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IDAHO EMPLOYMENT LAW LETTER

Part of your Idaho Employment Law Service

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HIRING

What ID employers should know about personality tests, antibias laws

by Andrew W. Alder

According to some reports, up to 60 percent of workers are required to complete personality tests during the hiring process. Employers use such tests to predict performance and "cultural fit" by attempting to learn about a prospective employee's character and personality, including his attitude, interests, motivations, opinions, preferences, and emotional makeup. Personality tests can help employers identify who may excel at a certain job or in a particular position.

Personality testing is generally less likely to expose your organization to liability than other psychometric testing, such as cognitive ability and intelligence testing, but using personality tests during the hiring process still presents risks. Many lawsuits related to personality testing have been brought under various federal discrimination laws. It's important to be aware of those laws and know how to mitigate the risk of liability.

Is federal law implicated by personality testing?

Idaho employers should understand that a prospective employee's "personality" is not a protected characteristic under federal antidiscrimination law. Federal courts have specifically held that deciding not to hire someone because of his "disruptive or uncooperative behavior" or "abrasive personality" is a legitimate nondiscriminatory reason. Thus, using personality testing during the hiring process is not in itself illegal.

Some unsuccessful job applicants have argued that personality testing implicates protected characteristics based on how their performance on the test is used to justify the decision not to hire them or that the tests are used as a "pretext," or excuse, for an illegal reason to reject them. For example, in one lawsuit, an applicant argued that questions about religious beliefs, visions, and sins relied on religion-based questions in a discriminatory, and therefore illegal, manner. Let's take a look at some federal antidiscrimination laws that may apply to the use of personality tests during the hiring process.

Disparate impact under Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the hiring process based on race, color, religion, sex, or national origin. Title VII expressly permits employers to administer "professionally developed ability tests" and take employment action based on the results as long as the tests aren't "designed, intended or used to discriminate."

However, Title VII prohibits you from adjusting test scores, using different cutoff scores, or otherwise altering

AGENCY ACTION

New wage and hour opinion letters issued. The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) in July announced new opinion letters related to the Fair Labor Standards Act (FLSA). FLSA2019-7 addresses overtime pay calculation for nondiscretionary bonuses paid on a quarterly and annual basis. FLSA2019-8 addresses the application of the highly compensated employee exemption to paralegals employed by a trade organization. FLSA2019-9 addresses permissible rounding practices for calculating an employee's hours worked. FLSA2019-10 addresses the compensability of time spent in a truck's sleeper berth while otherwise relieved from duty. The DOL offers a search function for existing opinion letters by keyword, year, topic, and a variety of other filters at www.dol.gov/whd/opinion/search/fullsearch.htm.

New FAQs issued for federal contractors. The DOL's Office of Federal Contract Compliance Programs (OFCCP) in July released FAQs on three topics: (1) validation of tests used by contractors when selecting workers, (2) the OFCCP's use of "practical significance" during compliance evaluations, and (3) how contractors can determine whether to include project-based or freelance workers in their affirmative action programs and employment activity data submitted to the agency. The FAQs on employment testing remind contractors to validate selection procedures used in the selection process if they find a disparate impact. The FAQs on "practical significance" address how the OFCCP determines where to apply investigative resources. The FAQs on project-based workers address how to determine those workers' status.

OSHA promotes its resources aimed at workplace hazards. The Occupational Safety and Health Administration (OSHA) reminds employers it has developed compliance assistance resources to help find and fix workplace hazards before they cause injury or illness. The Safe + Sound campaign webpage (www.osha.gov/safeandsound/) has resources and activities for finding and fixing hazards. The Recommended Practices for Safety and Health Programs (www.osha.gov/shpguidelines/) identifies actions for hazard identification and assessment and hazard prevention and control. A fact sheet (www.osha.gov/safeandsound/docs/SHP_That-Was-No-Accident.pdf) guides employers through the process of using an OSHA 300 log to identify workplace hazards. Guides for managers (www.osha.gov/safeandsound/docs/SHP_Safety-Walk-Arounds-for-Managers.pdf) and safety officers (www.osha.gov/safeandsound/docs/SHP_Safety-Walk-Arounds-for-Safety-Officers.pdf) are also available. ✤

the results of an employment-related test based on an applicant's protected characteristics (i.e., race, color, religion, sex, or national origin). Additionally, you cannot use facially (apparently) neutral tests that have the effect of disproportionately excluding applicants based on a protected characteristic unless (1) you can show the test is job-related for the position at issue and consistent with business necessity *and* (2) the applicant cannot demonstrate there's a less discriminatory alternative is available.

When a test does create a disparate impact (i.e., it disproportionately excludes people with a certain protected characteristic under Title VII), the Equal Employment Opportunity Commission's (EEOC) Uniform Guidelines on Employee Selection Procedures (UGESP) provides guidance and criteria for determining whether the test is legal. There are various methods of "validating" the test, and the UGESP is complex, so if your testing creates a disparate impact, you would be prudent to seek out legal counsel and have the test properly validated.

Disability discrimination under the ADA

The Americans with Disabilities Act (ADA) provides that employers "shall not . . . make inquiries as to whether [an] applicant is an individual with a disability or as to the nature or severity of [any] disability." Most personality tests do not assess for personality traits that would qualify as disabilities under the ADA. The law's definition of "impairment" doesn't include personality traits such as poor judgment or a quick temper if they are not symptoms of a mental or psychological disorder.

Courts have explained that the ADA doesn't prohibit employers from asking questions about organization, time management, judgment, temper, impulse control, the ability to perform under stress, a propensity for honesty, and the ability to get along with others.

The ADA *does* prohibit you from subjecting job applicants to medical examinations before you extend an eployment offer. According to the EEOC, a "medical examination" is "a procedure or test that seeks information about an individual's physical or mental impairments or health." The agency has clarified that psychological tests "designed to identify a mental disorder or impairment" are medical examinations under the ADA. However, psychological tests "that measure personality traits such as honesty, preferences and habits" are not medical examinations. In short, you shouldn't administer personality tests during the hiring process if they will reveal a mental impairment.

Age discrimination under the ADEA

The Age Discrimination in Employment Act (ADEA) forbids employment discrimination against anyone who is older than 40. Therefore, you shouldn't administer personality tests to prospective employees who are older than 40 unless you also test younger applicants. Additionally, the ADEA prohibits even neutral testing that has a "discriminatory impact" on applicants based on their age, unless the impact can be tied to a "reasonable factor other than age."

Mitigating legal risks and implementing best practices

In light of the discrimination laws outlined above, you should be aware of the potential risks of personality testing and take certain steps to mitigate them. Here are some recommendations and best practices to keep in mind if you decide to use the tests in the hiring process:

- Analyze your company's goals and the need to conduct personality testing during the hiring process. If it isn't truly necessary or meaningful for the job you're filling, consider whether the cost and potential liability are worth it.
- Ensure that your personality test is only one of several components of the hiring process. Usually, personality test results alone shouldn't exclude a candidate.
- Analyze your personality test to make sure it's a valid and effective predictor of relevant job performance.
- Consider removing any questions that have some relationship to any protected characteristics under Title VII.
- Use professionally developed personality tests.
- Do not adjust test scores, use different cutoff scores, or otherwise alter the results of the personality testing based on an applicant's protected characteristics.
- Provide appropriate training for employees involved in implementing, administering, and interpreting personality tests.
- Work with legal counsel to determine any risks in your current testing and to review and craft a personality testing policy that conforms with existing law. Obtaining legal counsel is particularly prudent if your personality test creates a disparate impact and therefore needs to be properly validated.

For additional recommendations, the EEOC has issued its own set of best practices for testing and selection,

QUESTION CORNER

The extent of ADA protection for breastfeeding mothers

by Jason R. Mau

Q *Does the Americans with Disabilities Act (ADA) require us to provide refrigeration in the designated lactation room?*

A Although such an accommodation might be considered a good business practice, the ADA doesn't require you to provide refrigeration in a lactation room. In fact, the ADA doesn't include any specific requirements to accommodate nursing employees in the workplace. Instead, it's the Fair Labor Standards Act (FLSA) that requires you to provide reasonable break times in a dedicated place other than a bathroom so breastfeeding employees may express milk, but it doesn't require access to refrigeration.

Q *We want to transition exclusively to paperless pay stubs for our employees. Is there any legal requirement preventing us from doing that?*

A Neither federal nor Idaho law prevents you from transitioning to paperless pay stubs.

Q *How should we handle a preemployment drug test that comes back positive for THC because the applicant was prescribed CBD oil to treat lupus?*

A CBD is legal under Idaho law only if it contains no THC. As a result, the use of any medical product that contains THC is illegal in Idaho, regardless of the underlying condition it is being used to treat. And Idaho employers may still base an adverse employment action on a positive THC test despite the ever-changing legal landscape for marijuana in neighboring states. However, depending on the applicant's explanation, your company's drug policies, and how safety-sensitive the job is, you may want to allow a split specimen to be sent to another laboratory for testing to confirm the positive result.

Q *Last month, our board of trustees approved a three percent companywide salary increase retroactive to April 1, 2019. Should an employee resigning at the beginning of this month receive the raise since he was an active employee when it was approved? It won't be processed by payroll until after his last day of work. We also have some employees who resigned between April 1 and the date the increase was approved. Should they receive the retroactive raise as well?*

A The FLSA doesn't prohibit your board from setting limits on the salary increase, such as who is excluded from having it retroactively applied. Often, organizational employment policies may already address the issue, putting employees on notice that when they tender their resignation, they may lose their eligibility for additional benefits.

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which can be located at https://www.eeoc.gov/policy/docs/factemployment_procedures.html.

Bottom line

Overall, personality testing during the hiring process isn't illegal by itself, and it may help you effectively narrow the pool of applicants for a particular position. Having a basic understanding of potentially applicable federal antidiscrimination laws and adopting the best practices set out above will minimize the risk of liability associated with the testing.

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HEALTH INSURANCE

IRS authorizes more preventive services to be paid by HSA-eligible health plans

The IRS recently issued guidance expanding the definition of "preventive care" that may be covered—possibly free of charge—by a high-deductible health plan (HDHP) that's paired with a health savings account (HSA). While the changes made by the guidance are relatively simple, they have the potential to make HSAs substantially more attractive, particularly to employees who have a chronic condition that is controlled by medication or therapy. Before diving too far into the details, however, it's important to have a solid understanding of HSAs and how they work.

Some background

HSAs are a type of tax-favored account employees put money into on a tax-free basis and later use to pay their medical expenses. For an individual to contribute to an HSA, he must be covered by an HDHP that covers only "preventive care" until after the deductible is met. In other words, other than the types of preventive services all health plans are required to cover at no cost to employees (such as immunizations and mammograms), employees who are covered by an HSA-eligible HDHP have been required to pay 100 percent of their health expenses up to the amount of the (very high) deductible. While that can be off-putting to many, some of the tradeoffs include substantial tax benefits, lower premiums, a low out-of-pocket max (often the same as the deductible), and for some, sizeable employer contributions to their HSAs.

The rationale behind the HSA/HDHP approach is that when employees are required to pay their own health expenses up front, they will be more motivated to shop around for cost-effective health care and/or avoid unnecessary treatments. One of the biggest objections to HSAs, however, has been that they can discourage participants from getting the health care they need and cause worsening health conditions in the long run. The new IRS guidance is intended to reduce that concern to some extent.

What has changed?

In short, the new guidance allows HSA-eligible HDHPs to cover more preventive drugs and therapies at no cost to employees (or possibly with some form of coinsurance or copay) by expanding the definition of "preventive care" the plan can cover before the deductible is met. Previously, the definition of preventive care was narrowly restricted to such things as immunizations, annual exams, and standard screenings such as colonoscopies or mammograms.

The types of preventive care that now may be covered by an HSA-eligible HDHP include a number of medications, tests, therapies, and devices that can help employees manage or minimize such conditions as:

- Diabetes;
- High blood pressure;
- Various heart conditions;
- Osteoporosis and osteopenia;
- Asthma;
- Liver disease and bleeding disorders; and
- Depression.

Some specific examples of items that can be covered as preventive medicine include blood pressure monitors for hypertension, a glucometer and A1C testing for diabetes, and SSRIs, which are a category of anti-depressants. The complete list can be found in the guidance at https://www.irs.gov/pub/irs-drop/n-19-45.pdf.

Some final thoughts

When it comes to HSAs, it's important to distinguish between:

(1) The types of preventive care that are required to be covered by a group health plan at no cost to employees;

(2) The types of preventive care an HDHP can cover before an employee has met his deductible;

(3) The types of medical expenses an employee can use an HSA to pay for.

The only effect of the guidance is that it expands the definition of preventive care with regard to #2. It doesn't require plans to cover those services for free (but we would expect many HDHPs to be designed that way). Nor does it have anything to do with the types of medical expenses that can be reimbursed out of an employee's HSA.

While the effective date of the notice was July 17, 2019, employers that offer a fully insured health plan likely will have to wait until their next renewal (or possibly even longer) while their insurance carrier works through implementing the changes and getting them approved by the necessary state departments of insurance. If you're self-insured, you should be able to take advantage of the new rules sooner than that, either by modifying an existing HDHP or offering one for the first time.

Finally, HSAs are very popular among Republicans and many Democrats, and how many things can you say that about? As their popularity has increased, there have been increasing calls from legislators and healthcare/insurance professionals to make them more "user-friendly," so to speak. The guidance from the IRS may be the first of many attempts to do just that, so keep an eye out for future developments. ✤

RETIREMENT

Association retirement plans may not be ready for prime time

The U.S. Department of Labor (DOL) recently finalized regulations allowing multiple employers to offer a retirement plan to their employees through a combined association retirement plan (ARP). In what is becoming a common theme for the agency under President Donald Trump, the new rules are intended to make it easier for small to mid-sized employers to offer such plans to their employees. While they are similar to rules finalized last year that established a new type of association health plan, they go even further by establishing guidelines for professional employer organizations (PEOs) to sponsor retirement plans for their members' employees. Unfortunately, they also may face some of the same problems as those rules, but we're getting ahead of ourselves.

Let's take a quick look at the issues the new ARPs are intended to address, how they are designed to work, and some of the potential problems.

Need for the plans

Citing various studies, the DOL notes that while 85 percent of private-sector establishments with 100 or more employees offer a retirement plan, only 53 percent of smaller organizations offer one. That's a total of 38 million private-sector employees whose employers don't offer a retirement savings plan. Many small employers cite cost, administrative responsibilities, and potential exposure to fiduciary liability as major impediments to sponsoring a retirement plan for their employees. ARPs are intended to help with those concerns.

ARPs are considered a type of multiple employer plan (MEP). Although many MEPs already exist and are authorized by the IRS, past guidance issued by the DOL hasn't clearly allowed them to be sponsored by associations and PEOs in the capacity of an "employer." By making that change, the rules enable associations and PEOs to act as the plan administrator and named fiduciary and remove most of those responsibilities from the shoulders of the small employers that participate in the

WORKPLACE TRENDS

Texting gaining popularity in hiring process. More employers and job candidates are using texting as a communication method, according to research from Robert Half Technology. More than two-thirds (67%) of IT decision makers surveyed said their organization uses texting as one way of coordinating interviews with job candidates. Nearly half (48%) of U.S. workers polled in a similar survey said they've received a text message from a potential employer. When asked about the greatest advantage of texting during the hiring process, quick communication was the top response among IT managers and workers. They also acknowledged the greatest drawback was the possibility of miscommunication.

Inclusion survey finds persistent bias. Despite organizations' efforts to advance inclusion in the workplace, many professionals are experiencing and witnessing bias on a regular basis, and it affects their performance, according to the 2019 State of Inclusion Survey from Deloitte. One finding from the survey is that professionals mostly experience or witness bias that is subtle and indirect, making it hard to address in the moment. The survey also found that people believe they are allies and say they feel comfortable talking to others about bias, but they don't always act when they see it in the workplace. Among professionals who had recently felt they experienced workplace bias, 61% said it had occurred at least once a month and as often as several times per week.

Job or career? Survey shows 50-50 split. Employees are split on how they feel about their current job, with 50% feeling like they have a career and the other 50% feeling like they have just a job, according to a survey from CareerBuilder. Representative samples of 1,021 hiring managers and HR managers and 1,010 full-time U.S. workers across industries and company sizes in the private sector were surveyed. One key finding is that many employees want to get ahead in their career but aren't offered educational opportunities to learn the skills needed to do so. Another finding highlights the importance of the jobseeker's experience, with 42% of employees saying that an application that is difficult or confusing to complete would cause them to give up before submitting.

Survey finds employers boosting benefits to win and keep talent. Employers are boosting benefits to recruit and retain highly qualified and high-potential employees in a competitive labor market, according to data from the Society for Human Resource Management's 2019 employee benefits survey. Eighty-six percent of employers responding to the survey believe health-related benefits are very important or extremely important to their workforce. ✤

UNION ACTIVITY

Miners' union invites presidential candidates to go underground. The international president of the United Mine Workers of America in July sent letters to all the candidates for the Democratic nomination for president inviting them to go to a union coal mine and go underground. Cecil E. Roberts said coal miners want to know that those running for president "have some understanding of what they do and why they do it." Roberts sent the letter at a time when the sector of the coal industry that produces steam coal, used as fuel for electricity generation, is under stress. Coal-fired power plants are disappearing, with 289 closing since 2010 and 50 since January 2017. A statement from the union said most Democratic presidential candidates have endorsed the Green New Deal or offered similar plans that would hasten the closure of coal-fired power plants and the mines that feed them. Roberts said the candidates "owe it to these workers to meet them face to face, tell them their plans, and then just listen."

New measure targets workplace violence, harassment. The United Auto Workers (UAW) has spoken out in favor of action taken by the International Labour Organization (ILO), an arm of the United Nations that sets internationally recognized labor standards. In June, the ILO adopted Convention 190, which extends protections to workers facing violence and harassment. It will be binding for governments that ratify it. "The UAW has been, and always will be, a tireless defender of workers' rights," UAW President Gary Jones said. The right to a safe and harassment-free work environment is doubtlessly a human right as well. Therefore, the UAW wholeheartedly stands with the ILO in supporting the new standards and protections of Convention 190. We urge the timely ratification of this measure."

Teachers unions condemn Trump attack on congresswomen. Education International (EI), a global body representing the world's teachers, voted in July to condemn President Donald Trump's attack on four U.S. congresswomen and pledged to support American unions in their fight to defeat him in 2020. The resolution was brought to the floor of EI's world congress by the American Federation of Teachers (AFT) and the National Education Association (NEA). The resolution took aim at Trump's rhetoric toward four freshman female, nonwhite members of Congress: Alexandria Ocasio-Cortez of New York, Ilhan Omar of Minnesota, Ayanna Pressley of Massachusetts, and Rashida Tlaib of Michigan. A statement released by the NEA said that by telling the representatives to "go back to where you came from," the president "once again employed racist, xenophobic and sexist tropes to try to disparage and divide American citizen from American citizen." ✤

plan. It's also anticipated ARPs will allow smaller employers to offer retirement plans at a lower cost than they could under previously available options such as simplified employee pensions (SEPs) and a savings incentive match plan for employees (SIMPLE plan).

Who can participate?

The final rule makes clear an ARP now can cover employers not just in the same industry but in the same geographic area, such as a common state, city, county, or metropolitan area (even if it crosses state lines). While the rule is applicable to "firms of all sizes," the DOL anticipates participation primarily by employers with under 100 employees.

The final rule includes a regulatory safe harbor for PEOs that want to offer a retirement plan to their client employers. While some PEOs already offer such plans, the safe harbor creates clear standards that haven't previously existed.

To meet the safe harbor, a PEO must:

- Play a definite and contractually specified role in recruiting, hiring, and firing workers of its client employers that adopt the MEP; and
- Assume the following responsibilities without regard to the receipt or adequacy of payment from client employers:
  - Payment of wages to their employees;
  - Payment and performance of reporting and withholding for all applicable federal employment taxes; and
  - Assumption of responsibility for and substantial control over the functions and activities of any employee benefits the contract with a client employer may require the PEO to provide.

Working owners without employees, including sole proprietors, also are eligible to participate in an ARP and may elect to act as the employer (for the purpose of participating in a bona fide employer group or association) and be treated as an employee of their business (for the purpose of participating in the ARP).

To qualify as a working owner, a person would be required to work at least 20 hours per week or 80 hours per month, on average, or have wages or self-employment income above a certain level. Interestingly, working owners can't participate in a plan offered by a PEO unless they have at least one employee.

What are some concerns?

While the new rules are effective September 30, 2019, it will likely take a while for them to ramp up—if they do at all. While few would argue with their stated purpose, there may be concern about the execution. The similar AHP rules issued last year were slow to take off for a number of reasons, not the least of which was that they appeared to exceed the Employee Retirement Income Security Act's (ERISA) authority to define who could be considered an "employer" for the purpose of establishing an employee benefit plan. A number of states sued to challenge the rules, and they have been put on hold by a court,

which referred to them as "absurd" and an unlawful expansion of ERISA.

The ARP rule presents some of the same concerns and may face similar legal challenges. Early adopters of the AHP rules are now facing uncertainty as a result of legal challenges. You are advised to perform due diligence on the potential risks that may exist before moving forward with developing or participating in an ARP. ✤

WORKER CLASSIFICATION

When determining contractor status, ABC test applies retroactively

The U.S. 9th Circuit Court of Appeals (whose rulings apply to all Idaho employers) recently ruled the California Supreme Court's 2018 Dynamex decision, which adopted the "ABC" test to determine whether a worker is an employee or an independent contractor, applies retroactively to claims that arose years ago, when individual franchisees claimed their national franchisor was their employer under state law.

Background

Jan-Pro Franchising International advertises itself as being in the commercial cleaning business. It does not, however, directly employ workers who perform cleaning services. Instead, it operates under a "franchise" model in which it contracts with regional franchisees and sells them the exclusive right to use the Jan-Pro trademarked logo in a defined geographic area.

Like Jan-Pro, the regional franchisees don't provide cleaning services directly to customers. Instead, they contract with individual workers to do that. Thus, the business arrangement is a three-level structure, with Jan-Pro at the top, the regional franchisees in the middle, and the individual workers at the bottom. The individual workers are treated as franchisees of the regional franchisees and are characterized as independent contractors.

Three workers—Gerardo Vazquez, Gloria Roman, and Juan Aguilar—sued Jan-Pro for violating California's minimum wage and overtime laws. They asserted that despite the franchise structure, they were employees and Jan-Pro was their employer under state law. The trial court rejected the workers' claims, and they appealed to the 9th Circuit.

While the case was pending before the 9th Circuit, the California Supreme Court issued its decision in *Dynamex Ops. W. Inc. v. Superior Court* and adopted the ABC test to determine whether a worker is an independent contractor or an employee under California's wage and hour laws.

The central issue presented to the 9th Circuit was whether the ruling in *Dynamex* should be applied only prospectively to cases arising after the decision was issued or whether it should be applied retroactively to all cases. The court ruled it should be applied retroactively.

What is the ABC test?

Under California wage and hour law, for a worker to be considered an employee, the putative employer (the "hiring entity") must "suffer or permit" the person to work. *Dynamex* clarified that requirement by concluding a hiring entity will be considered the worker's employer unless it can prove three things:

(A) The work performance is free from its control and direction;

(B) The work performed is outside the usual course of its business; and

(C) The worker regularly and customarily engages in that occupation or business.

The hiring entity must prove all three elements to avoid employment status. As the California court remarked, that's an exceptionally broad standard.

Was Jan-Pro the 'employer'?

We don't know for sure yet because the 9th Circuit sent the case back to the trial court to develop the facts necessary to apply the ABC test. The court did, however, provide "guidance" to the trial court.

First, the fact that this case involves a franchise structure doesn't make any difference. The ABC test applies to franchises just as it does to other businesses. In fact, the court noted that at least one court in Massachusetts has applied it to find the top-level franchisor was the employer of the bottom-level franchisees in a structure very similar to Jan-Pro's.

Second, the "B" prong of the test may be the easiest to apply. The prong requires the hiring entity to prove it isn't engaged in the same usual course of business as the worker. In applying Prong B, courts generally have considered three questions:

(1) Was the work necessary to or merely incidental to the work of the hiring entity?

(2) Was the work continuously performed for the hiring entity?

(3) What business does the hiring entity proclaim to be in?

Although the 9th Circuit didn't tell the trial court how it should answer those questions, it did make some observations that seem to indicate its preliminary impressions:

- Jan-Pro's business depends on someone performing the cleaning, and because it receives a portion

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of customers' payments, it actively and continuously benefits from the work.

- Its business model relies on the workers continuously performing the cleaning work.
- It holds itself out as a commercial cleaning company that provides cleaning services—not simply a business that "franchises."

What about regional franchisees?

The workers didn't sue the regional franchisees, perhaps because the agreements between them required claims to be arbitrated. It's apparent from the 9th Circuit's decision, however, that the regional franchisees are even more likely to be deemed employers because of their direct relationship with the workers. They also provide the workers their initial book of business as well as startup equipment and cleaning supplies, training, and assistance with customer relations. *Vazquez v. Jan-Pro Franchising International,* Case No. 17-16096 (9th Circuit, May 2, 2019).

Takeaways for employers

The significance of this decision extends far beyond the franchise industry. The retroactive application of the ABC test exposes all businesses in California that rely on independent contractors to provide the services they sell—a common feature in the "gig" industry.

Of course, this also is an important decision for the franchise industry in other states that apply the ABC test to determine employee status. Because franchisors will be evaluated under the same worker-friendly test as other businesses, they will be at increased risk of being liable for wage and hour violations.

The decision also serves as a reminder that even in states that haven't adopted the ABC test, it isn't uncommon for state workers' compensation and unemployment compensation laws to use a similar definition of "employment" to impose payroll taxes on employing entities for the work of independent contractors. Many of the states actively enforce those laws to increase their payroll tax revenues. ✤

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