

Business Brief

Business and Client Advisory

Wage and Hour Law Extended to Non-Residents

In a much-anticipated decision in *Sullivan v. Oracle Corp.*, issued on June 30, 2011, the California Supreme Court expanded the scope of California's complex wage and hour laws to non-resident employees who perform work in California. This decision will require a great many employers to review their overtime and other payroll practices, and will likely spur an increase in lawsuits, including class actions.

What You Need to Know Before You Cancel a Written Contract

Many written contracts contain specific provisions regarding cancellation or termination. These provisions are typically found in equipment lease and servicing contracts. It is common to see provisions which require the lessee to notify the lessor in a particular manner and within a specified time prior to the expiration of the contract term. Some provisions also require the lessee to provide the lessor with a reasonable time to cure in instances where the reason for cancellation is due to dissatisfaction of the equipment or service.

It is important to follow the contractual procedure for cancellation because the consequences of failing to do so invites allegations of breach and potentially expensive litigation. In addition to the lessor's ability to compel performance under the contract, the lessee may be liable for monetary damages and possibly attorney fees incurred in enforcing the terms of the contract. Further, it is not uncommon to see language that provides for automatic renewal of the contract. The contract may call for renewal on a month-by-month basis, renewal of the entire contract period or some other period. For long-term contracts, an automatic renewal can obviously have a devastating impact on a business, especially where the subject equipment and/or services are no longer needed.

Although there are several defenses available to lessees who fail to comply with contractual provisions based upon principles of fairness and equity, such defenses are generally difficult to establish in a business-to-business context where negotiations are made at arm's length. Courts expect businesses to comply with an unambiguous contractual provision regardless of whether the principal is a sophisticated business person or not. Although it may seem unfair to require a lessee to continue paying on an equipment lease contract, particularly when the equipment and/or service is no longer being used, the business is presumed to know and understand what it is agreeing to.

To avoid being caught-up in potentially costly litigation over a cancellation provision we suggest your contract's cancellation or termination provisions be reviewed by an attorney. Should your business be a party to such contracts, please contact Vogt, Resnick & Sherak, LLP, to schedule an office consultation.

Alternative Dispute Resolution

Alternative dispute resolution (ADR) clauses, if drafted properly, have the potential to save both time and money. Most companies cannot afford the cost, time and consequences that are often associated with traditional litigation in court.

There are several advantages to having a properly drafted ADR clause in a contract. Disputes resolved by ADR are often settled more quickly than disputes resolved in court. This may save the parties a substantial amount of money in attorneys' fees, court costs and experts' fees. Furthermore, ADR hearings offer more flexible scheduling options for hearings than the courts.

There are several options to choose from when parties are involved in alternate dispute resolution: (1) binding arbitration, (2) non-binding arbitration and (3) mediation.

1. Binding arbitration can be a quicker, easier and less expensive alternative to litigation in court. During binding arbitration, disputes are brought before a neutral third party (an arbitrator or a panel of three arbitrators) who carefully reviews all of the relevant information, and issues a final decision. The process offers parties a finite legal outcome, without the hassle of litigation in court. Decisions made by the arbitrator are generally binding, and are enforceable once they are confirmed by a court.

2. During non-binding arbitration, each party has a chance to present its case to an arbitrator. After hearing from the parties, the arbitrator gives an opinion on the strengths and weaknesses of each party's arguments and evidence. The arbitrator also offers an opinion as to how the dispute could be resolved. The arbitrator is often an expert in the subject matter of the dispute. Although the arbitrator's opinion is not binding, the parties often use it as a basis for negotiating a settlement of their dispute.

3. Mediation is a voluntary method of ADR that allows the parties to come up with their own solution to a dispute. An unbiased third party (the mediator) conducts interviews and negotiations with each party to discuss settlement options and possibilities. The mediator's job is to help facilitate an agreeable solution. Mediators do not impose decisions on the parties – instead, they encourage the parties to find common ground to resolve the dispute.

ADR, in addition to helping parties save time, also helps preserve relationships and increase the amount of control the parties have over the process and the outcome.

Is Your Independent Contractor an Employee?

The use of independent contractors has increased dramatically over the past decade. This is largely due to the economic advantages of hiring an independent contractor over an employee. Employers are not required to withhold taxes, make Social Security and Medicare contributions, or pay unemployment and workers' compensation premiums for independent contractors.

Additionally, group health insurance and 401(k) plans may only be available to employees, not independent contractors. These advantages have prompted many employers to mistakenly classify an employee as an independent contractor.

According to the Internal Revenue Service, an independent contractor is a person who is in an independent trade, business, or profession in which services are offered to the general public. The general rule is that person is an independent contractor if the person paying for the services has the right to control or direct only the result of the work, and not what will be done and how it will be done.

The California Labor Code (CLC) also provides some guidance in deciding if a person is an independent contractor. According to CLC Section 2750.5, independent contractor status includes satisfactory proof that the (1) contract determines the result of the work, and not the manner in which it is performed, (2) the individual has the right to control the manner of performance of the services, (3) the individual is customarily engaged in an independently established business, and (4) the individual's independent contractor status is bona fide and is not an attempt to avoid employee status.

For tax reporting purposes, independent contractors receive IRS Form 1099 and employees receive IRS Form W-2. The type of form, however, does not determine whether a person is an independent contractor or employee. The IRS looks to the nature of the relationship between parties.

The IRS and State of California take worker misclassification seriously and have become very strict in penalizing businesses who misclassify employees as independent contractors. The federal budget for 2011 includes \$25 million for an initiative that allows state governments to conduct random audits of 6,000 businesses over the next three years. The audits are used to determine if those businesses are correctly classifying employees.

If an employee is classified as an independent contractor and there is no reasonable basis for doing so, the employer may be held liable for unpaid taxes for the worker as well as penalties and interest. Additionally, there may be further financial risk to the employer, should the misclassified worker become injured in the performance of the services, as the employer did not pay workers' compensation for the misclassified worker.

When classifying a worker, it is imperative that employers understand not only the difference between an employee and independent contractor, but also the serious consequences of misclassification. Vogt, Resnick & Sherak, LLP, has significant experience in this area. Please contact us should you have any questions.

Barnet Resnick Attends Law Europe Conference

This past Spring, Barnet Resnick, the firm's managing partner, attended Law Europe's annual conference, held in London. Law Europe is a premier international network of law firms. Barnet is currently the chair of its Commercial Dispute Resolution practice group. He has served as the chair of this group for the last four years. For the last eight years Barnet has been one of Law Europe's four managers. Further information on Law Europe can be found at www.law-europe.com.

Future National Ocean Policy May Effect Your Business or Summer Plans

Felicia Vargo-Johnson, part of the administrative team at Vogt, Resnick & Sherak, visited Washington, DC, to lobby Congressional representatives regarding National Ocean Policy (NOP). NOP was enacted under an Executive Order by President Obama in 2010 to connect various federal, state and local jurisdictions and encourage multiple governmental agencies to collectively participate in discussing the management of the natural resources provided by the oceans, coasts, and Great Lakes.

One project included in the 2011 budget is for regional data collection from national offshore waters. The results of this research will indicate the region's health (measuring fish populations, ocean-oxygen levels, etc) and will be made publicly accessible. This information will also identify areas best suited for economic activity, conservation efforts, and areas vulnerable to national security. Depending on the quality of these zones, commercial or recreational activities like fishing and boating could be prohibited. Poor water quality or distressed ocean environments may be closed until restoration efforts are made to improve them.

Commercial and recreational industries should pay attention to the health of their respective regions. While the results of this research may increase opportunities for some regions (healthy regions can draw new business), other regions that do not meet the state's criteria for ocean health may be subject to restrictions.

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