

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

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## I.

### **LEGISLATIVE/ADMINISTRATIVE**

#### **Federal**

##### **U.S. Citizenship and Immigration Services Publishes New I-9 Form**

The U.S. Citizenship and Immigration Services (“USCIS”) has published a revised Employment Eligibility Verification Form I-9, which all employers are required to complete for each new employee hired in the United States. The revised form contains several improvements, including reformatting to reduce errors and clearer instructions. Although employers are technically required to begin using the new form immediately, the USCIS has indicated that employers may use older versions of the form until May 7, 2013. Employers do not need to complete a new form for current employees if a properly completed, previous version of the form is already on file. The new form can be found on the USCIS’s website at [www.uscis.gov](http://www.uscis.gov).

#### **California**

##### **California Legislature Considers Raising the Minimum Wage**

The California Legislature is currently considering AB 10 (Alejo), a bill that would raise California’s minimum wage from \$8.00 per hour to \$8.25 per hour in 2014, \$8.75 per hour in 2015, and \$9.25 per hour in 2016. The bill further provides for an adjustment to the hourly minimum wage beginning on January 1, 2017, and annually thereafter, to maintain employee purchasing power. The automatically adjusted minimum wage would be calculated using the California Consumer Price Index.

This bill is currently pending before the Assembly’s Labor and Employment Committee.

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## Proposed Bill Would Eliminate Penalties for Employers Who Promptly Resolve Claims Brought Before the Labor Commissioner

Under existing law, the California Labor Commissioner is authorized to take assignments of certain claims for enforcement. The Legislature is currently considering AB 228 (Logue), which would authorize the Labor Commissioner to waive any penalties against an employer if the employer promptly resolves the claim. In order for the employer to avoid penalties, two conditions would have to be met: (1) the Labor Commissioner must determine that the claim is the first of its type against the employer; and (2) the claim must be resolved within thirty days of the issuance to the employer of a notice stating that the claim has been verified and that applicable penalties under state law will be waived if the claim is resolved within the thirty-day period.

This bill is currently pending before the Assembly's Labor and Employment Committee.

## California Legislature Considers Increasing Workplace Flexibility

Existing law, with certain exceptions, requires that overtime premiums be paid if an employee works more than eight hours in a single work day or forty hours in a single work week. Employers may implement alternative workweek schedules providing for workdays no longer than ten hours within a forty hour workweek only if such schedules are approved by two-thirds of the employees in a work unit.

SB 607 (Berryhill), which is currently under consideration by the California Senate's Labor and Industrial Relations Committee, would permit an individual non-exempt employee to request an employee-selected flexible work schedule providing for workdays up to ten hours per day within a forty hour workweek, and would allow the employer to implement this schedule for the employee without a vote by the work unit and without the obligation to pay the employee overtime compensation for those additional hours in a workday.

## Legislation Again Attempts to Expand the FEHA to Protect "Familial Status"

California's Fair Employment and Housing Act ("FEHA") prohibits employers from discriminating against employees on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation.

SB 404 (Jackson) would expand the FEHA to include "familial status" as a protected class. With the inclusion of "familial status," the bill would protect "an individual who provides medical or supervisory care to a family member," as well as any employee "perceived" as or "associated with" such an individual. "Family member" is further defined as a child, parent, spouse, domestic partner, parent-in-law, sibling, grandparent, or grandchild. This bill is similar to previously proposed legislation.

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The bill passed the Senate Judiciary Committee and is currently held in the Senate Appropriations Committee suspense file.

## II.

### JUDICIAL

#### California

#### California Court Discusses Arbitration Waivers and Notice Provisions

In *Zamora v. Lehman*, a California Court of Appeal clarified employer and employee rights with respect to two provisions in an employment agreement. Specifically, the court held that: 1) the right of a party to compel arbitration was barred by that party engaging in discovery; and 2) the parties were permitted to enforce a notice provision, regardless of the applicable statutes of limitation, regarding the timeframe within which claims must be brought.

Stephen C. Lehman (“Lehman”), Eric R. Weiss (“Weiss”), and Daniel M. Yukelson (“Yukelson”) were executives at e4L, Inc. (“e4L”), a direct marketing company responsible for nationally broadcasting over 300,000 “infomercials” each week. Following a series of business transactions facilitated by Lehman, Weiss, and Yukelson, e4L declared bankruptcy on March 5, 2001. While certain improper acts and omissions of the executives were discovered on November 22, 2002, e4L’s bankruptcy trustee, Nancy Hoffmeier Zamora (“Zamora”), did not file suit against the men until December 19, 2005.

Pursuant to the arbitration clause in each of their employment agreements, Lehman, Weiss, and Yukelson moved to compel arbitration in late 2007. While Zamora argued that the motions were time-barred, all three executives argued that they had forgotten about the existence of the arbitration clauses and, therefore, their delay in moving to compel was justified. The trial court agreed with Lehman, Weiss, and Yukelson and granted all three motions. The court of appeal, however, ruled that Lehman and Weiss had already engaged in discovery in the civil lawsuit, thereby waiving their right to compel arbitration. Yukelson, on the other hand, had chosen to pursue settlement rather than engage in discovery. Thus, his right to compel arbitration was not waived.<sup>1</sup>

In 2011, Lehman and Weiss moved for summary judgment, contending that the action was time-barred under their employment agreements, each of which included a clause requiring that claims be presented to the other party within one year of the date claimant knew, or should have known, about the circumstances giving rise to the claim. Based on Zamora’s multi-year delay in notifying Lehman and Weiss of the corporation’s claims against them, both executives filed motions for summary judgment. The court of appeal held that the parties had a legal right to contractually shorten the timeframe within which a claimant must notify the respondent of the claim. Thus, using the notice provision to shorten the statute of

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<sup>1</sup> Zamora declined to arbitrate the claims against Yukelson and those claims were therefore dismissed.

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limitations was permissible, and summary judgment was affirmed in favor of Lehman and Weiss.

The *Zamora* decision offers two lessons for California employers. First, in the event an employer becomes embroiled in litigation, if it desires to enforce a contractual arbitration agreement, it should seek to do so immediately, and should refrain from engaging in discovery until it has attempted to compel arbitration. Second, employers may be able to contractually shorten the window of time within which employees must give notice of certain types of claims, but should proceed with caution when doing so in light of previous California precedent limiting or prohibiting this practice.

*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, Hazel Ocampo, Heather Stone or Ryan Nell at (858) 755-8500; or Andrew L. Smith or Jennifer Weidinger at (310) 649-5772.*