MORETON & COMPANY

Property & Casualty Newsletter

June 2018: Employment Practices Liability

Supreme Court Rules in Favor of Employers on Class Action Waivers

On May 21, 2018, in a 5-4 decision, the United States Supreme Court found that a class-action waiver within an arbitration clause of an employment contract barred the employee from filing a class-action lawsuit related to wage and overtime claims. The Court determined that employment agreements can require arbitration, waiving the employee's right to participate in a class-action lawsuit, to settle these disputes.

Prior to this decision, the National Labor Relations Board (NLRB) (and the Obama administration) took the position that although arbitration agreements in general may be enforceable, arbitration clauses in employment agreements that included class-action waivers violated Section 7 of the National Labor Relations Act and were not valid. As a result of this ruling (written by Justice Neil Gorsuch), employers are now free to include clauses in employment contracts requiring the use of arbitration to resolve wage and overtime claims and barring class-action lawsuits related to these matters. You may want to consider whether your company should include a class-action waiver in employment agreements.

Note: This ruling only impacts non-unionized employees and does not affect employees represented by labor unions.

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California Supreme Court Adopts New Independent Contractor Test

In a recent decision, *Dynamex Operations West v. Superior Court*, the California Supreme Court adopted a new standard for determining whether a worker is an independent contractor or an employee. The California court adopted the "ABC" test, which presumes that all workers are employees, and places the burden on the employer to rebut the presumption and establish independent worker status by showing:

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

B. The worker performs work that is outside the usual course of the hiring entity's business; and

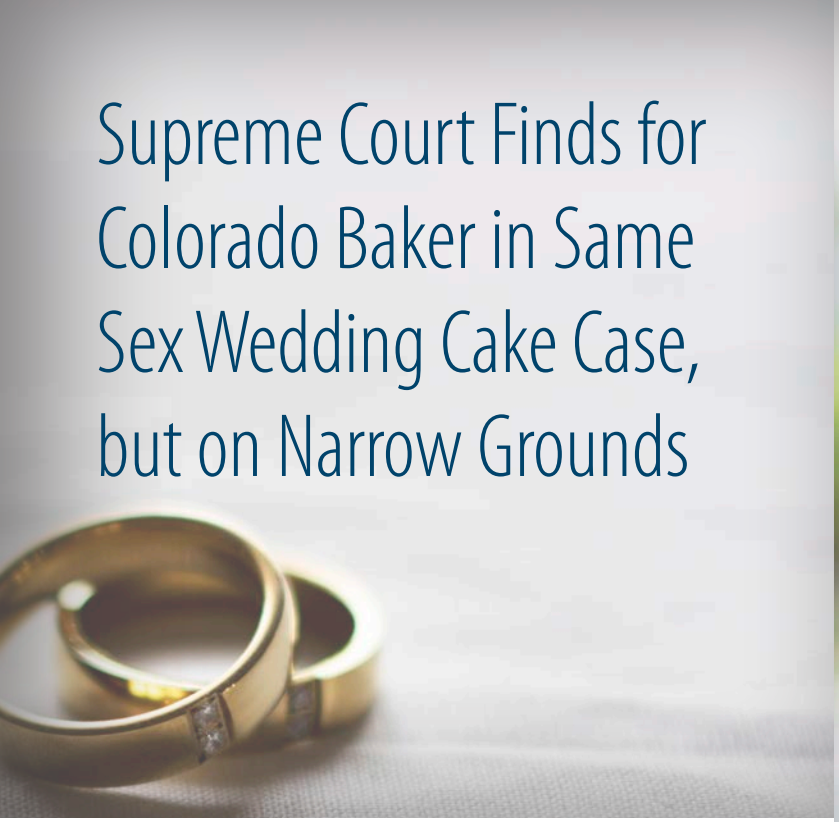
C. The worker is customarily engaged in an independently established trade, occupation or business of the same nature that is involved in the work performed.

Each of these requirements must be met in order for the presumption of employee status to be rebutted and to establish that the worker is truly an independent contractor. Employers with California operations that classify workers as independent contractors should review independent contractor status under this new test.

Utah Court of Appeals Addresses Independent Contract Analysis

A recent case from the Utah Court of Appeals demonstrates that businesses who classify workers as independent contractors should ensure the contract between the parties supports the classification. In *Deseret Book Company v. Department of Workforce Services*, the Utah Court of Appeals upheld a decision by the Utah Department of Workforce Services that an actor hired by Deseret Book to perform in a Christmas program was actually an employee, and not an independent contractor. The language of the contract between Deseret Book and the actor was critical to the Court's analysis. The contract provided that the actor would be "under the direction of" Deseret Book. The Court found that "it is the right of control" and not the actual exercise of control that is important in determining whether an employment relationship exists. Here the contract granted the "right of control" to Deseret Book, weighing in favor of employment status. If you classify a worker as an independent contractor, in addition to ensuring the worker meets applicable legal tests, you should ensure the language of the agreement between the parties is consistent with contractor status.

Supreme Court Finds for Colorado Baker in Same Sex Wedding Cake Case, but on Narrow Grounds



In early June, the United States Supreme Court issued a narrow ruling in favor of a Colorado baker who refused to make a wedding cake for a same-sex couple. In *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm.*, the Colorado Civil Rights Commission (Commission) found the baker violated Colorado's anti-discrimination law by refusing to make a wedding cake for the couple. The baker argued that his refusal was a justified exercise of his First Amendment rights, because his sincerely held religious beliefs prohibited him from serving a same-sex couple. The baker appealed, and the case ultimately made its way to the Supreme Court.

While the Supreme Court found in favor of the baker, its decision was based on a finding that the Commission displayed hostility toward the baker's arguments and applied a biased process in the initial proceedings that resulted in a ruling in favor of the couple and against the baker. The case was remanded back to the Commission for further review consistent with the Court's decision. The Court's ruling leaves open the key question of whether individuals who hold sincerely held religious beliefs can refuse service to individuals within a protected class. Until that question is definitively answered, further litigation in this area is likely.

Leave as an Accommodation Under the ADA

The United States Supreme Court recently declined to review the September 2017 decision of the Seventh Circuit Court of Appeals (*Severson v. Heartland*) holding that an extended medical leave of absence is not a "reasonable" accommodation with the meaning of the Americans with Disabilities Act ("ADA"). The Severson decision was viewed as a major win for employers, and while affirmance by the United States Supreme Court would have been welcomed, by refusing further review, the Seventh Circuit decision remains in place. The Tenth Circuit Court of Appeals (which governs Utah and Colorado) has adopted a position very similar to that of the Seventh Circuit.

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Moreton & Company - Idaho
2501 East State Avenue, Suite 200, Meridian, ID 83642
208-321-9300

Moreton & Company - Utah
101 South 200 East, Suite 300, Salt Lake City, UT 84111
801-531-1234

Moreton & Company - Colorado
4600 South Ulster Street, Suite 610, Denver, CO 80237
303-385-2100

www.moreton.com