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BKCG

BURKHALTER KESSLER CLEMENT & GEORGE LLP

Keith Butler Explains the Basics of Business Interruption Coverage

First party commercial property insurance is a form of first party coverage that most every business purchases. Most commercial property policies are "all-risk" policies that cover losses caused by a variety of "perils" such as fire, water, collapse, or even a mechanical breakdown. While commercial policies usually provide coverage for business personal property, inventory, and real property, it also typically contains business interruption coverage.

Business interruption is designed to protect the earnings that a business would have enjoyed had the peril not occurred (i.e., the pipe did not burst or the machine did not break down). That is, the coverage protects against a loss to business income. The purpose of business interruption coverage is to return the business the amount of profit it would have earned had there been no interruption.

Although policy language can vary from policy to policy, most business interruption coverage is triggered when two criteria are met. There must be: (1) a necessary interruption or suspension of the insured's business, (2) that is caused by physical damage to the insured's property (i.e., the business owner's property). Once triggered, coverage is provided during the "period of restoration."

To satisfy the first requirement, several courts have held that for there to be a "necessary interruption" or a "necessary suspension", there must be an actual or total interruption of the business. There are, however, cases where courts have not required a total shutdown of operations and have held that a "necessary suspension" means a suspension of normal or ordinary business activities. In those cases, courts point out that business owners have a duty to mitigate damages by resuming operations as quickly as possible. If a business can move production to a different facility or continue operations by renting space elsewhere but – as a result – sustains a loss to its profits, some courts have held that the business interruption coverage

has been triggered even though it continued production. Satisfying the second requirement involves demonstrating that the interruption of business resulted from the direct physical loss or damage to the business' property. For instance, if a fire damages the showroom of a business and, as a result, that business cannot serve its customers, the causation requirement would be satisfied. However, if the fire caused damage to the parking facility of the business but the showroom was undamaged, triggering business interruption coverage is less certain. (continued on page 2)

New Federal Court Decision Tackles Gig Economy's Use of Independent Contractors

Often, California business owners find themselves walking a fine line when entering into a relationship with an independent contractor. Many have had the unfortunate (and expensive) experience of an administrative body such as the Employment Development Department or a court of law determining an independent contractor was legally an employee.

In California, the determination of whether an individual is an employee or an independent contractor is guided by several factors from the seminal case, *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341. The most important of these factors is "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." *Borello*, 48 Cal.3d at 350. Other factors include whether the worker or the hirer provides the equipment, tools and/or workplace, whether the services performed are distinct from the occupation or business of the hirer, the level of skill required to perform the services, the length of time for which the services are performed, whether the services are paid for by time spent performing them or by the job, the level of supervision utilized by the hirer and whether the parties themselves believed they were creating an employment relationship. Id. at 351. As you can see, the factors are extremely flexible and business owners have little assurance when they enter into a relationship with an independent contractor that one or more of these factors won't be used to redefine the relationship as one between employer and employee. (continued on page 6)

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Litigation Update: Reversal of Fortunes-BKCG Finally Gets Justice for Long-Time Client

The California Court of Appeal recently issued a resounding reversal of a Los Angeles County Superior Court ruling awarding a fraction of fees and costs incurred in the underlying litigation. The appellate opinion in *Ultimo v. City Lights* (B270339, 2/13/2018), strongly rebuked Judge Dalila Lyons's 2015 ruling awarding just $20,000 in response to BKCG's motion for over $250,000 in fees and costs incurred, and ordered the trial court to issue a new award consistent with the law outlined in the opinion.

The underlying case was a contract dispute over commissions owed to long-time BKCG client, Frank Ultimo. When litigation head, Dan Kessler, got the call from Mr. Ultimo explaining he was being stonewalled on about $35,000 of unpaid commission for homes sold, Kessler assumed that the case could be resolved in a phone call. Unfortunately, from the very first call, it was clear that the other side intended to leverage their greater resources and disproportionate aggressiveness. Ultimo was resolute: he would not walk away from what he was owed just because the other side was unwilling to be rational. Comforted by the advice that he was protected by a solid attorney fee provision, Ultimo instructed BKCG to stand strong. The City Lights parties engaged in bizarre and aggressive scorched earth litigation. BKCG responded with measured and professional prosecution of the case, knowing that someday all of these uneven communications and disproportionate tactics would be subject to court scrutiny.

Interrupting a crippling deposition of City Lights' key employee, the City Lights principals folded and agreed to settle the case for $100,000. Just one week later, however, before the deal was signed, those same principals backed out abruptly. And so, BKCG went back to work preparing for trial. As the date approached, City Lights fired their lawyer and brought in new counsel. Soon after that, for the first time, City Lights agreed to mediate, and the case was settled. Ultimo agreed to compromise his commissions owed to $25,000, but insisted that the fees expended – as a result of City Lights' litigation tactics – must be paid. The parties agreed to let the court decide.

Having filed countless fee motions, Kessler and Senior Counsel Amber Sanchez, were well aware of the deep body of law on fee awards, and felt confident that a court following the law would look at not only the amount at issue, it would also consider that the conduct of City Lights drove up the cost of litigation. Unfortunately, that did not happen. In fact, although Judge Lyons was new to the case, she felt comfortable ignoring the detailed evidence laying out the conduct of City Lights, and picked the arbitrary fee amount of $20,000 (suggested by City Lights' counsel) as the full fee award.

Ultimo had the mettle to push forward and appeal the decision. Ultimo's principles were rewarded when the Court of Appeal issued its opinion – a veritable treatise on attorney fee cases. The Appeals Court reversed the ruling and ordered the lower court to reconsider the award in light of the opinion – and awarded Ultimo his fees and costs for having to file the appeal in the first place. Armed with the detailed instructions of the Court of Appeal, BKCG and Ultimo are confident that the lower court will award Ultimo the long overdue and actual amount of fees he was forced to incur in this litigation.

Please contact Daniel J. Kessler or Amber M. Sanchez at (949) 975-7500 or dkessler@bkcglaw.com / asanchez@bkcglaw.com if you have questions about any issue discussed in this article, or any other related matter.

Keith Butler Explains the Basics of Business Interruption Coverage (continued from page 1)

When business interruption coverage is triggered, coverage for the loss of profits is provided during the "period of restoration". The term "period of restoration" is a defined term that usually means the period of time from when the damage occurred to the reasonable amount of time that it should take to repair the damage and resume operations. Consequently, where it takes 10 months to prepare architectural repair plans, obtain permits, and complete repairs to a building, the business owner would receive business interruption coverage for the loss of profits for that 10-month period of time.

First party commercial property policies can be valuable and lessen the risk of loss to a business when a casualty occurs. The best way to protect the business is to understand the coverage at the time it is purchased and the nuances of the policy language. If a loss does occur, a careful review of the policy requirements, triggers, and limitations should be conducted after notice of loss is provided to the insurer but prior to the time a formal claim is submitted. For questions about your commercial property coverage, contact Burkhalter Kessler Clement & George.

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

In This Volatile Market, Investors Should Take Steps to Ensure That Their Brokers Are Only Recommending Suitable Investments

In a single week in February 2018, the DOW Jones plummeted 1032 points (10%) and suffered the largest single-day point drop in history. Since then, the stock market has been on a volatile roller-coaster, frequently going up, or down, by hundreds of points on any given day. During uncertain times like these, an investor may ask himself whether his broker is looking out for his best interests by recommending investments that are appropriate for the investor given his age, goals, investing experience and risk tolerance.

Investors should know that their broker has a duty under the law to only recommend investments that are "suitable" for them. This requirement is codified by the Financial Industry Regulatory Authority, known by its acronym "FINRA", as Rule 2111, and is generally referred to by lawyers as the "Suitability Rule". The Suitability Rule states in pertinent part that:

A member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile. A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation.

In layperson's terms, this means that a broker must have a reasonable, good faith reason to believe that his investment recommendations are appropriate (or "suitable") for the investor given that investor's current life circumstances. By way of example, a broker would clearly violate the Suitability Rule if he were to recommend to an uneducated, unsophisticated, elderly, retired widow living on a fixed income that she invest her entire nest egg in the stock of a single international micro-cap technology company on margin. In such a scenario, the widow would have the right to recover from her broker the losses she sustained as a result of this clearly unsuitable investment strategy.

What many investors do not realize, however, is that determining whether a broker's investment recommendations violated the Suitability Rule depends largely on the disclosures that an investor made to his broker when the investor initially set up the brokerage account. Specifically, when an investor opens a new brokerage account with a broker dealer (the company for which the broker works, like Charles Schwab, for example), the broker dealer will invariably require the investor to fill-out a form, generally referred to as an investor profile, that reflects his investment experience, net worth, goals and risk tolerance, among other things. The broker's duty to only recommend appropriate investments to the investor pursuant to the "Suitability Rule" is premised largely on the investor's answers to these very important questions in his investor profile.

Unfortunately, some investors do not understand the significance of the information they provided to their broker when they opened their account and fail to take the time to ensure the information given was complete and accurate. Some overly-trusting investors even allow their broker to fill out the investor profile on their behalf and simply sign the already-completed form without even reading it! In other instances, time passes and circumstances change such that the information the investor provided in his investor profile several years ago is no longer accurate today.

In these uncertain times, investors would be wise to review their investor profile at each broker dealer with which they maintain a brokerage account to ensure that the profile accurately reflects the investors' current investment goals, risk tolerance, sophistication level, net worth, etc. Investors should also check-in with their broker, in writing, whenever their financial life circumstances materially change (loss of a job, significant change in net worth, new financial goals, etc.) to make the broker aware of the change and ensure that the broker's investment recommendations remain consistent with the investor's current life circumstances.

If you are concerned that your broker has recommended investments that are not suitable for you that resulted in investment losses, you may want to consult with an attorney to determine whether your rights were violated.

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

Court of Appeal Changes Key Element of Intentional Interference Claim to Reverse Trader Joe's Early Round Win in Dispute with Food Broker

The food fight between Trader Joe's and a disgruntled food broker will continue in a Los Angeles trial court after the Court of Appeal reversed the trial court's order sustaining Trader Joe's demurrer. In doing so, the Court essentially changed a key element of the tort claim for intentional interference with contractual relations.

Since 2003, the food broker had been representing two food companies in successfully introducing their products into Trader Joe's stores. In 2010, Trader Joe's changed its policy, and stopped working with brokers to find new products, but generally continued to deal with food brokers on existing accounts.

The food broker alleges that starting in 2014 Trader Joe's falsely accused the food broker's employees of spreading rumors that Trader Joe's employees were soliciting bribes, and further alleged that paying bribes was the only way to do business with Trader Joe's. Based on these bribe accusations, a Trader Joe's executive who was aware of the food supplier's contracts with the food broker, told the food suppliers to terminate their relationship with the food broker or else Trader Joe's would terminate its contracts with them. Both food suppliers terminated their contracts with the food broker.

The food broker sued Trader Joe's for Intentional Interference with Contractual Relations, the elements of which are: (1) the existence of a valid contract between the Plaintiff [the food broker] and a third party [the food suppliers]; (2) the Defendant's [Trader Joe's] knowledge of the contract; (3) the Defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.

Prior to this case, the law in California was that if the contract depended on the non-contracting party's performance, the noncontracting party had an economic interest in that contract and could not be liable for an interference claim. Such a third party was not considered to be a proper "stranger" to the contract who could be sued for interference.

The Court acknowledged that the food broker's contracts were contingent upon the decision of Trader Joe's to purchase products from the food suppliers. Unless that occurred, the food broker's contracts with its food suppliers could not be performed. So, under existing law, Trader Joe's would not be considered a "stranger" to the contract, which had been defined as "interlopers who have no legitimate interest in the scope or course of the contract's performance," because Trader Joe's performance was necessary to the food broker's contracts.

However, the Court of Appeal decided not to follow the existing law, stating "Unlike the trial court … which must follow controlling precedent from a court of appeal, we are free to disregard the reasoning [of the prior courts]." And that is exactly what then happened. The Court eliminated the notion that one could not be a stranger if that party had an economic interest in the contract's performance … "if each of the elements of the tort are otherwise satisfied."

The Court of Appeal's decision in *Redfearn v. Trader Joe's Company* will likely expand the number of "strangers" to a contract that are now exposed to tort liability for intentional interference, and it presents a stark reminder that the law is a fluid concept, ever changing–even right underneath the grounds of the litigants before the court.

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

How The Tax Reform Legislation Affects You

The Tax Cuts and Jobs Act was enacted on December 23, 2017 and affects almost every taxpayer. Most changes were effective January 1, 2018. The highlights are as follows:

Individual Rates and Deductions

- Beginning January 1, 2018 and expiring December 31, 2025, income tax rates will begin at 10% and top out at 37%. This represents a 2.6% reduction in the previous top rate of 39.6%.
- The standard deduction is increased to $12,000 for single individuals and $24,000 for married couples. This change will result in most taxpayers not itemizing deductions. While this represents nearly a doubling of the standard deductions, the $4050 personal and dependency exemptions have been eliminated. In 2017, a married couple with two children had a standard deduction of $12,700 and $16,200 of personal and dependency exemptions, for a total reduction in taxable income of $28,900. With the increase in the standard deduction to $24,000 and elimination of personal exemptions, such a couple would have $4,900 more taxable income than before. A reduction in rates should partially ameliorate this dynamic.
- Mortgage interest deductions on homes purchased after December 31, 2017 have been limited to $750,000 of acquisition indebtedness. Interest on existing mortgages, up to $1,000,000, remain deductible.
- All State and local tax deductions are limited to $10,000.
- Interest on all home equity loans are no longer deductible.
- Alimony payments are no longer deductible.

Business Taxes

- The corporate tax rate has been reduced from thirty-five percent (35%) to twenty-one percent (21%).
- Individuals may now deduct twenty percent (20%) of qualified business income from a partnership, S corporation or LLC. This benefit generally applies to the conduct of a trade or business. Your accountant can explain the limitations on this benefit. (continued on page 5)

How The Tax Reform Legislation Affects You (continued from page 4)

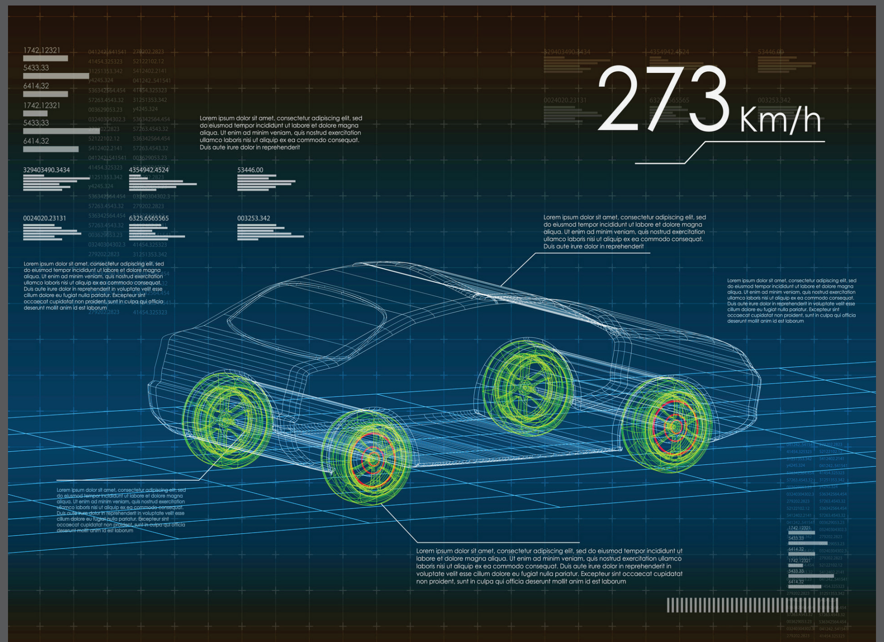
Estate, Gift and Generation-Skipping Transfer Taxes

- The estate, gift and generation-skipping transfer tax exemptions have doubled to $11,200,000 for a single individual and $22,400,000 for a married couple as of January 1, 2018, and will increase annually for inflation. The estate tax rate on the excess over the exemption amounts remains at 40%. This increase sunsets January 1, 2026 unless extended by Congress.
- For clients who created their trusts many years ago, these developments likely mean that such trusts are outdated and in need of major revisions.
- The annual gift exemption is increased to $15,000 per donor per donee.

Most taxpayers should see a lower income tax bill for 2018. For many high income earners who live in California, their tax bill may increase due to the elimination of deductibility of California State income taxes and property taxes, in excess of $10,000. With the exception of very large estates, estate taxes have been all but eliminated due to the significantly higher exemptions.

Please contact William George at wgeorge@bkcglaw.com or (805) 373-1500 if you have questions about any issue discussed in this article, or any other related matter.

Self-Driving Car Trial Pilots Itself To A Surprising Settlement



The high-profile trial between Uber and Alphabet's (Google) self-driving car offshoot, Waymo, came to a sudden and surprising end when Waymo's counsel announced an out-of-court settlement at the beginning of the fifth day of one of the most anticipated and salacious business trials in recent memory. The case highlighted, on a massive scale, many of the issues and problems encountered by BKCG and its clients in high-stakes intellectual property litigation.

Waymo started in 2009 as a Google project called "Project Chauffeur", and Google invested about $1.1 billion developing hardware and software. Its star engineer, Anthony Levandowski, allegedly stole 14,000 files and formed his own start-up self-driving truck company, Ottomotto, in January 2016. Levandowski was critical in the development of a laser technology called lidar (light detection and ranging), which allows vehicles to "see" their surroundings and detect traffic, pedestrians, bicyclists and other obstacles.

Uber acquired Ottomotto in August 2016 and, according to Waymo's counsel, began to use the data that Levandowski stole from Waymo. Waymo sued Uber in 2017, alleging that Uber had plotted with Levandowski on his departure from Waymo and later accessed and utilized Waymo's trade secrets for autonomous car technology. Through discovery, Waymo obtained secretive text messages and coded language that Uber employees used to talk about getting Levandowski to join their team, even while he was still employed by Google.

Uber denied Waymo's accusations and said it never got the 14,000 files that Levandowski allegedly stole. Uber claimed that its motive for bringing Levandowski onto the team was simply to acquire one of the world's best car engineers.

Over four days of testimony, witnesses described Uber's notoriously competitive tactics and educated the trial court about technical matters like SVN servers, fiber lasers and Drobo hard drives. Waymo's CEO, John Krafcik, and its Vice President of Engineering, Dmitri Dolgov, testified about Waymo's efforts to develop its self-driving car program and stated that Waymo had sued Uber because of the allegedly stolen trade secrets. In relatively short order, Waymo's counsel introduced some unsavory internal Uber correspondence, including a meeting "wish list" from Uber's former CEO, Travis Kalanick, that read, "source, all of their data, Tagging, road map, pound of flesh, IP." (continued on page 7)

New Federal Court Decision Tackles Gig Economy's Use of Independent Contractors

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This is especially true in California which recognizes a strong presumption that paying someone for services creates an employment relationship. However, a recent federal decision in *Lawson v. Grubhub, Inc.* (N.D. Cal., Feb. 8, 2018, No. 15-CV-05128-JSC) 2018 WL 776354, the District Court for the Northern District of California published a case which greatly favors business owners contracting with independent contractors.

Grubhub, as many of you know, is a food delivery service. It contracts with numerous drivers who use their own vehicles and set their own schedules to make deliveries of take-out food to Grubhub customers. In the *Grubhub* case, one of these former drivers, Rael Lawson, sued Grubhub claiming that he should have been classified as an "employee" and not an independent contractor.

The District Court considered Mr. Lawson's claim by first looking at the "most important" of the *Borello* factors – the "right to control the manner and means of accomplishing the result desired." As part of the analysis, the Court considered the things Gubhub required of its delivery drivers. It found, for example, that Grubhub requiring that its contracting drivers have a valid driver's license, registration and insurance "did not weigh in favor of employee status." This finding should be especially heartening for heavily regulated industries, such as the commercial trucking industry, which has found itself vulnerable to employment misclassification claims as a result of requiring that independent contractor drivers comply with federal and state trucking regulations.

The Court also looked at Lawson's contractual right to subcontract his work for Grubhub. The Court found that "[g]iven the nature of the work, the pay, how the [dispatch] app works, subcontracting was not a realistic option." Despite this conclusion, however, the Court found this fact weighed against an employment relationship as "Grubhub had no control over whom, if anyone, Mr. Lawson wanted to accompany him on his deliveries." The Court also found it significant that Mr. Lawson could reject deliveries Grubhub offered to him, had "complete control of his work schedule", and picked his own routes to make scheduled deliveries. Each of these things, the Court found, weighed in favor of an independent contractor relationship.

The Court noted that some aspects of the relationship demonstrated Grubhub's control over Mr. Lawson. For example, the Court noted that Grubhub was in sole control of negotiating the rates paid to Mr. Lawson and the amounts charged to Grubhub customers. Grubhub also determined what times were available to the drivers collectively and it determined the geographic boundaries for delivery zones. The Court opined in its decision that the "fact that arguably most suggests Grubhub had a right to control Mr. Lawson's work is its right to terminate the Agreement at will[.]". The Court, however, looked to how Grubhub actually exercised that right and determined that Grubhub's latitude in allowing Mr. Lawson to wait two months after contracting with Grubhub to start work, the freedom he was allowed in working as much or as little as he pleased and the minimal monetary investment he was required to make to perform services for Grubhub rendered "Grubhub's right to terminate at will [] neutral in the right to control analysis." The Court looked at the other "secondary" *Borello* factors but ultimately found Mr. Lawson was not an employee.

The *Grubhub* decision is interesting for two reasons; first, there is significant past legal precedent for finding (somewhat paternalistically) an employment relationship where businesses have contracted for unskilled labor. The *Grubhub* Court recognized that Mr. Lawson was not utilizing any "special skills" as a driver and that this factor favored an employment relationship, but nevertheless the other factors, especially the "right to control" factor, outweighed the importance of the type of service Mr. Lawson was providing as an independent contractor. The decision is also interesting as it concludes with the Court making a common-sense observation about California's overly-restrictive current approach to determining the "independent contractor" status. The Court wrote, "Under California law whether an individual performing services for another is an employee or an independent contractor is an all-or-nothing proposition. … With the advent of the gig economy, and the creation of a low wage workforce performing low skill but highly flexible episodic jobs, the legislature may want to address this stark economy." Hopefully, the legislature accepts this invitation. Until then, however, and until there is greater clarity regarding the proper classification of employees versus independent contractors, it is prudent to consult an attorney before retaining the services of anyone acting as an "independent contractor."

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

2018 Brings Expanded Employee Protections Under California's Fair Employment and Housing Act

Effective January 1, 2018, covered employers should familiarize themselves with a number of newly-enacted laws under the Fair Employment and Housing Act ("FEHA") particularly with regard to sexual harassment training and additional protections afforded to employees based upon gender identity and expression.

For example, covered employers must provide supervisors with at least two hours of sexual harassment prevention training every two years. This required training must include training on unlawful harassment based specifically upon gender identity, gender expression, and sexual orientation.

Covered employers must also display a poster developed by the Department of Fair Employment and Housing regarding transgender rights, in particular.

Reflective of these changes and to confirm that FEHA's protections apply to all employees, the language of the Fair Employment and Housing Act itself was also amended to delete gender-specific pronouns in favor of referring to "the person" or "the employee."

This *small selection* of 2018 changes are in addition to the revised materials issued by the Department of Fair Employment and Housing last year which included updated posters regarding required sexual harassment prevention training, which must be conspicuously displayed, easily legible, and translated into every language spoken by at least 10% of the total workforce.

If you have questions regarding any of these issues in this article, or to inquire whether you are a covered employer under FEHA, please contact Amber M. Sanchez at asanchez@bkcglaw.com or 949-975-7500.

Self-Driving Car Trial Pilots Itself To A Surprising Settlement

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After the fourth day, however, the primary issue of whether Uber had received the Levandowski files was still very much unresolved, which is why the announced settlement was such a surprise. Given that the central issue was still in doubt, the amount of the settlement is also stunning: as part of the settlement Waymo will receive 0.34 percent of Uber's equity. With Uber's current valuation of $72 billion, that translates to about $245 million. Uber also agreed to not incorporate Waymo's confidential information into its hardware and software.

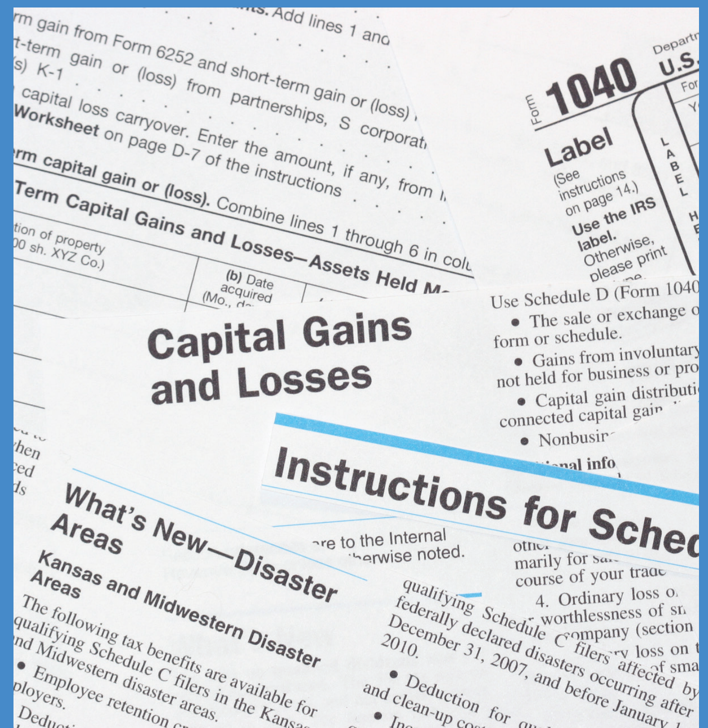
Following the settlement, both sides issued statements in which they called their opponent both a "partner" and a "competitor". The settlement is an unexpected twist that let both companies off the hook and left no clear winner in a case that was supposed to determine who would end up dominating the self-driving car market. In the battle of the mega personalities running the two companies, however, Alphabet's CEO, Larry Page, seems to have emerged on top. Page never had to take the witness stand, while his counterpart at Uber, Kalanick, had to take the stand and absorb questioning from Waymo's counsel about his "pound of flesh" notes.

In addition, Waymo negotiated the extra benefit of an independent monitor, who will provide Waymo a window into Uber's autonomous vehicle program to make sure that Uber does not use the trade secrets pilfered by Levandowski. On the other hand, many people will remain convinced that Uber stole trade secrets, even though the issue was far from proven during the trial. But, Uber managed to avoid a permanent injunction that could have put it years behind in the race to perfect self-driving cars, and it also cleared the path to spin off its autonomous car program with an IPO in 2019. It will be interesting to see what impact, if any, this lawsuit and its settlement has on this emerging technology.

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

#NoThanks: Congress Enacts a Misguided Change in Tax Law

Possibly lost amongst all the political wrangling surrounding the recent passage of the Tax Cuts and Jobs Act (signed into law on Dec. 22, 2017), there can be found a small amendment to the Internal Revenue Code that may have very significant –and potentially unintended – ramifications.



In what appears to be a hasty reaction to the #metoo movement, Congress amended 26 U.S.C. § 162, the tax code section that lays out permissible business deductions, to slip in subsection (q), originally entitled "Denial of Deduction for Settlements Subject to Nondisclosure Agreements Paid in Connection With Sexual Harassment or Sexual Abuse."

This subsection prohibits a taxpayer from deducting from its taxable income any "settlement or payment" (including attorney's fees) that is "related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement." Although, it may be argued that the change in the law was intended to help victims of sexual harassment in the wake of the numerous scandals in the entertainment and political arenas, as enacted, the law falls far short of the mark. First, the law creates a great deal of uncertainty due to its poor wording. Second, and more importantly, the addition will likely have negative consequences on both sexual harassment claimants and employers alike.

Congress apparently intended to make confidential settlements the target of their intended reform. However, as worded, even that seems entirely unclear. For example, "non-disclosure agreement" is not defined, leaving open whether just making certain terms (e.g., amount) confidential renders the agreement subject to this law. It is also entirely unclear how the law will apply to settlements that involve multiple claims, including sexual harassment and non-sexual harassment claims (as most do).

Employers are surely wary of the law, as a valuable incentive for settling claims is ensuring the confidentiality of the agreement. This law will therefore create a disincentive for employers to settle these claims out of court. However, claimants may be equally disincentivized. For one, the new law completely ignores that claimants may very well prefer the settlement to be confidential. Perhaps the claimant is a high-profile person that does not want the matter coming to public view; or is simply hesitant for a myriad of reasons to publicize the details of such a sensitive matter. This law does not account for that. Even worse, because it is so broadly worded, the law can arguably be applied to expenses of claimants as well as employers. That means a victim that is required to report his or her total settlement amount would not be able to deduct the substantial portion that goes to the claimant's attorney's fees. Indeed, the law could even prohibit a victim from expensing medical expenses in connection with the harassment.

Perhaps the most striking weakness of the new law is the fact that it does not address one of the sources of the #metoo movement's continued momentum: politicians settling sexual harassment cases confidentially. Because the law attacks non-disclosure agreements by punishing "taxpayers," the new prohibition has absolutely no impact on government employers. That's right. When a congressional member uses the U.S. Treasury to pay a settlement, there is no taxpayer to penalize on the employer side - only the victim side. Surely, that does little to address real workplace harassment.

In an effort to vilify "non-disclosure" agreements in harassment cases, Congress has missed an opportunity to truly address real issues affecting workers in the workplace. Instead, both employers and claimants are punished for resolving a dispute on the terms they want. And all the while, a primary impetus for this bill – congressional harassment scandals – goes wholly unaddressed. In all, this knee-jerk change to the tax law, as drafted, creates far more problems than it solves.

Employers would be wise to consult with BKCG before entering into a settlement agreement involving any allegations of sexual harassment.

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

The BKCG Bulletin is Published By:

Burkhalter Kessler Clement & George LLP

2020 Main Street
Suite 600
Irvine, CA 92614
Attn: Alton G. Burkhalter
949.975.7500
949.975.7501 fax
www.bkcglaw.com

340 North Westlake Blvd.
Suite 110
Westlake Village, CA 91362
Attn: William C. George
805.373.1500
805.373.1503 fax

Visit our web site at www.bkcglaw.com

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