WESIERSKI & ZUREK LLP

Defense Law Update

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FORWARDING A DEFAMATORY EMAIL MAY LEAD TO LIABILITY

Have you ever wondered if you could be liable for spreading defamatory (*i.e.* false) information over the internet by simply forwarding an email to your friends or co-workers? Ever since the California Supreme Court's ruling in *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, it has been clear that when a defamatory email is simply forwarded (without any additional commentary by the person forwarding the email), only the originator of the defamatory email can be held liable for defamation. Until recently, however, the law has been unclear as to what would happen in a situation where the receiver of a defamatory email adds his or her own commentary, and then forwards the email to others.

The California Court of Appeals recently weighed in on this issue in *Hung Tan Phan v. Lang Van Pham* (2010) DJDAR 2956. In that case, Nguyen Xuan Duc ("Nguyen"), the president of a group of Vietnamese military veterans, sent an email to at least one of his fellow veterans. In that email, Nguyen accused another veteran, Hung Tan Phan ("Hung"), of receiving disciplinary action for abusive behavior during the last days of the Vietnam War. Lang Van Pham ("Lang") received the email and forwarded it on to at least one of his fellow veterans, adding an introductory paragraph of his own. Essentially, the introductory paragraph indicated that "whatever will be, will be."

Hung sued Lang, alleging that by forwarding a defamatory message, Lang himself was liable for publishing the alleged libelous statement. The trial court dismissed the case, and Hung appealed. The issue before the Court of Appeal was whether the introductory paragraph drafted by Lang had "materially contributed" to the alleged defamatory statements of the original email drafted by Nguyen. After careful consideration of the language contained in the introductory paragraph drafted by Lang, the Court ruled in favor of Lang, holding that Lang's introductory remarks made "no material contribution" to the alleged defamation, and that the only possible defamatory content was contained in the original email drafted by Nguyen. As indicated by the Court, nothing "created" by Lang was itself defamatory.

Despite this recent clarification of the law, the publishing and/or forwarding of a potentially defamatory email remains a risky maneuver for both the originator of the email and for those persons who choose to comment and then forward the potentially defamatory content to others. Wesierski & Zurek LLP has extensive experience in handling these types of issues, and routinely advises clients regarding these matters in an effort to avoid costly litigation.

- Jason R. Bettendorf

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THE RIGHT TO CONTROL THE MANNER AND MEANS OF ACCOMPLISHING WORK IS THE PRINCIPAL TEST IN DETERMINING INDEPENDENT CONTRACTOR STATUS

Recently, the California Court of Appeal prevented a gardener, hired on only two occasions during a twelve month period, from receiving workers' compensation benefits after he injured himself during the performance of services. The Court reached this decision primarily because the gardener possessed the right to control the manner in which the work was completed.

At first blush, it would seem obvious that a gardener hired a mere two times in a year would not qualify as an employee entitled to workers' compensation benefits. Nonetheless, in *Jose Luis Lara v. Workers Compensation Appeals Board and Bratiff Home Corporation*, the Second Appellate District applied the long-standing "Borello" test in determining whether Mr. Lara, the gardener, was an employee or an independent contractor. If the latter, Mr. Lara could not recover workers' compensation benefits based on injuries sustained while pruning bushes because such benefits are only available to employees – not independent contractors.

The inquiry of the Borello test is whether the person to whom services are rendered has the right to control the manner and means of accomplishing the work. While "control" is the most important consideration in determining a service relationship, courts will also look at secondary factors such as (1) whether the work performed is a distinct occupation and/or an independently established business, (2) whether the work performed is done under direct supervision or by a specialist without supervision, (3) whether particularized skills are required to perform the work independent of control, (4) whether the worker provides his own tools or equipment, (5) the length of time for which the services are to be performed, (6) whether compensation is paid based on time to complete the job or by the job, regardless of how long it takes to complete the work, (7) whether the work performed is part of the regular business of the principal, and (8) whether the parties believe they are creating an employer-employee relationship. Courts will look at the totality of the circumstances to decide if the facts weigh in favor of employee or independent contractor status.

In *Lara*, the Court considered that Mr. Lara had owned and operated his gardening business independently for twenty-five years. His lack of a business license or work permit was of no consequence. The Court also considered that Mr. Lara provided the tools and equipment to complete the work, he did not require supervision or instruction, he was paid on a job-by-job basis, gardening was not an integral part of the principal business (a restaurant), there were no taxes taken out of his compensation, there was no pre-determined or agreed upon dates to return to work, and there was no evidence that the

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SEMINARS

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- *Supermarket Liability*
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... and any other employment topic you may want covered. Our seminars emphasize both a pro-active risk prevention perspective, and the means to effectively litigate and defeat claims once they are filed.

If you would like to schedule a seminar, please contact Paul J. Lipman at (213) 627-2300 for further information.

HIRING COMPANY CAN NOW BE LIABLE FOR THE INJURIES OF ITS INDEPENDENT CONTRACTORS' EMPLOYEES IF IT FAILS TO FOLLOW SAFETY REGULATIONS

Generally, entities that hire independent contractors can still be liable to third parties for personal injuries caused by the contractor's negligence under the "safety issue" exception to the independent contractor rule. However, the hiring entity is usually not liable to a contractor's *employee* who gets hurt on the job (because of workers' compensation) unless the hiring entity personally put a hazard in the wrong place or retained actual supervision and control of the workplace. What about a situation where the contractor's employee gets hurt, the hiring entity did not actually supervise (or "retain control" of) the worksite, and did not actually create the hazard, but is guilty of a Cal-OSHA violation on its property that caused the harm? The answer is, the hiring entity can be liable even though the worker has workers' compensation coverage.

It has long been the rule in California that the person or company hiring an independent contractor is usually not liable for injuries to the contractor's employees merely because the hirer has ownership of the worksite. In order for the hirer to be liable to an independent contractor's employees, the hirer must have affirmatively contributed to the employee's injuries. Under the *Privette-Toland* line of cases, it has been reasoned that it would be unfair to impose liability on the hirer when the contractor (the one actually controlling the worker's employment) is only required to provide workers' compensation coverage. In *Seabright Ins. Co. v. U. S. Airways, Inc.*, the First Appellate District of the California Courts of Appeal recently recognized an exception to this rule in cases involving nondelegable (or nontransferable) duties, such as the duty to implement mandatory Cal-OSHA safety precautions.

In S*eabright*, an airport baggage conveyor mechanic was injured on the job when his arm got caught in a baggage conveyer machine at the airport. The mechanic was an employee of a company contracted by the airline to provide preventive maintenance and repair services to the conveyor belts that the airline used at the airport. He was not an employee of the airline or the airport. Under Cal-OSHA, the airline was supposed to have guards on its baggage machines, to protect its employees. Nevertheless, the mechanic, who was not employed by the airline but by its contractor, intervened in the workers' compensation subrogation action against the airline, asserting his own causes of action against the airline for premises liability and negligent failure to install safety and warning equipment on the baggage conveyer machine.

The Court of Appeal held that the *Privette-Toland* rule did not shield the airline from liability because Cal-OSHA safety regulations imposed a nondelegable duty to provide a safe working environment. It has been previously held that third parties, not just independent employees, can use Cal-OSHA standards in court to prove a breach of a standard of care. Thus, the airline could not push its safety duties off onto the independent contractor and expect to escape liability. In applying the *Privette-Toland* rule, the Court of Appeal reasoned that the airline's failure to install the safety guards and warnings required by Cal-OSHA could itself be an affirmative cause of the mechanic's injuries.

According to *Seabright*, a hirer can be liable to an independent contractor's employees if the hirer breaches a nondelegable duty imposed by statute or regulation and if the employee's injuries were caused by the hirer's failure to fulfill its statutory or regulatory obligations. Such nondelegable duties often arise in the context of workplace safety. In the most serious cases of workers' injuries, the hirer can actually face greater liability than the worker's actual employer (*i.e.*, the independent contractor) because the hirer is not protected by workers' compensation laws. Therefore, it is important for businesses and individuals that hire independent contractors to review safety compliance in the places where independent contractors are performing work. Wesierski & Zurek LLP provides premises liability seminars that can help your company identify liability areas and strategies for dealing with them.

- Christian C.H. Counts

NEW AT WESIERSKI & ZUREK LLP

Garrett V. Jensen: Garrett V. Jensen concentrates his practice in the areas of employment law and business litigation. Mr. Jensen received his bachelor's degree from Dartmouth College, M.Ed. from Arizona State University, and J.D. from Chapman University School of Law. While at Arizona State University, he was named First Team All-American in Track and Field and Second Team Academic All-American in Cross Country.

Mr. Jensen is admitted to practice before the State Bar of California, the Ninth Circuit Court of Appeals and the U.S. District Court for all districts in California. He is currently a member of the Orange County Bar Association's Employment Law Section and the Robert A. Banyard Inn of Court.

Representative Cases: Prosecution and defense of contract claims on behalf of a general contractor, including the pass-through claims of its subcontractors, arising out of the construction of a state-of-the-art performing arts facility. Defense of an employer facing allegations of wrongful termination, unlawful business practices, and violations of the Labor Code. Prosecution of coverage claims on behalf of an oil company that suffered substantial losses as a result of Hurricane.

Christian C.H. Counts: Christian C. H. Counts graduated from Loyola Marymount University in 1994 with a dual baccalaureate degree in Mathematics and Latin. Mr. Counts received his J.D. from Loyola Law School in Los Angeles, CA in 1997, where he was on the Dean's List. During law school, Mr. Counts worked as an intern in the Unites States Attorneys Office. After graduating from law school, Mr. Counts worked as an associate at the accounting firm of Deloitte & Touche. Mr. Counts was admitted to the California Bar in 2000.

Mr. Counts is licensed to practice before all of the courts of the State of California as well as the United States District Court, Central District of California

Ali A Vazin: Mr. Vazin received a Bachelor of Science degree from Cornell University in 2004 and earned his Juris Doctorate from Southwestern Law School in 2009. He was admitted to the California Bar in December 2009.

Mr. Vazin is licensed to practice before all the courts of the state of California as well as the United States District Court, Central District of California.

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parties intended to create an employer-employee relationship. Moreover, Mr. Lara admitted that he was a "self-employed" gardener.

The Labor Code provides that "[a]ny person rendering service for another, other than as an independent contractor . . . is presumed to be an employee." Thus, when employment status is challenged, the recipient of services must overcome the presumption that the service provider is an employee. Here, the defendant did not provide any evidence to rebut the employment presumption. Nonetheless, based on the Court's application of the Borello test and analysis of the secondary factors, it ruled that Mr. Lara was not an employee, but rather an independent contractor. Consequently, Mr. Lara could not recover for his alleged on-the-job injury through the Workers' Compensation system.

Notably, the defendant in Lara had failed to maintain workers' compensation insurance, which every California employer is required to provide pursuant to the Labor Code. When employment status is challenged, employers must overcome the presumption that anyone rendering services is an employee. This, as well as job position classification issues, requires very fact specific analysis. Wesierski & Zurek LLP specializes in defending employers against all types of employment-related claims. As such, we have the expertise to advise and train California employers in connection with the analysis of employment status and classification issues.

- Nancy N. Lubrano

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Editor

Paul J. Lipman