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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *September 2014*

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I.

LEGISLATIVE UPDATE

Governor Brown Signs Bill Mandating Paid Sick Leave in California

Earlier this month, Governor Jerry Brown signed a bill requiring California employers to provide paid sick leave to their employees beginning July 1, 2015.

The Healthy Workplaces, Healthy Families Act of 2014 requires employers to provide paid sick leave to employees who work 30 or more days in a calendar year. Paid sick leave will accrue at a minimum rate of one hour for every 30 hours worked, and an employee may begin using paid sick leave beginning on the 90th calendar day of employment.

Employers may limit an employee's use of paid sick leave to 24 hours or three sick days in each calendar year. Employers may set a minimum increment of at least two hours for the use of paid sick leave, which can be used for the personal illness or preventive care of the employee or the employee's family member, or to recover from domestic violence, sexual assault, or stalking. An employee will be required to provide his or her employer with reasonable advance notification of the need to use paid sick leave if the need is foreseeable or "as soon as practicable" if it is not foreseeable.

Accrued paid sick leave will carry over to the following year of employment, but employers are entitled to cap an employee's accrual at 48 hours or six days. Employees are not entitled to a payout of accrued but unused paid sick leave upon separation from employment. However, if an employee is rehired within one year from the date of separation, any previously accrued but unused leave must be reinstated.

An employer will be required to maintain records of its employees' accruals and use of paid sick leave for at least three years. The notice provided to an employee at the beginning of employment pursuant to the Wage Theft Prevention Act must include notice of the employee's right to paid sick leave. Moreover, employers must provide each employee with a notice of the amount of paid sick leave or paid time off available to the employee on the employee's itemized wage statement, or in a separate writing provided on each pay date. Employers must also display a poster created by the State Labor Commissioner notifying employees of their paid sick leave rights. Employers are prohibited from retaliating against an

employee for using paid sick leave, filing a complaint with the Labor Commissioner alleging retaliation, or cooperating in an investigation of an alleged violation by the employer.

Employers that already provide paid sick leave or paid time off that satisfies the new law's requirements are not required to provide any additional paid sick leave. The new law exempts in-home support workers, most employees covered by collective bargaining agreements that provide paid sick leave or paid time off, and construction industry employees covered by collective bargaining agreements entered into before January 1, 2015, or that expressly waive the requirements of the new law.

Employers should immediately begin making arrangements to comply with the law. Employers with existing paid sick leave or paid time off policies should ensure their existing plans comply with the law, or adjust those policies as necessary.

New San Diego City Ordinance Raises Minimum Wage and Requires Paid Sick Leave

The San Diego City Council has approved an ordinance raising San Diego city's ("City") minimum wage to $9.75 per hour in January 2015; $10.50 per hour in January 2016; and $11.50 per hour in January 2017. Thereafter, the minimum wage will be adjusted annually for inflation.

The ordinance also requires employers to provide employees with one hour of "earned sick leave" for every thirty hours worked within the geographic boundaries of the City; however, employers are not required to provide employees with this leave in less than one-hour increments for a fraction of an hour worked.

"Earned sick leave" must be compensated at the same hourly rate or other measure of compensation as employees otherwise earn from their employment. Such leave will begin to accrue at the commencement of employment or on April 1, 2015, whichever is later, and employees are entitled to begin using their leave on the ninetieth calendar day following commencement of their employment or on July 1, 2015, whichever is later. After the ninetieth calendar day of employment or after July 1, 2015, whichever is later, employees may use their "earned sick leave" as it is accrued.

Employees may use their "earned sick leave" for several enumerated reasons, including, but not limited to, for physical or mental illness or injury, to obtain medical treatment, and to provide care to an ill or injured family member. While employers may limit an employee's use of "earned sick leave" to forty hours per year, they must allow the employee to continue to accrue such leave; additionally, earned but unused leave must be carried over to the following year.

Employers who already provide paid leave (including paid time off, paid vacation, or paid personal days) sufficient to meet the above-referenced leave requirements are not required to provide additional "earned sick leave" to employees.

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Employers who violate the ordinance are subject to civil penalties. The ordinance additionally creates a private right of action for aggrieved employees.

The new ordinance applies to all private sector employers, but the minimum wage provisions apply only to individuals who perform at least two hours of work within the geographic boundaries of the City during one or more calendar weeks of the year.

Although San Diego Mayor Kevin Faulconer initially vetoed the new ordinance, the City Council overrode the veto.

II.

JUDICIAL UPDATE

Employers Must Reimburse Employees Who are Required to Use Personal Cell Phones for Work

In *Cochran v. Schwan's Home Service, Inc.*, a California appellate court held that when employees are required to use their personal cell phones for work-related calls, the employer must reimburse employees for a reasonable percentage of their cell phone bills. This rule applies regardless of whether employees have cell phone plans with unlimited minutes.

A putative class action was filed against Schwan's Home Service, Inc. on behalf of 1,500 customer service managers who were not reimbursed for work-related use of their personal cell phones. The trial court denied class certification, reasoning that some employees' cell phone bills might be paid by a relative, friend, or other third person, and that employees may or may not have purchased different cell phone plans because of work-related calls. For these reasons, the trial court determined that the class lacked commonality, and class treatment was improper because the analysis required an individualized inquiry of each employee's cell phone plan and payments.

The appellate court held that the trial court's analysis was erroneous. Under Labor Code Section 2802 ("Section 2802"), an employer must reimburse employees for all necessary expenditures incurred in direct consequence of the discharge of their duties. Under Section 2802, an employer must always reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone. It does not matter whether the employee's phone bill is paid by a third person, or at all. Nor does it matter that the employee never incurred additional charges for work use, or never changed plans to accommodate work use. To bring a claim under Section 2802, an employee need only show that he or she was required to use a personal cell phone to make work-related calls, and was not reimbursed. The appellate court ordered the trial court to reconsider the motion for class certification in light of this interpretation of Section 2802.

Unless the *Cochran* case is reviewed by the California Supreme Court, this decision may fuel a new wave of litigation under Section 2802. Any employer that requires employees to use their own devices (including cell phones, personal

laptops, and tablets) for work should immediately review its policy on expense reimbursement.

California Court of Appeal Refuses to Compel Arbitration Based Upon a Deficient Arbitration Agreement

In 1996 Karl Knutsson ("Knutsson") began offering programming on consumer electronics under the name Kurt the Cyber Guy. By 2008, his broadcasts could be seen on numerous television stations and across the internet. That year, Knutsson contracted with KTLA, Inc. ("KTLA"), a Los Angeles area television station, whereby (among other provisions) Knutsson would be able to utilize KTLA's studio and production space in exchange for reduced syndication fees.

Knutsson memorialized this agreement by entering into a five year personal services contract ("PSA") with KTLA. The PSA made specific reference to a collective bargaining agreement ("CBA") between Knutsson's union and KTLA. Included within the CBA was a grievance and arbitration provision which required allegedly aggrieved employees to follow a three step grievance process. Step one required the union or employee to resolve a grievance through informal discussion with the employee's supervisor. Step two permitted the union to present the grievance to the employee's department manager. Step three permitted the union to initiate a binding arbitration.

Three years into the term of the PSA, KTLA notified Knutsson that it would no longer be utilizing his services and immediately replaced him with another consumer electronics host. Based upon this abrupt change, Knutsson filed suit against KTLA, alleging breach of contract, age discrimination, unfair business practices, and misappropriation of likeness. KTLA moved to compel arbitration, claiming that, since Knutsson's PSA referenced the CBA, and inherently its grievance and arbitration clause, arbitration was compulsory. Knutsson opposed the motion and the trial court sided with Knutsson, declining to compel arbitration.

The Court of Appeal affirmed the lower court's ruling. While KTLA argued that Knutsson had failed to follow the grievance procedure which ultimately would have culminated in arbitration, the appellate court disagreed. It held that the arbitration agreement existed merely between the *union* and KTLA. As the court explained: "[t]he collective bargaining agreement does not grant a union member the power to compel defendant to arbitrate a dispute. Conversely [KTLA] may only compel the union to arbitrate, not a member of the rank and file." Based upon this disparity, the appellate court refused to allow it to compel arbitration.

While KTLA argued that Knutsson should have exhausted the grievance process prior to compelling arbitration, the station forfeited its right to ensure compliance when it moved to compel arbitration prior to allowing a grievance procedure to run its course. Moreover, despite KTLA's argument to the contrary, the court confirmed that, absent an express agreement of the parties, the court, not the arbitrator, is the proper tribunal to determine arbitrability.

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In light of *Knutsson*, particularly in conjunction with other recent rulings on arbitrability, California employers must be increasingly cognizant of the form and substance of arbitration clauses. Courts remain unwilling to view ambiguities in favor of employers and instead stand prepared to protect the rights of employees to avoid the improper compulsion of arbitration.

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8th Annual

Employment Law Symposium

Thursday, November 13, 2014

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