PERSPECTIVES

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140 Geary Street, Seventh Floor • San Francisco, CA 94108-4635
Phone: (415) 433-1099 • Fax: (415) 433-9434 • www.sfcounsel.com

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Post-Dynamex Independent Contractor Classification Developments

We have written previous articles over the past year discussing the groundbreaking April 30, 2018, California Supreme Court decision in Dynamex Operations West, Inc. v Superior Court of Los Angeles which, in practice, significantly increases the liability risk and damages exposure to individuals or businesses seeking to classify workers as independent contractors. The Dynamex decision created a simplified three-factor test, referred to as the "ABC Test," under which the hiring party must prove that the prospective independent contractor is:

A. free from the control and direction of the hiring party,
B. performing services that are outside the core of the hiring party's business, and
C. engaged in an independently established trade, occupation or business which performs work similar to the work performed for the hiring party.

As previously advised, Factor B is proving to be the most difficult requirement for hiring parties to meet. As a result, best practices for individuals or businesses hiring workers in California is to retain those workers as employees rather than independent contractors. But that statement is proverbially easier said than done, in part, due to issues left unresolved by the Dynamex opinion. Specifically, Dynamex did not address whether the ABC Test should be applied (1) retroactively (to claims and cases based on acts and omissions occurring before the decision) or (2) only to claims, rights or obligations grounded in the Industrial Welfare Commission ("IWC") Orders (which include minimum wage, overtime and meal and rest break obligations).

However, agencies, lawmakers and courts have engaged in ongoing efforts to address these important questions.

Retroactivity of Dynamex ABC Test

The retroactivity of the Dynamex decision had, so far, only been addressed at the trial court level with most courts finding that the ABC Test properly applies retroactively because the fundamental elements of the classification analysis did not change but, instead, clarified existing law. However, in a May 2, 2019 decision, Vazquez v. Jan-Pro Franchising International, Inc., the Ninth Circuit reaffirmed the trial courts' majority view that Dynamex applies retroactively.

In This Issue

William Scherer

Most of us put a lot of effort into our workdays; we have deadlines, analyses to carry out, impasses to resolve, and everything else we do on a day-to-day basis, all of which can become a singular focus. And that applies to the other important pursuits outside of work that we do to keep our lives in order, our homes

Ninth Circuit decisions are not binding on California state courts but are viewed as persuasive authority. Consequently, unless or until a California appellate court rules differently, the Dynamex ABC Test should be used in examining California worker classification issues for the past, present and future.

Scope of Claims Covered by Dynamex ABC Test

Dynamex addressed the classification of workers bringing claims under IWC Wage Orders, but the Court did not expressly limit the scope of its decision to those claims. Consequently, Dynamex creates a legal landscape in which the same worker may be properly classified as both an employee and an independent contractor depending on the types of claims brought or examined. In practice, this type of legal inconsistency creates huge risks and uncertainties for businesses and workers alike. For example, how should a worker be classified if he or she does not pass the Dynamex ABC Test but does pass the Economic Realities Test which is applied under federal law to ERISA, social security and other federal benefits?

Amidst this uncertain legal landscape and a highly divided and partisan political climate, California agencies and politicians have taken competing steps to expand or contract Dynamex's scope.

At the agency level, on May 3, 2019, the Division of Labor Standards Enforcement ("DLSE"), California's wage and hour enforcement agency, issued a letter opining that the ABC test applies to both the IWC Wage Orders and any Labor Code provisions that enforce requirements set forth in the Wage Orders. DLSE decisions are not binding on state or federal courts but they are examined and may be cited for persuasive authority and, of course, will apply to wage claims adjudicated by the DLSE.

On the legislative front, California Assembly Bill ("AB") 5, was introduced by Democratic state Assemblywoman Lorena Gonzalez in December 2018, seeking to codify the Dynamex ABC Test into California's Labor Code and expand its scope by making it applicable to a panoply of employment laws including paid family leave, expense reimbursement, workers' compensation and health and unemployment insurance. Ms. Gonzalez has said in a statement supporting AB 5:
"Individuals are not able to make it on three side hustles. That shouldn't be the norm. That shouldn't be accepted . . . In a state with one of the country's highest poverty rates, this court decision is crucial to helping Californians maintain solid employment in an economy that's left millions struggling."

Conversely, Republican state Assemblywoman, Melissa Melendez, sponsored a competing bill in December 2018, AB 71, that seeks to reverse the Dynamex ABC Test to be replaced by the multi-factor Borello test that applied before Dynamex.

AB 5 and AB 71 remain in consideration stage with AB 5 one step ahead following its recent approval by the state Assembly. AB 5 is now proceeding to the state Senate for consideration. We will continue to monitor these and other developments in this dynamic legal arena.

We here at Scherer Smith & Kenny LLP remain available to address any questions you may have related to independent contractor classification and any other employment- or business-related issues. For additional information, please contact Denis Kenny at (dsk@sfcounsel.com), Ryan Stahl at (rws@sfcounsel.com), or John Lough, Jr. at (jbl@sfcounsel.com).

- Written by Denis Kenny

California Consumer Privacy Act

On the heels of the General Data Protection Regulation ("GDPR"), California is rolling out its own revamped privacy legislation in the form of the California Consumer Privacy Act of 2018 (the "Act").

The Act will go into effect on January 1, 2020.

clean, our cars' gas tanks full, and our time full with family and friends.

And so it has gone for me for many, many – *many* - years. I start my – (ahem) – 31st year of practice very shortly, and my next birthday will give no cover for arguing I'm other than nearly into my late 50s. My sister has a teachable story: the one in which she went in for her annual check-up shortly after her 45th birthday. After her exam, her doctor turned to her and said, "You know, you're 45 years old now. Your body is no longer taking care of you; you have to take care of *it*." Now, this guy's no slouch – he now to edits the Wellness Letter for UC Berkeley's School of Public Health.

Imagine my chagrin when I heard this story nearly 10 years after the threshold he set. Actually, I'd seen a few signs that the life I enjoy outside of work with friends and family, replete with good food, wine, and fun, was catching up with me.

Many people really enjoy exercise, and are anxious and unhappy without it. While I enjoy bike rides, ski weekends, or hikes in the Marin headlands, I would generally choose a rich, leisurely brunch with friends or a day lounging at a pool to the "runner's high" that comes from exercise if the outcomes of both were equivalent.

But those alternatives do not have equivalent outcomes, do they? And by the way, while it sounds nice, I don't think I've ever had a "runner's high."

Much like GDPR, the Act gives California residents certain additional rights in relation to the collection and use of their personal information. Below is a brief description of some of major components of the Act, but first:

Will the Provisions of the Act Apply to You?

The Act will apply to for-profit businesses that do business in California, collect and control California residents' personal information, and: (a) have annual gross revenues in excess of $25 million; or (b) receive or disclose the personal information of 50,000 or more California residents, households or devices on an annual basis; or (c) derive 50% percent or more of their annual revenues from selling California residents' personal information.

This means that non-profits, small businesses, and/or those not generally handling significant amounts of personal information will likely not have to comply with the Act.

Act Terms

Broadening of Definitions

The Act broadens certain data privacy definitions that make its reach more expansive. A couple of important ones to note are:

- The definition of "personal information" now includes any information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. The Act provides a sampling of examples of personal information, including device identifiers, other online tracking technologies and "probabilistic identifiers," which are identifiers that will "more probable than not" identify a consumer or device. The Act does not apply to de-identified or aggregated personal data, as long as the steps taken by the business to de-identify the information meet the Act's strict standards.

- The definition of "sale" in regards to the sale of personal information now includes selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating personal information to another business or third party for monetary or other valuable consideration.

Transparency

Under the Act, businesses are required to be more transparent regarding personal information that they collect. Specifically, a business must disclose what type of personal data they are collecting, why they are collecting it and for what purpose, whether they are selling or sharing the data and with whom. Consumers also have the right to request certain information from businesses, including where a business got the consumer's personal information, the specific pieces of personal information it collected about the consumer, and the third parties with which it shared that information.

Deletion Right

The Act also creates a right for consumers to request that a business delete such consumer's personal information, and the business must provide notice of this right in its online privacy notice. The Act also requires a business that receives a deletion request to direct service providers to delete the personal information from their records as well. Notably, the business is not required to delete the information if it is necessary to maintain the personal information for a certain purpose, such as detecting security incidents and preventing fraud.

Opt Out Right

The Act provides consumers with the right, at any time, to opt out of the sale of the consumer's personal information to third parties. Businesses that sell personal information to third parties are required to provide notice that personal information may be sold and that consumers have the right to opt out. The business are prohibited from selling the data to third parties absent subsequent express authorization to do so.

Non Discrimination

In any event, I was generally healthy but time was catching up with me. So a couple years ago I began experimenting with different diet and exercise initiatives to improve my health, core strength and endurance, lose fat, lower cholesterol, etc. You know the drill. And I have lost weight, eat and sleep better, drink more water and exercise more. I feel better this year at this time than the year before, and I can say the same for last year, when I felt better than the year before that. I still have a pretty long journey ahead to better fitness, but I like the direction I'm headed.

And I am still experimenting a lot to find the "answer" to fitness. The results have been – uneven; while I have slowly made progress, my weight and fitness level go up and down. I'm trying to balance the things I enjoy doing (see a few paragraphs above) to those things I know I must do; it's trial and error, with quite a few "errors." It's just that I don't believe living someone else's diet and exercise program works in the long run. So my path is evolving and I'm slowly adding healthy activities while also giving myself some license to enjoy myself. It's a journey I'm genuinely enjoying.

I have achieved some successes, and I have some takeaways from this continuing experiment: (a) substituting my car/Muni bus for walking and also biking to work, weather and schedule permitting, has left me stronger and leaner without sacrificing much times

The Act prohibits businesses from discriminating against consumers for exercising any of their rights created by the Act. For example, businesses are prohibited from denying goods or services, charging different prices, or providing a different quality of goods or services to consumers who exercise their privacy rights.

GDPR and the Act Are Not One in the Same

Many business may wonder (or assume) that if they are GDPR compliant, then the same must be true of being compliant under the Act. However, though the Act incorporates some GDPR concepts, such as the rights of access and data deletion (noted above), there are several areas where the Act requirements are more specific than those of the GDPR or where the GDPR goes beyond the Act requirements.

Despite the overlap and similarities, the Act and the GDPR are different and businesses should not rely on GDPR-compliance as an indicator that they are Act-compliant.

Companies are best advised to determine early on whether they must comply with the Act and, if so, begin formulating compliance strategies well before it goes into effect.

If you have further questions about the Act or other privacy compliance matters, please contact Heather Sapp at (hgs@sfcounsel.com).

- Written by Heather Sapp

Personal Involvement and Liability of Officers and Directors When it Comes to Cyber Security

Directors and officers of corporations have, as most of you know, fiduciary duties to act in the best interest of the corporation. To meet these duties, officer and directors must exercise a high degree of care in the operation and management of the corporation, to avoid self-dealing, to be transparent and to generally act in a way that protects the interest of the corporation. This duty extends to their oversight of the operations of the corporation. Acting in conscious disregard for their duties or ignore facts that appear as red flags could potentially expose them to personal liability. These cases typically arise through a shareholder derivative lawsuit brought by the company's shareholders on behalf of the corporation. Where shareholders allege that directors and/or officers have violated their duty of oversight (i.e. a breach of their fiduciary duties), courts have coined this a Caremark claim after the case In re Caremark International Inc. Derivative Litigation, (1996) 698 A. 2d 959.

As we witness ever more cyber security breaches and "cyber incidents", directors and officers are increasingly expected to pay close attention and to actively take steps to protect their companies from such threats. There are signs that plaintiff's counsel are looking closer at shareholder derivative actions to go after directors and officers personally after a breach. We are also seeing steps being taken at the public level where a recent bill has been introduced, for public companies only at this point that would require companies to disclose the cyber security experience of its directors and if they have none, explain why the company does not believe it is necessary for the Board to have such experience. Senate Bill 592.

The question then becomes what can officers and directors do to minimize or eliminate personal liability from a cyber security incident. Here are some suggestions:

• Make sure that the company has adequate D&O and Cyber insurance;
• Make sure that they are actively involved in Board meetings, reports and

since I would otherwise be commuting or doing errands; (b) eating a healthy and lower calorie breakfast and lunch leaves me with extra calories to enjoy a nice dinner; (c) signing up for at least one organized road bike event in the late Spring gets me on the road on weekends early in the year regardless of the distance I ultimately ride on event day; and (d) lifting weights has strengthened my core and eliminated aches and pains that were beginning to surface.

So this dog is still learning some new tricks. Here's to the journey!

- Written by William Scherer

committees and that they document, through minutes or otherwise, their involvement;
• Hire a Chief Information Officer or someone else charged with overseeing the security infrastructure of the company;
• Engage outside experts to assess and mitigate any potential weaknesses, regularly;
• Have the Board and officers meet regularly to discuss cyber security (and document it!);
• Adopt a security plan and a response plan in the event of a breach; and
• Make sure that everyone knows who to call (and who not to contact) in the event a breach is discovered.

Too many times we see directors who agree to serve on the Board of a company and then "check out"; engaging only when necessary or asked. It is important that directors and officers ask questions and push for cyber security protection to protect the company. If there is a security breach, directors and officers can jump in and try to help the company navigate that or at least oversee its actions and responses.
Taking an active role when it comes to cyber security will go a long way towards protecting the company and its shareholders and mitigating exposure to personal liability.

If you have further questions about your duties as an officer or director or other corporate matters, please contact Brandon Smith at (bds@sfcounsel.com), Bill Scherer at (wms@sfcounsel.com) or Heather Sapp at (hgs@sfcounsel.com).

- Written by Brandon Smith

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