MCLE SELF-STUDY ARTICLE

WHERE AGREEMENTS WON'T WORK - A WORD TO THE WISE REGARDING STRICT WAGE AND HOUR LIABILITY AND RELATED CLAIMS

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I. SYNOPSIS

Ed was a vibrant and healthy 85-year-old. One day, he decided to sign an advance healthcare directive providing that if his physical condition ever declined, he wished to remain in his home as long as possible with the help of live-in caregivers and other staff, as needed. Although his wife, Donna, and his daughter, Taylor, tried to assist Ed on their own, Ed's growing needs became more than they could handle. They decided to bring in a live-in caregiver, Paula, who was a family friend. Paula was loosely hired by all three of them. Ed and his wife, Donna, were trustees of their family revocable trust. Taylor was Ed's acting agent under his advance healthcare directive. No written employment agreement was signed by the parties. Paula was expected to work a "standard" workday, Monday through Friday, but was expected to be "on-call" during the evenings, weekends, and holidays. The family verbally agreed to pay Paula $500 per week, which was more than she made at her last job, so she felt she was adequately compensated. Moreover, over the years, Ed repeatedly promised her that after he passed, his estate would be sure to "take care of her." Based on this promise, Paula selflessly cared for Ed until he sadly passed away more than ten years later. She did not pursue any other employment, despite having a number of great opportunities.

Following his death, Paula was stunned to learn that she was not a beneficiary of Ed's estate. She also learned from an attorney-friend that her work arrangement with the family did not comply with various labor laws. Paula filed a creditor's claim in Ed's estate and a subsequent lawsuit against Donna, as successor trustee and personal representative, and Taylor, as former agent under the advance healthcare directive. Paula alleged the following causes of action:

- Breach of contract (breach of a promise to make a will)
- Elder financial abuse
- Failure to pay overtime wages[01]
- Failure to furnish timely and accurate itemized wage statements[02]
- Failure to provide mandated meal and rest breaks[03]
- Violation of limitation on hours and days of work[04]
- Failure to pay compensation due upon termination/waiting time penalties[05]
- Negligent misrepresentation
- Quantum meruit
- Unlawful business practices

Although the above facts are hypothetical, they are adapted from the authors' personal litigation experiences and a review of court filings across California. It appears the published appellate case law concerning wage and hour litigation against fiduciaries is nearly nonexistent. The

upward trend in court filings, however, reveals an increase in wage and hour litigation that cannot be denied.

This article aims to provide a general overview of some of the most common wage and hour issues that may be encountered by our readership. Many attorneys and fiduciaries are at risk of unwittingly stepping into a wage and hour dispute that can potentially entail claims reaching years and years into the past and exposing fiduciaries (and in some cases, the attorneys) to personal liability.

II. RELEVANT BACKGROUND IN LABOR AND EMPLOYMENT LAW

A. Establishing the Employment Relationship

Trustees, conservators, personal representatives, and other fiduciaries often serve in roles where they knowingly or unknowingly act as an employer. For example, such professionals or private individuals serving in these roles may manage and employ household staff including: caregivers, cleaners, gardeners, drivers, handymen, etc. They may also participate in managerial activities such as hiring and firing workers, managing companies,[06] running agricultural operations, and managing payroll. They may even simply be aware of a neighbor providing neighborly "help," and believe there is no employment-related liability for the trust. The attorneys assisting their client-fiduciaries may also be involved in the hiring, firing, or managerial activities.

However, what is perhaps lesser known to practitioners who practice mainly in trust and estate law, is that the establishment of an employment relationship is more vague, arguable, indirect, and possible in more situations than one might imagine. As discussed below, the mere act of "permitting" work to occur and benefitting from that work can potentially create an employment relationship.

1. The Labor Code's Definition of an Employer

The California Labor Code provides a broad definition of an employer. California Wage Orders[07] and the Labor Code define an employer as any "person, association, organization, partnership, business trust, limited liability company, or corporation," that: (1) exercises control over wages, hours, or working conditions, or (2) suffers or *permits to work*, or (3) engages, thereby creating a common-law employment relationship.[08]

Various California Wage Orders also provide that establishing an employment relationship is not always an *express* decision that is knowing and intentional. For example, "employ" means to engage, suffer, or *permit* to work.[09] Thus, simply observing and "permitting" someone to work can potentially establish an employment relationship.

Similarly, "employer" means any person (as defined in section 18 of the Labor Code), "who directly or *indirectly, or through an agent or any other person*, employs or exercises control over the wages, hours, or working conditions of any person" (emphasis added).[10] Even the concept of "hours worked" is one where a passive role of *indirect* permission may suffice.[11] These broad definitions should concern fiduciaries and their attorneys regarding the possibility of potential, unintended employment relationships and their related liabilities.

2. Authority to Employ Under the Probate Code

The Probate Code is littered with statutes granting individuals serving in various fiduciary roles (trustees, personal representatives, agents under powers of attorney, etc.) the authority to employ individuals for services rendered. For example, trustees have an express power to hire persons. Probate Code section 16247 provides:

> The trustee has the power to hire persons, including accountants, attorneys, auditors, investment advisers, appraisers (including probate referees appointed pursuant to Section 400), or other agents, even if they are associated or affiliated with the trustee, to advise or assist the trustee in the performance of administrative duties.

The trustee has the power to pay reasonable compensation to employees and agents of the trust, including expenses incurred in the collection, care, administration, and protection of the trust.[12] For example, the trustee has the power to hire individuals to make ordinary or extraordinary repairs, alterations, or improvements to buildings or other trust property.[13] Other types of fiduciaries have similar authority under the Probate Code to employ workers.[14]

B. Classification as an Employee Versus Independent Contractor

Generally speaking, those who provide services in exchange for compensation can be classified either as an employee or an independent contractor. All of the applicable standards currently in effect, as discussed below, establish a rebuttable presumption that a worker is an employee and not an independent contractor.[15]

The distinction between an employee and an independent contractor is an important one. Misclassification as an independent contractor deprives a worker of a host of rights and protections available to employees. For example, the following are generally not applicable to contractors:

- Leave laws
- Minimum wage

- Overtime
- Expense reimbursements
- Meal and rest periods
- Workers compensation
- Employer benefits offered to employees

Thus, for an employer, validly classifying workers as independent contractors can significantly reduce the burden of complying with California's employee-favored labor and employment laws and reduce employment-related expenses (*e.g.* taxes, unemployment contributions, etc.).

Additionally, numerous state and federal agencies scrutinize worker classification and actively enforce relevant laws:

- IRS (taxes)
- U.S. Department of Labor and the California Department of Labor Standards Enforcement (wage & hour enforcement)
- U.S. Equal Employment Opportunity Commission and the California Department of Fair Housing & Employment (harassment, discrimination, retaliation claims)
- California Employment Development Department (employment taxes & unemployment claims)
- California Department of Industrial Relations (workers' compensation)
- National Labor Relations Board (labor law/unions)

Importantly, companies and individuals do not have the power to choose to classify a worker as an independent contractor by contract or agreement. Classification is based upon objective criteria and not based on the parties' intent or desire. The relevant test for independent contractor status must be met and there are multiple tests that apply.[16] Discussed below are the most commonly required tests, including the *Borello* test and the ABC test.[17]

1. The Old Borello Test

The California Supreme Court established the *Borello* test in 1989.[18] The test relies upon multiple factors to make the determination, including whether the potential employer has all necessary control over the manner and means of accomplishing the result desired, although such control need not be direct, actually exercised, or detailed. This factor, which is not dispositive, must be considered along with thirteen (13) other factors, which include:

1. Whether the worker performing services holds themself out as being engaged in an occupation or business distinct from that of the employer;
2. Whether the work is a regular or integral part of the employer's business;
3. Whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work;
4. Whether the worker has invested in the business, such as in the equipment or materials required by their task;
5. Whether the service provided requires a special skill;
6. The kind of occupation, and whether the work is usually done under the direction of the employer or by a specialist without supervision;
7. The worker's opportunity for profit or loss depending on their managerial skill;
8. The length of time for which the services are to be performed;
9. The degree of permanence of the working relationship;
10. The method of payment, whether by time or by the job;
11. Whether the worker hires their own employees;
12. Whether the employer has a right to fire at will or whether a termination gives rise to an action for breach of contract; and
13. Whether the worker and the potential employer believe they are creating an employer-employee relationship (this may be relevant, but the legal determination of employment status is not based on whether the parties believe they have an employer-employee relationship).

Thus, under the *Borello* test, no one factor determines whether a worker is an employee or an independent contractor. On the other hand, as discussed below, when applying the ABC test, if the employer is unable to meet any one of the three prongs, the worker cannot be classified as an independent contractor.

2. The ABC Test

Effective January 1, 2020, Assembly Bill No. 5 (2019-2020 Reg. Sess.) ("AB 5") instituted the "ABC" test which establishes a rebuttable presumption that a worker is an employee. AB 5 requires the application of the ABC test to determine the employee's status for purposes of the Labor Code, the Unemployment Insurance Code, and the Industrial Welfare Commission ("IWC") wage orders, some of which are discussed herein. The California Supreme Court first adopted the ABC test in 2018, causing a

significant shift in the employee versus independent contractor analysis.[19]

To overcome the presumption of an employment relationship and to classify a worker as an independent contractor, the employer must establish *all* of the following:

- The worker is sufficiently *free from the control and direction of the company*;
- The worker performs work that is *outside the usual course of the company's business*; and
- The worker is *customarily engaged in an independently established trade, occupation, or business* of the same nature as the work performed.[20]

Thus, the failure to establish any one of these three factors will result in the classification as an employee, not an independent contractor. Therefore, the focus is not on whether the company prohibits or prevents the worker from engaging in an independently-established business. Instead, the focus is on whether the worker independently has made the decision to go into business for his or her established trade.

Misclassification can be a costly ordeal as it opens the floodgates to damages for unpaid wages and Labor Code penalties. For example, independent contractors are rarely expected to record the specific times they work and are almost never provided standardized meal or rest breaks. This alone would likely result in penalties for minimum wage violations for uncompensated time worked, unpaid overtime, failure to furnish timely and accurate itemized wage statements, meal and rest break premiums, waiting time penalties, etc.

C. Complying with Wage and Hour Laws for Non-Exempt Employees

1. Exempt versus Non-Exempt and Why It Matters

In addition to the misclassification issue between employees and independent contractors, another classification issue that is equally if not more prevalent is that between exempt and non-exempt employees. Non-exempt employees are entitled to overtime, statutory meal and rest breaks, minimum wage, etc.[21] The failure to provide these rights exposes the employer to civil liability. All employees are presumed to be non-exempt; it is the employer's burden to prove an exemption applies.[22] The standard white-collar exemptions[23] include:

- Executive Exemption (managers/supervisors)
- Administrative Exemption (high degree of discretion and authority)
- Professional Exemption (doctors/lawyers/artists)

On the other hand, exempt employees are not subject to the myriad of complicated wage and hour requirements set forth in the Labor Code, Wage Orders, and other applicable laws. Thus, an employer's knowledge of this classification is also crucial to assessing and preventing potential liability for a misclassification.

To further complicate matters, there are a number of differences between the California Labor Code/wage orders and federal Fair Labor and Standards Act ("FLSA") when determining an employee's exemption status. For instance, while the federal and state law provide the same general areas of exemption, they categorize the exemption criteria differently. In California, an exempt white-collar employee must earn a fixed monthly salary that is at least twice the state minimum wage for full-time employment ($1,240 per week as of the date this article was written).[24] The FLSA only requires exempt employees to be paid at least $684 per week.[25] In addition, California utilizes a "quantitative test" whereby exempt employees must spend more than half of their time performing exempt duties.[26] The federal exemption, on the other hand, focuses on defining the employee's "primary function," not on how much work time is spent doing exempt tasks.[27] California employers must meet both exemptions to avoid liability.

2. Important Definitions

In evaluating issues relating to wage and hour liability, such as overtime pay obligations discussed below, the definitions of certain concepts are important. For example, a "workday" is defined as any consecutive 24-hour period starting at the same time each calendar day.[28] The Labor Commissioner's default is 12:01 to midnight.[29] A "workweek" is defined as any 7 consecutive days, starting on the same calendar day each week.[30] The Labor Commissioner's default is Sunday through Saturday.[31]

Defining workdays and workweeks can be very important to overtime pay analysis. For example, an employee could technically work 16 hours straight without being entitled to overtime if the employee works the final 8 hours of one workday and the first 8 hours of the following workday.[32] To illustrate more specifically, if a workday is defined as 12:01 a.m. to midnight, and an employee works 4 p.m. to 12 a.m. on Tuesday and 12:01 a.m. to 8:00 a.m. on Wednesday, the employee worked no more than 8 hours on two separate workdays and is not entitled to overtime.

3. Overtime Obligations

A non-exempt employee is entitled to overtime.[33] Overtime is statutory and cannot be waived by the employee.[34] Employers may require employees to have overtime

pre-approved, but even if overtime was not approved, employers must pay the overtime.[35] However, employers may discipline employees for failure to follow an overtime pre-approval policy.[36]

Pursuant to most Wage Orders, the daily requirements for overtime pay for a single workday is as follows:

- 1½ x regular rate (defined and discussed below) after 8 hours and up to 12 hours in a single "workday."[37]
- 2 x regular rate for all hours beyond 12 in a workday.[38]
- The seventh consecutive day rule: 1½ x regular rate for first 8 hours and 2 x regular rate after 8 hours on the seventh consecutive day in a workweek.[39]

For weekly requirements, an employee is entitled to 1½ x regular rate for all straight-time hours beyond 40 hours in a single "workweek."[40]

a. Caregiver Overtime (Resident and Non-Resident)

Of all of the potential employment scenarios involving fiduciaries, perhaps the most commonly associated with wage and hour claims is that of the caregiver, in particular, the live-in caregiver. With respect to live-in caregivers, Wage Order 15 applies and has numerous requirements. For example:

- The worker must be paid at least the state minimum wage rate for employment, which is currently $15.50 per hour.
- The worker must have three hours off (may be nonconsecutive) in a 12-hour span of work.
- The worker must have 12 consecutive hours off in a 24-hour workday, or be paid overtime for work during this period.
- The worker must have 24 consecutive hours off for every five days worked (except in an emergency).
- If the worker works more than five days in a workweek, he or she must be paid overtime on the sixth and seventh days, and double time for work in excess of nine hours on those days.

Even for non-resident caregivers, there are certain requirements. For example, the worker must be paid overtime for any work in excess of eight hours in a workday or 40 hours in a workweek.[41] The worker must be paid overtime for the first eight hours on the seventh consecutive day, and double time for work beyond eight hours on the seventh consecutive day.[42] The worker must be paid double time for work in excess of 12 hours in a workday.[43]

b. Personal Attendants

Under the Domestic Worker Bill of Rights, a "personal attendant" is "any person employed by a private householder or by any third-party employer recognized in the health care industry to work in a private household, to *supervise*, *feed*, *or dress* a child, or *a person who by reason of advanced age*, *physical disability*, *or mental deficiency* needs supervision."[44] The Domestic Worker Bill of Rights (which applies instead of Wage Order 15) provides that "personal attendants" must be paid at least the state minimum wage rate for employment ($15.50/hour) and the worker must be paid overtime at one and one-half times the regular rate for all work performed in excess of nine hours in a workday or 45 hours in a workweek.[45]

c. "On-Call" House Staff

Although practices can vary, the concept of being "on-call" may apply to some live-in caregivers or personal attendants, particularly during the nighttime or sleeping hours. Although California case law has yet to address this particular situation, analogous case law does exist. In the 2015 California Supreme Court case of *Mendiola v. CPS Security Solutions, Inc.*,[46] security guards actively patrolled a construction site during the day, and were "on-call" at night. During the on-call time, they were required to be on the worksite and to respond to disturbances. The guards had amenities like a bed, bathroom, and kitchen. They could use on-call time as they wished, but children, pets, and alcohol were not permitted, and the guards could only entertain adult visitors with permission from the CPS client. If a guard wished to leave the premises, he/she had to notify a dispatcher and wait for a replacement to arrive. Even if relieved by a replacement, the guard also had to be accessible by pager or phone while away from the worksite, with the ability to return within 30 minutes. CPS did not pay the guards for this on-call time. The security guards filed a class action.

The California Supreme Court ruled that to assess the degree of control, the following factors were to be considered:

- whether the employee is required to live on the premises;
- whether there are excessive geographic restrictions on the employee's movements;
- whether the frequency of calls is unduly restrictive;
- whether on-call employees can easily trade responsibilities;

- whether use of a pager could ease restrictions; and
- whether the employee could actually engage in personal activities during on-call time.

Based upon analysis of these factors, the court determined that the guards were entitled to be paid for the on-call time because CPS exercised significant control over them. Such an analysis could easily be analogized to that of a live-in caregiver who is allowed to sleep or rest in the evenings but is "on-call" during that same period of time.

4. Regular Rate of Pay

Many employers assume that a non-exempt employee's overtime rate is based on the employee's base hourly rate. But it is not always that simple. If an employer does not calculate the "regular rate" of pay properly, the "overtime premiums" paid to non-exempt employees will not comply with California law, and small miscalculations can result in costly litigation. The "regular rate" of pay includes wages paid for hours worked, plus: (a) hourly rate, (b) piecework earnings, (c) objective (*e.g.*, production) bonuses,[47] (d) commissions, (e) on-call stipends (if agreed by contract), (f) housing benefits, and (g) meal benefits.[48]

The following items are excluded from the calculation of the regular rate of pay:[49]

- Payment made during time when no work performed (*i.e.*, vacation, holiday, sick pay);
- Discretionary bonuses and gifts (*e.g.*, holiday bonuses);
- Statutorily-required payments for failure to provide meal/break;
- Contributions made to benefit plans;
- Overtime compensation; and
- Premium pay (*e.g.*, split-shift premiums, discretionary weekend premium pay, etc.)

5. Timekeeping Requirements and Itemized Wage Statement Obligations

a. Time Record Requirements

Pursuant to section 7(A)(3) of whatever Wage Order is applicable, employers are required to keep time records for non-exempt employees showing precisely when the employee begins and ends each work period and meal periods, split shift intervals, and total daily hours worked.[50] Meal periods during which operations cease and authorized rest periods need not be recorded.[51] Employee time-keeping and wage records must be kept by the employer for at least three years.[52]

b. Wage Statements

Labor Code section 226 requires employers to issue itemized wage statements to employees at the time of payroll. The statement must include the following information (as applicable): (a) gross wages; (b) total hours worked (for non-exempt employees); (c) the number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis; (d) all deductions; (e) net wages earned; (f) the inclusive dates of the pay period; (g) the employee's name and his or her identification number (if a social security number, only the last four digits may be shown); (h) name and address of the legal entity that is the employer; and (i) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.[53] The failure to keep proper wage statements for at least three years[54] can result in potential civil penalties and damages under Labor Code section 226.3.

6. Meal and Rest Periods

a. Meal Periods

Employers have a duty to provide non-exempt employees with the opportunity to take meal periods.[55] The duty is satisfied if the employer relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so.[56]

A meal period of no less than 30 minutes must be provided for every employee working more than 5 hours.[57] But if work is completed in 6 hours, the first meal period may be waived by mutual consent.[58] A second 30-minute meal period is only required if the work period is more than 10 hours.[59] Unless the employee is relieved of all duty during the 30-minute meal period, it shall be considered an "on duty" meal period and counted as time worked.[60] "On duty" meal periods are only permitted if the nature of work prevents the employee from being relieved of all duty and when parties agree in a written agreement.[61] The employee may revoke the agreement at any time.[62]

b. Rest Periods

Employees are entitled to a total of 10 minutes rest for shifts from 3½ to 6 hours in length, *or major fraction thereof*, 20 minutes for shifts of more than 6 hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on.[63] Employees are permitted to take rest periods in the middle of each work period insofar as is practicable.[64] However, in the context of an eight hour shift, one rest break should generally fall on either side of the meal break.[65] Rest breaks may not be combined or added to meal

breaks, even at the employee's request. Employees may not use rest breaks to start late or end early.[66]

c. Consequences for Failing to Provide a Meal or Rest Period

California law provides that employers must pay one additional hour of pay at the employee's regular rate of pay no later than the next paycheck for each meal and rest period that is missed, late, or interrupted.[67] The California Supreme Court has recently characterized this extra hour of pay as a "wage," not a "penalty."[68] This means that the statute of limitations for a claim for missed meal or rest periods is three years rather than one year.[69] It also means that a failure to pay meal and rest period premiums can trigger other unpaid "wage"-based penalties such as waiting time penalties under Labor Code section 203, and penalties under Labor Code section 226 for failure to furnish timely and accurate itemized wage statements.[70]

III. RELATED CLAIMS PLED CONCURRENTLY WITH WAGE AND HOUR CLAIMS[71]

A. Elder Abuse Claims

When a disgruntled worker, who also happens to be an elder, commences litigation related to unpaid wages and other labor and employment claims, concurrently pled with those claims may be a cause of action for elder abuse. In these types of cases, plaintiffs generally plead that the deprivation of their wages was a "property taking"[72] that meets the definition of financial elder abuse under the Welfare and Institutions Code.

Welfare and Institutions Code section 15610.30 defines financial abuse of an elder as when a person or entity:

> (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
>
> (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
>
> (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70.

California law does not support elder abuse causes of action every time there is a breach of contract claim, particularly as it relates to employment contracts, as discussed herein. However, under the right set of facts, the cause of action may be properly pled and exposes the unwitting employer (i.e., fiduciary) to a host of liability and enhanced damages, such as double damages and attorneys' fees.[73]

To properly plead an elder abuse cause of action, a plaintiff must show that the breach of the employment contract was "for a wrongful use or with the intent to defraud, or both."[74] In employment-related actions, the term "wrongful use" may be defined as retaining the property, i.e., wages, allegedly promised to a particular plaintiff, such that the defendant "knew or should have known that this conduct is likely to be harmful to the elder or dependent adult."[75] When focused on the deprivation of property due an elder under a contract, the phrase "knew or should have known" "imposes a requirement in addition to the mere breach of the contract term relating to the property, as the existence of such a breach ordinarily does not hinge on the state of mind or objective reasonableness of the breaching party's conduct."[76] Although it would appear California appellate courts have yet to weigh in on the validity of elder abuse claims based on unpaid wages, it would appear based on existing law that the claim is potentially viable and is certainly pled in complaints filed across California.

B. Contractual Claims and Contract-Related Tort Claims

Plaintiffs with the above-discussed types of employment claims may also assert contract-related tort claims. The plaintiff may have a cause of action relating to (1) a written contract, (2) an oral contract, (3) an implied-in-fact contract (a contract that is evidenced by the parties' conduct rather than written or oral evidence), or (4) an implied-in-law contract (a court-imposed contract based upon detrimental reliance where the evidence in support of a contract is lacking). Additionally, some of the more common legal theories are discussed briefly below.

1. Claims Against an Estate; Promises to Make a Will

A "claim" against an estate is a demand for monetary payment for a liability of a decedent that arises in contract, tort, or otherwise.[77] These types of claims include those relating to a "promise to make a will," or other agreement where the decedent allegedly promises a distribution from the decedent's estate or, as relevant herein, payment for services rendered after the death of the decedent.[78]

A person who makes this type of claim against an estate has a one-year statute of limitations from the date of the decedent's death.[79] Of course, if the claimant alleges that the decedent would issue payment upon death for employment services rendered, the cause of action arguably does not accrue until the employer (the decedent) dies. This potentially creates liability for unpaid wages

that goes well beyond the four-year statute of limitations that exists in most wage and hour cases. For example, theoretically, a worker could assert a contractual claim (not based on the Labor Code) for payment for services rendered, to be paid upon the decedent's death from the decedent's estate. This period of time for work performed under a contract claim, theoretically, could be greater than the four-year statute of limitations that might apply for Labor Code claims. Generally, creditors who assert only oral promises for services rendered must first file a creditor's claim in a probate proceeding and whether in probate court (or in civil litigation from a rejected claim), damages may be limited to quantum meruit.[80] Wages owed would be asserted as a creditor's claim in a probate (or trust) proceeding but ultimate lawsuits filed could vary between civil claims (financial elder abuse, promise to make a will, breach of contract, etc.) and probate claims (claims under Probate Code section 850, breach of fiduciary duty if the claimant is also a beneficiary under the applicable trust or estate, etc.).

2. *Marvin Claims*

Non-marital co-habitants have a right to enforce express and implied contractual agreements and equitable rights between themselves, commonly referred to as a *Marvin* claim.[81] Additionally, *Marvin* agreements are enforceable against an estate when one of the parties to the agreement dies.[82] Support agreements between co-habitants are enforceable under the *Marvin* case.[83] Likewise, property agreements between co-habitants are enforceable under *Marvin*.[84]

These types of agreements are typically oral and not written. Certainly, the equitable defense of the statute of frauds[85] may apply; however, often times the claimants allege facts supporting detrimental reliance and promissory estoppel.[86] In the hypothetical provided in the Synopsis above, Paula forewent various employment opportunities in reliance of the oral promise to make a will. As such, there is potential exposure that a trier of fact will find that the statute of frauds may not be enforced against these types of claimants.

3. *Quantum Meruit*

Quantum meruit refers to the well-established principle that the law implies a promise to pay for services performed and not gratuitously rendered.[87] A party claiming under a quantum meruit theory is not required to prove the existence of an agreement, but must simply show that "the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made."[88] The law disfavors unjust enrichment. Thus, California law permits the recovery of compensation for services rendered based on an implied contract or quantum meruit theory. Where there is an invalid or otherwise unenforceable express contract, but recovery for services rendered is still allowed, the basis of the recovery is quasi-contractual and may be based on the theory of quantum meruit.[89]

IV. MISCELLANOUS RELATED ISSUES

A. Joint Liability

Courts have found joint liability for unpaid wages against multiple employers in various contexts.[90] Separate employer entities (joint employers) may share responsibility for the wages due an employee. If they each exert sufficient control (see the test described above in section II, A., 1. of this article), each can be the employer and share in the potential liability. In the hypothetical above, all of the named defendants are potentially liable for establishing the employment relationship. All arguably had the authority to hire the caregiver and all may have been involved in exercising control, paying wages, making promises, modifying work schedules, and otherwise directing or permitting work to occur for the benefit of Ed.

B. Personal Liability

Persons responsible for overtime and/or minimum wage violations can be held personally liable for civil penalties.[91] Labor Code section 558.1 states that "[a]ny employer or other *person acting on behalf of an employer*, who violates, or causes to be violated," provisions regulating wages or hours, may be held personally liable "as the employer." Thus, arguably anyone who is involved in the wage and hour issues on behalf of the "employer" may be held personally liable "as the employer." Such persons often include managers, directors, officers, human resource employees, and other managing agents of the employer who exercise substantial independent authority and judgment in their decision-making such that their decisions ultimately determine wage and hour policy.[92]

C. Statute of Limitations

Most of the Labor Code claims discussed herein have a one-year (penalties) or three-year statute of limitations. However, when the plaintiff also asserts an unfair business practices claim under Business and Professions Code, section 17203, the statute of limitations is potentially four years.[93] Of course, with a certain set of facts supporting detrimental reliance or promissory estoppel, claimants potentially may recover far more than four years of wage and hour damages based on a variety of contractual theories (and not statutory wage and hour laws).

V. CONCLUSION

As the title of this article suggests, the potential liability exposure relating to wage and hour issues is one that can easily go unnoticed, particularly in situations where the parties have an "understanding." Even in situations where the employment relationship is intentionally established, numerous traps and nuances exist related to a variety of labor and employment issues, not all of which are discussed or even mentioned here. Thus, whenever there is a situation where services are rendered, no matter the parties' understanding or arrangement, it may be necessary to further evaluate the potential employment relationship with the assistance of a competent labor and employment attorney.

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01 Lab. Code, section 1194; Cal. Industrial Welfare Com. wage order No. 15-2001.

02 Lab. Code, section 226.

03 Lab. Code, section 226.

04 Lab. Code, sections 558 & 1197.1; Cal. Industrial Welfare Com. wage order No. 15-2001(3).

05 Lab. Code, sections 201-203.

06 Prob. Code, section 16222 provides:

(a) Subject to subdivision (b), the trustee has the power to continue or participate in the operation of any business or other enterprise that is part of the trust property and may effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise.

(b) Except as provided in subdivision (c), the trustee may continue the operation of a business or other enterprise only as authorized by the trust instrument or by the court. For the purpose of this subdivision, the lease of four or fewer residential units is not considered to be the operation of a business or other enterprise.

(c) The trustee may continue the operation of a business or other enterprise for a reasonable time pending a court hearing on the matter or pending a sale of the business or other enterprise.

(d) The limitation provided in subdivision (b) does not affect any power to continue or participate in the operation of a business or other enterprise that the trustee has under a trust created by an instrument executed before July 1, 1987.

07 Orders of the California Industrial Welfare Commission regulating the wages, hours, and working conditions in certain industries or occupations. There are 17 such orders that are also known as "IWC Orders," or "Wage Orders."

08 Cal. Code Regs., tit. 8, section 11150, subd. (2)(E), (2)(G)-(H); *Martinez v. Combs* (2010) 49 Cal.4th 35.

09 Cal. Code Regs., tit. 8, section 11150, subd. (2)(E); "Employ" means "(a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship." *Martinez v. Combs*, *supra*, 49 Cal.4th at p. 64.

10 Cal. Code Regs., tit 8, section 11150, subd. (2)(G).

11 "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or *permitted* to work, whether or not required to do so. (Cal. Code Regs., tit. 8, section 11150, subd. (2)(H).)

12 Prob. Code, section 16243.

13 Prob. Code, section 16229.

14 Conservators of the person can hire workers regarding the "care, custody, and control of, and has charge of the education of, the ward or conservatee." (Prob. Code, section 2351.) Personal representatives of decedents' estates may hire individuals for a wide variety of assistance. (*Estate of McMillin* (1956) 46 Cal.2d 121 (carpenters, painters, electricians, plumbers, janitors, and others to carry on decedent's business).) Agents under a power of attorney granting authority with respect to real property transactions have the authority to hire assistance or laborers. (Prob. Code, section 4451.)

15 Lab. Code, sections 2775, subd. (b)(1) and 3357; *Dynamex Operations West, Inc. v. Super. Ct. of Los Angeles* (2018) 4 Cal.5th 903, fn. 24 citing *Robinson v. George* (1940) 16 Cal.2d 238, 242; *Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1220-1221; *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 349, 354.

16 For brevity, discussed below are the *Borello* test and the ABC test. Pursuant to Lab. Code, sections 2775 et seq., there are occupations to which the *Borello* test applies instead of the ABC test and for some occupations, additional requirements must be met first in order to use the *Borello* test instead of the ABC test.

17 The question of which test or whether both tests apply is a complex analysis, is beyond the scope of this article, and is one that depends on the type of occupation and other criteria as set forth in the California Labor Code and California case law.

18 *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, *supra*, 48 Cal.3d 341.

19 *Dynamex Operations West, Inc. v. Super. Ct.*, *supra*, 4 Cal.5th 903.

20 Lab. Code, section 2755, subd. (b)(1).

21 Cal. Code Regs., tit. 8, section 11150, subd. (1)(A).

22 *Walling v. General Industries Co.* (1947) 330 U.S. 545.

23 See Cal. Industrial Welfare Com. Orders, section 1 of the applicable order.

24 Lab. Code, section 515, subd. (a).

25 29 CFR section 541.600.

26 *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 797.

27 *Ibid.*

28 Lab. Code, section 500, subd. (a).

29 Division of Labor Standards Enforcement Policies and Interpretations Manual (August, 2019), section 48.1.3.1.

30 Lab. Code, section 500, subd. (b).

31 Division of Labor Standards Enforcement Policies and Interpretations Manual, *supra*, at section 48.1.3.1.

32 *Id.* at section 48.1.2.1.

33 See Cal. Industrial Welfare Com. Orders, section 3 of applicable order.

34 Lab. Code, section 1194.

35 *Ibid.*

36 See, e.g., *Jong v. Kaiser Foundation Health Plan, Inc.* (2014) 226 Cal.App.4th 391, 394, 398.

37 See Cal. Industrial Welfare Com. Orders, section 3 of applicable order.

38 *Ibid.*

39 *Ibid.*

40 Cal. Industrial Welfare Com. Orders, section 3 of applicable order.

41 Cal. Industrial Welfare Com. Wage Order No. 15, section 3(C).

42 *Id.* at section 3(C)(1)-(2).

43 *Ibid.*

44 Lab. Code, section 1451, subd. (d) (emphasis added).

45 Lab. Code, section 1454.

46 *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833.

47 A bonus is money promised to an employee in addition to the salary, commission, or hourly rate usually due as compensation. An objective bonus is one that is required where a promise is made that a bonus will be paid in return for a specific result. (*Lucien v. All States Trucking* (1981) 116 Cal.App.3d 972, 975.) It becomes a unilateral contract when the employee begins performance, provided the employee meets the conditions precedent to receive the bonus. (*Ibid.*; *see also* Division of Labor Standards Enforcement Policies and Interpretations Manual, *supra*, at sections 31.2.9 & 35.3.) A discretionary bonus is not based on any objective criteria and is not routine, but rather more of a gratuity. (*Id.* at section 35.4.4.) Objective bonuses are considered in the calculation of an employee's "regular rate of pay." (29 CFR section 778.110; Lab. Code, section 204.)

48 *Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419, 424-426; Division of Labor Standards Enforcement Policies and Interpretations Manual, *supra*, at sections 49.1.1 & 49.1.2.2.

49 Division of Labor Standards Enforcement Policies and Interpretations Manual, *supra*, at section 49.1.2.4.

50 See Cal. Industrial Welfare Com. Orders, section 7(A) of the applicable order.

51 *Ibid.*

52 Lab. Code, section 1174.

53 Lab. Code, section 226.

54 Lab. Code, section 1174.

55 Lab. Code, section 512, subd. (a); see Cal. Industrial Welfare Com. Orders, section 11(A) of the applicable order.

56 *Brinker Restaurant Corporation v. Super. Ct. of San Diego* (2012) 53 Cal.4th 1004.

57 Lab. Code, section 512, subd. (a); see Cal. Industrial Welfare Com. Orders, section 11(A) of the applicable order.

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 See Cal. Industrial Welfare Com. Orders, section 11(A) of the applicable order.

62 *Ibid.*

63 See Cal. Industrial Welfare Com. Orders, section 12 of the applicable order (except Order 16); *Brinker Restaurant Corporation v. Super Ct. of San Diego*, *supra*, 53 Cal.4th 1004.

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

67 *Murphy v. Kenneth Cole* (2007) 40 Cal.4th 1094; *Brinker Restaurant Corporation v. Super. Ct. of San Diego*, *supra*, 53 Cal.4th 1004.

68 *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 109; Lab. Code, sections 200, 203, & 226.7.

69 *Naranjo v. Spectrum Security Services, Inc.*, *supra*, 13 Cal.5th at p. 113.

70 *Id.* at p. 125.

71 This section is not intended to be comprehensive to any and all related claims that may be concurrently pled with the types of wage and hour claims discussed herein. The related claims discussed in this section are simply the ones perceived by the authors to be the most commonly pled.

72 *Bounds v. Super. Ct.* (2014) 229 Cal.App.4th 468.

73 See Welf. & Inst. Code, section 15657.5, subd. (a).

74 Welf. & Inst. Code, section 15610.30, subd. (b). Conduct that does not ordinarily constitute a "taking" or "appropriation" of property "for a wrongful use" and/or "with intent to defraud" does not become so simply because the claimant is a resident

of this state and over the age of 65. (See *Hillard v. Harbor* (2017) 12 Cal.App.5th 1006, 1015-1016.)

75 Welf. & Inst. Code, section 15610.30, subd. (b).

76 *Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 658. In *Stebley v. Litton Loan Servicing, LLP*, the court held that "a lender does not engage in financial abuse of an elder by properly exercising its rights under a contract, even though that conduct is financially disadvantageous to an elder." (*Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 527-528 (emphasis added).) As the court reasoned, "[i]t is simply not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid. … [A] commercial lender is privileged to pursue its own economic interests and may properly assert its contractual rights." (*Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal. App.3d 318, 334–335 (emphasis added).) These cases highlight the important distinction that elder abuse is a tort claim and not a contract claim. (See *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664.) As such, without a showing of subjective bad faith, *i.e.* "wrongful use," a related breach of employment contract claim may not be cognizable to support a tort cause of action for elder abuse.

77 Prob. Code, section 9000. Claims include liabilities of the decedent "whether due, not due, accrued or not accrued, or contingent, and whether liquidated or unliquidated." (See *Bradley v. Breen* (1999) 73 Cal.App.4th 798.)

78 Prob. Code, section 9000; see *Allen v. Stoddard* (2013) 212 Cal. App.4th 807.

79 Code Civ. Proc., section 366.3. The one-year statute of limitations is tolled only by the three actions identified in Code of Civil Procedure, section 366.2. Additionally, filing a creditor's claim or a petition to file a claim tolls the statute of limitations until the claim is rejected. (Code Civ. Proc., section 366.2, subd. (b); Prob. Code, section 9352.) In trust administrations where the trustee has elected to proceed with a creditor-notification process under Probate Code, section 19003, filing a claim also tolls the statute of limitations. (Code Civ. Proc., section 366.2.)

80 *Wilkinson v. Wiederkehr* (2002) 101 Cal.App.4th 822; *Chahon v. Schneider* (1953) 117 Cal.App.2d 334.

81 *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684.

82 *Bryne v. Laura* (1997) 52 Cal.App.4th 1054, 1064; see *Estate of Fincher* (1981) 119 Cal.App.3d 343, 348-50.

83 *Bryne v. Laura*, *supra*, 52 Cal.App.4th at p. 1063; *Marvin v. Marvin*, *supra*, 18 Cal.3d at pp. 665, 674-675, 685, fn. 26; *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 889.

84 *Marvin v. Marvin*, *supra*, 18 Cal.3d at pp. 674-675.

85 Civ. Code, section 1624.

86 The elements of a promissory estoppel claim are (1) a promise clear and unambiguous on its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance. (*Granadino v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 411.)

87 *E.J. Franks Construction, Inc. v. Sahota* (2014) 226 Cal.App.4th 1123, 1127-1128.

88 *Ibid.*

89 See *Rotea v. Izuel* (1939) 14 Cal.2d 605, 608; *Bogan v. Wiley* (1946) 72 Cal.App.2d 533, 536; *Murdock v. Swanson* (1948) 85 Cal.App.2d 380, 383 (services and goods furnished); *Shive v. Barrow* (1948) 88 Cal.App.2d 838, 844 (services and money furnished); *Drvol v. Bant* (1960) 183 Cal.App.2d 351, 356 (services for decedent in reliance on promise to devise home, will denied probate; recovery in quantum meruit); *Beley v. Mun. Ct.* (1979) 100 Cal.App.3d 5, 8; BAJI No. 10.71 (reasonable value of services (quantum meruit)); and see generally, Poulos, *Quasi-Contractual Recovery--Breach of Oral Contract to Perform Services in Exchange for Compensation by Will* (1961) 12 Hastings L. J. 408 (breach of oral contract to perform services in exchange for compensation by will); *Marvin v. Marvin*, *supra*, 18 Cal.3d 660.

90 *Real v. Driscoll Strawberry Assn.* (9th Cir. 1979) 603 F.2d 748, 754 (wage claim against joint employer decided under the Federal FLSA wage and hour laws); *Bonnette v. California Health and Welfare Agency* (9th Cir. 1983) 704 F.2d 1465, 1470 (wage claim decided in favor of employees against joint employer under the Federal FLSA wage and hour laws); *Michael Hat Farming Co. v. Agricultural Labor Relations Bd.* (1992) 4 Cal. App.4th 1037, citing *Rivcom Corp. v. Agricultural Labor Relations Bd.* (1983) 34 Cal.3d 743, 768-769 ("It is established that some farming operations have multiple, joint agricultural employers.").

91 *Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809.

92 See, e.g., Lab. Code, section 558.1, subd. (b); *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566-67.

93 Bus. & Prof. Code, section 17208; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177-179.