

Management Alert



Court Of Appeal Holds Employer Does Not Have To Pay Employee's Legal Fees

California Labor Code section 2802 requires employers to indemnify employees for all "necessary expenditures" incurred in carrying out their duties. While this section does not specifically require employers to defend employees sued by third parties for conduct within the scope of employment, an employee's legal costs in defending such an action may be considered necessary under section 2802, thereby entitling the employee to indemnification.

In *Carter v. Entercom Sacramento, LLC*, the Court of Appeal concluded that an employee's legal costs are not necessary where the employer or its insurer is willing to provide legal counsel to the employee free of charge. Accordingly, employers have no obligation to indemnify employees under such circumstances. However, the Court of Appeal noted that certain situations exist where an employee would nevertheless be entitled to indemnification where the employee retains independent counsel.

The Facts

Defendant Entercom Sacramento, LLC employed Plaintiff Matt Carter as an assistant on a morning radio program. In January 2007, Carter assisted with a contest at the radio station called "Hold Your Wee for a Wii," which rewarded the contestant who could refrain from urinating the longest after consuming a large quantity of water. One contestant died of hyponatremia as a result of participating in the contest.

The deceased participant's family filed a lawsuit against multiple defendants, including Carter. Carter tendered the lawsuit to Entercom's insurer, Vigilant Insurance Company. Vigilant accepted Carter's tender and notified him that it was appointing an attorney to represent him free of charge. However, Carter rejected that attorney and decided to hire his own counsel. When Vigilant refused to pay for Carter's attorney, Carter sued Entercom for indemnification under section 2802 for the legal costs and fees he incurred.

Following a trial on the indemnity issue, the trial court determined that the legal expenses Carter incurred after rejecting the attorney appointed by Vigilant were not "necessary" within the meaning of section 2802. Accordingly, the trial court held that Carter was entitled to indemnification only for the legal expenses he incurred before the appointment.

The Appellate Court Decision

The Court of Appeal agreed with the trial court that it was not necessary for Carter to incur any legal expenses after Vigilant had retained an attorney to represent him.

Although section 2802 does not require employers to defend employees, the Court of Appeal explained that there are

circumstances in which necessary expenditures include the cost of independent counsel. Determining whether independent counsel is necessary is a question of fact that requires “an inquiry into what was reasonable under the circumstances.” For instance, independent counsel may be necessary where the attorney provided by the employer is incompetent or is caught in a conflict of interest between the employer and employee.

On appeal, Carter argued that Vigilant’s attorney could not adequately defend him because of the punitive damages claims and potential criminal charges he faced, and therefore his retention of independent counsel was necessary under the circumstances. The Court of Appeal rejected Carter’s arguments because he offered no evidence suggesting that the representation provided by Vigilant was inadequate.

With regard to the punitive damages claim, the Court of Appeal acknowledged that public policy prevented Vigilant from indemnifying Carter for a punitive damages award against him. However, the Court of Appeal stated that the “mere prospect” of punitive damages did not create a conflict of interest that made it necessary for Carter to retain independent counsel. To the contrary, because Vigilant was liable for any compensatory damages award against Carter, the Court of Appeal reasoned that it was in Vigilant’s interest to vigorously defend him.

Regarding the potential criminal charges, the Court of Appeal determined that independent counsel was not necessary because Carter presented no evidence that he was ever contacted by law enforcement in relation to the criminal investigation or that his attorney “ever did a single thing connected to the criminal investigation.”

What *Carter* Mean For Employers

The *Carter* decision makes clear that an employer is likely to be liable under Labor Code section 2802 for necessary attorney’s fees that an employee incurs prior to the time that the employer retains counsel for the employee. Therefore, to ensure that the costs associated with the defense of the employee are controlled, and that the employee receives an appropriate defense—thereby mitigating against a larger damages award for which the employer may be responsible—it is in an employer’s interest to retain counsel for an employee as soon as possible when the employee is facing a lawsuit relating to the employee’s performance of the employee’s duties.

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