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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *October 2015*

9th Annual Employment Law Symposium

Thursday, November 5th
Hilton San Diego Resort
(Mission Bay)

Topics Include:

Wage & Hour Developments

Wellness Programs

Harassment, Discrimination & Retaliation

The New CPR: Risk Prevention Training for New Managers

Constructing Commission Plans

Know Your Audience: Advice for Avoiding Litigation

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I.

LEGISLATIVE

California

Legislature Amends PAGA to Limit Employers' Exposure for Certain Technical Violations of the Labor Code

AB 1506 (Hernandez) has been enacted into law, limiting employers' potential exposure to lawsuits brought pursuant to the Private Attorneys General Act ("PAGA") for certain technical violations of the Labor Code.[1]

Under the Labor Code, employers must provide their employees with specific information regarding their wages, including but not limited to the inclusive dates of the period for which the employee is paid and the name and address of the legal entity that is the employer. As amended, PAGA now provides an employer with the right to cure a violation of the requirement that it provide its employees with the inclusive dates of the pay period and the name and address of the legal entity that is the employer before an employee may bring a civil action under the PAGA. The employer's right to cure is limited to once in a twelve-month period.

II.

JUDICIAL

California

Court of Appeal Affirms Order Denying Employer's Motion to Compel Arbitration

In *Carlson v. Home Team Pest Defense, Inc.*, Julie Carlson ("Carlson") brought various employment-related claims against her former employer, Home Team Pest Defense ("Home Team"). Home Team filed a motion to compel arbitration, arguing that Carlson's claims were subject to a binding arbitration agreement that Carlson had signed on her first day of work. The trial court denied the motion, finding that the arbitration agreement was unconscionable. The court

[1] The PAGA authorizes aggrieved employees to bring representative civil actions to recover specified civil penalties for their employers' alleged violations of the Labor Code.

of appeal affirmed, concluding that the arbitration agreement was both procedurally and substantively unconscionable.

At the commencement of Carlson's employment, Home Team provided her with an arbitration agreement referencing Home Team's "Dispute Resolution Policy" (a separate thirteen-page document detailing the complete agreement to arbitrate). Upon reviewing the arbitration agreement, Carlson requested a copy of the Dispute Resolution Policy ("Policy"). Carlson was told that she would be given a telephone number she could call "in a couple of weeks" to see if someone could provide her with a copy of the Policy. However, Carlson was never given a copy of the Policy, nor was she given a copy of the American Arbitration Association ("AAA") rules, which were also referenced in the arbitration agreement. The appellate court determined that Home Team's failure to give Carlson the Policy and the AAA rules constituted oppression and unfair surprise. The court also reasoned that Carlson had no choice but to sign the non-negotiable arbitration agreement since she would otherwise lose her job offer.

The appellate court found the arbitration agreement to be substantively unconscionable due to (1) a provision permitting Home Team to seek relief in court for employees' solicitation of customers and misappropriation of trade secrets; (2) the agreement's requirement that an aggrieved employee make a "Request for Dispute Resolution" before demanding arbitration (and provision that any claims not included in this initial request were barred from any subsequent arbitration); (3) the requirement that after making a "Request for Dispute Resolution," the employee must submit the dispute for resolution in an unspecified forum, during which the employee could not be represented by legal counsel; (4) the shortening of the statute of limitations for the employee's demand for arbitration; and (5) the requirement that the employee pay a $120 filing fee and thereafter split all arbitration fees and expenses with Home Team.

In making its decision, the court of appeal noted that its application of California's unconscionability rules was not preempted by the Federal Arbitration Act because such rules apply to all contracts and do not specifically discriminate against arbitration agreements.

The *Carlson* case is a reminder that employers should periodically review their arbitration agreements to ensure their legality. Consultations with legal counsel are also advisable given that the law surrounding arbitration agreements is currently in a state of flux, with state and federal courts issuing differing - and often conflicting -rulings regarding issues such as the need to attach the rules governing arbitration and one-sided provisions ostensibly benefitting the employer.

Court of Appeal Holds Arbitrator, Not Court, Should Decide Class Arbitration Issues Where AAA Rules Are Referenced in Arbitration Agreement

In *Universal Protection Service, LP v. Superior Court*, a California Court of Appeal denied an employer's petition to set aside the trial court's order compelling class arbitration and ordered that the arbitrator should decide whether the class claims are arbitrable.

Areas of Practice

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Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

Five individuals (collectively, "Plaintiffs") were employed by Universal Protection Service, LP and Universal Services of America, Inc. (collectively, "UPS") as armed security guards. Plaintiffs filed a class action lawsuit alleging that they were not reimbursed for equipment or training costs necessary for their positions.

Plaintiffs petitioned to compel class-wide arbitration. UPS contended that the class action claims were barred by the arbitration agreement Plaintiffs had signed, and petitioned to compel individual arbitration. UPS argued that the trial court, not the arbitrator, should decide whether class action relief was available under the agreement. The trial court disagreed with UPS and granted the Plaintiffs' petition.

On appeal, the court of appeal concluded that the arbitration agreement's incorporation by reference of the American Arbitration Association's National Rules for the Resolution of Employment Disputes ("AAA Rules") vested the arbitrator with the power to decide whether the agreement authorizes class arbitration. The AAA Rules specifically provide that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement." Thus, by incorporating the AAA rules into the arbitration agreement, the parties implicitly gave the arbitrator power to determine if the agreement authorizes class arbitration.

This decision serves as a reminder to employers that incorporation of certain rules into arbitration agreements can have unintended consequences. Employers are advised to consult with legal counsel to ensure that all of the terms embodied in their arbitration agreements are both enforceable and desirable. Employers may also want to consider including specific provisions stating who (the court or arbitrator) will decide certain gateway issues relating to the enforceability of the agreement and/or arbitrability of claims.

Court of Appeal Invalidates Employer's Training Reimbursement Policy

In *In re Acknowledgment Cases*, a California Court of Appeal ruled in favor of a group of forty-three police officers ("the Officers") who had been sued by the Los Angeles Police Department ("LAPD") pursuant to an agreement requiring the Officers to repay the LAPD for their training expenses. The court held that the LAPD's mandatory repayment agreement was unenforceable.

By the early 1990s, the LAPD and City of Los Angeles recognized a pattern in which officers who had graduated from the LAPD's training academy were leaving within a short period of time for other jobs. To reduce the attrition, the LAPD enacted a policy under which officers were compelled to enter into an agreement ("the Acknowledgment") under which they would be required to repay a prorated portion of their police academy training expenses if, within five years after their academy graduation, they voluntarily resigned and took a job with another law enforcement agency.

The court of appeal held that even though the Officers were not initially required to incur expenses during their police academy training, the fact that the Officers became responsible for repaying the LAPD for training expenses pursuant

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to the Acknowledgement constituted an unreimbursed expense under Labor Code section 2802, which requires employers to bear the burden of any expenses, including training, incurred for the employer to conduct its business or for the employee to discharge his or her duties on the employer's behalf. The court acknowledged that some of the training expenses were not specific to the LAPD but instead were required by state law for licensed police officers. However, the LAPD training extended beyond that required for state licensure. Because the Acknowledgment was not apportioned between the LAPD-specific training and the less onerous state protocols, it could only be evaluated in its entirety. Since the Acknowledgment, as a whole, violated Labor Code section 2802, it was held to be unenforceable.

This decision serves as a reminder that, with few exceptions, training expenses for employees should be borne by the employer, not the employee. Employers who violate Labor Code section 2802 face the possibility of significant penalties and class action lawsuits. Experienced counsel can assist in implementing appropriate expense reimbursement 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, Jenna Leyton-Jones, Christine Mueller, Ryan Nell, Lauren Bates, Jennifer Suberlak or Shannon Finley at (858) 755-8500; or Jennifer Weidinger, Tristan Mullis or Andrew Chung at (310) 649-5772.