

Bottomline Threats & Ideas from an HR Expert Witness

Accounting Day – 5/13/19
Cláudia Schwartz – HR Results

Threats & Ideas



Contractors

Wage & Hour – Class Actions

Harassment – Discrimination – Retaliation

Local Ordinances – Sick Time

Arbitration – EPLI

ROI

Threats – Independent Contractors

ABC Test (*Dynamex v. Sup. Court* 2018)

- A. Free from the control and direction of the employer with regard to performance of the work
- B. Outside the usual course of the hiring entity's business
- C. Customarily engaged in independently established trade, occupation or business

Retroactive! (9th Circuit ruling on 5/2/19)

Threats – Independent Contractors

- Wage & Hour: FLSA, Labor Code, Wage Orders
 - Discrimination: FEHA
 - Unemployment Insurance: CA UI Code
 - Taxes
 - Workers' Compensation
 - Liability to 3rd Parties (*Respondent Superior Doctrine*)
- ⚠ *Also remember to send DE 34 to EDD within 20 days from hiring or contracting*

Ideas with Hidden Threats – Contractors

- Incorporated Contractors: Usual business?
- Not Usual Business: But, supervising employees
- Employee Leasing – PEOs: Joint employment
- Staffing, “Temporary Agencies”: Joint employment
- Outsourcing: Case-by-case
- Internships: Benefit of whom? Paid?
- Volunteers: Employee’s job function?

Ideas – Contractors Hired as Employees

- **Employee Classification**
 - ✓ Occasional (*“on call,” “call back,” “reporting time”*)
 - ✓ Temporary (*how long, e.g., ≤ 3 months*)
- **Mandatory Benefits:** Paid sick time (*Can't use <91 days*)
- **Overtime Exemption**
 - ✓ Exempt (*duties + $\geq 2 \times$ CA min. wage, even if not FT*)
 - ✓ Non-Exempt (*time keeping, rest & meal breaks, OT...*)
- **Several Pay Rates** (*\geq city and state minimum wage?*)
 - ✓ Regular, adm., non-billable, travel, on call / stand by...
- **Expenses of Performing Job** (*CA Lab. Code Sec. 2802*)

Employee vs. Company-Owned Devices

Threats

Ideas

- CA Labor Code Section 2802
 - ✓ Employer should pay for expenses incurred in the course of work
- Privacy laws
 - ✓ Limited access to records
- Co.'s Confidential Info
- Intellectual Property

- Pay an allowance equivalent to the cost of using the employee's device for work
- or
- Provide a company-owned device with notices about:
 - ✓ use for work-related purposes
 - ✓ no reasonable expectation of privacy (Co's access to data)
 - ✓ adherence to policies, e.g. harassment/discrimination, confidential information, intellectual property, use of device while driving, etc.

Threats – Wage & Hour – Class Action Private Attorney's Gen. Act (PAGA) Suits

Threats

- “Off-the-Clock”
- Remote Work
- De Minimis
 - ✓ going thru security cks
 - ✓ uniforms on/off, etc.
- Rounding (neutral?)
- Travel Time
 - ✓ CA vs. fed
 - ✓ Controlled commute
- Reporting Pay (including calling in to ck if working)

Ideas

- Time & attendance apps on mobile phones
- Alternative work schedules (re-define workweek, define work unit, vote, document, follow consistent schedule)
- Fractional FTEs
- Make up time (for EE's need)
- Different pay rates
 - ✓ Ex: travel rate for time when under control of employer
 - ✓ On-call/controlled standby

Threats – Wage & Hour – Class Action Private Attorney's Gen. Act (PAGA) Suits

Threats

Ideas

■ Meal & Rest Breaks

- ✓ Provide
- ✓ Free from control
- ✓ Penalties: hour extra of pay, if a break is missed

■ Meal & Rest Breaks

- ✓ Policy & procedure digitally signed each pay period
- ✓ EE's responsibility to let mgr. know if workload wouldn't allow break to be taken
- ✓ Uninterrupted
- ✓ May leave Co. premises
- ✓ Rest break is 10 min. net
- ✓ 1 hr. pay if rest break missed
+ 1 hr. if meal break missed

Threats – Wage & Hour – Class Actions Private Attorney's Gen. Act (PAGA) Suits

Threats

Ideas

■ Exemption Classification

✓ Criteria: CA ≠ Federal

✓ Minimum salary

✓ What if not full-time?

✓ Risks of inside sales exemption

✓ Risks of non-exempt “salaried” classification

■ Exemption Classification

✓ CA duties criteria: > 50% of time in exempt duties

✓ 2 x CA minimum wage

✓ Minimum salary: CA is 41% > proposed federal \$35,308

✓ Minimum salary not pro-rated if employee is part-time

✓ Inside sales and non-exempt “salaried”:

- record time and take breaks as if non-exempt

- check weekly if overtime due

Local Ordinances

Threats

Ideas

- **Minimum Wage:**
 - ✓ CA: \$11/hour
 - ✓ City of SD: \$12/hour
- **Minimum Exempt Salary = 2 x CA Minimum Wage:**
 - ✓ Even if just part-time
- **Paid Sick Leave – Amount:**
 - ✓ CA: 24 hours/year
 - ✓ City of SD: 40 hours/year
- **Method:**
 - ✓ Accrual (track, carry over)
 - ✓ Lump sum (use all soon)

- **Analytics:** Track cost-benefit projections with comprehensive turnover/ replacement costs
- **Co. Size:** Explore advantages, e.g., exempt salary minimum:
 - ≤ 25 EEs: \$45,760/year
 - ≥ 26 EEs: \$49,920/year
- **Paid Sick Leave – Eligibility:**
 - ✓ CA: Exempt and non-exempt
 - ✓ SD: Non-exempt only
- **Method - Combined with PTO:**
 - ✓ Accrual (accelerated up to 80?)
 - ✓ Lump: < unscheduled time off

Payroll Outsourcing

Threats

Ideas

- Case law – March 2019: Goonewardene v. ADP
 - ✓ Payroll not liable for errors in pay, unless they erroneously processed correct information client companies sent them

- Audit internal wage & hour and payroll practices
- Check how overtime is being calculated:
 - ✓ Is the “regular rate” used?
 - ✓ What factors are being included when calculating the “regular rate”?

California Fair Pay Act

Threats

Ideas

- Can't pay less to different gender or race/ethnicity in any establishment for "substantially similar work"
- Must justify differentials based on acceptable factors that account for the entire difference in pay.
- Can't prohibit:
 - ✓ Discussing own wages or inquiring others'
 - ✓ Aiding / encouraging others to exercise their equal pay rights

- Do internal "audit" under attorney-client privilege
- Weigh labor cost increase vs. probable liability
- Consider impact on brand for:
 - ✓ Consumers
 - ✓ Employee attraction + retention
- Synchronize & prioritize with:
 - ✓ External equity analysis
 - ✓ Fixing exempt classifications
 - ✓ Improvement of performance management
 - ✓ Revamping of total rewards

Threats

Harassment, Discrimination, Retaliation

■ #MeToo:

- ✓ Limits on non-disclosure clauses in releases
- ✓ Risk of increased liability due to respondents' reaction
- ✓ Inclusion of non-binary, gender identity & expression
- ✓ “Traditional” & expanded sexual harassment definition

■ Bullying: Abusive conduct based on gender and...

■ Legally Protected Personal Characteristics in CA

■ Expanded Training Requirements:

- ✓ Supervisors and Employees (if online, select carefully)

Ideas – ROI

■ Employee Handbooks and Policies

- ✓ Up-to-date vs. “waiting to be perfect”
- ✓ Consistency between policies and practices

■ Investigations

- ✓ HR with in-depth training, experience, objectivity, etc.
- ✓ 3rd Party: attorney (not defense) or CA PI license + AWI-CH
- ✓ Report writing training and deposition testimony skills

■ Leadership Development:

- ✓ Not too “friendly” or “unfriendly”
- ✓ Show caring by helping the Co. and the EE succeed

■ Performance Optimization

- ✓ Expected behaviors and outcomes – “FeedForward”
- ✓ Ownership by employee with multi-source input
- ✓ No quantitative ratings, especially overall rating
- ✓ Understood accountabilities and rewards

Disability and Leave Management

Threats

- **Top Discrimination Suits:**
 - ✓ CA DFEH complaints
 - ✓ 42 % of EEOC suits
- **Employers' Surprise:**
 - ✓ Failure to engage in the interactive process
 - ✓ Failure to provide a reasonable accommodation
- **Leaves and Related:**
 - ✓ FMLA, CFRA, PDL, NPL, workers' comp, military, extension as accommodation, PFL, SDI, COBRA...

Ideas

- Training for managers & HR
- Avoid “perception of disability,” e.g., obesity
- Get coaching or outsource interactive processes and accommodations
- Ensure two-way dialogue, ask employee for ideas
- Accommodate when reasonable, not just put on leave
- Consult attorney before ending employment, even if maximum leave was used

Cannabis & Work

Threats

Ideas

- Increase in Users:
 - ✓ 22% of adults in 2017
- Medical Marijuana
 - ✓ Legal in 33 states
- Disability Discrimination & Duty to Accommodate:
 - ✓ ME, MA, RI, CT, DE, NY, IL, MN, NV, AZ...
- EEs Who Test Positive:
 - ✓ 55% > industrial accidents
 - ✓ 75% > absenteeism
 - ✓ 85% > injuries
- CA Attempts to Legalize

- CA employers can still:
 - ✓ Not hire if drug test positive
 - ✓ Prohibit use at work
- Treat as alcohol:
 - ✓ Discipline or terminate if under influence at work
- If employee has a disability:
 - ✓ Engage in interactive process and consider accommodation, but not use/influence at work
- Focus on safety
 - ✓ Example: May narrow drug testing to safety-sensitive jobs

Costs Related to Litigation – Arbitration

Threats

Ideas

■ Enforceability

- ✓ Driven by case-law, watch for updates often (e.g., AB 51)
- ✓ Mutuality

■ Class Action

- ✓ Right can be waived in arbitration agreement, but...

■ PAGA Suits

- ✓ Right cannot be waived in arbitration agreement

■ Implement It:

- ✓ But preserve the option to allow the employee to sue

■ Update it Often:

- ✓ Keep employment attorney on retainer to update it

■ Get Signature on a Free-Standing Document

- ✓ Don't "bury" document in employee handbook, etc.)

■ Plan Legal Consequence:

- ✓ Decide what to do if current employees do not sign

Costs Related to Litigation – EPLI

Threats

- Median Jury Verdict
 - ✓ \$700k: harassment cases
- Legal Fees:
 - ✓ Defense Attorneys: \$250k
 - ✓ Plaintiff Attorneys: \$↑
- Time:
 - ✓ About 3 years

Ideas

- Employment Practices Liability Insurance
 - ✓ Get coverage while company's record is good
 - ✓ Negotiate greatest possible coverage for **wage & hour**
 - ✓ Negotiate **choice of attorneys** or agree on preferred defense firm
 - ✓ Call **helpline** before decision
 - ✓ Beware of **penalties** for not accepting **settlement option**

ROI – Ideas

HR's Impact on the Bottom Line

HR Administrator

HR Manager

HR Leader

Liability Prevention

Asset Creation