"Requesting Contact Information for Putative Class Members"
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In the pre-certification discovery phase of nearly every California wage and hour employment class action, plaintiff's counsel invariably requests that the employer disclose the putative class members' personal contact information. This typically includes names as well as home addresses and phone numbers. Counsel for plaintiff want the contact information to discover evidence to support plaintiff's claims. But under California law, putative class members have a constitutional right of privacy in their personal contact information and employers have an obligation to protect that information. So what does California law require? Unfortunately, the answer is not straightforward, which leads to frequent litigation of the issue.

Pre-class certification, and absent evidence of abuse, both parties have the right to communicate with putative class members who have an interest in or relevant knowledge of the subject of the lawsuit. See Atari, Inc. v. Superior Court, 166 Cal. App. 3d 867 (1985). But plaintiffs typically do not know the identity of the putative class members or have contact information, so plaintiffs seek such information in discovery. As the discovery laws provide for discovery of "the identity and location of persons having knowledge of any discoverable matter," the issue may appear to be relatively straightforward. California Code of Civil Procedure Section 2017.010. However, because putative class members have a privacy interest in their contact information, plaintiffs' request for the identity and contact information for the putative class often becomes a highly contested issue.

Article I, Section 1 of the California Constitution and California common law protect a person's right to privacy. While personal contact information is not as private as some other forms of information, such as medical, financial or other personnel information, many courts agree that it deserves at least some protection. Employers have standing to assert their employees' privacy rights, and indeed an obligation to protect them.

That personal contact information is relevant to the litigation may not be enough to override putative class members' privacy interests. Courts engage in a balancing test to determine whether the privacy interest outweighs the need for the information. Courts also examine whether there are safeguards, such as protective orders or the opportunity to object to the disclosure of the contact information, to protect the privacy interest. Over the last several years, California courts have repeatedly engaged in this balancing test regarding putative class member contact information, with varied results.

After years of relatively little published authority to guide parties in litigation, the California Supreme Court took up the contact information privacy issue in Pioneer Electronics (USA), Inc. v. Superior Court, 40 Cal. 4th 360 (2007). In Pioneer, plaintiff sought to represent a class of consumers regarding an allegedly defective DVD player. In discovery, plaintiff requested the identity of and contact information for consumers who had complained to the company about the DVD player. The defendant objected to the disclosure, asserting the privacy rights of the consumers. The Court agreed that plaintiff should be able to discover the information, but also recognized the consumers' privacy interest in their names, addresses and phone numbers. Balancing these interests, the Court held that prior to disclosure, putative class members should be provided written notice of plaintiff's desire for their contact information and an opportunity to opt out of having the information disclosed. By allowing the putative class members to opt out of the disclosure, the Court determined that no serious invasion of privacy occurred.

Following Pioneer, the appellate court in Belaire-West Landscape, Inc. v. Superior Court, 149 Cal. App. 4th 554 (2007), found no abuse of discretion where the trial court ordered the defendant employer in a wage and hour class action to disclose putative class member contact information only after the parties provided putative class members with written notice and an opportunity to opt out of disclosure. The court noted that the contact information of Belaire-West's employees deserved privacy protection; that the employees had a reasonable

expectation; that their employer would not disclose the information; and that the privacy concerns were more significant than those in Pioneer, where the complaining consumers voluntarily disclosed their contact information to the company with the hope of gaining relief. Balancing the employees' privacy interest with plaintiff's need for the information, the court found that by requiring written notice and providing putative class members with an opportunity to object to the release of the information, there was no serious invasion of privacy.

After Pioneer and Belaire, it appeared that there was a relatively straightforward rule with respect to putative class member contact information - prior to disclosure the parties had to provide the putative class with written notice of the potential disclosure and an opportunity to opt out of the disclosure (often called the "Belaire Process").

But the same court that decided Belaire-West complicated the rule when it issued its opinion in Puerto v. Superior Court, 158 Cal. App. 4th 1242 (2008). In Puerto, the court held that the trial court abused its discretion when it required witnesses to affirmatively opt in to a disclosure of their contact information. The court held that where the defendant employer had already specifically identified the witnesses in discovery responses, it was required to disclose their contact information without an opt in or opt out process. The Puerto court distinguished Pioneer on the grounds that in Pioneer, the plaintiff sought the identities of putative class members, whereas in Puerto the witnesses had previously been identified in discovery.

Despite Puerto, the appellate court appeared to continue to follow its decision in Belaire-West with respect to the identification and contact information of putative class members when it issued its decision in Lee v. Dynamex, 166 Cal. App. 4th 1325 (2008), another wage and hour class action. In Lee, plaintiff sought disclosure of contact information with a "Belaire Process," but the trial court prohibited disclosure before class certification and subsequently denied certification. The appellate court held that the trial court abused its discretion by not permitting disclosure of the contact information with the "Belaire Process." Noting that the California Supreme Court decided Pioneer after the trial court made its ruling, and citing to Pioneer , Belaire-West and Puerto, among other cases, the court found that the current state of the law required disclosure of the identities and contact information with a "Belaire Process."

But the appellate court muddied the waters further when it issued its Crab Addison v. Superior Court, 169 Cal. App. 4th 958 (2008) opinion. In Crab Addison, another wage and hour class action, many of the putative class members had signed forms stating that they did not want their contact information released by their employer, or wanted to be asked prior to release. The form did not specifically address the pending lawsuit. The employer argued that putative class members should have to affirmatively consent to disclosure and plaintiff argued they should have to opt out of disclosure. Despite the parties' positions, the trial court ordered production of the putative class list, including contact information, without any opt in or opt out procedure. Applying its decision in Puerto, the appellate court found no abuse of discretion in ordering disclosure without the opt out safeguard. Despite distinguishing Pioneer in its Puerto decision on the basis that the identities of the witnesses in Puerto had already been disclosed, in Crab Addison, the court attached little significance to the fact that Crab-Addison had not disclosed the identities of the putative class. The court also did not give effect to the forms signed by the putative class, noting, among other things, that the putative class members signed them without knowledge of the pending lawsuit.

Interestingly, all of the appellate decisions were issued by the 2nd Appellate District, Division Seven, with Belaire-West, Puerto and Dynamex all decided by the same three judges, Judge Dennis Perluss, Judge Laurie Zelon and Judge Fred Woods, and Crab Addison decided by Judge Perluss and Judge Zelon, along with Judge Frank Jackson.

Given the conflicting opinions at the appellate level, which all dealt with the question of whether the trial court had abused its discretion, and the California Supreme Court's decision in Pioneer, it is still appropriate for employers to insist on a "Belaire Process" prior to disclosing putative class member contact information. If plaintiff's counsel agrees to or a court

orders the "Belaire Process," the parties should send a letter to putative class members (through a third party administrator) advising them that if they do not want their contact information disclosed to plaintiff's counsel, they must return a postcard (or send an e-mail or call a 1-800 number) so stating. The letter should explain that putative class members are not precluded from a subsequent settlement or judgment in the lawsuit if they opt out of the disclosure and that the court has not certified the class or ruled on the merits. Because plaintiffs are requesting the private information, employers can insist that plaintiffs bear the cost of the mailing, or at most, the plaintiff and employer should split the cost.

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