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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *January 2013*

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I.

LEGISLATIVE/ADMINISTRATIVE

Federal

Congress Avoids Fiscal Cliff by Passing American Taxpayer Relief Act

In a rare New Year's Eve/New Year's Day session, Congress passed the American Taxpayer Relief Act of 2012 (H.R. 8), preventing the U.S. from going over the impending "fiscal cliff." The legislation extends permanently a number of tax provisions that had already expired at the end of 2011 and 2012, revises tax rates on income for married couples, modifies the estate tax, and extends unemployment benefits, Medicare payments, and farm subsidies. Additionally, the bill delays the sequestration provisions established by Congress in 2011 until March 27, 2013.

Specifically, H.R. 8 contains a number of provisions of importance to the human resources profession:

- Permanently extends employer-provided education assistance (Section 127 of the Internal Revenue Code), which allows an employee to exclude from income up to $5,250 per year in educational assistance at the undergraduate and graduate level regardless of whether the education is job-related.
- Permanently extends the increase in the monthly exclusion for employer-provided transit and vanpool benefits.
- Extends federal emergency unemployment benefits for one year.
- Reinstates and extends the Work Opportunity Tax Credit through 2013.
- The legislation ***does not*** reinstate the two percent payroll tax cut of the Social Security (FICA) employee tax, which expired on December 31, 2012.

California

California's New Commission Law is Now in Effect

A.B. 1396, which amended California Labor Code section 2751 and took effect on January 1, 2013, requires employers who pay commissions to enter into written commission contracts with their employees. The contract must describe the method by which commissions are computed and paid. Employers must also provide a copy of the signed contract to each employee and obtain a signed receipt from each employee.

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The term "commissions" under the new law has the same meaning as in California Labor Code section 204.1: "commission wages are compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof." The law excludes from the definition of "commissions" (1) short-term productivity bonuses; (2) bonus and profit-sharing plans, unless there is an offer by the employer to pay a fixed percentage of sales or profits as compensation for work; and (3) temporary, variable incentive payments that increase, but do not decrease, payment under the written contract.

Additionally, when a contract governing commissions expires without being replaced but the employee continues to work, the terms of the "expired" contract will apply to commissions until the parties sign a new agreement, or until the employment is terminated.

II.

JUDICIAL

California

California Appellate Court Issues Decision on Unenforceability of Class Action Waivers

In *Franco v. Arakelian*, a California appellate court expressly held that the U.S. Supreme Court decision *AT&T v. Concepcion* does not preempt California law regarding the enforceability of class action waivers in the employment context. The *Franco* Court held that the California Supreme Court's decision in *Gentry v. Superior Court* is not preempted because it does not categorically preclude enforcement of class action waivers in employment arbitration agreements, but rather sets forth a multi-factor test for determining whether such waivers are enforceable. The *Franco* Court also held that a waiver of the right to seek representative relief under California's Private Attorneys General Act was unenforceable.

Importantly, the California Supreme Court granted review of *Iskanian* v. *CLS Transportation* (along with similar arbitration cases dealing with the scope of the *Concepcion* preemption). Employers should expect guidance from the California Supreme Court, when it decides *Iskanian*, on the validity and enforceability of class action waivers in employment arbitration agreements.

California Court Holds that "Adhesive" Arbitration Agreement is Enforceable

In *Baltazar v. Forever 21*, the California Court of Appeal held that a contract of adhesion is not necessarily unconscionable (or unenforceable) in the arbitration context.

Maribel Baltazar ("Baltazar"), a "married woman of Mexican ancestry," began working for clothing retailer Forever 21 as an associate in the company's downtown Los Angeles distribution center in November 2007. Baltazar claims that her co-workers subjected her to racial and sexual harassment starting in early 2008. She allegedly complained to the company's human resources personnel, but claims the company failed to act. In January 2011, she quit and sued, alleging she was constructively discharged and subjected to discrimination and harassment based on race and sex.

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Forever 21 filed a motion to compel arbitration pursuant to an arbitration agreement ("the Agreement") that Baltazar signed in 2007. Baltazar, however, argued that the Agreement was unconscionable, noting that she had signed it as part of her employment application. The trial court held in favor of Baltazar, finding that the Agreement was substantively unconscionable because (1) it required the arbitration of employee - but not employer - claims; (2) it gave Forever 21 the right to take "all necessary steps" to protect its trade secrets or other confidential information; and (3) it mandated arbitration even if the Agreement was unenforceable.

The appellate court reversed, holding that although the Agreement was *procedurally* unconscionable and "adhesive" (*i.e.*, Baltazar was required to sign the Agreement as a condition of employment, was unable to negotiate its terms, and had no meaningful choice in the matter), it was not *substantively* unconscionable. Among other things, the appellate court held that the Agreement in fact required Forever 21 to submit its claims to binding arbitration (thus making the contract bilateral), that the trade secret provision was not unduly harsh and one-sided (because the provision was narrow and consistent with the duties imposed by the Uniform Trade Secrets Act), and that the Agreement did *not* mandate arbitration even if the Agreement was found to be unenforceable (rather, it required that arbitration proceed under the California Arbitration Act if the American Arbitration Association rules were found to be unenforceable).

The appellate court ultimately held that because the Agreement was not substantively unconscionable, the trial court erred in denying Forever 21's motion to compel arbitration.

California Court Holds Police Department Not Required to Excuse Disabled Police Officer from Performing Essential Functions of His Job

In *Lui v. City and County of San Francisco,* the California Court of Appeal held that a police department was not required to excuse a disabled police officer from performing the essential functions of his job.

Kenneth Lui ("Plaintiff") was hired as a police officer in the San Francisco Police Department ("Department") in 1981. He suffered a major heart attack in 2005, and was diagnosed with high blood pressure, high cholesterol, and coronary artery disease. After the Department informed Plaintiff that there were no administrative positions available that did not require him to perform the strenuous physical duties regularly performed by patrol officers in the field, Plaintiff sued the City and County of San Francisco for discrimination, failure to accommodate, failure to prevent discrimination, and refusal to engage in the good faith accommodation process.

Plaintiff took 11 months of disability leave after his heart attack and returned to work in a 365-day temporary modified duty ("TMD") position, performing light duty work in the records room. At the time, there was a Department General Order in effect which specified that if an injured officer returns to full duty at the end of the TMD period, he must be able to perform the essential functions of the full duty police officer position, including physically strenuous work, even if assigned to an administrative position. The essential functions of the police officer position were described in the Department's Essential Job Functions List ("EJF List"). Such tasks included making forcible arrests, pursuing fleeing suspects, and responding to emergency situations.

The Department sent Plaintiff a notice confirming that his TMD position would end in 90 days, and provided him a citywide reasonable accommodation request form, which Plaintiff failed to complete. Because Plaintiff was unable to perform a number of duties on the EJF List, the Department also offered to conduct a citywide search for non-sworn officer positions. However, Plaintiff declined the offer due to his desire to maximize his pension, and insisted on the administrative position.

The Court of Appeal determined that the Department's conduct did not violate the Fair Employment and Housing Act ("FEHA"), which does not require an employer to accommodate an employee by excusing the employee from performing the essential functions of a position. Similarly, the FEHA does not require that employers make a temporary position available indefinitely once the employee's temporary disability becomes permanent.

The Court of Appeal decided that the duties on the EJF List were essential functions of the administrative positions Plaintiff sought. Because Plaintiff could not perform a number of those duties, he was not a qualified individual under the FEHA; thus, the FEHA did not obligate the Department to accommodate Plaintiff by excusing him from the performance of essential functions.

The Court of Appeal reasoned that even though officers in administrative positions are not *often* required to engage in strenuous activities such as making forcible arrests, such activities are nevertheless essential functions of the administrative positions Plaintiff sought, as the Department has a legitimate need to be able to deploy officers in those positions in the event of emergencies and mass mobilizations. Thus, Plaintiff's claims for discrimination, failure to accommodate, and failure to engage in the interactive process failed.

California Court Clarifies Employer Duties Under the CFRA

In *Olofsson v. Mission Linen Supply*, the California Court of Appeal clarified an employer's duties in the context of offering family leave under the California Family Rights Act ("CFRA"). The court ruled against plaintiff Lars Olofsson ("Olofsson"), holding that (1) defendant Mission Linen Supply ("Mission Linen") did not misrepresent by deed that Olofsson's leave application was approved; and (2) Mission Linen was not silent when it had a duty to speak.

Olofsson worked as a regular route driver for Mission Linen. His mother lived in Sweden and had been experiencing back troubles which ultimately required surgery. Olofsson learned on June 12 that his mother's surgery would be performed on July 5 and that she would be returning home on July 12. Olofsson informed Mission Linen's plant manager that he needed seven weeks off, beginning on July 12, to provide the care his mother required.

In order to have his leave request considered, Olofsson needed to fill out the proper application and submit a doctor's certification. Olofsson spoke with payroll clerk Ruth Clark ("Clark") on June 15 and received the appropriate forms. He returned the paperwork on June 21 with a box checked indicating that management had already approved his leave. Clark crossed out Olofsson's mark, informed him that the decision needed to be made by human resources, and informed him that his submission was incomplete. After a series of attempted submissions, Olofsson's request was completed in its entirety on July 9. On the same day, Mission Linen management

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informed Olofsson that he had not met the threshold hourly requirement and therefore his leave request must be denied. Olofsson ignored the denial and left for Sweden the next day. As a result, his employment was terminated.

Olofsson filed suit for wrongful termination in violation of public policy and offered two arguments in support of his claim. In the first, Olofsson argued that Mission Linen had misrepresented the status of his request, thereby improperly leading him to believe that his request for leave had been approved. Among other arguments rejected by the court, Olofsson relied on the fact that he had been instructed to train another employee to take over his route, suggesting that such an instruction indicated an implied grant of his leave request. The court was unmoved, stating that Olofsson's training of another employee was merely in anticipation of the *possibility* that Olofsson's request would be granted.

Olofsson's second argument was that Mission Linen remained silent when it had a duty to speak and that its silence amounted to grounds upon which Olofsson could reasonably conclude that his request for leave had been granted. The court rejected this argument by clarifying the CFRA's requirement that an employer respond to an employee's leave request within 10 days. The court explained that California law does not require an employer to reach its final decision regarding an employee's family leave request within the statutory 10-day window. Rather, it must only *respond* to the request in some manner within that time. Here, Olofsson made his initial request on June 15 and Mission Linen "responded" on June 21 (within the 10-day window) by notifying Olofsson that his submission was incomplete. Thus, Olofsson's second argument regarding Mission Linen's alleged silence failed.

In light of *Olofsson*, California employers should heed two warnings. First, employers should avoid any actions which may be viewed as misrepresentations of their decisions regarding leave requests. Second, employers should be cognizant of their duty to respond to family leave requests within 10 days. While employers are not required to make an ultimate determination regarding the request within that window, action of some kind is required.

California Court Rules Against Employer in Employee Violence Case

Sylvia Ventura ("Ventura") worked for ABM Industries ("ABM") as a janitor. In December 2007, Ventura filed a lawsuit *(Ventura v. ABM Industries, Inc.)* against her supervisor ("Manzano"), alleging that Manzano harassed and committed an act of violence against her. The case went to trial on Ventura's claim for negligent supervision and hiring, and violation of Civil Code Section 51.7 ("Section 51.7"), which provides that "all persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of…specified characteristics, including sex." At trial, the jury found that Manzano committed violent acts against Ventura, that his perception of her sex was a motivating reason for his conduct, and that his conduct was a substantial favor in causing her harm.

On appeal, ABM argued that the cause of action for negligent hiring and supervision was barred by the doctrine of workers' compensation. The appellate court held that ABM had waived the issue because it never asked the trial court to rule on it. The court also found that Ventura had presented substantial evidence that ABM knew Manzano was sexually involved with some female employees, was harassing at least one other, and was drinking on the job, but did nothing. Thus, the verdict was

supported by substantial evidence, as a negligent hiring and supervision claim does not require the employer to know that the perpetrator had been violent before.

ABM also argued that Section 51.7 does not apply to employment cases. The appellate court disagreed, holding that a previous case, *Stamps v. Superior Court*, made it clear that Section 51.7 does apply in the employment context.

Finally, ABM argued that Section 51.7's references to threats of violence "because of" a person's sex means that the offending act must be based on hate and that there was no evidence of such hatred in this case because Manzano told Ventura that he loved her. The court held that hate is not an element of the offense, and even if it were, the court would reject the argument that Manzano's protestations of love mean there was no evidence of hate. According to the court, the evidence demonstrated that Manzano "loved" Ventura enough to attack and hurt her -- evidence from which a trier of fact could find hate.

This case demonstrates that employees may have another avenue of redress - Section 51.7 - available to them in the harassment context. Notably, Section 51.7 does not require employees to file an administrative charge or satisfy the "hostile work environment" standard.

<u>California Court Rules Against Employer in Executive Compensation Case</u>

Faigin v. Signature Group Holdings, Inc. presents a cautionary tale for employers wishing to utilize employment agreements containing generous severance provisions. Plaintiff Alan Faigin ("Faigin") worked as General Counsel and Chief Legal Officer for employer Fremont General. Faigin entered into an employment contract, which provided that he would be entitled to certain benefits if he was involved in an "involuntary termination" of his employment. The written employment contract defined an "involuntary termination" as including, among other things, a termination without cause or a significant change in Faigin's job duties. If discharged involuntarily, Faigin would receive a lump sum equal to three years of his base salary.

Faigin was eventually appointed interim President and Chief Executive Officer of FRC, a subsidiary of Fremont General. A short time after assuming these roles, Faigin was discharged by FRC. Faigin argued that his dismissal from his roles at FRC constituted an "involuntary termination" under the terms of his employment contract, entitling him to three years' salary (which exceeded $400,000 per year). FRC disagreed. Faigin sued FRC for breach of an implied-in-fact agreement to discharge his employment only for good cause. The jury found in favor of Faigin and awarded him $1.3 million in damages. The California Court of Appeal affirmed.

FRC contended that no implied-in-fact employment contract could arise between FRC and Faigin as a matter of law because Faigin's written employment contract with Fremont General exclusively governed his employment. While FRC argued that the employment contract was inapplicable to the current situation because FRC - the entity that discharged Faigin - was not a party to the agreement, Faigin presented evidence that FRC created an implied-in-fact employment contract whereby Faigin would only be discharged for good cause. As the court noted, an implied-in-fact employment contract can be established "from the totality of the circumstances, including the employer's personnel policies and practices, the employee's length of service, actions and communications by the employer reflecting assurances of continued employment, and practices in the relevant industry."

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The appellate court stated that because the agreement with Fremont General fixed the term of employment at three years and did not provide that Faigin's employment was at-will, the agreement was not inconsistent with the jury's finding that an implied-in-fact agreement existed between Faigin and FRC.

This case demonstrates how careful employers must be when drafting employment and executive compensation agreements.

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