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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

IGNACIO SALGADO, Plaintiff and Appellant, v. THE DAILY BREEZE et al., Defendants and Respondents.	B269302 (Los Angeles County Super. Ct. No. BC458074)

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry A. Green, Judge. Reversed in part.

Trush Law Office and James M. Trush; Marlin & Saltzman, Stanley D. Saltzman and Cody R. Kennedy; Law Offices of Timothy Donahue and Timothy J. Donahue for Plaintiff and Appellant.

Perkins Coie, Eric D. Miller, Sue J. Stott, and Jill L. Ripke for Defendants and Respondents.

Ignacio Salgado, individually and on behalf of other members of the general public similarly situated (appellant),[1] appeals from a judgment entered after the trial court granted the "Motion for Summary Judgment, or Alternatively, Summary Adjudication" (MSA), filed by Torrance Holdings, LLC doing business as The Daily Breeze (Daily Breeze), MediaNews Group, Inc., and Long Beach Publishing doing business as the Long Beach Press-Telegram (Press Telegram) (collectively respondents). Appellant seeks review of the trial court's ruling on appellant's certified class claim against respondents for reimbursement of business expenses under California Labor Code sections 2800 and 2802.[2]

Appellant and the class he represents are individuals who signed contracts to deliver newspapers to subscribers ("class members" or "carriers"). The trial court noted that all of appellant's causes of action against respondents were based on appellant's allegation that he was an employee of respondents, not an independent contractor. The trial court rejected appellant's contention that he was an employee as a matter of

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[1] On December 22, 2015, Jaime Salazar was appointed Special Administrator and given the power to act on behalf of the estate of Ignacio Salgado for the purposes of this appeal.

[2] The trial court's order granting the MSA also disposed of appellant's claims of failure to pay overtime; failure to provide meal and rest breaks; failure to pay discharged employee; failure to provide itemized wage statements; failure to maintain business records; failure to pay minimum wages; and unfair business practices. Appellant has limited this appeal to the fifth cause of action for failure to reimburse business expenses. Thus, appellant has forfeited any claim of error on the other causes of action at issue in the MSA.

All further statutory references are to the Labor Code unless otherwise noted.

law. The court's decision was based on its findings that (1) the contracts signed by appellant created an independent contractor relationship; and (2) appellant provided no extra-contractual evidence suggesting that what actually happened between the parties was at odds with the contract's written terms.

In addition, the trial court placed emphasis on the results of a recent audit of respondents' independent contractor relationships with newspaper deliverers carried out by the Employment Development Department (EDD), which found that such individuals were properly classified as independent contractors pursuant to the relevant EDD regulations (Cal. Code Regs., tit. 22, §§ 4304-1, 4304-6) (EDD regulations). The trial court admitted evidence of the EDD regulations over appellant's objection and held that such regulations should be accorded substantial deference. The trial court held that appellant failed to present any evidence to dispute the EDD audit report's conclusion that the independent contractor relationships between respondents and the carriers were proper.

We find that triable issues of fact remain under the common law employment test set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 351 (*Borello*), therefore we reverse the summary adjudication as to the fifth cause of action for reimbursement of business expenses.

FACTUAL BACKGROUND

MediaNews Group, Inc., owns Torrance Holdings, LLC and Long Beach Publishing, which publish the Daily Breeze and the Press Telegram, respectively. Between 2007 and 2011, respondents contracted with individuals for home delivery of newspaper products.

The contracts

In June 2007, appellant signed a contract to deliver the Press Telegram to home delivery subscribers. In March 2009, appellant signed a contract to deliver the Daily Breeze to home delivery subscribers. Many of the terms of appellant's contract with the Daily Breeze were the same as those of his contract with the Press Telegram. These contracts are referred to in the record as "uniform contracts" or "carrier contracts." The carrier contracts signed by appellant were representative of those signed by the other members of the class, as there was "one form starter contract" that was used by respondents. Template versions of the carrier contracts were submitted into evidence by respondents.

Pursuant to the carrier contract with the Press Telegram, appellant agreed to "deliver newspapers together with all inserts and supplements provided by the Press-Telegram." The deliveries were to be made "to a location readily accessible to the customer, in a readable condition . . . by 6:00 a.m. weekdays and 7:00 a.m. weekends and holidays." In return, appellant was paid a flat fee of $0.12 per newspaper Monday through Saturday and $0.17 on Sundays. The contract expressly reserved to appellant the right to "control the manner, method or means" of performance of his contractual obligations.

Under the contract, appellant had the right to delegate his responsibilities to a substitute at his sole discretion, and to compensate such substitute as he saw fit. However, appellant was required to "identify . . . such substitute and period of absence in advance." Further, any such delegation could only be temporary. Appellant was required to furnish his own vehicle and other equipment necessary to carry out his duties. In addition, pursuant to the contract, appellant could elect whether to address subscriber complaints or be charged $1.25 for each subscriber complaint received by the Press Telegram.

The Press Telegram contract provided: "It is mutually agreed and understood that [appellant] is engaged in an independent business and is an Independent CONTRACTOR and NOT AN EMPLOYEE of the Press Telegram." The contract could not be terminated without cause unless either party gave "thirty (30) days prior written notice." Appellant acted like a contractor for tax purposes, and was issued an IRS Form 1099, not a W-2.

Appellant's carrier contracts with the Daily Breeze were similar. He was required to provide the newspapers to subscribers by 5:30 a.m. on weekdays and 7:30 a.m. on Saturdays and Sundays. He was paid a flat fee per newspaper delivered, with additional fees for delivering samples, supplements, and special advertisements. Appellant was required to make timely deliveries, but had "sole and exclusive control over the manner and means employed," and was permitted to "perform all obligations under [the] Agreement without direct supervision."

Like the contracts with the Press Telegram, the Daily Breeze contracts could not be terminated without cause unless "thirty (30) days advance written notice" of such termination was given. If either party failed to abide by the 30-day notice provision, that party was subject to liquidated damages. The Daily Breeze contracts stated: "[b]oth [appellant] and Company fully and freely intend to create an Independent Contractor relationship under this Agreement" and that appellant is "NOT AN EMPLOYEE of the Company."

Under the terms of the carrier contracts, in addition to having sole responsibility for obtaining and maintaining vehicles used to perform delivery services, appellant was solely responsible for: (1) paying all expenses incurred in providing delivery services; (2) selecting and controlling the means used to perform delivery services; (3) hiring, compensating, controlling,

and discharging persons utilized to provide delivery service, and (4) satisfying all federal, state, and local tax obligations.

The Daily Breeze and the Press Telegram newspapers were assembled at, and delivered out of, three distribution centers maintained and operated by respondents. Carriers were assigned specific workstations within respondents' distribution centers. Pursuant to the carrier contracts, appellant was required to report to the facility to pick up and assemble the newspapers, including the insertion of special sections, prior to delivery. Appellant was further required to complete his routes and conduct his daily work in "a manner satisfactory" to subscribers and respondents. Respondents retained the power to determine whether appellant's work was satisfactory, and had the power to reprimand appellant and other class members through paycheck deductions and termination.

Appellant and the class members were required to take on additional duties as directed by respondents. This could include such tasks as collecting unpaid fees from respondents' subscribers, delivering sample copies of newspapers to persons or places as instructed, and marketing tasks assigned to promote the sale of subscriptions. In addition, the carriers were required to deliver newspapers of other companies at respondents' discretion.

If a carrier showed up late to respondents' facilities, respondents retained authority to have their own district managers make all deliveries on that individual's route and then to reprimand that individual by deducting pay and/or terminating the individual's contract. The contracts provide that if a customer complained about a missed, damaged, or unsatisfactory delivery, the complaint would remain on the class member's record with respondents. Carriers were not allowed to

have more than one complaint for every two thousand newspapers delivered.

The carrier contracts were personal in nature and terminated upon the carrier's death.

Daily carrier mail

Carriers were required to follow daily delivery instructions created and provided by respondents, known as "carrier mail." The carrier mail contained up to 25 pages or more of detailed instructions that the carrier was required to follow on any given day, including changes in the carrier's route, complaints from previous days, or unique delivery instructions from specific subscribers. If a carrier did not follow the daily carrier mail instructions, the carrier could be reprimanded by paycheck deductions or termination.

Carrier training and routes

The district managers for the Press Telegram and the Daily Breeze provided the same training and supervision to all carriers. The district managers worked in the warehouse, side by side with the carriers, providing them directions to their routes, distributing inserts and advertising materials to the assigned workstations, preparing the daily instructions, answering questions, and carrying out the deliveries if a carrier did not show up on time.

District managers would train new carriers on the required processes to be followed in the distribution centers. This included instructions on how to accumulate the papers and inserts on the tables provided, how the carrier mail worked, and how to assemble the newspapers for delivery.

District managers also trained the carriers regarding their routes. The training included having a district manager ride along with the carrier to show the "turns of the route" and teach the carriers how to deliver the papers in a satisfactory manner.

Respondents used a system known as "RouteSmart" which provided each carrier with a delivery list and the sequence in which the papers were to be delivered. The timeframe to deliver each route was based on a set time established by respondents, commencing when newspapers were first made available at the distribution center and ending at a time when the assigned route was to be completed, as set forth in the contract.

Respondents' non-reimbursement policy

Respondents had no policy allowing for reimbursement of mileage or other business expenses incurred by carriers. The carrier contracts specifically required that carriers bear the cost of any business expenses they incurred.

EDD regulations and audit

The EDD is part of the State Labor and Workforce Development Agency. (Unemp. Ins. Code, § 301.) The EDD was created to carry out several duties, including the administration of unemployment insurance benefits. (§ 301; see also <http://www.edd.ca.gov/About_EDD/About_EDD.htm>.) The Legislature expressly delegated authority to the EDD to "adopt, amend, or repeal such regulations as are reasonably necessary to enforce [the EDD's] functions under this code." (§ 306.)

In 1987, the EDD promulgated regulations which set forth the rules applicable to determination of whether an individual is an employee under the Unemployment Insurance Code and the application of such rules to the newspaper distribution industry. Respondents relied on the EDD regulations when creating, revising, and using the contracts negotiated and executed by class members.

In 2011 and 2012, the EDD conducted an audit of respondents' independent contractor relationships with carriers for the period of July 2009 through June 2012. Based on its investigation, the EDD concluded that the newspaper carriers

were independent contractors and "no employer-employee relationship" was found.

PROCEDURAL HISTORY

Appellant brought this action in March 2011. He alleged nine causes of action: (1) failure to pay overtime wages; (2) failure to provide meal and rest periods; (3) failure to pay discharged employee; (4) failure to provide correct itemized statement to employee; (5) failure to reimburse for business expenses under section 2802; (6) failure to maintain employee records; (7) failure to comply with minimum wage laws; (8) wrongful termination in violation of public policy and discrimination; and (9) unfair business practices in violation of Business & Professions Code section 17200.

Class certification proceedings

On February 27, 2014, appellant sought class certification on all nine causes of action. He tried to certify one class for Daily Breeze carriers and another one for Press Telegram carriers, with each class defined as "All persons that signed an independent contractor agreement with any of the Defendants for home delivery of " the newspaper. In support of his class certification motion, appellant maintained that the carrier contracts constituted "the sole source of the rules, guidelines and policies applicable to" his relationship with the Press Telegram and the Daily Breeze. Appellant argued that the agreements amounted to a "uniform policy consistently applied" and that there were no "'rules or guidelines' applicable to independent contractors other than the independent contractor agreements.'"

At the hearing on appellant's class certification motion, appellant represented to the court that "[t]he independent contractor analysis can be decided very easily on a class basis . . . [b]ecause the contract . . . is the same for every carrier."

On December 1, 2014, the trial court granted appellant's motion in part, granting class certification on the following claims: (1) the fourth cause of action for failure to provide correct itemized wage statements; (2) the fifth cause of action for unreimbursed business expenses; (3) the sixth cause of action for failure to maintain employee records; and (4) the ninth cause of action for unfair business practices. The remaining claims proceeded as appellant's individual claims.

Summary adjudication proceedings

Respondents had originally moved for summary judgment in October 2014. Following the class certification order, on December 17, 2014, respondents filed the MSA at issue in this appeal. Respondents argued that appellant was an independent contractor as a matter of law. Based on appellant's alleged representation that the case could be decided on a contracts-only theory, respondents contended that the express terms of the carrier contracts established that appellant and the other class members were independent contractors as a matter of law. Respondents' motion included a separate statement of undisputed material facts.

On February 20, 2015, appellant filed his opposition, including a response to respondents' separate statement of undisputed material facts that was procedurally deficient. In violation of California Rules of Court, rule 3.1350, subdivision (f), appellant failed to cite to evidence. Instead of citing to evidence, appellant included only arguments and references to appellant's "Additional facts." The court allowed appellant an opportunity to resubmit his separate statement.

On April 30, 2015, appellant submitted an amended separate statement of disputed material facts. The amended statement "suffered the same fatal defect as his original submission, failing to cite 'exhibit, title, page, and line numbers

in the evidence submitted' to support his assertion that facts were disputed." Instead, appellant relied on unsupported argument to establish that a triable issue of material fact existed. In addition, appellant provided citations to his own additional material facts. However, in support of his own additional material facts, appellant provided citations to evidence. Despite its deficiencies, the trial court did not strike the document and considered the arguments and evidence set forth by appellant.

On October 19, 2015, the trial court filed an order granting respondents' MSA and a related request for judicial notice. The court first addressed the relevance of the EDD regulations, of which it took judicial notice. The court noted that the regulations "apply the common law test for analyzing independent contractor/employee status in the specific context of the newspaper industry." As such, the court found that the regulations constitute either "(i) quasi-legislative rulemaking possessing the dignity of a statute -- which must be accorded substantial deference, or (ii) a government agency's interpretation that carries strong persuasive power." The court found that the regulations were highly relevant and appellant's objections thereto were overruled.

The court found that respondents relied on the EDD regulations when entering into the carrier contracts, and that the EDD audit confirmed respondents' proper classification of the class members as independent contractors.

The court explained that all of appellant's causes of action are premised on the allegation that he is an employee, not an independent contractor. The court found that the contracts between the parties established an independent contractor relationship as a matter of law because they complied with EDD regulations. Balancing the factors that the regulations identified as establishing an independent contractor relationship, with

those identified as establishing an employee relationship, the court found that the evidence permits a single conclusion -- that the contracts established an independent contractor relationship. The court also noted that it would be "unfair and unjust for the EDD to provide that independent contractor arrangements, like the one with [appellant], are allowed under the law . . . and for a court to later determine that following the guidelines set forth in the EDD regulations does not provide for an independent contractor arrangement under that very same common law."

The court stated that there does not appear to be a material distinction between the regulations and the common law test for employment set forth in *Borello*. Thus, the court concluded, even if it did not consider the EDD regulations, an examination of the common law factors would lead to the same conclusion. The court found that the carrier contracts created an independent contractor relationship and that there was no evidence of a practical allocation of rights at odds with the contract's written terms, also known as "subterfuge." The court concluded that appellant is an independent contractor as a matter of law.

The trial court summarily adjudicated several of appellant's claims on alternative grounds. The court disposed of the third, fourth, sixth, and ninth causes of action on grounds not relevant here. The court granted both summary judgment and alternatively summary adjudication as to appellant's class claims on the ground that the contracts involved in the class claim were uniform and established an independent contractor agreement as a matter of law.

Final judgment in favor of respondents was entered on October 19, 2015, and notice of entry of judgment was filed on October 28, 2015.

On December 23, 2015, appellant filed his notice of appeal.

DISCUSSION

Appellant challenges the trial court's summary adjudication of his class claim for failure to reimburse business expenses pursuant to section 2802.

I. Standard of review and applicable law

A. Standard of review

A party moving for summary judgment or adjudication bears the burden of persuasion that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) "There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) A motion for summary judgment should be granted if all the papers submitted show "that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc. § 437c, subd. (c).)

An order granting summary judgment or adjudication is reviewed de novo. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) Under this standard, we independently review the record to determine whether triable issues of fact exist to reinstate the cause of action. (*Ibid.*) We view the evidence in the light most favorable to appellant as the losing party. (*Ibid.*)

B. Section 2802

Section 2802 requires that an employer reimburse his or her employee for all "necessary expenditures or losses" incurred by the employee in carrying out his or her duties. (§ 2802, subd. (a).) "Because the Labor Code does not expressly define 'employee' for purposes of section 2802, the common law test of

employment applies. [Citation.]" (*Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 10 (*Estrada*).)

C. The employee versus independent contractor analysis

The determination of whether an individual is an employee or an independent contractor is one of fact if dependent upon disputed evidence or inferences. (*Borello, supra,* 48 Cal.3d at p. 349; see also *Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1142-1143 ["the 'existence of an employment relationship is a question for the trier of fact, but can be decided by the court as a matter of law if the evidence supports only one reasonable conclusion'"].) Deference to an agency's view is appropriate. (*Borello, supra,* 48 Cal.3d at p. 349.) "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced. [Citations.]" (*Ibid.*)

"The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. [Citation.]" (*Tieberg v. Unemployment Ins. Appeals Board* (1970) 2 Cal.3d 943, 946 (*Tieberg*).) "If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established. [Citation.]" (*Id.* at pp. 946-947). The key question is "not how much control a hirer *exercises,* but how much control the hirer retains the *right* to exercise. [Citations.]" (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 533 (*Ayala*).)

Carrier contracts "'are a significant factor for consideration' in assessing a hirer's right to control a hiree's work. [Citation.]" (*Ayala, supra,* 59 Cal.4th at p. 534.) However, the parties' course of conduct is also relevant to the analysis. "[T]he rights spelled

out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms. [Citation.]" (*Id.* at p. 535.)

While the right to control work details is the most important consideration, there are numerous secondary indicia of the nature of a service relationship. (*Borello, supra,* 48 Cal.3d at p. 350.) Notably, "'[s]trong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations.]' [Citations.]" (*Id.* at p. 350; see also *Ayala, supra,* 59 Cal.4th at p. 533 ["Whether a right of control exists may be measured by asking ""whether or not, if instructions were given, they would have to be obeyed"" on pain of at-will ""discharge[] for disobedience."" [Citation]"].) Additional factors include:

> "(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. [Citations.]"

(*Borello, supra,* 48 Cal.3d at p. 351.)

The individual factors listed above cannot be applied mechanically as separate tests. They are intertwined and their weight depends often on particular combinations. (*Borello, supra,* 48 Cal.3d at p. 351.)

II. Triable issues of material fact exist as to appellant's status as employee or independent contractor

A. Respondents' motion and evidence

Respondents' MSA was premised on respondents' position that appellant's claims, including his claim for reimbursement of business expenses pursuant to section 2802, only apply to employees. Because appellant was an independent contractor as a matter of law, respondents argued, appellant's claims must fail.

Respondents asserted that throughout the litigation, appellant had maintained the position that the carrier agreements constituted the sole source of all written policies, rules and guidelines applicable to appellant's relationship with respondents. Thus, respondents argued, there is no reason to look beyond the four corners of the agreements to determine independent contractor or employee status. Respondents claimed that the undisputed terms of the contracts gave appellant the legal right to control the manner and means of delivering newspapers; thus, as an independent contractor, appellant could not recover under the Labor Code provisions that apply only to employees.

Respondents' recitation of undisputed evidence focused on the terms of the carrier contracts. As to appellant's contract with the Press Telegram, respondents noted that it granted appellant "the right to 'control the manner, method or means by which [to] perform' the contractual obligations." In addition, the contract granted appellant the right to delegate the responsibility of supervision to a substitute; to employ persons necessary to perform his obligations; to furnish at his own expense vehicles or equipment necessary for the performance of his obligations; and to elect whether to correct or otherwise address customer complaints. Respondents noted that the contract stated that it is "'mutually agreed and understood that [appellant] is engaged in

an independent business and is an Independent CONTRACTOR and NOT AN EMPLOYEE.'"

As to appellant's contract with the Daily Breeze, respondents pointed out many of the same contractual provisions that existed in appellant's contract with the Press Telegram. Appellant contracted to provide timely deliveries, but had the right to exercise sole and exclusive control over the manner and means of carrying out his obligations. In addition, he was solely responsible for obtaining and maintaining vehicles; paying all expenses incurred in providing delivery services; selecting and controlling the means used to perform delivery services; hiring, compensating, controlling and discharging persons utilized to provide delivery service; and satisfying all federal, state, and local tax obligations. Respondents noted that the agreements stated that appellant and the Daily Breeze "'fully and freely intend to create an Independent Contractor relationship under this Agreement'" and that appellant "'is NOT AN EMPLOYEE of the Company.'"

Respondents also argued that they relied, in good faith, on EDD regulations in structuring the relationships with their carriers, including appellant. In addition, after undertaking a rigorous audit, the EDD concluded that respondents' newspaper delivery contractors were properly classified as independent contractors. This validated respondents' reliance on the EDD regulations and their belief that appellant and the class members were independent contractors.

Respondents acknowledged that the California Supreme Court has not said that the contract is the sole determinant of the nature of the employment relationship, however, respondents assert that appellant has "repeatedly" taken the position that only the contracts can answer that question in this matter.

B. Appellant's opposition

Appellant's opposition to the MSA disputed respondents' position that the contracts were the sole factor to be considered in determining whether an employment or independent contractor relationship existed between the parties. Appellant pointed to several decisions in which newspaper carriers were held to be employees in spite of the existence of form contracts labeling them as independent contractors. (See, e.g., *Antelope Valley Press v. Poizner* (2008) 162 Cal.App.4th 839 (*Poizner*); *Gonzalez v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 1584).[3]

Appellant disputed respondents' position that appellant had repeatedly asserted that the contracts comprise the sole source of all policies relevant to the parties' relationship. Appellant explained that while his theory "has focused on the class-wide form contracts, it has always also included common evidence."

Appellant pointed to provisions of the form contract which showed that respondents in fact had the right to control the manner and means of delivery. Primarily, the contracts could be terminated without cause, which appellant argued was the strongest evidence of right to control. In addition, the contract included a requirement that carriers deliver the papers "in a

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[3] Appellant also cited *Brose v. Union-Tribune Publishing Co.* (1986) 183 Cal.App.3d 1079 (*Brose*). While the *Brose* court did not decide the factual question of whether the newspaper carrier involved was an independent contractor or an employee, it did hold that the issue could not be decided on summary judgment. The court stated: "We do not think newspaper publishers should be insulated from liability involving newspaper carriers . . . by avoiding the appearance of 'control' . . . . The reality is different. We conclude the jury should decide the relationship between the carrier of the newspaper and the publisher." (*Id.* at p. 1087, fn. omitted.)

manner satisfactory" to customers and respondents, which required carriers to follow detailed daily instructions in the carrier mail. Other contractual provisions giving respondents the right to control included a provision imposing financial penalties for customer complaints; disallowing the performance of other businesses or delivery services that interfered with appellant's obligations under the contract; restricting the right to hire substitutes to individuals previously identified to respondents and ensuring that the delegation was only temporary; requiring appellant to deliver other newspapers, shopping samples, and promotional samples provided by respondents; requiring appellant to collect from past due subscribers; and mandating that appellant could not insert the Daily Breeze into any wrapping or covering not supplied by respondents.

Appellant also pointed to extra-contractual evidence showing respondents' right to control the manner and means of delivery, and argued that the secondary factors set forth in *Borello* required a finding that disputed issues of fact exist.

Appellant supported his opposition with the declaration of James A. Trush, attached to the class certification motion and supporting documents.

C. Appellant's amended separate statement of disputed material facts and evidence

Appellant also supported his opposition with an amended separate statement of disputed material facts filed April 30, 2015, which referenced evidence in support of appellant's claim that he should be categorized as an employee.

Appellant provided evidence that the contract terms were non-negotiable. Carriers needed to identify substitutes in advance and could only be used temporarily; carriers were required to report to and assemble newspapers at the warehouse; district managers would give detailed instructions; appellant was

required to follow the detailed instructions found in the carrier mail or risk termination; financial penalties were imposed for customer complaints; if appellant was unable to deliver the newspapers, they would be delivered on his behalf and he would be assessed charges of $15.00 per hour; and the contract could be terminated immediately upon material breach by the carrier. Appellant was required to "make other reasonable efforts to promote the sale" of the newspaper. Each carrier had a specific workstation or table in the warehouse which was considered that carrier's workstation. All such evidence was supported by citations to declarations submitted.

In addition, appellant provided extensive evidence of detailed instructions included in the daily carrier mail. Such details included vacation stops and starts; instructions on where to leave the papers such as "porch" or "further up driveway"; and instructions for new deliveries on the route. Appellant also provided evidence of close supervision and training by the district managers, such as showing carriers the route; how to fold the papers; how to place the inserts in the papers; and how to drive the route. Delivery deadlines in the contracts were not negotiable, and the carrier was required to abide by all pick up and delivery times. All such evidence was supported by citations to declarations submitted.

Further, appellant provided evidence that delivery was a part of respondents' regular business. In addition to their own papers, respondents contracted with other publications for the class members to deliver various other publications including USA Today and the Wall Street Journal. Appellant and the other class members were required to deliver other publications because respondents served as "distribution mechanism[s]" for those other publications. Such evidence was supported by citations to declarations submitted.

The trial court considered this evidence, but determined it was immaterial. As to the contractual provisions cited by appellant, the court held that the provisions address a broad general power of supervision and control, not the right to control the manner and means of performance. As to the evidence provided by appellant regarding the *Borello* factors, the court concluded :

> "[Appellant] did not create any material disputed facts with regard to any of the [*Borello*] secondary factors that would support a finding of employee status here, where [appellant] admitted that the contracts provided the sole source of rules and guidelines between the parties and those contracts provide [appellant] with the right to control the manner and means of performance."

As a result, the court found that none of appellant's extra-contractual evidence created a material dispute of fact.

D. The evidence submitted by appellant raises triable issues of material fact

We disagree with the trial court. Our review of the evidence submitted leads to the conclusion that appellant has created triable issues of material fact as to whether he was properly classified as an independent contractor or an employee.

1. Right of control

In analyzing this question, the principal test is "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. [Citation.]" (*Tieberg, supra,* 2 Cal.3d at p. 946.) Appellant offered evidence suggesting that respondents maintained the right to control the class members' actions. Among other things, appellant provided evidence that respondents required the carriers to deliver the papers in a manner satisfactory to both respondents and their customers. Respondents retained the right

to terminate the agreement "immediately and without prior notice" for a material breach of the contract, including the provision requiring satisfactory performance. Further, under the common law, the employer's right to terminate without cause with 30 days' notice, and the requirement that respondents not receive more than .5 customer complaints per 1,000 deliveries, dictate in favor of employee status. As set forth in *Poizner, supra,* 162 Cal.App.4th at page 854:

> "Regarding the right to discharge at will without cause, that right is clearly given to [the newspaper publisher] under the terms of the contracts. Only a 30-day written notice to the carrier is required; and, more than one complaint per month 'per one thousand contracted subscriber deliveries per edition . . .' can result in immediate termination for cause."[4]

Evidence that the class members were contractually bound to "promote and extend the circulation" of respondents' newspapers also supports a level of control consistent with an employment relationship. (*Poizner, supra,* 162 Cal.App.4th at p. 854 [noting that "under several provisions of the contract, the carrier is responsible for procuring new subscribers" and "there is no indication that persons who work in [the publication's] circulation department and have procurement of new subscribers as one of their tasks are not considered employees"].)

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[4] The *Poizner* court affirmed an administrative agency's finding that newspaper carriers were employees for the purposes of workers' compensation insurance law. In so doing, the *Poizner* court applied the common law test set forth in *Borello.* (*Poizner, supra*, 162 Cal.App.4th at pp. 852-853.) We therefore reject respondents' suggestion that the case is inapplicable.

Apart from these contractual provisions, there was also extracontractual evidence of respondents' right to control the class members. "While any written contract is a necessary starting point, . . . the rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms. [Citation.]" (*Ayala, supra,* 59 Cal.4th at p. 535.)

Extracontractual evidence showing a practical allocation of rights at odds with the written terms of the contract included the requirement that the class members work at designated locations and workstations; the close supervision of the class members by the local district managers; the requirements that the papers be folded and the inserts inserted in specific ways; and the daily customized instructions included in the carrier mail.

Based on the evidence provided by appellant, triable issues of fact exist as to respondents' right to control the manner and means of the class members' tasks.

2. Secondary factors

The right to control work details is the most important consideration in determining the nature of a service relationship. (*Borello, supra,* 48 Cal.3d at p. 350.) As set forth above, triable issues of fact exist as to respondents' right to control the class members' actions. However, we also note that appellant provided evidence concerning some of the secondary factors relevant to the issue of employment. These factors are not to be applied mechanically, but are intertwined in the analysis. (*Id.* at p. 351.)

One such factor is whether or not the work is part of the regular business of the principal. Appellant has provided evidence that newspaper delivery was integral to respondents' business. They contracted with other newspaper companies to provide delivery services, which were carried out by the class members. In addition, if a carrier did not show up, the district

manager would be responsible for delivering that route. Such evidence may support a finding of employment status. (*Poizner, supra,* 162 Cal.App.4th at p. 856 [noting that "delivery of . . . publications to homes, retail stores, and newspaper vending machines is part and parcel of the newspaper business"].)

An additional factor is whether the principal or the worker supplies the tools and place of work. Appellant provided evidence that the class members were required to report to the distribution centers, where the class members were required to assemble the newspapers. Respondent provided workstations and other materials necessary to assemble the papers. Such evidence may support a finding of employment status. (*Poizner, supra,* 162 Cal.App.4th at p. 855.)

Another *Borello* factor is "the method of payment, whether by time or by the job." (*Borello, supra,* 48 Cal.3d at p. 351.) Here, there was evidence that appellant and the class members were paid on a piece-rate basis for every newspaper delivered. Similar payment methods have been held to support an employment relationship between newspaper publications and their carriers. (*Poizner, supra,* 162 Cal.App.4th at p. 856.)

In addition, the length of time for which the services are to be performed is considered. (*Borello, supra,* 48 Cal.3d at p. 367.) Appellant provided evidence that the contracts are usually set for one-year terms. Similar contracts with identical terms have been held to support an employment relationship between newspaper publications and their carriers. (*Poizner, supra,* 162 Cal.App.4th at p. 855 [noting that 12-month contract is "at odds" with "the notion that an independent contractor is someone hired to achieve a specific result that is attainable within a finite period of time, such as plumbing work, tax service, or the creation of a work of art for a building's lobby"].)

The evidence described above creates triable issues of fact as to whether the class members were in fact employees. While no single factor is dispositive, the evidence as to all of the *Borello* factors should be weighed by a factfinder as part of the analysis. Thus, summary adjudication was inappropriate.

III. The EDD regulations and audit

The trial court emphasized that respondents relied on the EDD regulations when entering into the carrier contracts. The trial court found that the EDD regulations are "highly relevant" and overruled appellant's objections to the contrary. The court determined that the EDD regulations "apply the common law test in the specific context of the newspaper industry." The court also considered the results of the EDD audit.

The court's evidentiary decisions are not challenged on appeal. However, appellant argues that the trial court erred in holding that the EDD regulations "supplemented" the common law test in determining the employment status of workers. Further, appellant argues that the trial court erred in considering the EDD audit report to be controlling.

A. The regulations

California Code of Regulations, title 22, section 4304-1 provides that "[w]hether an individual is an employee for the purposes of Sections 621(b) and 13020 of the code will be determined by the usual common law rules applicable in determining an employer-employee relationship." By referencing Unemployment Insurance Code sections 621, subdivision (b) and section 13020, the regulation limits its applicability to decisions relating to unemployment and disability compensation. The regulation sets forth the *Borello* factors discussed above, including the fact that "[t]he terminology used in an agreement between a principal and a worker is not conclusive of the relationship." (Cal. Code Regs., tit. 22, § 4304-1, subd. (b)(5).)

The regulation acknowledges that "[i]f the factual relationship between the parties is different than that provided by the agreement, an inference will arise that the agreement does not express the intention of the parties and an employer-employee relationship does in fact exist." (*Ibid.*)

California Code of Regulations, title 22, section 4304-6 discusses the application of section 4304-1 in the newspaper industry under the Unemployment Insurance Code. The regulation is found under title 22, captioned "Social Security," and is positioned under Division 1, Subdivision 1, Division 2.5, relating to "Withholding Tax on Wages." It indicates that the determination of whether a newspaper carrier is an employee or independent contractor in this context will generally be determined by the rules set forth in section 4304-1, and that no one or more of the enumerated factors will necessarily indicate that a particular relationship exists. (Cal. Code Regs., tit. 22, § 4304-6, subd. (a).) Further, the regulation specifies that its interpretations of the enumerated factors are "Basic Guidelines." (§ 4304-6, subd. (c).) Thus, "they do not establish an absolute test or compel a particular finding." (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 351 (*Espejo*).)[5]

The regulation also acknowledges that, while a written agreement can be evidence of intent, "if the terms of the agreement are not complied with in practice, the agreement shall not determine the intent or the relationship of the parties." (Cal. Code Regs., tit. 22, § 4304-6, subd. (c)(1).)

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[5] The *Espejo* decision was filed during the pendency of this appeal. We requested, received and considered supplemental briefing from the parties regarding the impact of *Espejo* on the issues presented in this appeal.

B. The regulations and the common law

The trial court found that "[t]here does not appear to be a material distinction between the EDD Regulations and the common law *Borello* test because the EDD regulations apply the common law." However, we note that there do appear to be discrepancies between the EDD regulations and the common law. For example, California Code of Regulations, title 22, section 4304-6, subdivision (c)(2) provides that "[c]ompensation to the carrier in the form of a flat fee per route or per copy delivered shall be evidence of an independent contractor relationship." This would appear to conflict with common law decisions acknowledging that piece-rate compensation is consistent with an employment relationship. (See, e.g., *Poizner, supra,* 162 Cal.App.4th at pp. 855-856; *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 40; *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864, 871; *Espejo, supra,* 13 Cal.App.5th at pp. 338-39.)

As another example, California Code of Regulations, title 22, section 4304-6, subdivision (c)(6) provides:

> "Termination. When, by terms of an agreement or by practice of the principal, the relationship between the principal and carrier may be unilaterally terminated without 30 days' notice, it will be evidence of employment."

This subdivision is more restrictive than common law decisions acknowledging that unilateral termination without cause, even with 30 days' notice, is consistent with a finding of employment. (See, e.g., *Poizner, supra*, 162 Cal.App.4th at p. 854 ["Regarding the right to discharge at will without cause, that right is clearly given to [the publisher] under the terms of the contracts. Only a 30-day written notice to the carrier is required"]; see also *Estrada, supra*, 154 Cal.App.4th at p. 11

[holding that contractual provision providing for termination on 30 days' notice was not evidence of independent contractor relationship where "substantial evidence established that FedEx discharges drivers at will"]; *Espejo, supra*, 13 Cal.App.5th at p. 346 [affirming trial court's determination that newspaper carriers were employees where contract was terminable on 30 day's notice].)

C. The trial court did not err in considering the regulations and audit

Nothing within the text of the regulations suggests that they are meant to apply to actions brought under the Labor Code. In addition, the parties have cited no law suggesting that the regulations have ever been applied outside of the context of unemployment disability compensation.

However, deference to an agency's view is appropriate. (*Borello, supra,* 48 Cal.3d at p. 349.) There are "two classes of [administrative] rules -- quasi-legislative and interpretive." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10. (*Yamaha*).) Quasi-legislative rules are "an authentic form of substantive lawmaking: Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power. [Citations.]" (*Ibid.*) As to such quasi-legislative rules, as long as they are "within the lawmaking authority delegated by the Legislature," they have the dignity of statutes. (*Ibid.*) The other class of administrative rules are those interpreting a statute. (*Id.* at p. 11.) As to such rules, the judiciary "'accords great weight and respect to the administrative construction.'" (*Id.* at p. 12.)

The regulations themselves are quasi-legislative, and thus -- within the agency's jurisdiction -- have the dignity of statutes. The audit reflects the agency's interpretation of those regulations as applied to the relationship between the parties. The

construction of an enactment by an administrative agency "although not controlling, is entitled to great weight." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1388.) Because such deference is appropriate, we decline to find error in the trial court's decision to consider the content of the regulations and the outcome of the audit.

D. The audit was not dispositive

The trial court stated its position that "[i]t would be unfair and unjust for the EDD to provide that independent contractor arrangements, like the one with [appellant], are allowed under the law (stating in the EDD Regulations that they interpret the common law) and for a court to later determine that following the guidelines set forth in the EDD Regulations does not provide for an independent contractor arrangement under that very same common law." The court noted that appellant's position that he should be classified as an employee "creates a situation where the EDD audit found the independent contractor arrangement for Unemployment Insurance Code purposes but invites a court to later determine that the same contractual arrangement is one of employment for Labor Code purposes." The court felt that a finding of an employment relationship in this case would be "inherently unjust and unfair and implicates principles such as estoppel, notice, and reliance."

Appellant argues that the trial court erred by considering the EDD audit report to be controlling. Appellant argues that this position raises due process issues for appellant and the class members, who were not parties to the audit. Further, appellant argues, respondents did not raise issues of "estoppel, notice, and reliance" in their summary judgment motion thus these subjects were not briefed.

Respondents argue that the trial court did not determine that the audit was controlling, only that "the EDD Audit reconfirmed that [respondents'] approach was proper."

As set forth above, neither party cites any law suggesting that an EDD audit is dispositive on the issue of employment status under section 2802. Instead, case law confirms that the common law *Borello* test governs. (*Estrada, supra,* 154 Cal.App.4th at p. 10.) Thus, to the extent that the trial court made its ruling based on concepts of estoppel, notice, and reliance due to the EDD audit, it erred.[6]

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[6] We note that the Supreme Court recently issued an opinion in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903. *Dynamex* involved the review of a denial of a motion to decertify a class in a case involving couriers hired to make deliveries. The employer argued on appeal that the superior court erred in ruling that the class could be certified under the Industrial Welfare Commission (IWC) definition of employee found in Wage Order No. 9 (2001) (Cal. Code Regs., tit. 8, § 11090). The Court of Appeal determined that the superior court correctly relied on the IWC definition of an employment relationship for those claims falling under the scope of Wage Order No. 9, and the Supreme Court affirmed that decision. In doing so, the Supreme Court did not address the lower courts' decision that the common law definition of employee controlled all the other claims, including a claim for reimbursement of business expenses under Labor Code section 2802. However, the high court noted that "because the *Borello* standard itself emphasizes the primacy of statutory purpose in resolving the employee or independent contractor question, when different statutory schemes have been enacted for different purposes, it is possible under *Borello* that a worker may properly be considered an employee with reference to one statute but not another. [Citation.]" (*Dynamex, supra,* at p. 948.) Thus, *Dynamex* contemplates that individuals designated independent contractors under a scheme such as the EDD Regulations may

IV. Appellant did not make an admission that the contracts were the sole source for determining the relationship between the parties

The trial court emphasized that in his class certification motion, appellant contended his contracts were entirely dispositive of the threshold question of contractor status, because they comprised the "'*sole source* of the rules, guidelines and policies applicable to'" determining his relationships with respondents.

The court further emphasized that it "accepted" appellant's representations that the contracts comprised the sole source of the rules, guidelines and policies applicable to determining independent contractor status, and therefore granted appellant's motion for class certification in part. In addition, the court explained that respondents' MSA was based on appellant's "contracts-only theory of recovery."

Preliminarily, we note that appellant's arguments regarding respondents' extra-contractual policies and procedures were set forth in the motion for class certification. For example, the class certification motion described in detail the specific instructions set forth in the daily carrier mail. The class certification motion described the district manager training, including the training to show new carriers how to fold papers and exactly how to drive the route. The class certification motion also described the distribution center operations and the requirement that carriers report to work there. In addition, such evidence was set forth fully in opposition to respondents' MSA. Thus, the suggestion that appellant was proceeding on a contracts-only theory of recovery is inaccurate.

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not be considered independent contractors for the purposes of Labor Code violations.

Nor did appellant make a judicial admission based on the quoted words from appellant's class certification motion. Judicial admissions ""'"are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her."'"" (*Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 446, 451-452.) Such admissions may be made in pleadings, by stipulation, or in response to requests for admission. (*Ibid.*) No party has cited any law suggesting that contentions made in a motion for class certification constitute binding judicial admissions, and the trial court erred in treating appellant's words as such.[7] Because appellant's representations in the class certification motion did not constitute binding judicial admissions, the trial court erred in declining to consider extra-contractual evidence creating triable issues of fact as to appellant's employment status.

Evidence presented by appellant in opposition to respondents' MSA creates triable issues of fact as to whether appellant's relationship with respondents was that of an independent contractor or an employee. Thus, the trial court erred in granting summary adjudication in favor of respondents on the fifth cause of action.

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[7] We note that in the event it becomes apparent that individual issues predominate over common issues, a judge may decertify a class. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 335.)

DISPOSITION

The judgment is reversed as to the fifth cause of action only. Appellant is awarded his costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT