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Today's Presenters



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Direct Store Delivery

Independent Contracting Under Siege

John H. Douglas

Wage and Hour Issues in the Food Industry – The Big Picture

- Wage and Hour litigation has spread throughout the nation like wildfire in last decade
- Tends to go in waves, driven by issues and within industries
- Confluence of focus on Food Industry
 - Donning and doffing litigation has put food industry on radar screens of plaintiffs' class action litigation firms
 - Added to that is the recent wave of litigation over independent contractor status coming out of the package delivery business and heightened focus on independent contracting

Donning and Doffing

■ Key concepts

- “Portal to Portal” Act – arose in the coal industry
- “Preliminary” / “postliminary” activities – are they integral and indispensable
- If you have engaged in compensable work – the single workday
- 203(o) CBA exemption for donning and doffing “clothes” when there is an explicit agreement or practice of excluding such work from definition of compensable time

Litigation in Package Delivery Business

- FedEx is being targeted by combination of labor and plaintiffs' class action firms
 - Defensive measure by USPS and UPS (both unionized)
 - Independent contractors cannot be organized under NLRA (in contrast with employees)
 - Class action litigation can be effective union organizing tool (corporate campaign)

FedEx Litigation

- Is treatment of route drivers as independent contractors permissible as a matter of wage and hour law?
- Common law “right to control” test
 - Does the putative employer control the means by which the task is performed or only interested in the result?

FedEx Litigation (cont.)

- Numerous (50 plus) state and federal wage and hour class actions filed throughout the United States
- Federal litigation has been consolidated in Indiana
- State claims are being dealt with on a piecemeal basis
 - *Estrada* case in CA (November, 2007) – found employees (CA Supreme Court refuses to review case)
 - Washington (3/2008) jury trial result – independent contractors
 - Recent finding that Kansas employees are independent contractors

Labor's Allies Rallying in Support

- 2009 - Civil Actions being pursued by State Attorneys General (New York, Montana, New Jersey, Iowa, Kentucky, Missouri, Ohio, Rhode Island, Vermont)
- “EMPA” – “Employee Misclassification Prevention Act” (4/22/2010)
- H.R. 5107 – Introduced by Rep. Lynn Woolsey (D-CA)
- S. 3254 – Introduced by Sen. Sherrod Brown (D-OH)
 - Would amend FLSA to: (1) require additional recordkeeping for IK's; (2) provide notices to employees and non-employees of classification and notices about what to do if feel incorrectly classified;(3) enhance liquidated damage penalties for violations of minimum wage, etc. provisions; and (4) create substantial (\$5,000 per employee) civil penalties for repeat violations
- Currently in Committee
- Thought likely that some kind of bill of this nature will pass

Impetus for Heightened Scrutiny of Independent Contractors

- Additional Taxing Opportunities – Obama Administration is trying to close deficit
 - Social Security Taxes
 - Additional “employer” contributions

DOL / IRS Regulatory Agenda

- Obama Administration has hired numerous new federal investigators for DOL – focus will be on independent contractor classifications
- 4/29/2010 – Deputy Labor Secretary Harris announces “Plan, Prevent, Protect” strategy aimed at employers that use “cost benefit” approach to complying with labor laws
- IRS has launched random audit of 6000 businesses to look at, among other things, worker misclassification issues

DSD in the Food Industry – The Future?

- Food Industry a large and successful deep pocket
- DSD items account for up to 30 percent of total retail sales for small and large-format food retail outlets
- Many food manufacturers have long used employees, independent contractors and/or both to deliver products
- Employees are often unionized route sales representatives – Teamsters are interested
- “Independents” are not unionized – often subject to standard contracts

Challenges to Independent Contractor Use in DSD

- Snyder's of Hanover Case
 - Pretzel Manufacturer based in Hanover, PA (recently announced will be merging with Lance)
 - Lawsuit filed in October, 2008 claiming that delivery drivers were owed reimbursement for business expenses, employee benefits, overtime, meal and rest breaks
 - March 30, 2010 \$10 million settlement of class and collective FLSA action alleging misclassification of delivery drivers as independent operators rather than employees
 - Roughly 1,000 class members
- Other additional suits pending against national brands
- Expect trend will continue

Managing Risk

- Risk is greatest in hybrid systems / or where conversions have occurred
 - Must be able to articulate clearly why certain distribution routes are serviced by “employees” while others are serviced by “independent contractors”
- Stay on top of legislative developments / litigation
 - No IK agreement is bullet proof
 - Make sure your IK routes are bona fide
 - Monitor feasibility of alternatives to historical status quo
 - Dedicated DSD / Logistics companies
 - Employees (where volume has grown in previously small territories)

Managing Risk

- Remain cognizant of Union Organizing / Corporate Campaigns
- Employee Free Choice Act
 - Still on the radar screen
 - Will make organizing much easier
- Consider union avoidance training as prophylactic measure

Questions?

*The EU Nutrition and Health Claims
Regulation Starts to Bite — Practical Impact*

Owen Warnock, Partner

Katharine Vickery, Associate

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The Nutrition and Health Claims Regulation 1924/2006

- Why legislate?
 - No harmonised EU-wide rules
 - Health claims - EU ban on claims of disease risk reduction - despite the science
 - Many iffy claims in the market
- Adopted in a rush at the end of 2006
- Usual ambiguities and bad drafting
- Extra dimension – underestimation of the work involved in assessing the scientific validity of health claims

The Nutrition and Health Claims Regulation 2006 transitions into effect

- Nutrition claims
 - Must be in the Annex from 19 January 2010
 - More claims to be added
- Health and slimming claims
 - More complicated
 - Many opinions expected on health and slimming claims during 2010



Health Claims

- Two main streams
 - New science, proprietary, children's health and disease risk reduction (Arts 13.5 and 14)
 - Well established and understood claims (Art 13.1)
- Different transitional periods
- Different approval system
- ~~Different standard of proof?~~

If the claim is approved

- Nutrition Claims
 - Typical entry in the Annex is: “A claim that a food is [low in energy], and any claim likely to have the same meaning for the consumer, may only be made where...”
 - So some leeway in wording
- Health Claims
 - “*The claim*” is what is permitted by the EU Decision:
 - Approved wording
 - Approval may require further information too
 - Art 10.2 requirements:
 - A statement indicating the importance of a varied and balanced diet and a healthy lifestyle
 - Quantity and pattern of consumption to obtain the effect
 - If appropriate persons who should avoid the food
 - If appropriate warning of health risk if consumed to excess

Example of approved health claim

- Wording recommended by EFSA can be very technical, eg water soluble tomato concentrate:
 - Applicant: *“Helps to maintain a healthy blood flow and benefits circulation”*
 - EFSA: *“Helps maintain normal platelet aggregation”*
 - Commission: *“Helps maintain normal platelet aggregation, which contributes to healthy blood flow”*
- AND info that *beneficial effect is obtained with 3g in up to 250 ml of fruit juices or yoghurt drinks*



If the claim is approved

- For how long is it legal?
- Article 4 says claims can only be made for foods that meet the relevant 'nutrient profile'
- Nutrient profiles still to be adopted
- Attempt in European Parliament to remove Article 4
 - Much debate still to occur
 - Much lobbying still to be done
- If profiles are adopted
 - May be necessary to reformulate
 - Or, find a different way to promote the product

If the claim is *not* approved - nutrition claims

- Wait for amendments to the Annex eg
 - “reduced” to be reduced from -30% to -25%
 - addition of Omega-3 claims
 - “now reduced” claims – 10% or 15% less
- If a claim is not going to get listed in the Annex
 - Use a nutrition table instead
 - Rely on consumer knowledge
 - Turn to the media

If the claim is *not* approved - health claims

- Make a nutrition claim
 - and rely on consumer knowledge and the media
- Re-apply, making a better case
- Conduct fresh research and then re-apply
- Find a new proposition to market the product to the consumer
- Go to court to challenge to EFSA/Commission
- “Appeal” by asking for re-assessment under Art 13.4
- The media
- Place product in particular shop to create and association



Transitional arrangements

- Nutrition claims
 - Now complete
- Health claims
 - Claims as to role of nutrient in growth, development or functions of body which was being made on 19 Jan 2007
 - Permitted until generic list of claims adopted
 - Claims of reduction of risk of disease –
 - No transitional period – illegal until approved
 - Other claims - if claim being made as at 19 Jan 2007 *and* application made for approval before 19 Jan 2008
 - Permitted until 6 months after rejection of claim
- Generic list in batches
 - Source of competitive unfairness?
 - Repeated relabelling
 - Complaint just lodged with EU Ombudsman
- Query: market acceptability after rejection?

Transitional arrangements

Oddities

- Making of a general non-specific health claim for a nutrient not accompanied by an authorised health claim
 - Arguably permitted until generic list adopted
- Claims made by trade marks or brand names existing before 1 Jan 2005
 - Transition until 19 January 2022!
- Nutrient profiles
 - Non-compliant foods can still make claims until two years after adoption of the relevant nutrient profile

Implications for the Food Sector

- Reduction in the nutrition, slimming and health claims that can be made
- Impact on unethical competitors
- May reduce demand for certain foodstuffs and ingredients
- Products will be reformulated so that claims can be made or introduced
- Changes to the sales proposition for some products
- New ability to make a claim for disease reduction may stimulate the sale of certain foodstuffs and ingredients
- NHCR may stimulate research directed at developing new products, new ingredients or new strains of crops
 - NB apparent “quasi patent” for proprietary claims



Any Questions?



Proposition 65 Highlights for the Food Industry Last 18 Months in Review

S. Wayne Rosenbaum

Introduction

- What is proposition 65
- Why is proposition 65 important
- Recent Listings and Litigation Effecting the Food Industry
- Upcoming Regulation
- Recommendations

What Is Proposition 65?

- In November 1986, California voters approved Proposition 65.
 - An initiative to address growing concerns about exposures to toxic chemicals.
- That initiative became *The Safe Drinking Water and Toxic Enforcement Act of 1986*.

Prop 65 lawsuits have little or nothing to do with “Safe Drinking Water” or “Toxic Enforcement”

- A product that contains a relatively minute, but detectable level of a “listed” substance may trigger the duty to warn under Prop 65, making thousands of products subject to the warning requirements.
- The penalty for failure to warn is a fine of up to \$2,500 per day per violation, which can easily skyrocket into the millions.
 - Each sale or exposure is considered a separate violation.
 - Typically, plaintiffs extract smaller settlements amounts from businesses.

Litigation Statistics 2005 to 2009

- 60 Day Notices
 - 2005 – 500
 - 2009 – 1,800
- Average Settlement Amount
 - 2005 .. \$50,000
 - 2009 .. \$32,000
- Total wealth transfer
 - 2005 .. \$25,000,000
 - 2009 .. \$57,600,000

What Does Proposition 65 Require?

- Identify the presence of Prop 65 Chemicals
- Control the use of Prop 65 Chemicals
- Warn of the presence of Prop 65 Chemicals

Identification

- Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer, birth defects or other reproductive harm
- This list must be updated at least once a year.
- There are over 700 chemicals on the list and growing.

Why is Proposition 65 Important

- Size of the California Market
- Impact on out-of-state suppliers and processors

Recent Listings Effecting the Food Industry

- Acrylamides
 - Fast foods, French fries, breakfast cereals, etc.

- Cumene
 - Fried chicken, cooked rice

Safe Harbors

- DnHP
- DnHP: Di-n-Hexyl Phthalate
 - MADL 2,200 micrograms per day
 - Commonly Used in PVC containers
- DIDP: Diisodecyl Phthalate
 - MADL 2,200 micrograms per day
 - Commonly Used in PVC containers
- Fumonisin B1
 - NSRL 1.5 micrograms per day
 - Biological contaminant in corn
 - Recent guidance letter from OEHHA to Frito Lay
 - 0.8 PPM

Proposed Listings

- **Caffeine**
 - Naturally Occurring
 - Anthropogenic
 - Soda ,energy drinks, and over the Counter Drugs

- **Monochloropropane**
 - Fat and salt containing foods processed at high temperatures
 - Soy sauce, roasted cereals fermented sausages, and toasted breads

- **Aspartame**
 - Sweeteners, Soft Drinks

- **4-Methylimidazole**
 - Carmel coloring, soy sauce, Worcestershire sauce, wine, and ammoniated molasses

Recent Litigation Targets

- **Acrylamide**
 - Snack Foods
 - Breakfast Cereals
 - Freshly brewed coffee
 - French Fries

- **Lead, Cadmium, and Arsenic**
 - Candy from Mexico
 - Vitamin and Dietary Supplements
 - Fruit drinks
 - Canned Fruits
 - Protein Drinks

- **Mercury**
 - High fructose corn syrup

- **Heterocyclic amines**
 - Grilled Chicken

- **PCBs**
 - Fish Oil

Decisions Effecting the Food Industry

- Canned Tuna
 - Court of appeal affirms trial court's ruling that methylmercury found in tuna occurs naturally and is exempt from Prop 65 regulation.
- Meat
 - Court of Appeal rules that Federal Meat Inspection Act preempts Proposition 65 as applied to meat products
- MADLs
 - OEHHA proposal to prevent defendants from developing alternative MADLs defenses.

Future Regulation Food Warnings

- New regulatory scheme for food products
 - Requires manufacturers to list all compounds known to be contained in their products by name and CAS Number
 - Retailers will place generalized warnings on store shelves and provide customers access to ingredients book.
 - Processors and distributors will not be liable if stores fail to warn or provide book.
 - Retailers will not be liable for inaccurate information provided by processors.

Future Regulation “Green Chemistry”

- Modeled after EU Registration, Evaluation and Restriction of Chemicals Program (REACH)
- State will provide list of Chemicals of Concern and prioritize by toxicity and consumer exposure
- Manufacturers will then have to conduct an alternatives analysis and cease use where less toxic alternatives exist.

Future Regulation Bisphenol A (BPA)

- **Sources**
 - Food and beverage containers, can liners, water bottles
- **Suspected Endocrine Disrupter**
- **Regulatory Actions**
 - US House and Senate
 - Introduces legislation to ban BPA in all food and beverage containers 3/18/09
 - California Senate
 - Senate votes to ban BPA in baby bottles toddler cups and food containers 6/15/09
 - U.S. Food and Drug Administration
 - NRDC files lawsuit in an attempt to force FDA to ban the use of BPA in food packaging, food containers and other materials likely to come in contact with food 7/8/10
 - California Assembly
 - Votes to ban BPA from baby products, such as canned formula for children under 3 7/12/10
 - DART
 - Unanimously declines to list BPA 7/15/09
- **Final regulation still unclear**

Recommendations

- Stay informed
 - Be aware of proposed listings and plan ahead
 - Track “target compound” litigation

- Be proactive
 - Know your products
 - Develop contingency plans
 - Substitution
 - Safe Use Determinations
 - Warnings
 - Work with your suppliers
 - Participate in legislative and rule making process.

Questions?

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