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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *August 2016*

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LEGISLATIVE

Federal

California

City of San Diego Publishes Notice and Posters for Earned Sick Leave and Minimum Wage Ordinance

The City of San Diego has published the required posters and employee notice for the Earned Sick Leave and Minimum Wage Ordinance, which took effect on July 11, 2016. Among other things, the Ordinance increases the City's minimum wage to $10.50 per hour and requires employees who work at least two hours within the City's geographical boundaries during a year to accrue paid sick leave. The Ordinance sets forth specific guidelines for paid sick leave accrual and use, as well as employer obligations with respect to notices and posting. More information regarding the Ordinance can be found at https://www.sandiego.gov/citycouncil/cd3/san-diego-increases-minimum-wage. The requisite Minimum Wage Notice, Earned Sick Leave Notice, and Employer Notice to Employee can be found at https://www.sandiego.gov/treasurer/minimum-wage-program.

Governor Signs Bill Confirming That Wage Statements Need Only Reflect Total Hours Worked for Non-Exempt Employees

Governor Brown has signed into law Assembly Bill 2535 (Ridley), which confirms that employer-issued wage statements need only reflect total hours worked for non-exempt employees.

Existing law requires an employer to provide his or her employees accurate itemized statements in writing containing specified information, either semimonthly or at the time the employer pays the employees their wages. That specified information includes showing total hours worked, unless an employee's compensation is solely based on a salary and the employee is exempt from payment of overtime under a specified statute or an applicable order of the Industrial Welfare Commission. This bill clarifies certain ambiguities in the statute, confirming that employers need only track the hours worked by non-exempt employees.

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Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

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Ninth Circuit Holds That Employers Waived Their Right to Arbitrate By Waiting Seventeen Months to File a Motion to Compel

In *Martin v. Yasuda*, the Ninth Circuit Court of Appeals ("Ninth Circuit") affirmed the district court's denial of an employers' motion to compel arbitration due to the employers' litigation conduct. The employers were a group of private colleges that provided career training in cosmetology. The plaintiffs were students in the colleges who, they claimed, also performed cleaning, laundry, marketing, sales and other "employee" tasks. The plaintiffs filed claims for unpaid minimum wages, overtime, and missed meal and rest breaks.

Seventeen months after the plaintiffs filed their action, the employers moved to compel arbitration since the plaintiffs signed arbitration agreements with the colleges upon enrollment. The district court denied the motion on the ground that the employers' litigation conduct waived their right to arbitration.

On appeal, the employers advanced two legal theories to support their position. They first argued that the issue of waiver had to be decided by an arbitrator and not the court. They additionally argued that the district court's conclusion regarding waiver was erroneous.

The Ninth Circuit rejected both arguments. Relying on its previous decision in *Cox v. Ocean View Hotel Corp*., the Ninth Circuit held that the waiver issue was properly determined by the district court since that was a gateway issue that involved a question of arbitrability (i.e., whether the parties have submitted a particular dispute to arbitration). The Ninth Circuit concluded that the language of the parties' arbitration clause - "[a]ll determinations as to the scope, enforceability and effect of this arbitration agreement shall be decided by the arbitrator, and not by a court" – was not sufficiently clear and unmistakable so as to leave the waiver issue to be decided by an arbitrator.

As to the second issue, the Ninth Circuit weighed three factors to determine whether the employers had waived their right to arbitrate: (1) their knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts. The Ninth Circuit concluded that all three elements weighed in favor of finding that waiver had occurred, finding that the employers acted inconsistently with their right to arbitrate by spending months litigating the case before moving to compel arbitration. During that seventeen months, they submitted a joint stipulation to the district court structuring the litigation, filed a motion to dismiss on the merits, entered into a protective order, answered discovery, and conducted a deposition. The employers also represented to the district judge and opposing counsel that they were likely "better off" in federal court.

The Ninth Circuit also found that the plaintiffs would be prejudiced if the matter were arbitrated, as they had already expended significant costs litigating the case in district court. Moreover, if the matter were arbitrated, the plaintiffs would be required to re-litigate issues decided in their favor in connection with the employers' motion to dismiss.

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Martin is consistent with existing precedent on the issue of waiver, and serves as a reminder that parties seeking to compel arbitration should do so as soon as possible, before engaging in substantial litigation.

California

California Supreme Court Holds Arbitrator Decides Availability of Class Proceedings Where Arbitration Agreement is Silent on That Issue

In *Sandquist v. Lebo Automotive, Inc.*, the California Supreme Court held that where an arbitration agreement is silent regarding the availability of class proceedings, such availability is a question of contract for the arbitrator to decide.

When Plaintiff began work as a salesperson with an automotive dealership, he signed three arbitration agreements. The agreements, provided amongst approximately 100 pages of documents, were presented as a condition to begin work. Plaintiff was encouraged to hurry through the paperwork and as a result did not review the arbitration agreements.

Twelve years later, Plaintiff filed a complaint in state court on behalf of himself and "a class of current and former employees of color." Plaintiff alleged racial discrimination, harassment, and retaliation. Based on the arbitration agreement Plaintiff signed years earlier, Lebo Automotive moved to compel arbitration of Plaintiff's individual claims and dismiss his class claims. The trial court granted the motion. Citing precedent, the trial court concluded it was compelled to determine the availability of class arbitration, and dismissed the class claims with prejudice.

Plaintiff appealed and the Court of Appeal reversed, in part, holding that precedent did not mandate the trial court to determine the availability of class proceedings. The appellate court then held that the availability of class proceedings was a question for the arbitrator.

Lebo Automotive petitioned the California Supreme Court for review and it granted the petition. The Court declared that there is no universal rule requiring the decision to be made by a court or an arbitrator. Instead, the agreement of the parties dictates whether a court or arbitrator decides. The Court held that where an arbitration agreement is ambiguous or silent as to class proceedings, the agreement allocates the decision of class proceeding availability to the arbitrator.

This case reiterates the need for the careful drafting of arbitration agreements. As it is generally preferable for a court, not an arbitrator, to decide the availability of class proceedings, employers should consider including language in their arbitration agreements specifically allocating this decision to the court.

Court of Appeal Confirms Broad Scope of Attorney-Client Privilege in the Context of Workplace Investigations

In *City of Petaluma v. Superior Court of Sonoma County*, a California Court of Appeal vacated a trial court's holding that the City of Petaluma (the "City") was not protected by the work product doctrine and attorney-client privilege when it hired outside counsel solely to investigate allegations of sexual harassment. It also vacated

the trial court's decision that the City's assertion of the "avoidable consequences" doctrine waived any privilege it had in the findings of the investigation.

Plaintiff was a former firefighter and paramedic, and was the first and only woman in those roles. She alleged that she faced persistent sexual harassment and discrimination during her tenure and retaliation when she reported the conduct. The City contended that it only learned of the allegations when it received a notice of a complaint filed with the U.S. Equal Employment and Opportunity Commission ("EEOC"). Days after the City received the notice, Plaintiff resigned from her position. Subsequently, Plaintiff sued in state court.

Following Plaintiff's resignation, but prior to litigation, the City hired outside counsel to investigate the allegations in the EEOC notice. The City hired outside counsel only to investigate, not provide any legal advice. During litigation, Plaintiff sought to discover the contents of the investigation notes, and moved to compel when the City refused to disclose them. The trial court sided with Plaintiff, mandating the disclosure of the investigation. The trial court reasoned that communications between the City and outside counsel were not protected by the attorney-client privilege because outside counsel was not hired to offer legal advice (only investigate).

The City appealed and the Court of Appeal reversed. Looking to the Evidence Code, the appellate court found that a "client," as used in the term "attorney-client privilege," is a person who retains an attorney for "legal service *or* advice." Because the City hired outside counsel to provide a legal service, the attorney-client privilege was applicable. The Court of Appeal stated that the same analysis holds true for the attorney work product doctrine.

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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, Ryan Nell, Lauren Bates, Jennifer Suberlak, Shannon Finley, or Cameron Flynn at (858) 755-8500; or Jennifer Weidinger, Tristan Mullis or Andrew Chung at (310) 649-5772.