CalPERS' Employee Grab?
A View from the Trenches

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Introduction – Who is Considered an Employee?

- Public Employees Retirement Law ("PERL") includes a compulsory enrollment requirement for any person "in the employ" of the contracting agency.

- In the landmark case *Metropolitan Water District v. Superior Court ("Cargill")*, 32 Cal. 4th 491 (2004) the Supreme Court held that the employer was required to enroll in CalPERS "common law employees," despite these workers being supplied by private companies.

- Since then, employers continue to grapple with the issue of how to properly engage with independent contractors without having to enroll them in CalPERS.

Agenda

- History and Elements of Current Independent Contractor Test applied by CalPERS
- *Dynamex*
- AB 5
- The Audit and Appeal Process
- Tips and Preventive Measures

Cargill – Facts of the Case

- The workers were provided by third party "labor suppliers."
- They alleged:
  - They worked at MWD for indefinite periods, and in some cases several years;
  - MWD interviewed and selected them for the work;
  - They were integrated into the MWD workforce and performed the work at MWD worksites;
  - MWD supervisors directly oversaw and evaluated their work, determined their pay rate, determined their raises, determined their work schedules and approved their time sheets;
  - MWD had full authority to discipline and terminate them; and
  - MWD had the full right to control the manner and means by which they worked.

Cargill – Outcome

- Because neither PERL nor CalPERS define what a "person in the employ" is, *Cargill* held that in the absence of a statutory definition, the common law employment test applies.

- Importantly, *Cargill* did not actually decide *whether the* workers at issue were common law employees, but held that PERL requires enrollment of all common law employees. 32 Cal. 4th at 497.

- *Cargill* applied prior Supreme Court precedents that define common law employment, including the *Tieberg* case.

The *Tieberg* Test for Common Law Employees

- In *Cargill*, the California Supreme Court discussed and endorsed the test for common law employment discussed in *Tieberg v. Unemployment Insurance Appeals Board*, 2 Cal. 3d 943 (1970).

- *Tieberg* involved the issue whether television writers were employees of the producer and, if so, whether the producer was liable for past unemployment insurance contributions.

- *Tieberg* sets forth the test that is currently used by CalPERS.

- The primary and most important factor is *whether the employer retains the right to control the manner and means of accomplishing the work*. *Tieberg*, 2 Cal. 3d 943 at 950.

The *Tieberg* Test for Common Law Employees

- Secondary factors to consider include:
  - Whether or not the one performing services is engaged in a distinct occupation or business;
  - The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
  - The skill required in the particular occupation;
  - Whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
  - The length of time for which the services are to be performed;
  - The method of payment, whether by the time or by the job;
  - Whether or not the work is a part of the regular business of the principal; and
  - Whether or not the parties believe they are creating the relationship of employer-employee.

Tieberg – Additional Factors

- *Tieberg* endorses two additional factors that included in the *Restatement of Agency* law:

  1) The extent of control which, by the agreement, the employer may exercise over the details of the work; and

  2) Whether the principal is or is not in business for him or herself.

- Utilizing these factors, *Tieberg* concluded:

  - The writers were subject to the control and discretion of the producers;
  - The other factors collectively did not tip the scale in favor of the producers; and
  - The writers were appropriately considered common law employees.

The *Holmgren* Case and CERL

- Unlike PERL, the County Employees Retirement Law ("CERL") defines "employee" as "any officer or other person employed by a county *whose compensation is fixed by the board of supervisors or by statue and whose compensation is paid by the county*, and any officer or other person employed by any district within the county." *Holmgren v. County of Los Angeles*, 159 Cal. App.4th 593, 603 (2008)(emphasis added).

- In *Holmgren*, the issue concerned contractors who were hired to perform certain telecommunications work for the County.

- The contractors in turn hired engineers for particular work orders.

- The core issue was whether the County misclassified engineers hired as independent contractors, or whether they were common law employees who must be enrolled in CERL.

The *Holmgren* Case and CERL

- The court of appeal rejected the claim that the engineers were common law employees, agreeing that:
  - County employment is not governed by the common law definition of employment;
  - The County's civil service system determines who is an employee; and
  - The engineers did not meet the definition of an employee.

The *Holmgren* Case and CERL

- Notably, Plaintiffs asserted facts similar to those at issue in *Cargill*, including:
  - They were screened, interviewed and effectively hired by the County;
  - They were subject to the direct supervision and control by the County; and
  - They worked side by side with County employees.

159 Cal.App.4th at 598

Issue

- At least with respect to charter cities, there appears to be no harm in using local codes to define employment in a way that would exclude or minimize common law employment claims.

The *Tracy Fuller* Brouhaha

- *Tracy C. Fuller* and *Cambria Community College District*, Case No. 2016-1277; OAH No. 2017050780 (July 15, 2018)

- **Issue**: Should CalPERS make the decision a precedential decision?

Tracy Fuller Facts

- Interim Finance Manager supplied through Regional Government Services ("RGS").
- Express acknowledgement that this was an independent contractor relationship.
- RGS issued Fuller a phone extension, email address and business cards.

Tracy Fuller Facts

- Fuller used the title “Interim Finance Manager.”
- Board minutes identified Fuller as a CCSD staff member.
- Fuller received assignments from the General Manager.
- Fuller set her own work schedule but was expected to work full time.

Fuller Outcome

- Applying *Tieberg* and *Cargill*, the ALJ concluded that she was a common law employee and subject to compulsory enrollment in CalPERS.

The *Fuller* Controversy

- The arrangement is attractive to public agencies.
- Must critical short term needs entail the increased costs associated with CalPERS?
- Efforts to dissuade the Board from adopting the decision as precedential.

Dynamex – The Emerging "ABC" Test

- Last year's California Supreme Court ruling in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) endorsed a streamlined test for resolving common law employment versus independent contractor status.

- In *Dynamex*, a group of drivers brought a class action against their employers asserting they were misclassified as independent contractors instead of employees.

- The California Supreme Court adopted a three-part test that "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."

Dynamex – The Emerging "ABC" Test

A. The hiring business has no control and direction over the performance of the work, both under the contract and in fact;

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

C. The worker customarily engages in an independent business of the same nature as the work performed for the hiring process.

- Although Part A of the test largely resembles the preexisting common-law standard for employee classification, Parts B and C constitute a major shift in the law.

Dynamex – The Emerging "ABC" Test

- The ABC test may carry fewer consequences for public-sector employers than for private-sector employers.

- Decision is limited to "workers who fall within the reach of the wage orders," or legally binding orders that govern "obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions of California employees."

- 14 of California's 17 Wage Orders specifically exempt "employees directly employed by the State or any political subdivisions thereof, including any city, county, or special district," and courts have interpreted another Wage Order governing miscellaneous employees to exempt public employees.

- Charter cities, charter counties and general law counties may rely on the "home rule doctrine," which allows certain local entities control over employment matters despite conflicting state law, however some courts have found otherwise on this issue.

AB 5

- Authored by San Diego Assembly Member Lorena Gonzalez.
- AB 5 would codify *Dynamex*.
- September 11, 2019 – AB 5 passed out of Senate on a party line vote, 29 to 11.
- As expected, Governor Newsom signed AB 5 into law on September 18, 2019.



AB 5 – The Backstory

- A hotly contested piece of legislation.
- A flurry of lobbying efforts to gain exemptions: licensed insurance brokers, physicians, dentists, psychologists, podiatrists, lawyers, architects, engineers, private investigators, and more.
- League position "Watch."
- Public agencies not specifically exempted, but there are arguments that it does not apply to cities. More to follow . . .

The Process to Appeal a CalPERS Determination

- The Audit and Appeal
- The Statement of Issues
- Statement of Defenses
- Discovery
- The Hearing Process
- The Proposed Decision and Appeal Opportunity
- Penalties



The Audit and Appeal

- CalPERS has the right to audit payroll and personnel information.
- In the context of evaluating independent contractor status, CalPERS will issue an "initial determination" whether CalPERS views the relationship as a bona fide independent contractor relationship.
- The local agency will then be given an opportunity to respond, and thereafter CalPERS will issue a "final determination."
- The final determination triggers a thirty day timeline which may be extended by CalPERS for thirty (30) days.
- Local agencies should be very mindful of this deadline, as it will be strictly enforced.

The Statement of Issues

- After filing an appeal, CalPERS will issue a Statement of Issues. As provided by California Government Code section 11504:
    - The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing and, in addition, any particular matters that have come to the attention of the initiating party and that would authorize a denial of the agency action sought.

Statement of Defenses

- The Statement of Issues triggers a fifteen (15) day timeline to file a Notice of Defense. (Cal. Gov. Code § 11506(a).)

- Failure to file a Notice of Defense constitutes a waiver of the right to a hearing. (Id. § 11506(c).)

- Local agencies should be careful to include all affirmative defenses in this Notice, or they may face a later motion to exclude evidence or argument.

- CalPERS is responsible for making arrangements with the Office of Administrative Hearings ("OAH") for a hearing date.

- The local agency will be asked to set convenient dates and times for a hearing.

RPLG Practice Pointer!

- When setting dates, make sure there is sufficient time for discovery, and for resolution of discovery disputes. As with any litigation, it is very possible that disputes will arise over whether CalPERS has sufficiently complied with its discovery obligations. At the stage of setting a hearing, local agencies should have considerable latitude in setting a mutually agreeable and reasonable date(s) for hearing.

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Discovery

1. California Public Records Act

- There is a limited right to discovery under the APA.
- However, practitioners may also avail themselves of the Public Records Act ("PRA") to obtain documents.
- The PRA is a powerful tool to obtain documents related to how the OAH and CalPERS have ruled in other cases.

Discovery

2. The APA Discovery Statute, Section 11507.6 – Two Key Categories of Permitted Discovery:

1) Witnesses: Under the statute, each party may obtain "the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing" (Cal. Gov. Code § 11507.6.)

2) Documents: The statute provides for various categories of documents, including documents that will be introduced at the hearing, investigative reports, statement and others categories of documents.

RPLG Practice Pointer!

- Local agencies should pay careful attention to the discovery process. If an agency fails to identify a witness, or a document, it could be excluded during the hearing. In addition, if CalPERS fails to provide requested documents, agencies should consider filing a motion to compel.

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RPLG Practice Pointer!

- When communicating with CalPERS, always confirm receipt of the applicable communication. Consider sending confirmations in different ways – i.e., by email, regular mail and/or certified mail. Document all contact with CalPERS.

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The Hearing Process

- An Administrative Law Judge will preside over the hearing.
- Pre-briefing is permitted, but not required.
- Opening statements may be made.
- Witnesses will be sworn and are subject to direct and cross examination.
- Exhibits are proffered and subject to authentication and objection.
- Hearsay is admissible, subject to the rule that a material finding may not be premised solely on hearsay.
- At the conclusion of the hearing, the parties may request the opportunity for post hearing briefing. The parties may agree on a briefing schedule.

The Proposed Decision and Appeal Opportunity

- The ALJ will issue a Proposed Decision, which becomes final, unless one party appeals to the CalPERS Board.

- If appealed to the CalPERS Board, the case will be docketed for final decision.

Penalties

- Under California Government Code section 20283, if an employer fails to enroll a member within 90 days (which will always apply in these situations), the employer may be required to pay all employer and employee contributions associated with enrolling the contractor into the system retroactively to the time of initial hire.

- In addition, CalPERS may impose an additional $500 administrative fee per member.

Observations and Preventive Measures

- Agencies should consider an internal audit, to catalog their independent contractor relationships and to gauge risk.

- Consider making the audit subject to the attorney client privilege, to ensure that it is not subject to later disclosure.

- When being audited by CalPERS, ensure accurate information is provided.

- CalPERS may send out “employment relationship questionnaires” to employees without the agency’s knowledge. Consider adopting a rule requiring that employees coordinate with the city attorney before unilaterally responding to outside agency. This can help ensure that CalPERS receives balanced and accurate information.

Employing Retired Annuities

When utilizing retired CalPERS annuitants, carefully observe the various requirements and limitations in the Government Code. There are two types of employment: (1) "extra help;" and (2) "interim (or acting) vacant position employment." The limitations include:

- 960 hours per fiscal year maximum
- Compensation cannot be less than the minimum or more than the maximum paid to other employees performing comparable duties, as listed in the employer's available pay schedule

See https://www.calpers.ca.gov/docs/forms-publications/employment-after-retirement.pdf

With Respect to Independent Contractor Relationships:

- Confirm the third-party relationship, and have the worker sign and acknowledge that they are working as an independent contractor, and not as an employee.
- Ensure all identification of the worker is as a contractor. Avoid providing the same email address or other identification that would suggest the worker is an employee.
- Confirm in writing that the local agency has no right to control the manner and means of performing the work at issue.

With Respect to Independent Contractor Relationships:

- Avoid requiring the worker to attend meetings.
- Do not supply dedicated office space. If space is provided, consider using "hotel" office space that is not dedicated to the worker.
- Do not supply the specific "tools" needed to perform the work.
- Consider requiring the contractor to indemnify the local agency for adverse determinations by CalPERS.
- Consider obtaining an advance opinion from CalPERS as to whether the relationship qualifies a bona fide independent contractor relationship.

Likelihood of Success?

- Our office has recently made a PRA request to CalPERS asking for Office of Administrative Hearing ("OAH") decisions involving employee/independent contractor status determinations.

The Decisions Produced by CalPERS Prompt Two Key Insights:

1) ALJ's rule in favor of a common law relationship most of the time.

2) The public agency has the burden of proof. Most authority holds it is the party challenging CalPERS' initial "determination of employment" which must prove, by a preponderance of the evidence, that CalPERS was in error. In most cases, this means that the public agency must prove that the alleged employee is, in fact, an independent contractor.