

Legal Update: California Supreme Court Approves Right to Sue Third Party Companies for Employment Discrimination

The Supreme Court of California has held that third parties with five or more employees can be sued for employment discrimination under the state's Fair Employment and Housing Act (FEHA) *even if the company is not the employer of the person who suffered the alleged discrimination.* The case is **Kristina Raines et al. U.S. Healthworks Medical Group**, decided August 21, 2023.

How this issue came about: Raines alleged that she received an offer of employment from Front Porch Communities and Services that was conditioned on her successful completion of a medical screening to be conducted by U.S. Healthworks Medical Group (USHW). USHW was alleged to have required Raines to complete a written health history questionnaire that included numerous health-related questions having no bearing on Raines' ability to perform job-related functions. When Raines refused to answer a question about the date of her last menstrual period, the exam was terminated and her employment offer was revoked by Front Porch. After settling with Front Porch, Raines sued USHW. The District Court dismissed Raines' claim for employment discrimination against USHW on the ground that the California Fair Employment & Housing Act (FEHA) does not impose liability on agents of a plaintiff's employer.

The Ninth Circuit Court of Appeals certified to the California Supreme Court the question of whether the FEHA does or does not impose liability on the agents of a plaintiff's employer. The Court decided that the FEHA "permits a business entity acting as an agent of an employer to be held directly liable as an employer for discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employee's and carries out FEHA-related activities on behalf of an employer".

What this means for your business: Small, medium sized and large employers alike often rely on outside companies to conduct post-employment health and other background checks for individuals who have been conditionally hired pending the results of those checks. Employers should always exercise extreme caution in choosing the companies that conduct health and background, as reliance on the results of the checks can result in liability for the employer if the outside company engages in conduct that is prohibited by law. For example, the FEHA prohibits pre-employment inquiries about health conditions that are not job-related. The Supreme Court's decision now allows plaintiffs to sue both their direct employer, along with the company that conducted the post-employment health or background checks for making illegal employment inquiries.

It is of some consolation that this decision may help employers by allowing plaintiffs to directly sue the third party who administered an unlawful health or background check. But forewarned is forearmed. If you rely on third parties to conduct these screenings, you should make sure that their processes and inquiries comply with state and federal employment laws.

Want to know more? Contact Wendy Tice-Wallner at 415-733-3976 or email her at wtice-wallner@sideman.com. This update is for informational purposes only and should not be interpreted as providing legal advice to the reader.