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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *January 2021*

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LEGISLATIVE

California

California Enacts New Annual Pay Data Reporting Requirements

In September 2020, Governor Newsom signed Senate Bill 973, requiring California employers of 100 or more employees to report certain pay data (enumerated in Government Code §12999) to the Department of Fair Employment and Housing ("DFEH"). The deadline to comply with California's pay data report is March 31, 2021, and no later than March 31 every year thereafter.

Gov. Code §12999 is inspired by the Obama Administration's proposed revisions to Employer Information Reports ("EEO-1"). Under the proposal, which was later halted by the Trump Administration in 2017, employers would have been required to report pay data by gender, race, and ethnicity beginning in 2018. Putting the concepts conceived by the proposed federal analog into action at the state level, Gov. Code §12999's reporting requirements are designed to assist the DFEH in collecting data regarding employees' race, sex, and ethnicity to recognize and address pay discrimination.

Each report must include the number of employees by race, ethnicity, and sex in each of the ten EEO-1 job categories, as well as in each of the pay bands used by the United States Bureau of Labor Statistics Occupational Employment Statistics survey. For employers with multiple establishments, employers must submit a report for each establishment as well as a consolidated report that includes all employees.

Employers will report the data using a "snapshot" of its employees during a single pay period of the employer's choosing, between October 1st and December 31st (the "Snapshot Period") of each reporting year. The employer must include all employees employed during the Snapshot Period, including those employees who were no longer active employees by December 31st of that year.

Gov. Code §12999(g) notably includes an exception designed to ease the burden of reporting. Per Gov. Code §12999(g), if an employer submits an EEO-1 that would contain "the same or substantially similar pay data information" as required by Gov. Code §12999, the employer will be in compliance. However, the DFEH clarified that, because EEO-1 surveys do not currently collect pay data, it is not possible for an EEO-1 for reporting year 2020 to satisfy this standard.

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Employers should make necessary preparations to ensure their submissions are timely. If an employer fails to timely comply with Gov. Code §12999's reporting requirements, the DFEH may not only seek an order requiring the employer to comply, but also recover the costs associated with seeking the order for compliance.

The DFEH estimates that the user guide for the submission portal, as well as the DFEH's report template (including detailed instructions and examples), will be available by February 1, 2021. The pay data submission portal itself is slated to become available by February 15, 2021.

JUDICIAL

California

California Supreme Court Confirms Retroactivity of Dynamex in *Vazquez v. Jan-Pro Franchising International, Inc.*

In the recent decision in *Vazquez v. Jan-Pro Franchising International, Inc.*, the California Supreme Court answered an open question by ruling that the ABC test used to classify workers as employees or independent contractors in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal. 5th 903, applies retroactively. In issuing its ruling, the Court ruled against Jan-Pro Franchising International ("Jan-Pro"), which had argued the Court should depart from the general rule that judicial decisions are given retroactive effect.

The issue addressed in *Dynamex* – that is, what standard applies under California law in determining whether workers should be classified as employees or independent contractors for purposes of the obligations imposed by California's wage orders – was, importantly, one of first impression. *Dynamex* held that any worker who performs work for a business is presumed to be an employee afforded the protections articulated by relevant wage order. On the other hand, a worker is properly classified as an independent contractor when: (A) the worker is free from the control and direction of the hirer 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 (C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed by the hiring entity. This test articulated in *Dynamex* is commonly referred to as the "ABC Test."

Prior to *Dynamex*, California Courts analyzed classification issues utilizing a multi-factor test outlined in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* that focused predominantly on the amount of control a business held over a worker in determining whether classification as an independent contractor was appropriate.

In *Vazquez*, Jan-Pro argued that the commencement of litigation predated the ruling in *Dynamex* and, as a result, the ABC Test should not be retroactively applied. Put another way, Jan-Pro argued that it could not possibly have anticipated that the ABC Test would be the governing law at the time the lawsuit

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was initiated and, as a result, the *Borello* test should apply. The California Supreme Court disagreed, generally concluding that *Dynamex* addressed an issue of first impression concerning classification standards for purposes of California's wage orders, while *Borello* addressed classifying workers in the worker's compensation context. As a result, the court found no reason to depart from the general rule that judicial opinions are given retroactive effect.

Vazquez indicates that all currently pending misclassification lawsuits, even those that predate the decision in *Dynamex*, should anticipate application of the ABC test in evaluating independent contractor analysis. Moreover, California employers should pay heed of the willingness and desire of California Courts to impose the onerous requirements of the ABC Test. Between the ruling in *Dynamex* and the subsequent codification of the ABC Test via AB5, it appears that the new era of independent contractor classification is here to stay, at least for now.

Ninth Circuit Clarifies Legal Test for Analyzing Government Workers' First Amendment Speech Protections

Given the plethora of social media platforms employees now use, employers must be wary of the potential consequences of monitoring employee engagement across those platforms. This situation arose in the recent decision *Charles Moser, et al. v. Las Vegas Metropolitan Police Department, et al.* where the Ninth Circuit Court of Appeals determined that factual disputes existed regarding the meaning and effect of a *government employee's* Facebook comment, which led to the reversal of a grant of summary judgment. While the specific implications of the ruling are relatively narrow, the broad concept is one of which all employers should take heed.

Charles Moser ("Moser") joined the Las Vegas Metropolitan Police Department ("LVMPD") in 2000. He was a former Navy SEAL, and in 2006 he became a member of LVMPD's SWAT Team. He served as a SWAT sniper and Assistant Team Leader. In 2015, a LVMPD police officer was shot. After seeing news of the assailant's capture, Moser commented on a friend's Facebook post that it was "shame" that the suspect didn't have any "holes" in him. Moser was at home and off duty at the time he made the Facebook comment.

LVMPD's internal affairs department launched an investigation after receiving an anonymous tip regarding the Facebook comment. Moser admitted to investigators that his Facebook comment was "completely inappropriate," and confirmed that he had removed the comment. The internal affairs department determined that Moser's comment violated the LVMPD's social media policy. Moser's superiors, Captain Ballard ("Ballard") and Deputy Chief Neville ("Neville") determined that the Facebook comment was callous, and Moser was transferred from SWAT to a patrol unit. Moser filed a grievance report requesting his discipline be changed to a verbal reprimand, but the Labor Management Board denied the request. Moser sued the LVMPD, Ballard, and Neville for First Amendment Retaliation, seeking damages and injunctive relief.

The District Court analyzed Moser's comment according to *Pickering v. Bd. of Ed. of Twp. High Sch. Dist*., 391 U.S. 563 (1968). The *Pickering* case sets forth the legal balancing test required when analyzing speech by government employees.

Initially, a plaintiff must establish that the speech is: 1) a matter of public concern; 2) expressed as a private citizen only (not as a government employee); and 3) the speech was a substantial or motivating factor in the adverse employment action. If these factors are established, the government must show that: 1) an adequate justification existed for treating the employee differently from the general public or 2) that the adverse employment action would have been taken regardless of the protected speech. The District Court granted summary judgment in favor of the LVMPD, and Moser appealed.

On appeal, the panel clarified the scope of the legal analysis required under *Pickering*. First, speech by government employees is assessed on a sliding scale. Although government employers have more discretion to restrict employee speech, any restrictions must be directed at language disruptive to the government employer's operations. Second, because Moser was at home and off duty when he made the Facebook comment, his speech was expressed in his role as a private citizen. Third, the LVMPD transferred Moser from the SWAT team to patrol because his supervisors found the comment to be "callous to killing," which established that the adverse employment action was taken on account of Moser's protected speech. Thus, the burden shifted to the government to demonstrate an adequate justification for its treatment of Moser or that the adverse employment action would have occurred absent the protected speech.

The Ninth Circuit determined that the District Court improperly granted summary judgment because two factual disputes existed. First, Moser's statement was objectively ambiguous, as Moser and the LVMPD disagreed as to its express meaning. Second, a factual dispute remained regarding whether the government could predict that the statement would disrupt its operations. Although police departments have a special need to avoid disruption and provide public safety, as discussed in *Byrd v. Gain*, 558 F.2d 553, 554 (9th Cir. 1977), an employer "must provide some evidence for the court to evaluate whether the government's claims of disruption appear reasonable." There was no media coverage of Moser's Facebook comment, and the LVMPD did not provide evidence supporting its argument that the comment would expose the department to future liability. Thus, although the *Pickering* balancing test is a legal question, the Ninth Circuit determined that a jury should have resolved these underlying factual disputes, and as a result, reversed and remanded.

The *Moser* case shows that government employers in particular are held to a standard which must balance First Amendment protections with the potential for workplace disruption. While the particular scope of this case applies only to government employees, government and private employers alike should be cautious when taking adverse employment action against employees regarding social media speech.

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