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BURKHALTER KESSLER CLEMENT & GEORGE LLP

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Covid-19 Changed The Litigation Process In Many Ways, And Some Of Those Changes Will Likely Remain Long After The Pandemic Ends

The Covid-19 pandemic impacted lives and industries in many significant ways, and the litigation process was not immune from its sweeping effects. The pandemic caused lawyers to virtually meet with their clients rather than discuss strategy in-person in conference rooms, it made virtual, video depositions and mediations commonplace and it even forced courts and arbitrators to virtually conduct significant hearings, and even hold some full-blown trials online, with jurors sitting at home watching witnesses testify on screens. In short, Covid essentially moved the entire litigation process to an online environment.

Although the end of the pandemic may finally be in sight, many of the changes it brought to litigation are likely here to stay because we have learned through forced experience that they actually improved the litigation process. After adapting to Covid's impacts on litigation for over a year, BKCG believes that Covid will likely change the way parties litigate post-pandemic in at least three significant ways.

First, while virtual depositions were rare prior to the pandemic, they will likely become ubiquitous going forward. For most witnesses, we have discovered that little is gained by requiring all of the lawyers, the witness, court reporter and a videographer to be physically sitting in the same room for a deposition. In most cases, virtual depositions functioned essentially the same as in-person ones, but eliminated the time and expense related to travel. Given that depositions frequently took place in different cities from BKCG's office (and sometimes in different states, or even different countries), removing this travel results in substantial gains in efficiency and resulting cost savings for clients.

Admittedly, virtual depositions present some drawbacks, as reading a witness's body language can be more challenging online, examining witnesses virtually concerning documents in document intensive matters can be more difficult than it would be in-person and the virtual deposition environment inevitably provides unscrupulous lawyers with methods to unethically assist their clients during deposition questioning. Due to these negatives, good reasons exist to continue to take critical witness depositions in-person when feasible. However, due to the changes the pandemic forced upon us, we now know that lawyers can effectively depose most witnesses virtually and save substantial travel time (and reduce their clients' fees and expenses) by doing so. (continued on page 6)

New California Statute Provides For Retroactive COVID Related Paid Sick Leave

All California employers with more than 25 employees should take note that California enacted a new Labor Code provision effective March 19, 2021 that has retroactive effect back to January of this year. Labor Code Section 248.2 requires all employers with more than 25 employees to provide up to 80 hours of paid "COVID-19 supplemental" leave for any full-time employees wanting or needing to take time away from work for a broad variety of COVID related reasons.

Specifically, the statute requires the employer provide the paid leave when the employee has been (1) ordered to submit to a quarantine or isolation period, (2) advised by a health practitioner to quarantine or isolate, (3) is experiencing symptoms related to a COVID vaccine that prevent the employee from being able to work at the workplace or telework, (4) is experiencing COVID symptoms and seeking a diagnosis, (5) is caring for a family member who has been ordered or advised to quarantine or isolate or, (6) is caring for a child whose school or place of care is closed for COVID related reasons. (continued on page 2)

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Alton G. Burkhalter & Daniel J. Kessler

Space – The Final Frontier … For Litigation?

Just a few weeks ago, the crew and astronauts on the International Space Station were put on alert when a piece of space debris came within a concerning distance of the ISS's orbit. This is not the first case of orbital debris sounding alarms aboard the ISS – in fact, crew members have made several incremental changes to the ISS orbit over the years to avoid collisions with space junk, both naturally occurring and man-made. There are more than 500 defunct satellites, over 200 spent rocket stages, and thousands of pieces of other debris littering the Geostationary Orbit (GEO). With the proliferation of satellites already orbiting the planet – SpaceX alone is launching thousands more satellites to create a Starlink global network – the risk of satellites colliding with a spacecraft, or each other, undoubtedly increases.

To paraphrase Stan Lee, with great risk comes great opportunity – for lawyers, that is. Let's say that a defunct satellite owned by one international company collides with the functioning satellite of another company domiciled in a different country. To assess liability and potentially seek compensation, we would actually look to two antiquated relics from the dawn of the space race – the Outer Space Treaty of 1967 and the Liability Convention of 1972 are the key treaties governing legal liability in space.

For space-related injuries, the treaties require proof of fault to attach liability. While "fault" is an express requirement of liability under the Liability Convention, the treaty does not define "fault" at all and sheds no light on its meaning! The United States government, during the ratification of the treaty, equated fault to "negligence", a well established standard in American jurisprudence, but this interpretation was never formally adopted. The remedy for liability under the Liability Convention is payment or other damages "in accordance with international law and the principles of justice and equity, in order to … restore the person … to the condition which would have existed if the damage had not occurred." Under U.S. law, this remedy might allow the aggrieved party to seek lost revenues or profits, but it is not clear whether this restorative principle would apply under the treaties.

Alternatively, U.S. companies whose satellites cause damage could face exposure in a U.S. federal court. A California based company could be sued in a California federal court based on state tort law. The Liability Convention specifically allows for a claim in a local venue as an alternative to the treaty process. Even so, the Court's jurisdiction and suitability would almost certainly face a challenge from the defendant, as would the attempt to apply California law to a collision in space. If the claim survived jurisdictional challenges, a negligence claim against a California company for space damage would require proof that the company had a duty to avoid the collision, failed to conform to a required standard of conduct in attempting to satisfy that duty and proximately caused actual damages. Establishing that standard of conduct – in order to prove that the defendant fell below it – may prove to be challenging because there are no actual treaties or requirements governing the mitigation of space junk. There are only non-binding guidelines directing satellite operators to consider measures to "limit the probability of accidental collisions-in-orbit." American satellite operators must conform to FCC licensing regulations that require a description of operational strategies that would be used to mitigate orbital debris, but there are no specific regulations for the decommission and removal of a satellite from orbit.

Space debris litigation is an untested and unproven field. As Earth's orbit becomes further cluttered with space junk and discarded satellites, debris mitigation will take on significant importance, and there will be cases that will subject traditional legal concepts of jurisdiction and suitability to new tests. With the dawn of civilian space travel now also upon us, it may not be long before space is also the venue for personal injury or wrongful death claims, and the lawyers filing those claims will be boldly going where no lawyer has gone before.

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New California Statute Provides For Retroactive COVID Related Paid Sick Leave (continued from page 1)

The statute requires that the employer provide the paid sick leave "upon the oral or written request of the covered employee to the employer." Importantly, no employee is required to use their vacation time, paid time off or other paid or unpaid leave before being entitled to the COVID supplemental leave. This requirement for the employer to provide this supplemental leave is in effect until September 30, 2021.

Employers must also note that the statute applies retroactively to January 1, 2021. This means that if an employee took leave from January 1, 2021 forward for any of the COVID related reasons that trigger the supplemental leave under the statute, the employer (upon the employee's oral or written request) must pay them in accordance with the statute's provisions. The payment must be made on or before the next pay period following the employee's request.

The statute has some fairly complicated provisions regarding how the employer must calculate the amount of the sick time pay and there are some special provisions for employees working fewer than 40 hours a week so check with your attorney before denying any request for COVID related paid sick time.

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

4 Important Things For California Businesses To Consider As The Pandemic Fades

As businesses begin to return to something resembling pre-Pandemic operations, we wanted to bring up a few issues that we feel our friends and clients should consider in order to minimize the risk of lawsuits and other legal difficulties to their businesses.

1. Employment Law Issues. Wage and hour, and employment law claims generally, represent perhaps one of the biggest legal challenges facing California businesses. The past year has seen a raft of new laws which employers are expected to immediately implement. One significant example of this is the new retroactive COVID-related paid sick leave law, which is discussed in Ros Lockwood's article elsewhere in this newsletter. However, employers must also contend with the usual employment laws which require them to be ever-vigilant and also make both regular adjustments, as well as changes due to changing employee work habits brought about by the recent lockdown. Two examples of the latter are minimum salaries for exempt employees and reimbursement of employee expenses. As of January 1, 2021, based on the increase in the California minimum wage to $13.00/hour for employers with 25 employees or fewer and $14.00/hour with 26 or more employees, the minimum legally-required annual salary for exempt employees increased to $54,080 and $58,240 per year, respectively. For computer software employees, the annual salary requirement increased to $98,907.20. All employers need to ensure that they meet these minimum salary requirements for their exempt employees. As for reimbursement of employee expenses, we employment lawyers interpret Labor Code Section 2802 to require employers to contribute to the home internet expenses of employees working online from home – just as California courts ruled, several years, ago that employers are expected to contribute to the cell phone expenses of employees who use their personal cell phones for work purposes, even if the employee has a flat rate plan. We recommend a minimum employee stipend of $25/month for cell phone usage and $25 for home internet expenses. Employment laws in California are constantly changing and the failure to keep up with them can be ruinously expensive. We can help!

2. California Deductibility of PPP Loans. On April 29, 2021 Governor Newsom signed California Assembly Bill 80, to substantially align California with Federal law governing the deductibility of business expenses paid using proceeds from forgiven Paycheck Protection Program (PPP) loans. However, as with many California laws, this one comes with caveats. In order for such expenses to be deductible, non-publicly traded companies must be able to prove either that their gross receipts during a quarter of 2020 were at least 25% lower than their gross receipts for the corresponding quarter of 2019; or, that their gross receipts for 2020 as a whole were at least 25% lower than their gross receipts for 2019. These criteria were also the qualifying criteria for businesses to receive a second PPP loan beginning in late 2020. Publicly traded companies cannot deduct any amount of expenses paid with funds from forgiven PPP loans. Please consult with your CPA or tax advisor for additional information on this subject.

3. Use of Independent Contractors. Especially in light of employment law changes such as those described above, businesses now reopening or scaling back up will have an even greater incentive than usual to hire workers as independent contractors, rather than as employees. However, I strongly urge you to resist that temptation, at least until you have been able, with the assistance of competent legal counsel (such as BKCG!), to ascertain that doing so is lawful under current California law. What many businesses still do not comprehend is that treating someone as a properly classified independent contractor is not just as simple as both parties agreeing to the nature of the relationship and then signing an Independent Contractor Agreement. Nor is it sufficient that an individual simply forms an entity, so that you can issue a Form 1099 to the entity, rather than to the individual, and consider the entity an independent contractor. Rather, the legitimacy of treating someone as an independent contractor hinges almost entirely on the facts and circumstances of the underlying business relationship between the parties. As a recap to our prior articles on this subject, to begin with, unless the worker is in an exempted occupation (mostly professional occupations such as doctors, lawyers, dentists, licensed insurance agents, accountants, architects and engineers, private investigators, real estate agents, translators, appraisers and home inspectors, etc.), the worker must satisfy the dreaded ABC test in order to be properly classified as an independent contractor.

All three of the following conditions must be met: (A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, (B) the worker performs work that is outside the usual course of the hiring entity's business, and (C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. For most businesses, the (B) prong of the test is the killer since, in most situations, the hiring entity does intend to have the worker perform tasks that are very much a part of its regular core business. That factor alone precludes independent contractor status. The analysis does not stop there either, because even if the worker is engaged in an exempt occupation, the business relationship must still satisfy the Borello test that used to be the default test in California. The Borello test, together with more details on the ABC test, are explained on the California Department of Industrial Relations' website here: https://www.dir.ca.gov/dlse/faq_independentcontractor.htm. The legal penalties and ramifications of employee misclassification can be severe and punitive so please tread carefully and seek legal advice before you hire an independent contractor! (continued on page 5)

The New Department Of Financial Protection And Innovation And Its Regulatory Powers

In September 2020, the California legislature enacted the California Consumer Financial Protection Law (the "CFPL"), signed into law by Governor Newsom. The CFPL renamed the Department of Business Oversight as the Department of Financial Protection and Innovation (the "DFPI") and expands the DFPI's regulatory and enforcement powers.

The CCFPL also broadly grants the DFPI power to regulate unfair, deceptive, and abusive acts or practices engaged in by covered persons and service providers, as those terms mean under California law. However, the DFPI may implement new rules and regulations which modify the current legal framework regarding unfair, deceptive, and abusive business practices. While the DFPI has indicated that it will promulgate rules by January 2023, the Debt Collection Licensing Act (the "DCLA") allows the DFPI to regulate debt collection practices as well and has already changed how such businesses must operate.

The DCLA requires debt collection businesses to apply for a DFPI license by December 31, 2021, or else those businesses will have to wait for the DFPI to issue such a license before they can operate in California. In addition, the DFPI has issued formal reminders regarding protections for California renters and homeowners facing economic hardship due to the COVID-19 pandemic. These include such protections as examinations of mortgage lenders to ensure they are complying with state and federal laws protecting against foreclosures, and creditors not being able to charge, or even attempt to collect, late fees for COVID-19 rental debt if the renter has submitted a "declaration of COVID-19 financial distress." Debt collectors and mortgage lenders, as well as the consumers using their services, should pay close attention to these protections as the pandemic comes to an end.

In addition, the DFPI will be focusing in on other COVID-19 related business practices. The DFPI reports that it has seen an increase of more than 40 percent in the number of complaints it received since the onset of the COVID-19 pandemic. The DFPI tracks all of these complaints for investigation and enforcement, such as the worrisome trend of scams targeting federal stimulus recipients. The DFPI also indicated that it will be investigating lenders who attempt to evade the state's new, and stricter, interest rate caps because the DFPI "will not tolerate excessive charges to consumers during these difficult times," according to DFPI Commissioner Manuel Alvarez.

Another major expansion of the department's powers is that the DFPI can now regulate financial technology companies and services. This means that the DFPI now has power to enforce regulations regarding companies that provide services such as digital banking, consumer credit, and payment processing, and most of those companies must now register with the DFPI. These types of business have historically not fallen within the former Department of Business Oversight's regulation, and thus the DFPI is likely to implement regulations focusing specifically on financial technology services.

The DFPI also has new powers to regulate student loan servicing companies, and new remedies are available to consumers which will likely lead to an influx of litigation. Although the DFPI has said that its financial technology registration regulations will not be finalized until January 2023, business should operate is if they are subject to the DFPI's starting on January 2021 in order to avoid any issues going forward.

If your business needs advice navigating the new business regulations implemented by the DFPI, or requires representation in any matter, BKCG's experienced attorneys can assist with any issues your business faces.

Please contact Michael McConnell at mmcconnell@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

4 Important Things For California Businesses To Consider As The Pandemic Fades (continued from page 3)

4. Reviewing Your Major Business Contracts. Let's be honest, the last thing that business owners ever want to do is to dig out and review the contracts they have signed with their landlords, vendors, suppliers and other business partners! However, doing so is essential in order to avoid unintended or undesired consequences, or nasty surprises. Contracts contain clauses such as renewal options, automatic renewals, and periodic adjustments in prices or terms which require notice to be given within a specified period or by a certain date to either exercise the option or to avoid an unwanted automatic renewal, or some other action on the part of the business. Ideally, those deadlines or time windows should be calendared when the agreement is signed; however, business owners are often so relieved to get an agreement negotiated and signed, and to get back to running their business, that they neglect to do so. To that end, if you are reading this article, stop and think about your company's most significant current business agreements.

Do you know when they expire? Do you even know where they are? Have you calendared the date by which you need to tell your landlord whether you want to exercise your lease option, or your option to purchase the building? Do you even have fully-executed copies of your most important business contracts?

Don't rely upon unsigned drafts! I can assure you that a few minutes spent reviewing the contracts most critical to your business may save you months, or even years, of headaches, legal problems and regrets. And, if you can't bring yourself to do so, send them to me and I will review them for you!

Please contact Greg Clement at gclement@bkcglaw.com or (949) 975-7586 if you have any questions about this article, or any other related matter.

Breaking Down The Lunch Break

In a case which was decided just this February, the Supreme Court of California recently changed the rules regarding how employers calculate meal breaks for their employees, and so it behooves every employer in California to review their practices to ensure that they are not exposing themselves to unnecessary liability. Generally, under California law, employees must receive a 30-minute, unpaid meal break for every five hours that they work, and a second 30-minute meal break if they work 10 hours. Given these requirements, a common practice was rounding time-clock punches to the nearest 10-minute increment, which meant that sometimes employees had breaks that were a few minutes under 30-minutes.

For example, some timekeeping systems will show an employee who clocks out for lunch at 1:02 p.m. to have clocked out at 1:00 p.m. If that employee returns from her meal break at 1:28 p.m. and clocks in, the timekeeping system might show 1:30 p.m. A system that shows consistently that the clock-outs and clock-ins always occur exactly on the 10-minute mark, that serves as a red flag and can be used as evidence against an employee defending a lawsuit alleging meal break violations.

In *Donohue v. AMN Services, LLC*, the Supreme Court declared that the practice of rounding time up to 30-minutes, depriving employees of a few minutes of their break was an unlawful violation of the California Labor Code, and the employer in that case was therefore liable to the employee for each missed break. Even though employers are not required to 'police' meal breaks to ensure that the employees take their full 30 minutes, they must provide some mechanism by which employees can record their meal periods, and also to ensure that the mechanism is used properly.

If you use a time-keeping system to track your employees' breaks, it may be in your interest to ensure that you are not using technology that rounds to the nearest 10 minutes, so that you do not violate the Labor Code unwittingly and find yourself in hot legal water.

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Covid-19 Changed The Litigation Process In Many Ways, And Some Of Those Changes Will Likely Remain Long After The Pandemic Ends (continued from page 1)

Second, the pandemic has likely changed the mediation process forever. Prior to Covid-19, conducting a mediation required that all parties, all of their lawyers, sometimes an insurance adjuster, and a busy mediator must physically be in same place at the same time. Not only did this process require all of these people to have to travel (sometimes hours) but finding an available date for so many busy people posed substantial scheduling challenges that often significantly delayed a mediation from taking place. The virtual mediation environment largely solved, or least heavily mitigated, these problems. By mediating virtually, no party needs to travel, which obviously leads to substantial time and cost savings. Further, because a party can mediate while in their home or office, they can usually take extended breaks from the mediation to conduct other business, which allows for greater flexibility with scheduling. Surprisingly, BKCG has continued to enjoy significant success mediating in this online environment and experienced very few, if any, drawbacks to virtual mediation. Moreover, many mediators with whom BKCG have discussed this issue share the same sentiment. In short, it appears that virtual mediation is likely here to stay for most cases, and that is probably a good thing for all litigation participants.

Finally, the pandemic has likely changed how lawyers appear in court and arbitration for most pre-trial hearings going forward. While lawyers pre-pandemic already often appeared telephonically for court and arbitration appearances related to minor procedural matters like status conferences and the like, most lawyers (and most judges and arbitrators) preferred that counsel appear in-person for hearings to discuss substantive motions and issues. A general perception existed that it was disrespectful to the judge or arbitrator to telephonically appear for a dispositive motion and thus lawyers rarely appeared telephonically to argue a summary judgment motion, for example. The pandemic took away lawyers' options to appear in person and forced lawyers to appear telephonically for all hearings, regardless of their significance. While telephonic appearances are not perfect and technological glitches periodically occur, BKCG found that appearing telephonically for substantive motions was generally effective, saved hours of travel time (and resulting fee savings) and this new normal likely changed many lawyers' (and judges' and arbitrators') perceptions concerning telephonic appearances for substantive matters. In the future, lawyers will likely appear telephonically or via video-conference for most hearings, including dispositive ones.

While we at BKCG cannot wait to work and collaborate with our colleagues in the office again and again meet with our clients over coffee in a conference room, we believe this pandemic will improve at least the foregoing three aspects of the litigation process going forward for the benefit of all parties, and especially the litigants.

Please contact Josh Waldman at jwaldman@bkcglaw.com or call (949) 975-7500 if you have any questions regarding COVID related claims against your business.

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