Proskauer

California Employment Law Notes

May 2019

Strict Independent Contractor Test Applies Retroactively

Vazquez v. Jan-Pro Franchising Int'l, 2019 WL 1945001 (9th Cir. 2019)

Last year, the California Supreme Court in *Dynamex Ops. W. Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), adopted the so-called "ABC test" for determining whether a worker is an employee or independent contractor and in so doing made it much more difficult for a hirer to properly classify a worker as an independent contractor. The ABC test requires the hirer to prove that the worker is: (A) free from the control and direction of the hirer; (B) performing work outside of the usual course of the hirer's business; and (C) customarily engaged in an independently established trade of the same nature as the work performed. In *Vazquez*, the Ninth Circuit held that *Dynamex* should be applied retroactively to hiring arrangements that existed prior to issuance of the *Dynamex* opinion.

California Employee Is Compelled To Litigate His Employment Claims In Indiana

Ryze Claim Solutions LLC v. Superior Court, 2019 WL 1467947 (Cal. Ct. App. 2019)

Jerome Nedd was employed by Ryze Claim Solutions in El Cerrito, California for almost three years before his employment was terminated, resulting in his filing claims against Ryze for wrongful termination and violation of the Fair Employment and Housing Act ("FEHA") in Contra Costa County Superior Court. When Nedd was first employed, he executed an employment agreement with Ryze (an Indiana-based company), which contained a forum selection clause in which Nedd agreed that he would prosecute any claims he might have against Ryze in either Marion County or Hamilton County, Indiana or in federal court in the Southern District of Indiana. In response to Nedd's complaint, Ryze filed a motion to stay or dismiss the action based on the Indiana forum selection clause in the agreement. The trial court denied Ryze's motion, but the Court of Appeal issued a peremptory writ of mandate directing the trial court to grant Ryze's motion. The Court of Appeal rejected Nedd's argument that the public policy underlying FEHA favors a "wide choice of venues" on the ground that the relevant issue here involved *forum* (i.e., which state) rather than *venue* (i.e., which county within the state) selection. The Court also rejected Nedd's reliance upon Labor Code § 925 (restricting non-California forum selection clauses) on the ground that the contract at issue in this case was entered into prior to the January 1, 2017 effective date of that statute.

Employee Could Rely Upon Former Supervisor's Statement About Existence Of Discrimination

Weil v. Citizens Telecom Servs. Co., 2019 WL 1891796 (9th Cir. 2019)

David Weil sued Citizens Telecom Services for wrongful termination and discriminatory failure to promote under Title VII and related statutes. In support of his failure-to-promote claim, Weil testified in his deposition that his former supervisor (identified in the opinion as "L.H.") told him that he did not receive the promotion because "You have three things going against you: You're a former Verizon employee, okay. You're not white. And you're not female." At the time L.H. made this statement to Weil, she was still working for the company though she was no longer Weil's supervisor. The district court excluded L.H.'s statement on the ground that it was inadmissible hearsay, and in the absence of other evidence of discrimination, the district court granted Citizens' summary judgment motion. The Ninth Circuit reversed, holding that L.H.'s statement was not inadmissible hearsay pursuant to Fed. R. Evid. 801(d)(2)(D) because L.H. was still employed by the company (albeit in a different capacity) at the time she made the statement. Based upon L.H.'s statement, the Ninth Circuit reversed the summary judgment that had been entered with respect to Weil's failure-to-promote claim. However, the Ninth Circuit affirmed summary judgment with respect to Weil's wrongful termination claim on the ground that Weil failed to produce evidence that he was performing satisfactorily or that the employer treated a similarly situated employee who was not a member of Weil's protected class differently.

Former Employee's Claims Against The Salvation Army Were Properly Dismissed

Garcia v. Salvation Army, 918 F.3d 997 (9th Cir. 2019)

Ann Garcia worked as social services coordinator for the Salvation Army but "left the Church" and stopped attending religious services there a few years before taking a lengthy medical leave of absence due to fibromyalgia and eventually being fired for failing to report to work despite being cleared by her doctor. Garcia sued for religious discrimination under Title VII and disability discrimination under the Americans with Disabilities Act ("ADA"). The district court granted summary judgment in favor of the Salvation Army, holding that the religious organization exemption ("ROE") to Title VII applied even though the Salvation Army had failed to raise the defense in its answer to the complaint. The Ninth Circuit held that although the ROE is not an unwaivable jurisdictional defense, absent prejudice to the plaintiff, it could be first raised at the summary judgment stage (as it was in this case). The Court further held that the ROE bars claims for retaliation and hostile work environment and is not limited to discriminatory hiring and firing claims. Finally, the Court affirmed summary judgment of Garcia's ADA claims on the grounds that she failed to return to work after her doctor cleared her to return "without restrictions" and that once she was no longer disabled, the employer was no longer required to engage in the interactive process with her. *Compare Su v. Stephen S. Wise Temple*, 32 Cal. App. 5th 1159 (2019) (preschool teachers who were employed by temple were not "ministers" within the meaning of the ministerial exemption and thus could proceed with wage/hour claims).

Employer Did Not Violate PAGA By Failing To Include "ZIP+4 Code" On Wage Statements

Savea v. YRC Inc., 2019 WL 1552686 (Cal. Ct. App. 2019)

Vaiula Savea sued his employer (YRC) for an alleged violation of Labor Code § 226 based upon YRC's alleged failure to include the correct employer name and address on its wage statements. The alleged violations arose from YRC's listing on the wage statements its fictitious business name ("YRC Freight" instead of "YRC Inc.") as the employer name and its inclusion of an employer address that did not contain a reference to the applicable mail stop code or the ZIP+4 Code. The employer successfully demurred to the complaint on the ground that Savea's complaint failed to state a claim because the employer name and address on its wage statements were in fact accurate. The Court of Appeal affirmed dismissal of the complaint, holding that YRC's use of its "actual, recorded fictitious business name" (of which the trial court properly took judicial notice) on the wage statements was proper and that the address listed on the wage statements did not need to include the mail stop code or the ZIP+4 Code. *See also Myers v. Raley's*, 32 Cal. App. 5th 1239 (2019) (trial court's denial of employees' motion for class certification is reversed and remanded for trial court to expand upon its "cursory finding" and issue a statement of reasons for its ruling in order to ensure the court did not employ improper criteria or rely upon erroneous legal assumptions).

IT Analyst Was Properly Denied Unemployment Benefits

Goldstein v. CUIAB, 2019 WL 1923530 (Cal. Ct. App. 2019)

Steven M. Goldstein applied for and received unemployment insurance benefits from March 23, 2013 through August 10, 2013 after which time he ceased receiving unemployment benefits because he began receiving disability benefits, which continued until September 2014. Goldstein's second claim for unemployment insurance benefits had an effective date of March 23, 2014. The Employment Development Department ("EDD") denied the second claim for unemployment insurance benefits because during the preceding benefit year he neither was paid sufficient wages nor performed any work. Goldstein unsuccessfully challenged the denial of the second claim for unemployment benefits before an administrative law judge, the California Unemployment Insurance Appeals Board ("CUIAB") and the Superior Court of California. In this opinion, the Court of Appeal affirmed the trial court's denial of benefits on the ground that although Goldstein's receipt of unemployment benefits did not disqualify him from receiving unemployment benefits in the following year (as the Board had determined), Goldstein was still ineligible for additional unemployment insurance benefits because he had failed to satisfy the requirement that he perform "some work" during the relevant period.

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