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PETTIT KOHN INGRASSIA & LUTZ

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *October 2012*

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I.

LEGISLATIVE/ADMINISTRATIVE

California

Governor Signs Bill Implementing New Social Media Privacy Rules

Governor Brown has signed into law AB 1844 (Campos), which prohibits employers from requiring or requesting that an employee or applicant for employment (1) disclose a user name or password for the purpose of accessing personal social media; (2) access personal social media in the presence of the employer; or (3) divulge any personal social media. This bill also prohibits an employer from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand by the employer that violates these provisions.

Notably, the bill does not affect an employer's existing rights and obligations to request that an employee divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violations of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding. Additionally, the bill does not preclude an employer from requiring or requesting that an employee disclose a username or password for the purpose of accessing an employer-issued electronic device.

Governor Signs Bill Addressing Religious Discrimination in Employment

Governor Brown has signed into law AB 1964 (Yamada), which includes a religious dress practice or religious grooming practice as a belief or observance covered by the Fair Employment and Housing Act's ("FEHA") protections against religious discrimination. The law specifies that requiring a person to be segregated from the public or other employees is not a reasonable accommodation.

The bill also clarifies that "undue hardship," as defined in the FEHA, will apply to the religious discrimination section of the statute, thereby clearing up confusion over federal versus state definitions of "undue hardship." Under the FEHA, "undue hardship" means "an action requiring significant difficulty or expense, when considered in light of the following factors: (1) the nature and cost of the accommodation needed; (2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these

accommodations upon the operation of the facility; (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities; (4) the type of operations, including the composition, structure, and functions of the workforce of the entity; and (5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities."

II.

JUDICIAL

California

California Court Denies Class Certification in Light of *Brinker*

In *Lamps Plus Overtime Cases*, the California Court of Appeal upheld a trial court order denying class certification based in part on guidance provided by *Brinker Restaurant Corp. v. Superior Court* ("Brinker"). The plaintiffs, former and current employees of Lamps Plus ("Plaintiffs"), filed a class action lawsuit alleging that Lamps Plus denied them meal and rest breaks, required them to work off-the-clock, failed to provide them with itemized wage statements, and failed to timely pay wages due upon termination.

Plaintiffs moved for class certification, but the trial court denied the motion on the ground that individual issues predominated over common issues, and class treatment was therefore not superior to individual actions. The trial court reasoned, with regard to meal and rest breaks, that pursuant to the California Supreme Court's ruling in *Brinker*, employers need only authorize and permit breaks (*i.e.*, make them available) but do not need to ensure that they are taken. The trial court also concluded that commonality had not been established for the remaining claims, as they all required individualized assessment, and there was no evidence of any illegal company-wide policy.

In affirming the trial court's order, the Court of Appeal noted that pre-certification discovery revealed the following: (1) Lamps Plus did not have a universal practice of denying employees their breaks; (2) Lamps Plus had a meal and rest period policy conforming to the applicable laws and wage orders; (3) Lamps Plus disciplined its employees for failing to comply with the policy; (4) the breadth of supposed "violations" was widely variable; (5) some employees declared they often missed meal and rest breaks while others declared they always received their meal and rest breaks, and still others declared that they always received either their meal break or their rest breaks, but not both; (6) some employees declared their meal breaks were uninterrupted, and others claimed interruptions of varying degrees; (7) approximately half of the employees surveyed said Lamps Plus required them to work off-the-clock while the other half reported no off-the-clock work; (8) there was no evidence that Lamps Plus knew of any off-the-clock work; (9) employees reported varied experiences with respect to their pay upon termination; and (10) even the named plaintiffs had divergent experiences, despite all having worked at the same store and reported to the same manager.

In light of the fact that there were so many divergent experiences and Lamps Plus (1) had compliant policies, and (2) was not obligated to *ensure* employees

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complied with the meal and rest break policies (pursuant to *Brinker*), the appellate court agreed that the case was not suitable for class treatment because the trial court would have had to conduct many inquiries into employees' individual circumstances.

California Court Upholds Arbitration Clause in Employment Agreement Despite Lack of Express Class Waiver

In *Reyes v. Liberman Broadcasting, Inc.*, the California Court of Appeal reversed the trial court's order denying the defendant's motion to compel arbitration, even though the subject arbitration agreement lacked an express class waiver. The Plaintiff, Jesus Reyes ("Reyes"), filed a class complaint alleging wage and hour violations against Liberman Broadcasting, Inc. ("LBI"). Reyes had executed an agreement to arbitrate his claims with LBI prior to commencing his employment. The arbitration agreement ("Agreement") was expressly governed by the Federal Arbitration Act, and provided that LBI and Reyes agree to submit to final and binding arbitration all claims, disputes and controversies arising out of, relating to, or in any way associated with Reyes's employment or its termination. Specific claims identified in the Agreement included wage claims, unfair competition claims, and claims for violation of federal, state, local, or other governmental laws. The Agreement did not contain an express class arbitration waiver.

In reversing the trial court's denial of LBI's motion to compel arbitration, the appellate court held that although the Agreement did not include an express class action waiver, such a waiver had to be implied because of *AT&T Mobility v. Concepcion*,[1] which provided that class claims cannot be compelled to arbitration unless the parties to the agreement expressly agree to arbitrate class claims. The court noted the conflict among California state and federal courts on whether *AT&T Mobility* preempts California's previous test (set forth in *Gentry v. Superior Court*[2]) for determining whether a class waiver in an employment arbitration agreement is enforceable. The court held that in this case, the plaintiff had not made any showing why the agreement would fail under *Gentry*, even if *Gentry* is still good law. As such, the court held that it did not need to decide whether *Gentry* is still good law. The court held that under *Gentry* and *AT&T Mobility*, the agreement was enforceable.

While the case law regarding class action waivers is ever-changing in California, this case is a positive ruling for employers. However, employers may wish to review their current arbitration agreements and add express language regarding class arbitrations.

California Court Holds that Violation of Labor Code Section 132a Cannot Give Rise to Wrongful Termination Claim

In *Dutra v. Mercy Medical*, the California Court of Appeal held that a violation of California Labor Code section 132a ("Section 132a")—the statute that prohibits employers from retaliating against employees for filing workers' compensation claims—cannot give rise to a tort claim for wrongful termination.

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[1] The U.S. Supreme Court held in *AT&T Mobility* that under the Federal Arbitration Act, California courts must enforce arbitration agreements even where the agreement requires that employee complaints be arbitrated individually (instead of on a classwide basis).

[2] The California Supreme Court previously held in *Gentry* that a court may invalidate a class action waiver and require class arbitration if it determines that individual arbitration is impractical as a means of vindicating employees' rights. The court then set forth various factors to be used if determining that the matter should proceed as a class action.

Michelle Dutra ("Dutra") sued her former employer, defendant Mercy Medical Center Mt. Shasta ("Mercy"), for defamation and wrongful termination in violation of public policy. Dutra alleged Mercy committed libel per se by communicating to her and others in a private meeting its grounds for terminating her employment. She also alleged that Mercy discharged her in violation of the public policy codified by Section 132a.

The trial court granted Mercy's motion for summary adjudication on the defamation cause of action, concluding that Mercy's communicating its grounds for terminating Dutra was a conditionally privileged communication under Civil Code section 47, subdivision (c), and that Dutra had failed to introduce triable issues of material fact that would defeat the privilege, including showing the publication was motivated by malice.

The trial court then granted Mercy's motion to dismiss the remainder of the action on the ground that the Workers' Compensation Appeals Board has exclusive jurisdiction to adjudicate claims under Section 132a. The court gave Dutra an opportunity to amend her complaint, but she refused.

In upholding the trial court's ruling, the appellate court found that limitations on Section 132a's scope and remedies prevent it from being the sort of public policy which provides the basis for a common law wrongful termination claim. More specifically, the statute establishes a specific procedure and forum for addressing a violation. It also limits the remedies that are available once a violation is established. Thus, the court reasoned, allowing a plaintiff to pursue a tort cause of action based on a violation of Section 132a would impermissibly give her broader remedies and procedures than that provided by the statute. Accordingly, the statute cannot serve as the basis for a tort claim of wrongful termination in violation of public policy. This is a positive ruling for employers, as it limits the legal action employees may take when they believe their employer has violated Section 132a.

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Pettit Kohn Ingrassia & Lutz PC's
6th Annual

Employment Law Symposium

Tuesday, November 13, 2012
The Dana Hotel on Mission Bay

Registration form available online at www.pettitkohn.com or by contacting Cathy Johnson at events@pettitkohn.com or call (858) 755-8500 for details.

This event is pre-approved for 5.5 (Specified-California) recertification hours toward PHR, SPHR and GPHR recertification through the HR Certification Institute. The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

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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, Hazel Ocampo or Heather Stone at (858) 755-8500; Eric De Wames, Mark Bloom, Jennifer Weidinger or Edgar Martirosyan at (310) 649-5772.

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