CLARK & TREVITHICK

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LEGAL *Issues*

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The Change in the Personal Injury Statute of Limitations

What Effect Will It Have on California Business?

By James E. Daniels, II

A plaintiff wishing to bring a lawsuit must do so in a timely manner. The Legislature has enacted particular deadlines by which a lawsuit shall be filed in court. These enactments are generally referred to as "statutes of limitation." The rationale for these statutes of limitation is to require plaintiffs to bring suit before the memories of relevant witnesses fade and before the relevant documents are lost or destroyed.

If a plaintiff files a lawsuit after the statute of limitation has expired, the defendant can assert the defense that the statute of limitations has "run" and the lawsuit should be dismissed. A successful statute of limitations defense acts as a complete bar to the action, regardless of the merits of the plaintiff's claim.

The statute of limitations for bringing a lawsuit based upon a personal injury has been recently expanded from one year to two years.[1] The previous statute of limitation of one year had been in place since 1872. The extension of time in which a plaintiff can bring a lawsuit was accomplished by the motivated lobbying by attorney groups who mainly represent such plaintiffs and to provide the terrorist victims of September 11, 2001 additional time to bring lawsuits in California. Slip and fall cases, actions brought by parties injured by employees during the course of their employment, and actions for injuries caused by defective products are some of the legal claims that are affected by this change in statute.

California businesses should take notice of this change and be aware of its potential effects. Businesses may see a potential increase in their insurance premiums since there is a longer period of time within which to file personal injury lawsuits. Such an increase may require a careful cost analysis of risk management issues.

What can a business do to attempt to minimize its litigation exposure? It should have in place a method for dealing with incidents that could potentially lead to a lawsuit.

First, it is imperative to fix the date of the claimed injury so that there is no doubt about when the statute of limitations begins to run. The claimant should be encouraged to make an immediate report of everything that happened. Company representatives who are witnesses should also make an immediate written report. This can be especially important in the case of a claimed emotional injury which may otherwise be hard to determine with objective standards.

Next, it is important to review the activities that have led to personal injury claims in the past. Investing money in safety upgrades, design improvements or employee training may now be more cost-effective with a longer period during which a lawsuit may be filed.

Finally, this is a good opportunity to review insurance pricing issues. Rates will surely increase, but a considered decision to increase a company's deductible or self-insured retention may be the right move to keep insurance costs down.

Implementing this course of action will assist California businesses in successfully asserting a statute of limitations defense against a potential personal injury plaintiff. It is recommended that businesses respond to this new law armed with full knowledge of the risks and costs, and adjust their policies accordingly. ▲

[1] The previous statute of limitation for personal injury was codified in California Code of Civil Procedure §340(3) while the new statute of limitation is now codified in §335.1.

James E. Daniels, II

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Employer Alert

Dolores Cordell

Personal Liability for Wages

By Dolores Cordell, Esq. (Of Counsel)

With the worsening economy, employers may be tempted to make deals with their employees, particularly key employees, to defer wages until cash flow is better. Or worse yet, the company might run out of money to pay wages which have already been earned, because of a cash crunch. Still worse, the company or a division could have to shut its doors leaving unpaid wages in its wake.

A recent California Court of Appeals case has highlighted a new pitfall for employers: personal liability for unpaid wages.

On April 2, 2003, the Court of Appeals issued an opinion in a case known as ***Reynolds v. Bement*** and held that corporate managers and officers are not individually liable for wages under California law. This is good news for management in the event an employee seeks to recover unpaid wages through the California Department of Labor or the California courts. However, the case also points out a hidden pitfall for employers under federal law.

The ***Reynolds*** case relies on a distinction between the definition of "employer" stated in the California Wage Orders and the definition applicable under federal law. In so doing, the Court did an extensive analysis of numerous federal cases which held the employer personally liable for unpaid wages. Thus, if an employee seeks payment of wages under a federal statute and/or through the federal Department of Labor, members of management could be at risk of personal liability.

In view of the risk of personal liability for wages, Clark & Trevithick recommends the following:

1. Don't Create a Wage Liability:

While deferring wages is a tempting way to keep an employee, particularly a key employee, it is obviously a dangerous one for the individual manager(s). A better choice would be to pay the employee a minimum amount of wages or salary, and enter into an agreement that the employee will be paid a "bonus" if and when the company finds investors or the company turns a profit of a certain amount. Be careful, however, to comply with other wage and hour regulations: An hourly employee will have to be paid at least minimum wage ($6.75 per hour as of the date this article was written) and an exempt employee must be paid twice the minimum wage ($2,340.00 per month or $28,080.00 per year).

2. Notify the Employee of the New Wage Rate in Advance:

If you are reducing the employee's wages, it is important to give written notice to the employee of the new wage rate before the new rate goes into effect. Preferably, have the affected employee(s) sign an acknowledgement that he/she is aware of the new wage rate. Without the notice and proof that the employee was aware of the reduced wage rate before he/she continues to work, you run the risk that the employee will claim that he/she never agreed to the lower rate and believed that the higher rate was still in effect. This could result in a federal Labor Department or the federal courts imposing the higher wage rate, together with potential Waiting Time Penalties.

3. Pay Employees or Implement a Reduction in Force:

If the company looks like it is headed for hard times and/or is at risk of not making a payroll, implement a reduction in force (layoff) sooner rather than later. Failing to make a payroll may be as risky as failing to make a payroll tax payment.

4. Plan:

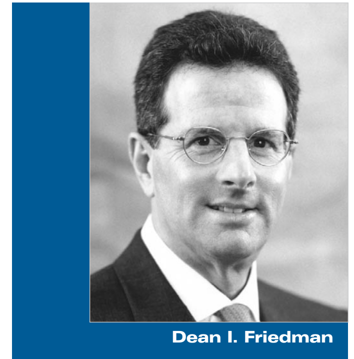
If the company looks like it is headed for serious trouble that could result in going out of business, be sure you plan ahead to have enough cash to pay all accrued wages and accrued vacation pay to all of the terminating employees. Don't wait until the company is at the crisis point to address these employee wage issues. Employers should also pay off wage claims, even if it means having to put the employees ahead of trade creditors. Be sure to contact legal counsel with questions and to discuss any unusual situation.

Employment Law Updates

As a continuing service to clients, **Leonard Brazil** periodically publishes an ebulletin that outlines significant developments in employment law. To sign up for this ***Employer Bulletin***, register online at www.clarktrev.com

A Split-Dollar Life Insurance Plan Review Imperative

By Dean I. Friedman


Dean I. Friedman

December 31, 2003 is the deadline to terminate or adapt split-dollar life insurance plans ("*Split-dollar Plans*") to IRS "safe harbors." *Legal Issues* readers should know of the imperative for their immediate review.

Characterizing Split-dollar Plans

Split-dollar Plans are used in employment contexts (though they work for corporations/shareholders). An "arrangement" is reached for sharing premium costs of "permanent" coverage on the employee's life. The face amount can be any level. The employee usually designates the death beneficiary. Employer premium advances are repaid when the policy matures, or when the arrangement is terminated.

Traditionally, two approaches are used, either the *"endorsement method"* or *"collateral assignment method,"* though there are variations. Under the endorsement method, the employer as policy owner conveys the employee's interest by policy endorsement. Under collateral assignment, the employee owns the policy and signs a collateral assignment securing repayment of the employer's "loan." The method selected depends upon control of the policy.

"Equity" plans (endorsement or collateral assignment) usually limit the employer's interest in policy cash value to its aggregate premium advances; the balance goes to the employee. Equity is shared disproportionately to the financial burden of the premium obligation (or the employer pays all). The employee also receives the benefit of current life insurance protection. "Non-equity" plans provide employees only the value of current life insurance protection.

It is proposed for equity endorsement plans that the employee's total *"economic benefit"* equals the cost of current life insurance protection, the "accessible" equity and any other benefit conferred. That cost would be determined by an IRS life insurance premium factor applied to the amount of protection provided, including paid-up additions, *i.e.*, the excess of the average contract death benefit over the amount repayable to the employer, policy loans and equity taken into account. *"Split-dollar loans"* (demand or term) result under collateral assignment plans and may impute taxable income to the employee if stated at below-market interest rates.

Tax Law Changes

Old *Revenue Rulings 64-328*, *66-110* and *67-154* tax the value of initial issuance, one-year term insurance protection (even though permanent coverage is purchased) to the employee using *Table PS-58* rates. **IRS Notices 2002-8** and **2002-59** provide that:

A. P.S. 58 rates *may* be used for *pre*-January 28, 2002 plans expressly providing for P.S. 58 rates (but Table 2001 rates are lower).

B. Before Final Regulations, lower one-year, insurer-published, term rates for standard risks, to the extent provided by the old Revenue Rulings, *may* continue to be used for *pre*-January 28, 2002 plans; after year-end, *post*-January 28, 2002 plans *may* use published rates *only* if such coverage is generally available and regularly sold.

C. Table 2001 rates *may* be used for *pre-* and *post*-January 28, 2002 plans adopted before Final Regulations (with adjustments needed for "two-life" policies).

D. Insurer-published rates *cannot* be used if a third party receives policy benefits.

Before Year-End

For plans adopted before Final Regulations, the employee's equity "build-up" will *not* be taxed solely because of accretion. And those plans will *not* be "deemed" terminated so long as the value of current life insurance protection is annually reported, or *all* employer premium advances are treated as loans. For *pre*-January 28, 2002 collateral assignment plans, the IRS will not assert that there is a taxable equity transfer upon "actual" plan termination by December 31, 2003, or loan treatment is applied after year-end for all employer-paid premiums. The transfer of an endorsement method policy to the employee is taxed according to value.

After Year-End

It is not clear when Final Regulations will be issued. **Proposed Regulations** published **July 9, 2002** (providing for the "economic benefit" regime for endorsement method plans and "loan" regime for collateral assignment plans) and **May 9, 2003** (valuing the economic benefit of endorsement plans) will only be effective then (if unchanged). A cautionary note: A "material" modification of an old Split-dollar Plan makes it a "new" plan.

Call us before year-end about your Split-dollar Plan (we can consult with your insurance professional, too). It does not matter whether you are an officer, shareholder or key employee of your company or an advisor to one who is. A follow-up should occur once Final Regulations are issued.▲

Announcements

Donald P. Clark recently was named to the Executive Committee of the Performing Arts Center of Los Angeles County, formerly known as the Music Center.

Philip W. Bartenetti will co-present a seminar on "Covenants Not to Compete" in Downtown Los Angeles on Friday, October 3, 2003. This seminar will be sponsored by Lorman Education Services. For more information, call Elizabeth Anderson at (213) 341-1340.

Robert F. DeMeter will speak about "How to Design Deferred Compensation Plans" to the Pasadena Discussion Group of the California Society of Certified Public Accountants at 12:00 noon on Monday, July 7, 2003. To learn more about this presentation, please call Elizabeth Anderson at (213) 341-1340.

Catherine C. Rayer and her husband Matt welcomed the newest member of the Clark & Trevithick family with the birth of their first child, Allison Isabella, on Saturday, June 7, 2003.

Clark & Trevithick to Co-Host Executive Development Series July 24 and July 31

Clark & Trevithick will co-host a two-part series called "Advanced Strategies for Maximizing the Benefits of Limited Partnerships and LLCs" on July 24, 2003 and July 31, 2003 at The Sportsmen's Lodge in Studio City. Both sessions will be held from 8:00 a.m. to 11:00 a.m.

Part I and Part II are designed to give managing partners, business owners, investment bankers, real estate professionals, attorneys, accountants, insurance brokers and other executives the latest practical information about drafting and tax saving strategies related to Limited Partnerships and LLCs in California. This Executive Development Series qualifies for continuing education credit for attorneys and accountants.

Dean I. Friedman of the Clark & Trevithick tax department will be the moderator. The speakers' panel includes top legal specialists from Clark & Trevithick's partnership/corporate, debtor/creditor and real estate practice groups, **Robert F. DeMeter, Leslie R. Horowitz, James S. Arico** and **Robert W. Renken**. Also on the panel are Eric A. Gronroos of Hinton, Kreditor & Gronroos and Mark C. Higgins of Higgins, Marcus & Lovett.

The tuition for any one person to attend an Executive Development session (either Part I on July 24 or Part II on July 31) is $50, but the cost for any one person to attend both sessions is $75, if payment is received by July 17, 2003.

To learn more about this Executive Development Series, log onto our web site at www.clarktrev.com and click on the seminars link or call contact **Elizabeth Anderson** at (213) 341-1340.

Buying, Selling & Financing Middle Market Companies

Michael K. Wofford is one of six distinguished panelists taking part in "Buying, Selling & Financing Middle Market Companies," a program for entrepreneurs, managers and professionals who work with companies that generate $10 to $500 million in annual revenue. This presentation will be held on Thursday, July 10, 2003 at 6:30 p.m. at the Jonathan Club, 545 S. Figueroa Street, Los Angeles. The event is presented by the University of Southern California Marshall Alumni Association Los Angeles Chapter and co-sponsored by Clark & Trevithick, Fleet Capital, Kibel Green Inc. and Riordan, Lewis & Haden. To learn more about the event or register to attend, go to www.marshall.usc.edu/alumni/FinanceRSVP or phone the Marshall Alumni Association at (213) 740-7900.

Upcoming Continuing Education Seminars:

Thursday, July 24, 2003 • 8:00 a.m. to 11:00 a.m. *Advanced Strategies for Maximizing the Benefits of Limited Partnerships and LLCs - Part I* presented by Clark & Trevithick, Higgins, Marcus & Lovett and Hinton, Kreditor & Gronroos. The Sportsmen's Lodge, Studio City, CA. $50 per person admission.

Thursday, July 31, 2003 • 8:00 a.m. to 11:00 a.m. *Advanced Strategies for Maximizing the Benefits of Limited Partnerships and LLCs - Part II* presented by Clark & Trevithick, Higgins, Marcus & Lovett and Hinton, Kreditor & Gronroos. The Sportsmen's Lodge, Studio City, CA. $50 per person admission.

Thursday, September 4, 2003 • 8:00 a.m. to 11:00 a.m. *Navigating the Slippery Slope - Part II: Successfully Administering the Revocable Living Trust After the Death of the Second Spouse* presented by Clark & Trevithick and Fiduciary Trust International of California. The Portofino Hotel and Yacht Club, Redondo Beach, CA. No charge for admission.

Clark & Trevithick presents continuing education seminars for CPAs and attorneys. To find out more about these upcoming events or register to attend, log onto our web site at www.clarktrev.com and click on the seminars link or call **Elizabeth Anderson** at (213) 341-1340.

Coming in the next Legal Issues!

Independent Director Legal Concerns

CLARK & TREVITHICK

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Feedback/Faxback

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