# THE BKCG BULLETIN

Summer 2017 Edition

BKCG
BURKHALTER KESSLER CLEMENT & GEORGE LLP

## New "Fair Chance" Law Warrants Immediate Attention By Employers

On July 1, 2017, a new statute went into effect which significantly limits how employers in California can use and request information from job applicants and employees about that individual's prior criminal history.

Specifically, California's Fair Employment and Housing Act (FEHA) now contains Section 11017.1, titled, "Consideration of Criminal History in Employment Decisions." The statute prohibits an employer when making "employment decisions" (such as hiring, promotion, training, discipline, lay-off and termination) from taking into consideration any of the following:

- An arrest or detention that did not result in conviction;
- Referral to or participation in a pre or post-trial diversion program;
- Any conviction that has been expunged, dismissed, sealed (such as juvenile offenses) or otherwise eradicated by the Courts;
- Any juvenile detention, adjudication, diversion or court disposition; and
- Any non-felony conviction for possession of marijuana that is two years old or more.

In addition, there are other critical restrictions on what an employer can ask about an applicant or employee's criminal history and how the employer can use that information when making employment decisions. Specifically, if an employer is using criminal history to make employment decisions, the job applicant or employee can use statistics to show that the use of that information has an "adverse impact" on a protected class (such as people of certain national ethnicity, or race, or gender) and the use of that information then becomes presumptively unjustified because of that adverse impact.

The burden then shifts to the employer to demonstrate that consideration of the applicant or employee's criminal history is justified "because it is job-related and consistent with a business necessity." For example, an employer cannot simply use any and all criminal convictions to weed out applicants based upon a general distrust of people with a prior criminal history. But, an employer looking to fill certain positions in a pharmacy might be able to take into consideration convictions for controlled substance crimes. Even then, however, the employer must make sure the policy of considering that past criminal history is "appropriately tailored" to be "job-related and consistent with a prior criminal history." To demonstrate that consideration of the prior criminal offense(s) is "appropriately tailored", the statute requires that the employer take into account:

- The nature and gravity of the offense or conduct;
- The amount of time which has passed since the "offense, conduct, or completion of the sentence; and
- The nature of the job held or sought.

(continued on page 5)

## California Streamlines The Rush To Conduct Expert Discovery In Advance Of Trial

Although the California Legislature continually implements new statutes and amendments, Code of Civil Procedure section 2034.415 is among the most practical and necessary new enactments of the prior year.

As California litigators know, by the time expert discovery is conducted in a civil trial, the first day of trial is imminent and the marshalling of evidence is nearly complete. This compressed timeline is the result of the Code of Civil Procedure which delays the designation of expert witnesses until 50 days before trial, and then allows for expert depositions to occur as late as 15 days before trial. Even these tight deadlines are often extended by stipulation pushing expert depositions even closer to the first day of trial or to the time of trial.

Further complicating this piece of trial preparation is the fact that, prior to the effective date of Code of Civil Procedure section 2034.415 on January 1, 2017, a designated expert had no obligation to produce her or his expert opinions and information supporting those opinions in advance of the deposition date. Thus, in the typical pre-2017 scenario, the deposing attorney received either hard-copy binders or a thumb-drive of expert materials at the deposition. Of course, this forced the deposing attorney to spend additional time at the deposition reviewing and absorbing the materials on the spot before deposing the expert; not to mention the administrative task of duplicating the materials for use as deposition exhibits.

Code of Civil Procedure section 2034.415, however, addressed this issue and now requires a retained expert to produce any materials or category of materials, including electronically stored information, that are sought in a deposition notice no later than *three business days before the deposition*. In the context of the inevitable time constraints immediately before trial, these three additional days of preparation for an expert deposition are crucial and alleviate a small part of the pre-trial preparation time crunch.

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

## In This Issue

# What Your Meal & Rest Break Policy Needs To Say

California's Labor Code requires employers to pay to employees one additional hour of pay *for each daily violation* of the meal and rest period requirements. These requirements are established by a series of Wage Orders which have been promulgated by the California Industrial Welfare Commission, and these requirements vary slightly from one industry to another. Plaintiffs' employment lawyers have mined this statute for hundreds of millions of dollars of damages against employers, including a $172 million class action award against Walmart in the mid-2000s.

The basic meal and rest break requirements that employers must follow are:

**Meal Breaks:** An employee who works at least five hours in a day must be "provided" a thirty-minute off-duty period, during which time the employee must be relieved of all work related duties, and the meal period must take occur within the first five hours of that shift. An employee who works more than ten hours in a single day also must be provided a second thirty-minute off-duty period.

The employer's duty to "provide" a meal break has been hotly litigated since the statute was enacted nearly twenty years ago. In 2012, the California Supreme Court issued an important decision, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, in which it held that "an employer must relieve the employee of all duty for the designated period, but need not ensure that the employee does no work." The Court noted that the employer has *no duty* to police the employees during their meal breaks to ensure that they are not working, as the employer's obligation is to *relinquish control* over the employee during the break period. More recent cases have generally followed *Brinker* but mandate a true "hands off" approach to employees who are on their meal breaks.

**Rest Breaks:** If an employee works at least three and one-half hours and up to six hours in a work day, the employee is entitled to 10 minutes of paid rest. Employees working between six and ten hours in a day are entitled to 20 minutes of paid rest, and employees working between ten and 14 hours in a day are entitled to 30 minutes of paid rest. Rest breaks must fall in the middle of work periods "insofar as practicable", but nothing requires that the rest break must take place before the meal break.

For example, an employee working an eight hour shift is entitled by law to one 30 minute off-duty meal period, which must be provided within the first five hours of the shift, and two 10 minute periods of paid rest. As a general matter, one rest break *should* fall on either side of the meal break, but sometimes "truly unusual circumstances" could justify placing both rest breaks before, or after, a meal break.

Companies should do everything they can to insulate themselves from potentially large penalties and wages that can be awarded in wage and hour claims (the prevalence of which claims is mushrooming at a staggering rate). Your company's written meal and rest break policies should reflect the language of the Wage Orders as much as possible. Rather than promising a rest break every four hours, the rest break policy should just parrot the applicable Wage Order. If the Wage Order for your industry requires a rest break starting with a 3 ½ hour shift, your policy should too.

The following example illustrates how a carefully drafted policy could help you in court. In a recent federal decision regarding a motion to dismiss a rest break violation claim, the court found that a policy that states "employees must take a 10 minute rest break for every four hour shift worked" could be interpreted to mean that the company did not allow for a rest break for a shift of fewer than four hours (when the Wage Orders require rest breaks beginning at shifts of three and one-half hours or more). If the employer's policy in that case been consistent with the language of the Wage Order, it may have been able to prevail on its motion to dismiss.

In addition, employers are advised to maintain accurate records that comprehensively establish that employees in fact took their meal and rest breaks. The Wage Orders specifically require employers to record the meal breaks of all non-exempt employees, and authorities generally take the position that the absence of written documentation establishing the meal periods creates a presumption that the meal breaks were not taken. From a practical standpoint, employees are likely to deny that they received meal breaks if the employer has not enforced a requirement that they record the break in accordance with company time-keeping protocol. By contrast, there is no requirement that employers record all paid rest breaks, although it is still an advisable practice to do so. California law requires the employer to *authorize* rest breaks, but there is no specific requirement that the employee takes each break or records the ones that they do take.

If you have questions about the sufficiency of your company's meal and rest break policies, contact Michael Oberbeck at 949-975-7500 or moberbeck@bkcglaw.com to discuss.

## CALIFORNIA PASSED A NEW LAW TO FURTHER PROTECT EMPLOYEES FROM COVENANTS NOT TO COMPETE

Since the 2008 California Supreme Court's decision *Edwards v. Arthur Anderson* (2008) 44 Cal.4th 937 that eliminated the "narrow restraint of trade exception" which previously allowed for enforceability of some limited noncompete agreements, California law has strongly protected employees from covenants not to compete. Under current California law, all agreements that preclude employees from competing with their employers post-termination are unenforceable, with only specific and limited exceptions related to either the sale of a business or protection of trade secrets.


However, creative employers with a multi-state presence have attempted to circumvent California's employee-friendly prohibition on non-competes by including provisions in employment contracts mandating that any employment related dispute must be litigated in another state that enforces noncompetes in which the employer has a presence, such as New York for example, and that the other state's law must govern the dispute. Lawyers generally refer to these types of contract clauses as "choice of law" and "forum selection clauses".

In some cases, employers' efforts to circumvent California law by including a choice of law and forum selection provision identifying another state that enforces noncompetes in which the employer maintains a presence have not been successful. However, in other instances these creative employers' efforts to thwart California's non-compete prohibition worked. For example, in *Harrison v. Synthes USA Sales, LLC*, 2013 WL 1007662, the California based employee signed an employment contract with his employer based out of Pennsylvania which included a covenant not to compete and a Pennsylvania choice of law and forum selection provisions. After the employee resigned, he filed a declaratory relief action in California federal court seeking to invalidate the noncompete based on California law. Shortly thereafter, the employer sued the employee in Pennsylvania state court alleging that the employee breached the noncompete covenant. In this case, the California federal court dismissed the employee's action, holding that the Pennsylvania court, which would uphold the enforceability of the noncompete, was the proper forum for the dispute given the existence of the Pennsylvania choice of law and forum selection provisions in the employment agreement.

The California legislature recently stepped in to ensure that these creative forum selection and governing law strategies used by employers to circumvent California's prohibition of noncompetes will no longer work. California passed a new statue effective January 1, 2017, Labor Code section 925, which prohibits employers from requiring employees who live and work in California to sign any agreement that mandates the employee must litigate an employment dispute outside of California or which deprives a California employee of the protections of California law. Significantly, this statute also enables the court to award an employee who successfully enforces his or her rights under the statute to reimbursement of attorney's fees. While this statute includes an exception for employees who are represented by counsel while negotiating the terms of the employment agreement, that circumstance is fairly unique in the employment context.

Although creative employers with a multi-state presence had been able to potentially get around California noncompete law by including favorable choice of law and forum selection clauses in their employment contracts, the recently enacted section 925 of the Labor Code no longer allows this strategy and subjects violators to potentially significant liability for employee's attorneys' fees. Employers need to be aware of this new Labor Code section and be sure to comply.

If you have questions about any of the issues discussed in this article, please contact Josh Waldman at jwaldman@bkcglaw.com or at 949-975-7500.

## Matters of Opinions: Appellate Update

Recently, BKCG received two appellate decisions upholding judgments in our clients' favor.

In *Vincent v. Ralphs*, the California Second District Court of Appeal upheld and affirmed the summary judgment that BKCG trial team Dan Kessler and Ros Lockwood obtained in 2015. Readers may recall that case involved an employee that was fired for violating Ralphs' return policies when the employee refunded herself a bottle of Jim Beam whiskey for more than she paid (see *Zero Proof Whiskey*, Summer 2015 Newsletter). Following a unique oral argument held at the USC Gould School of Law, the Appellate Court quickly and resoundingly affirmed the trial court's summary judgment, agreeing that the plaintiff had no evidence to support her case. Costs incurred on appeal were also awarded to BKCG client, Ralphs Grocery.

In *South Coast Merced Land Co. v. Red Mountain*, the Fourth District Court of Appeal affirmed the judgment obtained on the first day of trial by the same trial team of Dan Kessler and Ros Lockwood. The Red Mountain case focused on the contract between BKCG client Red Mountain and a home developer. The trial court granted BKCG's motions to exclude improper evidence at trial and thereafter awarded judgment in Red Mountain's favor, and later awarded attorney's fees and costs (see *Contracts Mean What They Say*, Spring 2016 Newsletter). The Court of Appeal was entitled to review the case on its merits and came to the very same conclusion as the trial court: when sophisticated parties make a contract, the agreed terms must be enforced. Red Mountain was also awarded its costs on appeal.

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

# 5 To Do-s For Your Summer Corporate Tune-up

With Summer upon us and business perhaps in a bit of a seasonal lull, now is a great time to take a few easy steps that could potentially save your business a lot of headaches, not to mention help you avoid or lessen your company's legal disputes and the corresponding legal expenses. We like to pass on some of the lessons we regularly learn from our dealings with hundreds of small and medium-sized corporate clients and, with this goal in mind we offer you, in no particular order, 5 things you can do to make your business' legal life easier.

1. Use an Employee Arbitration Agreement and Obtain EPLI. If you are a California employer, it is almost certainly the case that, sooner or later, you will face some sort of employment-related claim, whether it relates to a wage and hours issue, discrimination, or wrongful termination claim. Accordingly, if you are not doing so already, BKCG strongly encourages you to have your employees sign a properly-drafted agreement requiring them to resolve all permissible employment disputes with your company through binding arbitration conducted by a private dispute resolution service (certain claims such as those relating to workers' compensation, unemployment and disability benefits cannot be resolved through private arbitration). What's more, a California employee *can* be lawfully terminated for refusing to sign an employment arbitration agreement. Arbitration is essentially a trial adjudicated by a private individual, who is typically either a retired judge or an attorney with expertise in the subject matter of the dispute. In our experience, arbitration tends to yield far better results for an employer in an employment-related claim than the employer would otherwise obtain through a jury trial or a proceeding before the California Department of Labor Standards Enforcement, commonly known as the Labor Commissioner. Equally important, the fact that a disgruntled employee must arbitrate his or her claim will often either deter or derail altogether the filing of a frivolous, nuisance employment claim or lawsuit, whether by the employee herself, or by a plaintiffs' employment contingency lawyer acting on the employee's behalf, who is looking for a quick and easy pay day or lawsuit. Please also bear in mind that if your company does not have Employment Practices Liability Insurance with a wage and hours defense endorsement, to help cover the cost of defending and settling an employment claim, you should immediately speak to your commercial insurance broker about obtaining this coverage.

2. Review All Contracts for Notice Deadlines for Automatic Renewals and Options. Many contracts for goods and services, such as equipment leases, software and other online subscriptions, and vendor supply agreements have a fixed term which automatically renews unless the contracting party provides notice of non-renewal by a specific date, quite typically 30-90 days before the expiration of the term. Similarly, options to extend real property leases always contain very explicit notice requirements that the tenant must follow in order to exercise its option. Unfortunately, clients all too frequently fail, when the contract or lease is signed, quite often after an exhausting negotiation process, to identify and calendar these critical notice dates and deadlines. As a result, the client either finds itself stuck with another year of paying for a contract it no longer wants or needs, or completely misses out on an option to extend its premises lease at an extremely favorable, below-market rental value. So, take this opportunity to dig out your company's most significant long-term agreements and check to make sure this fate won't befall your business.

3. Do You Need a Corporate Buy-Sell, or Shareholders', Agreement with Your Business Partners, or an Update to Your Existing Agreement? If you own your business through a corporation, your business is valuable and you have one or more business partners, the odds are great that you need a buy-sell agreement. This agreement typically places restrictions on each owner's ability to sell his or her ownership interest; defines events which give shareholders the right to purchase another shareholder's stock, such as upon the shareholder's resignation, termination, death or retirement; and provides a methodology to determine the purchase price and terms for the sale of the stock. If your business is a limited liability company and has an Operating Agreement from when it was formed, the agreement may contain some buy-sell provisions, but it is highly likely that these provisions are not what you would want or need them to be today and that they should be revised. Contrary to a commonly-held belief, absent a written buy-sell agreement, there is no way to protect the other owners' best interests, or to compel the sale of a shareholder's stock, if the shareholder ceases to be active in the business, is ordered to transfer half of his or her interest to the owner's ex-spouse in a divorce action, declares bankruptcy or dies. Such occurrences are the cause of many expensive legal battles between business owners. Similarly, existing buy-sell agreements, written years ago under very different circumstances, can have drastic unintended consequences. For example, allowing an exiting shareholder's stock to be purchased at a fraction of its current value because the old buy-sell agreement set the purchase price using a valuation formula that no longer reflects industry valuation norms. The best time to address these issues is now, when things are harmonious between the business owners and before disagreements arise.

4. Have You Trademarked Your Brand? In today's business works, branding is everything and a properly managed and cultivated brand can, literally, be worth billions of dollars. But, despite the old adage that imitation is the sincerest form of flattery, there is nothing flattering about having a competitor or a short-term profit seeker ride on the coattails of your business' hard work, large investment of capital and goodwill. This freeloading can take many forms, from counterfeiting your products, to misappropriating your slogans or logo, parroting your marketing slogans, to registering a URL that matches your company's name and using it to deceive consumers into thinking they're doing business with you. Many of these problems, however, can be avoided if you obtain trademark protection for your product, logo or catchphrase (or a service mark for your services). The Lanham Act, which governs Federal trademark registrations, provides powerful and effective legal tools to stop trademark infringers in their tracks and a well-drafted cease-and-desist letter from a trademark lawyer will often be sufficient to put an end to the transgressor's wrongful conduct. By the same token, if your company is rolling out a new brand or logo, you should also seek legal guidance prior to its launch, to ensure you are not the target of someone else's cease-and-desist letter, and then register your new creations under the Lanham Act.

5. Talk to Your Business Lawyer About Your Company's New Ventures. Legal risk is omnipresent and business changes bring new risk that can result in unforeseen and expensive legal consequences. Is your company venturing into a brand new business sector that you are unfamiliar with? Are you buying a building for your company because you're tired of paying rent? Do you intend to hire a hotshot new CEO at a huge salary and with stock options because you believe he or she can take your business to the next level? All of these actions can have a significant impact on your business if handled, structured or documented in a less than optimal manner. Accomplishing the same goal in two different ways can result in substantially divergent levels of potential legal liability if the new venture or the new hire does not turn out the way you planned. Even a fifteen minute phone conversation with one of BKCG's seasoned and experienced business, real estate, employment, estate planning or intellectual property lawyers can point out risks you did not even realize you faced - or have you approach the entire transaction in an entirely different way than what you intended, which will significantly mitigate or reduce your legal risk. Conversely, cure is always more expensive than prevention and sometimes, once a business transaction has already been structured in a certain way, there is no truly satisfactory legal fix.

Please contact our transactional business partner Gregory Clement at (949) 975-7586 or at gclement@bkcglaw.com if you have questions about any of the foregoing issues, or any other legal issue confronting your business.

# California Continues To Tinker With Its Fair Pay Act


Earlier this year, a revision to California's Fair Pay Act went into effect that will have an immediate and significant impact on California employers. To understand how the revised California Fair Pay Act will ripple through employment law, a brief look at the equal pay landscape is necessary.

Pay disparity between men and women in the United States has long been a political hot button, and there is no doubt that the disparity exists. However, some statistics have been used to distort that disparity. For example, in 2014 the U.S. Bureau of Labor Statistics estimated that a full-time woman working year-round earned an average of 83 cents less for every dollar that a full-time working man earned year-round. This statistic led to the oft quoted "17 percent wage gap." This statistic can be misleading, though, because it is a simple ratio of the median earnings of men and women across all different industries. The calculations do not take into account the difference between areas of work that are traditionally disproportionately male or female. For example, the teaching profession is disproportionately female, but teachers only work 9 months out of the year. Thus, this impacts their "year-round" salary. In fact, a 2015 "fact checker" article in the Washington Post showed that the BLS statistics can vary the wage gap from as high as 22 cents to 18 cents (based on weekly wages), all the way down to 5 cents for unmarried women. This is not to say that the gender wage gap is not real–it is. The point is that wage gap statistics can be very misleading, which is troubling when legal liability can be imposed based on it.

That brings us to California's Fair Pay Act. Although California has had an equal pay statute dating back to the 1940's, it was poorly worded and of little effect. In 2015, California updated the statute and in 2016 the revised law went into effect. The revised law required that men and women be paid equally for "substantially similar work" instead of "equal work" as the old law required. The 2016 law also removed employer defenses based on geography as well as requiring other defenses based on "bona fide" business factors. Finally, the 2016 revisions also made it improper for employers to prohibit employees from, or retaliate against employees for, discussing, inquiring or complaining about pay. All in all, the 2016 changes reformed California's Equal Pay Act from a meaningless statute to a much more practical, and enforceable law aimed at leveling workplace pay.

Just one year later, the California legislature chose to again tinker with the Fair Pay Act. Effective 2017, California again revamped the equal pay statute, now known as the California Fair Pay Act. In this iteration, the state legislature created ample breeding grounds for severe abuses by a broader group of employees. First, the 2017 revisions now prohibit an employer from using an employee's prior compensation as the sole justification for a wage differential. California employers may still ask about prior salaries (unlike Massachusetts), but that cannot be the sole basis for a difference in pay among a man and a woman. This means that California employers must be sure to document all bona fide reasons for their compensation decisions. In addition, and most notably, the 2017 revisions expanded the scope of the Act to include wage disparity based on race or ethnicity in addition to gender. This adds another arrow in the employment plaintiff bar's quiver against California employers. While all protected classes (race, gender, sexual orientation, religion, etc.) are already safeguarded from disparate treatment (of any kind) in the workplace by the Fair Employment and Housing Act, these revisions now bolt on additional statutes for the plaintiff's bar to potentially exploit.

In light of these recent changes in the law, BKCG highly recommends that employers be proactive. We recommend that employers review their handbooks for any language that may run afoul of the revisions. It is also wise to look at the company's record keeping policies to ensure that evidence demonstrating bona fide reasons for wage decisions are well documented. In addition, prudent employers should ensure that management employees are properly educated about their obligations under the law. Finally, employers can contact BKCG to discuss whether or not a professional analysis and assessment of compensation makes sense for your company in order to head off misguided claims down the road. In the ever-changing landscape of California employment law, it is critical that employers stay vigilant.

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

## New "Fair Chance" Law Warrants Immediate Attention By Employers (continued from page 1)

So, for example, if that employer mentioned above is looking to fill a position washing windows in the pharmacy, it could be improper for him to consider an applicant's five-year old conviction for a misdemeanor offense involving controlled substances. The statute does not end there, however, as even more is required of employers under this new provision of FEHA. If the employer utilizes a "bright line" conviction disqualification or consideration (for example, say our employer with the pharmacy disqualifies any job applicant with a prior conviction for a controlled substance offense), that employer must show that "bright-line" is properly drawn to distinguish between individuals that do and do not pose "an unacceptable level of risk" and that the convictions being used to disqualify or otherwise adversely impact the employee or applicant "have a direct and negative bearing on the person's ability to perform the duties or responsibilities necessarily related to the employment position."

On the other hand, if the employer does not use a "bright-line" conviction disqualification but instead does an individual assessment of the individual and the prior criminal history, that employer must have policies and procedures that ensure the applicant or employee is (1) given notice before any adverse action is taken that the employer is screening the applicant or employee out based upon the criminal history, (2) that the applicant or employee has a reasonable opportunity to demonstrate that exclusion is not warranted and (3) that the employer considers the applicant's or employee's input about why the exclusion is not warranted before making a decision. That decision must still be "job-related and consistent with business necessity."

The statute also requires that regardless of whether the employer is using a bright-line disqualification or is employing an individualized assessment, the employer must give notice to the applicant or employee of a disqualifying conviction and the applicant or employee must be provided a reasonable opportunity to show that the information the employer is relying upon is "factually inaccurate." A factually inaccurate criminal record cannot be used by an employer as a basis for an employment decision.

Finally, even if the employer jumps through all of these hoops, the statute still allows the employee or applicant to challenge use of the criminal history by showing there is a "less discriminatory policy or practice that serves the employer's goals as effectively" without significantly increasing the cost or burden on the employer.

As you can see, this new provision of FEHA is daunting to say the least. In addition, some localities (such as San Francisco and Los Angeles) have even further restrictions on the use of an applicant's or employee's prior criminal history. As a result, any employer with a policy or practice of using prior criminal history to make employment decisions should consult an attorney to ensure that the employer is in compliance with the law.

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

# PRACTICAL LITIGATION AND ATTORNEY'S FEES

Civil litigation can be lengthy and costly, but worth the time and effort when it is the best or only way to resolve your legal dispute. However, halfway through your case is not a good time to determine whether litigation is practically sound for your dispute. While you can trust your attorney to do his or her best to cost effectively manage your case, your attorney can only do so much. Your attorney's obligation is to represent your legal interests – and that may not always coincide with a cost-effective and swift representation. The legal and factual issues in your case, and the cooperation (or lack of cooperation) by your opponent will affect and often drive the work your attorney has to perform. To avoid the surprise of a large fee bill during litigation, ask yourself a few questions before starting litigation:

- Has my opponent done something (or failed to do something) that has directly caused me to lose money?
- How much money have I lost?
- Have I exhausted cost-effective ways to recover the money I have lost?
- If I commence litigation, how will I pay my attorney?
- Do I have a way to recover the attorney's fees I have paid my attorneys from my opponent?

By answering these questions before you start litigation, you can better determine whether litigation is a practical option for resolving your dispute. You should pose the last question to your attorney. To help him or her answer this question, make sure you provide your attorney any contracts between you and your opponent(s)–and of course, as many details as necessary to answer your attorney's questions about the dispute. These details are critical for determining the attorney's fee issue because California and Federal law do not generally require your opponent to pay our attorney's fees.

Unless you bring a lawsuit against your opponent based on a contract stating that the "prevailing party" in the lawsuit can recover attorney's fees from the losing party, or unless you bring a statutory claim against your opponent providing the same right to fees, you are responsible for paying your attorney's fees. That is precisely why it is important to know this information up front.

Once you determine how much money you can realistically aim to recover, how you plan to pay the fees, and whether you can later recover the fees from your opponent, you can make a more informed decision on whether litigation is the best option for your dispute. Typically, the larger the amount of money at dispute, the lengthier and more costly litigation will be.

Knowing this information up front avoids unnecessary fee disputes with your attorney during litigation, and allows your attorney to focus on representing your legal interests.

Please contact Suren Weerasuriya at (949) 975-7500 or sweerasuriya@bkcglaw.com 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

BKCG

Visit our web site at www.bkcglaw.com

Be sure to visit us on LinkedIn


Burkhalter Kessler Clement & George LLP (BKCG) advises and protects businesses and high net worth individuals through experienced litigation and transactional lawyers. Core practice areas include: Business litigation in state and federal courts, as well as FINRA, AAA and JAMS arbitration and mediation; Corporate, transactional and employment law documentation; and Estate Planning and Probate services through the Firm's State Bar certified Estate Planning Specialist.