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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *July 2012*

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I.

LEGISLATIVE

Federal

House and Senate Seek to Lower Bar for Class Certification in Employment Discrimination Cases

Introducing companion bills collectively known as the Equal Employment Opportunity Restoration Act, the House and Senate are seeking to lower the bar for class certification in employment discrimination cases. H.R. 5978 (DeLauro) and S.B. 3317 (Franken) provide that a representative may sue on behalf of all members of the group if the representative party shows, by a reasonable inference, that (1) the members of the group are so numerous that their joinder is impracticable; (2) the claims of the representative party are typical of the claims of the group the representative party seeks to represent, and the representative party and his or her counsel will fairly and adequately protect the interests of the group; and (3) the members of the group are, or have been, subject to a "subjective employment practice" that has adversely affected or is adversely affecting a significant portion of the group's members. The bill defines "subjective employment practice" as:

> (A) an employer's policy of leaving personnel decisions to the unguided discretion of supervisors, managers, and other employees with authority to make such personnel decisions; or
>
> (B) an employment practice that combines a subjective employment practice, as defined in subparagraph (A), with other types of personnel decisions.

A representative seeking to bring the class action suit would be permitted to challenge a subjective employment practice "to the same extent as the party may challenge any other employment practice covered by the covered employment statute in such an action." Moreover, the bill would establish that:

> The fact that individual supervisors, managers, or other employees with authority to make personnel decisions may exercise discretion in different ways in applying a subjective employment practice under the covered employment statute shall not preclude a representative party from filing a corresponding group action under this section.

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The Act is largely a response to the U.S. Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes,* wherein the Court set forth stringent standards that employees must meet in demonstrating that their claims are similar enough to warrant class treatment.

California

California Senate Passes Social Media Privacy Act

The California Senate has passed SB 1349 (Yee), also known as the Social Media Privacy Act. This bill would prohibit employers from requiring, or formally requesting in writing, a current or prospective employee's user name and account password for personal social media accounts, or otherwise requiring the employee to provide the employer access to any content of those accounts.

The bill now moves on to the California Assembly.

California Assembly Considers Bill Targeting Class Action Waivers

The California Assembly is currently considering SB 491 (Evans), which was previously passed by the Senate, and which would invalidate any provision in a form contract (entered into on or after January 1, 2013) proposing to waive the right of one of the parties to pursue a class action, class arbitration, or a private attorney general action. This rule would apply broadly to most employment contracts, including arbitration agreements.

If passed by the Assembly and signed into law, this bill would create uncertainty for employers in light of several recent judicial decisions, including *Iskanian v. CLS Transportation- Los Angeles* (discussed below), that have upheld class waivers in arbitration agreements.

California Legislature Eliminates Fair Employment and Housing Commission, Transfers Duties to Department of Fair Employment and Housing

Governor Jerry Brown has signed into law a bill that eliminates the Fair Employment and Housing Commission, transferring its duties to the Department of Fair Employment and Housing ("DFEH").

The California Fair Employment and Housing Act ("FEHA") establishes the DFEH, which among other things, has the power and duties to receive, investigate, and conciliate complaints relating to employment and housing discrimination. The FEHA also establishes the Fair Employment and Housing Commission ("FEHC"), which among other things, previously had the power and duty to conduct hearings, subpoena witnesses, create or provide financial or technical assistance to advisory agencies and conciliation councils, publish opinions and publications, and conduct mediations at the request of the DFEH.

The new law eliminates the FEHC and transfers the duties of the Commission to the DFEH. The law also creates within the DFEH a Fair Employment and Housing Council that will succeed to the powers and duties of the former Commission, and makes several other changes to the FEHA. The new law takes effect on January 1, 2013.

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AGENCY

Federal

H-1B Cap Met for 2013

The U.S. Citizenship and Immigration Services ("USCIS") has announced that it has received a sufficient number of H-1B petitions to reach the statutory cap for 2013. U.S. businesses use the H-1B program to employ foreign workers in specialty occupations that require theoretical or technical expertise in specialized fields, such as scientists, engineers, or computer programmers. The current annual cap on the H-1B category is 65,000, with certain exceptions.

USCIS will reject petitions subject to the cap for H-1B specialty occupation workers seeking an employment start date in 2013 that are received after June 11, 2012. USCIS continues to accept petitions exempted from the cap, Department of Defense cooperative research worker H-1B petitions, and Chile/Singapore H-1B1 petitions requesting an employment start date in 2013.

II.

JUDICIAL

Federal

U.S. Supreme Court Upholds Patient Protection and Affordable Care Act

In a landmark 5-4 decision, the U.S. Supreme Court upheld the Patient Protection and Affordable Care Act. In 2010, Congress enacted that Act in order to increase the number of Americans covered by health insurance and decrease the cost of health care. One key provision of the Act is the individual mandate, which requires most Americans to maintain "minimum essential" health insurance coverage. For individuals who are not exempt, and who do not receive health insurance through an employer or government program, the means of satisfying the requirement is to purchase insurance through a private company. Beginning in 2014, those who do not comply with the mandate must make a "share responsibility payment" to the federal government. The Act provides that this "penalty" will be paid to the Internal Revenue Service with an individual's taxes, and "shall be assessed and collected in the same manner" as tax penalties.

Another key provision of the Act is the Medicaid expansion. The current Medicaid program offers federal funding to states to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. The Act expands the scope of the Medicaid program and increases the number of individuals the states must cover. Pursuant to the terms of the Act, if a state does not comply with the new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds.

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Twenty-six states, several individuals, and the National Federation of Independent Business brought suit in federal court challenging the constitutionality of the individual mandate and the Medicaid expansion. The Court of Appeals for the Eleventh Circuit upheld the Medicaid expansion as a valid exercise of Congress's spending power, but concluded that Congress lacked the authority to enact the individual mandate.

The Supreme Court, however, concluded that while the individual mandate is not a valid exercise of Congress' power under the Commerce Clause (because that clause only permits Congress to regulate affirmative activity, not *in*action), it may properly be upheld as being within Congress' power under the Taxing Clause. That is, the shared responsibility payment may for constitutional purposes be considered a valid tax.

On the other hand, the Supreme Court held that the Medicaid expansion violates the Constitution by threatening states with loss of their existing Medicaid funding if they decline to comply with the expansion. Essentially, the Court found that the Constitution does not give Congress the authority to require states to regulate, and when Congress threatens to terminate other grants as a means of pressuring states to accept a Spending Clause program, the legislation runs counter to the nation's system of federalism.

While the health care debate will likely continue, the Supreme Court's ruling sends a clear message: organizations need to review their plans and seize this opportunity to create better strategies for their health plans, both in design and employee communication. Employers should continue to move forward with implementing and complying with the Act, since major portions of it take effect in 2013 and 2014 (e.g., many employers soon will be required to report the value of employer coverage on IRS Form W-2, and all employers must issue a summary of benefits and coverages). Other steps employers should consider taking include: (1) determining the strategic implications of whether or not to offer a plan; and (2) reviewing existing plans to determine if they meet qualifying eligibility and affordability standards (in order for employers to avoid potential penalties, they must ensure that any health plan offered meets both standards).

U.S. Supreme Court Rules Pharmaceutical Sales Representatives Exempt from Overtime

In *Christopher et al. v. SmithKline Beecham Corp., dba GlaxoSmithKline*, the U.S. Supreme Court ruled that pharmaceutical sales representatives may be properly classified as "outside salespersons" who are exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA").

The plaintiffs, two sales representatives of a large pharmaceutical company, sued their employer, alleging that they were owed overtime wages pursuant to the FLSA. The pharmaceutical company argued that the sales representatives were not entitled to overtime wages because they were classified as "outside salesmen." The FLSA requires employers to pay employees overtime wages, but this requirement does not apply with respect to workers employed "in the capacity of outside salesman." In the past, Congress has not elaborated on the meaning of "outside

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salesman," but instead had delegated authority to the Department of Labor ("DOL") to issue regulations to define the term.

The Court ultimately held that the DOL's previous interpretation of the exemption– that pharmaceutical sales representatives are not exempt because they are not primarily engaged in sales (a) is entitled to no deference, and (b) has no persuasive value. Examining the exemption itself, the Court found that pharmaceutical sales representatives *are* primarily engaged in sales, which includes: "any sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition*." As such, they are exempt employees.

California

California Court Upholds Arbitration Agreement Containing Class Waiver

In another win for California employers, the California Court of Appeal held in *Iskanian v. CLS Transportation- Los Angeles* that an employment arbitration agreement prohibiting employees from filing class or representative actions was lawful.

The wage-and-hour class action complaint in *Iskanian* was filed in 2006 by a driver whose contract contained a requirement that claims be arbitrated individually. CLS Transportation's ("CLS") lawyers moved to compel arbitration. The lower court granted the motion in March 2007, but the court of appeal—on its first consideration of this case remanded in light of the California Supreme Court's August 2007 decision in *Gentry v. Superior Court. Gentry* held that an arbitration clause's class waiver should not be enforced if class arbitration would be a more effective way of vindicating employees' rights. Following the remand, CLS voluntarily withdrew its arbitration request. However, after last April's ruling in *Concepcion v. AT&T Mobility* wherein the U.S. Supreme Court held that the Federal Arbitration Act allows parties to limit arbitration agreements to single-plaintiff claims— CLS revived its motion to compel arbitration.

The *Iskanian* court held that "the *Concepcion* decision conclusively invalidates the *Gentry* test." "A rule like the one in *Gentry*—requiring courts to determine whether to impose class arbitration on parties who contractually rejected it—cannot be considered consistent with the objective of enforcing arbitration agreements according to their terms."

The U.S. Supreme Court's *Concepcion* decision and the California *Iskanian* decision provide new hope for employers in California who are faced with a deluge of class and/or representative actions. Based on these recent decisions, California employers may be able to enter into binding arbitration agreements containing class waivers. However, the efficacy of the *Iskanian* decision may be short-lived, as the decision will likely be appealed to the California Supreme Court, and is already under attack by the legislature.

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California Court Upholds Arbitration Agreement; Finds that Such Agreements Do Not Improperly Force Employees to Release Claims for Wages Due

In another win for California employers, the California Court of Appeal held in *Pulli v. Pony International, LLC* that a pre-employment arbitration agreement was enforceable notwithstanding the employee's arguments to the contrary.

The Plaintiff, Kyle Pulli ("Plaintiff"), filed suit against his former employer, Pony International, LLC ("Pony") and several related entities, alleging that the defendants fraudulently induced him to enter an employment agreement with Pony, and that Pony wrongfully terminated his employment.

Pony filed a motion to compel arbitration in which it argued that all of Plaintiff's claims against it were subject to an arbitration provision in Plaintiff's employment agreement. Plaintiff opposed the motion, contending that the employment agreement was unenforceable pursuant to Labor Code section 206.5 ("section 206.5"), which prohibits an employer from requiring an employee to execute "a release of a claim or right on account of wages due…" Pony, on the other hand, argued that section 206.5 prohibits an employer from requiring an employee to execute a release of a claim for wages under specified circumstances, and that the statute does not preclude a party from waiving its right to a jury trial by agreeing to an arbitration provision. The trial court denied Pony's motion to compel, concluding that the employment agreement was void under section 206.5 and that the arbitration provision contained in the employment agreement was therefore unenforceable. The Court of Appeal reversed, finding that section 206.5 precludes the execution of a *release of a wage claim* unless payment of those wages has been made; the statute does *not* preclude a party from waiving its right to a jury trial by entering into an agreement containing an arbitration provision.

California Court Rules that Employer Waived Right to Arbitration by First Litigating Claims in Court

In contrast to several recent cases upholding pre-employment arbitration agreements, the California Court of Appeal held in *Hoover v. American Income Life Insurance Company* that an employer waived its right to compel arbitration by first litigating in court.

The plaintiff, Martha Hoover ("Plaintiff"), worked as a sales agent for defendant American Income Life Insurance Company ("AIL"), a Texas-based company that sells life insurance policies in California. Pursuant to a collective bargaining agreement governing her relationship with AIL, Plaintiff signed an agent contract with AIL stating that she was an independent contractor, not an employee of the company. The agent contract also contained an arbitration clause, requiring the parties to arbitrate disputes relating to the agent contract if they were unable to informally resolve their disputes. Plaintiff voluntarily terminated her relationship with AIL, and later filed a class-action complaint against AIL alleging that it had actually hired its agents to sell insurance as employees, and had failed to reimburse them for business expenses, pay minimum wage during training, and pay earned wages due after termination.

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The parties actively litigated the case in court for fifteen months. Thereafter, AIL filed a motion to compel arbitration based on the arbitration clause in Plaintiff's agent contract. The trial court denied the motion to compel arbitration, ruling that Plaintiff's "statutory wage claims are not subject to arbitration because neither the arbitration agreement nor the CBA refers to the arbitration of statutory rights [the Labor Code claims]" and because "AIL waived its right to arbitrate . . . through its participation in the litigation process."

The Court of Appeal affirmed, holding that AIL had waived its right to compel arbitration by actively litigating the case for more than a year. The court further held that statutory wage and hour claims are not subject to arbitration unless there is a "clear and unmistakable waiver" of a judicial forum. AIL argued that Plaintiff agreed to arbitrate her statutory wage claims under the agent contract. However, the court stated AIL failed to point to any contractual provision under which Plaintiff *expressly* agreed to arbitrate any violations of *statutory rights*. Instead, the language of the agent contract merely described its scope as applying to "any dispute or disagreement arising out of or relating to this contract" and "all disputes, claims, questions, and controversies of any kind or nature arising out of or relating to this contract." According to the court, nothing in the contract constituted an *express* waiver of the right to a jury trial with respect to the enforcement of *statutory rights.*

The court noted, however, that in cases where the parties are engaged in interstate commerce, the Federal Arbitration Act ("FAA") may preempt state statutory claims, in which case an employer could compel arbitration notwithstanding the contractual language. In this case, however, AIL failed to establish that its relationship with Plaintiff had a specific effect or "bear[ing] on interstate commerce in a substantial way" such that the FAA was invoked.

This case highlights the value of preparing a comprehensive employment agreement that includes a valid and binding arbitration provision whereby the employee agrees to arbitrate claims arising from both statutory and non-statutory rights.

California Court Addresses DFEH Filing Requirement; Says No Signature is Required on Charge

In *Rickards v. United Parcel Service, Inc.*, the California Court of Appeal held that a complaining employee or his/her attorney can satisfy the jurisdictional prerequisites for filing a lawsuit under the Fair Employment and Housing Act ("FEHA") by simply submitting a complaint through the Department of Fair Employment and Housing's ("DFEH") online automated system.

The plaintiff, George Rickards ("Plaintiff"), sued United Parcel Service, Inc. ("UPS") under the FEHA for age and disability based discrimination, harassment, and retaliation. The trial court granted UPS's motion for summary judgment on the ground that Plaintiff did not file a verified complaint with the DFEH, as is required by California Government Code section 12960. As such, the jurisdictional prerequisite for bringing suit under the FEHA had not been met. In reversing the trial court's ruling, the Court of Appeal held that the jurisdictional prerequisite had been satisfied because Plaintiff's *attorney* timely filed a FEHA

complaint on Plaintiff's behalf through the DFEH's automated system. The system required that the information be verified under penalty of perjury but did not require an actual signature. Plaintiff's attorney clicked the "CONTINUE" prompt on a screen containing a declaration under penalty of perjury about the truth of the complaint he was submitting. The DFEH's automated system then issued an automatic right-to-sue letter.

While UPS argued that the complaint was not properly verified because Plaintiff never signed the complaint, the court concluded that the combination of (1) the new DFEH regulations, which became effective during 2011 and confirm that verification of online complaints is permissible *without* a physical signature; and (2) prior case law holding that attorneys may verify DFEH complaints so long as they personally are subject to penalties for perjury, were sufficient to warrant a finding that attorney verification of the online DFEH complaint—even without an attorney signature—is sufficient to meet the jurisdictional prerequisites for filing suit under the FEHA.

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