PETTITKOHN
PETTIT KOHN INGRASSIA & LUTZ

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *May 2014*

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I.

LEGISLATIVE UPDATE

Comments on Proposed CFRA Amendments Due by June 2nd

California's Fair Employment and Housing Council ("FEHC") is currently proposing amendments to the California Family Rights Act ("CFRA") regulations. Many of the proposed amendments modify the current CFRA regulations to conform to existing federal Family and Medical Leave Act ("FMLA") regulations. Other proposed amendments make clarifications to existing regulations or deal with situations unique to California – such as the interaction between pregnancy disability leave laws and CFRA.

The first public hearing on the proposed amendments occurred on April 7, 2014. The second public hearing is scheduled for June 2, 2014, at 10 a.m. The written comment period closes at 5 p.m. on June 2, 2014.

II.

JUDICIAL UPDATE

Court of Appeal Strikes Down Arbitration Agreement

In *Carmona v. Lincoln Millennium Car Wash*, the Court of Appeal affirmed an order denying Lincoln Millennium Car Wash and Silver Car Wash's ("Defendants") petition to compel arbitration. The appellate court affirmed on the ground that the arbitration agreement was unconscionable.

Plaintiffs Esteban H. Carmona, Marcial H. Carmona, Pedro Cruz, and Yoel Isail Matute Casco ("Plaintiffs") worked for Defendants. Plaintiffs each signed an employment agreement containing an arbitration clause, a stand-alone confidentiality clause, and a confidentiality subagreement, which included an enforceability clause (collectively, the "Arbitration Agreement"). Plaintiffs were given what they believed was an employment application, with some parts written in Spanish and other parts in English. However, Plaintiffs spoke Spanish as their primary language and had difficulty speaking and reading English.

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Plaintiffs filed a putative class action against Defendants for wage and hour violations. In response, Defendants filed a petition to compel arbitration. The trial court denied the petition, finding the Arbitration Agreement unconscionable. Unconscionability is comprised of both procedural and substantive elements, with the former focusing on "oppression" or "surprise" due to unequal bargaining power, the latter on "overly harsh" or "one-sided" results. A court may refuse to enforce a contract or any clause of a contract that it finds unconscionable, so long as both elements are present. However, both elements need not be present to the same degree; the more substantively unconscionable the contract term, the less evidence of procedural unconscionability is required, and vice versa.

In affirming the denial order, the Court of Appeal determined that the Arbitration Agreement was procedurally unconscionable. First, the agreement was drafted by Defendants and presented to Plaintiffs on a "take it or leave it" basis, and Plaintiffs believed they had to sign the employment agreements to be permitted to work at the car wash. Moreover, though the Arbitration Agreement referenced the American Arbitration Association's rules, Defendants did not provide Plaintiffs with a copy of those rules. Additionally, the Arbitration Agreement did not explain what arbitration is, nor did anyone explain that, by signing, Plaintiffs waived their right to a jury trial. Further, one plaintiff was given only a few minutes to review the document. Finally, though Plaintiffs could not read English, Defendants did not translate the subagreement or the enforceability clause into Spanish. Therefore, as both oppression and surprise were present, the court concluded that the arbitration agreement was procedurally unconscionable.

The appellate court then determined that the Arbitration Agreement was also substantively unconscionable because it lacked mutuality—that is, it imposed limitations only on the employee, but not on the employer. First, the arbitration agreement required that Plaintiffs submit their disputes to arbitration, while allowing Defendants to choose to arbitrate or go to court. The arbitration clause states that "any dispute" arising out of employment must be resolved through arbitration; but only Plaintiffs initialed that provision, and only Plaintiffs signed the employment agreements. Moreover, the enforceability clause provides that breaches of the confidentiality subagreement may be presented "to either a court or binding arbitrator." Since only Defendants would ever seek to enforce the confidentiality agreement, this clause gave only Defendants a choice of forum. Second, the enforceability clause permits Defendants to recover attorneys' fees and costs whenever they institute arbitration or litigation, but contains no reciprocal provision enabling Plaintiffs to recover attorneys' fees and costs. Third, the Arbitration Agreement presumes harm to Defendants in their confidentiality claims. The enforceability clause states that disclosure or breach of the confidentiality subagreement "will cause immediate, irreparable harm to [Defendants]," but provides no reciprocal presumption of harm favoring Plaintiffs in their claims. Finally, the stand-alone confidentiality clause requires Plaintiffs to discuss "problems or concerns with anything related to" their employment before disclosing any information to outsiders, including attorneys or courts. The arbitration agreement contains no corresponding obligation for Defendants to discuss its disputes with Plaintiffs prior to proceeding to litigation or arbitration. Therefore, as the Arbitration Agreement lacked mutuality in many respects, the court deemed it substantively unconscionable.

The Court of Appeal determined that the trial court did not abuse its discretion in determining that the arbitration agreement was permeated by unconscionability. Because the many defects discussed above demonstrated a systemic lack of mutuality favoring Defendants, the trial court did not err by refusing to sever the unconscionable provisions. Therefore, the court affirmed the order denying Defendants' petition to compel arbitration.

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