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By Philip J. Bonoli

Freelancers and Independent Contractors: Not without Protection

BEING FREE OF THE BALL AND chain constraints of having to clock in and out at specific times and having someone control every aspect of the work day are very attractive incentive for a number of working folks to set their own hours and complete projects on their own time and at their sole direction. As a result, many workers choose to work as freelancers or independent contractors because of this freedom.

This freedom, however, may come with a steep price. Unlike their W-2 brethren who work regular 9 to 5 jobs, people who work as freelancers or independent contractors are generally not entitled to many of the benefits provided to the W-2 employees, such as overtime pay, a minimum wage, meal and rest breaks, and paid time off. In fact, freelancers and independent contractors are typically not protected by the California Labor Code, which provides those protections to the state's W-2 employees.

Similarly, freelancers and independent contractors are typically not covered under workers' compensation insurance and are not entitled to unemployment benefits available through California's Employment Development Department or the protections of anti-discrimination and retaliation laws laid-out in the state's Fair Employment and Housing Act (FEHA).

This lack of compensation, anti-discrimination and retaliation protection may convince a few workers to reluctantly trade their relaxed and casual 1099 working environments for the more regimented world of W-2 conformity.

All is not lost, though, and there is hope on the horizon for the more independent among us.

FEHA Protections

Although FEHA generally will not protect freelancers and independent contractors from discriminatory and retaliatory conduct, it does protect them from workplace harassment, sexual or otherwise.

The recent spotlight on the tragic serial harassment of women by top executives in a number of industries has created a long-overdue dialogue concerning the protection of workers from the predatory nature of those individuals. This spotlight uncovered a source of protection that hasn't drawn much attention over the years—that in California, FEHA protects workers, regardless of classification or gender, from workplace harassment.

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The FEHA ban on workplace harassment applies to an employee, an unpaid intern or volunteer, or "a person providing services pursuant to a contract," i.e., an independent contractor.[1] The Act expressly embraces freelancers and independent contractors by defining "a person providing services pursuant to a contract" as an individual who "has the right to control the performance of the contract for services and discretion as to the manner of performance," "is customarily engaged in an independently established business," and "has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work."[2]

These are the factors that California courts have routinely considered when determining whether a worker is an independent contractor as set forth in the "multi-factor" or "economic realities" test adopted by the California Supreme Court.[3] However, the California Supreme Court recently adopted the ABC Test to determine whether a worker is properly classified as an independent contractor with respect to California wage orders.[4]

Under this test, "a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity."

Protection from Harassment

Freelancers and independent contractors who have been harassed have the ability to file harassment-based claims under FEHA to recover damages—including attorney's fees and punitive damages—against their employers. Individuals may also be personally liable under FEHA for harassment.

Female freelancers and independent contractors are not the only workers entitled to protection. Although the media's recent attention on harassment has focused on victims who are primarily women and the accused who were primarily men, harassment has no boundaries. Just like women who have been victims of serial harassment at the hands of men, so too have men at the hands of women. FEHA makes it known that, in California, all workers are protected from any form of sexual, verbal or physical harassment.

Most companies also provide workers with employee manuals or handbooks that lay out their anti-harassment policies and the procedures to follow if a worker believes he or she is the victim of harassment. Generally, workers are instructed to advise their manager, supervisor and/or human resources director of the alleged harassment. An internal investigation to determine whether or not the alleged harassment had, in fact, occurred and if it did, determine the appropriate course of action.

In California, workers—including freelancers and independent contractors who are victims of harassment—may also file a claim with California's Department of Fair Employment and Housing and request a right to sue letter, which preserves the worker's ability to file a claim under FEHA.

Protection from Violence and Discrimination

The Ralph Civil Rights Act[5] and the Tom Bane Civil Rights Act[6] may also provide protection from discriminatory violence and intimidation to freelancers and independent contractors in the workplace. Section 51.7 states, in relevant part: "All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute…"

Section 52.1 prohibits the interference "by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state…"

In 2006, the Court of Appeal for the State of California, Second District, held that although the Unruh Civil Rights Act did not apply to employment discrimination, Sections 51.7 and 52.1 are not part of the Act and, as a result, may be applied in the employment context.[7] [8] This allows individuals to assert statutory claims for discriminatory violence and intimidation and denial of civil rights by means of threats and intimidation in the workplace.

There has also been a push in both the public and private sectors to ban arbitration agreements for sexual harassment and gender discrimination claims. Many prominent companies have taken the step to eliminate provisions in arbitration agreements that require arbitration of sexual harassment and gender discrimination claims.

Legislative Action

The California Legislature has also introduced Assembly Bill 3080, which would prohibit California employers from requiring applicants to sign arbitration agreements that require arbitration of sexual harassment claims. The bill would also bar an employer from prohibiting an employee or independent contractor from disclosing to any person an instance of sexual harassment "that the employee or independent contractor suffers, witnesses, or discovers in the workplace or in the performance of the contract."

Assembly Bill 1870, which was also introduced during the 2017-2018 regular session, seeks to extend the period to file an administrative harassment-based complaint with the state Department of Fair Employment and Housing from one year to three years. Another bill, Senate Bill 1038, seeks to make an employee personally liable for unlawfully retaliating against a person under FEHA. This proposed bill would increase the scope of personal liability under the Act from merely harassment-based claims to retaliatory-based claims as well.

Under current California law, California employers of 50 or more employees, including those outside California, must provide supervisors with two hours of sexual harassment training every two years. This training is required to include a component regarding the prevention of abusive conduct and must include gender identity, gender expression, and sexual orientation.

Proposed Senate Bill 1300 would require employers (regardless of size) to provide two hours of sexual harassment prevention training to all employees, even if they are not supervisors, within six months of hire and thereafter, once every two years. SB 1300 would also require employers to provide "bystander intervention training" and to provide "information to each employee on how to report harassment and how

to contact the department to make a complaint."

There has also been a boom in misclassification claims in California by workers claiming they were erroneously classified as independent contractors. In such claims, workers typically seek minimum wages, overtime pay, or pay for meal and rest breaks under the minimum wage and overtime protection laws found in the state's Labor Code.

Workers who believe they have been incorrectly classified as an independent contractor may file a civil action or a wage claim with California's Labor Commission Division of Labor Standards Enforcement seeking remedies.

Legal Recourse

The Labor Code also makes it unlawful to willfully misclassify individuals as independent contractors. The penalties for violations of range from $5,000 to $15,000 per violation "in addition to any other penalties or fines permitted by law."[9] Also, if the Labor and Workforce Development Agency or a court issues a determination that a person or employer "has engaged in or is engaging in a pattern or practice of these violations," they can also be subject to a civil penalty that ranges from $10,000 to $25,000 per violation.

Although freelancers and independent contractors may not currently be entitled to assert discriminatory-based claims under FEHA and may not be protected under California's Labor Code minimum wage and overtime laws, they are protected from workplace harassment, while the California Legislature is seeking to expand those protections.

[1] Cal. Gov't Code §12940(j)(1).
[2] Cal. Gov't Code § 12940(j)(5)(A)-(C).
[3] *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, 48 Cal.3d 341 (1989).
[4] *Dynamex Operations West, Inc. v. Superior Court*, S222732.
[5] Cal. Civ. Code §51.7.
[6] Cal. Civ. Code §52.1.
[7] *Stamps v. Superior Court*, 136 Cal.App.4th 1441 (2006).
[8] Cal Civ. Code §51.1.
[9] Cal. Lab. Code §226.8.