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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *April 2016*

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LEGISLATIVE

California

Governor Signs Bill Increasing California's Minimum Wage

Governor Jerry Brown has signed into law SB 3 (Leno) which amends sections 245.5, 246, and 1182.12 of the Labor Code. The new law raises the state's minimum wage to $10.50 per hour on January 1, 2017, and then annually thereafter until reaching $15.00 per hour on January 1, 2022. The timeline of minimum wage hikes for employers with fewer than 25 employees will run from January 1, 2018 to January 1, 2023.

The minimum wage increase will not only affect the base hourly compensation that employers must provide to their non-exempt employees, but also the overtime rate as well as the minimum salary requirements for classifying employees as "exempt." With each increase in the minimum wage, employers should review their pay and employee classification practices to ensure compliance with state and federal law.

JUDICIAL

Federal

U.S. Supreme Court Affirms Class Certification Based on Statistical Evidence

In *Tyson Foods, Inc. v. Bouaphakeo, et al.*, the Supreme Court upheld a district court's decision certifying and maintaining a class of Tyson Foods' ("Tyson") employees. The employees work at a pork processing plant in Storm Lake, Iowa in the kill, cut, and retrim departments, where hogs are slaughtered, trimmed, and prepared for shipment. The dangerous work requires the employees to wear certain protective gear, but the exact composition of the gear depends on the specific tasks a worker performs on a given day. Tyson paid some, but not all, employees for this donning and doffing. Tyson did not record the time each employee spent on those activities.

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The employees filed suit alleging that they should have received statutorily mandated overtime pay for time spent donning and doffing their protective equipment. They sought certification of their state claims as a class action under Federal Rule of Civil Procedure 23 and certification of their Fair Labor Standards Act ("FLSA") claims as a collective action.

The FLSA requires employers to pay employees for activities "integral and indispensable" to their regular work, even if those activities do not occur at the employee's workstation. The FLSA also requires employers to "make, keep, and preserve . . . records of the persons employed by [them] and of the wages, hours, and other conditions and practices of employment."

To recover for a violation of the FLSA's overtime provision, the employees had to show that they each worked more than 40 hours a week, inclusive of the time spent donning and doffing. As a result of Tyson's failure to keep records of donning and doffing time, however, the employees were forced to rely on representative evidence. This evidence included employee testimony, video recordings of donning and doffing at the plant, and, most importantly, a study performed by an industrial relations expert, Dr. Kenneth Mericle. Mericle conducted 744 videotaped observations and analyzed how long various donning and doffing activities took. He then averaged the time taken in the observations to produce an estimate of 18 minutes a day for the cut and retrim departments and 21.25 minutes for the kill department. These estimates were then added to the timesheets of each employee to ascertain which class members worked more than 40 hours per week and the value of classwide recovery.

In opposition to the employees' request for class certification, Tyson contended that, because of the variance in protective gear each employee wore, the employees' claims were not sufficiently similar to be resolved on a classwide basis. The district court concluded that common questions, such as whether donning and doffing protective gear was compensable under the FLSA, were susceptible to classwide resolution even if not all of the workers wore the same gear. Thereafter, the jury returned a special verdict finding that time spent in donning and doffing protective gear at the beginning and end of the day was compensable work but that time during meal breaks was not. It awarded the class approximately $2.9 million in unpaid wages. The Eighth Circuit Court of Appeals affirmed the judgment and the award.

Tyson appealed, arguing that the class should not have been certified because the primary method of proving injury assumed each employee spent the same amount of time donning and doffing protective gear, even though differences in the composition of that gear may have meant that, in fact, employees took different amounts of time to don and doff.

According to the U.S. Supreme Court, whether and when statistical evidence such as Mericle's sample can be used to establish classwide liability depends on the purpose for which the evidence is being introduced and on the elements of the underlying cause of action. Because a representative sample may be the only feasible way to establish liability, it cannot be deemed improper merely because the claim is brought on behalf of a class. Where an employer violates its statutory duty to keep proper records, the employees can meet their burden by

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proving that they in fact performed work for which they were improperly compensated and by producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Here, the employees properly sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. Thus, the district court did not err in certifying the class.

California

California Court of Appeal Clarifies When Litigants May Recover Attorneys' Fees in Connection with Meal Break and Overtime Claims

In *Ling v. P.F. Chang's Chinese Bistro, Inc.*, a California Court of Appeal addressed the propriety of attorneys' fee awards to prevailing employers and employees in the context of overtime and meal break premium claims. Plaintiff Cynthia Ling ("Ling") worked as a floor manager for defendant P.F. Chang's Chinese Bistro, Inc. ("P.F. Chang's"). After she was discharged, Ling alleged that P.F. Chang's misclassified her as exempt and therefore owed her overtime, premium pay for missed meal breaks, and waiting time penalties.[1] Because Ling had signed an enforceable arbitration agreement governing employment-related disputes, she pursued her claims in arbitration.

The arbitrator determined that Ling was properly classified as exempt during her tenure as floor manager, and was therefore not entitled to overtime wages or meal breaks for that time period. However, the arbitrator also found that, for the first nine weeks of Ling's employment (during which she received off-site training), she was a non-exempt employee and was thus entitled to premium pay for missed meal breaks, as well as waiting time penalties for P.F. Chang's failure to timely provide the premium pay.

The arbitrator awarded attorneys' fees to P.F. Chang's pursuant to Labor Code section 218.5, which authorizes a prevailing party (employee or employer) to recover attorneys' fees in "any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions." The arbitrator specified that the award of attorneys' fees was for P.F. Chang's victory on the meal break claim only—P.F. Chang's was not awarded any fees for prevailing on the overtime claim. Pursuant to Labor Code section 1194, a prevailing employee may recover attorneys' fees in connection with an overtime claim, but prevailing employers may not recover fees for such claims. Ling challenged this fee award in the trial court.

The trial court concluded that the arbitrator should not have awarded attorneys' fees to P.F. Chang's in connection with the meal break claims, and the court of appeal agreed. Section 1194 represents a one-way fee shifting statute—only an employee can recover attorneys' fees in connection with an overtime claim. The legislature intended to give "special treatment" to overtime claims by enacting a one-way fee shifting statute, ensuring that it is economical for employees to pursue overtime claims. According to the trial and appellate courts, permitting an

[1] Pursuant to Labor Code section 203, an employer must pay a penalty for failing to pay certain wages to an employee who quits or is discharged. These penalties are commonly referred to as "waiting time penalties."

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employer to recover attorneys' fees on an overtime claim via section 218.5 would circumvent that legislative intent. Because Ling's meal break and overtime claims required the same proof (e.g., hours worked and duties performed by Ling), the two claims were "factually inextricably intertwined." Thus, by awarding P.F. Chang's attorneys' fees for prevailing on the meal break claim, the arbitrator had de facto awarded P.F. Chang's attorneys' fees for prevailing on the overtime claim too.

Ling requested an award of attorneys' fees in connection with her successful meal break claim (in relation to her training period). The arbitrator denied the request, relying on the California Supreme Court's decision in *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244—an opinion that was issued after the trial court determined it was improper to award attorneys' fees to P.F. Chang's for prevailing on the remainder of Ling's meal break claims and remanded the case back to the arbitrator for further proceedings. In *Kirby*, the Court held that attorneys' fees for missed meal and rest break claims are governed neither by Labor Code section 1194 nor section 218.5—rather, each party is responsible for bearing its own fees in connection with such claims. The arbitrator determined that *Kirby* precluded either party from receiving an attorneys' fee award in connection with Ling's meal break claims. In the trial court, Ling argued that the arbitrator improperly denied her request for attorneys' fees. The trial court disagreed with Ling, and the court of appeal affirmed the trial court's decision not to vacate the arbitrator's decision.

The arbitrator awarded Ling waiting time penalties under Labor Code section 203 because P.F. Chang's had failed to timely provide her with meal break premiums (for missed meal breaks during her training period). However, the arbitrator denied Ling's request for attorneys' fees in connection with her waiting time penalties claim. The trial and appellate courts refused to vacate the arbitrator's decision.

Ling argued that, because her claim for waiting time penalties was based upon her entitlement to premium pay for missed meal breaks, her claim was an "action [] brought for the non-payment of wages." Thus, according to Ling, she was entitled to recover attorneys' fees under section 218.5. However, section 203 provides that an employee may sue to recover "[waiting time] penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise." In *Kirby*, the Supreme Court determined that actions for meal and rest break premiums are actions "brought for the nonprovision of meal and rest periods, not for the 'nonpayment of wages.'" Because a section 203 claim must derive from a claim for the nonpayment of wages, it cannot serve as the basis for an attorneys' fees award when the underlying claim is not an action for wages. *Ling* confirms that employers cannot circumvent the pro-employee public policy behind Labor Code section 1194's one-way fee shifting by seeking attorneys' fees via another statute. However, employers can rest assured that plaintiffs cannot recover attorneys' fees based on claims for missed meal and rest breaks, either when suing for premium pay or waiting time penalties based on the failure to provide premium pay.

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California Supreme Court Rules in Favor of Enforcing Arbitration Agreement in *Baltazar v. Forever 21*

In its unanimous decision in *Baltazar v. Forever 21, Inc.*, the California Supreme Court upheld an arbitration agreement which contained, among other attacked provisions, an injunctive relief clause which merely restated existing state law.

Maribel Baltazar ("Baltazar") was a merchandising associate at Forever 21, a popular clothing company. During her initial interview, Baltazar was presented with an employment application that included a two page arbitration agreement ("the Agreement"). While Baltazar initially refused to sign the Agreement, she was informed that signing was a condition precedent to her employment. She signed and was hired.

Among other provisions, the Agreement expressly allowed the parties to seek preliminary injunctive relief. The language in question specifically stated that "pursuant to California Code of Civil Procedure section 1281.8, either party hereto may apply to a California court for any provisional remedy, including a temporary restraining order or preliminary injunction."

Baltazar resigned from Forever 21 in January 2011. Several months later, she filed a complaint in state court, claiming that Forever 21 had subjected her to harassment, discrimination, and retaliation. Forever 21 filed a motion to compel arbitration. Baltazar opposed the motion, arguing that the Agreement was both procedurally *and* substantively unconscionable.

Generally, California arbitration agreements are reviewed for both procedural and substantive unconscionability. Procedural unconscionability looks at the manner in which the parties entered into an agreement, while substantive unconscionability looks at the contents of the agreement itself. Courts examine both types of unconscionability together to determine whether an arbitration agreement ought to be deemed unconscionable.

The trial court agreed with Baltazar, holding that the Agreement was both procedurally and substantively unconscionable, and therefore unconscionable on the whole. The California Court of Appeal, however, overturned the trial court's decision. It agreed that the unequal bargaining position between the parties allowed Forever 21 to force Baltazar to sign the Agreement and therefore amounted to procedural unconscionability. It refused, however, to hold that the agreement was substantively unconscionable. In making its decision, the appellate court primarily focused on the Agreement's inclusion of the injunctive relief provision. While Baltazar argued that since Forever 21, as the employer, would be far more likely than Baltazar to seek injunctive relief, the provision should be deemed substantively unconscionable. The court disagreed, holding that the Agreement was not unconscionable. Baltazar appealed to the California Supreme Court.

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On appeal, the state's highest court reviewed and affirmed the appellate court's decision. In its ruling, the Court reasoned that the injunctive relief clause merely restates existing law regarding the rights of parties to seek injunctive relief. Its inclusion is therefore not sufficient to create a level of substantive unconscionability, even when coupled with procedural unconscionability, to invalidate the Agreement.

Baltazar signals a victory for California employers, though it may only be a pyrrhic one. On its face, the ruling protects the ability of an employer to enforce an arbitration agreement. On a deeper level, however, the decision underscores the recent litany of cases seeking to attack the enforceability of California arbitration agreements. As the landscape of the conscionability of arbitration agreements continues to change, California employers must be as cautious as ever in crafting arbitration agreements that will pass judicial scrutiny.

Court of Appeal Rules *Harris* Defense Applicable to Non-FEHA Wrongful Termination Claims, and Reiterates Prohibition Against Classifying Employees as Independent Contractors

In *Davis v. Farmers Insurance Exchange*, a California Court of Appeal ruled that the substantial motivating factor analysis (a so-called "*Harris* defense") previously utilized in claims brought under the Fair Employment and Housing Act ("FEHA") may be extended to tort claims for wrongful termination in violation of public policy. Moreover, in the same lengthy decision, the court shed light on the proper analysis for misclassification claims, finding that an independent contractor acting on behalf of Farmers had actually been misclassified for over twenty years. William Davis was initially hired as an insurance agent by Farmers in 1977. In 1983, he entered into a contractual agreement under which he became a district manager, a role in which he was required to recruit and train insurance agents to sell Farmers' policies. Despite this close relationship and his obligation not to represent any other insurer, he was classified as an independent contractor. Davis's pay was predicated on the volume of sales from agents in his district. This arrangement continued until October 2006, when Farmers terminated its contract with Davis on the stated grounds that the business performance in his district was inadequate. Davis was 57 years old at that time.

Davis sued Farmers for wrongful termination in violation of public policy, based on the public policy interest in opposing age discrimination. Moreover, Davis alleged that he had at all times been an employee of Farmers—not an independent contractor—and had been denied his wages due when Farmers withheld outstanding loan amounts and advanced payments for insurance and business expenses from the amount he was owed under the contract. These loans and advances related to expenses incurred by Davis in recruiting agents and operating his business.

At trial, the jury concluded that Davis was an employee, not an independent contractor. Accordingly, Farmers sought to utilize the *Harris* defense to the claim for wrongful termination. Under this defense, even if discrimination was a factor in the termination decision, damages are unavailable to the plaintiff if an employer can establish that the discharge would have occurred regardless of the

discrimination, based on the existence of a non-discriminatory substantial motivating factor. Based on the evidence presented at trial, the jury concluded the *Harris* defense applied, and awarded Davis no damages. Further, following the jury's ruling on the employee question, the trial court issued a directed verdict in favor of Farmers on the wage claims, on the grounds that Davis had not proven that he had been denied any wages owed. Davis appealed on the grounds that the *Harris* instruction had been improper, and the withheld loan amounts constituted a denial of his wages.

The Court of Appeal upheld the trial court's decision with respect to the *Harris* instruction. In its ruling, the Court found that the close similarity between a FEHA discrimination claim and a claim for wrongful discharge in violation of public policy made it illogical for *Harris* to be applicable in one, but not the other. In many cases, the underlying policy is the statutory violation of FEHA, so *Harris* should be available in both circumstances as a potential defense to damages. The Court of Appeal further ruled that the withholding of funds from Davis upon his contract's termination had been unlawful. As an employee, the business-related expenses were to be borne by Farmers, not Davis. Moreover, the outstanding loan amount could not be withheld as a balloon repayment unless authorized by Davis, as opposed to a previously agreed-upon repayment schedule.

For employers, multiple lessons arise from *Davis*. First, documenting the legitimate reasons for an employee's discharge is critical, as an effective use of the *Harris* defense requires clear evidence of a lawful motive for the termination. Further, designating as an independent contractor any person who works closely with and on behalf of an employer must be carefully considered, as there are numerous potential pitfalls in this strategy. Employers are advised to consult with experienced legal counsel prior classifying individuals as independent contractors.

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