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CLIENT ALERT

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Are You My Employer?

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It is becoming increasingly common that when an employee files suit against their current or former employer, they file not only against the company they worked for day-to-day but also against any related company. Akin to the little hatchling in the well-known children's story, Are You My Mother? who asked everyone and everything if it was his mother, including a kitten, a hen, a dog, and a piece of heavy machinery (a Snort), plaintiffs these days are quick to ask if an entity or an individual may be considered their employer or liable as if it were so. Plaintiffs make such allegations regardless of whether the entity or individual ever dealt directly with the them during their employment. This article will address when a company and an individual may be held liable for a variety of California claims even though they may not believe that they are the employer of the individual in question.

Types of Claims

It should come as little to no surprise that plaintiffs will often sue multiple companies and high-level individuals when filing a complaint, seeking to get into as many "deep pockets" as possible. This is true for claims filed under the California Fair Employment and Housing Act ("FEHA"), including allegations of discrimination, harassment and retaliation; claims of wrongful termination; claims of whistleblower retaliation; and claims filed under the California Labor Code for wage and hour violations, among others. Labor Code claims can include individual actions, class actions and actions brought under the Private Attorneys General Act of 2004 ("PAGA"). For more information about PAGA, click here.

Proof of an employment relationship is an element that a plaintiff must prove to prevail on these claims. Specifically, a plaintiff must show that an employment relationship exists to prevail on a FEHA claim. (Cal. Gov. Code § 12900, *et seq.*; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042; *see* CACI 2500, *et seq.*) The same is true for a plaintiff to prove a claim of wrongful termination in violation of public policy. (*Miklosy v. Regents of Univ. of Cal.* (2008) 44 Cal.4th 876, 901 [a "cause of action for wrongful termination in violation of public policy lies only against an employer"]; CACI 2430.) For a whistleblower claim, proof of an employment relationship is required for a plaintiff to make a prima facie showing of their cause of action. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 287-88; *Bennett v. Rancho California Water Dist.* (2019) 35 Cal.App.5th 908, 921; CACI 4603.) Wage and hour claims also necessitate that a plaintiff show an employment relationship exists. (*See, e.g.,* Cal. Lab. Code §§ 201, 203.)

Totality of the Circumstances Test – Are You My Joint Employer?

Courts often apply the "totality of the circumstances" test when evaluating whether a company should be considered an employer of the plaintiff. The test is just like it sounds – courts will look at a myriad of factors and determine whether they indicate that an employment relationship exists. "There is no magic formula for determining whether an organization is a joint employer. Rather, the court must analyze myriad facts surrounding the employment relationship in question. No one factor is decisive." (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 124.)

But, as one might imagine, some factors are treated as more important or convincing than others. The key factor is the "right to control." For this factor, courts will look at whether the company in question had the "the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed." (*Scates v. FedEx Ground Package Sys*. (C.D. Cal. 2020) 2020 U.S. Dist. LEXIS 178198, 11.) Other factors a court will consider include ownership of the equipment necessary to perform the job, where the work is performed, the authority to discipline and the duration of the employment relationship. (*Vernon,* 116 Cal.App.4th at 124-26.)

Integrated Enterprise Test – Are You My Employer's Parent?

The "integrated enterprise" test is generally used when a court is determining whether a parent company may be considered the employer of an employee who works for a subsidiary or similar entity. California law presumes that corporate entities have separate existences. (*Laird v. Capital Cities/Abc* (1998) 68 Cal.App.4th 727, 737; *citing Mesler v. Bragg Management Co*. (1985) 39 Cal.3d 290, 300; *Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1212.) And, in California, "there is a strong presumption that a parent company is not the employer of its subsidiary's employees." (*Laird,* 68 Cal.App.4th at 737.)

This "integrated enterprise" test has four factors that a court will look at to evaluate whether a parent company is an employer in the case at bar: (1) Interrelation of operations; (2) Common management; (3) Centralized control of labor relations; and (4) Common ownership or financial control. (*Id.*) Under this test, common ownership and control is not enough to establish that a parent company is considered the employer and, therefore, may be held liable. (*Id.* at 738.) The most important thing that a court will look at is what entity made the final decisions regarding employment matters. (*Id.*) "To satisfy the control prong, a parent must control the day-to-day employment decisions of the subsidiary." (*Id.*) The plaintiff must show that the parent company has exercised control "to a degree that exceeds the control normally exercised by a parent corporation." (*Id.*) In other words, the more "hands-on" the parent company is, and especially if the parent company makes decisions about things like hiring and firing, the more likely it is to be on the hook for any damages.

Alter-Ego / Piercing the Corporate Veil – Are You Treated Like My Employer?

"Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.)

Though rarely used in California, plaintiffs often attempt to 'pierce the corporate veil' and use the 'alter ego doctrine' to assert that another entity or person should be held liable in addition to the plaintiff's agreed-upon employer. The general rule that a corporation is a stand-alone entity may be disregarded – and the 'corporate veil' pierced – in the event there is an abuse of the corporate privilege. (*Id.*) When the corporate form is used to commit fraud, circumvent a statute or commit another wrongful act, courts will ignore the entity and deem the corporation's actions to be those of the persons or organizations controlling that entity. (*Id.*) The "alter ego" doctrine is in place to prevent individuals and companies from attempting to shield themselves from liability simply by hiding behind the formation of a corporation. (*Id.*)

A plaintiff in California must meet two conditions before they can avail themselves of the alter ego doctrine. First, the plaintiff must show "a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist." (*Id.*) Second, there must be an inequitable result if the actions about which the plaintiff complains were to be treated as those of the corporation alone. (*Id.*) Courts will look at things like whether the entities have comingled funds and other assets, whether one entity is liable for the debts of the other, the entities' ownership, whether corporate records are comingled and whether one is a mere shell for the other. (*Id.* at 238-39.) As with the totality of the circumstances test described above, there is no one factor that is controlling here. "To put it in other terms, the plaintiff must show 'specific manipulative conduct' by the parent toward the subsidiary which relegates the latter to the status of merely an instrumentality, agency, conduit or adjunct of the former." (*Laird,* 68 Cal.App.4th at 737.)

It should be noted, however, that "[i]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts." (*Sonora,* 83 Cal.App.4th at 549.) Courts recognize that individuals can "change hats" when serving as directors for different entities, despite their common ownership. (*Id.*; *United States v. Bestfoods* (1998) 524 U.S. 51, 69.) Indeed, there is a "presumption, founded in established principles of corporate law, that directors maintain their appropriate roles when holding positions in both a parent company and subsidiary." (*Rivelli v. Hemm* (2021) 67 Cal.App.5th 380, 395.)

Labor Code Section 558.1 – Are You Liable Like You Are My Employer?

In California, an owner, director, officer or managing agent of a company can be held personally liable as if they were the employer for certain wage and hour violations. This applies to any such person "who violates, or causes to be violated" provisions regulating wages or hours worked. (Cal. Lab. Code § 558.1.) These provisions include Labor Code sections 203 (governing unpaid wages), 226 (governing wage statements), 226.7 (governing meal and rest periods), 1194 (governing payment of minimum wages), and 2802 (governing reimbursements). Notably, Labor Code section 558.1 is not limited to civil penalties and, therefore, an individual could presumably be held liable for unpaid wages, liquidated damages and statutory penalties related to the untimely payment of wages. Therefore, owners, directors, officers and managing agents should be motivated to ensure that the company for which they work is abiding by California's strict labor laws.

Should you have any questions about whether an entity or individual may be liable as an employer under California law, please reach out to any of the attorneys in Buchalter's Labor & Employment Practice Group.

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