THE BKCG BULLETIN

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BKCG

BURKHALTER KESSLER CLEMENT & GEORGE LLP

COVID-19 Continues Its Onslaught On Courts Across The Nation

Regular Bulletin readers already know that in the best of times, civil litigation in California is a slow and arduous process. Even before the pandemic forced a complete shutdown of civil courts, litigants seeking a jury trial expected to wait more than a year before having their day in Court, due to budget cutbacks that reduced capacity while the number of filed lawsuits spiked. When the COVID pandemic struck, Courts across Southern California canceled all civil jury trials that were set for the rest of 2020 and rescheduled every trial for 2021, to make room for more than 7,000 criminal cases with constitutionally-mandated "speedy trial" requirements. As a result, cases that had been set to go to trial in 2020 have been delayed far into 2021 and beyond. The following is a snapshot of the status of several Courts of significance across the country.

In California, most courts are allowing litigants and lawyers to appear in Court under strict mask and social distancing mandates. Litigants have been encouraged to appear remotely using either conference call or Zoom videoconference technology.

In Los Angeles County, on November 23, 2020, Presiding Judge Kevin Brazile issued an order further restricting access to authorized personnel only at all Los Angeles Courts in response to repeated and routine violations of mask mandates by all visitors to the Courts, including attorneys and litigants.

In Orange County, the North Justice Center of the Orange County Court system is completely shut down until at least mid-January, 2021. The remaining courthouses of Orange County Superior Court are open for limited in-person services. Members of the public should NOT visit a courthouse unless they have been notified by the Court that they have an in-person hearing or they have scheduled an appointment to enter the building for counter services.

In Riverside County, the Superior Court has unveiled a "Master Plan" to restore court services throughout Riverside. Because of the pandemic's surge in the Inland Empire, however, the master plan has barely been implemented, and several satellite branches of the Riverside Court system, including Hemet, Corona, and Moreno Valley, are completely closed through at least the end of the year. (continued on page 6)

Burkhalter Kessler Clement & George LLP Is Pleased To Announce Our Newest Partner, Joshua A. Waldman

Please join us in welcoming Joshua A. Waldman as the newest equity partner of BKCG.

Josh has been with BKCG since 2006, and over his 14 years with the firm he has successfully tried a number of high-profile cases with partners Alton Burkhalter and Dan Kessler. "Josh has certainly earned the right to join the partnership" say Alton and Dan. "His hard work and commitment to our clients is exemplary."
Josh obtained his juris doctor from the University of San Diego School of Law in 2002, where he graduated in the top of his class. Josh also earned an M.B.A. from the University of San Diego School of Business in 2003.

After law school, Josh worked for the Honorable Napoleon Jones, Jr. in the U.S. District Court, Southern District of California. From there he worked for two civil litigation firms, with an emphasis on business and employment disputes.

Josh's practice at BKCG focuses on business litigation, including trade secret, employment defense and FINRA arbitrations. Josh is AV rated by Martindale Hubbell's peer review rating system, with the highest ranking (5.0 out of 5.0) in legal ability and ethics.

When not practicing law, Josh is a loving father and husband, who occasionally still likes to rip the mountain bike trails of Orange County.

In This Issue

Proposition 22: The New Changes To AB5 And Worker Classification

On November 3, 2020, California voters passed Proposition 22 which affects the application of California Assembly Bill 5 ("AB5"). AB5, passed in 2019, set forth a complex set of standards for determining whether to classify a worker as an "employee" or "independent contractor." Incorrectly classifying a worker as an independent contractor or an employee under California law can result in back taxes, civil judgments, administrative penalties, and other liabilities. Thus, the complex rules set forth by AB5 understandably frustrate business owners and create immense uncertainty for both employers and workers alike. Unfortunately, the recently-passed Proposition 22 only eases the burden on a small portion of businesses–those hiring application-based drivers.

To understand the impact of Proposition 22, it is first necessary to understand how AB5 functions. As we have discussed in previous articles, in determining the classification of a worker as an independent contractor or an employee, AB5 generally requires businesses to use what is known as the "ABC" test set forth by the California Supreme Court's opinion in *Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903. Under the ABC test, a worker is classified as an employee, unless: (A) the worker retains control and discretion over his or her manner of work performance; (B) the worker performs work outside the hirer's usual course of business; and (C) the worker is customarily engaged in an established trade, occupation, or business of the same nature of the work to be performed.

However, AB5 provides for an extensive and specific list of carve-outs which exempts certain professions from the default ABC test set forth by *Dynamex*. In those instances where the ABC test does not apply, AB5 requires businesses to analyze the classification of their workers according to the factors originating in *S.G. Borello & Sons v. Department of Industrial Relations* (1989) 48 Cal.3d 341, known as the *Borello* factors. The *Borello* factors include, among others, weighing whether the hirer or worker retains control over the manner of performance of work, whether the worker uses his or her own equipment, and whether the work requires any special skills of the worker.

AB5 complicated the classification of workers, increased costs for numerous employers, and confused many workers applying for jobs. Application-based businesses relying on the classification of their drivers as independent contractors–such as those driving for Uber, Lyft, and DoorDash–in particular found that these changes would necessitate overhauling their entire business structures. This set the groundwork for the campaign by major applications such as Uber, Lyft, and DoorDash to pass Proposition 22 and amend the application of AB5.

Indeed, many voters lauded Proposition 22 as the remedy to the burdensome rules imposed by AB5. However, while ride sharing and food delivery applications enjoyed a major win with the passage of Proposition 22, the legal realities are far more complicated for other businesses.

Proposition 22 overrides AB5 as it applies to application-based drivers. Proposition 22 reclassifies application-based drivers as independent contractors, unless the company hiring the application-based driver: (1) sets specific dates and hours for its drivers; (2) requires its drivers to accept certain rideshare or delivery requests; (3) prohibits its drivers from driving for other companies; or (4) restricts its drivers from working in another business or profession.

The language of Proposition 22 plainly applies *only* to application-based drivers, such as those driving for rideshare applications or food delivery applications. This means that, although many businessowners believed that Proposition 22 would allow them to classify workers as they had before AB5, Proposition 22 does not actually apply to many of those businesses. Without the benefits provided by Proposition 22, other businesses not exempt from AB5 must determine whether to use the ABC test or the *Borello* factors. Thus, for businesses which do not fall under the purview of Proposition 22's exemption to AB5, it is critical not only to accurately determine whether their workers' classifications must be determined according to the ABC test or the *Borello* factors, but also to then correctly apply the applicable standard in order to avoid misclassification.

Given these new changes in employment law, businesses should be careful regarding classification of employees and independent contractors–especially those businesses not hiring app-based drivers. If your business needs advice navigating the new changes in employment law, BKCG's experienced attorneys can assist with any issues your business faces.

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

Will The Court Allow A Witness To Testify At Trial Via A Video Link?

The era of COVID-19 pandemic, social distancing, and stay at home orders, has raised a number of unique issues for courts to resolve. One issue is what to do if a witness or an expert cannot appear in person at trial due to COVID-19 concerns. For instance, an expert is available to testify but falls within a high-risk group for contracting COVID-19 and cannot take the risk of traveling or appearing in person. Should that expert be allowed to testify at trial via a video link?

The Federal Rules of Civil Procedure ("FRCP") provide the court with discretion to allow witnesses to testify at trial via a live video feed. While the general presumption at a trial is that witnesses will present their testimony in-person in the courtroom, FRCP 43(a) provides a process for testimony to be presented by contemporaneous transmission where there is "good cause", "compelling circumstances", and where appropriate safeguards are taken to ensure the veracity of the testimony.

FRCP 43(a) states, in pertinent part, "[a]t trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, [the Federal Rules of Civil Procedure], or other rules adopted by the Supreme Court provide otherwise." Rule 43(a) goes on to provide that "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." The decision of whether to allow testimony by video falls within the trial court's discretion. *Thomas v. Anderson*, 912 F.3d 971, 977 (7th Cir. 2018). The Court's discretion is supplemented by wide latitude in determining the manner in which the evidence is to be presented under the Federal Rules of Evidence. *Parkhurst v. Belt,* 567 F.3d 995, 1002 (8th Cir. 2009). Courts strive to make certain that appropriate safeguards are taken to ensure the veracity of the testimony.

Determining whether "good cause" and "compelling circumstances" exist is left to the discretion of the trial court. *In re Vioxx Products Liability Litigation*, 439 F.Supp. 2d 640 (2006); See also *Gould Elecs. Inc. v Livingston Cty. Rd. Comm'n*, 2020 WL 3717792 at 4 (E.D. Mich. June 30, 2020). According to the Advisory Committee Note to FRCP 43(a), "good cause" and "compelling circumstances" are likely to arise when a witness is unable to attend trial for unexpected reasons but remain able to testify from a different place. See *Advisory Committee Note*. With regard to COVID-19 and the pandemic, many courts around the country have held that the COVID-19 pandemic and its impact on parties' and witnesses' ability to appear in person do indeed constitute "good cause" and "compelling circumstances" for purposes of a bench or jury trial. See *In re RFC & ResCap Liquidating Trust Action*, ---F.Supp.3d ---,---, 2020 WL 1280931 at 2, 4 (D. Minn Mar 13, 2020); *Argonaut Ins. Co. v. Manetta Enters., Inc.* 2020 WL 3104033 at 2-3 (E.D.N.Y. June 11, 2020); *Vitamins Online, Inc. v. HeartWise, Inc.* 2020WL 3452872 (US Dist. Ct., D. Utah June 24, 2020); *Xcoal energy & Resources v. Bluestone Energy Sales Corp* 2020 WL 4794533 (US Dist. Ct., D. Delaware August 18, 2020); *Flores v. Town of Islip* 2020 WL 5211052 (US Dist. Ct. E.D. NY September 1, 2020); *Sentry Select Insurance Company v. Maybank Law Firm*, US Dist. Ct. D. South Carolina, Orangeburg Division September 10, 2020) (where court granted defendant's motion to allow video testimony of its expert via videoconference due to the age and the fact that the expert was in a high risk category for contracting COVID-19); *Vasquez v. City of Idaho Falls*, 4:16-CV-00184-DCN (D. Idaho April 13, 2020)(where court held that a 73-year old witness who was a diabetic and would have to travel from out of state could testify via remotely). Even where the jury has to decide complex intellectual property issues, the COVID-19 pandemic has been deemed to constitute "good cause" and "compelling circumstances" to allow videoconference testimony from witnesses. *Guardant Health, Inc. v. Foundation Medicine, Inc.* 2020 WL 6120186 (US Dist Ct, D. Delaware October 16, 2020).

Although courts start with the strong presumption that witness testimony will be presented in-person in the courtroom, FRCP 43(a) does carve out a process to be used in certain limited instances such as the current pandemic. In the event you have a trial scheduled in the near future and a witness who will not be able to testify in person, FRCP 43(a) may provide relief.

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

BKCG Litigation Update: From Bad To Worse. How Not To Handle A Big Verdict Against You

After a sizable verdict is awarded, the losing party must confront its options clear-eyed and deliberately. There are many tools at the disposal of the prevailing party, and judgments do not just go away. Thus, there is a right way and a wrong way to navigate these waters. Below is a case study of the wrong way.

Avid readers of the BKCG Bulletin may recall that in late 2017, BKCG obtained a $4.3 million jury verdict for its clients, Winchester-Wesselink, LLC and its majority members, against Richard and Diane Van Loon (see "BKCG Scores 'Gouda' Result At Trial", BKCG Bulletin, 2017 Winter Issue). That judgment was augmented by over $1 million of fees and costs awarded by order of the Court following trial, and then began accruing post-judgment interest at 10%. Instead of tackling this obvious problem head-on, the Van Loons instead became defiant and evasive. The Van Loons filed an appeal to challenge the verdict, but did not post a bond to hold off collection efforts. The Van Loons did, however, file a petition for relief in Bankruptcy which acted to freeze all collection efforts–temporarily. BKCG reviewed the bankruptcy petition and immediately enlisted the expertise of colleague Richard Golubow of the bankruptcy firm Winthrop Golubow Hollander, LLP.

Within months, the Van Loons' bankruptcy was dismissed as a bad faith filing, and BKCG was back to pursuing the judgment for its clients. Soon after getting post-judgment discovery back on track, however, the Van Loons chose not to comply with the discovery–or the subsequent orders of the court. That led to BKCG pursuing contempt charges and after a short trial, the Van Loons were sentenced to jail and served three days! (See "Out Of Order! BKCG Puts Disobedient Judgment Debtors In Jail", BKCG Bulletin, 2019 Fall Issue). As BKCG turned up the pressure with foreclosure sales on two real estate properties owned by the Van Loons, the recalcitrant debtors boldly filed for bankruptcy for a second time. And, again, BKCG brought in Mr. Golubow. And again, within months, the bankruptcy filing was dismissed as a bad faith filing. This time, however, the bankruptcy court made the extraordinary additional ruling of barring the Van Loons from filing any bankruptcy petitions for 18 months. With the threat of improper bankruptcy stays quelled, BKCG was able to proceed (albeit during the early days of the pandemic) with the foreclosure sales, netting more than $1.5 million for the clients.

Another result of the bankruptcy stays being lifted was that the appeal was finally able to proceed to oral argument. And so, with all participants, including the justices, on video, oral argument was held. Within days, the Court of Appeal issued its opinion fully affirming the verdict, including the punitive damage award. Soon after the judgment was finalized by the Court of Appeal, BKCG was able to collect nearly $1.8 million more for its clients in a related eminent domain case filed against the Van Loons relating to their commercial property.

Not surprisingly, all of this work that the evasive Van Loons caused after the judgment led to substantial legal expenses for BKCG's clients. Thus, following the Court of Appeal's affirmance, BKCG filed a motion with the trial court to recoup these expenses (nearly $550,000) as an additional judgment against the Van Loons. Recently, the Riverside Superior Court issued its order, granting the motion and awarding BKCG's clients every penny requested.

And so, three years after the jury returned its verdict, and despite having seen over $3.3 million of their assets collected (including their family home), the Van Loons remain judgment debtors. With post-judgment interest and fee awards, there still remain substantial amounts owing–well above that original $4.3 million verdict. In other words, a perfect example of what not to do after losing a big verdict.

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The Not-So-Remote Perils Of Remote Workplace Holiday Gatherings

The holidays look vastly different for most of us this year and nowhere is this more evident than in the workplace. One especially vexing issue that has confronted employers as we head into the holiday season is how to say a safe "thank you" to the employees who make many businesses run. Especially now, after much of California has been placed into a lock-down almost as stringent as the first one in March, employers are looking for alternatives to the in-person holiday parties they usually throw for their employees and many are choosing to move the celebrations to an online platform such as Zoom.

Over the past several months, employers and employees alike who have been working from home have generally gotten used to using platforms like zoom to conduct day-to-day business and communicate with management, other co-workers and clients. This sense of familiarity has, in some ways, spurred less than professional behaviors from some attending to business during a Zoom meeting or on a similar platform. I am sure we have all heard the same horror stories, such as the news anchor who appeared from his home seemingly without pants during a national broadcast. Therefore, as businesses turn to these platforms to host remote social events it is a good idea to remind ourselves that labor laws still apply and that certain behaviors (even at a remote holiday party) must not be tolerated.

For example, during the pre-COVID times, one of the greatest liabilities for employers was deciding how to responsibly manage alcohol consumption at workplace holiday events. Because the risk of intoxicated employees at these events created such liability, many employers simply hosted an event without allowing alcohol. Although those potential problems are greatly decreased for employers hosting remote events, employees might still become intoxicated (and less inhibited) during an online holiday gathering. In fact, because individuals are in their own homes and not driving there may be an increased risk of employees drinking too much and behaving inappropriately. If that situation arises, employers hosting such an event should make sure to use the platform tools available to mute unruly individuals or disable other features such as video or screen sharing.

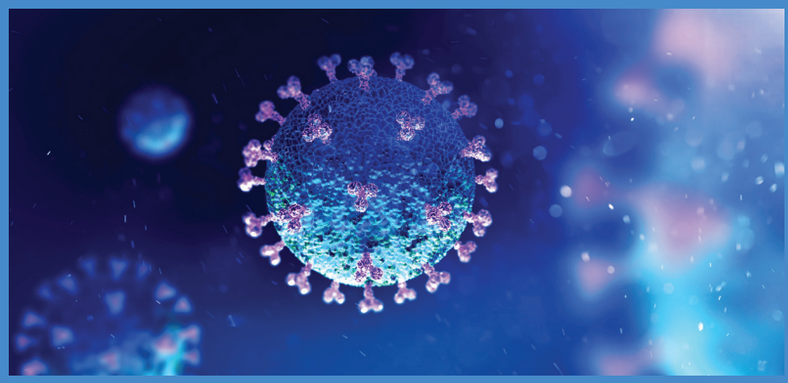
Depending upon the platform being used, employers should also be cognizant that if one participant says or shares something inappropriate (such as a joke or a picture) that could be found discriminatory or offensive, likely everyone at that remote event will hear and/or see the offensive content. As a result, the employer should be vigilant and perhaps maintain a set structure such as virtual games to avoid the opportunity for things to go off the rails. A simple google search provides countless game ideas (such as virtual holiday bingo and karaoke).

Finally, employers should realize that employees in their homes for remote holiday gatherings may have far less flexibility than, for example, when they are able to hire a babysitter and go out for an in-person workplace event. Therefore, employers should be flexible regarding if and for how long an employee decides to attend a remote event.

Things in 2020 have been tough and it's a great idea to take some time to reward employees for their hard work and flexibility, but at the same time employers must remember that the same employment rules apply even though many of us are working from home.

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

COVID-19 Continues Its Onslaught On Courts Across The Nation (continued from page 1)



Courts in other jurisdictions have experimented with in-person jury trials, and with trials conducted using Zoom technology, with results that could easily be anticipated. The Eastern District of Texas, where BKCG is pursuing claims on behalf of a long-time client, has conducted at least 20 in-person jury trials, with a modified number of jurors, since June, with varying degrees of success, as several trials were suspended when jurors and/or trial lawyers tested positive for COVID. Trials conducted over Zoom have encountered both technological and organic challenges, as even when a strong internet connection can be maintained for a group of lawyers, jurors and courtroom officials, keeping their focus and attention over a video-conference presents a further challenge for trial lawyers.

Florida courts resumed in-person jury trials over the summer, but the pandemic's surge has caused its Court administrators to rethink its decision. Recently, South Florida judges have urged trial lawyers to consider jury selection and trial using remote methods, such as Zoom. In late November, the Florida Supreme Court issued new guidance discouraging in-person appearances at court houses and seeking to establish uniform rules for the use of technology and video conferencing during jury selection and trials.

Trials conducted by Zoom may ultimately pose bigger problems than simply keeping jurors' attention, as a recent study of potential Zoom jurors in Travis County, Texas (where Dallas is situated) revealed that a Zoom jury panel will ***not*** be representative of the actual composition of your jurisdiction, as 30% of families did not have access to high-speed internet service. These households were in the same areas that experience high crime rates, food deserts, and poverty levels. When nearly a third of households do not have the same access to reliable internet service as other jury-qualified individuals, it creates a massive participation disparity. The divergence in both education and race demographics is substantial. 83% of the Zoom jury panel self-reported having a college or post-graduate degree when U.S. Census data reports only 48.6% of individuals in Travis County have the same. People of color were also underrepresented in this jury pool: 73% of the Zoom jury panel self-reported their race as White when the data shows this percentage as less than 50% for the county. While some differences can certainly be accounted for by the necessity of ensuring individuals are jury-qualified (over 18 years of age, eligible to be registered voter, etc.) as well as the randomness of the jury wheel, the demographics of this Zoom jury panel was just not representative of a traditional Travis County jury pool.

There is no fast and easy answer for providing relief to an already-overburdened Court system. To further complicate matters, we are already seeing a surge of litigation seeking to place blame on deep-pocketed employers for the spread of the pandemic across a country that was unprepared and ill-equipped to respond sensibly. The widespread adoption of a vaccine will help Courts return to some sense of normalcy, as will the return of some basic respect for medical science, but it will take years to recover, and litigants will pay that price.

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Burkhalter Kessler Clement & George LLP (BKCG) advises and protects businesses and high net worth individuals through experienced litigation and transactional lawyers. Core practice areas include: Business litigation in state and federal courts, as well as FINRA, AAA and JAMS arbitration and mediation; Corporate, transactional and employment law documentation; and Estate Planning and Probate services through the Firm's State Bar certified Estate Planning Specialist.