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JUDICIAL UPDATE

Federal

Ninth Circuit Rules that Home Delivery Drivers are Not Independent Contractors

In *Ruiz v. Affinity Logistics Corp.*, the Ninth Circuit Court of Appeals held that Affinity Logistics (“Affinity”) violated California law by misclassifying its home delivery drivers as independent contractors.

Prior to working for Affinity, Fernando Ruiz (“Ruiz”) worked as a driver for Penske Logistics, a furniture delivery company. Ruiz was classified as an employee throughout the time he worked for Penske. In 2003, Affinity became responsible for the services that had previously been provided by Penske. Affinity told Ruiz and the other drivers that if they wished to work for Affinity, they would have to do so as independent contractors. Affinity advised them that they would need a fictitious business name, a business license, and a commercial checking account. Affinity assisted the drivers in completing all necessary forms and procedures to accomplish these tasks. Affinity also required the drivers to sign an independent contractor agreement that automatically renewed from year to year but could be terminated for any reason on 60 days’ notice. Affinity’s drivers leased their trucks from Affinity and were required to leave them at Affinity during non-working hours.

Ruiz filed a class action lawsuit against Affinity, alleging that Affinity misclassified its drivers as independent contractors rather than employees and thereby deprived them of various benefits afforded only to employees, including sick leave, vacation time, and holiday pay. Following a bench trial, the district court concluded that the drivers were properly classified as independent contractors. The drivers appealed. The Ninth Circuit held that the district court’s legal conclusion was incorrect.

The Ninth Circuit reasoned that, under California law, the primary consideration in determining whether a worker is an employee or an independent contractor is the degree to which the principal has the right to control the manner and means by which the work is accomplished. While the right of control is the most important component of the analysis, other factors to consider include: (1) whether the worker is engaged in a distinct occupation or business; (2) whether the type of work performed is typically done under the direction of a principal or by a specialist without supervision; (3) the skill required in the particular occupation; (4)

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whether the principal or the worker supplies the tools and place of work; (5) the length of time for which services are to be rendered; (6) whether or not the work is part of the regular business of the principal; and (7) whether or not the parties believe they are creating the relationship of employer-employee.

In analyzing these factors, the Ninth Circuit held that Affinity’s drivers were employees. The court determined that Affinity substantially controlled the manner and means of its drivers’ performance of their duties. For example, Affinity controlled the flat “per stop” rate paid to the drivers. In addition, Affinity decided the drivers’ schedules and set their daily routes each day, with specific instruction not to deviate from the order of deliveries. Moreover, Affinity controlled the drivers’ appearance. Finally, Affinity required its drivers to comply with a detailed procedures manual and closely monitored and supervised their work. The Ninth Circuit therefore determined that Affinity retained and exercised the right to control the drivers’ work.

The Ninth Circuit held that the analysis of the additional factors further supported a finding that the drivers were employees. Affinity’s drivers did not have distinct occupations or businesses apart from their work for Affinity. Also, the type of work the drivers provided was not a specialized or unique skill commonly performed by an independent contractor. The only reason the drivers established the formality of separate businesses was because Affinity required them to do so. The Ninth Circuit emphasized that the drivers did not perform work without supervision because Affinity closely monitored and directed their work. Furthermore, the drivers’ work was a regular part of Affinity’s primary business – providing home delivery services. Finally, the Ninth Circuit acknowledged that the drivers and Affinity understood their working arrangement to be an independent contractor arrangement rather than an employment relationship. However, the Ninth Circuit dismissed this factor, reasoning that the parties’ label is not dispositive and that the parties’ conduct in fact revealed an employment relationship.

The *Ruiz* decision serves as a reminder that improper classification carries substantial risk for employers. Employers who have independent contractor arrangements should carefully review these classifications to ensure that these workers are properly classified.

California

California Supreme Court Upholds Enforceability of Class Waivers in Arbitration Agreements But Not Private Attorney General Act Waivers

The California Supreme Court issued its highly anticipated opinion, *Iskanian v. CLS Transportation*. *Iskanian* addresses the enforceability of class and representative action waivers in employment arbitration agreements under California law following the United States Supreme Court’s decision in *AT&T Mobility v. Concepcion*. Positively for California employers, the Court held, consistent with *Concepcion*, that class action waivers in arbitration are enforceable. In addition, however, the Court also held that Private Attorney General Act (“PAGA”) representative action waivers in arbitration agreements are not enforceable. Thus, through properly drafted arbitration agreements, employers

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effectively can prevent class action claims alleging wage and hour violations, but cannot bar representative claims brought under PAGA.

The California Supreme Court held that its previous precedent was effectively overruled by *Concepcion* and is preempted by the Federal Arbitration Act (“FAA”). As a result, class action waivers in employment arbitration agreements are now generally enforceable under California law. The agreement at issue in *Iskanian* included not only a waiver of class claims in arbitration, but also a waiver of representative claims. In *Iskanian*, the Court analyzed whether a waiver of representative claims under PAGA was enforceable. The Court reasoned that the employee’s right to bring a PAGA action is an unwaivable statutory right because that statute is intended for public benefit and an individual cannot, by private agreement, waive that public benefit.

The Court did not resolve how the action would proceed on remand, given that some claims were subject to arbitration while the PAGA claim was not. In light of *Iskanian*, California employers should review their arbitration agreements to optimize enforceability.

California Supreme Court Holds Unauthorized Employees Can Recover Back Pay

In *Salas v. Sierra Chemical Co.* the California Supreme Court held that an employee who fraudulently obtained employment through use of someone else’s social security number may still pursue employment discrimination claims stemming from termination and recover damages against the employer, including back pay for the period when the employee was not authorized to work and did not actually perform work. The Court held that federal immigration law does not preempt this result.

Vicente Salas (“the Employee”) applied for employment with Sierra Chemical (“the Employer”) in 2003 and was thereafter hired. In compliance with its legal obligations, the Employer required the Employee to complete a form I-9 as well as a W-4. The Employee completed these forms by providing a resident alien card and a social security card. From 2003 to 2005, on a few occasions, the Employee was subject to seasonal layoffs by the Employer on a few occasions, but was later recalled to work. Each time the Employee was recalled to work, he provided the same social security number he provided upon hire. In 2006, the Employee injured his back at work. The Employee sought medical treatment and returned to work with temporary work restrictions, which were accommodated by the Employer. A few months later, the Employee was released to full duty.

Later the same year, the Employee reinjured his back and filed a workers’ compensation claim. The Employee performed modified work until the winter of 2006 when the Employee was subject to another seasonal layoff. In May 2007, the Employer notified the Employee and other production workers that it was recalling them. The Employee’s supervisor also told the Employee to bring a doctor’s note indicating he was released to return to work. The Employee contacted his supervisor and told him that he had not been released to return to full duty but that he had an appointment in June to obtain the release. The Employee’s supervisor agreed to hold his job open for him until that time. The Employee’s supervisor never heard from the Employee again.

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In August 2007, the Employee sued the Employer, alleging claims for failure to accommodate a disability in violation of the California Fair Employment and Housing Act, and for unlawful refusal to rehire him in retaliation for filing a workers' compensation claim. Two years into the litigation, the Employer learned that the Employee had falsified his employment eligibility documentation and that he was not authorized to work in the United States. The Employer filed a motion for summary judgment, arguing that it was entitled to judgment as a matter of law on the Employee's causes of action based on the doctrines of after acquired evidence and unclean hands. The trial court denied the Employer's motion, but was then directed by the court of appeal to grant the motion. After judgment was entered for the Employer, the Employee appealed. The court of appeal again held that the Employee's claims were barred by the doctrines of after acquired evidence and unclean hands. The California Supreme Court granted review and reversed the judgment in favor of the Employer, holding that the doctrines of after acquired evidence and unclean hands did not operate to completely bar the Employee's claims.

The Court held that the doctrines of after acquired evidence and unclean hands may operate to reduce an employee's damages and/or preclude reinstatement, but that they are not a complete defense to an employee's claims. The Court further stated that these doctrines generally preclude recovery of lost wages from the point of the employer's discovery of the employee's misconduct forward, but that the doctrines do not bar recovery of damages for the period of time prior to the employer's discovery of the information. In the case of an employee who is fired and later sues, and during the litigation the employer discovers that the employee fraudulently obtained employment through use of someone else's social security number, the employee would still be entitled to recover lost wages for the time period from termination until the employer discovered the fraud.

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, Lauren Bates or Jennifer Suberlak at (858) 755-8500; or Jennifer Weidinger, Tristan Mullis or Andrew Chung at (310) 649-5772.

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