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ISSUE 50 | A QUARTERLY PUBLICATION | December 2019

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New Employment Law Changes In California And Nevada

As the new year approaches, California and Nevada are both set to adopt significant new employment law changes that will take effect next year.

In Nevada, for instance, starting January 1, 2020, it will be unlawful for an employer to deny employment to a prospective employee who has submitted to a drug screening test that indicates the presence of marijuana. Assembly Bill 132 makes Nevada the first state to enact such a law (although New York City enacted a similar law earlier this year).

The Nevada legislation states, "It is unlawful for any employer in this State to fail or refuse to hire a prospective employee because the employee submitted to a screening test and the results of the screening test indicate the presence of marijuana." A "screening test" is defined in the law as "a test of a person's blood, urine, hair or saliva to detect the general presence of a controlled substance or any other drug."

However, it is important to note that the law provides several exceptions. For instance, the law does not apply to applicants who apply for positions as (1) firefighters, (2) emergency medical technicians, (3) motor vehicle operators for whom a drug screening is required by law, or (4) any position that, "in the determination of the employer, could adversely affect the safety of others."

Employers in Nevada are still permitted to refuse to hire applicants who test positive for other drugs, and may prohibit the use of marijuana at work.

California, meanwhile, will be subject to a host of its own new laws in 2020. Perhaps most significantly, Assembly Bill 5 will go into effect, which statutorily adopts the controversial test set out in *Dynamex Operations West, Inc. v. Superior Court* (2018) to determine whether an individual can be properly classified as an independent contractor versus an employee.

Under the new law, there will be a presumption that an individual is an employee unless the hiring entity can establish *all* of the three following elements: (1) the person is free from the control and direction of the hiring entity in connection with the performance of the work; (2) the person performs work that is outside the usual course of the hiring entity's business; and (3) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. Certain individuals are exempt from this law, including attorneys, real estate agents, and physicians.

Several other new California laws taking effect in 2020 will expand lactation accommodations and extend paid family leave from six weeks to eight weeks.

For more information about the new laws, contact California partner Chris Schmitthenner or Nevada associate Paul Ballou.

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What happens when someone uses a contractor's license number to carry out a project without the contractor's knowledge? What if they appropriate the business's letterhead or wear the company's uniform and work on projects under the company's name? Is the company liable to third parties for any damages that arise from the imposter?

Clients come to LGC with these questions and the answer often surprises them. In fact, contractors may be responsible for damages if they are not careful. It is important to identify the situations that may arise and determine what steps a contractor can take to prevent potential liability.

The potential for liability is seen in an unpublished decision from several years ago from the California Court of Appeal in the case of *Dosremedios v. Pantheon Design & Construction*.

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Effectiveness Of Handwritten Changes To Trusts

Typically, a trust declaration is a printed document that bears the settlor's signature. Can the settlor/trustee simply make handwritten interlineations, crossing out or adding substantive provisions to the trust? The answer to that is…it depends. As is always the best practice, the first place to look is the trust language itself.

The Court of Appeal recently looked at this issue in *Pena v. Grey Dey*. There, the Court evaluated whether James Robert Anderson, settlor and trustee of the James Robert Anderson Revocable Trust (the "Trust"), validly amended the Trust when he made handwritten interlineations to the First Amendment to the Trust, which made Grey Dey a beneficiary.

After making the interlineations, Anderson sent both the original trust instrument and the interlineated First Amendment to his attorney to have the new disposition of this trust estate formalized in a second amendment to the Trust. Anderson died before the formal amendment was prepared for his signature.

The Court, as it will always do, looked at the intent of the trustor/Anderson and to the express language of the Trust. The Court concluded the interlineations did not validly amend the Trust because the Trust specifically required that amendments "be made by written instrument *signed by the settlor* and delivered to the trustee."

While the law considers the interlineations as a separate written instrument from the Trust, and while there can be no doubt Anderson delivered them to himself as trustee, he did not sign them.

Notably, Dey argued that Anderson effectively signed the interlineations by attaching a Post-it note to the documents (to the attorney), which read, "Hi Scott, Here they are. First one is 2004. Second is 2008. Enjoy! Best, Rob." The Court rejected this argument because the Post-it note was a separate document and could not be construed as being part of the interlineations.

The Court expressly acknowledged that there was no dispute that Anderson intended Dey to receive a portion of his Trust estate, which made the Court's ultimate decision a difficult one. Ultimately the issue came down to two key factors for the Court: (1) what is the express language of the Trust, and (2) what is the true intent of the settlor.

Probate Code §15402 states that "unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation."

The Probate Code further provides that revocation can be performed by (1) compliance with any method set forth in the trust, or (2) by a writing "signed by the settlor" and delivered to the trustee during the lifetime of the settlor. This same procedure applies to modifications.

Thus, unless the trust language states otherwise, a revocation or modification of a trust must be signed. If the trust specifies how the trust is to be modified, that method *must* be used to amend the trust.

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LGC Participates In Candlelighters Charity Race

LGC was proud to once again participate in the Las Vegas Candlelighters Superhero 5K.

The event was put on by Candlelighters Childhood Cancer Foundation of Nevada, an organization created to provide emotional support, quality of life programs, and financial assistance for children and their families affected by childhood cancer.

The annual event featured participants and sponsors dressed as superheroes and Disney characters.

Attorneys and staff from LGC, along with their family and pets, participated in the race. They also passed out Otter Pops to the race participants.

All funds raised benefit the families served by Candlelighters.

Candlelighters funds numerous programs: emotional support programs, like art therapy and counseling; quality-of-life programs, like "No More Chemo Parties" and movie nights; and financial assistance for families.

LGC strives to give back to its local community, both in charitable work and pro-bono legal representation.

Unauthorized Use Of Contractors' License

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In *Dosremedios*, a former partner of Pantheon, a construction company, used Pantheon's license to carry out an unauthorized project for third-party homeowners.

Pantheon negligently failed to notify the state license board that the former partner was no longer associated with the company. Thus, public records linked the unlicensed contractor to the company.

The Court noted that an unknowing contractor may be liable in certain circumstances under an ostensible agent theory. Under such a theory, the principal is responsible if they "cause[] a third party to believe another to be his agent who is not really employed by him."

Ultimately, the Court determined that Pantheon faced potential liability because the homeowners could have reasonably assumed the unlicensed contractor had permission to conduct business on behalf of the company.

Given this background, consider a hypothetical. Suppose a former business associate gained access to your company computer and used the company's letterhead, contracts, and license number to work on a job without your knowledge or permission. What is the best way to protect yourself given the Court's decision in *Dosremedios*?

Consider the following options:

- Send a letter to clients listing current members of the company and advising them to check the list prior to contracting with someone claiming they represent the company.
- When an employee is no longer with the company, post a notice on the company website and send letters to your clients to notify them.
- Ensure public records are up to date with current members listed.
- Change your passwords frequently, especially in the event of a personnel change.
- Issue a "cease and desist" letter if you find out an individual is using your company name or license number.
- File an unlicensed activity report with your local building department against the individual.

It is crucial to be careful and cautious because a company can still suffer liability for a project it was not involved with, despite the company's lack of knowledge and consent. Steps like these are critical to avoid potential liability.

For more information regarding potential exposure for unauthorized use of one's contractors' license and ways to minimize the risk, contact partner Tom Lincoln in LGC's San Diego office.

LGC Welcomes Its Newest California Associate

LGC is proud to welcome Lisa Xu as the newest associate in LGC's San Diego office. Lisa passed the July bar exam and officially joined the California bar in December when she was sworn in.

Lisa received her J.D., *magna cum laude*, from the University of San Diego School of Law in 2019. During law school, she was an Articles Editor for *San Diego Law Review*. She was also a member of the Appellate Moot Court Associate Board, President of USD's chapter of Phi Delta Phi International Legal Honor Society, and Vice President of Asian Pacific American Law Students Association (APALSA). She also completed externships at the U.S. Attorney's Office and the San Diego City Attorney's office.

Before law school, Lisa received her B.A. in Political Science from the University of California, Los Angeles in 2015.

Lisa is also a member of the San Diego County Bar Association and Federal Bar Association. At LGC, Lisa's practice will focus on labor & employment matters, personal injury litigation, and general civil litigation.

Founded over 32 years ago, LGC has offices in California, Nevada, and Arizona. LGC now has 12 partners and 16 associates in its three offices, supporting a diverse practice.

Effectiveness Of Handwritten Changes To Trusts

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Darcie Colihan

In looking at Anderson's intent, the Court concluded that if Anderson had intended the interlineations and signature on the Post-it note to amend the Trust by themselves, there would have been no need to have his attorney prepare the amendment for his signature.

The Court instead concluded that it was Anderson's intent that his attorney prepare a second amendment for Anderson's signature, but unfortunately he died before he could carry out that intended action. As a result, the Court concluded the handwritten changes did not effectively change the trust.

In making amendments to estate documents, it is critical to read the current provisions regarding amendments, modification, and revocations to ensure strict compliance. For more information about these or any other estate planning issues, contact Darcie Colihan in LGC's San Diego office.

Procedural Difficulties Of Damages Pled "According To Proof"

Routinely parties in California will file a complaint or cross-complaint that does not specify a particular amount of damages, but rather seeks damages "according to proof" or similar general language. However, this creates procedural problems if a party seeks a default judgment based on that complaint or cross-complaint.

With limited exceptions, the amount sought by way of a default judgment "cannot exceed that demanded in the complaint . . . ." (Code Civ. Proc., § 580.) The purpose is to ensure due process and proper notice to defendants of the full scope of the relief sought against them.

In light of these due process considerations, the California Supreme Court has made it clear that in all default judgments, the demand in the complaint "sets a ceiling on the recovery." (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 824.) Because that "ceiling" is jurisdictional, a judgment in excess of damages specified in a complaint is void and may be set aside at any time.

These due process considerations significantly impair a party's ability to obtain a default judgment if the operative pleading does not specifically plead an amount of damages. Case law in California has made clear that a prayer for damages "according to proof" is not sufficient to support a default judgment.

Similarly, a prayer for damages "in excess of the jurisdictional minimum" or similar language is insufficient, though it may permit a judgment up to the jurisdictional minimum. For instance, general jurisdiction in California is for actions where the amount in controversy exceeds $25,000. If an action filed in general jurisdiction pleads damages "in excess of the jurisdictional minimum," that may support a default judgment up to $25,000, but no more.

An invalid judgment can even be attacked in collateral lawsuits. For instance, in a subsequent direct action to collect against a judgment debtor's insurance, the insurer can assert that the underlying judgment is in excess of the amount specified in the operative pleadings and thus void and not subject to collection from insurance. (See *Yu v. Liberty Surplus Ins. Corp.* (2018) 30 Cal.App.5th 1024.)

Given these issues, if a party is going to seek a default judgment, it is critical to plead the amount of damages sought in the complaint. Or, if a defendant fails to respond to an original complaint, file and serve an amended complaint pleading specific monetary damages before seeking a default judgment.

For more information, contact Chris Schmitthenner in LGC's San Diego office.