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California Supreme Court Holds Some Agents May Be Held Directly Liable Under The FEHA For Employment Discrimination

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Decided August 21, 2023 ***Raines v. U.S. Healthworks Medical Group*, S273630 This week, the California Supreme Court held that a business entity acting as an agent of an employer may be held directly liable as an "employer" for alleged violations of California's Fair Employment and Housing Act. Background:** Plaintiffs Kristina Raines and Darrick Figg were job applicants who received offers of employment contingent upon passing a medical screening. The screening included a detailed health history questionnaire that the applicants were required to complete. These pre-employment screenings were not conducted by the plaintiffs' prospective employers, but instead by third-party occupational health services providers. Plaintiffs sued these providers on behalf of a putative class, alleging that the questions were intrusive and overbroad in violation of California's Fair Employment and Housing Act, or the FEHA. Plaintiffs sued in state court, and the providers removed the case to federal court. The FEHA generally precludes "any employer or employment agency" from "requir[ing] a medical or physical examination" of a job applicant. Cal. Gov't Code § 12940(e)(1). It does, however, allow employers to require such examinations of a "job applicant after an employment offer has been made," so long as the examination is "job related and consistent with business necessity." *Id.* § 12940(e)(3). The statute elsewhere defines "employer" as "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly." *Id.* § 12926(d). The providers argued that even if they were "agents" of the plaintiffs' prospective employers, agents could not be held directly liable for FEHA violations separately from their employer-principals. The district court agreed. On appeal, the Ninth Circuit observed the significance of the issue on employment litigation throughout the state, and that the California Supreme Court had previously reserved judgment on the issue in *Reno v. Baird*, 18 Cal. 4th 640 (1998). The Ninth Circuit accordingly certified the question of an agent's direct liability under the FEHA to the California Supreme Court. **Issue:** California's Fair Employment and Housing Act defines "employer" as "any person regularly employing five or more persons, or any person acting as an agent of an employer." Can a business acting as an agent of an employer be held directly liable for employment discrimination? **Court's Holding:** Yes. Businesses with at least five employees that carry out FEHA-regulated activities as an agent of an employer may be held directly liable for employment discrimination under the FEHA.

> *"[W]e conclude that legislative history, analogous federal court decisions, and legislative policy considerations all support the natural reading of [the FEHA] advanced here, which permits business-entity agents to be held directly liable for FEHA violations in appropriate circumstances."*

Justice Jenkins, writing for the Court **What It Means:**

- By interpreting the FEHA's definition of "employer" to include an employer's

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agents in a manner beyond simply incorporating the ordinary principles of respondeat superior, the opinion opens up businesses acting as agents to potential FEHA litigation that was otherwise not clearly available to employees under the statute.

- Still, the California Supreme Court clarified that its decision was limited to answering the specific question posed by the Ninth Circuit: "whether a business-entity agent *may ever* be held directly liable under the FEHA." The court therefore declined to "identify the specific scenarios" in which a business-entity agent could face direct liability under the statute. And it stated that it was not ruling on the "significance, if any," of the degree of employer control over the agent's acts on the ultimate question of liability.
- The court observed that a large business acting as an agent, like the screening providers, may have the bargaining power either "to avoid contractual obligations that will force it to violate the FEHA" or to secure agreements from employers to indemnify it for any FEHA liability. But the court left open the question whether businesses acting as agents and having fewer than five employees could be held directly liable for FEHA violations.

The Court's opinion is available here. Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the California Supreme Court. Please feel free to contact the following practice leaders:

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