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# EMPLOYMENT LAW UPDATE

*Relationship-Driven Results* *December 2013*

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## JUDICIAL

### Federal

Ninth Circuit Denies Employer's Petition to Compel Arbitration Pursuant to "Unconscionable" Arbitration Agreement

In *Chavarria v. Ralphs Grocery Company*, the Ninth Circuit Court of Appeals affirmed the decision of the district court denying the employer's petition to compel arbitration. The court found that the arbitration agreement at issue was both procedurally and substantively unconscionable.

Zenia Chavarria ("Chavarria") filed an action against Ralphs Grocery Company ("Ralphs") alleging violations of the California Labor Code. Chavarria asserted claims on behalf of herself and a proposed class of other Ralphs employees. Ralphs moved to compel arbitration of her individual claim pursuant to its arbitration agreement ("Agreement").

The court found that the Agreement was procedurally unconscionable for several reasons. First, consent to the Agreement was a condition of applying for employment, and the Agreement was presented on a "take it or leave it" basis with no opportunity for Chavarria to negotiate its terms. Additionally, the Agreement stated that no signature was required in order for its terms to apply, which bound Chavarria to its terms regardless of whether she actually signed it. Finally, the terms of the Agreement were not provided to Chavarria until three weeks after she had agreed to be bound by it. The court noted that the degree of procedural unconscionability is enhanced when a contract binds an individual to later-provided terms.

The court also found that the Agreement was substantively unconscionable. First, it did not provide an adequate procedure for the selection of a neutral arbitrator. The Agreement explicitly prohibited the use of an arbitrator from the American Arbitration Association or the Judicial Arbitration and Mediation Service, which have established rules and procedures to select a neutral arbitrator. Instead, the Agreement provided that each party would propose a list of three

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arbitrators, the parties would alternate striking one name from the other party's list until only one name remained (with the party who had not demanded arbitration making the first strike), and the lone remaining arbitrator would adjudicate the claim. The court noted that this process would always produce an arbitrator proposed by Ralphs in employee-initiated arbitration proceedings. Second, the court was troubled by the Agreement's requirement that the arbitrator must, at the outset of the arbitration proceedings, apportion the arbitrator's fees between Ralphs and the employee regardless of the merits of the claim. The court noted that this provision imposed significant costs on the employee up front and precluded the employee from recovering those costs, making many claims impracticable.

In light of *Chavarria*, employers should review their arbitration agreements to ensure that they provide for a neutral arbitrator and do not impose unconscionable costs on the employee. Employers should also require employees to affirmatively consent to (*i.e.*, sign) the arbitration agreement at the outset of their employment, and ensure that employees have an opportunity to review and discuss the agreement before they sign.

## California

### Court of Appeal Allows Claim for "Associational Discrimination" But Rejects Retaliation Claim Based on Leave Requests

A California Court of Appeal held in *Rope v. Auto-Chlor System of Washington, Inc.* that an employee who intended to donate a kidney to his ailing sister was a member of a protected class based on his association with her, and could therefore maintain a claim for "associational discrimination."

In September 2010, Scott Rope ("Rope") was hired as a branch manager for defendant Auto-Chlor System of Washington, Inc. ("Auto-Chlor"). At the time he was hired, Rope informed Auto-Chlor that he was scheduled to be an organ donor in February 2011 for his sister, who required a kidney transplant. Rope later informed Auto-Chlor managers and human resources personnel that he would need time off to recover after he donated the kidney.

In November 2010, Rope requested 30 days paid leave to recover from his kidney donation pursuant to the California Labor Code. He also informed Auto-Chlor that he might need additional accommodations after he returned to work. Auto-Chlor human resources personnel informed Rope that he could take an unspecified amount of unpaid leave, but did not respond to his other requests.

From September to December 2010, Rope received satisfactory performance reviews with no disciplinary problems. On December 30, 2010, however, Rope was discharged, purportedly for poor performance. Rope donated a kidney to his sister as planned in February 2011.

Thereafter, Rope filed a complaint for retaliation, discrimination and wrongful termination, among other claims. Auto-Chlor asked the trial court to dismiss the complaint, which it did. The appellate court held that Rope could not make a claim for retaliation under the Fair Employment and Housing Act ("FEHA") on the basis of his request for paid leave, as such requests do not

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constitute a "protected activity." However, Rope *could* maintain claims for discrimination and wrongful termination, as the FEHA prohibits discrimination against employees on the basis of their association with, or perceived association with, a disabled person. According to the court, a wide array of situations could give rise to associational discrimination: through expense incurred by the employer as a result of that association; through the possibility that the employee may himself become a part of a protected class by way of the association (*e.g.*, communicable diseases); and through the employee being distracted and therefore less effective in the workplace as a result of a relative's disability. In this case, Rope set forth facts indicating his taking leave for the purpose of donating a kidney to his sister would cause Auto-Chlor to incur expense it otherwise would not have, thus fitting into the "expense" category of associational discrimination.

The *Rope* case exemplifies the breadth of protection provided to employees by the FEHA, and the many and varied ways in which that protection can be applied. Employers are encouraged to take a broad and inclusive approach when dealing with employees who request time off for health-related issues (or for the purpose of assisting family members with similar issues) in order to avoid the potential liability that may result from an overly narrow interpretation of the law.

## Court of Appeal Reaffirms Standard for Class Certification in Wage and Hour Cases

In *Benton v. Telecom Network Specialists, Inc.*, a California Court of Appeal reaffirmed the class certification standard previously set forth in *Brinker Restaurant Corp. v. Superior Court*, wherein the California Supreme Court held that class certification is generally appropriate where an employer's internal policy fails to authorize and permit employees to take legally compliant, off-duty meal and rest breaks.

Telecom Network Specialists ("TNS") provides installation and maintenance services for telecommunications companies. Of the technicians working on TNS projects, approximately fifteen percent are TNS employees. The remaining eighty-five percent are assigned to TNS through various staffing agencies. In June 2006, Lorenzo Benton ("Plaintiff") filed a class action lawsuit alleging a series of wage and hour violations, including unpaid overtime and denial of meal and rest breaks. In April 2012, Plaintiff filed a motion to certify the class, which purportedly encompassed all TNS technicians, including those assigned from the staffing agencies. In support of the motion, Plaintiff offered evidence that all TNS technicians worked solely under TNS' direction and utilized the TNS timekeeping system.

In opposition to the motion, TNS offered declarations from employees indicating that the technicians worked in a variety of different job positions and pursuant to a range of varying employment practices. Moreover, most technicians worked under minimal supervision, if any at all, and had discretion as to the timing of their meal and rest breaks. TNS also argued that because the majority of technicians were contracted through staffing agencies, the putative class members' claims were not subject to common proof because the staffing agencies had adopted a variety of different meal and rest period practices. The trial court agreed with TNS, concluding that the divergent practices maintained by the staffing agencies

necessitated an individualized analysis, and thus destroyed the benefit of class treatment. Plaintiff appealed and the California Court of Appeal reversed the trial court's ruling.

In its holding, the appellate court provided an extensive discussion of *Brinker*, as well as other cases wherein California courts held that class certification was warranted where the plaintiff alleged an illegal, class-wide practice by the employer. Using this framework, the court rejected the trial court's ruling, holding that variations in experiences by putative class members impacted only their damages, not Plaintiff's theory of the case. According to the appellate court, the relevant question with respect to class certification was whether TNS had instituted lawful policies, not whether the technicians had actually been denied meal breaks, rest breaks, or overtime pay. Because Plaintiff presented evidence that TNS had failed to adopt a policy of authorizing and permitting its technicians to take meal and rest breaks, class treatment was appropriate.

The *Benton* case serves as an important reminder to employers to ensure that their meal and rest break policies are legally compliant. Employers who do not have legally compliant policies are now more likely to lose a challenge to a class certification motion.

*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 Jennifer Weidinger or Tristan Mullis at (310) 649-5772.*

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