IMPORTANT EMPLOYMENT ISSUES BEFORE THE CALIFORNIA SUPREME COURT IN 2021

Scott H. Toothacre, Esq.
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In addition to the Dynamex ruling handed down by the California Supreme Court in 2018 (and the related fallout, including the passage of Assembly Bill 5 (AB5), Assembly Bill 2257, and the passage of Proposition 22 to exempt ride-sharing services such as Uber and Lyft from the new employee classification test), California employers are more than ever being impacted by California's highest court. Here are four cases currently pending before the California Supreme Court that employers should keep an eye on.

Vazquez v. Jan-Pro Franchising 10 Cal.5th 944 (2021)

Under the Dynamex Operations West, Inc. v. Superior Court of Los Angeles 4 Cal.5th 903, (2018) decision, the California Supreme Court held that whether a worker is an employee for purposes of the California Wage Orders is determined by the "ABC test." Under that test, a worker is presumed to be an employee unless the hiring entity establishes all three of the following factors:

(a)The person is free from the control and direction of the hiring entity with regard to the performance of the work, both under the contract for the performance of the work and in fact.

(b)The person performs work that is outside the usual course of the hiring entity's business.

(c)The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Prior to this decision, California Courts applied the test set forth in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 34 (the "Borello test") for determining whether a worker was an independent contractor or an employee. Under that test, the Courts primarily looked at whether the hiring entity had the "right to control" the manner in which the work was performed. Dynamex completely changed the way the Courts had decided whether a person was an employee or independent contractor, but left open the question of whether or not the case applied retroactively.

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The federal Ninth Circuit Court of Appeals in the Vazquez decision asked the California Supreme Court to answer the question of whether or not the decision in Dynamex was to be applied retroactively. On January 14, 2021, the California Supreme Court confirmed Dynamex is indeed to be applied retroactively to all cases currently pending as of April 30, 2018, the day the California Supreme Court decided Dynamex. The California Supreme Court came to this decision noting that Dynamex did not change any settled rule about what test applied to the Wage Orders and, accordingly, retroactive application would not be improper or unfair to employers.

The reason this case is important for California employers to follow: Under this decision, businesses that had been applying the Borello test are potential subject to increased legal liability because the Dynamex decision, together with its ABC test, applies retroactively.

Grande v. Eisenhower Medical Center 44 Cal.App.5th 1147 (2020), Review Granted

FlexCare,LLC (FlexCare), a temporary staffing agency, assigned Lynn Grande to work as a nurse at Eisenhower Medical Center. According to Grande, during her employment at Eisenhower, FlexCare and Eisenhower failed to ensure she received her required meal and rest breaks, wages for certain periods she worked, and overtime wages.

Grande was a named plaintiff in a class action lawsuit against FlexCare brought on behalf of FlexCare employees assigned to hospitals throughout California.Her own claims were based solely on her work assignment at Eisenhower. FlexCare settled with the class, including Grande, and Grande received $162.13 for her injuries, plus a class representative incentive bonus of $20,000. Grande executed a release of claims, and the trial court entered a judgment incorporating the settlement agreement.

About a year later, Grande brought a second class action alleging the same labor law violations, this time against Eisenhower, who was not a party to the previous lawsuit. FlexCare intervened in the action asserting Grande could not bring the separate lawsuit against Eisenhower because she had settled her claims against them in the prior class action.

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The Court is reviewing the question whether a class of workers may bring a wage and hour class action against a staffing agency, settle that lawsuit with a stipulated judgment that releases all of the staffing agency's agents, and then bring a second class action premised on the same alleged wage and hour violations against the staffing agency's client?

The reason this case is important for California employers to follow: The California Supreme Court's decision could affect staffing agencies and how they approach settlement of claims when their clients are not also named as defendants in the case. The case could have a notable impact for California staffing agencies as duplicative litigation could mean that they have to pay settlement costs twice due to potential indemnity clauses in their contractual arrangements with their clients.

Naranjo v. Spectrum Security Services, Inc. 40 Cal.App.5th 444 (2019), Review Granted

In Naranjo, a class of security guards sought premium wages for alleged meal break violations from their employer; based on the meal period premium wages, the employees also sought penalties for waiting times, inaccurate wage statements, and attorney's fees against their employer. The Court of Appeals found that unpaid premium wages for meal period violations do not, alone, entitle the employees to penalties for inaccurate pay stubs or waiting time penalties.

Petition for review after part affirmance and part reversal of judgment. Questions presented:

> (1) Does a violation of Labor Code §226.7, which requires payment of premium wages for meal and rest period violations, give rise to claims for failing to pay all wages at employment termination and inaccurate wage statements when the employer does not include the premium wages in the employee's wage statements, but does include the wages earned for meal breaks?
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> (2) What is the applicable prejudgment interest rate for unpaid premium wages owed under Labor Code § 226.7?

The reason this case is important for California employers to follow: If the California Supreme Court disagrees with the findings of the lower court, potential penalties for California meal break and rest period violations, alone, could support a finding of violations and be compounded by any alleged pay stub penalties or any waiting time penalties.

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Ducksworth v. Tri-Modal Distribution Services 47 Cal.App.5th 532 (2020), Review Granted

In this case, the Court of Appeals reaffirmed the rule that a staffing agency cannot be held liable for alleged workplace discrimination in which it did not participate. In that case, the two plaintiff employees sued their immediate employer, Tri-Modal, along with the two staffing agencies that had assigned them to work at Tri-Modal alleging that the failure to promote them was a result of race discrimination because they were African Americans. One of the staffing agencies moved for summary judgment stating that the decision to promote or not promote the employees was made solely by Tri-Modal and that the staffing agencies did not have any input, or any authority to make any decision regarding the promotion of any employees leased to Tri-Modal. Neither of the two plaintiffs disputed this statement of fact. The trial court concluded this factual admission by the plaintiffs exonerated the staffing agencies, stating that the staffing agencies were basically innocent bystanders in the alleged discrimination by Tri-Modal.

The reason this case is important for California Employers to follow: This is an important decision for employers because if it stands, it would not extend liability for discrimination claims to staffing agencies who are typically uninvolved in the day-to-day employment decisions of their employer clients.

Petition for review after affirmance of judgment was granted on two issues unrelated to the main decision, concluding that the staffing agencies had no liability in the case.

Issues Presented:

> (1) In a cause of action alleging quid pro quo sexual harassment resulting in a failure to promote in violation of the Fair Employment and Housing Act, did the statute of limitations to file an administrative complaint with the Department of Fair Employment and Housing begin to run when the successful candidate was offered and accepted the position, or when that promotion later took effect, if there is no evidence that the plaintiff was aware of the promotion on the earlier date?
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> (2) Was it proper for the Court of Appeal to award costs on appeal under rule 8.278 of the California Rules of Court against an unsuccessful FEHA claimant in the absence of a finding that the underlying claims were objectively frivolous?

For more context, analysis, and how these cases may affect your business, please contact Attorney Scott Toothacre at stoothacre@ferrisbritton.com.