rent" so all costs of utilities, operating expenses, janitorial and maintenance are included in a single monthly fee. However, percentage rent may also be a component of the cost. Finally, if the retailer is thinking of staying in that location permanently, consider negotiating a right of first opportunity to lease the store during the term of the license.

### **Labor and Employment**

The temporary nature of pop-up shops may lead employers to believe (incorrectly) that temporary workers can automatically be classified as independent contractors, but that is not the case. Depending on the circumstances and jurisdiction, courts and government agencies will apply various tests to determine whether a worker qualifies as an independent contractor or should be classified as an employee. Most tests involve an examination of the totality of circumstances to determine whether—and to what extent—an employer exercises control over a

worker in deciding whether the worker is properly classified. While the permanency of the relationship an employer has with a worker is considered in many such tests, it is just one factor in the analyses.

The ramifications of independent contractor misclassification can be serious and costly. Employers found liable for misclassification can owe back taxes, as well as unpaid contributions for workers' compensation and unemployment insurance, plus penalties and interest. Additionally, there is a risk of liability for unpaid wages and overtime. Claims under state and federal wage-and-hour laws carry the potential for attorneys' fees, costs, and liquidated damages. Employers should therefore refrain from automatically classifying temporary workers at pop-shops as independent contractors, and instead carefully analyze worker classifications under applicable state and federal laws.

Employers should also be mindful that many labor and employment protections, such as minimum wage, overtime, meal and rest breaks, sick leave, posting requirements, and background check laws, vary by state and even by city in some cases. These laws will generally apply with equal force to temporary employees, and local laws may apply to permanent employees temporarily stationed in a different city or state. Employers opening pop-shops in new locations, and/or employing temporary employees, should identify and comply with all applicable legal requirements pertaining to their permanent and temporary employees.

## **Partnering With Vendors**

Many companies spread holiday cheer through their pop-up location by providing food and beverage to visitors. When contracting with a vendor to provide on-site food and beverage services, companies should plan for the best by setting performance expectations as well as health and safety expectations. Be certain that the vendor agreement confirms the retailer's expectations regarding the types and quantities of food and beverage to be provided, serving instructions, signage and other labeling within the pop-up location and types of containers, cups, napkins or utensils that will be made available. The agreement should also obligate the vendor to obtain all necessary permits and other licenses to comply with the law; prepare, store and/or serve all food and beverage products in a manner that ensures the safety of consumers; and clearly identify for the customers the contents of all food and beverage products offered in order to avoid inadvertent consumption of products which the customers may be unable to consume for health, religious, cultural or other reasons.

The retailer should also obligate the vendor to obtain appropriate insurance for the pop-up promotion, should the worst happen. In addition to an indemnification provision to recover damages in the event of a breach or negligent action by the vendor, the agreement should impose an obligation on the vendor to fully cooperate (both during and after the term of the promotion) if there is any concern about the health and safety of your customers.

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