

ATTACHMENT C

RESPONDENT'S ARGUMENT



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NOV 18 2019

November 11, 2019

Via Certified Mail

CALPERS Executive Office

Attn: Cheree Swedensky – Assistant to the Board

California Public Employees Retirement System

P.O. Box 942701

Sacramento, CA 94229

Re: Bo Y. Kim's Barr from CALPERS Membership – Application # [REDACTED]

Dear Cheree Swedensky:

I had previously sent this letter to Ms. Marcy Frost. I am forwarding a modified copy to you, which now includes:

- The Signed Declaration of Bo Y. Kim – Attached as Exhibit "A". Mrs. Bo Y. Kim's declaration evidences that her work hours and timesheets were treated as a common law employee's, and not as an independent contractor.
- 2001 Bruce T. Mizuno's email directing how to approve TAR requests, evidencing the same. – Attached as Exhibit "B"
- Witness statement, witnesses are available to be contracted for verification – Attached as Exhibit "C"

Dear Ms. Marcy Frost:

Please be advised that this firm is counsel to Mrs. Bo Y. Kim ("My Client") and that this letter is a formal demand in light of CALPERS ongoing refusal to acknowledge My Client as a common law employee.

APPLICABLE LAW

Employment Classification

Independent contractors are not considered "employees" and therefore are not covered by the FLSA. Mere labeling of someone as an independent contractor, however, is not sufficient to exempt them from the FLSA. *Real v Driscoll Strawberry Assocs., Inc.* (9th Cir 1979) 603 F2d 748, 755. In determining whether an individual qualifies as an independent contractor or as an employee for purposes of the FLSA, the courts and enforcement authorities apply an "economic



realities" test. *Doty v Elias dba Eddy's Steakhouse* (10th Cir 1984) 733 F2d 720, 722. In applying this test, courts generally focus on six factors: (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) whether the work performed is integral to the employer's business. *Doty*, 733 F2d at 723; *Real*, 603 F2d at 754; Department of Labor, Wage & Hour Division Field Operations Handbook, chap 10b05 (Mar. 31, 2016) (as revised Mar. 08, 2018), available at www.dol.gov/whd/FOH/FOH_Ch10.pdf.

Recently, the California Supreme Court established a new three-factor "ABC" test for determining whether an individual qualifies as an independent contractor or as an employee for wage order claims. Under the ABC test, a worker is presumed to be an employee unless the hiring entity establishes each of the following: "(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed." *Dynamex Operations W. v Superior Court (Lee)* (2018) 5 C5th 903, 957.

Misclassification of an employee as an independent contractor may have serious consequences, including liability for failure to withhold federal and state income taxes and pay into pension funds, and workers' compensation coverage issues. See, e.g., *Metropolitan Water Dist. v Superior Court* (2004) 32 C4th 491; *Holmgren v County of Los Angeles* (2008) 159 CA4th 593, 604. See also *Eastern Inv. Corp. v U.S.* (10th Cir 1995) 49 F3d 651 (applying Rev Rul 87-41). The Internal Revenue Service and other government agencies continue to audit municipal entities to determine if they have misclassified their employees.

Persons Entitled to benefits

Determining the persons entitled to participate in a pension plan depends on the statute, charter, or contract granting the pension. *Metropolitan Water Dist. v Superior Court* (2004) 32 C4th 491; *Holmgren v County of Los Angeles* (2008) 159 CA4th 593. The rule that pension laws are liberally construed to carry out their beneficent policy may be applied in construing language that specifies which employees must be included within the pension statutes. *Adams v Modesto* (1960) 53 C2d 833. When the relevant statute, charter, or contract states that "employees" are entitled to benefits but does not define the term, courts will apply the doctrine of common law employment to determine whether an employer-employee relationship exists. *Holmgren*, 159 CA4th at 604. See also *Metropolitan Water Dist. of So. Cal.*, 32 C4th at 509 (applying doctrine of common law employment to conclude that a so-called "independent contractor" was actually an "employee" for purposes of Public Employees' Retirement System (Govt C §20000 *et seq.*)).

ANALYSIS

The applicable law governing our present issue is contrary to CALPERS reasoning that My Client is not entitled to purchase service credit for the period of May 1, 2001 through October



19, 2004. The employment at issue involves My Client working for Electronic Data Systems ("EDS"). Throughout My Client's tenure the following events occurred by and between EDS and the State of California

In January 2000, EDS Contracted by the State of California to create CalWORKs Information Network (CalWIN), the 'U.S.'s largest information solutions system for social services agencies'. The goal is to support and streamline services for 1.2 million social services recipients in California (40% of the caseload) It was an 11-year contract between 40 California counties and EDS worth \$321 million. Includes: Medicaid, Food Stamp, General Assistance, Welfare-to-Work.

In June 2001 an 18-month contract extension of the "California Healthy Families Program" a program to provide medical insurance to children whose families can't get Medicaid and can't afford private insurance. Worth \$64 million.

In October 2002 following an 18-month competitive process, EDS regained the contract from the state of California to administer the claims processing for Medi-Cal, California's Medicaid program.

During her tenure at EDS, while working as a pharmaceutical consultant, My Client was involved in the development and implementation of the various aforementioned contracting activities which occurred for the benefit of the State of California. She contributed to implementing these various important projects, projects that contributed to making California one of the most prosperous and social service friendly States in the Nation. The fruits of My Client's labor are still visible in all aspects of social programs in the State.

Presently she is demanding that the State of California make good and repay her generous service to the State, by granting her rights under the status of a "common law" employee to purchase service credits and assist her in her age of retirement. The benefit to my client is significant, whereas the detriment to permitting her to move forward to the State of California is minor if non-existent.

The on-going unwillingness to properly apply the *Metropolitan Water Dist. v. Superior Court*, 32 Cal.4th 491 (Cal. 2004) analysis fully bypasses the result that the holding was implemented to obtain. CALPERS is refusing to acknowledge that the core of My Client's employment was working on projects and services for the benefit of the State of California. And notwithstanding the notion that she was not paid from "funds directly controlled by the State" does not negate the fact that she was working on contracts, and solely for the benefit of the State of California.

Ultimately CALPERS must avail My Client the opportunity to move forward with her purchase, because refusal to do so emboldens My Client to move forward in Superior Court and make her argument in a Court of law. Presently she knows at least 30 pharmaceutical consultants who are willing to join her in this valiant effort, and potentially as a class-action lawsuit.



We are hoping that this letter is sufficient to grant My Client what she has been patiently seeking these many years, I am looking forward to your response by 11/26/2019, and I truly hope your response is in agreement to My Client's request.

Very truly Yours,

Law Offices of H. Jack Kakoian



H. Jack Kakoian



EXHIBIT "A"

Bo Y Kim

Nov 11, 2019

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701
FAX: 916-795-3972

RE: Declaration of Bo Kim

In the Matter of the Appeal to Purchase Service Credit Prior to Membership of Bo Y. Kim

1. I, Bo Kim had worked for the Department of Health Care Services for 4 years (2001 to 2004). Witness statements provided
2. My work hours are changed toward the end of every month from 8AM to 7AM by Department of Health Care Services Supervisor, Mrs. Bradford to meet the demands of departmental turn around time of 24 hours.
3. Mrs. Eola Bradford approved timesheets, had the full right to control the manner and means of how business of TAR unit was carried on while the labor supplier, EDS provided payroll services.
4. CalPERS violated with mandated Supreme court Ruling that enrolling all common law employees in to CalPERS (Cargill v Metropolitan Water District, 32 Cal. 4th 491 (2004): Class action for employees who were denied pension and other benefits; obtained rulings that MWD must enroll all common law employees in CalPERS and must pay their arears employee contribution as penalty.
5. Department of Health Care Services, Bruce T Mizuno, Chief Email : Directing the manner in which to approve Medical Tar Request for his staff to prove Bo Kim was common law employee.

Bo Y Kim





EXHIBIT "B"

Kim, Bo (DHS-TAR)

From: Mizuno, Bruce (DHS-TAR)
Sent: Thursday, July 05, 2001 2:43 PM
To: Ardestani, Akhtar; Berryman, James; Bradford, Eola; Chang, Phyllis; Comas, Amarillis; Diep, Katherine; Espinosa, Jeanette; Faraj, Juma (Jim); Goldsobel, Sherwin; Hsieh, Eileen; Huang, Chris; Jacobs, Deborah; Jung, Joannie; Khashan, Ibrahim; Le, Nhan Van; Leung, Simon; Melzer, Nancy; Sigal, Stanley; Wong, Beverly; Wright-Wheeler, Carolyn; Cassis, Samy; Choi, Edward; Fuller, John; Fung, Keith; Gil, Felisa; **Kim, Bo**; Lee, Timothy; Nazarian, Ani; Nguyen, Nhung; Olf, Neal; Or, Jenny Phen; Quon, Jimmy; Stinson, Michael; Tang, Scholastica; Tietz, Terry; TSao, Victoria
Cc: Gorospe, Kevin (DHS); Ahrens, Tom (DHS-MCPD); Cabacungan, Katherine (DHS-MCPD)
Subject: TARs for "feeding bags"

It has come to my attention that some of you are denying TARs for enteral feeding bags (unlisted medical supply) when you do not see any evidence of an enteral pump being used, requested of or paid for by the Medi-Cal program. One explanation I have received is that some providers of enteral pumps provide feeding bags, without a separate charge, as part of the service associated with the pump rental. If that is the case, we (the Medi-Cal program) should be grateful for this, but that should not be a factor in determining medical necessity for feeding bags that are requested as unlisted medical supplies on drug TARs. Feeding bags are separately payable as items of unlisted medical supplies.

I feel that it is not necessary for a provider to show evidence of enteral pump use to obtain payment authorization for feeding bags. I feel that this item would not be requested if it were not needed. I may be wrong about that, however, I strongly feel that such TARs should not be denied unless there is absolutely no medical necessity for the item. For example, if it is clearly evident to you that the patient is drinking the enteral product, I see no medical necessity for feeding bags. Otherwise, I believe that we can assume that these bags are medically necessary unless there is compelling evidence to the contrary.

By "cc" of this note to Policy Division, I am respectfully requesting to be corrected if I am in error on this matter.

Thank you.

Bruce T. Mizuno, Pharm.D.
Pharmaceutical Program Consultant
Chief
Southern Pharmacy Section, MCOB



EXHIBIT "C"

Witness Statements:

Simon Leung, Pharmaceutical Consultant I

Sandy Tang, Pharmaceutical Consultant I

We, Simon Leung and Sandy Tang had witnessed followings during May 2001 to Oct 2004.

- 1. Bo Kim working for the Dept of Healthcare Services**
- 2. Bo Kim's working hours are changed toward the end of every months from 8AM to 7AM by Mrs. Bradford, DHCS Supervisor to meet the demands of departmental turn around time of processing medical TAR requests.**
- 3. Mrs. Eola Bradford approved timesheets; had the full right to control the manner and means of how business of TAR unit was carried on while the labor supplier, EDS provided payroll services.**

Date and sign:

S Tang 4/28/19