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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *March 2012*

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I.

LEGAL/LEGISLATIVE UPDATE

Federal

Congress Approves Extension of Payroll Tax Cut

The Senate has passed an extension of the payroll tax cut and long-term jobless benefits. Under the bill, workers will continue to receive a 2 percentage point increase in their paychecks through 2012, and people out of work for more than six months will keep jobless benefits averaging approximately $300 per week. President Obama is expected to sign the bill, which the House approved earlier this year.

AGENCY

Federal

NLRB Provides Additional Guidance on Workplace Social Media Policies

In an effort to provide additional guidance to employers on an increasingly complex issue, the National Labor Relations Board's ("NLRB") Acting General Counsel has released a second report describing social media cases reviewed by his office.

The Operations Management Memo covers fourteen cases, half of which involve questions about employer social media policies. Five of those policies were found to be unlawfully broad, one was lawful, and one was found to be lawful after it was revised. The remaining cases involved discharges of employees after they posted comments to Facebook. Several discharges were found to be unlawful because they flowed from unlawful policies. In one case, however, the discharge was upheld despite an unlawful policy because the employee's posting was not work-related.

The report underscores two main points: (1) employers' social media policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among

employees; and (2) an employee's comments on social media platforms are generally not protected if they are mere gripes not made in relation to group activity among employees.

Additional information, as well as the Operations Management Memo, can be found at https://www.nlrb.gov/news/acting-general-counsel-issues-second-social-media-report.

EEOC Extends Recordkeeping and Reporting Requirements Under Genetic Information Nondiscrimination Act

The Equal Employment Opportunity Commission ("EEOC") has extended its existing recordkeeping requirements under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act ("ADA") to entities covered by Title II of the Genetic Information Nondiscrimination Act of 2008 ("GINA"), which prohibits employment discrimination based on genetic information. Title II of GINA applies to all employers with fifteen or more employees, and protects job applicants, current and former employees, labor union members, and apprentices and trainees from discrimination based on their genetic information. The new rule, which takes effect on April 3, 2012, does not require the creation of any documents or impose any reporting requirements. It merely imposes the same employment/personnel record retention requirements under GINA that apply under Title VII and the ADA.

As a general matter, employers are required to take the following steps:

- Any personnel or employment record made or kept by an employer must be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. In the case of involuntary discharge, the personnel records of the affected individual must be kept for a period of one year from the date of discharge.

- Where a charge of discrimination has been filed, or an action brought by the EEOC or the U.S. Attorney General, against an employer under GINA, the employer must preserve all personnel records relevant to the charge or action until final disposition of the charge or the action.

A summary of the recordkeeping requirements covered by the new rule is available at http://www.eeoc.gov/employers/recordkeeping_obligations.cfm.

EEOC Issues Additional Guidance on Interplay Between ADA and Educational Requirements

On November 17, 2011, the EEOC issued an informal discussion letter regarding how the Americans with Disabilities Act ("ADA") applies to qualification standards for jobs. More specifically, the letter explained that employers who require employees to possess a high school diploma as a prerequisite to employment may violate the ADA. In light of "significant commentary and conjecture about the meaning and scope of the letter," the EEOC

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has recently provided additional guidance on the issue, which can be found at http://www.eeoc.gov/eeoc/newsroom/wysk_high_school_ada.cfm. The EEOC emphasizes that nothing in its initial letter prohibits employers from adopting a requirement that a job applicant have a high school diploma. However, an employer may have to allow someone who claims that a disability has prevented him from obtaining a high school diploma to demonstrate qualification for the job in some other way. The EEOC also states that even if the applicant with a disability can demonstrate the ability to do the job through some means other than possession of a high school diploma, the employer may still choose the most qualified person for the job. The employer does not have to prefer the applicant with a disability over someone who can perform the job better.

EEOC Issues Revised Guidance on Employment of Veterans with Disabilities

The EEOC has issued two revised publications addressing veterans with disabilities and the Americans with Disabilities Act ("ADA"). The revised guides reflect changes to the law stemming from the ADA Amendments Act of 2008, which makes it easier for veterans with a wide range of impairments, including those that are often not well understood (such as traumatic brain injuries and post-traumatic stress disorder), to obtain needed reasonable accommodations that will enable them to work successfully.

The Guide for Employers explains how protections for veterans with service-connected disabilities differ under the ADA and the Uniformed Services Employment and Reemployment Rights Act, and how employers can prevent disability-based discrimination and provide reasonable accommodations.

The Guide for Wounded Veterans answers questions that veterans with service-related disabilities may have about the protections they are entitled to when they seek to return to their former jobs or look for civilian jobs. The publication also explains the kinds of accommodations that may be necessary to help veterans with disabilities obtain and successfully maintain employment.

Over the past decade, three million veterans have returned from military service; another one million are expected to return to civilian life over the course of the next five years with the anticipated drawdown of operations in the Middle East. Further information is available on the EEOC website at www.eeoc.gov.

California

Division of Labor Standards Enforcement Updates Guidance on New Wage Notice

The California Division of Labor Standards Enforcement ("DLSE") has updated the online guidelines and frequently asked questions about the law that took effect on January 1, 2012 requiring employers to provide nonexempt employees with a notice at the time of hire containing specified wage information.

The notice requirement was mandated by the Wage Theft Protection Act of 2011, which adds Labor Code section 2810.5, and requires employers to provide a written notice to nonexempt employees at the time of hire. This law also increases penalties for wage violations. In addition to specifying the information that must

be included in the notice, the legislation authorized the DLSE to include other information it deemed "material and necessary." In light of this provision, the DLSE placed additional requirements on the form. For example, the form requires the employer to identify "any other business or entity" that the company uses to "hire employees or administer wages or benefits," such as a professional staffing agency. The form also requires the employer to check a box indicating whether there is an oral or written agreement with the employee. These requirements were not in the original legislation, but apparently were deemed "material and necessary" by the DLSE.

In addition, according to the frequently asked questions, the employer must provide the notice to new hires "reasonably close in time to the inception of the employment relationship," whether that relationship is created by acceptance of an offer or only by commencing employment. Moreover, if an employee has multiple pay rates, "all applicable rates must be provided in the notice (or may be attached as a separate sheet to the notice with a clear reference in the notice to the attachment)."

II.

JUDICIAL

Federal

Ninth Circuit Holds That Proposition 8's Ban on Same-Sex Marriage is Unconstitutional

In a 2-1 decision, the Ninth Circuit ruled in *Perry v. Brown* that Proposition 8, a voter initiative that amended the California Constitution to provide, "Only marriage between a man and a woman is valid or recognized in California," violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The majority affirmed the judgment of the district court on narrow grounds not considered by the lower court, ruling that Proposition 8 had taken away from same-sex couples the right to marry that they already had under California law, without a legitimate reason for doing so. The court emphasized that it was not deciding the broader constitutional question of whether a state may deny same-sex couples the right to marry in the first place.

The Ninth Circuit's ruling will likely be appealed to the U.S. Supreme Court. Even if the Court's ruling is upheld, it is unlikely to have any significant effect on employers so long as federal law does not recognize same-sex marriage, since California law already extends all of the same rights and obligations to registered domestic partners as to spouses (e.g., the right to take family leave due to the serious health condition of a domestic partner).

California

California Court Rejects "Trial By Formula" in Class Action

In a case of first impression, the California Court of Appeal held in *Duran v. U.S. Bank National Association* that an employer's due process rights were

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violated by "innovative" class trial procedures that utilized statistical sampling to prove liability on a class-wide basis.

The plaintiffs were 260 current and former business banking officers who claimed they were misclassified by defendant U.S. Bank National Association ("USB") as outside sales personnel exempt from California's overtime laws, and thus were unlawfully denied overtime pay. California Industrial Wage Commission Wage Order No. 4-2001 defines "outside salesperson" as a person who "customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities."

USB opposed the plaintiffs' motion for class certification on the grounds that (1) common issues did not predominate, and (2) the named plaintiffs were not typical of the class because they had all admitted facts establishing that they were, in fact, exempt employees under the outside salesperson exemption. Despite USB's arguments, however, the trial court certified the class. The trial court conducted the liability phase of the trial based on a purportedly random sample of 20 class members. During the course of the mini-trial, the trial court determined that USB had misclassified 19 of the 20 randomly selected employees. The trial court then decided it could extrapolate from the mini-trial results that all 260 employees had been misclassified because the plaintiffs' expert statistician testified that he had calculated "with 95% confidence that all 260 employees" had been misclassified. The trial court refused to allow USB to put forth evidence that at least 70 of the 260 employees were not misclassified. At the conclusion of the trial, the court awarded the class members $15 million plus $8 million in attorneys' fees.

On appeal, USB argued that the case should not have been certified as a class action, and that the trial court's trial management plan deprived it of its constitutional due process rights because the plan prevented USB from defending against the individual claims for over 90 percent of the class. The appellate court agreed that the trial management plan was fatally flawed, and concluded that the class must be decertified. In vacating the trial court's award, the appellate court first took issue with the purported "sampling" method, finding that "there was no statistical foundation for the trial court's initial assumption that 20 out of 260 is a sufficient size for a representative sample by which to extrapolate either liability or damages." Furthermore, even assuming the entire class was entitled to recover unpaid overtime, the method of determining the restitution owed failed to comport with established statistical principles and resulted in such a high margin of error as to render the judgment constitutionally infirm.

The court next noted that the trial court forbade USB from introducing evidence as to any non-class members' right to recover, notwithstanding the 70-plus declarations that had been signed, under penalty of perjury, by employees attesting they were properly classified. The court determined that a fair procedure would have allowed USB the opportunity to inquire into the specific circumstances of these absent class members.

As the court stated, "one of the elements of a fair trial is the *right to offer relevant and competent evidence on a material issue.* Subject to such obvious qualifications as the court's power to restrict cumulative and rebuttal evidence . . . ,

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and to exclude unduly prejudicial matter, denial of this fundamental right is almost always considered reversible error. . . A party's opportunity to call witnesses to testify and to proffer admissible evidence is central to having his or her day in court." Ultimately, the court held that "a trial in which one side is almost completely prevented from making its case does not comport with standards of due process" and that "the [trial] court erred when, in the interest of expediency, it constructed a set of ground rules that unfairly prevented USB from defending itself."

This case will likely be appealed to the California Supreme Court. In the meantime, this case confirms that expediency and efficiency do not trump employers' right to due process during class action litigation.

California Court Invalidates "Unconscionable" Arbitration Agreements

In two separate opinions, the California Court of Appeal invalidated purportedly "unconscionable" arbitration agreements.

Case #1

In *Ajamian v. CantorCO2e,* the California Court of Appeal affirmed a trial court ruling which held that an employer's arbitration agreement was both procedurally and substantively unconscionable, and therefore unenforceable.

In September 2006, CantorCO2e ("Cantor") hired respondent Lena Ajamian ("Ajamian") as its San Francisco office manager. At the time she was hired, Ajamian signed an annual acknowledgement and certification form, by which she acknowledged that she had read Cantor's Policies and Procedures Manual. The manual was a 65-page document that included an employee handbook containing, among many other things, a section entitled "Arbitration Agreement and Policy"; a form by which the employee was to confirm receipt of the handbook and acknowledge that claims and disputes pertaining to its policies are subject to arbitration; an arbitration agreement and policy, containing a line for the employee's signature; and a confidentiality agreement and exhibits. Ajamian did not sign the acknowledgement of her receipt of the employee handbook and agreement to arbitrate, nor did she sign the arbitration agreement and policy.

In March 2007, Ajamian was promoted from office manager to broker. In connection with her position as a broker, she received and eventually signed an employment agreement containing an arbitration clause. The clause stated, in pertinent part, that (1) any disputes arising under the employment agreement would be determined by arbitration before a panel of three arbitrators in New York, according to the rules of the National Association of Securities Dealers, Inc. (or, at Cantor's sole discretion, the American Arbitration Association or any other alternative dispute resolution organization); (2) the arbitrator was not authorized to include as part of any award special, exemplary, punitive or statutory double (or other multiple) damages; and (3) the employee would be liable for Cantor's reasonable attorneys' fees if Cantor was the "prevailing party" on a any claim brought pursuant to the arbitration clause. While the parties did not dispute the fact that the employment agreement was not presented to Ajamian on a take-it-or-leave-it basis, the parties had differing recollections as to how its execution came about,

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with Ajamian contending that she was pressured into signing it even though she was uncomfortable with its terms.

After her employment ended, Ajamian filed suit against Cantor, asserting claims for sexual harassment, sexual discrimination, retaliation and a variety of wage and hour claims. In response to the complaint, Cantor requested that Ajamian stay or dismiss her lawsuit and submit the matter to binding arbitration before the American Arbitration Association. Ajamian replied that she would not agree to arbitrate because she did not sign the arbitration agreement included in the employee handbook, and that both the arbitration provision in the employee handbook and the arbitration provision in the employment agreement were unconscionable.

The court agreed with Ajamian, finding that the arbitration provision in the employment agreement was procedurally unconscionable because (1) Ajamian had "no realistic bargaining power" and was required to sign the employment agreement to receive her promised compensation – for work she had already performed; (2) it was based on a standardized form, drafted and imposed by a party of superior bargaining strength, and left Ajamian with only the option of adhering to the contract or rejecting it (and losing her position and compensation as broker); (3) at the time of contracting, Ajamian was unaware of the excessive costs she would incur in arbitrating before a three-judge panel in New York; and (4) although the arbitration provision stated that the arbitration would be conducted under AAA (or NASD) rules, the rules were not attached to the agreement or provided.

The court also found the arbitration provision to be substantively unconscionable in that (1) it limited the remedies available to Ajamian; (2) Cantor failed to show that New York law would provide Ajamian with rights and remedies equivalent to those provided by California law; and (3) the unilateral attorneys' fees provision arguably stripped Ajamian of her right to recover attorneys' fees under her California statutory claims while forcing her to pay Cantor's attorneys' fees where she would otherwise have no such obligation.

The court further held that it was not an abuse of discretion by the trial court to conclude that the unconscionability so permeated the arbitration provision that it could not be cured except by rewriting it (which the court cannot do) or by refusing to enforce the section in its entirety. Finally, the court held that the arbitration agreement in the employee handbook was unenforceable because while Ajamian did receive the handbook containing the company's policy of arbitrating disputes, she never signed or agreed to the actual arbitration agreement in the handbook.

Case #2

In *Mayers v. Volt Management Corp.*, the plaintiff employee ("Plaintiff") filed a complaint against his employer ("Employer") pursuant to California's Fair Employment and Housing Act ("FEHA"). Plaintiff alleged disability discrimination, failure to accommodate, failure to engage in the interactive process, retaliation, and age discrimination.

The Employer moved to stay judicial proceedings and resolve the matter via binding arbitration in light of a written arbitration agreement which covered "all employment related disputes." Plaintiff had unequivocally signed an acknowledgement of receipt of Employer's employee handbook, along with a copy of Employer's alternative dispute resolution policy.

The appellate court affirmed the trial court's denial of Employer's motion, holding that the arbitration agreement was unenforceable. The court found the agreement to be procedurally unconscionable based on the fact that it was offered on a take-it-or leave-it basis, and contained elements of surprise and oppression (e.g., Plaintiff was not provided a copy of the applicable American Arbitration Association rules or advised as to how he could access those rules). The court found the agreement to be substantively unconscionable as well, as it provided for an award of reasonable attorneys' fees to the "prevailing party." Under the FEHA, a defendant can only recover attorneys' fees if the plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith. As such, the arbitration agreement exposed Plaintiff to greater risk than if he had litigated his claims in court.

These cases serve as an important reminder that employers should review their arbitration policies to ensure that they are both procedurally and substantively conscionable, and ensure that employees affirmatively consent to be bound by such policies.

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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