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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *August 2012*

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I.

LEGISLATIVE/ADMINISTRATIVE

California

California Assembly Rejects Bill Targeting Class Action Waivers

The California Assembly failed to pass SB 491 (Evans), a bill which would have invalidated 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 have applied broadly to most employment contracts, including arbitration agreements. The bill's failure in the Assembly is in line with several recent cases upholding class waivers in arbitration agreements.

II.

JUDICIAL

California

California Court Upholds Arbitration Agreement Containing Class Action Waiver

In *Nelsen v. Legacy Partners Residential, Inc.*, the California Court of Appeal once again upheld an arbitration agreement containing a class action waiver.

Plaintiff Lorena Nelsen ("Plaintiff") was employed by Legacy Partners Residential, Inc. ("LPI") as a property manager. At the inception of her employment, Plaintiff was provided with an employee handbook, which contained, among other things, the following language:

> I agree that any claim, dispute or controversy…which would otherwise require or resort [sic] to any court….between myself and Legacy Partners (or its owners, partners, directors, officers, managers, team members, agents, related companies, and parties affiliated with its team member benefit and health plans) arising from, related to, or having any

> relationship or connection whatsoever with my seeking employment with, employment by, or other associate with, the Legacy Partners,…shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the California Arbitration Act.

Plaintiff signed a separate document whereby she acknowledged that she had read, understood, and agreed to be bound by all of the terms of the handbook.

Thereafter, Plaintiff filed a lawsuit against LPI alleging various Labor Code violations, including failure to pay overtime and provide meal and rest breaks. The complaint was styled as a class action by Plaintiff on behalf of all current and former California-based property managers who worked for LPI at any time from four years preceding the filing of the complaint until final judgment in the suit. LPI sent Plaintiff a letter advising her of the arbitration agreement and requesting that she stipulate to the dismissal of her action and agree to submit her individual claims to arbitration. Receiving no response from Plaintiff, LPI moved to compel arbitration. Plaintiff opposed the motion on the ground that the arbitration agreement was unconscionable and violated California public policy favoring class actions and wage and hour lawsuits. The trial court granted LPI's motion, and Plaintiff appealed.

In affirming the trial court's order, the Court of Appeal held that there was nothing that rendered the arbitration agreement unconscionable. While certain elements of procedural unconscionability were present (e.g., the agreement was part of a preprinted form drafted by LPI that all of LPI's California property managers were required to sign on a take-it-or-leave-it basis), the agreement as a whole was not unenforceable because Plaintiff could not make the requisite showing of substantive unconscionability.

On the class action waiver issue, the court held that the language of the arbitration agreement did not permit class arbitrations. Moreover, although the California Supreme Court's prior ruling in *Gentry v. Superior Court* allows a court to invalidate a class action waiver and require class arbitration if it determines that individual arbitration is impractical as a means of vindicating employees' rights—a rule which has already been called into question by at least one U.S. Supreme Court ruling[1] and several state cases— Plaintiff in this case failed to present evidence sufficient to satisfy the *Gentry* prerequisites to class waiver invalidation: (1) the potential individual recoveries are small; (2) there is a risk of employer retaliation; (3) absent class members are unaware of their rights; and (4) as a practical matter, only a class action can effectively compel employer overtime compliance. Thus, the record was "wholly insufficient to apply *Gentry* even assuming that *Gentry* had not been vitiated by *AT&T Mobility v. Concepcion.*" The Court also rejected Plaintiff's contention that the class waiver violated the National Labor Relations Act.

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[1] In *AT&T Mobility v. Concepcion*, the U.S. Supreme Court held that that the Federal Arbitration Act preempts state laws that prohibit contracts from disallowing class action lawsuits.

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California Court Approves Commission Chargebacks

In *DeLeon v. Verizon Wireless, LLC,* the California Court of Appeal upheld the right of an employer to reclaim or "charge back" commissions which are provisionally advanced for sales that are later canceled.

Saul DeLeon ("Plaintiff") worked as a sales representative for Verizon Wireless ("Verizon"). His compensation was based upon the 2004 and 2005 Sales Compensaton Plans for Retail and Telesales Channels ("the Plan"). Retail sales representatives received an hourly wage plus monthly commissions as described in the Plan. The Plan explained that the commissions on the sale of cell phone service plans are paid in advance, but not earned until the expiration of a chargeback period during which the customer may cancel the service. If a customer disconnected service during the chargeback period, the employee's future commission advances would be reduced by the original amount advanced for the sale.

Plaintiff, who had received a copy of and was trained on the Plan, brought suit against Verizon, alleging that the chargeback provision violated California Labor Code section 223 ("section 223"), which prohibits the secret underpayment of wages. Verizon filed a motion for summary judgment, contending (1) Plaintiff's commission payments were advances, not wages; (2) the chargeback policy was set forth in the Plan and was not a "secret" underpayment of a lower than agreed-upon wage; and (3) the chargeback provision did not result in a payment of a lower wage than the wage designated in the Plan. The trial court granted Verizon's motion, stating that the Plan was "crystal clear" that commission payments were advances subject to chargebacks, and that customer retention for the full term of the service contract was a "necessary condition for actually earning the commissions."

The Court of Appeal affirmed the judgment, finding that the commission payments were advances (not wages), and there was therefore no statutory violation of section 223. The Court also based its ruling on the fact that the chargeback provision does not require the employee to pay back a portion of his or her wages and does not secretly deduct amounts owed to the employee so that retail sales representatives are earning less than what is stated in the plan. Moreover, Plaintiff accepted the offer of employment and understood the terms in the "clear and unambiguous" plan that governed his employment.

California Court Finds That Insurance Adjusters Are Not Exempt

Late last year in *Harris v. Superior Court (Liberty Mutual Insurance Co.)*, the California Supreme Court unanimously reversed the decision of a lower appellate court which had held that insurance claims adjusters are not exempt employees as a matter of law. In rejecting the appellate court's narrow interpretation of the administrative exemption, the Supreme Court relied on the federal Department of Labor guidelines for guidance in interpreting the Wage Order exemption. The Court held that the adjusters' *duties* (as opposed to their general "production" role within the company) had to be examined to assess applicability of the exemption.

The Supreme Court further clarified that in order to qualify for the administrative exemption, employees must (1) be paid at a certain level,

(2) perform administrative work, (3) have primary duties that involve administrative work, and (4) discharge those primary duties by regularly exercising independent judgment and discretion.

The Supreme Court, however, limited its ruling to setting forth the proper standard for determining whether an employee is performing "administrative" work. It declined to rule on whether or not the plaintiff claims adjusters were, in fact, exempt; instead, it remanded the case to the Court of Appeal for further findings on that issue.

On remand, the Court of Appeal directed the trial court to recertify a class of Liberty Mutual insurance claims adjusters and again held that they are not exempt from overtime pay under California's "administrative exemption." This time, however, the appellate court provided more thorough reasoning for its decision, pursuant to the direction of the Supreme Court. The appellate court found that the primary responsibility of the *Harris* employees was adjusting individual insurance claims, a task which is not at the level of management policy or general operations. In the court's opinion, adjusting individual claims is just carrying out the day to day production work of the company and does not involve advising management on policies or general business operations, much less formulating such policies or operational strategies. The court acknowledged that the adjusters at issue had varying levels of responsibility and authority; however, the court dismissed these differences as immaterial to the exemption analysis. The court reasoned that regardless of the amount of their authority, all adjusters' duties were to adjust individual claims, and that simply is not "administrative" work at the level of policy or general operations. Furthermore, even though some adjusters may have advised management some of the time, which might qualify as administrative work, they would have to engage in this work the majority of their work time in order to qualify for the administrative exemption.

The Supreme Court will likely again be asked to review the Court of Appeal's reasoning, which takes a very narrow view of the administrative exemption.

<u>California Court Denies Class Certification in Misclassification Case</u>

In *Sotelo v. Medianews Group, Inc.*, the California Court of Appeal affirmed the denial of class certification in an employee misclassification case.

Cynthia Sotelo, along with six other individuals (collectively, "Plaintiffs"), appealed the trial court's denial of their motion for class certification, wherein they alleged that defendant Medianews ("Medianews") erroneously classified them as independent contractors rather than employees. Medianews, a group of inter-connected newspaper publishers, hired independent contractors to insert advertisements into newspapers, fold and bag newspapers, deliver newspapers to subscribers, and supervise others who performed these tasks.

Plaintiffs' complaint identified two groups of independent contractors: (1) low-level "carriers" that insert, fold, bag, and deliver papers; and (2) high-level "distribution contractors" or "district managers," who may also carry, oversee carriers, and report to recognized employees of Medianews. Plaintiffs brought

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claims for, among other things, Medianews' alleged violation of California's minimum wage and overtime laws, and alleged failure to provide meal and rest breaks.

To obtain class certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members, which requires an inquiry into numerosity, ascertainability, whether common questions of law or fact predominate, whether the class representatives have claims or defenses typical of the class, and whether the class representatives can represent the class adequately.

In affirming the denial of class certification, the appellate court held that Plaintiffs failed to establish that the class was ascertainable because there was an absence of business records confirming class membership for identified putative class members. Additionally, for those class members not already identified by Medianews' records, Plaintiffs failed to provide an objective means of determining whether such individuals were members of the proposed class.

The court further held that Plaintiffs failed to prove that common issues of law or fact predominated, as there was a wide variation among carriers in the number of hours they worked each day and their ability to take breaks. With respect to the question of overtime, the routes and helper arrangements varied such that not all routes would take *more* than eight hours per day to complete. Due to the variety of experiences and absence of an overarching policy which required putative class members to work more than eight hours per day, commonality could not be established for the overtime claim. Likewise, commonality could not be established for the meal and rest break claims because there was no evidence that Medianews had a policy which prohibited employees from taking the meal and rest breaks to which they were entitled.

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