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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *February 2012*

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

California

California Assembly Considers Raising Minimum Wage

The California Assembly is considering a bill that would raise the state's minimum wage from $8.00 per hour to $8.50, beginning January 1, 2013. In its current form, AB 196 (Alejo) would provide for an adjustment to the hourly minimum wage on January 1, 2014, and annually thereafter, to maintain employee purchasing power. The automatically adjusted minimum wage would be calculated using the California Consumer Price Index. The bill would also prohibit the Industrial Welfare Commission ("IWC") from adjusting the minimum wage (downward or upward) if the average percentage of inflation for the previous year was negative. The bill would additionally require the IWC to publicize the automatically adjusted minimum wage. Finally, the IWC would be given leeway to increase the minimum wage in an amount greater than the formula would provide.

The bill is currently being reviewed by the Labor and Employment Committee. The same proposal was introduced during 2011 as AB 10 and is currently in the Assembly Appropriations Committee suspense file.

Assembly Considers Bill Prohibiting Discrimination Against Unemployed Job Applicants

On January 5, 2012, California lawmakers introduced AB 1450 (Allen), a bill that would make it unlawful, unless based on a bona fide occupational qualification or any other provision of law, for an employer to knowingly or intentionally: refuse to consider for employment or refuse to offer employment to an individual because of the individual's status as unemployed; publish an advertisement for any job that includes provisions pertaining to an individual's status as unemployed; or direct or request that an employment agency take an individual's status as unemployed into account in screening or referring applicants for employment.

The bill would also make it unlawful, unless based on a bona fide occupational qualification or any other provision of law, for an employment agency to: knowingly or intentionally refuse to consider or refer an individual for employment because of the individual's status as unemployed; limit, segregate, or classify individuals in any manner that may limit their access to information about jobs or referral for consideration of jobs because of their status as unemployed; or publish an advertisement, as described above, with respect to employers.

While the bill would not create a private right of action against employers or employment agencies, such entities would be subject to civil penalties for violating its provisions. AB 1450 is currently before the Assembly Committees on Labor and Employment as well as Judiciary.

AGENCY

Federal

NLRB Invalidates Class Action Waivers

The National Labor Relations Board ("NLRB") has ruled that it is a violation of federal labor law to require employees to sign arbitration agreements that prevent them from joining together to pursue employment-related legal claims in any forum, whether in arbitration or in court. The NLRB's decision examined one such agreement used by nationwide homebuilder D.R. Horton, under which employees waived their right to a judicial forum and agreed to bring all claims to an arbitrator on an individual basis. The agreement prohibited the arbitrator from consolidating claims, fashioning a class or collective action, or awarding relief to a group or class of employees.

The NLRB found that the agreement unlawfully violated the National Labor Relations Act ("NLRA"), which specifically vests employees with the right to engage in "concerted activities for the purposes of collective bargaining or other mutual aid or protection." The NLRB's ruling distinguishes the facts at hand from those in *AT&T Mobility v. Concepcion* (2011) 130 S.Ct. 1740, in which the Supreme Court upheld a class action waiver in a consumer contract for cellular phone services. The NLRB compared D.R. Horton's prohibition on class arbitrations as akin to a prohibition on union organizing, which would clearly violate the NLRA.

The NLRB emphasized, however, that the ruling does not require class arbitration. Rather, it held that employers cannot mandate a wholesale waiver and foreclose the class action remedy in both arbitral *and* judicial forums.

This decision, which applies to employers covered by the NLRA, will likely be appealed. In the meantime, however, covered employers who require employees to sign a class action waiver could be subject to an unfair labor practice charge. Accordingly, such employers should review, and if necessary, revise, their current arbitration agreements.

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U.S. Department of Labor Proposes Statutory Amendments to FMLA

The U.S. Department of Labor has issued a notice of proposed rulemaking to implement new statutory amendments to the Family and Medical Leave Act ("FMLA") that would expand its military family leave provisions and incorporate a special eligibility provision for airline flight crew employees.

The proposed language would extend to five years the entitlement of military caregiver leave to family members of veterans leaving the military. The current law only covers family members of "currently serving" service members. Additionally, the proposal expands the law's military family leave provisions by extending qualifying exigency leave to employees whose family members serve in the regular armed forces. Currently, the law only covers families of National Guard members and reservists.

For airline flight crew employees, the proposed revision seeks to make the benefits of the FMLA more accessible by adding (1) a special hours-of-service eligibility requirement, and (2) specific provisions for calculating the amount of FMLA leave used that better take into account the unique — and often difficult to track — hours worked by crew members.

Additional information regarding the proposed FMLA amendments can be found at http://www.dol.gov/whd/fmla/NPRM/whdfsFMLA_NPRM.htm. The Department of Labor strongly encourages interested parties to submit comments on this proposal.

II.

JUDICIAL UPDATE

Federal

Ninth Circuit Reverses Summary Judgment on ADEA Claim

In *Shelley v. Geren*, the Ninth Circuit Court of Appeals reversed the trial court's decision to grant summary judgment on a claim brought pursuant to the Age Discrimination in Employment Act ("ADEA"). The plaintiff, Devon Scott Shelley ("Shelley"), sued Pete Geren, Secretary of the Army and the United States Army Corps of Engineers (collectively, "the Corps"), alleging that the Corps violated the ADEA by failing to interview him and rejecting his applications for two promotions. At the time he applied for the supervisory positions, Shelley was fifty-four years old and had been serving as an assistant to the positions he desired, had a master's degree in business administration, and had 26 years of experience with the same division of the Corps. The Ninth Circuit found that Shelley presented a prima facie case of age discrimination and evidence of pretext sufficient to create a material dispute as to whether age-related bias was the "but for" cause of the Corps' failure to interview and promote him.

Although the Corps produced a facially legitimate, non-discriminatory explanation for its actions (that it selected the candidate who was hired because doing so caused only a *lateral* move, as opposed to requiring a *promotion* of

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Shelley), the Court found evidence of pretext based on, among other things, the fact that two high-ranking members of the Corps who had influence over the decision-making process had inquired as to the projected retirement dates for certain groups of employees during the hiring period, Shelley had significantly more years of relevant experience (and with the Corps) than the candidate who was hired, and Shelley had superior educational qualifications and more on-the-job awards than the candidate who was hired. The Court held that this evidence was sufficient to allow a reasonable jury to find that the Corps' reliance on its "lateral" versus "promotion" explanation for its actions was pretextual in light of Shelley's otherwise superior experience, education and recognition. Accordingly, summary judgment was reversed and the case was remanded to the trial court.

California

California Supreme Court Orders Appellate Court to Decide Whether Employers Can Round Time Entries

A San Diego Superior Court found that See's Candy Shops ("See's") violated California law by rounding employee time entries to the nearest six minutes. The Fourth District Court of Appeal let the ruling stand. In January, the California Supreme Court ordered the Court of Appeal to review the case and decide the rounding issue.

For years, the position of both the U.S. Department of Labor ("DOL") and the California Division of Labor Standards Enforcement ("DLSE") has been that rounding employee time entries is lawful. The DOL's regulations and the DLSE enforcement manual permit rounding "to the nearest five minutes, or to the nearest one-tenth or quarter of an hour." Both the DOL's regulations and the DLSE's enforcement manual note, however, that rounding is acceptable provided that the practice is used "in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." In the case against See's, the San Diego Superior Court, disregarding the positions of the DOL and the DLSE, ruled that an unbiased rounding procedure violated California law, which according to the court, requires payment for all time worked.

Because the Fourth District Court of Appeal must now review the case, employers may soon receive clarity on the "rounding" issue. In the meantime, however, California employers who round employee time entries should be aware of the potential threat for litigation and should review their rounding policies and practices.

California Court Determines Recruiters are Commissioned Employees and Thus Exempt from Overtime Wages

In *Muldrow v. Surrex Solutions Corp.*, a California appellate court examined the parameters of the "commissioned employees" exemption in California. The employer, Surrex Solutions Corporation ("Surrex"), employed recruiters to match candidates with its clients. The plaintiffs were current and former "senior consulting services managers" of Surrex, led by class representative Tyrone Muldrow ("Muldrow"). Muldrow brought a class action against Surrex for,

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among other things, failure to pay overtime wages. The trial court found that under the "commissioned employees" exemption, an employer is not required to pay overtime wages to an employee whose earnings exceed one and one-half times the minimum wage, if more than half of that employee's compensation represents commissions. In affirming the trial court's ruling, the appellate court followed the requirements for the exemption as set forth in *Keyes Motors, Inc. v. Division of Labor Standards Enforcement* (1987) 197 Cal.App.3d 557; which states that the employee must be involved principally in *selling* a product or service (not making the product or rendering the service), and the amount of the compensation must be a percent of the price of the product or service.

In *Keyes Motors*, the court found that the plaintiffs (mechanics for Keyes Motors) were not involved in primarily selling a product or a service (although they did receive a percent of the hourly rate charged to customers for repairs). The court looked at factors such as job descriptions, training documents, and the testimony of supervisors concerning the qualities they looked for in their employees. In *Surrex*, the court found that the recruiters were definitely involved in sales based on their job description (which included the word "sales"), training documents (which used the term "sales people"), and the testimony of executive officers, all of whom agreed that the recruiters they hired would have needed "sales experience." Other key factors the court considered were that recruiters engaged in what are commonly considered sales activities, *i.e.*, attempting to persuade or influence candidates and clients in a course of action. The court also considered it important that Surrex did not receive any revenue until a candidate was placed with an employer, and additionally held that activities such as researching, cold-calling, interviewing candidates, inputting data and submitting resumes were all "sales-related."

While the plaintiffs argued that the second prong of the *Keyes* test was not met because Surrex's payment of recruiters was based on a percentage of adjusted gross profit (rather than on a percentage of the price paid by the client), the court rejected this argument, stating that "the definition of commission expressly includes payment derived from profits." The court also noted that recruiters negotiated the price paid by the client employer to Surrex and the hourly fee to be paid to the candidate (the difference, after adjustment for overhead, being the adjusted gross profit). The payment scheme therefore incentivized recruiters who negotiated better deals for Surrex.

From a practical standpoint, this case provides much-needed guidance on the "commissioned employees" exemption. Employers should remember, however, that the applicability of this exemption is often fact intensive, hinging on factors such as the language of job descriptions, employee agreements, actual job duties, and even unwritten beliefs held by managers and supervisors.

Court Rules Employer is Not Liable Under the FEHA for Disciplining Employee Who Made False Harassment Complaint

In *Joaquin v. City of Los Angeles*, the California Court of Appeal held that an employee may be disciplined for filing a false complaint of sexual harassment because such conduct is not a "protected activity" pursuant to California's Fair Employment and Housing Act ("FEHA").

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The plaintiff ("Joaquin") was a Los Angeles Police Department officer who complained of sexual harassment by a sergeant during 2005. The department conducted an investigation and determined that Joaquin's complaint had been fabricated. A Board of Rights confirmed this finding and recommended that Joaquin be discharged.

In response, Joaquin filed for a writ of mandate to the superior court. The writ was granted and Joaquin was ordered reinstated. Following his reinstatement, Joaquin filed a lawsuit against the City of Los Angeles ("City") alleging that he was discharged in retaliation for filing a sexual harassment complaint, in violation of the FEHA. A jury agreed, and awarded Joaquin over $2 million in damages. The City subsequently appealed.

In overturning the jury verdict, the appellate court stated that when an employer takes an adverse employment action based on a good faith belief that an employee engaged in misconduct, the employer has acted because of the perceived misconduct, not because of any protected status or activity. The critical inquiry is whether the employer actually *believed* the employee was guilty of the conduct justifying discharge. Thus, to prevail on a retaliation cause of action under the FEHA, an employee must show that the employer acted based on an intent to retaliate rather than on a good faith belief that the employee violated a workplace rule.

The court found that Joaquin failed to prove that the City's decision to terminate his employment was *motivated* by prohibited retaliatory animus or intent. Although there was a causal connection between Joaquin's initial complaint of sexual harassment and the decision to terminate his employment, the reason for his discharge was not that he complained of sexual harassment, but rather that he made a false complaint. Accordingly, the City's decision to terminate Joaquin's employment pursuant to its good faith belief that he filed a false complaint did not support his allegation that he was retaliated against in violation of the FEHA.

California Court Holds "Unconscionable" Arbitration Agreement Unenforceable

In *Wisdom v. AccentCare, Inc.*, the California Court of Appeal held that a clause in an employment application—requiring only the *applicant* to agree that, if hired, all disputes would be submitted to binding arbitration—was both procedurally and substantively unconscionable and therefore unenforceable.

The plaintiffs were employed by AccentCare as on-call staffing coordinators. They alleged they were not paid for all of the time they spent handling off-hour calls.

Four of the six plaintiffs had signed acknowledgment forms when they applied for employment with AccentCare. The acknowledgment was the last page of an application form that AccentCare gave the plaintiffs, along with several other forms, when they applied for a job. The last page of the form consisted of five initialed paragraphs and a signature line at the bottom. The heading directed: "Acknowledge Your Understanding of the following Statements and Agreements by Placing Your Initials by Each Paragraph, then Sign and Date Below." The third of the five paragraphs was an arbitration agreement that stated as follows:

I hereby agree to submit to binding arbitration all disputes and claims arising out of the submission of this application. I further agree, in the event that I am hired by AccentCare, that all disputes that cannot be resolved by informal internal resolution which might arise out of my employment with AccentCare, whether during or after that employment, will be submitted to binding arbitration. I agree that such arbitration shall be conducted under the rules then in effect of the American Arbitration Association.

The plaintiffs did not negotiate the terms of the application form, nor were the provisions explained to them. They were not told that their signature on the form was optional, and they were not aware of the consequences of signing a binding arbitration agreement.

AccentCare brought a motion to compel arbitration of the claims asserted by the four plaintiffs who had signed the arbitration agreement, but the trial court denied the motion on the ground that the agreement was procedurally and substantively unconscionable. The Court of Appeal affirmed the trial court's ruling.

In this case, the Court deemed the preemployment arbitration agreement to be procedurally unconscionable because (1) its language implied there was no opportunity to negotiate, (2) the rules of arbitration were not spelled out in the agreement or attached thereto, and (3) the plaintiffs did not understand they were waiving their right to a trial, nor was that fact explained to them. The Court also concluded that the agreement was substantively unconscionable because it lacked mutuality. According to the Court, the lack of mutuality was made apparent by contrasting the agreement with a different application form, also used by AccentCare, which provided that "in exchange for my agreement to arbitrate, AccentCare also agrees to submit all claims and disputes it may have with me to final and binding arbitration … "

Because the agreement was both procedurally and substantively unconscionable, it was not enforceable. This decision serves as an important reminder to employers to ensure that their preemployment arbitration agreements meet all of the prerequisites for procedural and substantive conscionability.

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, Tyler Theobald, Jenna Leyton, Vanessa Maync, Christine Mueller or Hazel Ocampo at (858) 755-8500 or Eric De Wames, Mark Bloom or Jennifer Weidinger at (310) 649-5772.

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