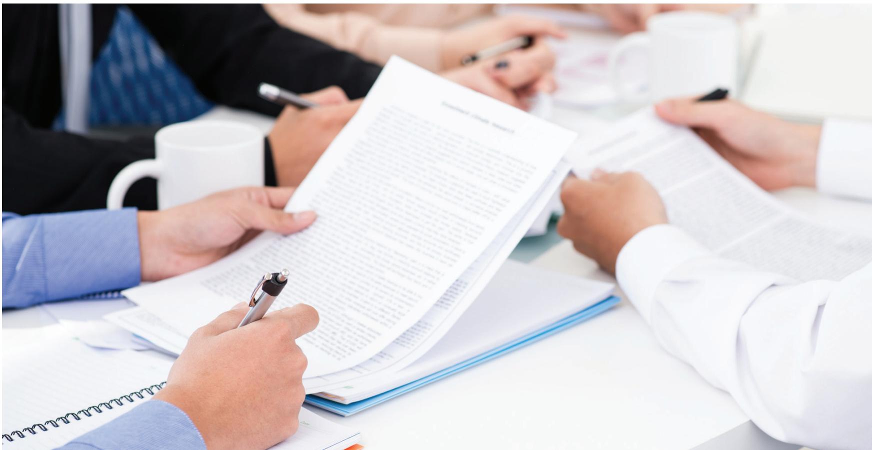
THE BKCG
BULLETIN
FALL 2018 Edition

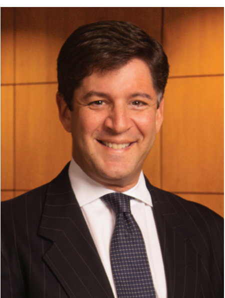
What You Need To Know About Forum Selection Clauses

In my last article, I wrote about arbitration clauses that appear in many contracts entered into between businesses and its customers. There are, however, instances where the parties to a contract decide not to include an arbitration provision but instead decide to include a forum selection clause. That is, the parties agree ahead of time where they will litigate should any disputes arise. After all, in today's world, it is easy to imagine how a small or mid-size business in California that sells a product might wind up in a lawsuit clear across the country. The cost and risk of litigating close to home is time consuming and stressful enough. The added cost of litigating 2,000 miles away in an unfamiliar jurisdiction presents serious additional obstacles to consider. Further, there are differences between litigating in State Court and Federal Court. Therefore, many businesses decide to include a forum selection clause in its contract. But what exactly is required to have an effective and enforceable forum selection clause?

There are essentially two types of forum selection clauses: "mandatory" and "permissive." In deciding what type of clause is contained in the contract, intent matters and intent is determined by the words chosen by the parties. Ambiguous wording can lead to a court deciding not to enforce the provision. In other words, it pays to be clear, unequivocal, and specific.



As a starting point, forum selection clauses are presumptively valid, and the party seeking to avoid one bears a "heavy burden" to establish it is unenforceable. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17, 92 S.Ct. 1907, 1917 (1972). The forum selection clause is mandatory when it contains language designating a specific forum as the exclusive forum or venue for disputes. *N. Cal. Dist. Council of Laborers,* 69 F.3d at 1036-37; *Dockside, Ltd.,* 875 F.2d at 764 (9th Cir. 1989); *Hunt Wesson Foods, Inc.,* 817 F.2d at 76. The intent of the parties should reflect the clear and unequivocal agreement to litigate in a specific court.



In *Sterling Forest Associates v. Barnett-Range Corp.,* 840 F.2d 249, 250 (4th Cir. 1988), the court found the forum selection clause at issue to be mandatory. The litigation was filed in North Carolina but the defendant filed a motion to have the case brought in California. The provision at issue stated: "This Agreement shall be construed and enforced in accordance with the laws of the State of California and the parties agree that in any dispute jurisdiction and venue shall be in California." *Sterling Forest Associates,* 840 F.2d at 252. The court found in favor of the defendant and required that the case proceed in California.
(cont. on page 4)

Federal Actions Against Las Vegas Shooting Victims Highlight The Scope Of Declaratory Relief

Many people are scratching their heads or downright outraged after MGM Resorts filed nine lawsuits across the country against 2,500 victims of the October 1, 2017 mass shooting in Las Vegas. From a legal standpoint, however, the purpose of the lawsuits, which seek declaratory relief from the courts regarding the reach of the federal SAFETY Act, is not necessarily as malevolent as it seems.

Foremost, the lawsuits are not seeking monetary damages or any other relief from the victims. Instead, the lawsuits seek pure declaratory relief from the courts regarding the relative rights and liabilities of the parties involved in the mass shooting including MGM, the victims, and the security company providing services to MGM on the day of the attack. Under federal law, "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Because the security company, Contemporary Services Corporation (or "CSC") is certified by the Secretary of Homeland Security under the federal SAFETY Act, it is MGM's position that only CSC can be held liable for the attack because the SAFETY Act precludes liability against MGM. In theory, a declaration from the court on this issue before litigation of the victim's claims against MGM and CSC could save the parties and the courts time and money by limiting the issues and parties ultimately involved in future litigation.

The Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (or the "SAFETY Act") is a law that was passed in the wake of the September 11, 2001 terrorist attacks. (cont. on page 2)

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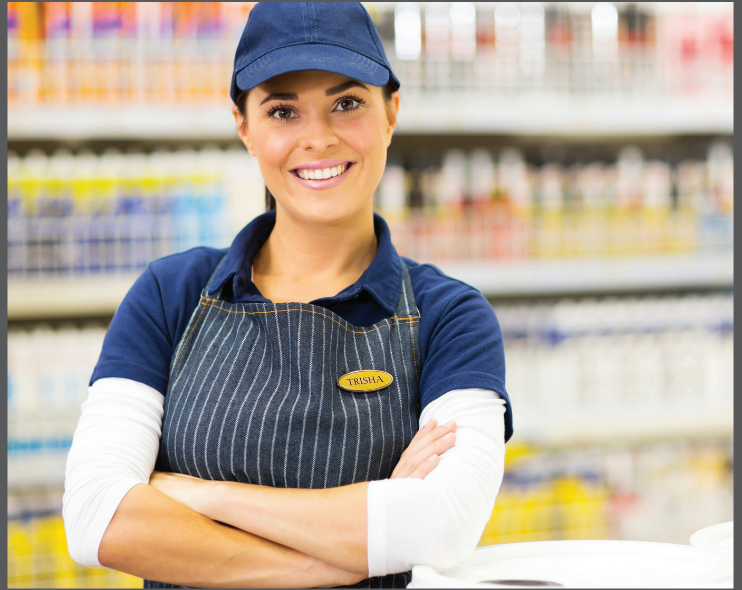
Employer "Non-Poaching" Agreements Under Attack As Unlawful

Many nationwide franchises, including several in the fast food industry, require their franchisees to agree that they will not attempt to "poach" employees from other franchisees in the same chain. These agreements now face scrutiny and are under attack from attorneys general representing more than a dozen states who recently commenced investigations against Arby's, Burger King, Dunkin' Donuts, and others.



Franchisors contend that these non-poaching agreements are essential components to the franchise concept – they argue that the agreements protect investments their franchisees make in workers, like training. If franchisees know that they might train an employee, only to have another franchisee immediately steal away that employee upon completion of training, they might have less incentive to provide that training, or to become part of the franchise system in the first place. Thus, the agreements attempt to foster a cooperative spirit among franchisees, rather than a cutthroat competition for qualified workers.

On the other hand, the attorneys general contend that non-poaching agreements are unlawful restraints on free employment and limit the ability of low-wage workers to seek promotions and earn a better living. Opponents of non-poaching agreements point out that in many cases, the employees who are affected by them may be completely unaware of their existence. As mentioned above, non-poaching agreements are part of the contract between the franchisor and the franchisee, which employees do not even see, much less have a right to approve.

Other experts who contend that non-poaching agreements are illegal point out that franchisors take conveniently conflicting positions on when a franchisee is treated as part of their company. Franchisors go to great lengths to argue that each franchisee is a separate and independent corporate entity (and not merely a part of the franchisor), but the franchise's operating agreement which each franchisee must sign effectively makes them part of one big company.

In recognition of this conflict, and also to maintain the separation between the franchisor and franchisee, several fast food heavyweights – including McDonalds, Arby's, Carl's Jr., and Cinnabon -- announced that they would no longer enforce non-poaching agreements. Attorneys general have doubled down and threatened legal action and civil penalties against any franchisors who continue to enforce the agreements.

With industry heavyweights backing down without mounting much legal defense, it seems clear that non-poaching agreements will likely be removed from most, if not all, future franchise agreements. If you have a business with any contracts containing non-poaching agreements, contact your attorneys at BKCG to discuss whether they should still be enforced under the current legal trends.

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Federal Actions Against Las Vegas Shooting Victims Highlight The Scope Of Declaratory Relief (cont. from page 1)

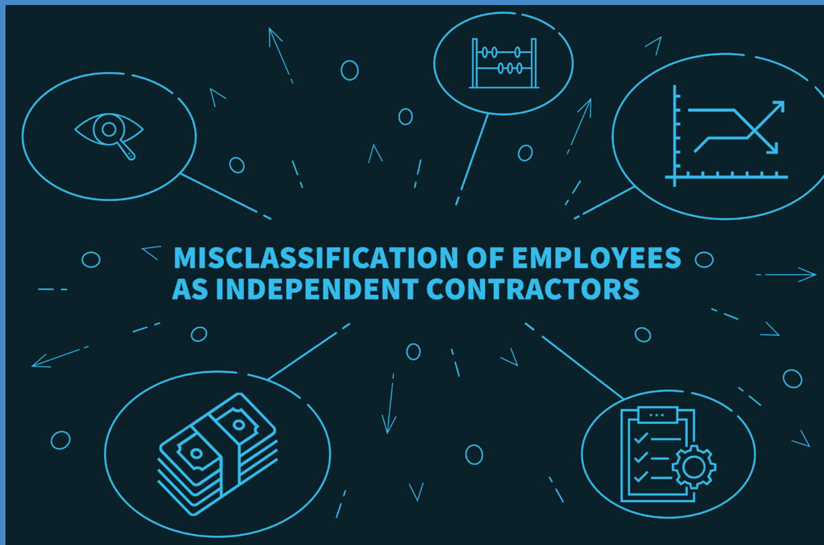
The SAFETY Act was intended to encourage the development of security technologies or services by limiting the liability of certain service providers, certified by the Department of Homeland Security, for injuries and deaths resulting from "acts of terrorism." For example, and pertinent to the MGM lawsuits, the SAFETY Act provides that the only proper defendant in a lawsuit arising out of an act of terrorism is the certified security service provider (or "seller"), and not the seller's clients, vendors, or subcontractors. Thus, the seller need not defend against cross-claims by these third-parties who might otherwise be sued for such acts.

Still, whether MGM is off the hook under the SAFETY Act is still up for adjudication by the courts because the October 1, 2017 mass shooting has not yet been deemed an "act of terrorism" as defined in the Act.

These cases are, of course, dramatic and sobering examples of what declaratory relief actions can accomplish or address. More applicable examples to our clients involve parties' rights under commercial real property leases and shareholder agreements. For example, BKCG recently obtained a favorable declaratory relief judgment in favor of its clients regarding their rights under an LLC operating agreement. The court declared that under the operating agreement, BKCG's clients were, in fact, the majority members of the LLC with the right to commence dissolution of the LLC. Notably, such declaratory relief actions are adjudicated solely by the presiding judge and fall outside the purview of a jury.

If you have any questions about the information in this article or about declaratory relief actions, in general, please contact Amber M. Sanchez at (949) 975-7500 or asanchez@bkcglaw.com

The Early Effects Of The Dynamex Employee Classification Case



In light of the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court*, which greatly expanded the definition of "employee" in California, some parties are fighting back. In *Dynamex,* the Court greatly expanded the definition of an "employee" versus "independent contractor," adopting the "ABC" test which places the burden of proof on the hiring entity to prove: "(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed."

At least one lawsuit has already been filed to challenge the decision. Western States Trucking Association (WSTA), which represents trucking companies in 11 states including California, is concerned about the impact the decision will have on truckers who are owner-operators and drive oversize and overweight loads throughout the country. The WTSA has filed a petition with the U.S. Department of Transportation seeking to have the Court's decision nullified.

In its lawsuit, the WSTA argues that the Court's decision is superseded by U.S. DOT regulations related to California's employment laws as applied to truckers. The WSTA argues that if the U.S. DOT does not step in, and all truck drivers in California must be classified as employees, the decision effectively eliminates the use of owner-operators from the trucking marketplace. WSTA claims that the 1994 Federal Aviation Administration Act preempts the Court's decision because it prevents states from enacting laws that interfere with "prices, routes and service" of interstate motor carriers. Because of the application of the expansive definition of "employee" set forth in the *Dynamex* decision, the entire industry could be upended, WTSA argues.

Surely, the Court's decision and the nature of businesses like the trucking business that use owner-operators and cross state lines create a myriad of issues when determining how to properly classify workers. It remains to be seen how the *Dynamex* decision will impact all California employers, but it is safe to assume that there will be, and have already been, many workers challenging their classification as independent contractors. In a brief survey of complaints filed against employers since the Court's April 30, 2018 decision, at least 18 new lawsuits have been filed against employers specifically mentioning the *Dynamex* case and dozens of workers in pending cases have argued the expansive scope of the *Dynamex* decision.

Because of the expanded definition of "employee" and the impact that classification can have on benefits, taxes, regulations, workers compensation, and other areas related to employment, it is imperative that business owners and employers reexamine their policies and classifications of current employees and independent contractors to avoid lawsuits related to those classifications.

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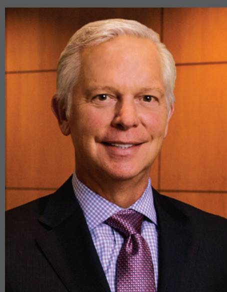
BKCG Delivers Unusual Jury Trial Win

BKCG trial lawyers Alton Burkhalter and Joshua Waldman wrapped up a seven-week jury trial with a decisive jury trial verdict in their client's favor. The case, *Kalypso LP vs ___________________, Inc.*, was heard by a jury in Orange County Superior Court and resulted in a $2.2 million breach of contract verdict which with prejudgment interest will total about $3 million. The team also successfully fended off a $4.6 million conversion claim against Kalyspo, limiting the cross complaint to about $700,000 before interest.



BKCG took over as trial counsel with less than a month to go before the originally scheduled trial date. Kalypso's prior lawyers had failed to take depositions of __________l witnesses and failed to propound any written discovery. Worse, based on prior counsel's failure to comply with discovery obligations owed to ________, the trial judge severely limited Kalypso's affirmative defenses and limited the scope of testimony that Kalypso witnesses would be allowed to address at trial. As the trial judge put it on the first day of trial "… it sounds like there's a peach of a malpractice action [against prior counsel] lurking here in the weeds…." No doubt, prior counsel's failures made it difficult, but not impossible to win.

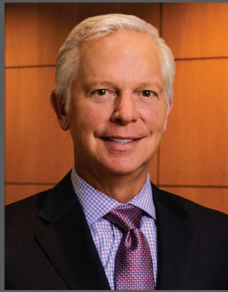
Please contact Alton Burkhalter at aburkhalter@bkcglaw.com or (949) 975-7500 if you have any questions about any issue discussed in this article, or any other related matter.

Election To Buyout Disgruntled Shareholder Under Involuntary Dissolution Statute Triggers "Special Proceeding" That Cannot Be Dismissed By A Party

Once formed, corporations are legal entities intended to live on in perpetuity. However, Corporations Code Section 1800 allows a disgruntled shareholder to sue for "involuntary termination" under certain circumstances. In response to such a claim, the corporation or a majority (in terms of voting power) of the shareholders may avoid dissolution by purchasing the shares owned by plaintiff at "fair value". The mechanics of such a process are governed by Corporations Code Section 2000.

Under Section 2000, if the purchasing parties are unable to agree with the plaintiff on the fair value of the shares, the court will, upon application of the purchaser, stay the winding up/dissolution proceeding and will proceed to fix the fair value of the shares by appointing three disinterested appraisers to appraise the fair value. The decision of the appraisers (or a majority of them), when confirmed by the Court, becomes final and conclusive on the parties. The purchasing party then has a choice: pay the fair value and become the owner of the shares, or have judgment of dissolution entered.

Until recently, there was an open issue as to whether the plaintiff could change his mind and avoid the mandatory buyout by simply dismissing his involuntary dissolution cause of action before the award of the appraisers had been confirmed by the court. A plaintiff might try to do so because he disagrees with the value attributed to his shares or for other reasons. But a recent appellate court decision, *Ontiveros v. Constable,* now makes the law clear that once the court grants the purchasing party's application to fix the fair value of the shares, the court has stayed the litigation and has commenced a "special proceeding". At that point, the parties give up their rights to litigate the involuntary dissolution and must abide by the process set forth in Section 2000. This means that the plaintiff no longer controls the involuntary dissolution cause of action and therefore cannot dismiss it in the same way a plaintiff could dismiss a cause of action before the commencement of trial.



A similar process is available to members of a limited liability company, but is governed by Section 17707.03 of the Corporations Code. The appellate court refused to apply its ruling to the context of LLC's dissolution proceeding.

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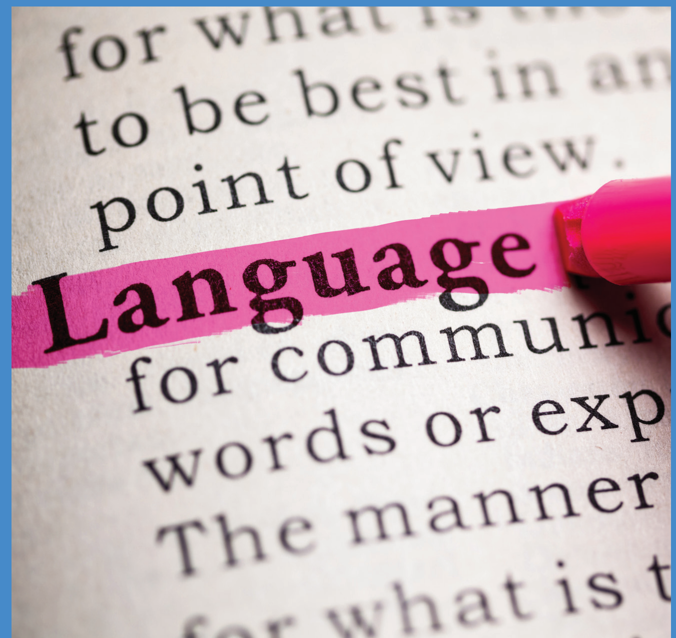
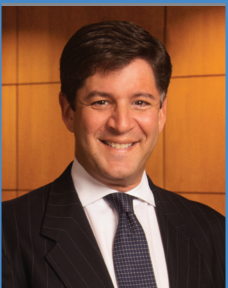
What You Need To Know About Forum Selection Clauses (cont. from page 1)



Similarly, in *Docksider, Ltd. V. Sea Tech., Ltd.,* 875 F.2d 762 (9th Cir. 1989) the Ninth Circuit also held the following language to be mandatory: "Licensee hereby agrees and consents to the jurisdiction of the courts of the State of Virginia. Venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia." The case had been brought in California but was required to proceed in Virginia. In both instances, use of the word "shall" was important.

Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75 (9th Cir. 1987) added a twist and provided a different result. In *Hunt Wesson,* the issue was whether the litigation could proceed in State Court or in Federal Court. The contract provision at issue stated "[t]he courts of California, County of Orange, shall have jurisdiction over the parties in any action." Although the word "shall" was used, the court interpreted the language as permissive. The court held that because the language did not rule out other jurisdictions in Orange County and there are both Federal and State courts in Orange County, either court was proper.

In *L'Garde, Inc. v. Raytheon Space & Airborne Sys.,* 805 F.2d 932 (C.D. Cal. 2011), the court held that the contract language used by the parties was too general and, therefore, the clause was permissive. The contract provision at issue stated: "Any controversy or claim …aris[ing] out of or in connection with this Purchase Order … may be resolved by submitting the claim to a court of competent jurisdiction." The court held that the language was vague and non-exclusive. The contract did not name a required court, judge, or jurisdiction where the case had to be brought. In short, the forum selection clause was too general to be considered a mandatory clause and the case could proceed in either State or Federal Court.

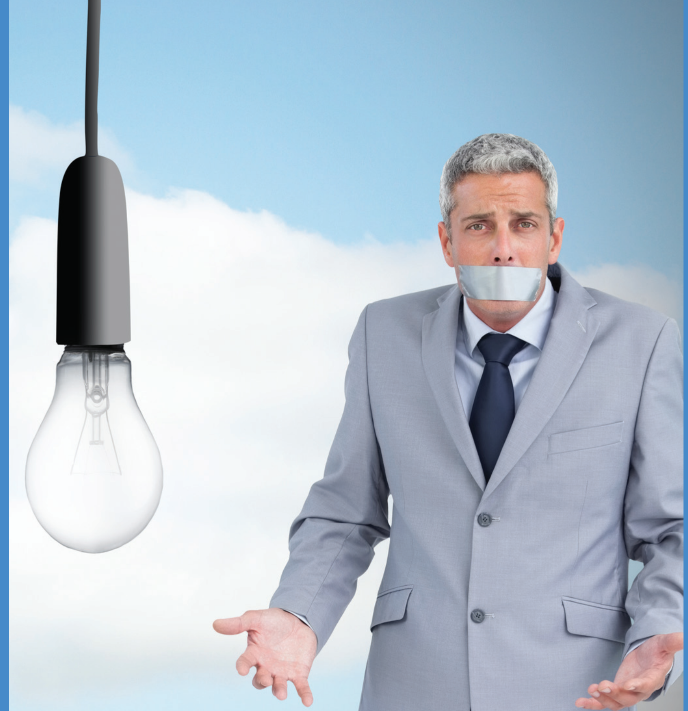


The forum where a dispute is litigated can have implications with regard to both cost and risk. Forum selection clauses in contracts can be helpful in providing some level of certainty that you will not be forced to litigate a case 2,000 miles away. While there is no "magical" language to have a mandatory provision, the contract language needs to be clear, unequivocal, and specific. Please contact our office for more information on forum selection provisions and other effective risk management clauses for your commercial contracts.

Please contact Keith Butler at kbutler@bkcglaw.com or (949) 975-7500 if you have any questions about any issue discussed in this article, or any other related matter.

Lessons Learned: The Dangers Of Public Statements In The Social Media World

As an officer or director of a publicly traded company, you must be very careful when making any public statement regarding company affairs or finances. This lesson is turning out to be a hard one for Elon Musk in light of the recent lawsuit filed by the Securities and Exchange Commission (SEC) against Mr. Musk, as well as the investigation launched by the United States Department of Justice (DOJ) against both Tesla, Inc. and Musk. Mr. Musk is the current Chief Executive Officer of Tesla, and as such has placed Tesla and its shareholders at risk by what may have been intended as a harmless social media publication.



On August 7, 2018 Mr. Musk wrote the following in a tweet, "Am considering taking Tesla private at $420. Funding Secured." Mr. Musk wrote this from his personal Twitter account, @elonmusk. SEC Rule 10(b)5, derived from Section 10(b) of the Securities Exchange Act of 1934, prohibits any person from making an untrue statement of a material fact that would cause fraud or deceit in connection with the purchase or sale of a security. The most common situation in which Rule 10(b)5 is applied and enforced is when an officer or director of a public company makes a material, untrue public statement that has a significant impact on that company's stock price.

While it is unclear what Mr. Musk intended by his August 7 tweet, what is clear is that the statement was a public statement made by the CEO of Tesla; the fact that the statement was made on Mr. Musk's private Twitter account is immaterial. Based upon the stock market's quick reaction to this tweet in regards to the price of Tesla shares, it is also hard to argue this statement was not material. Typically, the rule of thumb to determine materiality of a statement is whether or not an investor would use that information in determining whether to make a particular investment. Mr. Musk presumably saying he intends to take Tesla private at $420 per share is certainly that type of material information.

Shortly following Mr. Musk's statement, the SEC launched a formal investigation into whether this statement violated federal securities laws. Shortly thereafter, on September 27, 2018 the SEC filed a lawsuit against Elon Musk for securities fraud in the U.S. District Court for the southern district of New York. The key component of Mr. Musk's tweet that the SEC is basing its allegations on is whether the funding Musk referenced was in fact secured. If funding was not yet secured, and Tesla's CEO made a public statement that not only was funding secured, but also included a share valuation that the stock market instantly reacted to, and later turns out to be untrue, Tesla and Mr. Musk will face significant liability. In the SEC's Complaint, it is alleging that Musk either knew, or was reckless in not knowing, that his statement was materially false and misleading. The SEC is seeking civil penalties from Mr. Musk, as well as an order prohibiting him from serving as an officer or director of any publicly traded company.

Recently, the DOJ has also launched an investigation to determine whether to bring criminal charges against Tesla and Mr. Musk for securities fraud, as the SEC may only impose civil penalties. At this time, Tesla has cooperated with the DOJ's voluntary request for documents, and no subpoenas have been issued. It is uncertain whether the DOJ investigation into Tesla and Elon Musk will lead to a criminal complaint. However, what is certain is that the SEC lawsuit and related DOJ investigation are likely to both go on for some time, causing undue strain to a company already wrought with production issues and struggling to gain footing in an industry plagued by increasing material and labor costs.

While comments on social media nowadays seem so common and casual, officers and directors of public companies must tread lightly and be careful with any public statements that are made. Words matter, and any material statement concerning one's company better be true, deliberate, and is best followed by typical safe-harbor language that the statement is forward-looking and dependent on risk factors that could impact the accuracy of the statement. And if your public statement dissemination tool will be Twitter, you better fit all of your safe-harbor language in 280 characters or less.

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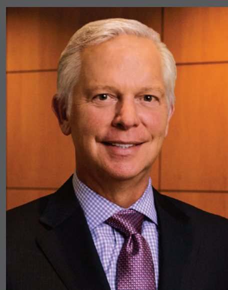
Beginning 2019, Attorneys Must Provide Written Disclosure To Clients Regarding Mediation Confidentiality

Effective January 1, 2019, Evidence Code §§ 1122 and 1129 requires a law firm to provide written disclosures to its client concerning mediation confidentiality. The new law requires that the client be informed of the confidential nature of settlement communications set forth in Evidence Code §1119 which are:



(a) No evidence of anything said or any admission made in the course of mediation is admissible or subject to discovery in any civil action, including arbitration.

(b) No writing that is prepared for the purpose of a mediation is admissible or subject to discovery.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation shall remain confidential.

The new law also requires that the disclosure be signed by the client.

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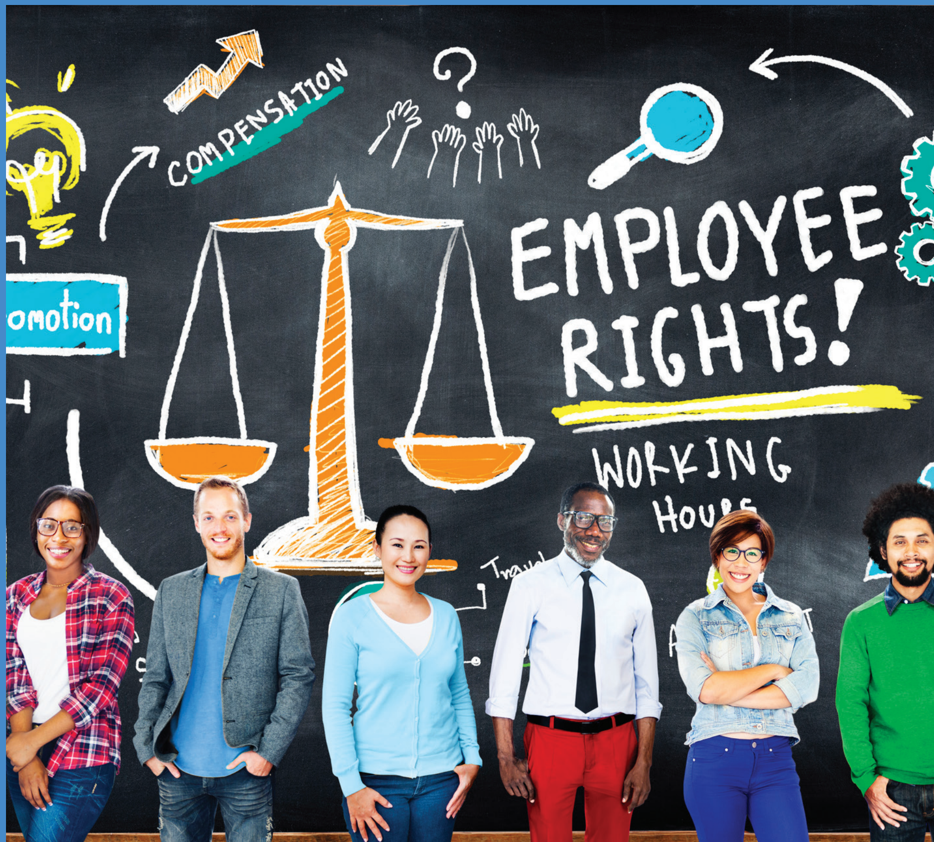
The First Step In Defeating a PAGA Claim



It is natural to be alarmed when your business receives a letter from an attorney notifying your business that the attorney, on behalf of one your employees, has made a complaint to California's Department of Industrial Relations about alleged Labor Code violations. These notice letters can be the first step in pursuing a claim against a business under California's Private Attorneys General Act ("PAGA"), Labor Code Section 2698 et. seq. These letters essentially notify the State of purported Labor Code violations which a company is allegedly committing against numerous employees. The letters seek permission from the State to step into the State's shoes and sue the company to vindicate the rights of aggrieved employees. The State easily (and often) allows these "representative" claims to move forward under PAGA - much to the delight of attorneys who specialize in representing disgruntled employees. This is because a PAGA claim is much simpler to litigate than a "class action" but allows the employee named in the action to recover her or his fees and costs for representing numerous employees. Despite the popularity of PAGA claims, however, an employer is not without protections when a former employee pursues a PAGA claim against it. One such protection comes into play with this initial PAGA notice letter.

Specifically, PAGA was amended in 2006 to help prevent frivolous representative actions. To that end, California's Legislature now requires that the initial PAGA notice letter set forth the factual basis for alleged Labor Code violations therefore allowing the State to consider the seriousness of those alleged violations and the employer the opportunity to remedy such violations. See Cal. Labor Code § 2699.3(a)(1); *Alacantur v. Hobart Service* (9th Cir. 2015) 800 F.3d 1047, 1057; *Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330. 338-39. Often, however, attorneys representing these disgruntled employees use a cookie-cutter, form-letter in an attempt to satisfy the PAGA notice requirement. These letters usually use conclusory allegations bereft of the detail required to actually satisfy the PAGA notice requirement. In such a case, the employer might be able to utterly prevent an employee from pursuing a PAGA claim in court.

As a result, if your business receives a copy of a PAGA notice, you should immediately forward the letter to an attorney. You might have the upper hand if the letter is deficient and it is important for your legal team to formulate an aggressive strategy to neutralize the alleged PAGA claim. Please contact me if you have any questions about this article or need any assistance defending a PAGA claim.

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