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Employment Law UPDATE

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INDEPENDENT CONTRACTOR TEST CLARIFIED—LIKELIHOOD OF EMPLOYMENT RELATIONSHIP INCREASED DRAMATICALLY

The California Supreme Court has made it considerably more difficult to qualify a worker as an independent contractor. The ruling has already caused a rise in misclassification lawsuits on both individual and class bases, as well as an increase in workplace "investigations" (that is, raids) by government agencies. The consequences of misclassification can be staggering. We encourage all of our clients who use workers classified as independent contractors to re-evaluate the appropriateness of that designation. The following brief summary of the status of the law is a starting point to identify problematic situations.

In its *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* decision, the Supreme Court ruled that the hiring entity now has the burden of proving that a worker is properly considered an independent contractor by establishing all three elements of a new "ABC" test. The elements that must be proved by the hiring entity are:

> (A) the worker must be free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of such work and in fact;
>
> (B) the worker performs work that is outside the usual course of the hiring entity's business; *and*,
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> (C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature of the work performed for the hiring entity.

The hiring entity's failure to prove any one of these three elements will be sufficient to establish that the worker is considered an employee for purposes of the Wage Orders, which require that employees be paid a minimum wage and overtime, and receive rest breaks and meal periods. The ABC test represents a dramatic departure from the previous multi-factor standard used in determining whether a worker can properly be classified as an independent contractor.

The Supreme Court offered little guidance as to the types of workers who might properly be considered as independent contractors. Instead, it indicated that the ABC test should not be interpreted in a manner that would encompass independent workers such as plumbers or electricians who have traditionally been viewed as genuine independent contractors working in their own independent business.

Employers often prefer to classify workers as independent contractors instead of employees to avoid having to pay payroll taxes, unemployment insurance, disability insurance, workers' compensation insurance, business-related expenses, minimum wage, and overtime. However, misclassification lawsuits are coming fast and can leave an employer liable for back wages; penalties for late payment, meal and rest premiums, and improper wage statements; attorneys' fees; and even criminal prosecution.

Employers utilizing the services of independent contractors should promptly seek advice on whether their independent contractors are properly classified, as well as on strategies for converting improperly classified independent contractors to employees. We have already addressed this developing issue with clients who have been investigated by the state. We are prepared to assist you with your analysis.

DE MINIMIS RULE REJECTED BY CALIFORNIA SUPREME COURT—EVERY MINUTE WORKED MUST BE PAID

The California Supreme Court has again parted ways with established federal law, this time rejecting the *de minimis* doctrine long recognized under the Fair Labor Standards Act. Under federal law, the *de minimis* doctrine excuses employers in some circumstances from paying employees for small amounts of otherwise compensable time worked when that time is administratively difficult to track. For example, the *de minimis* doctrine has been applied to excuse employers from paying for the time it takes to log into a computer to clock in and out, or the time it takes to walk a retail employee out of the store and check their bag at the end of a shift.

This may seem trivial at first glance; after all, five minutes for a $12.00 an hour worker is only $1.00. The problem, though, is with the add-on claims that accompany unpaid wage suits. These include overtime, paystub, and waiting time claims. These add-ons add up to thousands of dollars per individual.

The California Supreme Court found in *Troester v. Starbucks Corporation* that the *de minimis* doctrine did not apply where the employer required the employee to work off-the-clock for several minutes per shift. The Supreme Court did not say whether the *de minimis* doctrine might apply under circumstances where the compensable time is so small or irregular that it is unreasonable to

expect the time to be recorded. The decision is unclear as to whether and under what circumstances small amounts of time may be considered *de minimis* and properly excluded from an employee's wages.

In the aftermath of this departure from established law, employers should closely examine all instances in which employees are subject to employer control or are performing work but are off-the-clock. Employers are encouraged to speak to counsel to create clear policies preventing off-the-clock work and procedures for reporting time that was performed off-the-clock, and to develop a practice of adding pre or post-shift activities to the daily hours worked for all affected employees.

FMLA/CFRA EQUIVALENT PARENTAL BONDING LEAVE EXTENDED TO EMPLOYERS OF 20 OR MORE

Pursuant to California's *New Parent Leave Act*, employers with 20 or more employees must allow eligible employees to take up to 12 weeks of unpaid, job-protected leave to bond with a newborn or a child placed with the employee for adoption or foster care. An employee is eligible for parental leave if she or he has worked with the employer for at least 12 months, worked at least 1,250 hours in the last 12 months, and works at a worksite with at least 20 employees within a 75-mile radius. Previously, only employers with 50 or more employees had to provide eligible employees with bonding leave. Also, leave under the New Parent Leave Act is in addition to the 4-month leave offered under the Pregnancy Disability Act.

Employers with 20 or more employees are encouraged to contact counsel to update an existing employee handbook and develop practices for handling leave requests. Additionally, employers with 50 or more employees should consider adjusting employee eligibility requirements in their existing FMLA/CFRA policies to include employees working at a site where there are 20 or more employees within a 75-mile radius who take leave covered under the New Parent Leave Act.

NLRB PROPOSES RULE TO MAKE EMPLOYER-FRIENDLY JOINT EMPLOYMENT STANDARD

In keeping with its recent promise to re-establish the decades-old joint employer standard in place prior to the Obama era, the National Labor Relations Board has issued a new proposed rule. Under the proposed rule, an employer "may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction."

In contrast with the current rule that allows for joint employment status to be found even where no actual control has been exercised, the new rule clarifies that a putative joint employer "must

possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine." According to the NLRB's press release, the proposed rule reflects the Board majority's view that the NLRA's intent is best supported by a joint-employer doctrine that does not draw third parties who have not played an active role in deciding wages, benefits, or other essential terms and conditions of employment into a collective bargaining relationship for another employer's employees.

If adopted, this newly proposed rule will make it more challenging for employees and unions to prove a joint employment relationship for purposes of unionization and other related issues under the National Labor Relations Act. The NLRB's rules can be persuasive to California Courts who may use the NLRB's joint employment standard when deciding joint employer liability issues under California law. In other words, this new standard could be good news for California employers seeking to avoid joint employer liability, even in situations where the NLRA is inapplicable; after so many new challenges, California employers deserve a break.

EMPLOYERS SHOULD UPDATE FORMS USED FOR EMPLOYEE BACKGROUND CHECKS AND FAMILY MEDICAL LEAVE

Employers conducting background checks on their employees must now use a new model "Summary of Rights Under the FCRA" form. The updated form incorporates a new obligation on the part of nationwide consumer reporting agencies to provide national security freezes that restrict prospective lenders' access to consumers' credit reports. Employers generally must provide a copy of the new form at the time they provide notice to an applicant/employee that a background check will be conducted, and again if the employer plans to take an adverse action against an applicant/employee based on the results of the report. The new model form is available here.

Additionally, the Department of Labor ("DOL") recently issued new model Family Medical Leave Act (FMLA) forms. Employers covered by FMLA that use the DOL's model forms should replace the old forms with the new forms, which are available here. The new forms are not materially different than the old ones, but reflect a new expiration date of August 31, 2021.
