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# EMPLOYMENT LAW UPDATE

*Relationship-Driven Results* *April 2021*

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## JUDICIAL

### California

### Pending Misclassification Lawsuits Continue to Rely on Retroactive Application of the *Dynamex* ABC Test

The California Supreme Court recently issued a ruling in *Vazquez v. Jan-Pro Franchising International, Inc.*, in which it held that the "ABC Test" used to classify workers as employees or independent contractors in *Dynamex Operations West, Inc. v. Superior Court* applies retroactively. In *Parada, et al. v. East Coast Transportation, Inc.*, appellant truck owners/operators successfully appealed a prior trial court ruling that the *Dynamex* decision did not apply retroactively. Acknowledging that *Vazquez* has since been decided, the Second Appellate District for the California Court of Appeal confirmed that the *Vazquez* decision regarding the retroactivity of the ABC Test is controlling.

The ABC Test, which marks a change from the previously utilized *Borello* standard, indicates that 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 contract for the performance of such work and in fact; (B) the worker performs the 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. The ruling in *Dynamex*, however, was notably silent as to whether the ABC Test applied retroactively.

In a bifurcated trial to determine the issue of whether East Coast Transportation, Inc. ("East Coast") properly classified its truck owners/operators, the *Parada* court initially applied the *Borello* standard and ruled that East Coast properly classified its truck owners/operators as independent contractors rather than employees.

Following the trial court's ruling, however, the California Supreme Court issued its awaited decision in *Vazquez*, in which a defendant company was unable to succeed on an argument that it could not have possibly anticipated that the ABC Test articulated in *Dynamex* would be the governing law at the commencement of litigation.

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The truck owners/operators in *Parada* appealed the trial court's decision, arguing that the ABC Test should have been applied according to the decision in *Vazquez*. The Court agreed, finding that East Coast's arguments were sufficiently similar to those made in *Vazquez*.

*Parada* cements California courts' position that pending misclassification lawsuits, even those whose alleged harm predates the *Dynamex* decision, will be held to analysis under the ABC Test.

**Court of Appeal Affirms a 2:1 Ratio Punitive to Compensatory Damages in Disability Discrimination Case**

Punitive damages awards are designed to punish and deter wrongful conduct, with the amount of damages awarded to a successful plaintiff determined by the trier of fact. However, because California does not place a cap on punitive damages, juries are occasionally prone to awarding excessive punitive damages, as was the case in *Contreras-Velazquez v. Family Health Centers of San Diego, Inc.*

Rosario Contreras-Velazquez ("Velazquez") sued her former employer, Family Health Centers of San Diego, Inc. ("Family Health"), alleging disability discrimination and related causes of action when Family Health terminated Velazquez's employment after she suffered a work-related injury. Although a jury found in favor of Family Health at trial, the trial court ordered a new trial as to three causes of action after finding the evidence submitted was insufficient to support the jury's verdict.

A jury found in favor of Velazquez at retrial, awarding Velazquez $915,645 in compensatory damages and $5 million in punitive damages. Family Health challenged the jury's punitive damages award with a motion for judgment notwithstanding the verdict ("JNOV"). The trial court granted Family Health's JNOV in part, reducing the punitive damages award to $1,831,290—a 2:1 ratio of punitive to compensatory damages. The court reasoned that a punitive damages award of twice the compensatory damages award was the maximum amount of punitive damages award allowable under the due process clause of the Fourteenth Amendment to the United States Constitution. Family Health appealed on two grounds.

First, Family Health argued that certain special verdict findings returned by the first jury stopped Velazquez from prevailing at retrial under the doctrine of issue preclusion. The Court of Appeal found Family Health's argument unpersuasive, holding that the first jury's special verdict rulings did not constitute a final adjudication of any issues. Therefore, the doctrine of issue preclusion did not require a ruling in favor of Family Health.

Second, Family Health appealed the JNOV ruling, claiming the reduced punitive damages award remained excessive, thus violating Family Health's due process rights. Family Health argued that any punitive damages award in excess of $915,645 (a 1:1 ratio of punitive to compensatory damages) violated Family Health's due process rights. The Court disagreed.

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Citing *Nickerson v. Stonebridge Life Ins. Co.* (2016), the Court recognized that, when evaluating punitive damages awards, it must take into account: (1) the degree of reprehensibility of the misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages award and the civil penalties authorized or imposed by comparable cases. The Court affirmed the trial court's ruling, finding that, although Family Health's conduct was reprehensible (as it foreseeably caused emotional and mental distress to a financially vulnerable victim), given the sizable compensatory damages award and the state's relatively diminished interests in punishment and deterrence, a punitive damages award exceeding a 2:1 ratio of punitive to compensatory damages was not warranted.

**California Appellate Court Applies FAA Exemption to "Last Mile" Delivery Drivers in *Betancourt et al. v. Transportation Brokerage Specialists, Inc.***

In *Betancourt et al. v. Transportation Brokerage Specialists, Inc.,* the California Court of Appeal ruled on the applicability of the Federal Arbitration Act ("FAA") to a delivery driver who made wholly intrastate deliveries of goods that originated out of state. While the FAA grants courts the power to stay litigation and compel arbitration according to the terms in the parties' arbitration agreement, it provides an exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The United States Supreme Court has held that the FAA's exclusion for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" extend only to transportation workers defined "as those workers actually engaged in the movement of goods in interstate commerce."

The plaintiff in *Betancourt* ("Plaintiff") worked as a delivery driver for the defendant company (the "Company"), a "last-mile" delivery provider whose primary client was online retailer Amazon.com, Inc. ("Amazon"). As a "last-mile" delivery driver, Plaintiff picked up packages from Amazon warehouses in California that he would then deliver to Amazon customers in California. Plaintiff proffered that the packages he delivered could have originated from anywhere in the United States or even foreign countries. The Company, on the other hand, argued that Plaintiff could not be engaged in interstate commerce because Plaintiff never crossed state lines in making his deliveries. The trial court ultimately held that Plaintiff was in fact engaged in interstate commerce, as the goods Plaintiff delivered to customers were still part of continuous interstate transport, notwithstanding that Plaintiff never crossed state lines.

On appeal, the court agreed with the trial court's ruling, relying on *Nieto v. Fresno Beverage Co., Inc.* (2019) 33 Cal.App.5th 274. The court in *Nieto* analyzed the FAA exemption as applied to a delivery driver making intrastate deliveries of beverages originating from out of state, holding that the FAA exemption applied, as the deliveries "were essentially the last phase of a continuous journey of the interstate commerce."

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Applying *Nieto*, the Court of Appeal in *Betancourt* noted that "[n]othing in the record suggests that the Amazon goods delivered by plaintiff originated only in California, such that he was making purely intrastate deliveries." Accordingly, Plaintiff met his burden to demonstrate that he was "engaged in interstate commerce through his participation in the continuation of the movement of interstate goods to their destinations."

After clearing the preliminary hurdle, the *Betancourt* court was then tasked with determining whether the class action waiver in Plaintiff's arbitration agreement was enforceable. In *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 450, the California Supreme Court established a test to determine whether class action waivers should be enforced, focusing on the following four factors: (1) the modest size of the potential individual recovery; (2) the potential for retaliation against class members; (3) the fact that absent class members may be ill-informed about their rights; and (4) other real-world obstacles to the vindication of class members' rights. The Court held that, based on the evaluation of the four factors, class action waivers should not be enforced, as class arbitration "would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." (*Gentry, supra,* 42 Cal.4th at 444.) The *Betancourt* court found, and the appellate court agreed, that all four *Gentry* factors were met, thus rendering the class action waiver in Plaintiff's agreement unenforceable.

Finally, however, the court held that the trial court erred in rendering the *entire* arbitration agreement unenforceable upon finding the class action waiver unenforceable. To support its conclusion, the court assessed whether the agreement was unconscionable. Despite finding the agreement procedurally unconscionable—it was a form contract offered as a condition of employment, and Plaintiff was neither informed of the arbitration provision nor told he could negotiate any terms—the court nonetheless found the arbitration provision overall was not substantively unconscionable under *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, except for one severable provision.

In sum, the court held that: (1) an Amazon delivery driver transporting out-of-state packages from warehouses in California to customers also in California was exempt from FAA applicability because he was "engaged in interstate commerce through his participation in the continuation of the movement of interstate goods to their destinations"; (2) the class action waiver at issue was unenforceable as it met all four factors of the test set forth in *Gentry*; and (3) the trial court should have severed the unenforceable class action waiver and analyzed the applicability of the arbitration agreement as to Plaintiff's individual claims for wrongful termination and unlawful retaliation.

An important takeaway from *Betancourt* for both employers and employees is that, depending on the origination of the goods being delivered, a delivery driver can be exempt from FAA applicability as being engaged in interstate commerce without ever crossing state lines—as exemplified by both *Betancourt* and the case on which it relies, *Nieto*. More broadly, courts have been trending toward finding FAA exemption for Amazon delivery drivers, as Amazon's last-mile delivery drivers generally deliver out-of-state or foreign goods and packages to customers in the driver's state, despite being wholly intrastate. This trend may lead to decreased

arbitration—and increased court litigation—of work-related claims against employers brought by drivers working for Amazon or other similar online or delivery-based retailers.

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*This is Pettit Kohn Ingrassia Lutz & Dolin PC's employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Carol Shieh, Rio Schwarting, Christopher Reilly, Tina Robinson, Zachary Rankin, or Christine Robles at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Jennifer Weidinger, Rachel Albert, Sevada Hakopian, or Catherine Brackett at (310) 649-5772.*