PETTITKOHN
PETTIT KOHN INGRASSIA & LUTZ

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *September 2012*

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I.

LEGISLATIVE/ADMINISTRATIVE

California

Bills Expanding the FEHA and the CFRA Lose Traction in the Senate

The Senate Appropriations Committee placed two bills that would have substantially expanded the Fair Employment and Housing Act ("FEHA") and the California Family Rights Act ("CFRA") in its suspense file; they are dead for the year.

AB 1999 (Brownley), would have amended the FEHA to include "familial status" as an additional basis upon which the right to seek, obtain, and hold employment cannot be denied. The bill defined "familial status" as being an individual who is, will be or is perceived to be a family caregiver, and specified "family" as a child, parent, spouse, domestic partner, parent-in-law, sibling, grandparent, or grandchild.

AB 2039 (Swanson), sought to expand the CFRA by (1) eliminating the age and dependency requirements to care for a "child," thereby allowing a qualifying employee to care for an independent adult child experiencing a serious health condition; (2) expanding the definition of "parent" to include an employee's parent-in-law; and (3) permitting an employee to care for a grandparent, sibling, grandchild, or domestic partner with a serious health condition.

II.

JUDICIAL

California

California Court Holds Class Arbitration is Not Automatically Mandated Where the Employment Agreement is Silent on That Issue

In *Truly Nolen of America v. Superior Court*, the California Court of Appeal held that class arbitration is not automatically mandated where the arbitration agreement is silent on that issue. The plaintiffs ("Plaintiffs"), former employees of Truly Nolen Pest and Termite Control ("Truly Nolen"), filed suit alleging that Truly Nolen had violated various wage and hour laws. The claims included an off-the-clock

claim, meal and rest period claims, a wage statement claim, and a waiting time penalties claim. Truly Nolen promptly sought to compel arbitration under its mandatory employment arbitration agreement. The agreement did not contain an express class action waiver. Truly Nolen argued that since the agreement was silent on the availability of class actions, the arbitration agreement precluded class arbitration.

Plaintiffs argued that class arbitration is mandatory in California where the four "*Gentry* Factors"[1] can be established: (1) the amount each class member could potentially recover is small; (2) the employees will likely be chilled from enforcing their rights because of the potential for retaliation; (3) the absent class members lack knowledge of their rights; and (4) class arbitration would more adequately vindicate the employees' rights than individual arbitrations would. Truly Nolen argued that *Gentry* was implicitly overruled by *AT&T Mobility v. Concepcion*,[2] and that *Gentry* applies only to employment agreements containing an express class action waiver, not to agreements that are silent on the issue.

The trial court compelled arbitration, but not on an individual basis. Rather, it compelled arbitration with the availability of class action (assuming an arbitrator found the prerequisites for class certification had been met). The Court of Appeal, however, reversed the trial court's decision on the ground that the *Gentry* factors the trial court had used were too lenient given the U.S. Supreme Court's ruling in *AT&T Mobility*. As the appellate court stated, "assuming the *Gentry* standard survives the United States Supreme Court holdings, the factual analysis as to whether the *Gentry* factors apply in any particular case must be specific, individualized, and precise." The court further ruled that mandating class arbitrations was contrary to the Federal Arbitration Act because class arbitration eliminates the streamlined nature of arbitration.

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.

Court Rejects "Desperate Housewives" Star's Wrongful Termination Claim

Nicollette Sheridan ("Sheridan"), an actor for the television series "Desperate Housewives," sued Touchstone Television Productions ("Touchstone") for wrongful termination in violation of public policy. Sheridan alleged that the show's creator (Marc Cherry) committed a battery upon her and that Touchstone fired her in retaliation for complaining about Cherry's conduct.

The appellate court found it was error to deny Touchstone's motion for a directed verdict on Sheridan's wrongful termination claim. Originally, Touchstone hired Sheridan to appear in Season One of the show. Sheridan signed an agreement whereby Touchstone had the exclusive option to renew her services on an annual basis

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[1] The California Supreme Court previously held in *Gentry v. Superior Court* that a court could invalidate a class action waiver and require class arbitration if it determines that individual arbitration is impractical as a means of vindicating employees' rights.

[2] The U.S. Supreme Court held in *AT&T Mobility v. Concepcion* that under the Federal Arbitration Act, California courts must enforce arbitration agreements, even where the agreement requires individual arbitration of employee complaints (instead of on a class-wide basis).

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for an additional six seasons. During Season Five, Touchstone informed Sheridan that it had declined to renew her contract for Season Six. As required by the contract, Touchstone paid Sheridan $4.5 million for her services for the entirety of Season Five, even though she did not appear in every episode that season.

The appellate court reasoned that there is no wrongful termination claim where an employer simply decides not to exercise its option to renew a contract. In fact, in such cases there is no "termination"; rather, there is simply an expiration of a fixed-term contract. Because Touchstone did not fire or discharge Sheridan, there was no basis for her wrongful termination claim. The court further confirmed that there is no cause of action for tortious nonrenewal of an employment contract in violation of public policy.

Notwithstanding the above, the court did permit Sheridan to amend her complaint to plead a cause of action for retaliation based on her alleged complaints about workplace safety.

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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.