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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *October 2016*

10th Annual Employment Law Symposium

Thursday, December 1st
Hilton San Diego Resort
(Mission Bay)

Topics Include:

Wage & Hour Developments

Discrimination & Retaliation

Social Media in the Workplace

Arbitration

Suitable Seating

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LEGISLATIVE

California

Governor Signs Bill Amending Overtime Rules for Agricultural Workers

Governor Jerry Brown has signed Assembly Bill 1066 (Gonzalez), also known as the "Phase-In Overtime for Agricultural Workers Act of 2016." Existing law sets wage, hour, meal break requirements, and other working conditions for employees, and requires an employer to pay overtime wages to an employee who works in excess of eight hours in a workday or 40 hours in a workweek. However, existing law exempts agricultural employees from these requirements, providing them overtime only when they work more than 10 hours in a workday or 60 hours in a workweek.

The new law gradually drops the overtime ceiling from 10 hours in a day to eight hours in a day, and requires farm workers to take at least one day off for every seven days worked. These changes are to be phased in over the course of four years, from 2019 to 2022; however, employers who employ twenty-five or fewer employees will have an additional three years to comply with the new requirements.

Governor Signs Bill Providing Additional Rights to Victims of Domestic Violence, Sexual Assault and Stalking

Governor Brown has signed into law Assembly Bill 1337 (Burke), which requires employers to inform each employee of his or her rights as a victim of domestic violence, sexual assault, or stalking.

Existing law prohibits an employer from discharging or in any manner discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault, or stalking for taking time off from work for specified purposes related to addressing the domestic violence, sexual assault, or stalking. Existing law also provides that any employee who is discharged, threatened with discharge, demoted, suspended, or in any manner discriminated or retaliated against in the terms and conditions of employment by his or her employer because the employee has taken time off for those purposes is entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, as well as appropriate equitable relief, and is allowed to file a complaint with the Labor Commissioner.

Areas of Practice

Appellate

Business Litigation

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Personal Injury

Product Liability

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Retail

Transactional & Business Services

Transportation

The new law requires employers to inform each employee of these rights. The information must be provided to new employees upon hire and to other employees upon request. The law also requires the Labor Commissioner to develop a form that employers can use to comply with the notice requirements, and to post the form on its website on or before July 1, 2017. Employers may use the form developed by the Labor Commissioner or they may use their own notice, so long as the notice is substantially similar in content and clarity to the form developed by the Labor Commissioner. Employers are not required to comply with these notice requirements until the Labor Commissioner posts the form online.

Governor Signs Bill Limiting Choice of Law and Form Provisions in Employment Contracts

Governor Jerry Brown has signed into law Senate Bill 1241 (Wieckowski), which limits the choice of law and forum provisions in employment contracts.

Existing law prohibits an employer from requiring an employee or applicant for employment to agree, in writing, to any term or condition that is known by the employer to be illegal.

The new law, for contracts entered into, modified, or extended on or after January 1, 2017, prohibits an employer from requiring an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would require the employee to adjudicate outside of California a claim arising in California or deprive the employee of the substantive protection of California law with respect to a controversy arising in California. The new law makes any provision of a contract that violates these prohibitions voidable, upon request of the employee, and requires a dispute over a voided provision to be adjudicated in California under California law. The new law specifies that injunctive relief is available and authorizes a court to award reasonable attorney's fees. The law excepts from these provisions a contract with an employee who was represented by legal counsel.

Governor Signs Bill Limiting Employer Inquiries into Criminal History of Applicants

Governor Jerry Brown has signed into law Assembly Bill 1843 (Stone), which prohibits an employer from asking an applicant for employment to disclose, or from utilizing as a factor in determining any condition of employment, information concerning or related to an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law.

The new law also prohibits an employer at a health facility, as defined in Section 1250 of the Health and Safety Code, from inquiring into specific events that occurred while the applicant was subject to juvenile court law (unless the information concerns an adjudication by the juvenile court in which the applicant has been found by the court to have committed a specified felony or misdemeanor offense that occurred within five years preceding the application for employment) and from inquiring into information concerning or related to an applicant's juvenile

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offense history that has been sealed by the juvenile court. The law requires an employer at a health facility seeking disclosure of juvenile offense history under the exception to provide the applicant with a list describing offenses for which disclosure is sought.

Governor Signs Bill Clarifying Gender-Based Wage Discrimination Law

Governor Jerry Brown has signed into law Assembly Bill 1676 (Campos), which clarifies current law regarding wage discrimination. Existing law generally prohibits an employer from paying an employee at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. Existing law also establishes exceptions to that prohibition, including, among others, where the payment is made based on any bona fide factor other than sex, such as education, training, or experience. The new law specifies that prior salary cannot, by itself, justify any disparity in compensation under the bona fide factor exception to the above prohibition. Employers are advised to review the current compensation of their employees in order to identify potentially problematic pay disparities due to salary history.

Governor Signs Bill Prohibiting Wage Discrimination on the Basis of Race or Ethnicity

Governor Jerry Brown has signed into law Senate Bill 1063 (Hall), which clarifies current law regarding wage discrimination. Existing law prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, unless the employer demonstrates that specific, reasonably applied factors account for the entire wage differential. The new also prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work, as specified above. Employers are encouraged to review the wages paid to all employees of different sexes, races, and ethnicities to determine whether any wage differential can be defended based on a seniority system, merit system, or a system that measures earnings by quantity or quality of production, education, training or experience. This review will help employers determine if they need to make adjustments to their employee compensation policies in order to ensure compliance with the law.

Governor Signs Bill Requiring Employers to Post Bond When Challenging Labor Commissioner Citations

Governor Jerry Brown has signed into law Assembly Bill 2899 (Hernandez), which requires the posting of a bond by individuals or entities seeking to challenge a Labor Commissioner citation.

Under existing law, any employer or other person acting either individually or as an officer, agent, or employee of another person, who pays or causes to be paid to any employee a wage less than the minimum fixed by applicable state or

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

local law or an order of the Industrial Welfare Commission, is subject to a civil penalty, restitution of wages, liquidated damages payable to the employee, and any applicable specified penalties, as provided. Existing law provides notice and hearing requirements under which a person against whom a citation has been issued can request a hearing to contest proposed assessment of a civil penalty, wages, liquidated damages, and any applicable penalties. Existing law further provides that after a hearing with the Labor Commissioner, a person contesting a citation may file a writ of mandate, within 45 days, with the appropriate superior court.

The new law requires a person seeking a writ of mandate contesting the Labor Commissioner's ruling to post a bond with the Labor Commissioner, as specified, in an amount equal to the unpaid wages assessed under the citation, excluding penalties. The new law requires that the bond be issued in favor of the unpaid employees and ensure that the person seeking the writ makes prescribed payments pursuant to the proceedings. The new law further provides that the proceeds of the bond, sufficient to cover the amount owed, are forfeited to the employee if the employer fails to pay the amounts owed within 10 days from the conclusion of the proceedings.

Governor Signs Bill Amending the Private Attorneys General Act

Governor Jerry Brown signed Senate Bill 836. The lengthy budget appropriations bill adds a new section to the Labor Code that doubles the time (from 30 days to 60 days) within which the Labor and Workforce Development Agency's ("LWDA") may review proposed Private Attorneys General Act ("PAGA") claims to determine if it will bring an action itself. Additionally, aggrieved employees are now required to wait 65 days instead of 33 days after submitting information to the LWDA before they file a lawsuit based on PAGA. Furthermore, any proposed PAGA settlement has to be sent to the LWDA to permit the LWDA to comment on the settlement provisions. The new law also enables the court to give the LWDA's commentary appropriate weight in its decision as to whether or not to approve the settlement.

AGENCY

Federal

OSHA Issues Final Rule To Improve Tracking of Workplace Injuries

On May 12, 2016, the Occupational Safety and Health Administration ("OSHA") issued a final rule to improve tracking of workplace injuries and illnesses. The final rule includes new requirements to inform employees of their workplace right to report an injury or illness while also imposing retaliation and discrimination restrictions. It also requires some employers to submit electronic data detailing workplace injuries and illness to be published on a public website.

The new rule affects two common workplace policies—mandatory post-accident substance testing and safety incentive programs. The new law prohibits employers from discriminating against employees for reporting work-related injuries or illness, and further prohibits mandatory post-accident substance testing except in those situations in which substance use is likely to have been a factor in

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the incident and where a drug test can accurately identify impairment caused by drug use. Examples where drug testing may not be reasonable include a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction.

The new rule also prohibits safety incentive programs any time they discourage reporting of work-related injuries and illnesses without improving workplace safety. Employers are prohibited from creating an incentive program that denies a benefit because an employee reports an injury or illness. Any program that makes reporting an injury or illness a disqualification for a bonus is prohibited. Incentive programs are permitted where they reward employees for following legitimate safety rules; participating in safety-related activities, such as identifying hazards or risks; or conducting investigations of incidents.

Finally, the new rule requires some employers to electronically submit information from the recordkeeping forms already maintained. The new reporting requirements and deadlines vary by company size and industry, but are generally limited to those employers who employ 250 or more employees or those that employ between 49 and 250 employees and are considered a "high hazard industry." However, "high hazard industry" is used liberally and includes grocery, furniture, department stores and most residential care facilities.

The new retaliation and discrimination restrictions became effective August 10, 2016, while the remaining sections become effective on January 1, 2017.

California

Minimum Pay for Exempt Computer Professionals and Hourly-Paid Physicians Set for 2017

On October 5, 2016, the Director of California's Department of Industrial Relations set new minimum pay rates for next year for certain professionals exempt from overtime. Effective January 1, 2017, exempt computer professionals must be paid at least $42.39 per hour, or a minimum salary of $7,359.88 monthly or $88,318.55 annually. Also beginning January 1, 2017, hourly paid physicians and surgeons must be paid at least $77.23 per hour to be eligible for the professional exemption from overtime.

JUDICIAL

Federal

Ninth Circuit Confirms the Validity of Clauses Delegating Questions of Arbitrability to the Arbitrator

In *Mohamed v. Uber Technologies, Inc.* and *Gillette v. Uber Technologies, Inc.*, the Ninth Circuit Court of Appeals ("Ninth Circuit") upheld a clause delegating authority to the arbitrator, not the court, to decide questions regarding arbitrability. Plaintiffs Abdul Mohamed ("Mohamed") and Ronald Gillette ("Gillette") both served as drivers for the ride-sharing service, Uber Technologies, Inc. ("Uber"). When Mohamed and Gillette (collectively, "Plaintiffs") began

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

driving for Uber, they were required to sign various services agreements that contained arbitration provisions. Pursuant to the agreement Plaintiffs signed in 2013 ("the 2013 Agreement"), drivers waived all class, collective, and representative (e.g., Private Attorney General Act ("PAGA")) claims. The 2013 Agreement also provided that any dispute as to arbitrability had to be resolved by the arbitrator, not the court, with one exception: any claims that the class, collective, and representative action waiver was invalid must be resolved by the court. Drivers could opt out of the 2013 Agreement's arbitration provision by delivering notice to Uber in person or by overnight mail within thirty days.

In 2014, Mohamed signed another agreement ("the 2014 Agreement"), which also contained a class, collective, and representative action waiver and a delegation clause, but provided that all disputes regarding arbitrability, including claims that the class, collective, and representative action waiver was invalid, must be resolved by the arbitrator. The 2014 Agreement further provided that drivers could opt out of arbitration by sending notice in person, by overnight mail, or by email.

When Uber moved to compel arbitration, the district court denied the motion, finding the delegation clauses "ineffective" and unconscionable. The Ninth Circuit reversed, reasoning that, under federal law, absent "clear and unmistakable" evidence to the contrary, questions of arbitrability are for the court, not the arbitrator, to decide. An express agreement to delegate the resolution of arbitrability questions to the arbitrator constitutes such "clear and unmistakable" evidence. Here, both the 2013 and 2014 Agreements contained an express delegation clause. Therefore, the Agreements contained "clear and unmistakable" evidence that matters of arbitrability should be resolved by the arbitrator, not the court.

In light of the express delegation clauses, the Ninth Circuit held that all questions of arbitrability relating to the 2014 Agreement must be decided by the arbitrator. Further, all questions of arbitrability relating to the 2013 Agreement, except for the arbitrability of the class action waiver, must be decided by the arbitrator (because that particular issue was specifically carved out of the delegation clause in the 2013 Agreement).

The Ninth Circuit also disagreed with the district court's determination that the delegation clauses were unconscionable. In order for a contract (or provision thereof) to be unenforceable based on unconscionability, both procedural and substantive unconscionability must be present. The district court concluded that the delegation provisions were procedurally unconscionable because they were hidden in a lengthy form contract and there was no meaningful opportunity to reject the contract (i.e., the contracts were "adhesive"). The district court found substantive unconscionability because the drivers and Uber would have to share the costs of arbitration. The district court further noted that Plaintiffs lacked a meaningful opportunity to opt out of arbitration.

The Ninth Circuit thought otherwise, explaining that binding precedent holds that a contract is not adhesive if there is an opportunity to opt out of it. The Ninth Circuit determined that the 2014 Agreement provided a meaningful opportunity to opt out: drivers could do so in person, by overnight mail, or by

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email. The Court of Appeal further declared that the 2013 Agreement's opt-out provision was not illusory: Uber was bound to accept the opt-outs of anyone who followed the enumerated steps, and did in fact recognize the opt-outs of people who followed the steps. Therefore, because the Agreements lacked any procedural unconscionability, Plaintiffs' unconscionability argument failed entirely. Plaintiffs should have been compelled to arbitrate pursuant to the 2014 Agreement. The Ninth Circuit also held that, although the PAGA waiver in the 2013 Agreement was unenforceable, it could be severed and the rest of the Agreement preserved.

The *Uber* decision illustrates the importance of clear language in an arbitration agreement. Where the contract provides that matters of arbitrability must be delegated to the arbitrator, and such delegation is expressed in a clear and straightforward manner, a court is likely to enforce that provision. Moreover, when a contract provides a simple, efficient mechanism for opting out of arbitration, it is much more difficult for an employee to argue that the agreement is unconscionable. Employers may wish to consider revising their arbitration agreements to include such opt out and delegation provisions. Of course, delegating arbitrability questions to the arbitrator is not without risk: if the arbitrator resolves the questions in a manner unfavorable to the employer, the employer is left with little recourse to seek review of the arbitrator's decision.

California

Court of Appeal Delivers Blow to Employers Seeking to Arbitrate PAGA Claims

Arbitration agreements have become a popular tool for California employers seeking to limit the expense and uncertainty of adjudicating employment disputes in court. Recent cases, however, have struck blows to the power of employers to utilize such agreements to prevent employees from bringing representative actions. In *Perez v. U-Haul Company of California*, a California Court of Appeal rejected yet another employer's attempt to regain the upper hand on this issue.

Plaintiffs Sergio Perez ("Perez") and Erick Veliz ("Veliz") were employed by the U-Haul Company of California ("U-Haul") as customer service representatives. Both were required, as a condition of employment, to sign arbitration agreements, thereby explicitly agreeing to submit all claims and disputes relating to their employment to final and binding arbitration.

The Private Attorneys General Act ("PAGA") operates as a means by which individuals may step into the shoes of the Attorney General and sue on behalf of similarly aggrieved employees. In 2012, Perez and Veliz filed a representative action under the PAGA, alleging numerous wage and hour violations predominantly based on U-Haul's alleged failure to pay employees overtime and provide proper meal periods. By doing so, Perez and Veliz sought recovery in a representative, rather than individual, manner on behalf of their former coworkers.

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

U-Haul countered Perez and Veliz's complaint by filing a motion to compel arbitration. It argued that, before Perez and Veliz could be permitted to proceed with their PAGA claim, they must first prove, in arbitration, that they were "aggrieved employees."

Perez and Veliz's opposition to U-Haul's motion relied heavily on the California Supreme Court's 2014 decision in *Iskanian v. CLS Transportation Los Angeles, Inc*, which held that "claims pursuant to PAGA are not arbitrable in any manner whatsoever, as it is against public policy." Perez and Veliz argued that compelling arbitration of their individual claims to determine their status as aggrieved employees *before* permitting PAGA claims to proceed would render *Iskanian* moot, as it would make arbitration an improper condition precedent to litigation of PAGA claims.

Guided by the holding in *Iskanian*, the trial court sided with Perez and Veliz, denying U-Haul's motion to compel. U-Haul appealed and the appellate court affirmed the lower court's decision. In doing so, it noted that, even though Perez and Veliz did agree to arbitrate *individual* claims against U-Haul, their arbitration agreements did not (and could not) preclude Perez and Veliz from initiating a PAGA action, nor did the agreements require that either arbitrate their threshold status as aggrieved employees before proceeding with PAGA claims. Moreover, even if the arbitration agreements *did* include such a requirement, it would be unenforceable under *Iskanian*.

On its face, the ruling in *Perez* prevents employers from compelling arbitration, whether through explicit or implicit language in an arbitration agreement, to determine whether an individual is an aggrieved employee under PAGA. On a deeper level, the case deals another blow to employers seeking to implement and enforce arbitration agreements. California employers wishing to enforce arbitration agreements must therefore not only be cognizant of the protections already provided to employees, but also remain on the lookout for additional protections as they arise.

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, or Tristan Mullis at (310) 649-5772.