PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

140 Geary Street, Seventh Floor ▪ San Francisco, CA 94108-4635
Phone: (415) 433-1099 ▪ Fax: (415) 433-9434 ▪ www.sfcounsel.com

July 2016

Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

Protecting Trade Secrets in 2016

Our increasingly mobile workforce and gig / on-demand economy continues to provide a host of benefits to businesses and workers alike. But with growth comes challenge and growing pains. One critical challenge businesses face is how to protect intellectual property while attracting and retaining talent. On May 11, 2016, and effective that day, President Obama signed into law The Defend Trade Secrets Act of 2016 ("DTSA" amending 18 U.S.C. §§ 1832–1839). The DTSA includes many nuanced issues outside the scope of this article. Critically, the DTSA broadly applies to and requires immediate action by anyone who uses employees or independent contractors, alike and, for the first time, creates a federal civil cause of action against those who steal trade secrets.

Whistleblower Immunity Notice

The immediate action warranted by the DTSA concerns certain "notice" provisions which must be provided to any "employee" (broadly defined as "any individual performing work as a contractor or consultant") hired on or after May 11, 2016 and those subject to an agreement or contract (for example, a statement of work) which may be revised or updated after May 11, 2016. (18 U.S.C.A. § 1833(b)(3)(D).)

The notice provisions concern what is commonly referred to as "whistleblower immunity." Specifically, the DTSA provides civil and criminal immunity to individuals who disclose trade secrets under two circumstances: (1) direct or indirect disclosure "in confidence" to a federal, state or local government official or to an attorney "solely for the purpose of reporting or investigating a suspected violation of the law" and (2) "in a complaint or other document filed in a lawsuit" under seal. (§ 1833(b).)

To ensure awareness of the whistleblower immunities, the DTSA requires any person or business hiring another to provide notice of the whistleblower immunity in "any contract or agreement with an employee that governs the use of a trade secret or other confidential information." (§ 1833(b)(3).) This notice matters because failure to comply prevents recovery of exemplary damages (i.e., up to double damages) or attorney's fees, which otherwise may be awarded under the DTSA. (§ 1833(b)(3)(C).)

For these reasons, any person or business using W2 or 1099 workers should update all hiring agreements to include DTSA-compliant notice provisions. In order to avoid an indicia of "control" for purposes of independent contractor misclassification, the DTSA provisions should be separately included within a hiring company's independent contractor agreement, rather than simply requiring the worker to abide by policies applicable to the company's employees, in general (since treating employees and independent contractors, alike, is a factor militating

In This Issue

Brandon Smith

I hope all of you have been enjoying an amazing summer so far and finding time to spend with your family and friends, who are so key to our success in life and in business. I was lucky enough to take a sabbatical this summer and to travel to Ecuador to visit the Galapagos Islands with my family. It's a truly incredible place: largely untouched and full of amazing animals and scenery. Each day held a new and unexpected adventure, ranging from swimming with dolphins and baby sea lions to watching a Waved Albatross do its mating dance only a few meters away. Watching giant

against viable independent contractor classification). Here is a sample notice provision for your consideration:

> *Defend Trade Secrets Act. Company has provided notice that [insert name of employee or independent contractor] shall not be held criminally or civilly liable under any federal or state trade secret lawfor the disclosure of a trade secret that (a) is made (i) in confidence to a federal, state, or local government official, either directly or indirectly to an attorney and (ii) solely for the purpose of reporting or investigating a suspected violation of lawor (b) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.*

Potential Benefits of Federal Court and Law

Before the DTSA, companies pursuing civil actions for trade secret theft were limited to state law claims, which, of course, vary from state to state. Now, with the DTSA, companies can pursue civil remedies in federal courts under a uniform federal statute so long as the subject trade secret is "related to a product or service used in, or intended for use in, interstate or foreign commerce." (§ 1836(b).) In addition to uniformity and potentially greater consistency and guidance in case decisions and results, other benefits will undoubtedly develop over time.

For example, one readily-apparent benefit of the DTSA compared to California law concerns California's requirement that the plaintiff identify with "reasonable particularity" the trade secret(s) before engaging in discovery. (*See* Code Civ. Proc. § 2019.210.) This evidentiary requirement under California law sometimes presents an insurmountable obstacle to trade secrets plaintiffs who may lack the information and details necessary to properly explain their trade secrets. At a minimum, the pre-discovery identification of trade secrets requirement often results in delay and increased expenses and fees which, taken together, may dissuade victims of trade secrets theft from continuing litigation.

Companies need to immediately update operative employment and independent contractor agreements to ensure compliance with the DTSA whistleblower notice provisions. Companies should also be aware of the potential benefits the DTSA provides for trade secrets protection in today's increasingly mobile and dynamic workforce. Consultation with experienced counsel is critical before deciding to sue for trade secret theft.

Please contact Denis Kenny at (dsk@sfcounsel.com), Ryan Stahl at (rws@sfcounsel.com), or John Lough, Jr. at (jbl@sfcounsel.com) for more information on wage-and-hour laws and classification issues (e.g., independent contractor v. employee, exempt v. nonexempt employees).

- Written by Denis Sullivan Kenny

California's Anti-SLAPP Statute: A Powerful Tool for Litigators

Passed into law in 1992, California's anti-SLAPP statute (prohibiting strategic lawsuits against public participation, or "SLAPPs") has evolved into a nuanced but powerful procedural device for litigants facing lawsuits arising from protected petitioning or speech activity. An example of a SLAPP would be an individual who decides to voice an opinion at a governmental proceeding – such as a school board meeting – and whose comments become the basis for a defamation or other action meant to silence the opinion of the speaker. In enacting California's anti-SLAPP statute, the Legislature acknowledged a "disturbing increase" in actions cloaked as tort claims meant to silence legitimate free speech activity. As such, the Legislature directed that the anti-SLAPP statute be "construed broadly" to achieve its objective of rooting out these sorts of actions.

In considering an anti-SLAPP motion, a California court will engage in a two-part inquiry. First, it will consider whether the movant has demonstrated that some cause of action against it arises from protected activity. If the movant is successful, then the burden shifts to the nonmoving party to demonstrate a probability of prevailing on that cause of action. If the nonmoving party is unable to meet this burden, then the cause of action is stricken and fees are awarded to the prevailing moving party.

tortoises slowly march through a forest and having to step around messes (yes they are actually called messes) of over thirty marine iguanas as the sun rose gave me a new appreciation for how incredible this planet is and how it could be without the constant intervention of people.

Spending so much uninterrupted time with my family (I didn't check email for weeks) allowed me to settle into a rhythm and a connection with them that I haven't been able to have in years. I was able to be truly present with my parents, my wife and my twin girls and to share these experiences that I'm sure will last a lifetime. It's a rare trip these days that allows us to do this, given near constant connectedness, media barrage and expectations to be available.

Of course none of that would have been possible without supportive partners, associates and clients who helped me take this trip. It was a good reminder that we cannot do anything alone in this life and that whether it's work, vacation or having a family we all need supportive people around us and to support those same individuals when they need that help.

At Scherer Smith & Kenny our motto is "The Strength of Partnership". We believe that strong businesses and relationships take a partnership to achieve. Whether it's two partners starting a business or the partnership between a client and their attorney it's all stronger with a solid partnership among everyone involved. I encourage you to continue working on your relationships with your friends, family

Regarding the first step inquiring into protected activity, the statute divides this into four categories. The first two categories include speech or petitioning activity that either occur in or are made "in connection with" legislative, executive, or judicial proceedings. The third category addresses statements made in certain other public forums relating to "an issue of public interest." Finally, the fourth category serves as a sort of catch-all encompassing various other forms of speech or petitioning activity "in connection with a public issue or an issue of public interest." The collective result of the definition of protected activity has been the creation of an expansive realm of speech and petitioning activity that may be susceptible to an anti-SLAPP motion to strike under California law, including but not limited to statements made during grievance procedures, homeowners' association governance, warnings of fraud, and commentary on the Iraq war.

The second step in a court's inquiry into an anti-SLAPP motion looks to the movant's probability of prevailing on the cause of action arising from the alleged protected activity. As the California Supreme Court has noted, this analysis operates like a "summary judgment in reverse" in that it forces the nonmoving party - usually a plaintiff - to come forward with some proof to support its claim. The nonmoving party may have little or no opportunity to conduct discovery to gather such evidence and may therefore be limited to only its own evidence and declarations as a means to defeat such a motion. If the nonmoving party is unable to demonstrate a probability of prevailing, the court must strike the subject cause of action and award attorney's fees to the moving party for prevailing in its anti-SLAPP motion.

Given the broad conduct deemed protected activity, one can see how California's anti-SLAPP statute may apply in all types of civil litigation. Statements made in nearly any forum or setting may potentially give rise to a claim that is susceptible to an anti-SLAPP motion to strike. So long as such a motion is not deemed frivolous, it will have the impact of staying the proceedings and potentially making available to the movant a large fee award. In circumstances where, for example, a plaintiff may have included a claim that may not be asserted against a party as a matter of law (and on which there would be no probability of prevailing), settlement discussions may occur much sooner than had the litigation been allowed to proceed without being subject to an anti-SLAPP motion.

We at Scherer Smith & Kenny remain available to assist you with any litigation-related or other legal issues. Please contact Denis Kenny (dsk@sfcounsel.com), Ryan Stahl (rws@sfcounsel.com), or John Lough (jbl@sfcounsel.com) for more information.

-Written by Ryan Stahl

Implications of New Federal Exemption Compensation Rules

Recent changes to federal law (discussed below) highlight the ongoing need for employers to be very careful before deciding to classify an employee as "exempt" from overtime and other wage-and-hour laws. Some employees consider it a mark of prestige and career advancement to be an exempt or salaried employee. These employees see value in their skills rather than "clock" time. Many employers are more than willing to accommodate employees' preferences in this regard since treating an employee as exempt eliminates the need to track hours worked, pay overtime, and ensure the provision of meal and rest breaks, among other wage-and-hour requirements. But federal and California laws detail specific and stringent requirements for exempt employment classification. And the exemption analysis is highly fact-intensive, thorny, and nuanced. The stakes are high since misclassifying an employee may result in employer liability for up to 4 years of back wages, among other remedies owed to a misclassified employee.

Many times the decision on how to classify an employee is a close call. Nonetheless, the risk of misclassification should not deter an employer from classifying an employee as exempt *if* the employee is truly an exempt employee.

Generally, employees are considered nonexempt, unless the employer can show that the subject employee meets one of the narrow exemption

members and business partners and wish you success as we head into the second half of 2016.

- Written by Brandon Smith

categories. When multiple laws apply to an employee, the law that is more protective of the employee applies. The most commonly applicable exemption is commonly known as the "white collar" exemptions, which includes executive, administrative, and professional employees. Additional exemption categories exist that are outside the limited scope of this article including the outside salesperson, commissioned employee, and computer professional exemptions, among others. To properly classify a white-collar employee as exempt, the employer must meet a two-part test: (1) minimum salary compensation and (2) duties. Both parts will be discussed below.

On paper, the exemption analysis appears relatively straightforward. In practice, the analysis is far from clear.

California Law

To satisfy California's minimum salary test, the employee must earn a minimum monthly salary equal to twice the state minimum wage for full-time employment (40 hours per week). As of January 1, 2016, the California minimum wage is $10.00 per hour, so the employee needs to earn a minimum of $3,466.67 per month (equal to $800 weekly or $41,600 annually). However, the minimum salary increases as of December 1, 2016, given the new federal requirements discussed below.

While the "salary" basis test is a simple calculation, the analysis of the "duties" test is a wholly different matter. In sum, the employee needs to spend more than 50% of the employee's time performing "exempt" activities. Each of the white-collar exemptions—executive, administrative, and professional—details those duties that are considered exempt tasks which requires an analysis of case law and agency precedent. Among other guidelines, the assessment focuses on whether the employee "customarily and regularly exercises discretion and independent judgment" over "matters of significance." The nuances of the duties tests applicable to each of the various white-collar exemptions is outside the scope of this article.

Federal Law and New Overtime Regulations

The Fair Labor Standard Act ("***FLSA***") is the federal statute governing exempt classifications of employees which sets forth the effective floor or minimum requirements which all United States employers must meet, in addition to any applicable state or local laws. On May 18, 2016, the United States Department of Labor ("***DOL***") finalized its rule that expands overtime protections to more workers. Effective December 1, 2016, the new FLSA Regulations will modify the salary basis test, requiring that an employee earn a minimum $913 per week ("***Standard Salary Level***"), which would be equivalent to $47,476 per year (or about $3,956.33 per month) for a full-time employee. Critically, the Standard Salary Level under the new FLSA Regulations is greater than the minimum monthly salary under controlling California law, which is about $3,466.67 per month.

As for the duties test, while commentators ruminated whether the DOL would change the duties test, the new FLSA Regulations left the duties test untouched. The FLSA Regulations provide that an employee meets the "duties" tests when the employee performs duties that are "primarily" exempt executive, administrative, or professional work. The FLSA duties test differs from the California duties test in that the FLSA duties test takes a more qualitative approach. In other words, FLSA simply requires that the employee's primary duty be exempt, and time is one but not necessarily a dispositive factor in the "primary" duties test. (*See* 29 C.F.R. § 541.700.) For California employers, since the California duties test requires "more than 50%" of time spent performing exempt duties, California employers must satisfy California's more stringent duties test to classify an employee as exempt, regardless of federal law. In practice, this continues to make it more difficult for California employers to meet the "duties" test under California law than federal law.

Issue to Monitor

Beginning January 1, 2020, employers should be aware that the Standard Salary Level will increase every three years based on the 40th percentile of full-time salaried workers in the lowest income region of the country ("***Automatic Updates***"). This means that based on current wage-growth projections, the Standard Salary Level would be expected

to rise to more than $51,000 by January 1, 2020.

While the FLSA builds in Automatic Updates, which must be met by all employers of exempt employees, California's minimum salary requirement will surpass the federal Automatic Updates in the coming years. On April 4, 2016, Governor Brown signed Senate Bill 3 ("***SB 3***"), which sets the schedule for step increases in minimum wage up through January 1, 2022. The California minimum salary basis for employers with 26 or more employees will exceed the federal December 1, 2016, Standard Salary Level by 2019 as outlined below.

Effective Date*	Minimum wage	Salary Basis Test ($/year)
January 1, 2016	$10.00	$41,600.00
January 1, 2017 (2018)	$10.50	$43,680.00
January 1, 2018 (2019)	$11.00	$45,760.00
January 1, 2019 (2020)	$12.00	$49,920.00
January 1, 2020 (2021)	$13.00	$54,080.00
January 1, 2021 (2022)	$14.00	$58,240.00
January 1, 2022 (2023)	$15.00	$62,400.00

*Beginning January 1, 2017, these are the effective dates for employers with 26 or more employees. For employers with 25 or less employees, the effective years are noted in parenthesis.

How does this affect California employers?

First, California employers must still satisfy the California duties test because the California duties test is more stringent than the federal primary duties test.

The true impact will be on salaries. In the near-term, if a California employer wants to continue classifying an employee as exempt under both California and federal law, the employer will need to make sure the employee is earning the Standard Salary Level of $47,476 per year by December 1, 2016.

With the new FLSA Regulations' effective date looming, California employers face two options if they find themselves with white-collar exempt employees earning a salary in the range of $41,600 and $47,476: (1) reclassify newly overtime-eligible employees as non-exempt or (2) increase the effected employees' salary to be at or above the Standard Salary Level.

Conclusion

While employers and employees may be attracted to the allure and prestige of being a salaried employee, controlling law sets out specific requirements before an employer may properly classify an employee as exempt. Agreeing to be an exempt employee does not shield an employer from misclassification liability. If an employer is considering classifying an employee as an exempt (salaried) employee, the employer should consult experienced employment counsel to properly assess an employee's classification.

Please contact Denis Kenny at (dsk@sfcounsel.com), Ryan Stahl at (rws@sfcounsel.com), or John Lough, Jr. at (jbl@sfcounsel.com) for more information on wage-and-hour laws and classification issues (e.g., independent contractor v. employee, exempt v. nonexempt employees).

- *Written by John Lough, Jr.*

Areas of Practice

Business; Real Estate; Intellectual Property and Employment Law;

Litigation and Dispute Resolution; Nonprofit; Estates and Trusts

For more information: www.sfcounsel.com