# California Expands Who is Considered an "Employer" Under the Fair Employment and Housing Act

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The California Supreme Court recently held that the definition of "employer" under the Fair Employment and Housing Act (FEHA), includes "business entity agents" with five or more employees that are engaged in traditional employer activities. Where individuals previously were limited to pursuing FEHA liability against only their direct employers, the decision now permits individuals to pursue FEHA liability directly against the third-party vendors that employers have engaged to perform FEHA-regulated activities, such as pre-employment screenings or leave administration.

## The *Raines* Decision

In *Raines v. U.S. Healthworks Medical Group*, Kristina Raines and Darrick Figg applied for positions with two separate employers. Both were offered positions contingent on their successful completion of a medical screening. Both employers engaged a third-party, U.S. Healthworks, to administer the pre-employment medical screenings. Raines refused to answer some of the questions included on the medical screening questionnaire and the employer revoked the employment offer. Figg completed the screening and was hired. Raines settled her FEHA claims against her employer. But Raines and Figg brought a class action complaint under FEHA against U.S. Healthworks. The district court dismissed the FEHA claims against U.S. Healthworks, holding that FEHA does not impose liability on the agents of plaintiff's employer. On appeal, the Ninth Circuit asked the California Supreme Court to answer the following question: Does FEHA, which defines "employer" to include "any person acting as an agent of an employer," permit a business entity acting as an agent of an employer to be held directly liable for employment discrimination.

The California Supreme Court held that FEHA's statutory language, legislative history, and public policy all supported the conclusion that a business entity acting as an agent of an employer can be held directly liable for employment discrimination in violation of FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of

an employer. The court held that this interpretation imposes FEHA liability not only on the employer, but also extends liability to the entity that is most directly responsible for the FEHA violations. The decision means that third-party vendors with five or more employees providing traditional employment services, such as leave administration or pre-employment screenings, can be directly liable as an "employer" under FEHA. The court narrowed the scope of its decision and expressly stated that its ruling did not address: (1) the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation; (2) whether the decision extends to business-entity agents that have fewer than five employees; and (3) the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision. The court also did not state whether the decision applied retroactively.

## Takeaways

Employers cannot delegate their obligations under FEHA. Thus, the *Raines* decision does not absolve traditional employers from FEHA liability based on the acts of their third-party vendors. It simply allows FEHA plaintiffs to expand the number of entities against whom they can pursue direct liability under FEHA. The practical effect is that there is likely to be an uptick of FEHA lawsuits naming third-party vendors as FEHA defendants. Given the issues not addressed by the court in *Raines*, there could also be an increase in litigation between employers and their vendors to determine who should bear responsibility for FEHA violations based on the vendor services. The decision underscores the importance of carefully vetting any company with whom employers contract to perform FEHA-regulated services. Employers and vendors both should review their vendor contracts to help define issues such as control over the services, as well as indemnification for FEHA liability.

Contact your Vorys attorney if you have any questions about the *Raines* decision or the employer obligations under the FEHA.