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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *December 2014*

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I.

LEGISLATIVE/ADMINISTRATIVE

NLRA Reaffirms on *D.R. Horton* and Unenforceability of Class Action Waivers

In *Murphy Oil USA, Inc.*, the National Labor Relations Board ("Board") reviewed its previous decision in *D.R. Horton*, which held that class action waivers in employment arbitration agreements violate the National Labor Relations Act ("NLRA"). The Board's decision in *D.R. Horton* was later reversed by the Fifth Circuit Court of Appeals, and its reasoning has been rejected by several other circuit courts. In a 3-2 decision, the Board in *Murphy Oil USA* reaffirmed its previous holding, and concluded that the arbitration agreement at issue violated the NLRA by prohibiting class proceedings.

Section 7 of the NLRA provides that "employees shall have the right to engage in concerted activities for the purpose of mutual aid or protection." Under Section 8(a)(1) of the NLRA, it is an unfair labor practice "for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." The NLRA applies to most private sector employers, but does not apply to federal, state, or local governments, employers who employ only agricultural workers, and employers subject to the Railway Labor Act.

The Board determined in *Murphy Oil USA* that the rights guaranteed by Section 7 are substantive (not procedural) rights, and there is no basis to carve out class proceedings as being entitled to less protection than other concerted activity. According to the Board, mandatory arbitration agreements that bar employees from bringing joint, class, or collective workplace claims in any forum restrict the exercise of the substantive right to act concertedly for mutual aid or protection. The Board therefore determined that employer-imposed individual agreements that purport to restrict employees' Section 7 rights, including agreements that require employees to pursue claims against their employer individually, violate the NLRA. The Board further concluded that its decision does not conflict with the Federal Arbitration Act ("FAA") or undermine its policies.

After concluding that its previous decision in *D.R. Horton* was correct, the Board held that the employer had violated the NLRA by requiring its employees to forfeit the right to bring a class action. Due to the conflict between the Board's decision, circuit courts rulings, and the U.S. Supreme Court's interpretation of the FAA, this issue is ripe for review by the U.S. Supreme Court. In the meantime,

employers who use arbitration agreements with class action waivers should have those agreements reviewed by counsel.

II.

JUDICIAL

California

Court of Appeal Reverses Denial of Class Certification in Wage and Hour Case

In *Martinez v. Joe's Crab Shack Holdings*, employees of Joe's Crab Shack ("JCS") restaurants filed a class action complaint for unpaid overtime wages, arguing that restaurant managers had been misclassified as exempt. In their motion for class certification, the employees ("Plaintiffs") presented evidence that managers were often required to perform "utility" functions, *i.e.*, filling in as cooks, bussers, servers, bartenders, stockers, or kitchen staff. Plaintiffs alleged that managers spent a majority of their time performing non-exempt tasks for which they were not paid overtime wages. JCS argued that the putative class members were exempt employees.

The trial court denied class certification, reasoning that Plaintiffs were unable to estimate how much time they spent on individual exempt and non-exempt tasks, and had admitted that the amount of time spent on particular tasks varied daily. Further, there were significant issues of fact regarding how much time individual class members spent on particular tasks. Since "the variability among individual class members would require adjudication of the affirmative defense of exemption for each class member," the trial court concluded that a class action would not be the superior means of resolving the dispute.

The court of appeal reversed, first concluding that Plaintiffs' claims were typical of the class. According to the appellate court, the trial court had focused too much on individual differences rather than commonalities. Plaintiffs and the putative class were governed by standard policies, performed a "utility" function in which they filled in for hourly workers in performing non-exempt tasks, and worked more than forty hours per week without being paid overtime wages. Second, the appellate court noted that any problems concerning the adequacy of Plaintiffs to represent the class could be solved by creating subclasses.

Third, the trial court failed, according to the appellate court, to adequately address how Plaintiffs' theory of recovery could be proved through the resolution of common questions of law and fact. The court declared that Plaintiffs' theory of liability - that by classifying all of its managers as exempt, JCS violated overtime wage laws -"is by its nature a common question eminently suited for class treatment." Common evidence showed that managers functioned as utility workers, cross-trained in all tasks, who could be assigned to fill in for hourly workers when needed. The court explained that, instead of asking employees in retrospect how much time they spent performing exempt versus non-exempt tasks, a process that would likely necessitate individual mini-trials, a trial court in an overtime exemption case must focus on the realistic expectations of the employer and the actual requirements of the job. Here, the trial court should have asked whether JCS' expectations and classification of tasks resulted in the exercise of supervisorial discretion or instead consigned managers to a "utility" role.

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In light of the foregoing, the appellate court concluded that it was error to deny class certification, and remanded the case to the trial court for reconsideration. This case evidences a continuing trend of courts certifying class actions in misclassification cases.

Court of Appeal Confirms "Make Available" Standard for Meal and Rest Breaks

In *Walgreen Company Overtime Cases*, A California court of appeal issued a ruling in favor of California employers with respect to the provision of meal and rest breaks, affirming the trial court's denial of class certification. In doing so, it bolstered the application of *Brinker Restaurant Corp. v. Superior Court*.

Walgreens is a national drug store chain with locations throughout the country. Lead plaintiff Darryl Collins ("Collins") was an employee of Walgreens and filed suit against the company, alleging that a class should be certified consisting of all similarly situated employees who had been denied proper meal breaks. Collins' motion for class certification was premised on the theory that while Walgreens' stated meal break policy was proper, the actual class-wide practice and application was contrary to the written policy.

In 2012 the California Supreme Court issued its much anticipated decision in *Brinker*, ruling that employers need only "make available" such breaks; they have no duty to ensure that these breaks are actually taken. In its ruling, the *Brinker* court stated that an employer is only required to relieve employees of all duties and provide them with the *opportunity* to take a meal break. The decision of whether to actually take that break is left to the employee.

Applying *Brinker* to this case, the court of appeal found that Walgreens' employees were provided with the requisite *opportunity* to take their breaks. While numerous putative class members indicated that they skipped or delayed breaks, generally out of a desire to go home early, such actions are permissible. Based on the weight of the evidence demonstrating that Walgreens had complied with the *Brinker* standard, coupled with the dearth of evidence in support of Collins' motion, the court of appeal affirmed the trial court's denial of class certification.

This decision confirms that employers need only ensure that requisite breaks are made available to employees. However, employers should ensure that their meal and rest break policies are legally compliant, and that managers and supervisors receive appropriate training in connection therewith.

Court of Appeal Finds Arbitration Clause Enforceable Where Not Inconsistent with Collective Bargaining Agreement

In *Willis v. Prime Healthcare Services, Inc.*, the Second District Court of Appeal found that the arbitration clause in an employee's individual employment agreement was enforceable where it was not inconsistent with the employee's collective bargaining agreement.

Plaintiff Maucabrina Willis ("Willis") was hired to work as a clerk at the Centinela Hospital Medical Center ("Centinela"). Willis signed an employment application and employment acknowledgement form. Both forms contained provisions whereby Willis agreed to submit any dispute regarding her employment with Centinela to binding arbitration. Willis was also covered by a collective bargaining agreement

between the hospital and certain hospital employees. The hospital was later acquired by Prime Healthcare Centinela, LLC, which assumed all of the legal obligations of Centinela.

After Willis was discharged, she filed a class action complaint alleging Labor Code violations against Prime Healthcare Services, Inc. (the parent company of Prime Healthcare Centinela, LLC) ("Prime"). Prime filed a petition to compel arbitration and dismiss the class claims, arguing that Willis was required to arbitrate her employment-related claims pursuant to her arbitration agreement with Centinela. In opposition, Willis argued that the collective bargaining agreement rendered the arbitration agreement with Centinela inapplicable because the private dispute resolution procedure in the individual agreement conflicted with the grievance procedure set forth in the collective bargaining agreement. Further, Willis contended that the collective bargaining agreement did not waive her right to bring a statutory claim in court, and that Prime did not have standing to enforce the arbitration agreement because the agreement was between Willis and Centinela, not Prime. The trial court agreed with Willis and denied Prime's petition to compel arbitration. Prime appealed.

The court of appeal, applying federal law, reversed the trial court's order. First, the appellate court found that because Prime used interstate commerce to purchase equipment and received reimbursement from Medicare payments, the individual arbitration agreement was subject to the Federal Arbitration Act. Second, applying federal common law, the court acknowledged that an individual employee contract cannot waive any benefit to which the employee otherwise would be entitled under a collective bargaining agreement, including the right to file a civil action. However, under the collective bargaining agreement, a grievance was defined as a "dispute as to the interpretation, meaning or application of a specific provision of this Agreement." The collective bargaining agreement did not mention the specific type of wage claims at issue. Because the arbitration agreement covered "any dispute," including Willis' statutory wage and hour claims, the court concluded that there was no inconsistency between the arbitration agreement and the collective bargaining agreement with respect to the dispute at issue, and the arbitration agreement was enforceable.

While there is a strong federal policy favoring enforcement of collective bargaining agreements, this case supports the notion that an employer may include a valid arbitration clause in an employment agreement as long as the clause is not inconsistent with the collective bargaining agreement.

Court of Appeal Holds that Trial Court, Not Arbitrator, Must Decide Arbitrability of Class Claims

In *Garden Fresh Restaurant Corporation. v. Superior Court*, the Fourth District Court of Appeal held that the trial court, not the arbitrator, must decide the arbitrability of class and/or representative claims when the arbitration agreement is silent on that issue.

Plaintiff Alicia Moreno ("Plaintiff") sued Garden Fresh Restaurant Corporation ("Garden Fresh"), her former employer, for claims related to a variety of Labor Code violations. Plaintiff's complaint was pled as a class action, and included a claim for relief under the Private Attorneys General Act ("PAGA"). Garden Fresh moved to compel arbitration, on an individual basis only, based on two arbitration agreements Plaintiff had signed during her employment with Garden Fresh. Garden Fresh also

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moved to dismiss Plaintiff's class and representative claims, arguing that the parties' arbitration agreement did not contemplate class- or representative-based arbitration. In fact, the agreement was silent with respect to the question of whether or not class and representative claims were arbitrable.

The trial court granted the motion to compel arbitration, but specifically left for the arbitrator the question of whether the arbitration agreements between the parties contemplated classwide and/or representative arbitration.

The court of appeal reversed the trial court's ruling, holding that the availability of class and/or representative arbitration is a question of arbitrability, and is therefore a gateway issue for a court to decide in the absence of a clear indication that the parties intended otherwise. As the court explained, the fact that parties have entered into an arbitration agreement does not mean they have necessarily agreed to arbitrate class and/or representative claims. If the significant question of whether the parties to an arbitration agreement agreed to class and/or representative arbitration were to be sent to an arbitrator to decide, the arbitrator's decision would be unreviewable, and if the matter were to proceed to arbitration on a class and/or representative basis, the result of this potentially high stakes proceeding would also be unreviewable.

Citing U.S. Supreme Court precedent, the court further noted that a shift from individual to class arbitration is not simply a matter of what procedural mode is available to present a party's claims, because that shift fundamentally changes the nature of the arbitration proceeding and significantly expands its scope. Unlike the question of whether, for example, one party has waived his claim against the other - which would be a subsidiary question for the arbitrator to decide - the question of whether the parties agreed to classwide arbitration is "vastly more consequential" than even the gateway question of whether they agreed to arbitrate bilaterally. An incorrect answer in favor of classwide arbitration would force parties to arbitrate not merely a single matter that they may not have agreed to arbitrate, but thousands of them.

In light of the foregoing, the appellate court held that the trial court, not the arbitrator, should decide whether the parties agreed to arbitrate class and/or representative claims when the arbitration agreement is silent on that issue.

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, Heather Stone, 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.

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