In its recent decision, *Martinez v. Combs et al.*, the California Supreme Court expanded, and yet also limited, the universe of employers who will now have liability exposure for unpaid wages under Section 1164 of the California Labor Code. The Court adopted the Industrial Welfare Commission’s definition of employer as one who exercises control over the wages, hours, or working conditions of the employee, who suffers or permits the employee to work or who hires the employee.

The Facts

Under the facts of the case, Munoz & Sons grew and harvested strawberries. Miguel Martinez and other employees (“employees”) worked for Munoz as seasonal agricultural workers for the 2000 harvest. During that season, the market for strawberries was extremely poor and Munoz did not pay his employees. Munoz eventually filed a bankruptcy petition. Martinez sued Munoz, Apio, Inc., and Combs Distribution Co., two produce marketers (“marketers”) through which Munoz sold its strawberries, for among other things, unpaid minimum wages. Munoz eventually filed a bankruptcy petition. Martinez sued Munoz, Apio, Inc., and Combs Distribution Co., two produce marketers (“marketers”) through which Munoz sold its strawberries, for among other things, unpaid minimum wages. Martinez alleged that the marketers were joint employers with Munoz and liable for their unpaid wages. The marketers requested summary judgment, which the trial court granted, and the Court of Appeal affirmed. The employees petitioned the Supreme Court, and review was granted.

The Reasoning Behind Decision

The Supreme Court rejected the employees’ argument that the marketers “suffered or permitted” them to work simply because the marketers knew they were working or because the marketers benefited from their work as purchasers of the strawberries. The Supreme Court stated: “[T]he concept of a benefit is neither a necessary nor a sufficient condition for liability under the ‘suffer or permit’ standard. [Rather], the basis of liability is the defendant’s knowledge of and failure to prevent the work from occurring.”

Only Munoz had the power to hire and fire his employees, to set their wages and hours, and to tell them when to report to work. According to the Court, the marketers’ business relationship with Munoz, standing alone, did not transform them from purchasers of goods into employers of Munoz’ workforce.

Ramifications for “Employers”

The consensus among employment law attorneys is that *Martinez v. Combs* increases the risk of unpaid minimum wage and overtime liability in joint employer leasing and independent contractor arrangements, although it does limit the liability of marketing agents who simply sell the produce harvested by a grower, even if they advanced funds to the grower.
Employers should be mindful of the following:

- Employers cannot hide behind a “straw man” or contractual agreement to dilute the level of control they may have over workers.
- Employers that engage outside, independent contractors for labor or personnel services should specify that the other party is solely responsible for: (a) hiring/firing decisions, (b) supervising workers, (c) working conditions, and (d) wages and hours.
- Indemnification provisions are appropriate to absolve third parties from possible employment claims.

**WAGE & HOUR:**

**EMPLOYEES ARE ENTITLED TO REIMBURSEMENT FOR “WORK-RELATED EXPENSES” UNDER CALIFORNIA LAW, AND THE RIGHT TO REIMBURSEMENT CANNOT BE WAIVED**

The Right To Be Reimbursed Is Found in the Labor Code

Under California Labor Code § 2802, employers are required to reimburse all employees for any “work-related expenses.” Mileage, travel expenses, cell phone usage costs, and the cost of maintaining uniforms are examples of work-related expenses. Reimbursable expenses also can include the costs of defending a lawsuit if an employee is sued for work-related conduct.

California Labor Code § 2804 further provides that employees cannot waive the right to be reimbursed for work-related expenses. According to a recent decision of the U.S. District Court for the Northern District of California, *Stuart v. RadioShack Corporation*, this means that even if employees do not submit expense reports in compliance with company policy, an employer nonetheless must reimburse them. Moreover, the court ruled that employers are obligated to reimburse work-related expenses even if employees do not make a formal request to be reimbursed if the employer knows or has reason to know that an expense was incurred.

Employee Entitled to Reimbursement Even If Employee Did Not Follow Company Policy

Richard Stuart was a manager for RadioShack in Northern California. Stuart was sometimes required to transfer merchandise between stores using his personal vehicle. RadioShack maintained a policy of only reimbursing employees for mileage if the employee traveled more than 25 miles in his or her own vehicle. (This policy violates California law, which requires mileage reimbursement for all work-related travel.) RadioShack also had a policy requiring employees to list all work-related expenses on the company travel form or through the company’s online reporting system.

Stuart sued RadioShack on behalf of himself and a class of employees, claiming that the company was required to reimburse all employees for mileage regardless of distance, even if employees did not submit formal expense reports. He contended that the duty to reimburse is automatically triggered when an employee incurs a work-related expense. RadioShack argued that an employer’s duty to reimburse for work-related expenses arises only if the employee formally requests reimbursement and that its employees did not request reimbursement for the inter-store trips.

The court rejected the arguments made by both Stuart and RadioShack. It instead found that under California law, an employer must reimburse employees for work-related expenses if the employer knows or has reason to know that the expense was incurred. In other words, the court ruled that employers must reimburse for expenses if the company has “actual knowledge” that the expense was incurred as well as when the company has “constructive knowledge” of the ex-
EMployee Can Be Liable for Employee’s Accident While Commuting

Although employers are usually exempt from liability for an employee’s acts while commuting to and from the job, the California Court of Appeals, in Lobo v. Tamco, recently issued a reminder of an important exception to this rule—which was not favorable to a Rancho Cucamonga employer.

Commuting Employee Kills Sheriff in Car Accident

Luis Duay Del Rosario had been the manager of quality control for 16 years for Tamco, a steel manufacturer. His job occasionally required him to visit customers’ facilities to address their quality complaints. The company did not provide him with a company car, but he often caught a ride with a co-worker. If a co-worker wasn’t available, Del Rosario would use his own car and get reimbursed for mileage. Del Rosario estimated that he used his car 10 or fewer times in 16 years.

In October 2005, Del Rosario was leaving Tamco’s premises to go home. As he turned out of the driveway and onto Arrow Highway, he collided with a San Bernardino deputy sheriff on a motorcycle; the sheriff was killed.

The sheriff’s family filed a wrongful death lawsuit against Tamco, alleging that Del Rosario was acting within the course and scope of his employment at the time of the accident. The trial court dismissed the case, and the sheriff’s family appealed.

The ‘Going and Coming’ Rule and Its Exception

Under what is known as the “going and coming rule,” employers are...
typically not liable for acts employees commit while commuting to and from work; these acts are considered outside of the course and scope of employment.

But, as the Court of Appeals noted, an exception to the rule occurs when the use of the employee’s vehicle provides some incidental benefit to the employer. According to the court, this “required vehicle” exception can apply if:

1. The use of a personally owned vehicle is either a stated or implied condition of employment, or
2. The employee has agreed (expressly or implicitly) to make the vehicle available as an accommodation to the employer, and the employer has reasonably come to rely on its use and to expect the employee to make the vehicle available on a regular basis.

Any Amount of On-the-Job Use of a Vehicle Can Make an Employer Liable
Tamco argued that the required vehicle exception only applies when driving is an “integral” part of an employee’s job. Del Rosario’s occasional use of his car to visit customers was insufficient to trigger the exception, the company contended.

The appellate court disagreed. It found that the fact that an employer only rarely makes use of an employee’s personal vehicle is not a sufficient defense if the employer also requires or reasonably relies on the employee to make the vehicle available for the employer’s benefit, and the employer derives a benefit from that availability.

The court concluded that the availability of Del Rosario’s car benefited Tamco by ensuring that he could respond promptly to customer complaints if a co-worker could not drive him to the site. The company also benefited because it did not need to provide him with a company car. Therefore, the Court of Appeals reversed the trial court’s dismissal of the case against Tamco and allowed the family’s lawsuit to proceed.

Limiting Liability for the Commute
Employers need to exercise caution when it comes to their employees’ use of their own vehicles for work-related reasons. First and foremost, avoid making the use of a workers’ personal vehicle a condition of his or her employment, and understand that requiring an employee to use his or her vehicle to attend meetings, make client calls, or perform similar off-site work-related tasks – no matter how rarely – opens the door to liability for that employee’s commute. It may be wise to restructure some jobs to eliminate the need to use personal vehicles.

INJURED GARDENER WAS INDEPENDENT CONTRACTOR, NOT AN EMPLOYEE COVERED BY WORKERS’ COMPENSATION

Jose Luis Lara was pruning bushes for the Metro Diner when he fell from a roof and suffered head, back, neck, shoulder, arm, hand and thumb injuries. It was the second time he had pruned the bushes for the diner within a year, but he had done no other work for the diner.

Lara testified before a workers’ compensation judge that he has performed gardening, painting, pipe fixing, and graffiti removal for 25 years. His clients are people who know him or who find him on street corners. Lara brings his own equipment and does the same type of work each day but for different clients. He also testified that no one gave him instructions on the day of his accident because he already knew how to do the job.

The workers’ compensation judge found that Lara was employed by the diner as a gardener and was injured in the course of employment. Consequently, he was entitled to workers’ compensation benefits. The diner filed a petition for reconsideration with the Workers’ Compensation Appeals Board and the Board granted the petition, reversing the trial judge. The Board determined that Lara was an independent contractor who paid his own taxes and contracted with numerous individuals to perform different types of jobs. Further, the Board found “no evidence that Metro had the power to control the details of [Lara’s] work in pruning the bushes or the method by which he performed the task.”

Lara filed an appeal of the Board’s decision and the Court of Appeal, in Lara v. WCAB upheld the Board’s finding that Lara was an

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independent contractor. The Court emphasized that Lara was engaged to produce a result trimmed bushes. The means and manner of accomplishing that result were not discussed or part of the agreement between Lara and the diner. Further, Lara testified that once he accepts a job, he performs it without direction from the client. He also chose the date and time of the pruning.

Employers have paid a high price for misclassifying workers as independent contractors when the worker should have been classified as an employee. With the current economic climate, employers have tried to reclassify employees as independent contractors in an attempt to cut overhead (payroll taxes, workers’ compensation insurance, minimum wage, overtime etc.). Employers are cautioned to consult with counsel before reclassifying an employee to independent contractor status, and counsel should be consulted even when the worker is not “re-classified,” but also when the worker will perform services for the first time and the company believes he or she may be properly classified as an independent contractor.

AN EMPLOYEE’S COMMUTE TIME MAY BE COMPENSABLE UNDER CALIFORNIA LAW

Last year, the Ninth Circuit Court of Appeals, which includes California, ruled that the time nonexempt employees spend commuting to and from work in company cars is not compensable under the federal or state laws. The federal appeals court, however, in Rutti v. Lojack Corporation, Inc., reconsidered the case and reversed part of its decision, holding that commute time may be compensable under California (not federal) law in certain circumstances.

Lojack Tech Sues for Commuting Pay as Plaintiff in Class Action

Mike Rutti was a technician for Lojack Corporation, Inc., installing and repairing vehicle recovery systems. Most of the work was done at the clients’ locations in Orange County and required him to travel to jobsites in a company-owned vehicle. Lojack did not permit employees to make personal stops or use any other personal use of the vehicle. Rutti was paid on an hourly basis, starting when he arrived at his first job location each day and ending when he completed his final installation of the day.

California Law Requires Compensation for All Time an Employee is “Subject to Control of an Employer”

The Ninth Circuit relied upon the holding of a California Supreme Court decision issued a decade ago in which the state high court found that farm workers must be compensated for their commute time when they commuted on company supplied buses, because the Company required the farm workers to take the company buses. The farm workers were not permitted to take their cars to the fields, and as a result, they were unable to run errands, drop their children off at school etc. In Lojack, the Court reasoned that the technicians’ situation was similar to the farm workers in the following respects:

- required to drive the company vehicle
- could not stop for personal errands
- could not take passengers
- required to drive the vehicle directly from home to job and back
- could not use cell phone while driving (except to answer calls from Lojack’s dispatcher)

Additionally, Lojack’s computerized scheduling system dictated the technician’s first assignment each day and the order in which the day was completed.

Consequently, the Ninth Circuit concluded that Rutti was under Lojack’s control while driving the vehicle to the first job of the day and on his way home. In light of the Rutti opinion, employers should not assume that an employee’s commute time is noncompensable. The question is going to turn on whether a California employer exercises control of the employee in connection with the commute to and/or from work.
DISCRIMINATION CLAIMS APPROACH RECORD HIGH IN 2009

The U.S. Equal Employment Opportunity Commission announced recently that 93,277 workplace discrimination charges were filed with the agency nationwide during fiscal year 2009 - the second highest level ever. Continuing a decade-long trend, the most common charges were based on racial discrimination (36 percent of the charges), retaliation (36 percent), and sex-based discrimination (30 percent). Complaints alleging discrimination based on disability, religion, and/or national origin hit record highs, and the number of charges alleging age-based discrimination reached the second-highest level ever.

OUTBACK STEAKHOUSE CHAIN SETTLES SEX-BIAS SUIT FOR $19 MILLION

The EEOC announced that the Outback Steakhouse restaurant chain has agreed to pay $19 million to settle a national class action lawsuit. The women plaintiffs alleged that the company maintained a “glass ceiling” that prohibited female employees from attaining management positions within the company. Outback required kitchen management experience as a pre-condition to advancing to supervisory positions. However, according to the EEOC, women were not hired for these kitchen positions. In the settlement, the company also agreed to change its promotion and application procedures and criteria and make semi-annual reports to the EEOC for two years, detailing its progress in promoting more women to management positions.

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