



by Scott E. Boyer

Employees ONLY

California courts require a threshold showing of remuneration for consideration of employee discrimination claims under the FEHA

MANY PUBLIC ENTITIES, nonprofits, and other member associations rely upon volunteers for emergency medical and fire services, education, and economic development, and in turn, many volunteers donate their time and services to promote the laudable goals of these organizations. Despite the importance of volunteers, they do not enjoy the same status and rights as full-time employees. Several recent court decisions make it clear that volunteers face an uphill battle if they sue for employment discrimination.

California's laws protecting equal opportunity in the workplace are rooted in the Fair Employment and Housing Act (FEHA).¹ The act's antidiscrimination provisions were enacted to "protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement."² As such, the FEHA's provisions make it unlawful for an employer to discriminate against a protected employee "in compensation or in terms, conditions,

or privileges of employment."³

However, in order to benefit from the FEHA's antidiscrimination protections, one must be an employee.⁴ The FEHA does not actually define who is an employee.⁵ Rather, the statute only includes exclusions for persons employed by close relatives and persons employed by nonprofit sheltered workshops and rehabilitation facilities.⁶ The statutory exclusion does little to shed light on who may or may not fit the definition of an "employee." Therefore, California courts have had to look beyond the statute when assessing who is an employee entitled to the benefit of the FEHA's antidiscrimination protections.

Courts have cited the definition of "employee" in regulations established by the Department of Fair Employment and Housing, which state that an employee is any indi-

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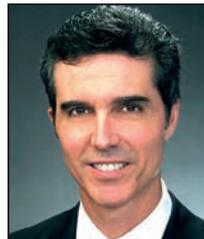
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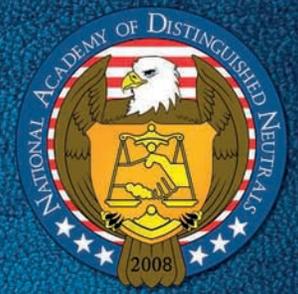
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vidual who is “under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.”⁷ California courts have thus determined that an employee under the FEHA can be an individual who has been appointed, who has been hired under express or implied contract, or who serves as an apprentice.⁸

As a result, plaintiff volunteers have attempted to designate themselves as appointees. For example, in *Mendoza v. Town of Ross*,⁹ the plaintiff sued for disability discrimination in violation of the FEHA after the town of Ross terminated his position as a volunteer community service officer. Citing his identification card, which stated that he was certified as a “duly appointed Community Service Officer,” the plaintiff argued that he met the FEHA’s definition of an employee because he was appointed to his volunteer position.¹⁰ However, the court of appeal rejected that argument, finding that no matter what was stated on the identification card, a local ordinance vested the town council with exclusive authority to make appointments to employment. Because the town’s appointment process had not been initiated for the plaintiff, he was deemed not to have been appointed for the purposes of meeting the definition of “employee” under the FEHA.¹¹

Ordinances in the public sector and policy manuals or employee handbooks in the private sector typically define the appointment process for a volunteer. Even if these sources use some derivation of the word “appoint” to describe how an individual is awarded a volunteer position, the analysis does not end there. Rather, these same sources must be reviewed to see if there is a description of the process by which one is appointed to an employee position. For example, civil service rules typically describe how one is appointed to be a classified employee in the civil service system. The rules and provisions in these sources are the starting point for those attempting to show that they were appointed to a position.

Public Employees

Although volunteers at public employers have also attempted to argue employment by contract for the purposes of meeting the definitional standard of an employee under the FEHA, the argument has been largely unsuccessful. Unlike some private employment relationships, which may be governed by contract, the terms of public employment are typically governed by statute.¹² As such, contracts cannot be used to circumvent statutory provisions controlling the terms and conditions of public employment.¹³ Therefore,

individuals attempting to assert they are public employees for the purposes of an employment lawsuit must show employment in accordance with the applicable statute or local ordinance.¹⁴

Because the antidiscrimination objectives and relevant wording of the federal antidiscrimination statutes are similar to the FEHA, California courts have also looked to federal authority on the subject.¹⁵ Title VII of the Civil Rights Act of 1964,¹⁶ which most closely approximates FEHA’s antidiscrimination objectives, “succinctly defines ‘employee’ as an ‘individual employed by an employer.’”¹⁷ The first element of the Title VII test of employee status requires a plaintiff to prove that he or she was hired by the putative employer.¹⁸ This first test requires that remuneration was provided in exchange for work.¹⁹

Federal courts have applied this test to claims of employee status. The Second Circuit, for example, determined that an unpaid intern could not sue for sexual harassment under Title VII because she did not receive any financial benefit, and compensation is “essential” to the existence of an employer-employee relationship.²⁰ In another case, the Eighth Circuit determined that a rodeo barrel racer could not bring a Title VII claim because the defendant association did not provide any compensation.²¹ The Fifth Circuit recently determined that a volunteer firefighter suing for sexual harassment who received \$78 for responding to 39 calls, a life insurance policy, a uniform, a badge, and training, was not an employee under Title VII because she also had not make a requisite showing of remuneration.²²

California courts have followed suit in requiring a threshold showing of remuneration.²³ In *Mendoza*, for example, the court considered Labor Code Section 3352, which excludes volunteers at public agencies from receiving workers’ compensation benefits.²⁴ Based upon this statutory exclusion, California courts have determined that it would make little sense to find that a volunteer who is receiving no remuneration is an employee under the FEHA but not an employee for workers’ compensation purposes.²⁵

Even if an entity makes a policy decision to extend workers’ compensation benefits to volunteers, the receipt of those benefits by a volunteer may still not prove remuneration. In *Estrada v. City of Los Angeles*, the court of appeal determined that receipt of workers’ compensation benefits alone is insufficient to grant employee status.²⁶ In that case, a former volunteer police reserve officer brought a lawsuit against a city alleging disability discrimination under the FEHA. The city’s administrative code included volunteer reserve officers within the definition of “employee” for the purposes of workers’

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1. California's laws protecting equal opportunity in the workplace are rooted in the Fair Employment and Housing Act (FEHA).
 True.
 False.
2. The FEHA's provisions make it unlawful for an employer to discriminate against a protected employee in which of the following:
 A. Workplace assignments.
 B. Management and employee protections.
 C. Compensation or in terms, conditions, or privileges of employment.
 D. None of the above.
3. An individual does not have to be an employee to benefit from the workplace antidiscrimination protections of the FEHA.
 True.
 False.
4. The FEHA clearly defines who meets the criteria of an employee under the statute.
 True.
 False.
5. The FEHA includes exclusions for persons employed by nonprofit sheltered workshops and rehabilitation facilities.
 True.
 False.
6. The Department of Fair Employment and Housing definition of an employee includes an individual who has been appointed by the employer.
 True.
 False.
7. The following category has been determined by California courts to meet the definition of an employee under the FEHA:
 A. An individual hired under implied contract.
 B. An apprentice.
 C. An individual hired under express contract.
 D. All of the above.
8. In *Mendoza v. Town of Ross*, the plaintiff asserted that he was an employee because he was hired under an express contract.
 True.
 False.
9. In *Mendoza*, the court of appeal determined that the plaintiff was not an employee because:
 A. He had not signed an employment contract.
 B. He had not completed his probationary period.
 C. The town's employment appointment process had not been initiated for the plaintiff.
 D. He did not receive a salary.
10. The terms of public employment are usually governed by contract.
 True.
 False.
11. Written contracts can be used to circumvent provisions

- in statutes setting forth the terms and conditions of public employment.
 True.
 False.
12. Which federal statute most closely approximates the FEHA's antidiscrimination objectives:
 A. Occupational Safety and Health Act of 1970.
 B. Title VII of the Civil Rights Act of 1964.
 C. Worker Adjustment and Retraining Notification Act.
 D. National Labor Relations Act.
13. An individual must show remuneration has been provided in exchange for work in order to qualify as an employee under Title VII.
 True.
 False.
14. This federal circuit recently determined that a volunteer firefighter suing for sexual harassment who received \$78 for responding to 39 calls, a life insurance policy, a uniform, a badge, and training, was not an employee under Title VII:
 A. The Second Circuit.
 B. The Eighth Circuit.
 C. The Ninth Circuit.
 D. The Fifth Circuit.
15. California courts do not require a showing of remuneration in order to qualify as an employee under FEHA.
 True.
 False.
16. Labor Code Section 3352 excludes volunteers at public agencies from receiving workers' compensation benefits.
 True.
 False.
17. An individual's receipt of workers' compensation benefits alone is sufficient to qualify as an employee under the FEHA.
 True.
 False.
18. The California Legislature acknowledged the importance of remuneration in the employment relationship when enacting amendments to FEHA relating to which category of protection:
 A. Gender.
 B. Race.
 C. Age.
 D. Disability.
19. For employee qualification under the FEHA, remuneration must come in the form of direct compensation.
 True.
 False.
20. A volunteer who only receives benefits from an employer consisting of clerical support and networking opportunities is still considered an employee.
 True.
 False.

compensation coverage only.²⁷ Although the city had made a policy decision to extend workers' compensation benefits to reserve officers, the court determined the consequence of this policy was not to convert uncompensated volunteers into employees for all purposes.²⁸ The court noted that workers' compensation benefits simply serve to make a volunteer whole in case of an injury while performing volunteer duties, and the benefits do not constitute remuneration.²⁹

Remuneration

The California Legislature has also acknowledged the importance of remuneration in the

conferred a financial benefit upon reaching a certain age if the volunteer accumulated a specified amount of service credit. Under this scenario, the court determined there was no "guarantee of consideration for the work performed," because a volunteer might perform work but not accumulate the requisite amount of service credit and therefore receive nothing.³⁴ Consequently, the volunteers in this situation were deemed not to be employees because they received no compensation for their work.

Similarly, when the only benefits being offered are incidental to the employer, such as clerical support and networking opportu-

nificant even when they bear little relation to the underlying damages award.³⁷

Public agencies wishing to limit their exposure can take steps to ensure volunteers and other unpaid interns are not mistaken for employees. First, public agencies should ensure that local ordinances clearly define who is an employee. Second, they should state who is subject to the relevant ordinances, civil service, or other personnel rules governing employment with the public entity. Third, the rules should clearly state the employment provisions do not apply to volunteers. Fourth, the rules should clearly delineate the process by which appointments to

There may be circumstances in the nonprofit and nonpublic agency arena in which someone can show that he or she is an employee by virtue of having a contract or apprenticeship. Even if an individual can make this showing, he or she must still be able to show remuneration, and its absence will derail any efforts to prove the individual is an employee for the purposes of making a claim of employment discrimination under the FEHA.

employment relationship. Specifically, when the legislature enacted amendments to the FEHA that extended its coverage to disabled employees, the legislature noted that by providing reasonable accommodations for disabled employees, employers were making the economy stronger by keeping people working who would otherwise be receiving public assistance.³⁰ The legislature made it clear that disabled individuals needed to be compensated employees in order to benefit from the FEHA's protection.³¹ There is no reason to believe the legislature's statement regarding the FEHA's protection of compensated employees is limited to the disabled.

Remuneration typically takes the form of direct payment of salary or wages. However, the court has also acknowledged that remuneration does not have to be direct compensation. In fact, even substantial indirect compensation that is not merely incidental to the activity performed, such as health insurance or vacation or sick pay can serve as evidence of remuneration.³² In one case, volunteer firefighters were found to have employee status because they received significant benefits, including disability pensions, survivors' benefits, group life insurance, and scholarships for dependent children of deceased firefighters, all of which benefit the employee independently of the employer.³³

In another case, however, the only benefit provided to volunteer firefighters was participation in a service awards program, which

nities, a volunteer's receipt of those benefits does not transform the volunteer's status to that of an employee.³⁵ Clearly, an individual in an unpaid position who does not receive any retirement, healthcare, insurance, tuition, reimbursement, or similar benefits cannot be said to have received remuneration, and thus does not meet the definition of an employee.³⁶

There may be circumstances in the nonprofit and nonpublic agency arena in which someone can show that he or she is an employee by virtue of having a contract or apprenticeship. Even if an individual can make this showing, he or she must still be able to show remuneration, and its absence will derail any efforts to prove the individual is an employee for the purposes of making a claim of employment discrimination under the FEHA.

Law Enforcement

There are some organizations, most notably in law enforcement, that have made the decision to include remuneration, sometimes significant remuneration, to its volunteers. Although the decision to include remuneration may be rooted in sound policy, these organizations must also understand that they are leaving themselves exposed to lawsuits based upon workplace discrimination. Discrimination lawsuits are expensive to defend, and if a plaintiff prevails they can include an award of attorney's fees to the plaintiff's counsel. Attorney's fees awards can be sig-

employment are made. Finally, and most importantly, any benefits provided to volunteers should be set forth clearly in the rules, and these benefits should be limited to incidental benefits or benefits put in place to make a volunteer whole, such as workers' compensation benefits to protect at-risk workers who may sustain injury while performing work duties. Nonprofit organizations and other private agencies utilizing volunteers should make sure similar standards are set forth in their policies.

Of course, employers should be careful not to misclassify legitimate employees as volunteers. Not only does misclassification leave an employer open to claims under the FEHA but also could lead to exposure for other employment-related claims, such as claims under wage and hour laws.

Undoubtedly, volunteers and other unpaid members must overcome several obstacles in trying to prove they are employees for the purposes of asserting FEHA claims. However, there have also been instances in which volunteers have been able to show they received benefits substantial enough to confer employee status. Volunteers who believe they have been the victim of discrimination or other conduct protected under the FEHA should secure the rules and policies of the purportedly offending entity so as to be able to determine the appointment process and the full extent of benefits provided to the volunteer. Even if employee status can be proven,

this is only a first step in asserting a claim under the FEHA, and the volunteer employee must still prove he or she was subjected to illegal animus based upon a protected category. ■

¹ GOV'T CODE §§12900 *et seq.*

² GOV'T CODE §12920 (The listed categories include "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation.")

³ GOV'T CODE §12940(a).

⁴ Shephard v. Loyola Marymount Univ., 102 Cal. App. 4th 837, 842 (2002) ("[T]o recover under the discrimination in employment provisions of the FEHA, the aggrieved plaintiff must be an employee.")

⁵ *Id.* at 847.

⁶ *Id.* at 847; GOV'T CODE §12926(c).

⁷ CAL. CODE REGS, tit. 2, §7286.5(b).

⁸ Mendoza v. Town of Ross, 128 Cal. App. 4th 625, 632 (2005).

⁹ *Id.*

¹⁰ *Id.* at 629.

¹¹ *Id.* at 633.

¹² Creighton v. Regents of Univ. of Cal., 58 Cal. App. 4th 237, 242 (1997).

¹³ Miller v. State of Cal., 18 Cal. 3d 808, 814 (1977).

¹⁴ Mendoza, 128 Cal. App. 4th at 634.

¹⁵ *Id.* at 635.

¹⁶ Title VII of the Civil Rights Act of 1964, §701, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§2000e *et seq.*).

¹⁷ Estrada v. City of Los Angeles, 218 Cal. App. 4th 143, 150 (2013) (quoting 42 U.S.C. §2000e(f)).

¹⁸ Mendoza, 128 Cal. App. 4th at 635-36; United States v. City of New York, 359 F. 3d 83, 91-92 (2d Cir. 2004).

¹⁹ Mendoza, 128 Cal. App. 4th at 635-36.

²⁰ O'Connor v. Davis, 126 F. 3d 112, 115-16 (2d Cir. 1997); see also, e.g., Craig J. Ortner, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613 (1998), available at <http://ir.lawnet.fordham.edu/flr/vol66/iss6/13>.

²¹ Graves v. Women's Professional Rodeo Ass'n, Inc., 907 F. 2d 71, 72-73 (8th Cir. 1990).

²² Juino v. Livingston Parish Fire Dist. No. 5, 717 F. 3d 431, 439 (5th Cir. 2013).

²³ Mendoza, 128 Cal. App. 4th at 637.

²⁴ LAB. CODE §3352 ("Employee" excludes any person performing voluntary services for a public agency or a private, nonprofit organization who receives no remuneration other than meals, transportation, lodging, or reimbursement for incidental expenses.)

²⁵ Mendoza, 128 Cal. App. 4th at 635.

²⁶ Estrada v. City of Los Angeles, 218 Cal. App. 4th 143 (2013).

²⁷ *Id.* at 155.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Mendoza v. Town of Ross, 128 Cal. App. 4th 625, 637 (2005).

³¹ *Id.*

³² *Id.* at 636.

³³ Pietras v. Board of Fire Comm'rs of Farmingville, 180 F. 3d 468 (2d Cir. 1999).

³⁴ Keller v. Niskayuna Consol. Fire Dist., 51 F. Supp. 2d 223 (N.D. N.Y. 1999).

³⁵ O'Connor v. Davis, 126 F. 3d 112, 115 (2d Cir. 1997).

³⁶ Mendoza, 128 Cal. App. 4th at 636.

³⁷ Muniz v. UPS, Inc., 2013 WL 6284357 (9th Cir. 2013).

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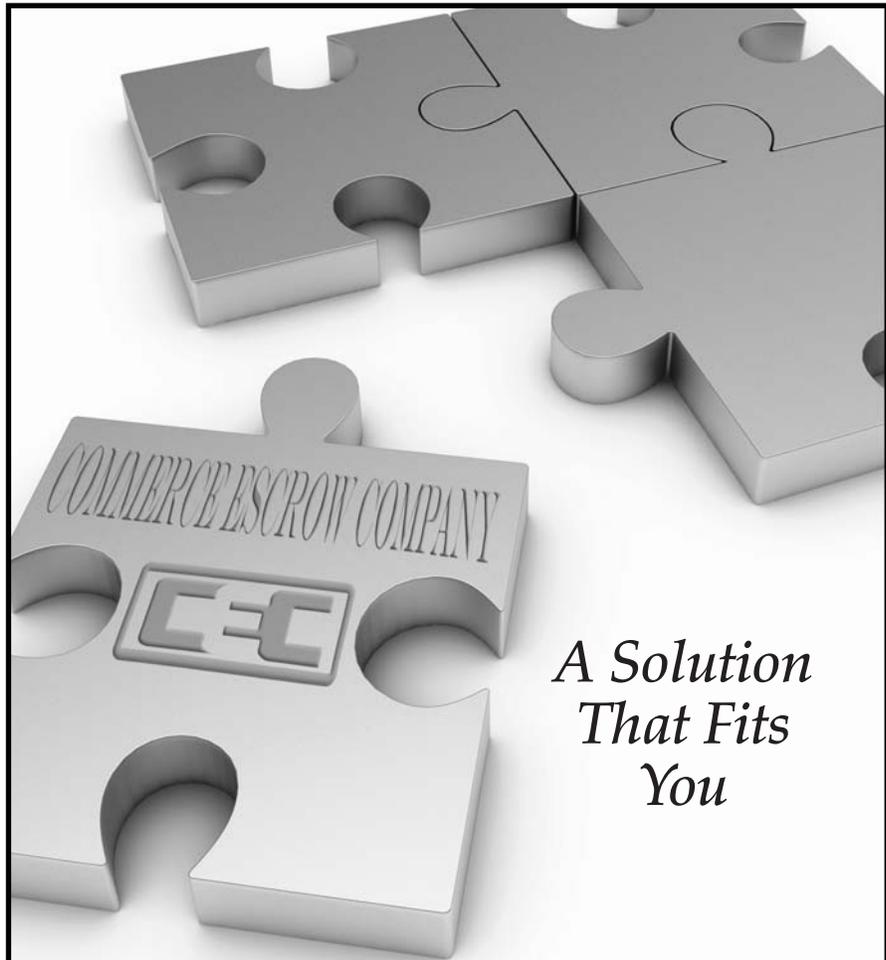
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