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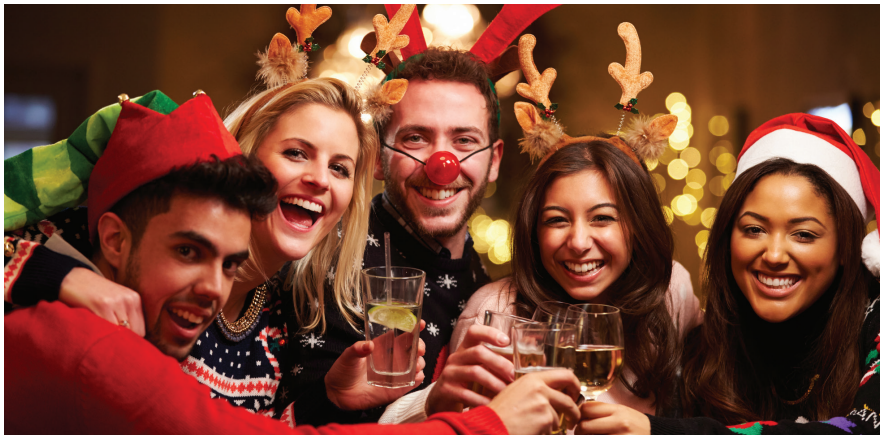
BKCG
BURKHALTER KESSLER CLEMENT & GEORGE LLP

Tips To Limit Potential Liability For Your Company's Holiday Party

This holiday season, a number of our clients are likely hosting parties to thank their employees for their hard work the past year. If your company plans to do this, it is worth remembering that in a relaxed, party environment, especially when alcohol is being served or is available to people, better judgment can give way to impulse and poor choices.

A number of California court cases demonstrate how employers create significant legal risks for themselves when they provide alcohol to employees or permit employees to consume alcohol at company sponsored events. The liabilities range from an employee injuring or killing someone due to drunk driving, to workers compensation cases where intoxicated employees injure themselves or other employees, to sexual harassment cases where an employee complains an intoxicated co-worker behaved inappropriately at the work event.

Obviously, the most drastic step an employer can take to manage these risks is to forbid alcohol at company events, including holiday parties. Short of this step, however, there are a number of other measures employers can take to limit the legal exposure caused by the poor choices of intoxicated



employees. For example, employers can limit the number and type of drinks provided to employees at the party or event. Once this measure is in place, the employer must enforce it. For example, in the 2013 case *Purton v. Marriott International, Inc.* (2013) 218 Cal.App.4th 499, Marriott was found liable for deaths caused by its employee who drove drunk following Marriott's holiday party. The court in *Purton* found it significant that Marriott did not enforce the two-drink ticket rule it had implemented at its party. Additionally, employers can establish a cut-off time beyond which alcohol will not be served, they can make sure food is available along with the alcohol, they can offer plenty of non-alcoholic beverages as an alternative and they can make attendance at the party voluntary.

In addition, it is a good idea for the employer to ensure alternative modes of transportation are available to get employees to and from the company event.

In short, employers should be mindful that hosting a holiday party, or any company event, can be risky without careful planning. To that end, it is always a good idea for the employer to consult legal counsel prior to the party to make sure measures are in place that allow everyone attending the event a relaxed and enjoyable time.

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

You May Have To Allow Your Employee To Bring Her Emotional Support Parrot To Work With Her

California's Fair Housing and Employment Act ("FEHA") makes it illegal to discriminate on the basis of age, religion, color, gender identity, national origin, race, marital status, familiar status, sexual orientation, or physical or mental disability. As faithful readers to this newsletter are well familiar, the FEHA applies to employers, but it also applies to property managers, lenders, public entities, realtors, rental owners and anyone working in the housing industry. The FEHA broadly prohibits the treatment of a member of any protected class unequally to others or refusing to make reasonable accommodations.

The FEHA's reach is so extensive that California courts have found that it even protects individuals who need emotional support animals. An emotional support animal is not a service animal, which is recognized under Federal law and may only be a dog or miniature horse that is specifically trained to perform a task for a disabled person. On the contrary, an emotional support animal may be any type of animal, and that animal does not have to be trained to perform any specific task. Although it may not be treated as a "pet", in reality it is difficult to find a difference.

Authority for deeming emotional support animal users to be members of a protected class derives from *Auburn Woods I Homeowner's Assoc. v. FEHC* (2004) 121 Cal.Appp.4th 1578. In that case, owners of a condominium unit were sued by their homeowners association for violating a CC&R provision that prohibited them from keeping a dog at their condo. A year after purchasing their condo, the owners bought a small dog, hoping that it would help them with their depression.

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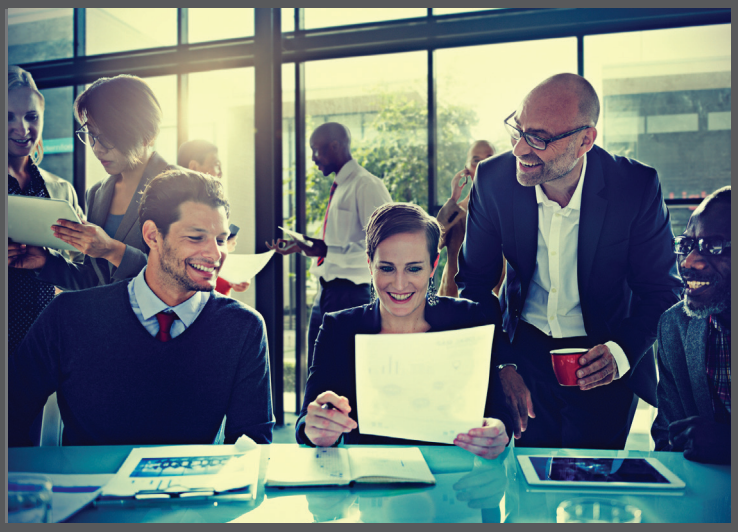
3 Items For Your Winter Corporate Check-Up

One of BKCG's main goals is to help our clients avoid legal problems from occurring in the first place and, with that in mind, based on our clients' experiences and recent legal developments, we suggest you consider doing the following 3 things to help your company stay out of legal peril.

1. Conduct a Cybersecurity Audit. The time to do this is now, before your company experiences a data breach, whether it be an outside hack, a ransomware demand or the loss of valuable proprietary company information to a competitor. Not only can any one of these events cause massive disruption to your business, but the costs can be devasting. For example, since 2015, California has required businesses to provide 12 months of free credit monitoring services to persons whose personal information has been subject to a data breach. Disclosure of a person's name and social security number or driver's license number can trigger this monitoring requirement. Assuming a modest monitoring cost of $100/year, if your business has a database of 1,000 such consumer records that is breached, the monitoring cost alone would be $100,000. Among the most common causes of company data breaches are: (1) not regularly installing security patches issued by Microsoft, Google, etc.; (2) giving employees administrator rights, for example, so they can install their own software updates; and (3) failing to properly train employees so as to avoid computer viruses and malware.



While a consultation with an IT professional is the best way to determine any additional steps you need to take to protect your company, here are a few simple things you can do immediately:

- Consider hiring an outside specialist IT consulting company to conduct a thorough audit of your company's current cybersecurity measures. Many such companies will do so at a low or nominal cost, and there are obvious advantages to having someone other than your regular IT services provider or in-house IT person undertake the audit.
- Conduct an inventory of employees who remotely access your company's servers and ensure that the devices they use to do so employ appropriate security protocols and have regularly updated security software. Your data is only as safe as your weakest link.
- With your IT professional's help, develop an internal company security plan which includes employee training on security training and limiting access to legally sensitive information to higher level employees on a "need to know" basis.
- Ask your commercial insurance broker precisely what types of cybersecurity insurance coverage you have under your business' existing commercial general liability policy, and what the limits of coverage are. Do not just assume that your existing coverage is adequate for your business' needs, you may need to purchase supplemental coverage.
- Determine exactly what employee and customer information your company gathers and how and where it is stored. Avoid complacency, as the law is evolving rapidly in this area. For example the California Consumer Privacy Act of 2018 will go into effect in January 2020 and will impose significant new obligations on companies' use and retention of consumers' personal information. As is always the case, ignorance of the law will not shield you from liability.

2. Immediately Review Your Company's Use of Independent Contractors. As has been widely reported in the press and online, the decision issued a few months ago by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, makes it even harder than it previously was for companies in California to legally justify characterizing a service provider as an independent contractor, rather than as an employee.

The *Dynamex* court adopted a three-part test used in other jurisdictions for determining whether a worker is properly considered an independent contractor under the "suffer or permit to work" standard in the California wage order in question. Commonly referred to as the "ABC test," this test "presumptively considers all workers to be employees", and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies **each** of three conditions:

A. The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;

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 BKCG clients, the biggest obstacle to legally utilizing independent contractors will be to satisfy the "B" prong of the test, which the Court stated was meant to cover "all individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor."

As examples of how the "B" part of the test would apply, the Court said that a retail store could justify hiring an outside plumber to repair a bathroom leak, or an electrician to perform electrical work. In contrast, a clothing manufacturer company could not hire a work-at-home seamstress to make dresses from cloth and patterns supplied and to be later sold by the company; and a bakery could not legitimately hire a cake decorator to decorate the bakery's custom cakes.

In a nutshell, if a business engages independent contractor to provide services that are part of the business' usual business operations, it risks an expensive employee misclassification claim. Bear in mind also that, if the "B" part of the test is not satisfied, even the fact the parties signed an independent contractor agreement, or that the service provider asked, or even insisted, on being treated as an independent contractor will not change the legal result. Practically speaking, it also does not matter if the independent contractor provides services for just a few hours a week, or for a limited period of time. (continued on page 3)

3 Items For Your Winter Corporate Check-Up (continued from page 2)

The *Dynamex* case involved only how to determine a worker's employment status under a wage order, and the California Court of Appeal recently confirmed, in *Jesus Cuitlahuac Garcia v. Border Transportation Group, LLC, et al*, that the ABC test set forth in *Dynamex* applies only to causes of action brought under wage orders. However, it is to be anticipated that creative plaintiffs' employment and personal injury lawyers, workers' compensation insurance companies and others will still seize on the *Dynamex* case and attempt to expand its applicability to further their own agendas. For example, if your independent contractor salesperson is involved in a vehicle accident, a plaintiffs' personal injury lawyer may name your company as a co-defendant in the resulting lawsuit, as the salesperson's alleged employer, and your company could find itself defending an auto liability claim with no insurance if your company does not have "non-owned" automobile liability coverage.

With these factors in mind, it is imperative that you immediately review your company's use of independent contractors and consider either hiring as employees any independent contactors who will not satisfy the "ABC test" described above, or consider hiring them through a staffing company or a professional employer's organization.

3. Implement or Review Your Company's Arbitration Policy for the Resolution of Employee Disputes. A recurring theme in this newsletter is our firm's strong suggestion that California employers seriously consider requiring all employees to sign an arbitration agreement agreeing to settle all employment-related disputes that can be legally resolved through arbitration.[1] It is a harsh reality of doing business in California that, however careful an employer is with its employment practices, procedures and documentation, sooner or later some kind of employment claim will arise and the employer will be faced with a potentially expensive litigation claim.

In many instances, however, litigation can be avoided through the use of a well-drafted employment arbitration agreement. Although employers are required to pay the costs of the arbitration service and the arbitrator, in our experience, the significant advantages to an employer that result from having the case decided by an impartial arbitrator, rather than by a Southern California jury that is highly likely to contain at least one disgruntled ex-employee, greatly outweigh the added cost.

The U.S. Supreme Court recently concluded in three cases decided simultaneously [2] that arbitration agreements providing for individualized proceedings (in other words, prohibiting the use of a class action) are enforceable, thus providing yet another reason for employers to make use of an arbitration agreement and, specifically, one containing a class action waiver. If your company either does not have an employee dispute arbitration agreement in place with your employees, or uses an agreement that has not been recently reviewed for legal compliance purposes, please contact us.

We would also be remiss if we failed to remind you of the importance of obtaining Employment Practices Liability Insurance (often referred to as "EPLI") for your business, since commercial general liability policies do not cover employment-related claims brought by employees. Finally, if you do suspect that an unhappy employee may be considering making some sort of employment-related claim against your company, do not overlook the possibility of offering to pay a departing employee severance pay, in exchange for the employee signing a separation agreement containing a general release of claims. If you are successful, you may never need to even resort to your arbitration agreement.

[1] For example, workers' compensation claims wage and hour claims brought against an employer under the California Private Attorneys General Act (PAGA) are not subject to mandatory arbitration.

[2] *Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP et al. v. Morris et al.*, No. 16-300; *National Labor Relations Board v. Murphy Oil USA, Inc., et al.*, No. 16-307 (May 21, 2018).

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

New Appeals Court Decision Makes It Harder For Businesses To Protect Themselves From Ex-Employees

In *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, the Court of Appeal held that a "Nonsolicitation of employees" provision of a standard Confidentiality and Non-Disclosure Agreement signed by employees who later left to compete against their former employer was void and unenforceable as an improper restraint of the employees' right to practice in their chosen profession.

The Court relied upon *Business and Professions Code Section 16600*, which provides in relevant part, "… every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

Plaintiff AMN and Defendants Aya and former employees of AMN, were competitors in a niche field of recruiting travel nurses on 13-week assignments. The undisputed evidence showed that if the former AMN employees were barred for at least one year from "soliciting or recruiting any travel nurse listed in AMN's database, that would likewise restrict the number of nurses with whom a recruiter could work with while employed at his/her new staffing agency."

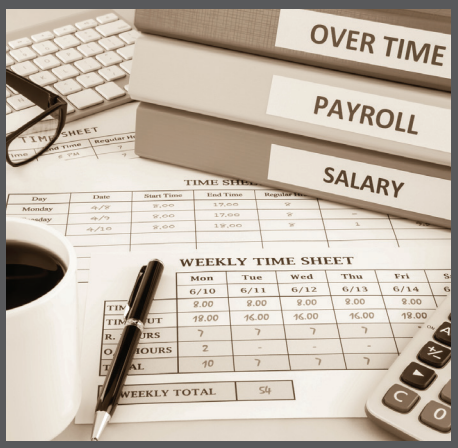
AMN also tried to preserve its claim against its former employees by arguing that they were using "trade secrets", such as "the terms and conditions of AMN's travel nurses' employment with AMN, their placement at various hospitals…, [and] their identity…." The Court independently evaluated the three categories of trade secrets and found, as a matter of law, that they were not because, among other things, travel nurses belong to a public social media site where they reveal their names, assignments and even terms of employment.

Adding injury to insult, the Court also upheld the award of attorneys' fees to the Defendants pursuant to Code of Civil Procedure Section 1021.5 which provides, "a court may award attorneys' fees to a successful party … in any action which has resulted in the enforcement of an important right affecting the public interest…." The Court held that Defendants' successful challenge of the Nonsolicitation provision conferred a significant benefit on a large class of persons, namely, the current and former AMN California employees who had signed the Confidentiality/Non-Disclosure Agreement.

The AMN decision will make it extremely difficult for employers to restrict their former California employees from competing with them.

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

Employers Must Pay For Small Amounts Of Time Employees Spend On Work After Clocking Out



A new potential trap for employers was set forth in a recent decision by the California Supreme Court in *Troester v. Starbucks Corp.* The Supreme Court ruled that employers must compensate its employees for minutes of work that are regularly reoccurring activities, even if it is brief in duration.

This decision rejected the long-standing federal rule that insubstantial or insignificant periods of time that could not be practically and precisely recorded were not required to be compensated. California law, the Court held, does require that time to be compensated.

In *Troester*, the employee was a shift supervisor at Starbucks who was required to clock out at the end of each closing shift before finishing his required tasks. After the employee clocked out, he was required to go to a separate computer to run a program that would transmit financial and inventory data, activate the alarm, exit the store and lock the front door. He also would walk coworkers to their cars in compliance with Starbuck's policy. He estimated that these tasks would require him to work an extra 4 to 10 minutes per shift.

Over his 17-month employment, he calculated that his unpaid time totaled approximately 12 hours and 50 minutes, which would have been about $102.67, exclusive of any penalties.

The federal court hearing the case originally agreed with Starbucks that this time was de minimis and impractical to account for this time. Therefore, Starbucks was not responsible for compensating him for that time. On appeal, the Ninth Circuit asked the California Supreme Court to answer the question whether California law required Starbucks to compensate the employee for this time. The California Supreme Court said the law required that he be compensated.

However, the California Supreme Court did limit its decision to situations like this one where the employee was required to perform "regularly reoccurring" activities that are required after an employee clocks out. The Court said that it was not necessarily extending its reasoning beyond these scenarios, and that this rule may not apply to activities that are irregular or rarely occurring.

The Court also pointed out that with advancements in time tracking technology, the burden is on the employer to find ways to make sure employees' time is properly captured, such as using new time tracking tools, or restructuring its work so that employees could clock out after finishing closing tasks.

This decision, which was announced in July 2018, will certainly lead to many more lawsuits brought by employees who have a few minutes on each shift for which they have not been compensated. As of this writing, at least one class action has been filed that specifically references this case, and surely more will be on the way.

Employers should take this opportunity to evaluate its time-tracking methods and policies to insure that employee time is captured as precisely as possible so its employees can be compensated for the time spent performing duties on behalf of the employer.

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

California Passes New Law Aimed At Increasing Corporate Diversity

California has become the first state to require all publicly traded companies based in California to have at least one woman on their board of directors in a push to increase equality in the workplace.

The law, signed by Gov. Jerry Brown on September 30, 2018 requires public companies whose principal offices are located in California to have at least one woman on the board by the end of 2019. Additionally, if the company has up to five directors on its board the law will require two women board members by the end of 2021, or three women if the company has six or more directors. Approximately a quarter of the 445 publicly traded companies in California don't have a single woman on their board currently.

California's Chamber of Commerce and 29 other business groups opposed the law, sending a letter to the state senate arguing that the measure is unconstitutional, that it takes into account only gender and not other diversity, and that it seeks to manage the directors of companies that are incorporated in other states. Companies that don't comply with the law will be fined $100,000, while subsequent violations will warrant a $300,000 fine.

However, since the bill specifically creates a classification based on gender, it may raise questions of equal protection under both the U.S. Constitution and the California Constitution. When the government legislates on the basis of gender, courts typically subject that legislation to a heightened level of scrutiny. Essentially, this means the government has to prove it has a very compelling reason for doing what it is doing, and that there isn't a better way of accomplishing that goal.

Currently, only five percent of the companies on the Standard & Poor's 500 list have female CEOs. It has been found that women who have served as a chief executive are far less likely than men to go on to be CEO at another company, and less likely to serve on corporate boards. A decade ago, Norway instituted quotas requiring women to make up 40 percent of the directors at listed companies, spurring many countries in Western Europe to follow suit. As each country passed a similar law, business leaders would routinely protest. However, now a decade later, seemingly none of their worst fears have been realized.

An often-touted concern is that a small group of women would end up on many corporate boards, but it turns out this is also an issue for men as well. Still, the Economist found that some of the benefits often hyped for increasing the number of women on boards–such as closing the wage gap between men and women, or having a positive impact on company decision-making–haven't necessarily come to fruition.

The bill was one of Gov. Brown's last opportunities to approve or veto before he leaves office due to term limits. The approval also took place against the backdrop of the controversial U.S. Supreme Court confirmation process of Judge Brett Kavanaugh, who was being accused of sexual assault by his high school classmate, Christine Ford.

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Better Late Than Never – Late Notice May Not Be Detrimental To Coverage Under An Occurrence Policy

As anyone who has ever tried to read through an insurance policy can attest, there are pages upon pages of terms, conditions, exclusions, limitations, definitions, and … notice requirements. Most notice requirements in policies mandate that notice of a claim be provided in a prompt or timely manner. While the failure to strictly adhere to the policy's notice requirements can result in a forfeiture of coverage, late notice may not always be detrimental. In *Marty Lat v. Farmers New World Life Insurance Company* (10/16/18 Court of Appeal 2nd Dist.), the Court of Appeal held that an insurance company may not deny an insured's claim under an occurrence policy based on lack of timely notice or proof of claim unless the insurer can show actual prejudice from the delay.

The facts of *Marty Lat* are relatively straightforward. Maria Carada purchased an "occurrence" life insurance policy from Farmers New World Life Insurance Company ("Farmers") and named her sons – Marty and Mikel Lat ("Lat") - as beneficiaries. The policy established an "accumulation account" to which Carada's premium payments and interest were added and from which the monthly costs of insurance and other amounts were deducted. If the accumulation account was reduced below the amount needed to cover the next month's deductions, a 61-day grace period began within which Carada could pay the premium needed to cover the deduction. If the grace period expired before Farmers received the necessary premium payment, the policy terminated and could not be reinstated. Importantly, the policy also included a rider under which Farmers agreed to waive the cost of insurance while Carada was totally disabled if Carada provided Farmers with notice and proof of her disability.

In August 2012, Carada was diagnosed with cancer and became totally disabled. She did not, however, notify Farmers. On May 20, 2013, Farmers sent a letter to Carada advising her that the premium payments were insufficient to pay for the coverage under the policy and gave her until July 20, 2013 to make payment or the policy would lapse. On July 23, 2013 Farmers sent Carada a letter stating that the policy's grace period had expired and coverage was no longer in force. Carada died on September 23, 2013 and Lat submitted a claim which was denied by Farmers. Subsequently, a suit was filed. Farmers moved for summary judgment which was granted. The trial court held that the 61- day grace period had expired and the premium had not been paid. Consequently, the policy lapsed. An appeal was filed and the Court of Appeal reversed.

On appeal Lat argued that their mother was totally disabled within the meaning of the policy's rider. Consequently, the cost of the insurance under rider was waived while Carada was disabled and the policy should never have lapsed. Farmers, on the other hand, argued that it was never provided with proper notice of disability as required under the policy. According to Farmers, it properly reduced the accumulation account, notified Carada of the shortfall in premium, and correctly declared that the policy had lapsed.

The Court of Appeal noted the distinction between "occurrence" policies, "claims made" policies, and "claims made and reported" policies. The Court held that although Carada had not given Farmers notice of her disability, the requirement was excused by California's notice prejudice rule. Under the notice prejudice rule, an insurance company may not deny an insured's claim under an "occurrence" policy based on lack of timely notice or proof of claim unless it (the insurer) can show actual prejudice from the delay. The rule is based on the rationale that the primary and essential part of the contract is insurance coverage, not the procedure for determining liability. The notice requirement serves to protect insurers from prejudice … not to shield them from their contractional obligations through a technical escape hatch. Moreover, the burden of establishing prejudice is on the insurance company and prejudice is not presumed by delay alone. To establish prejudice, the insurer must show it lost something that would have changed the handling of the underlying claim.

According to the Court, under the Rider, there could be no deduction from Carada's accumulation account while she was disabled and there was no dispute that Carada was totally disabled and was entitled to the deduction waiver had she provided notice. The notice prejudice rule prevented Farmers from denying the benefit of the deduction waiver unless Farmers suffered actual prejudice from the delayed notice. Farmers made no such showing. In fact, the only reason why Farmers terminated the policy was that it applied the deductions it had promised Carada it would waive. While Farmers had an excuse for its conduct, once it learned of Carada's disability and her entitlement to the deduction waiver, Farmer's continued refusal to honor its contractual obligations prevented judgment in its favor.

Learning Point: While it is always prudent to provide timely notice of a claim to your insurer, the failure to do so may not be fatal. The facts surrounding the claim and the type of policy matter. In many instances, California's notice prejudice rule applies to place the burden on the insurer to demonstrate that the late notice caused it prejudice. If an insurer cannot make a showing of prejudice, then the late notice may not preclude coverage.

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

You May Have To Allow Your Employee To Bring Her Emotional Support Parrot To Work With Her

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After bringing the dog home, the owners noticed that their agitation lessened, their interpersonal relationships improved, their sleeping and concentration improved, and they stopped engaging in acts of depression-related self-mutilation. When the HOA demanded that they remove the dog, the owners asked for a reasonable accommodation under the law.

After an administrative judge found that the small dog was a reasonable accommodation, a trial court reversed. The Court of Appeal reversed the trial court and reinstated the administrative judge's decision. The Court made clear that its decision should not be considered a rule that companion pets are always a reasonable accommodation for individuals with mental disabilities. However, before an employer refuses to allow an employee to bring her support animal to work, or before a property manager refuses to rent a residence to someone with an emotional support animal, the employer or property manager would be wise to consider the circumstances under which the request is made.

The following practices can be implemented and observed to handle future requests by employees for emotional support animals. First, you should have a written policy and an established set of procedures for handling reasonable accommodation requests. You should require that all requests for accommodation be made in writing, or at least confirmed with written acknowledgment following a verbal conversation. Next, you should require the employee to produce documentation supporting the accommodation request, including potentially a note from a doctor or medical professional, documentation from a peer support group (like AA, for example), or from any reliable third party in position to know about the individual's disability. After receiving this documentation, you should consult with an attorney to assess the reasonableness of the request and whether the employee has made a showing that the animal is necessary to allow them an equal opportunity to work.

If you receive a request from an employee or tenant for an accommodation for an emotional support animal, you should take this request as seriously as you would for any other potential disability, as the legal consequences from wrongfully denying this accommodation are just as grave as any other FEHA violation.

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

California Passes New Law Aimed At Increasing Corporate Diversity (continued from page 4)

In his statement on signing the bill into law, Gov. Brown deliberately cc'd the U.S. Senate Judiciary Committee and wrote: "I don't minimize the potential flaws that indeed may prove fatal to [the law's] ultimate implementation. Nevertheless, recent events in Washington, D.C.–and beyond–make it crystal clear that many are not getting the message." He noted that as far back as 1886, corporations have been considered persons as far as the 14th Amendment is considered.

Only time will tell what legal challenges, if any, this new law will be up against and if it is able to bring about meaningful change to corporate boardroom diversity. Yet, what is certain is the old adage, "as California goes, so goes the nation."

Please contact Jonathan Stilz at jstilz@bkcglaw.com or (949) 975-7500 if you have any 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

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