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June 18, 2002

The Honorable Judge John M. Watson
Orange County Superior Court, Department 15
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Re: Grounds for Imposition of Individual Liability for Unpaid Wages and Penalties Against Corporate Officer --- Barry Vincent Lyou v. Centrecom, Inc., and Donald S. Feuer, an individual; jointly and severally (State Case No. 18-15109)

This in response to the joint written request from the above-named counsel, dated March 14, 2002, asking the Labor Commissioner's hearing officer to clarify certain matters relating to the order, decision or award ("ODA") that was issued on December 11, 2001 in connection with the above-referenced unpaid wage claim. Seeking assistance in framing the issues on the appeal of this ODA, the letter asks: 1) whether the hearing officer intended to direct the award against Centrecom, Inc., and Donald Feuer, jointly and severally; 2) whether the hearing officer intended to include Donald Feuer as a responsible party; and 3) whether the hearing officer made any findings as to the basis of Donald Feuer's liability. Of course, the filing of what we assume to have been a timely de novo appeal under Labor Code §98.2 vacates the Labor Commissioner's order, decision and award and vests jurisdiction in the superior court to hear and decide the claim. *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831. In the de novo trial court proceedings, "review is accorded not to the decision of the commissioner, but to the underlying facts on which depend the merits of the dispute." *Sales Dimensions v. Superior Court* (1979) 90 Cal.App.3d 757,763. However, in order to provide the court and the parties with the best

assistance possible, we will endeavor to answer the questions that have been posed by setting out the legal principles which the hearing officer would have applied in resolving issues of individual liability for unpaid wages when the claimant was employed by a corporation.

The ODA that was signed by the hearing officer named as the defendant both Centrecom, Inc., a Nevada corporation, and Donald S. Feuer, an individual, "jointly and severally." On its face, the ODA makes both the corporation and the individual liable for $34,864.68 in unpaid wages, interest on those unpaid wages pursuant to Labor Code §98.1, plus penalties pursuant to Labor Code §203 in the amount of $9,230.70. The ODA sets out fairly detailed findings of fact as to the manner in which the unpaid wage claim arose -- the employer's cash flow problems led to the creation of an agreement that was apparently signed by the plaintiff and Donald Feuer, under which payment of wages owed to the plaintiff was deferred in order to allow for the use of those amounts to operate the business, in the hope that this would give the business time to obtain the funding needed to continue to function. When the hoped for funding failed to materialize, Donald Feuer informed the plaintiff that he would not be paid his deferred wages, and plaintiff's employment came to an end without the deferred wages having been paid. Unfortunately, the ODA does not specifically identify the facts, or the legal principles upon which the hearing officer relied in deciding that Donald Feuer is jointly and severally liable for the amounts owed, and it does not appear that the hearing officer made any findings in the ODA as to the basis of Donald Feuer's liability. We apologize for this oversight, and note that a copy of this letter will be sent to all Labor Commissioner hearing officers to remind them of the need to include such findings in the ODA as to any defendant against whom a claim has been made. (See, Government Code §11425.50(a), which provides that the decision of a hearing officer in an administrative adjudicatory hearing "shall be in writing and shall include a statement of the factual and legal basis for the decision.")

Nonetheless, in view of the above-cited judicial precedents on the scope of de novo review under Labor Code §98.2, the facts that the parties present to the court in these proceedings are the facts that will determine whether any unpaid wages and penalties are owed and if so, whether Donald Feuer is liable for those amounts. These facts must, of course be assessed against the backdrop of existing law on the subject of the liability of corporate officers or managers for unpaid wages. We start with the basic premise that all earned and unpaid wages must be paid promptly upon an employee's separation from employment -- either immediately upon a discharge (Labor Code §201) or within 72 hours of a voluntary quit without prior notice (Labor Code §202). The obligation to pay these wages is an obligation that rests with the employer. But just who is the "employer" for the purpose of the laws dealing with payment of wages? The only definition of the term employer, for this purpose, is found not in the Labor Code, but rather, in the various orders of the Industrial Welfare Commission ("IWC") which govern the payment of wages, hours of work, and

working conditions of employees in every industry and occupation in California.

The IWC is "the state agency empowered to formulate regulations (known as wage orders) governing employment in the State of California. (Labor Code § 1173, 1178.5, 1182.)" *Tidewater Marine Western v. Bradshaw (*1996) 14 Cal.4th 557, 561. As the Supreme Court has explained: "In article XIV, section 1 of the California Constitution, the people have given the Legislature broad power in this area: 'The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers.' . . . . In Labor Code sections 1173 and 1178 and following, the Legislature in turn has delegated its power in this regard to the Commission." *Henning v. IWC* (1988) 46 Cal.3d 1262, 1277 (italics omitted.)

Wage orders are quasi-legislative. "Quasi-legislative regulations are those 'adopted by an agency to which the Legislature has conferred the power to make law' and such rules 'have the dignity of statutes' [citation omitted]." *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 800.

Every one of the IWC's industry-wide and occupational wage orders expressly defines an "employer" as "any person as defined in Section 18 of the Labor Code[1], 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. See, e.g., IWC Order 4-2001 [8 CCR §11040], subdivision 2(H).) Under the second of these two independent prongs, all that is needed to come within the definition of "employer" is the exercise of control over wages, hours or working conditions. This second prong has been construed in only one published decision, *Bureerong v. Uvawas* (C.D. Cal. 1996) 922 F.Supp. 1450, in which the court held that this definition of "employer" allows for the imposition of liability for unpaid wages against officers of a corporation who exercise the requisite control over employees' wages, or hours, or working conditions. The court's rationale is instructive:

> The terms "employer," "employee," and "employ" are not specifically defined in the Wages, Hours, and Working Conditions sections of the California Labor Code. See §§Cal.Labor Code 1171-1205. In addition, no reported California decisions have directly addressed the issue. However, as with the federal FLSA, the California law governing wages is remedial in nature and must be "liberally construed." See *California Grape & Tree Fruit League v. Industrial Welfare Commission*, 268 Cal.App.2d 692, 698, 74 Cal.Rptr. 313 (1969). . . . The wage statutes "are not

[1] Labor Code §18 defines "person" to include "any person, association, organization, partnership, business trust, limited liability company, or corporation."

construed within narrow limits of the letter of the law, but rather are to be given liberal effect to promote the general object sought to be accomplished." [Ibid.]

Thus, in determining the applicability of the minimum wage and overtime provisions of the California Labor Code, the Court must look to the fundamental remedial purposes behind the laws. Given this duty, the Court finds that the California courts would likely adopt the federal FLSA's broad definition of "employment." The California courts would likely focus on the "economic realities" of the relationship, rather than on mere contractual or technical distinctions.

The Court reaches this conclusion for three main reasons. First, it is evident that the federal and state minimum wage and overtime provisions are analogous and complementary. Accordingly, federal authorities defining the concept of employment (see discussion above) are extremely persuasive to the Court in its determination of the California definition. Second, in its Order Regulating Wages, Hours, and Working Conditions in the Manufacturing Industry, the California Industrial Welfare Commission defines the terms "employ," "employee," and "employer" extremely broadly, and in terms almost identical to §29 U.S.C. 203(g) ("employ"), § 203(e) ("employee"), and § 203(d) ("employer"). See Industrial Welfare Commission Order 1-89, 8 California Regul.Code § 11010 ("IWC Wage Order"). The IWC Wage Order states that the verb "employ" "means to suffer, or permit to work." Compare §29 U.S.C. 203(g) (" 'employ' includes to suffer or permit to work"). The IWC Wage Order states that an "employee" is "any person employed by an employer." Compare §29 U.S.C. 203(e) ("the term 'employee' means any individual employed by an employer"). Finally, the IWC Wage Order states that an "employer" is "any person ... 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." Compare §29 U.S.C. 203(d) ("'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee"). Thus, the IWC has adopted the federal FLSA's definitions of these terms.

Third, the California Supreme Court has construed a related remedial statute to contain an extremely broad definition of "employer." In *S.G. Borello & Sons v. Department of Industrial Relations*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399 (1989), the California Supreme Court construed the Worker's Compensation Act's definition of "employment" to be "not inherently limited by common law principles." Id. at 352, 256 Cal.Rptr. 543, 769 P.2d

> 399. Mindful of the "history and fundamental purposes" of the statute, the Court found that in determining whether "employment" existed, a court must consider "[t]he nature of the work, and the overall arrangement between the parties," and not technical or contractual distinctions. Id. at 353, 256 Cal.Rptr. 543, 769 P.2d 399. The Court stated that "[e]ach service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case." Id. at 354, 256 Cal.Rptr. 543, 769 P.2d 399. Moreover, in reaching this conclusion, the California Supreme Court cited with approval the various United States Supreme Court cases defining "employment" in the context of the FLSA. Id. at 352, 256 Cal.Rptr. 543, 769 P.2d 399.

For these reasons, and in light of the general remedial purposes of the prevailing wage statutes, the federal district court held that under California wage and hour law, the term "employer" should be broadly construed, so as to permit corporate officers who exercise sufficient control over employees to be subject to liability for these employees' unpaid wages. *Bureerong v. Uvawas, supra,* 922 F.Supp. 1450, 1469-1470.

Federal cases construing these analogous provisions of the federal Fair Labor Standards Act ("FLSA") provide further persuasive guidance. See *Aguilar v. Association of Retarded Citizens* (1991) 234 Cal.App.3d 21 [federal interpretations of federal labor laws may provide persuasive authority for interpreting similar provisions of state law.] Numerous federal cases have imposed liability under the FLSA against corporate officers or managers for unpaid wages and liquidated damages owed to the corporation's employees. To be held liable under the FLSA, a person must be an "employer," which §3(d) of the Act defines broadly as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 USC §203(d). The Supreme Court has emphasized the "expansiveness" of the FLSA's definition of "employer." *Falk v. Brennan* (1973) 414 U.S. 190, 195, 94 S.Ct. 427. More recently, in *Herman v. RSR Security Services, Ltd.* (2nd Cir. 1999) 172 F.3d 132, 139, the court explained that "the overarching concern is whether the alleged employer possessed the power to control the workers in question . . . with an eye to the 'economic reality' presented by the facts of each case." The Court explained:

> Under the 'economic reality' test, the relevant factors include 'whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.' [cites omitted.]
>
> No one of the four factors standing alone is dispositive. [cite omitted.] Instead, the 'economic reality' test encompasses the totality of the circumstances, none of which is exclusive. Since

> economic reality is determined based upon *all* the circumstances, any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition. . . . (*Ibid.)*

Federal cases finding individual liability for wages owed to a corporation's employees on the basis of this broad definition of "employer" are not a new development. See, e.g., *Donovan v. Agnew* (1st Cir. 1983) 712 F.2d 1509, 1511 [employer includes person who has "operational control" of the day to day functions of the business]; *Donovan v. Sabine Irrigation Co.* (5th Cir. 1983) 695 F.2d 190, 194-195 [employer includes person who "effectively dominates its administration or otherwise acts, or has the power to act, on behalf of the corporation vis-a-vis its employees." Also, stock ownership is not necessary to a finding of employer status -- the focus of the test is control; not ownership.]

In another case in which a corporation's president was found liable for the corporation's FLSA obligations, the district court in *Lopez v. Silverman* (S.D. N.Y. 1998) 14 F.Supp.2d 405, 412, explained, "Numerous Courts of Appeal have concluded that an individual corporate officer or owner may be deemed an employer under the FLSA -- and therefore responsible for the corporation's FLSA obligations -- in situations where the individual has overall operational control of the corporation, possesses an ownership interest in it, controls significant functions of the business, or determines the employees' salaries and makes hiring decisions. *See, e.g., United States Dep't Labor v. Cole Enters., Inc.,* 62 F.3d 775, 778 (6th Cir 1995) [other cites omitted.]"

Again, it is control -- not stock ownership -- that is the critical factor. In *Reich v Circle C. Investments, Inc.* (5th Cir. 1993) 998 F.2d 324, 329, the court held that a "consultant" providing services to a corporation that owned and operated an exotic dance club, who held no ownership interest in the corporation, was not an officer of the corporation and did not exercise control over the most of the corporation's day-to-day operations, nonetheless came within the definition of an "employer" under the FLSA so as to be liable for unpaid wages owed to the corporation's dancers because he "exercised control over the work situation." Specifically, this individual hired some of the dancers, acted as their supervisor and gave them specific instructions as to how to perform their work, signed their paychecks, and imposed or threatened to discipline the dancers for violating certain work rules.

As recognized in *Bureerong*, these FLSA cases tell us exactly how the "control prong" of the state law definition of "employer" for wage and hour purposes ought to be construed. To be sure, not every employment law provides for the same broad definition of "employer" as that found under the FLSA and California's IWC orders. And other laws, which may have a much narrower definition of "employer," should not be used as guidance in construing the term under the IWC orders. For example, in *Reno v. Baird*

(1998) 18 Cal.4th 640, the California Supreme Court held that there is no individual liability for certain discriminatory employment practices under the Fair Employment and Housing Act ("FEHA"). Two of the factors upon which the Supreme Court premised its holding in *Reno* show precisely why that decision is inapposite to the issue of the definition of "employer," and the scope of individual liability under wage and hour law. First, the *Reno* court held that holding supervisors personally liable for discrimination was incongruent with the small employer exemption. (*Id.* at 662) Under the IWC orders and California's wage and hour laws, no such incongruity exists; there is no small employer exemption, instead, *all employers* -- individuals and corporations regardless of the number of employees employed -- must abide by the wage orders and laws governing payment of wages. Second, the *Reno* court stated that "in interpreting FEHA, California courts have adopted the methods and principles developed by federal courts in employment discrimination claims arising under [the federal acts]. The general rule applies to the issue in this case." (*Id.* at 659.) Here, the analogous federal act, the FLSA, makes corporate officers and managers who exercise the requisite control personally liable for non-payment of wages.

The Labor Commissioner hearing officer's decision finding Donald Feuer liable for the wages and penalties owed to the plaintiff was founded upon these general principles of California wage and hour law. We trust that whatever facts may be presented to the trial court in the pending de novo proceedings, these same legal principles will determine whether or not individual liability exists. We thank the parties, and the court, for affording us this opportunity to better explain the basis for our decision below.

Sincerely,

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