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PROTECTED ACTIVITY

Whistleblowers in the news, California style

by Judith Droz Keyes
Davis Wright Tremaine LLP

Whistleblowing has been front-page news in recent weeks. As an impeachment investigation roils the nation, we've heard debate about the handling of confidential complaints, speculation about the whistleblower's identity, and discussions of the validity of the claims. What we haven't heard, at least not yet, is a report from the whistleblower that he's been retaliated against for blowing the whistle. If the system operates as it's supposed to, that will never happen.

The situation in Washington is far less common than what usually happens with whistleblowing in the workplace. The usual scenario goes something like this: An employee whose identity is known complains about something he considers to be wrong. The employer investigates and either finds the complaint has merit and corrects the problem or deems the complaint unfounded. When the employee is later disciplined or counseled or denied some reward, he complains that the adverse action was in retaliation for his whistleblowing. The employer explains that the action was based on a legitimate reason unrelated to the whistleblowing. If the dispute isn't settled amicably, a jury will decide whom to believe.

That was the situation a California Court of Appeal addressed in a recently published decision that serves as an important reminder of the way whistleblower protection works in California.

Problems existed for years

Todd Hawkins and Hung Kim worked as part-time hearing officers for the Parking Adjudication Division of the Los Angeles Department of Transportation (LADOT). Their job involved hearing appeals from people who got parking tickets. Hawkins had clashed with his supervisor, Carolyn Walton-Joseph, for years. She claimed he was doing things wrong and being insubordinate, and he complained about what he viewed as her poor management. In August 2011, after they had an altercation, LADOT assistant manager Robert Andalon asked HR to discipline Hawkins, but no action was taken until years later.

Meanwhile, Hawkins, Kim, and other hearing officers began reporting that Walton-Joseph and another supervisor, Kenneth Heinsius, were pressuring them to change their decisions about parking tickets. Over a period of about two years, 14 hearing officers, including Hawkins and Kim, complained to Andalon and other LADOT officials about the pressure being exerted by the supervisors and about their abrasive management style. Eventually, Andalon commissioned an internal investigation.

In September 2013, the investigator issued a report finding that Walton-Joseph and Heinsius had pressured the hearing officers to change their

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Mark I. Schickman, Editor
Freeland Cooper & Foreman LLP, San Francisco
415-541-0200 • schickman@freelandlaw.com

Cathleen S. Yonahara, Assistant Editor
Freeland Cooper & Foreman LLP, San Francisco
415-541-0200 • yonahara@freelandlaw.com

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decisions but hadn't abused their authority in doing so. On October 8, Andalon determined there was insufficient evidence to support the allegations against Walton-Joseph and Heinsius. He considered the matter closed, but Hawkins and Kim did not. They escalated their complaints outside LADOT to the city ethics commission and the city council.

On November 19, 2013, the city fired Hawkins, purportedly in fulfillment of Andalon's August 2011 request that he be disciplined for the altercation with Walton-Joseph. A month later, on December 23, the city fired Kim, purportedly because of his conduct at hearings in May and June 2013. Not surprisingly, Hawkins and Kim sued.

Jury didn't buy employer's explanation

California's whistleblower protection law, Labor Code Section 1102.5(b), prohibits an employer from retaliating against an employee "for disclosing information . . . to a government or law enforcement agency, or to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, . . . if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation."

Hawkins and Kim sued under Section 1102.5(b) as well as under California's Private Attorneys General Act (PAGA). They also filed claims for race discrimination. The jury rejected their discrimination claims but found in their favor on the whistleblower and PAGA claims.

The jurors awarded Hawkins $238,531 and Kim $188,631 in damages. The judge assessed a $20,000 PAGA penalty against the city and awarded Hawkins and Kim $1,054,286 in attorneys' fees. The city appealed.

Court of appeal didn't buy it, either

The California Court of Appeal concluded Hawkins and Kim had proven their threshold case: Their complaints about the parking tickets fit squarely within the whistleblower law, they obviously suffered an adverse action (termination), and the timing alone was enough to suggest a causal link between the two. However, the court noted: "Even if we found that a long period elapsed between the protected activity and the terminations, a causal connection between them would still be established so long as the city engaged in a pattern of conduct consistent with retaliatory intent."

The court cited examples of a pattern "consistent with retaliatory intent," including Heinsius requiring Kim to get a doctor's note after a one-day illness and both supervisors issuing numerous counselings to Kim and Hawkins over a two-year period. The court acknowledged that the city had put forth legitimate nonretaliatory reasons for the terminations and that Hawkins and Kim had the burden of proving the city's explanation was pretextual, or a cover-up. And the court recognized that it wasn't enough for them to merely show the employer's decision was wrong, mistaken, or unwise. Instead, they had to "demonstrate such weakness, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable [fact finder] could rationally find them unworthy of credence, and hence infer that the employer did not act for a [nonretaliatory] reason."

The court ruled that Hawkins and Kim met that high bar. Although only a short amount of time had lapsed between their whistleblowing and their terminations, that was offset by the fact that the city tolerated their misconduct for a long time. Rejecting the city's explanation that the

delay was simply due to a backlog in HR, the court observed that Hawkins and Kim had been allowed to continue working throughout the period they supposedly engaged in misconduct—and that Kim had received a performance evaluation in which he was rated "competent." Consequently, the court affirmed the jury's verdict—and the city's liability of more than $1.5 million. *Todd Hawkins et al. v. City of Los Angeles* (California Court of Appeal, 2nd Appellate District, 9/19/19).

Bottom line

Don't retaliate against whistleblowers. To state the obvious: There should be no retaliation against an employee who blows the whistle—even when he is mistaken about the perceived violation, and even when he persists after being told that. As tempting as it may be, retaliation must not be countenanced.

Don't put off until tomorrow what really should be done today. It's a mistake to put off disciplining or terminating an employee who misbehaves or whose job performance is unacceptable. When an employee engages in whistleblowing (or any other protected activity), the timing of a subsequent adverse employment action cuts both ways. Although acting quickly will create an inference of retaliation, dragging things out doesn't eliminate the risk. Tolerating misbehavior or poor performance for any length of time makes it harder to prove the employee's misconduct or unacceptable performance is what motivated the adverse action.

The author can be reached at Davis Wright Tremaine LLP in San Francisco, jkeyes@dwt.com. ✤

WAGE AND HOUR LAW

Security company escapes derivative claims and attorneys' fees award in meal and rest period case

by Mathew A. Goodin
Seyfarth Shaw

California employers have come to expect that with every meal or rest break claim comes a derivative claim for failure to pay wages owed upon termination and for failure to provide accurate itemized wage statements. The following case is a significant boon for employers facing such derivative claims, although the court made clear that its holding generally will be limited to situations involving on-duty meal periods.

Company secures partial victory at trial

Spectrum Security Services, Inc., contracts exclusively with federal agencies to take temporary custody of federal prisoners and people detained by U.S. Immigration and Customs Enforcement (ICE) who must travel off-site for medical treatment or other appointments. Spectrum's officers provide continuous supervision of prisoners and detainees until they are returned to their original custodial locations.

AGENCY ACTION

NLRB switches standard relating to CBA changes. The National Labor Relations Board (NLRB) in September adopted the "contract coverage" standard for determining whether a unionized employer's unilateral change in a term or condition of employment violates the National Labor Relations Act (NLRA). In doing so, the NLRB abandoned the "clear and unmistakable waiver" standard. Under the contract coverage standard, the Board will examine the plain language of the parties' collective bargaining agreement (CBA) to determine whether the change made by the employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. If it was, the employer will not have violated the NLRA. If the CBA doesn't cover the employer's disputed action, the employer will have violated the Act unless it demonstrates the union waived its right to bargain over the change or it was privileged to act unilaterally for some other reason. The decision is *M.V. Transportation, Inc.*

OSHA to handle retaliation complaints under new law. The Occupational Safety and Health Administration (OSHA) has been granted authority to handle worker retaliation complaints under the Taxpayer First Act (TFA), which was signed into law July 1. OSHA will investigate retaliation complaints against employees who provide information regarding underpayment of taxes, violations of internal revenue laws; or violations of federal law involving tax fraud to the IRS, another federal entity listed in the statute, a supervisor, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct. The TFA also prohibits retaliation against employees for testifying, assisting, or participating in any administrative or judicial action taken by the IRS relating to an alleged underpayment of taxes, violation of internal revenue law, or violation of federal law involving tax fraud.

Boeing partial plant unit deemed inappropriate for union election. The NLRB held in September that a petitioned-for unit at Boeing's South Carolina plant that was limited to two job classifications within an aircraft production line wasn't an appropriate unit for purposes of conducting a union election. The decision resolves a petition filed by the International Association of Machinists Union for a unit of approximately 178 mechanics out of a workforce totaling more than 2,700 employees. Boeing argued the mechanics must be included in the larger community of workers at the aircraft production plant where the company's 787 Dreamliner is built. ✤

Under Spectrum policy, officers have always been required to take on-duty meal breaks for which they are paid at their regular rate. Before October 1, 2007, Spectrum's employment manuals required on-duty meal and rest breaks but contained no language stating officers could revoke their on-duty meal break agreement in writing at any time. On October 1, 2007, after a lawsuit was filed, Spectrum issued a memorandum reiterating that officers were to take meal and rest breaks while they were on duty, but the memo added an acknowledgment that employees could revoke the on-duty meal period agreement.

Gustavo Naranjo began working for Spectrum in December 2006. He was terminated in May 2007 after he left his post for a meal break. The following month, he filed a putative class action lawsuit alleging that Spectrum failed to provide its security officers meal and rest breaks as required by Labor Code Section 226.7 and asserting derivative claims for waiting time penalties under Labor Code Section 203 and failure to provide accurate wage statements under Labor Code Section 226.

The court granted class certification for all of Naranjo's claims except the rest break claim, finding common questions didn't predominate for that claim. The meal break claim proceeded to trial with two subclasses, one comprising officers who didn't sign the October 1, 2007, on-duty meal period memo, and another comprising those who did.

After hearing evidence, the trial court directed a verdict in favor of the officers who didn't sign the October 2007 memo, finding the previous version of the on-duty meal period waiver was invalid because it didn't contain an express provision that it could be revoked in writing. The parties stipulated that the subclass was owed $1,393,314 in premium pay. The jury found in Spectrum's favor on the claims involving the officers who had signed the October 2017 memo.

Trial court's decision leaves both sides unhappy

In the final phase of the trial, the court turned to the derivative claims for waiting time penalties and itemized wage statement penalties. The court found that Spectrum's failure to include the one-hour premium on employees' wage statements during the time the noncompliant meal period policy was in effect was "knowing and intentional" pursuant to Section 226, entitling the subclass to $399,950 in penalties. Conversely, the court determined that Spectrum's failure to include the meal break premium wage in the final paychecks of employees who left the company wasn't willful and ruled in Spectrum's favor on the Section 203 waiting time penalties claim. Both sides appealed.

Spectrum appealed its liability for premium wages for the pre-October 2007 meal break subclass, the Section 226 itemized wage statement penalties, the premium wage award, and the Section 226 award of attorneys' fees to class members' counsel. The meal break subclass primarily challenged the denial of Section 203 waiting time penalties.

Court of appeal wades through penalties, premiums, and wages

The court of appeal first noted that Section 226.7 authorizes one additional hour of pay at the employee's regular rate of compensation for each workday a meal period is not provided. The court concluded that employees who sign on-duty meal period agreements that include a right-to-revoke clause are entitled to be paid their regular wages for the on-duty meal period, but they are not entitled to one hour of premium pay.

However, if all the requirements for a compliant on-duty meal period are not met (as with Spectrum's agreement without the required right-to-revoke clause), the employer owes employees their regular wage for working during the meal break *plus* one hour of premium pay for every workday the meal break policy was noncompliant. Because the trial court correctly determined that Spectrum's on-duty meal period agreement wasn't compliant, the court of appeal affirmed the award of $1,393,314 in premium pay to the pre-October 2007 meal break subclass.

The court then turned to the question of whether officers who were entitled to premium pay under Section 226.7 may pursue derivative waiting time penalties under Section 203 or wage statement penalties under Section 226. Central to the court's analysis was the statutory definition of "wages" under Labor Code Section 200: all "amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation."

Section 203 imposes a penalty on an employer that willfully fails to timely pay "wages" upon an employee's discharge or voluntary separation. Section 203(a) calculates the penalty as the employee's per diem wages from the date they are due until they are paid, for a period not to exceed 30 days. The court reasoned that the penalty under Section 226.7 is paid to the employee, not for "labor performed" personally by the employee, but for the employer's failure to provide a proper meal period or, in this case, its failure to have a legally compliant on-duty meal period agreement. Therefore, an employer's failure, however willful, to pay the Section 226.7 statutory penalty alone doesn't trigger Section 203's derivative penalty provisions for failure to pay wages due upon discharge or voluntary separation.

Section 226 imposes a penalty on employers that knowingly and intentionally fail to provide itemized wage statements for, among other things, gross and net

"wages earned." The method for calculating a Section 226 penalty is specified in Subdivision (e), which entitles an employee to minimum fixed penalties or "actual damages" not to exceed $4,000. Unlike Sections 203 and 226.7, Section 226 expressly authorizes attorneys' fees to a prevailing "employee suffering injury as a result of a knowing and intentional failure by an employer to comply with" the itemized wage statement requirements. Again, however, Section 226.7 is a statutory remedy for an employer's conduct, not an amount "earned" for labor performed by an employee.

The court of appeal held that an employer's failure to pay the Section 226.7 statutory premium alone doesn't entitle employees to pursue the derivative penalties in Sections 203 and 226. As a result, it affirmed the trial court's denial of Section 203 waiting time penalties. The court also concluded the award of itemized wage statement penalties under Section 226 must be reversed. Because the employees weren't entitled to Section 226 penalties, they weren't entitled to attorneys' fees under Section 226(e), so the court also reversed the attorneys' fee award. *Naranjo v. Spectrum Security Services, Inc.* (California Court of Appeal, 2nd Appellate District, 9/26/19).

Bottom line

This case is a significant win for employers, but it's a narrow one. It will apply only when an employer fails to pay a premium payment for a missed meal period but otherwise pays the employee for all time he worked during the meal period (as is the case with "on-duty" meal periods). As the court noted, in situations in which employees work through all or part of an otherwise "off-duty" meal period, they generally aren't paid for that work time. Therefore, those employees *would* be entitled to bring derivative claims under Sections 203 and 226 because they wouldn't have received all wages they were owed upon termination or all of their wages wouldn't have been correctly reflected on their wage statements.

The author can be reached at Seyfarth Shaw in San Francisco, mgoodin@seyfarth.com. ✤

INSURANCE COVERAGE

Court delivers narrow interpretation of policy exclusion for wage, hour claims

by Anjuli M. Cargain
Duane Morris LLP

A wage and hour exclusion in an employment practices liability insurance (EPLI) policy barring coverage for claims based on "wage and hour or overtime laws," but providing coverage for the cost of defending excluded claims, did not bar coverage for a restaurant's defense of Labor Code 2802 claims by delivery drivers for business-related expenses, including travel for required training, mileage driven for deliveries, and cell phone usage, or for purely derivative claims.

Background

Southern California Pizza Co., LLC (SC Pizza), owns and operates more than 250 Pizza Hut and Wing Street restaurants throughout Southern California. After being named in a class action lawsuit alleging Labor Code violations, SC Pizza sought coverage under an EPLI policy from certain underwriters at Lloyd's, London.

The underlying lawsuit involved garden-variety claims by nonmanagerial hourly employees for unpaid overtime, unpaid minimum wages, noncompliant wage statements, unpaid business expenses, untimely payment of wages, unlawful payroll deductions, and violations of the California Business and Professions Code and Private Attorneys General Act (PAGA).

The policy's basic liability coverage provided, in part, that the underwriters would pay for claims made by employees, former employees, or job applicants arising from "Employment Events," which were defined as:

- Discrimination;
- Harassment; or
- Inappropriate employment conduct, including employment-related misrepresentations, failure to adopt, implement, or enforce policies or procedures, or other workplace torts (wrongful conduct).

But the policy was subject to a specific endorsement providing that claims arising out of "wage and hour or overtime laws" were not covered, although the underwriters would pay the cost of defending such claims up to $250,000. The policy didn't define what constituted "wage and hour" laws.

Coverage dispute arises

SC Pizza timely reported the underlying lawsuit to the underwriters. The underwriters denied coverage but provided $250,000 toward the cost of the defense

WORKPLACE TRENDS

Growing skills gap called serious drag on business. A new survey of HR leaders shows the skills gap grew by 12% since last year. According to the study "Closing the Skills Gap 2019" from Wiley Education Services and Future Workplace, 64% of the 600 HR leaders surveyed said there is a skills gap in their company, up from 52% in the 2018 report. This year, 44% of HR leaders reported it was more difficult to fill their skills gap than it was last year, and 42% said the skills gap was making their company less efficient. The report also found that 40% of employers estimate that a skill is usable for four years or less and that fast-paced obsolescence escalates the need to hire or train workers.

Survey finds more employers interested in lifetime income solutions. A growing number of employers are adding lifetime income solutions, such as annuities, to their defined contribution retirement plans, according to the "2019 Lifetime Income Solutions Survey" by Willis Towers Watson. The survey found 30% of employers currently offer one or more lifetime income solutions. That's an increase from 23% in 2016. An additional 60% of sponsors have not adopted annuities or other insurance-backed products but are considering them or would consider them. Driving the interest in lifetime income solutions is concern over an aging workforce, increasing longevity, and the financial health of workers.

Slower employment growth rate predicted. The U.S. Bureau of Labor Statistics (BLS) has released employment projections that show employment is expected to grow by 8.4 million jobs to 169.4 million jobs over the 2018-28 decade. That expansion reflects an annual growth rate of 0.5%, which is slower than the 2008-18 annual growth rate of 0.8%. An aging population and labor force will contribute to changes expected over the coming decade, including a continued decline in the labor force participation rate and continued growth in healthcare employment.

Dressing for success: It's still a thing. Even though casual dress is gaining ground in the workplace, job applicants may want to keep a power suit ready, according to research from staffing firm Accountemps. In a survey of senior managers, 52% of respondents reported how someone dresses for an interview is very important, and 42% said it's at least somewhat important. The survey showed that 37% of respondents said candidates should always wear a formal suit to an interview, and 36% felt proper interview attire depends on the position or department at the company. The research also showed that recommended job interview attire varies by industry, with suits more often preferred in finance, insurance, and real estate than in construction or retail. ✤

as specified in the exclusion. Believing it was entitled to coverage for certain claims based on a narrower interpretation of the policy exclusion, SC Pizza sued the underwriters, alleging breach of contract and tortious (wrongful) breach of the implied covenant of good faith and fair dealing. The company sought damages and declaratory relief.

The underwriters asked the court to dismiss SC Pizza's complaint, asserting that none of the claims in the underlying lawsuit arose from "Employment Events" or, in the alternative, they were all excluded. Although SC Pizza conceded that some of the claims fell within the exclusion, it contended that the exclusion didn't apply to the business expense reimbursement and noncompliant wage statement claims because those claims didn't seek recovery of "wages" or fall under any "wage and hour" laws.

The trial court granted the underwriters' motion, holding the underlying lawsuit didn't allege any potentially covered conduct, and even if it did, the claims fell within the exclusion because all of the violations were part of the Labor Code. SC Pizza appealed the trial court's ruling, and the court of appeal reversed.

Duty to defend arises when key ingredients for exclusion are lacking

The issue before the court of appeal was whether the factual allegations in the underlying lawsuit evinced claims arising from "wage and hour or overtime laws." Noting that in the context of insurance policies, courts routinely construe words in their "ordinary and popular sense," the court of appeal determined that "wage and hour" laws refers to laws involving the "duration worked and/or remuneration received in exchange for work." The court then reviewed whether the business reimbursement claim (Labor Code §§ 2800, 2802) and the itemized wage statement claim (Labor Code § 226) should be considered "wage and hour" claims triggering the policy exclusion.

Under the Labor Code, employers are required to reimburse their employees for certain losses or expenditures incurred as a result of the employment relationship. However, those statutory provisions do not mention "wages" or "hours," nor do they appear in Labor Code sections addressing "compensation" or "working hours."

Courts have concluded that expense reimbursements are not payments made in exchange for labor or services. Instead, the statute is intended to protect employees from employers' lack of reasonable care and diligence and to ensure that employers are bearing all the costs inherent in conducting their business. (It's unsurprising that the California Supreme Court has characterized claims seeking reimbursement of business expenses as "nonwage" claims.") Accordingly, the court of appeal concluded that the business reimbursement claims fell outside the scope of the policy exclusion.

The opposite conclusion was reached with respect to the Labor Code 226 itemized wage statement claim. Section 226 lists nine pieces of information that employers must provide in

writing to employees on a semimonthly basis or each time wages are paid. They include the gross wages earned, total hours worked, all deductions, any applicable hourly rates, inclusive dates for which the employee is being paid, and the name and address of the legal entity that is the employer. Section 226 falls within a chapter of the Labor Code titled "Payment of Wages." And courts have held that Section 226 was enacted "as part of a comprehensive statutory scheme governing the payment of wages." All of those things point toward Section 226 being a quintessential wage law.

The court of appeal noted that even if the remedy for violating a statute is something other than wages, that doesn't preclude the conclusion that it is a wage law. Accordingly, the court found that the Section 226 claim as well as other claims based on the untimely payment of wages arose from "wage and hour" laws, which means they would fall within the scope of the policy exclusion.

Coming full circle, the court of appeal concluded that the business expense reimbursement claims should be considered a "workplace tort," bringing it and all the derivative claims potentially within the scope of policy coverage since they would be considered "Employment Events." The court further explained that ambiguous policy language should be construed broadly in favor of affording protection, consistent with objectively reasonable expectations under the circumstances. *Southern California Pizza Co., LLC v. Certain Underwriters at Lloyd's, London Subscribing to Policy Number 11EPL-20208* (California Court of Appeal, 4th Appellate District, 8/27/19).

Bottom line

Most EPLI policies specifically exclude coverage for "wage and hour" claims. In a mixed case in which some of the claims are at least potentially covered and others are not, an insurer has a duty to defend the claims that are at least potentially covered. Although the insurer must defend the action in its entirety, it does have a right of reimbursement regarding the defense costs for claims that are not potentially covered. However, consistent with past decisions, the court of appeal emphasized in this case that policy exclusions will be narrowly interpreted, even in the context of wage and hour claims, resulting in more coverage for employers.

When confronted with wage and hour claims, you should scrutinize the applicable policy exclusions and take action to ensure you are being provided all the available coverage under your EPLI policy. In the case of mixed actions, you should take the necessary steps to prepare for potential reimbursement claims brought by your insurer.

The author can be reached at Duane Morris LLP in San Francisco, amcargain@duanemorris.com. ✤

LEGISLATION

Are you ready for California's new law on independent contractor status?

by Cathleen S. Yonahara
Freeland Cooper & Foreman LLP

On September 18, 2019, California Governor Gavin Newson signed a landmark bill, Assembly Bill (AB) 5, into law. The new law may potentially reclassify over a million independent contractors as employees. Companies that have independent contractors in California should conduct an audit to determine whether the contractors satisfy the "ABC test" or fall under a statutory exception and make any necessary adjustments to their business structures if they don't.

AB 5 codifies, expands California Supreme Court's ABC test

In *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County* (April 30, 2018), the California Supreme Court abandoned the long-standing multifactor common-law test set forth in *Borello v. Department of Industrial Relations* in favor of a much narrower three-pronged test (commonly referred to as the "ABC test") for determining independent contractor status for purposes of California Wage Orders.

Under the ABC test, a worker is presumed to be an employee, rather than an independent contractor, unless a hiring company proves each of the following:

(A) The worker is free from the control and direction of the hiring entity, both under the contract for the performance of the work and in fact;

(B) The worker performs work that is outside the usual course of the hiring entity's business; and

(C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

AB 5 codified and expanded the *Dynamex* decision to broadly apply the ABC test for purposes of the (1) California Labor Code, (2) Unemployment Insurance Code, and (3) Wage Orders, unless a specific statutory exemption applies.

Does AB 5 apply prospectively or retroactively?

AB 5 states it is declaratory of existing law with regard to California Wage Orders and violations of the Labor Code relating to wage orders. However, all the exceptions to the bill that would relieve an employer of liability apply retroactively to the maximum extent permitted by law.

Effective January 1, 2020, the ABC test will apply for purposes of the Unemployment Insurance Code and all other provisions of the Labor Code. Beginning July 1, 2020, the test will apply for purposes of workers' compensation.

Statutory exceptions to ABC test

The majority of AB 5 is devoted to explaining the specific statutory exceptions to the ABC test, which are summarized below. Generally, if the ABC test doesn't apply, the *Borello* common-law test will apply.

Specific occupations. Certain occupations are exempted from the ABC test, such as insurance brokers, physicians, surgeons, dentists, podiatrists, psychologists, veterinarians, lawyers, architects, engineers, private investigators, accountants, securities broker-dealers, investment advisers, direct salespeople, commercial fishermen, real estate licensees, repossession agencies, and motor club services. On October 2, 2019, Governor Newson signed AB 170 into law, which added an exception for newspaper distributors until January 1, 2021.

"Professional services" contracts. The ABC test doesn't apply to a contract for "professional services" if the following factors are satisfied:

(1) The individual maintains a business location (which may include the individual's residence) that is separate from the hiring entity. The individual may choose to perform services at the hiring entity's location.

(2) If work is performed more than six months after AB 5's effective date, the individual has a business license, in addition to any required professional licenses/permits.

(3) The individual has the ability to set or negotiate her own rates for the services.

(4) Outside of project completion dates and reasonable business hours, the individual can set her own hours.

(5) The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds herself out to other potential customers as available to perform the same type of work.

(6) The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

The term "individual" includes an individual providing services through a sole proprietorship or other business entity.

This exception narrowly defines "professional services" as marketing; HR administration; travel agent services; graphic designers; grant writers; fine artists; enrolled agents who are licensed by the U.S. Department of the Treasury; payment processing agents through an independent sales organization; services by still photographers or photojournalists who don't license content submissions to the putative employer more than 35 times per year; freelance writers, editors, or newspaper cartoonists who don't provide content for the putative employer more than 35 times per year; and licensed estheticians, electrologists, manicurists, barbers, or cosmetologists. AB 5 includes additional subcriteria for some of the above professional services.

Business-to-business contracting relationships. The ABC test doesn't apply to business-to-business contracting relationships that satisfy the following criteria:

(1) A sole proprietorship, partnership, LLC, LLP, or corporation ("business service provider," or BSP) is free from the control and direction of the contracting business entity.

(2) The BSP is providing services directly to the contracting business rather than to customers of the contracting business.

(3) The contract is in writing.

(4) The BSP has any required business license or business tax registration.

(5) The BSP maintains a business location that is separate from the business or work location of the contracting business.

(6) The BSP is customarily engaged in an independently established business of the same nature as that involved in the work performed.

(7) The BSP actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.

(8) The BSP advertises and holds itself out to the public as available to provide the same or similar services.

(9) The BSP provides its own tools, vehicles, and equipment to perform the services.

(10) The BSP can negotiate its own rates.

(11) The BSP can set its own hours and location of work.

(12) The BSP isn't performing work for which a license from the Contractor's State License Board is required.

This exception specifies that it doesn't apply to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business. However, it also defines a BSP as a sole proprietorship. Thus, it's unclear whether an individual operating as a sole proprietor would be considered a BSP or an individual worker excluded from the exception.

Relationships between referral agency and service provider. Under this exception, a "referral agency" is defined as a business that connects clients with service

providers that provide graphic design, photography, tutoring, event planning, minor home repair, moving, home cleaning, errands, furniture assembly, animal services, dog walking, dog grooming, Web design, picture hanging, pool cleaning, or yard cleanup. Relationships between a "referral agency" and a BSP that satisfy the following criteria are excepted from the ABC test:

(1) The BSP is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact.

(2) The BSP has any required business license, business tax registration, or state contractor's license, if applicable.

(3) The BSP delivers services to the client under its own name, rather than under the name of the referral agency.

(4) The BSP provides its own tools and supplies to perform the services.

(5) The BSP is customarily engaged in an independently established business of the same nature as that involved in the work performed for the client.

(6) The BSP maintains a clientele without any restrictions from the referral agency and is free to seek work elsewhere, including through a competing agency.

(7) The BSP sets its own hours and terms of work and is free to accept or reject clients and contracts.

(8) The BSP sets its own rates for services performed, without deduction by the referral agency.

(9) The BSP isn't penalized in any form for rejecting clients or contracts.

Like the business-to-business contracting relationship exception, this exception doesn't apply to an individual worker, as opposed to a business entity, who performs labor or services. Thus, it's unclear whether an individual operating as a sole proprietor would be considered a BSP or an individual worker excluded from this exception.

Contractor-subcontractor relationship in construction industry. The ABC test doesn't apply to the relationship between a contractor and an individual performing work under a subcontract in the construction industry, provided specified criteria are satisfied.

Bottom line

You should expect more legislative activity related to AB 5 as businesses continue to push for additional exceptions to and clarification of the new law. Although the gig companies weren't successful in having an exception included in AB 5, Uber, Lyft, and DoorDash have threatened to spend $90 million on a 2020 ballot measure for an exception to the law.

In the meantime, you should work with your legal counsel and promptly conduct an internal audit to determine if any independent contractors in California need to be reclassified in light of AB 5.

The author can be reached at Freeland Cooper & Foreman LLP in San Francisco, yonahara@freelandlaw.com. ✤

UNION ACTIVITY

UAW calls for lower drug prices. In a September blog post, the United Auto Workers (UAW) called for Congress and the Trump administration to develop reforms to lower drug prices and end what the union called "Big Pharma's price gouging." The post said more than a dozen organizations, including the AFL-CIO and the American Federation of State, County and Municipal Employees (AFSCME), have joined forces in "support of American health and the ability of our citizens to receive the medications they need at an affordable cost." The union said the cost of prescription drugs is at a crisis level. The reason? Big Pharma's influence in Washington, D.C.

Laws "haven't kept up," union president says. Mary Kay Henry, president of the Service Employees International Union (SEIU) and cochair of California Governor Gavin Newsom's Future of Work Commission, says it's time "to create new ways for working people to join together and build the bargaining power they need to negotiate for better jobs and lift up their communities." In a statement after her appointment as cochair of the commission, she said the country's labor laws "haven't kept up with our changing economy and are useless to most people working service and tech-driven gig jobs." She said workers, the private sector, and government need to address long-standing economic obstacles for communities of color and immigrant communities. She said she wants to ensure California continues to lead the way in building economic power for working families. "As the fifth largest economy in the world, California can chart the course in the United States and around the globe to ensure economic success in the private sector and economic success for working families go hand in hand," Henry said.

SEIU local tries to block Trump administration rules. Members of SEIU Local 200United in September filed a motion to block new Trump administration rules the union claims would hurt its ability to improve care and advocate for veterans. The Local 200United members work at Veterans Health Administration hospitals in New York. The motion to block the orders is based on a number of challenges, SEIU said, including the union's assertion the Trump administration is trying to issue new regulations without giving the public a chance to comment on them, as all new rules require, and its belief that the orders direct federal agencies to violate the law, including the Federal Service Labor-Management Relations Statute, which was written to protect federal employees. Local 200United and the SEIU were seeking to block the orders on behalf of federal employees in Buffalo and Canandaigua, New York, as well as workers across the country who would be affected. ✤

DRUG TESTING

Changing laws, attitudes pushing employers to explore alternatives to drug tests

Nobody wants an impaired person on the job, especially in a safety-sensitive position. But how can a supervisor know if an employee who seems a little off is high? And—perhaps more important—how can an employer screen applicants to reduce the chance of hiring someone who is likely to come to work impaired? The first thought may be to use drug testing, but that option isn't as simple as it once was.

Testing problems

Employment-related drug testing, particularly preemployment testing, isn't as common as it was several years ago. Back when marijuana was illegal under both federal and state law, the drug-testing picture was clear. There was an emphasis on zero-tolerance policies, and any positive result was grounds for rejecting an applicant or firing an employee. It didn't matter if someone used drugs on or off the job.

Now the picture is murky. Marijuana remains illegal under federal law but not under many state laws. Currently, 33 states allow marijuana use for medical purposes, and 11 allow recreational use. With looser restrictions on marijuana, many employers are hesitant to limit their applicant pool by using preemployment testing. They also don't want to lose employees who may use pot away from work but don't come to work impaired.

Employers can choose from a variety of policies and procedures related to testing. You can use preemployment tests for applicants and random, postaccident, or reasonable-suspicion testing for employees. Many employers use a combination of those screens. Testing methods also vary and carry their own pros and cons. Some tests check urine for the presence of drugs, while others test hair or saliva.

But no test is perfect since they all can turn up an employee's use of marijuana without determining whether he was high on the job. Tests can pick up the presence of tetrahydrocannabinol (THC), the "high"-producing component of marijuana, long after the high has worn off.

CALIFORNIA NEWS IN BRIEF

Governor signs bill giving childcare workers the right to unionize. Governor Gavin Newsom in September signed Assembly Bill (AB) 378, giving childcare workers the right to join a union and collectively bargain with the state. The legislation will allow an estimated 40,000 workers who provide childcare in home settings to join care providers in 11 other states who are able to negotiate collective bargaining agreements with the state. The new law covers licensed family childcare and license-exempt providers who are caring for a child receiving a childcare subsidy.

Efforts to allow childcare workers to unionize in California began in 2004, according to a statement from the governor's office. The legislation allows workers who were exempt from the National Labor Relations Act (NLRA) to bargain on issues with the state, including reimbursement rates and payment procedures.

Retailer to pay $1.2 million to settle sexual harassment and assault cases. The California Department of Fair Employment and Housing (DFEH) announced in September it had reached a settlement in two sexual harassment and assault investigations with 99 Cents Only Stores, LLC. Two former employees at 99 Cents in Redding filed complaints with the DFEH in August 2018 in which they alleged their supervisor sexually assaulted them in the walk-in freezer located at the back of the store and subjected them to other forms of sexual harassment. The former employees also alleged that managers at 99 Cents retaliated against them after they reported the sexual harassment, including subjecting them to additional scrutiny at work and reducing their hours.

After an investigation, the DFEH found cause to believe that violations of the Fair Employment and Housing Act (FEHA) had occurred. Following mandatory mediation, 99 Cents agreed to pay the former workers and the DFEH $1,225,000 to resolve the claims.

DFEH settles disability discrimination and harassment case. The DFEH announced on October 4 that it had reached a $60,000 settlement with JP Morgan Chase Bank in a disability discrimination and harassment case. A former employee who worked at a Chase branch in Hayward filed a complaint with the DFEH in December 2017. The former employee, who has diabetes, alleged that Chase failed to provide a reasonable accommodation that would have allowed her to take additional breaks, which she needed to manage her condition. She also alleged her supervisor harassed her based on her disability.

The DFEH found cause to believe that violations of the FEHA had occurred. After mandatory mediation, Chase agreed to pay the former employee and the DFEH $60,000 to resolve the claims. ✤

Also, with the rise of the cannabidiol (CBD) industry, some applicants and employees can test positive for THC even if they have used a legal product. Unlike marijuana, CBD oil made from hemp is now legal under federal law since hemp was removed from the definition of marijuana in the 2018 farm bill. To be legal under federal law, CBD from hemp must contain less than 0.3 percent THC.

Alternative to traditional tests

So, since traditional testing has shortcomings, how should you protect yourself from impaired employees? Some employers have turned to impairment testing as an alternative to tests that reveal an employee's drug use.

Companies that market alternative tests point to the flaws of traditional drug testing and tout the ability of their products to detect if an employee is impaired because of drug or alcohol use as well as for some other reason, such as fatigue or illness.

Impairment tests launched in the 1990s but didn't catch on in a big way. A few companies are still in the business with products that measure alertness and identify impairment, whether it's caused by alcohol, drugs, fatigue, or something else.

Training supervisors on how to recognize impairment is another option for employers that don't want to rely strictly on traditional drug tests. The Substance Abuse and Mental Health Services Administration (SAMHSA), an agency within the U.S. Department of Health and Human Services (HHS), has provided guidance for supervisors and HR on ways to handle possibly impaired workers:

- **Know the organization's policies and program.** Supervisors need to understand the program and communicate policies to employees.
- **Be aware of legally sensitive areas.** Care must be taken to follow any collective bargaining agreements and maintain all employees' rights. If drug testing is part of the program, you must ensure laboratory quality control and confirm positive tests. You also must stay up to date on related local, state, and federal laws.
- **Recognize potential problems.** Supervisors should be trained to look for signs of potential problems, such as a change in work attendance or performance; unusual behavior patterns, including sleeping on the job or inability to concentrate; and mood swings or attitude changes. They also should understand that signs alone don't necessarily indicate substance use.
- **Document and act.** Supervisors need to document problems so they will be able to identify patterns in performance or attendance and take corrective action. Supervisors should be able to present an employee with evidence of performance deficits and offer a referral to a company employee assistance program if appropriate. ✤

SETTLEMENTS OF NOTE

Home healthcare provider settles pregnancy bias claims for $200K

On August 28, the Equal Employment Opportunity Commission (EEOC) announced that A Plus Care Solutions, Inc., a supplier of direct professional caregivers to clients with disabilities, has agreed to pay $200,000 and furnish injunctive relief to settle a pregnancy discrimination lawsuit.

According to the EEOC, since at least 2010, A Plus has required its female employees to sign a pregnancy policy during orientation. The policy provided that employment would terminate when the worker reached the fifth month of her pregnancy. The EEOC maintained that A Plus enforced its policy against several women by terminating them during their pregnancies, despite their ability to effectively perform their job duties.

In addition to providing monetary relief to the affected employees, A Plus has agreed to a two-year consent decree prohibiting it from removing pregnant employees from its work schedules because of their sex and pregnancy or from requiring pregnant employees to disclose that they are pregnant. A Plus has also agreed to rescind its policy prohibiting women from working after their fifth month of pregnancy and has issued letters of apology to the affected employees. The consent decree further requires the company to hire an EEO consultant to review and revise

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10-23 1094-C and 1095-C and Employer Shared Responsibility Requirements: How to Get a Jump on Upcoming ACA Compliance Deadlines

10-24 Workplace Violence Could Happen at Your Facility: Assessing Your Risks and Identifying Safeguards to Protect Employees

10-25 FMLA Certifications: How to Get the Medical Information You Need to Properly Designate Leave and Decrease Abuse

10-28 OFCCP Scheduling Letters, Anticipated Changes and More: The Latest Outlook under New Acting DOL Secretary Pizzella—and the Practical Impact on Federal Contractors

10-29 Holiday Headaches: How to Avoid Pay, Discrimination, Harassment, and Other Compliance Conundrums

10-30 Onsite Clinics, Telehealth, Health Fairs and Flu Shots: What You Must Know to Avoid Legal Hassles

10-30 Post-accident Drug Testing: Balancing Safety, Legal Considerations, and OSHA's Antiretaliation Stance

10-31 Hijabs, Tattoos, Dreadlocks, and More: Grooming and Appearance Policy Drafting and Enforcement Tips for Staying Out of Legal Trouble

10-31 Termination and Performance Management Discussion Training: De-escalation Tactics for Managing Unexpected Outbursts, Threats of Violence, and the Risk of Lawsuits

11-1 DOL's Final Overtime Exemption Rule Expected Any Day Now: What the Changes Will Mean for Your Organization

11-1 Managing Safety at Multi-Employer and Joint Employer Worksites: Key Strategies for Ensuring Contractor Compliance and Limiting Liability

its policies and procedures and train its executives and HR personnel on Title VII and its prohibitions against pregnancy discrimination. *EEOC, et al. v. A Plus Care Solutions, Inc.*, D.C. TN, Civil Action No. 1:18-CV-01188.

EEOC sues McDonald's franchise for religious discrimination

On July 16, 2019, the Equal Employment Opportunity Commission (EEOC) filed a lawsuit against Chalfont & Associates Group, Inc.—owner of multiple McDonald's restaurants. The agency alleged the company violated federal law when it refused to hire a job applicant who wouldn't shave his beard because of his religious beliefs.

According to the EEOC's lawsuit, the applicant is a practicing Hasidic Jew who applied for a part-time maintenance worker position at McDonald's Longwood, Florida, location. During the interview, the hiring manager told him that he would be hired but that he needed to shave his beard to comply with the grooming policy.

McDonald's grooming policy states, "All employees must be completely clean shaven." The applicant told the hiring manager he wouldn't shave his beard due to his religious beliefs and instead offered to wear a beard net as a solution. His offer, however, was declined. *EEOC v. Chalfont & Associates Group, Inc.*, D.C., Fl. Civil Action No.: 6:19-CV-01304-PGB-GJK.

Trucking firm sued for sex discrimination

On August 7, 2019, the EEOC sued Stan Koch & Sons Trucking for its use of a strength test that allegedly discriminated against women truck drivers.

According to the EEOC's lawsuit, the trucking company used a CRT test, a strength test developed by Cost Reduction Technologies, Inc. The agency maintained the test discriminates against women truck drivers because of their sex. Moreover, it alleged the CRT test disproportionately screens out women who are qualified for truck driver positions with the company. The lawsuit included the original complainant, who was fired from her job as a truck driver when she failed the CRT test. *EEOC v. Stan Koch & Sons Trucking, Inc.*, MN. D.C. Civil Action No.: 0:19-CV-02148. ✤