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In Ruling Arbitration Agreement Unenforceable, Appellate Court Reiterates the Key Principles for Evaluating Unconscionability

In *Penilla v.Westmont Corporation*, a California Court of Appeal reaffirmed courts' unwillingness to enforce arbitration agreements that are procedurally or substantively unconscionable. Although not an employment case per se, the court's ruling contemplates the same issues that are analyzed in employment claims, highlighting the close judicial scrutiny given to arbitration agreements.

In *Penilla*, a group of mobile home owners who rented land from Westmont brought suit on a series of contract, tort, and statutory claims—including claims under the Fair Employment & Housing Act ("FEHA"). In short, the plaintiffs asserted that Westmont had engaged in or allowed discriminatory housing practices to occur, broke contractual agreements, and failed to provide safe and habitable premises. Westmont filed a motion seeking to compel arbitration of the claims, contending that the plaintiffs had each signed a binding arbitration agreement ("the Agreement") upon moving onto Westmont's property. However, the trial court refused to compel arbitration on the grounds that the Agreement was procedurally and substantively unconscionable. Westmont appealed.

The Court of Appeal affirmed, finding that the Agreement was both procedurally and substantively unconscionable. First, the Agreement was provided to the tenants only in English, despite the fact that approximately one-third of them only spoke and read Spanish, leaving them unable to read the Agreement. The Agreement was also procedurally unconscionable because Westmont required tenants to sign it after they had paid for their mobile home or made a significant deposit, essentially forcing them to accept the terms. The tenants mostly had low incomes, leaving them with few housing options (particularly after having put down deposits with Westmont). Moreover, the terms of the Agreement were unclear, creating "surprises" as to the conditions tenants would be bound to follow. In finding the Agreement to be substantively unconscionable, the court noted that tenants were forced to either split the substantial arbitration costs or waive their right to bring claims, placing them in an unfair position based on their limited resources. The Court noted that the degree of substantive unconscionability was

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increased by the fact that the Agreement illegally required tenants to pay arbitration costs in connection with FEHA claims, improperly reduced the statute of limitations on claims, and reduced the tenants' available remedies.

Penilla highlights the need for employers to carefully review and understand their arbitration agreements. Most notably, the agreements must be clear, translated to accommodate non-English speakers, and may not pass arbitration costs onto the employee in whole or part. Moreover, any communications concerning the agreement by the employer should be honest and open. Thus, while employers may require their employees to sign an arbitration agreement, they should only do so after taking meaningful steps to ensure its terms are fair and understood by both parties.

Court of Appeal Addresses the Impact of Failing to Attach Arbitration Rules to an Arbitration Agreement

In *Nguyen v. Applied Medical Resources Corporation*, a California Court of Appeal recently provided additional guidance regarding the enforcement of mandatory arbitration agreements. According to the Court of Appeal, the failure to attach the arbitration rules or explain the meaning of the term "arbitration" does not increase the procedural unconscionability of the arbitration agreement, and an improper fee-sharing term, in the absence of other substantively unconscionable provisions, can be easily severed from the agreement.

Plaintiff Da Loc Nguyen ("Nguyen") was required to complete and submit a job application when he sought employment by Defendant Applied Medical Resources Corporation ("Applied Medical"). The job application included an arbitration provision. Nguyen signed the application and initialed next to the arbitration provision. When Nguyen filed a putative class action lawsuit for unpaid wages, meal and rest break penalties, and Private Attorneys General Act ("PAGA") penalties, the trial court granted Applied Medical's motion to compel arbitration, dismissed the class claims, and stayed the PAGA claim. Nguyen appealed. The Court of Appeal first examined whether the arbitration provision was governed by the Federal Arbitration Act ("FAA"), the federal statute that requires arbitration agreements to be enforced according to their terms where such agreements evidence a transaction involving interstate commerce. Applied Medical presented evidence that it designed, manufactured, sold, and distributed its products across the country and internationally, and Nguyen worked on the production line for these products. This evidence was sufficient to support a determination that the FAA governed the dispute.

The Court of Appeal next turned to Nguyen's contention that the arbitration provision was unconscionable. Nguyen argued that because the arbitration provision stated that any arbitration would be governed by the rules of the American Arbitration Association ("AAA") but the AAA rules were not attached to the application, the arbitration provision was procedurally unconscionable. The Court of Appeal disagreed, concluding that the failure to provide the arbitration rules, by itself, did not increase the procedural unconscionability of the arbitration provision. If some unreasonably unfair terms were contained within the AAA rules and those terms were "artfully hidden" from Nguyen by incorporating the rules by reference instead of providing him with a copy, then the court *might* find an

increase in unconscionability. Such was not the case here, because Nguyen did not complain that any unfair terms were hidden in the AAA rules; he merely objected that the rules were not provided to him.

The fact that no one explained the meaning of the word "arbitration" to Nguyen also did not increase the procedural unconscionability of the arbitration provision. Other courts have determined that the failure to explain an arbitration agreement creates a higher level of procedural unconscionability. However, in those cases, the arbitration agreements were written in English, while the employees only understood Spanish. Here, Nguyen specifically indicated on his application that English was a "special skill" and that he had attended years of college in Australia. Thus, the Court of Appeal was not persuaded by Nguyen's after-the-fact contention that he was not fluent in speaking or reading English.

The Court of Appeal further rejected Nguyen's arguments that the arbitration provision was substantively unconscionable. Nguyen contended that the arbitration provision lacked mutuality because it stated "I hereby agree to submit to binding arbitration" all claims arising from employment. According to Nguyen, that language required only Nguyen to submit his claims to arbitration but left Applied Medical free to pursue its claims against him in court. Because the arbitration provision required arbitration of "all disputes and claims arising out of or relating to the submission of [the] application" and "all disputes…which might arise out of or relate to my employment with the company," the agreement created a mutual obligation to arbitrate employment-related disputes. The mere inclusion of language such as "I agree" did not destroy the bilateral nature of the agreement. Moreover, even though the arbitration provision required Nguyen to share in the cost of the arbitrator's fees—a requirement that is substantively unconscionable—that term could be "easily severed" from the agreement since there was no other evidence of substantive unconscionability.

This case provides some welcome good news for employers with respect to the enforceability of arbitration provisions. However, due to the ongoing volatile nature of the arbitration landscape in California, employers should consider having their arbitration agreements reviewed by counsel to ensure they are compliant with the most recent legal precedent in this area.

Court of Appeal Holds Wage Statements Need Not Include Accrued Vacation Time or Paid Time Off

California Labor Code section 226 mandates that employee wage statements contain nine specific pieces of information. If an employer fails to comply with these requirements, it may face penalties.

In *Soto v. Motel 6 Operating L.P.*, a former employee ("Plaintiff") filed an action in her individual capacity and on behalf of all other affected workers alleging only that Motel 6 failed to issue compliant wage statements. She alleged that the statements were deficient because they failed to include the monetary amount of accrued vacation pay. Plaintiff argued that since California cases have recognized, in other contexts, that a "wage" includes vacation pay and that vacation benefits are earned and become vested during the period they accrue, then they must be included on an employee's wage statements.

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Motel 6 sought to dismiss the case, arguing that the plain language of the statute does not require an employer to itemize the monetary value of vacation time prior to the termination of the employment relationship. The trial court dismissed the case and Plaintiff appealed.

The Court of Appeal affirmed the trial court's decision, holding that Labor Code section 226 does not require an employer to include the monetary value of accrued vacation time until a payment is due following the termination of the employment relationship. The court reasoned that the plain language of the statute does not support Plaintiff's contention: it is highly detailed and contains nine separate categories of information that must be included on any wage statement; accrued vacation pay is not one of those enumerated items. Moreover, including accrued vacation pay is not supported by the legislative intent of the section. The Court concluded that if an employer need not compensate an employee for unused vacation in a given paycheck, then there is no statutory duty to identify the monetary amount of the accrued vacation (or PTO).

Court of Appeal Reiterates That Supervisory Employees Are Not Covered by the NLRA Absent Express Infringement of Non-Supervisory Employee's Rights

In *Khanh Dang v. Maruichi American Corporation*, a California Court of Appeal reversed a summary judgment for an employer and found that the plaintiff's claim for wrongful termination (based on his engagement in concerted activity related to unionizing efforts) was not subject to the National Labor Relations Act ("NLRA").

Maruichi American Corporation ("Maruichi") hired Khanh Dang ("Plaintiff") to work as a maintenance supervisor at its Santa Fe Springs facility. In July 2013, Maruichi became aware of an effort by the United Steelworkers to organize employees at Plaintiff's facility. Employees indicated Plaintiff's mistreatment of them was the reason they wanted to unionize, and Plaintiff was discharged shortly thereafter. In July 2014, Plaintiff brought a lawsuit for wrongful termination, claiming he was discharged for engaging in concerted activity related to unionizing efforts. Plaintiff admitted he had spoken to many employees about the impending union, but maintained that he tried his best to keep the conversations neutral and did not express an opinion about the union one way or another. Maruichi filed a motion for summary judgment, contending the state court did not have jurisdiction to adjudicate Plaintiff's claim because the lawsuit was preempted by the NLRA. Plaintiff contended that as a supervisor, his employment was not subject to the NLRA; accordingly, he could bring a lawsuit in state court.

Section 7 of the NLRA guarantees the right of employees to organize, join labor organizations, bargain collectively, and engage in other concerted activities. The NLRA has exclusive authority to determine whether a claim is arguably within in purview. Accordingly, the trial court agreed with Maruichi and granted its summary judgment motion.

The Court of Appeal reversed, noting that supervisors are explicitly excluded from the definition of "employee" under the NLRA, and that discharge of a supervisor may only constitute an unfair labor practice, thus invoking section 8 of

the NLRA, if it "infringes on the rights of the employer's nonsupervisory employees." The court found that Plaintiff had shown evidence that he was in fact a supervisor, and that his conversations with the nonsupervisory employees were too benign to infringe on their rights under sections 7 and 8. Plaintiff's claim was therefore not preempted by the NLRA, and could continue on in state court.

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