PERSPECTIVES

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THE STRENGTH OF PARTNERSHIP

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Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

ALERT: GDPR Effective May 25, 2018

As we have written about previously, in 2016 the European Union (EU) approved a new privacy regulation called the General Data Protection Regulation (GDPR). It is a mandatory regulation that applies to all companies that collect the data and information of EU individuals.

The GDPR expands the privacy rights granted to European individuals and requires certain companies that process the personal data of European individuals to comply with its regulations.

The GDPR went into effect May 25, 2018, and all companies collecting or processing the personal data of EU individuals must be compliant.

If you want to find out more about the GDPR, additional information is available on the official GDPR website of the European Union.

If you are in need of an assessment to make sure data is processed and managed according to the GDPR instructions, or to ensure that your Terms of Use and Privacy Policy support GDPR requirements, please contact us at bds@sfcounsel.com or hgs@sfcounsel.com and we can direct you to a privacy professional to assist with your GDPR needs.

Employer Alert – Clarification on California's Salary History and Equal Pay Statutes

Early this year in our *New California Employment Laws for 2018* article, http://www.sfcounsel.com/new-california-employment-laws-for-2018/, we alerted you to Assembly Bill ("***AB***") 168 (codified at Labor Code § 432.2 and

In This Issue

Brandon Smith

This summer we were lucky enough to travel to Barcelona to join a

effective as of January 1, 2018), which places restrictions on information an employer may seek from job applicants concerning compensation or salary history. For example, Labor Code § 432.2(a) prohibits an employer from "rely[ing] on the salary history information of an applicant for employment as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant."

While the ink was still drying on AB 168, Governor Brown signed AB 2282, which sought to clarify some ambiguities in Labor Code §§ 432.2 and 1197.5 (California's Equal Pay Act) created by AB 168 and other prior amendments.

Salary Inquiry (Labor Code § 432.2)

AB 2282 specifically states an employer *may ask* "an applicant about his or her *salary expectation* for the position being applied for" (emphasis added). The employer still cannot ask for an applicant's salary history, though a nondiscerning applicant or employer may not realize the distinction between "salary history" and "salary expectation."

Additionally, AB 2282 defined three terms that were left undefined in Labor Code § 432.3(c) with respect an applicant's request for a pay scale for a position ("An employer, upon reasonable request, shall provide the pay scale for a position to an applicant applying for employment."):

- "Pay Scale" means a "salary or hourly wage range."
- "Reasonable Request" means a "request after an applicant has completed an initial interview with the employer."
- "Applicant" or "Applicant for Employment" means "an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position."

Current Salary in Compensation Decisions (Labor Code § 1197.5)

AB 2282 does not change the existing prohibition under Labor Code § 1197.5 of prior salary as the sole justification in compensation disparity; instead, AB 2282 clarifies that an employer may make a "compensation decision based on a current employee's existing salary, so long as the wage differential resulting from that decision is justified" by one or more of the following factors: (a) seniority system, (b) merit system, (c) system that measures earnings by quantity or quality of production, or (d) bona fide factor other than sex, race, or ethnicity, such as education, training, or experience.

Takeaway

While AB 2282's amendments to Labor Code §§ 432.2 and 1197.5 do not signal any dramatic change with respect to salary inquiries, these amendments clarify how to treat "salary history":

- Employers cannot ask for an applicant's salary *history*, *but* can ask for an applicant's salary *expectations*.
- Employers can use an employee's current salary in making compensation decision, but any wage differential cannot be based on sex-, race-, or ethnicity-based reason(s).

close friend in celebrating her "big" birthday and to see family living in Munich. It was the first time travelling to Europe for our twin girls and I loved seeing it through their fresh eyes. It reminded me of why we travel in the first place.

Traveling outside our comfort zone brings with it many benefits and what resonates with one person doesn't always resonate with another. For me, I was struck by these five benefits:

•Challenging yourself;
•Changing your perspective to see things from a different vantage point;
•Strengthening relationships;
•Enhancing your tolerance for uncertainty; and
•Giving yourself space to be creative.

These are all great benefits for anyone but as legal counsel to entrepreneurs across a range of industries, and as an entrepreneur myself, I find these benefits to be invaluable.

Please contact Denis Kenny at (dsk@sfcounsel.com), Ryan Stahl at (rws@sfcounsel.com), or John Lough, Jr. at (jbl@sfcounsel.com) for more information on upcoming laws that may affect your workforce, including best practices in assessing wage differentials, assessments of workers as either independent contractors or workers, scheduling a mandatory harassment training, or assessing and updating your workplace policies to ensure compliance with controlling law.

- Written by John Lough, Jr.

Impact of Dynamex California Supreme Court Decision on Use of Independent Contractors

On April 30, 2018, the California Supreme Court in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, announced a sea change on who is an employee, rather than an independent contractor ("***IC***"), for claims under California's Industrial Welfare Commission Wage Orders ("***Wage Orders***"), which regulate the wages, hours, and working conditions of workers in California. Such claims include minimum wage, overtime, and meal and rest breaks, among other things.

In brief, the California Supreme Court adopted what is referred to as the ABC Test (it is derived from a test adopted in other states, including Massachusetts), under which a hiring entity must prove three elements for valid IC classification of its workers. This article will discuss those three elements in detail below.

Background Facts

Two delivery drivers alleged that Dynamex, a nationwide same-day courier and delivery service, had improperly classified them and other "similarly situated" drivers as ICs. In relevant part, these drivers:

- were paid a flat fee or percentage of the delivery fee received from the customer;
- were generally free to set their own schedules;
- were free to reject or accept jobs assigned by Dynamex;
- used their own cell phones and vehicles for work;
- were free to choose their own routes;
- could perform work for other companies; and
- were hired for an indefinite period of time.

Analysis

Under most tests distinguishing ICs from employees, these facts would have weighed toward an IC determination. However, in a densely-academic opinion, the Court held that the "suffer or permit to work" definition of "employ" contained in the Wage Orders should replace the more flexible "right of control" test which has been used in California since 1989.

We all know that you often find yourself in a challenging situation when travelling, such as trying to communicate in a foreign language, navigating a new city, or dealing with an unexpected event without your safety net around you. When we were in Barcelona, I found myself challenged by trying to "relearn" driving a stick shift when driving a 9 person van around Spain (including stalling it out in a traffic circle!). Figuring out how to control your stress in order to handle a difficult situation is a great skill to acquire.

Viewing the world from a different perspective, especially during these times, will help you communicate with others who may not see the world as you do. My teenage girls were able to step out of their Marin "bubble" and see people valuing other things in life, such as slowing down to be with friends. It also gave them more of an appreciation about their own home

Specifically, the Court adopted the "ABC" test as the proper way to distinguish employees from ICs. Under the ABC test, if the hiring entity establishes *all three* elements below—(A), (B), and (C)—then the worker is an IC:

A. Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?
B. Does the worker perform work that is outside the usual course of the hiring entity's business?
C. Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?

(*Id.* at 956–58.) Of material note, prong (B) in other jurisdictions also permits a worker to be treated as an IC if the work is "performed outside all the places of business of the hiring entity," and the Court rejected that formulation of prong (B) in favor of Massachusetts's formulation. (*Id.* at 956 n.23.) The reason being that Massachusetts's version is "consistent with California's intended broad reach of the suffer or permit to work definition" found in the Wage Orders and captures the fact that the modern work force telecommutes or works from homes. (*Id.*)

To illustrate how the ABC test works, the Court gave the example that a worker would be properly classified as an IC "only if the worker is the type of traditional independent contractor—such as an independent plumber or electrician—who would *not* reasonably have been viewed as working *in the hiring [entity's] business*." "On the other hand," the Court said, "when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company," or "when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees," and not ICs. (*Id.* at 953, 959–60, citations omitted.)

Critically, the ABC test is an all-or-nothing test, that is, if the hiring entity cannot establish one of the elements, the worker is an employee. In fact, the Court noted that "it may be easier and clearer for a court to determine whether or not part B or part C of the ABC standard has been satisfied" rather than delving into the degree of control attendant with part A of the ABC test. (*Id.* at 963.)

Open Questions in the Wake of Dynamex

Some of the key issues to follow concerning the *Dynamex* decision include:

1. Retroactivity? Dynamex filed a petition for rehearing, in part, seeking a ruling on whether the Court's decision should apply retroactively or prospectively. On June 20, 2018, the Court denied the petition for rehearing and request for modification of its opinion. The Court's April 30, 2018 opinion is now final and will be presumed to apply to all pending and future cases. This means the decision will apply retroactively. The only current recourse for limitations on this decision entails possible legislative change. Business groups are actively lobbying for such change. Notably, a group of over 70 businesses and

town.

If you find yourself traveling with family, doing so can help strengthen those relationships while you go through shared adventures and challenges. For example, during our trip, one of our flights was cancelled when the French air traffic controllers cancelled all flights into and over France and we were faced with an unexpected two day delay. We worked together and figured out a new plan and a new city to visit instead and that became one of the highlights of our trip.

Hopefully dealing with the uncertainty of travel (Will I be able to order dinner? Will my train be on time? Am I even on the right train?) increases your tolerance for uncertainty by getting you used to being in those situations and increasing your confidence in yourself when you see that you were able to survive and maybe even thrive during them. This is a key strength as an

business organizations recently requested State of California officials to delay or defer application of the *Dynamex*decision.

2. The "new" ABC test applies only to claims, rights and obligations grounded in one of the IWC Wage Orders. Specifically, in a footnote, the Court refused to address whether the multi-factor *Borello* test was still the applicable standard for various obligations under the California Labor Code, including the obligation to reimburse employees and to provide them with workers' compensation benefits. (*Id.* at 916 n.5; *see also Salgado v. Daily Breeze* (California Court of Appeal June 6, 2018) 2018 WL 2714766 at *15 n.6; *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289, 314 [holding that the "ABC" test "does not appear" to apply in the joint employment context].)

This means that the host of other IC tests (e.g. the *Borello* factors) still apply to other types of employment claims such as failing to provide workers compensation and unemployment insurance, ERISA benefits, unreimbursed employment expenses, tax laws etc... This also means that it is conceivable a worker could be treated for wage and hour purposes as an employee but for other purposes (such as tax laws) as an IC.

In the ever-changing employee / independent contractor landscape, we will continue to follow all developments.

Please contact Denis Kenny at (dsk@sfcounsel.com), Ryan Stahl at (rws@sfcounsel.com), or John Lough, Jr. at (jbl@sfcounsel.com) for more information on upcoming laws that may affect your workforce, including assessments of workers as either independent contractors or workers, scheduling a mandatory harassment training, or assessing and updating your workplace policies to ensure compliance with controlling law.

- Written by Denis Kenny

Reverse Veil Piercing Gains New Life in the LLC Context

A recent California appellate court decision has ruled that reverse veil piercing is permitted in California in the context of limited liability companies. Practically speaking, this means that an LLC's assets could potentially be at risk for an LLC member's personal liability under the right circumstances.

Most people are familiar with the concept of "piercing the corporate veil." This is when shareholders of a corporation can be held liable for the corporation's debts (which is typically not permitted), if the corporation is not managed in such a way as to warrant the corporate veil of protection. In order to pierce the veil, a plaintiff must prove that there is such a unity of interest and ownership between the corporation and the shareholder that it would be unfair to treat the acts of the individual as being those of the corporation exclusively.

entrepreneur so that you'll be able to take risks.

Finally, getting out of your day to day activities gives you the space to be creative. It frees up your mind from the constant to-dos so that you can give deeper thought to issues and allows you time, without interruptions, to figure out solutions. When you aren't constantly thinking about picking up the dry cleaning, dropping the kids off, shopping, fixing the car etc. you might be surprised at your creativity and the solutions that come to you for long running problems or ideas.

Keep traveling!

Written by Brandon Smith

A less familiar, but related, concept is that of "reverse veil piercing," when a judgment creditor is permitted to enforce a judgment against ***the corporation*** for the debts of ***the shareholder***, rather than the other way around.

Historically, this legal theory was not favored in California. In a 2008 Court of Appeals decision (*Postal Instant Press, Inc. v. Kaswa* (2008) 162 Cal.App.4th), the court held that a judgment creditor could not add a corporation to a judgment against one of its individual shareholders ultimately prohibiting the creditor from reverse-piercing the veil of the corporation. The decision was largely based on the fact that there were other remedies available to the creditor to get its debt repaid that were not as drastic. In addition, there were other non-debtor shareholders of the corporation who would have been adversely (and unfairly) affected if the creditor was allowed to go after the corporation's assets.

Since the *Postal Instant Press* decision, the legal community has largely assumed that it created a complete prohibition on reverse veil piercing in California regardless of the structure of the legal entity involved.

Fast forward to 2017 and the issue once again came before California's Fourth Appellate District in the form of *Curci Investments, LLC v. Baldwin*, ***only this time involving a limited liability company***.

In *Curci*, a California real estate developer, James Baldwin, formed a Delaware LLC called JPB Investments LLC ("JPB"). Baldwin owned 99% of the LLC, was the manager and CEO of the LLC, and made all decisions regarding distributions. His wife owned the remaining 1%. Baldwin subsequently borrowed $5.5 million from Curci in his individual name, but failed to pay the note when due. Curci filed suit against Baldwin and won a judgment against him for $7.2 million.

Curci also got a charging order against the LLC to divert distributions until Baldwin's debt was paid, but this proved fruitless because Baldwin simply opted not to declare distributions. In response, Curci sought to add JPB to the judgment as a judgment debtor using the theory of reverse veil piercing. Curci's argument was that Baldwin held virtually all the interest in JPB and controlled its actions, and used the LLC as a personal bank account, which justified disregarding the separate nature of JPB to allow Curci to access its assets to satisfy the judgment against Baldwin.

The trial court initially ruled against Curci based on the holding in *Postal Instant Press*, reasoning that there was a prohibition on reverse veil piercing in California. Curci appealed, arguing that this case was distinguishable because it involved an LLC rather than a corporation.

The Court of Appeals agreed and remanded the case back to the trial court.

In its ruling, the court was careful to note that *Postal Instant Press* was correctly decided as it applies to corporations because LLCs and corporation are treated differently for judgment enforcement purposes. The major difference is that corporate shares can be levied by a creditor, but interests in an LLC cannot be levied and are only subject to charging orders, which can be thwarted in a single member situation (as mentioned above). The court noted that by placing a complete prohibition on reverse veil piercing in the LLC context, it would essentially allow LLC members to place all of their personal assets into a single member LLC and have those assets enjoy blanket

immunity from creditor claims.

The court also distinguished *Postal Instant Press* because the corporation (like many corporations) had other non-debtor shareholders who would have been adversely affected by reverse veil piercing. In this case, however, it was only Baldwin and his wife who owned the interests in JPB.

It is important to note that the Court of Appeals did not decide whether the veil should, in fact, be pierced. Instead, the case was remanded it back to the trial court to determine whether Curci can pierce the LLC's veil to gain access to its assets to satisfy Baldwin's debts. Moreover, even though the court allowed the legal theory to proceed, it warned that reverse veil piercing should remain a remedy of last resort and should only be granted if the facts are closely aligned with this case and a creditor can show that all other remedies were unavailable or impractical.

As a reminder to our clients, it is incredibly important to adhere to corporate formalities, especially as it pertains to single member LLCs. There may be a strong temptation to be lackadaisical in the day to day operations such as opening a separate LLC bank account, signing with proper titles, and documenting LLC member and manager actions. The *Curci* case demonstrates that these seemingly insignificant actions are vital to preserving not only the limited liability shield but also to protecting the LLC from personal judgments.

If you have further questions regarding this case or what you can do to ensure you are properly operating your LLC or partnership, please contact Heather G. Sapp, Esq. (hgs@sfcounsel.com), Brandon D. Smith, Esq. (bds@sfcounsel.com), or Bill Scherer, Esq. (wms@sfcounsel.com).

- Written by Heather Sapp

Areas of Practice

Business; Real Estate; Intellectual Property and Employment Law; Litigation and Dispute Resolution; Nonprofit; Estates and Trusts