First, But Certainly Not the Last: California Agricultural Labor Relations Board Issues First-Ever Additional Penalties to Employer for Willful Misclassification

Insights
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A new decision by the California Agricultural Labor Relations Board increases the stakes for employers who are found to have willfully misclassified its employees, as the Board deployed a powerful weapon in its arsenal for the very first time – and created another pathway for supervisors to also recover for certain workplace wrongdoings. Though the statute for authorizing penalties for willful misclassification has been around since 2012, the Board actually issued those civil penalties to an agricultural employer for willful misclassification of its crew members for the first time, demonstrating once again the serious consequences of worker misclassification. The Board, which is the agency established to enforce California's Agricultural Labor Relations Act of 1975 (ALRA), held that it was "not only authorized, but obligated" to issue the penalties even though neither the charging party nor the administrative law judge included an assessment for those penalties in the initial charge or order. What five steps should you consider in order to avoid a similar outcome at your operation?

Vegetable Grower's Paycheck Practices – and Worker Treatment – Held Improper

Cinagro Farms is a vegetable grower located in the central Coast of California. Within two months of directly hiring a crew and foreman, the crew complained that their paychecks lacked all the legally required information. The foreman relayed their complaints to the General Manager. In response, the General Manager told the foreman that they were working on it. The crew members later went directly to the General Manager themselves to complain about their paystubs, but they were ultimately never fixed. Within one month, Cinagro hired a second crew and told the foreman that there was no more work for him and his crew.

The crew and foreman believed this was improper and thus took their complaints to the California Agricultural Labor Relations Board. In a July 28 decision, the Board held that Cinagro unlawfully terminated the crew in retaliation for their complaints that their paystubs did not have the legally required employee deductions in formation, which was a result from willfully misclassifying them.

More importantly, the Board found that the foreman's crew was willfully misclassified because Cinagro's bookkeeper testified that the company's owner instructed her to treat the workers as vendors rather than employees. This resulted in paychecks accounting only for the gross piece-rate

wages with no showing for deductions. Additionally, the Board found sufficient evidence to show Cinagro's owner knew his classification of the workers did not comply with California law and failed to act.

Adding Insult to Injury

Labor code section 226.8 subdivision (b) allows a person or employer to be subject to civil penalty of not less than $5,000 and not more than $15,000 ***per violation*** for unlawful willful misclassification of an individual as an independent contractor, ***in addition*** to any other penalties or fines permitted by law.

Although the labor code has allowed these penalties, the Board had never acted to levy them against an employer – until now. Notably, the Board wrote that they "not only are authorized, but obligated" to assess such penalties because of the circumstances outlined above.

The Board sent the matter back to an administrative law judge to determine the exact amount of penalties that should be assessed against Cinagro in this case. It also ordered the employer to rehire the crew and foreman besides compensating them for the time they should have been employed between the date of their terminations and the present day.

Supervisors Can Also Collect Penalties

In addition to the new imposition of civil penalties, this landmark decision created an exception to the general rule that supervisors are generally not entitled to relief under the ALRA.

Prior to this decision, supervisors were only entitled to collect in ALRA cases in three circumstances:

- when they were discharged for having refused to engage in activities proscribed by the ALRA;
- when they were discharged for having engaged in conduct designed to protect employee rights, such as giving testimony adverse to the employer in a NLRB proceedings; or
- when their discharge is the means by which the employer unlawfully discriminates against its employees – often applied when an employment of a crew was directly contingent on the continued employment of their supervisor.

This case created an additional exception — when supervisors are discharged ***in response to the supervisor's serving as a conduit*** for reporting the employees' complaints about being misclassified as independent contractors. In other words, supervisors who can show they were discharged because they reported or passed on employee complaints to an employer would be entitled to relief under the ALRA.

The Board abstained from applying this new exception to the foreman in this case, however, because it found that the employees did not rely solely on their foreman to carry their concerns on their behalf and instead directly spoke to the General Manager about their complaints. Additionally, the record did now show the foreman was terminated for reason of passing on their complaints.

Moving Forward: A 5-Step Plan to Avoid a Similar Fate

Based on the Board's decision, we predict employees' attorneys in California will spend more time bulking up their willful misclassification arguments to obtain these penalties. While each case will be highly fact-specific, this decision will serve as precedent for further rulings in misclassification cases, which is already a highly litigious issue.

In light of this ruling, we strongly encourage employers to take these five steps:

1. Spend time understanding how this decision affects your company;
2. Review California's specific "ABC Test" for independent contractors;
3. Revisit your onboarding process to determine whether the need for upgrades;
4. Properly train human resource staff on the "ABC Test" and effect of this decision; and
5. Routinely review employee records for accuracy of classification

Conclusion

We will continue to follow this decision as it may likely be appealed. Make sure you are subscribed to Fisher Phillips' Insight system to keep up with the most up-to-date information. If you think one or some of your employees have been misclassified, we can assess the risk and provide trainings to avoid the misclassification trap. Please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in one of our California offices with any questions or concerns.

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