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PETTIT KOHN INGRASSIA & LUTZ

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *November 2013*

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I.

LEGISLATIVE

California

New Law Increases Minimum Wage

Governor Jerry Brown signed into law AB 10 (Alejo), a bill increasing California's minimum wage from its current rate of $8.00 per hour to $9.00 per hour on July 1, 2014, and $10.00 per hour on January 1, 2016. These changes will affect various other aspects of wage and hour law, including overtime calculations and the thresholds for salaried exemptions, the retail inside sales exemption, and split shift premiums.

New Law Expands Scope of Paid Family Leave Program

Governor Jerry Brown signed into law SB 770 (Jackson), expanding the scope of California's Paid Family Leave ("PFL") program. Existing law provides up to six weeks of wage replacement benefits to employees who take time off to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a minor child within one year of the birth or placement of the child in connection with foster care or adoption. The new law, effective July 1, 2014, expands the scope of the PFL program to include time off to care for a seriously ill grandparent, grandchild, sibling, or parent-in-law, as defined.

II.

JUDICIAL

Federal

Ninth Circuit Affirms Certification of Class of Employees Who Signed On-Duty Meal Period Agreements

In *Abdullah v. U.S. Security Associates, Inc.*, the Ninth Circuit Court of Appeals affirmed an order certifying a meal break class of former and current employees ("Employees") of U.S. Security Associates ("USSA"), a private security guard company. The appellate court found that common issues of law or fact

predominated where the security guards were required to sign on-duty meal period agreements. The agreements were used by USSA because the majority of Employees worked at single post locations, which meant no other guards were on duty at the same time. Because Employees could not be relieved of their duties during meal periods, USSA required them to sign on-duty meal period agreements, providing for daily meal periods to be on-duty and paid.

Employees filed a class action complaint alleging that USSA violated California wage and hour laws by requiring Employees to work through their meal periods. On-duty meal periods are permissible only when the nature of the work prevents an employee from being relieved of all duties and the parties agree in writing to an on-the-job paid meal period. Employees successfully argued that common questions predominated and class certification was appropriate because USSA had a uniform policy of requiring them to work through their legally mandated meal periods. In opposing class certification, USSA argued that Employees' claims were not common because the "nature of the work" exception applied to USSA's single post location model, and an individualized analysis of each employee's work was required.

In an order upholding class certification, the Ninth Circuit held that USSA's "nature of the work" defense did not require an individualized, fact-specific analysis. Questions of law or fact were common to the class, given USSA's uniform policy of requiring Employees to sign the on-duty meal period agreements and evidence that the policy was implemented to require the on-duty meal breaks.

This case serves as a reminder that exceptions to the general requirement of an off-duty meal period will be narrowly construed, and the onus is on the employer to show that the work involved actually prevents the employee from being relieved of duty, even when the employee has signed a voluntary on-duty meal period agreement.

California

California Supreme Court Overrules Earlier Decision on Arbitration Agreement Containing a Berman Hearing Waiver

Plaintiff Frank Moreno ("Moreno") was previously employed by Sonic-Calabasas A, Inc. ("Sonic"). As a condition of employment with Sonic, Moreno signed an agreement requiring arbitration of all disputes arising out of the employment relationship. After his employment ended, Moreno filed an administrative claim for unpaid vacation pay with the Division of Labor Standards Enforcement ("DLSE," also known as the Labor Commissioner's Office). Such DLSE claims are tried in a "Berman hearing," an administrative hearing in front of a deputy labor commissioner.

Sonic filed a petition to compel arbitration of Moreno's wage claim pursuant to the arbitration agreement. The trial court denied Sonic's petition as premature, finding that as a matter of public policy, there must be a preliminary Berman hearing before Sonic could petition to compel arbitration. Sonic appealed, and the appellate court ruled in its favor, finding that Moreno was barred from pursuing his administrative wage claim with the DLSE.

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The California Supreme Court disagreed holding that an employer could not require an employee to waive the right to a Berman hearing as a condition of employment, thereby rendering arbitration agreements that included a waiver of a Berman hearing unconscionable and contrary to public policy. Following the 2011 decision, the United States Supreme Court granted review and remanded the case to the California Supreme Court for reconsideration in light of *AT&T Mobility LLC v. Concepcion*,[1] which reversed its 2011 decision. Finding that federal preemption applied, the California Supreme Court held that arbitration agreements containing a waiver of a Berman hearing are not categorically prohibited, "because compelling the parties to undergo a Berman hearing would impose significant delays in the commencement of arbitration." This, in turn would interfere with the "fundamental attribute" of arbitration, *i.e.*, streamlined proceedings and expeditious results. The Court ultimately held that such agreements may be enforced as long as they are not unconscionable.

The Court cautioned that an arbitration agreement with a Berman waiver may be unconscionable if it does not provide an employee with an accessible and affordable arbitral forum for resolving wage disputes. Because the trial court had not yet addressed the conscionability of the arbitration agreement between Moreno and Sonic, the California Supreme Court remanded the issue to the trial court to make this inquiry.

While employers may seek to require employees to waive their rights to a Berman hearing as a condition of employment, they should keep in mind that courts will still look closely at whether the arbitration agreement is unconscionable.

California Court of Appeal Finds Arbitration Agreement Enforceable, Even Without AAA Rules Attached

In *Peng v. First Republic Bank*, a California Court of Appeal clarified the permissible scope of an arbitration agreement under California law. It held that the arbitration agreement was neither procedurally nor substantively unconscionable where it: (1) required an employee to abide by American Arbitration Association ("AAA") rules (which were not attached); and (2) allowed an employer to unilaterally modify the agreement.

On March 26, 2010, Anna Peng ("Peng") received a written offer of employment from First Republic Bank ("First Republic") to serve as an assistant manager. Included in her offer was an arbitration agreement ("the Agreement") requiring any employment-related claims to be resolved by final and binding arbitration. Four days after receiving her offer, Peng signed the Agreement.

Peng's employment ended on May 23, 2011. Thereafter, she filed suit against First Republic alleging various employment-related claims. First Republic moved to compel arbitration. Peng opposed the motion, arguing that the Agreement was both procedurally and substantively unconscionable because: (1) Peng had no meaningful opportunity to negotiate the Agreement's terms; and

[1] *Concepcion* held that the Federal Arbitration Act preempts state laws and state court decisions that are "hostile" to arbitration provisions and that arbitration agreements should be enforced according to their terms.

(2) the Agreement unfairly gave First Republic the unilateral authority to modify or terminate it without notice. The trial court ruled in favor of Peng, holding that the Agreement was unconscionable and unenforceable.

The California Court of Appeal disagreed. With respect to procedural unconscionability, the appellate court found that the Agreement's requirement that the parties arbitrate under the rules of the AAA was not improper, and failure to attached AAA rules was not improper. Similarly, the court found no substantive unconscionability in the language permitting First Republic to unilaterally modify the Agreement. The court noted that substantive unconscionability exists only when an arbitration agreement is unreasonably one-sided (*e.g.* an employee's claims are subject to arbitration, but the employer's claims are not). Moreover, First Republic was still bound by the requirement that any unilateral changes be made in the exercise of good faith and fair dealing.

In light of *Peng*, absent a showing of bad faith, arbitration agreements meeting minimum "conscionability" standards will generally be upheld.

This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Christine Mueller, Heather Stone, Ryan Nell or Lauren Bates at (858) 755-8500; or Andrew L. Smith, Jennifer Weidinger or Tristan Mullis at (310) 649-5772.

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