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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *March 2015*

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JUDICIAL

California

California Supreme Court Punts on Viability of "Honest Belief" Defense

In *Richey v. AutoNation, Inc.*, the California Supreme Court upheld an arbitrator's decision that the employer did not violate the California Family Rights Act ("CFRA") and the Family and Medical Leave Act ("FMLA") when it fired an employee on medical leave for violating the company's policy against engaging in outside employment.

In 2004, Power Toyota Cerritos ("Power Toyota") hired Avery Richey ("Richey"). Richey received an employment manual noting that outside work while on approved medical leave was prohibited. There was also a general understanding that outside employment of any kind, including self-employment while on approved leave, was against company policy.

In October 2007, Richey began working on plans to open a seafood restaurant, which he opened in February 2008. Richey marketed his restaurant while still working full time at Power Toyota. In March 2008, Richey injured his back while moving furniture at his home. Richey's physician informed Power Toyota that Richey was medically unable to work. Richey requested, and was provided, extended leave pursuant to the CFRA and the FMLA. Power Toyota learned that Richey had been seen working the front counter of the restaurant, sweeping, bending over, and hanging a sign using a hammer. Richey admitted to handling orders and answering the phone at the restaurant while on leave from Power Toyota, but claimed that these tasks were within the limited light duties authorized by his doctor.

Power Toyota terminated Richey's employment on May 1, 2008. Richey's medical leave was set to expire on May 28, 2008. In its termination letter, Power Toyota stated that it was dismissing Richey for engaging in outside employment while on a leave of absence, in violation of company policy.

Richey filed a claim in arbitration against Power Toyota and its parent companies, alleging multiple claims under California's Fair Employment and Housing Act and the CFRA. The arbitrator rejected Richey's claims, finding that Power Toyota could terminate Richey's employment if it had an "honest belief" that he was abusing his medical leave and/or was not telling the company the truth about his outside employment. The arbitrator also found that the overwhelming weight of the evidence supported the conclusion that Power Toyota fired Richey for non-discriminatory reasons. Richey sought to vacate the arbitrator's decision, arguing that the arbitrator committed legal error by adopting the "honest belief" defense, which is recognized by some federal courts. Notably, the California Supreme Court declined to decide whether that defense is viable in California.

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The Court did determine, however, that even if the arbitrator erred, Richey had not shown that the error was prejudicial.

Under both the CFRA and the FMLA, an employee has no greater right to reinstatement or to other benefits and conditions of employment than if he had been continuously employed during the statutory leave period. An employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed at the time reinstatement is requested. The arbitrator found that Richey was fired because he violated Power Toyota's policy. Power Toyota explicitly warned Richey that its policy prohibited any outside employment, including self-employment, while on leave. Richey ignored the warnings. The arbitrator would likely have made that finding regardless of the evidence as to the employer's honest belief that Richey was misrepresenting his medical condition. Thus, even if the arbitrator was mistaken in relying on an "honest belief" defense, Richey was not prejudiced; accordingly, the court upheld the arbitrator's decision in Power Toyota's favor.

Court of Appeal Enforces Arbitration Agreement Contained in Employment Application

In *Cruise v. Kroger Co.*, a California Court of Appeal held that an employer sufficiently proved the existence of an agreement to arbitrate even though it failed to establish the precise terms of its arbitration policy. Stephanie Cruise ("Cruise") signed an employment application for a position with Kroger Co. ("Kroger"). The application contained an arbitration provision requiring the parties to arbitrate all employment-related disputes and incorporating by reference an "Arbitration Policy." When Cruise sued for violations of the Fair Employment and Housing Act, Kroger moved to compel arbitration based on the application and the Arbitration Policy. The trial court denied the motion, ruling that Kroger failed to prove the existence of an agreement to arbitrate. The trial court reasoned that Kroger did not show that Cruise ever received the Arbitration Policy or that the Arbitration Policy existed at the time Cruise signed the application. Further, the trial court found the Arbitration Policy to be unconscionable.

The appellate court reversed, holding that Kroger did establish an agreement to arbitrate. The application stated that Kroger had an arbitration policy applicable to all employees and job applicants, which applied to any employment-related disputes. According to the court, this language "eliminates any argument the parties did not agree to arbitrate their employment-related disputes."

The appellate court further ruled that Kroger's failure to establish the contents of the Arbitration Policy did not negate the underlying agreement to arbitrate. The language of the employment application, standing alone, entitled Kroger to enforce the agreement. However, because Kroger did not prove that Cruise received the Arbitration Policy, the Arbitration Policy could not govern the proceedings. Instead, the court ruled that the arbitration must be conducted pursuant to the California Arbitration Act and California case law. As such, Cruise could no longer argue that the agreement was unconscionable.

The appellate court also rejected Cruise's argument that because only she signed the employment application, the agreement to arbitrate lacked mutuality. Because the application was printed on Kroger's letterhead and stated that Kroger "likewise agrees to mandatory and binding arbitration of Covered Disputes," the court concluded that Kroger also intended to be bound by the agreement to arbitrate.

This case demonstrates that arbitration may still be compelled even where an arbitration policy is absent or flawed, so long as an underlying agreement to arbitrate exists. Employers are still advised, however, to obtain employees' specific consent to an arbitration policy.

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Court of Appeal Clarifies Rest Break Rules for "On-Call" Employees

In *Augustus v. ABM Security Services Inc.*, a California Court of Appeal held that an employer's obligation to relieve employees of the obligation to do "work" during rest breaks is not as far-reaching as prospective plaintiffs might hope.

Jennifer Augustus ("Augustus") was employed as a security guard for ABM Security Services, Inc. ("ABM"). ABM's security guards are generally required to remain "on call" at all times during their shifts, including during rest breaks. Augustus, along with two other employees (collectively, "Plaintiffs"), alleged, among other things, that ABM failed to provide statutory rest breaks. Plaintiffs moved to certify a class of all similarly situated ABM security guards, arguing that the "on-call" requirement during rest breaks rendered those breaks indistinguishable from normal security work. ABM conceded that security guards were uniformly required to keep their radios and pagers on during breaks and to remain vigilant in the event a need for their services arose. Based on these admissions, the trial court certified the class, holding that ABM possessed a uniform rest period policy applicable to the entire putative class.

Following class certification, Plaintiffs moved for summary adjudication of the rest break claim. The trial court granted the motion, holding that the "on-call" requirement rendered the security guards "subject to employer control." ABM appealed.

In reversing the trial court's decision, the appellate court looked more closely at the standard for provision of rest breaks, holding that California Labor Code section 226.7 only precludes an employee from being required to "work" during rest breaks. While ABM's security guards were required to remain "on-call" during these breaks, they were also "otherwise permitted to engage and did engage in various non-work activities." The trial court's classification of Plaintiffs as "subject to employer control," therefore, was an insufficient basis upon which to grant the summary judgment motion. It is important to note that by reversing summary judgment, the case goes back to the trial court, where the finder of fact determines whether the on-call breaks are compensable.

While nuanced, this case marks a victory for employers seeking to provide rest breaks in a manner that both meets the employer's needs and fulfills its legal obligations. As always, however, employers are encouraged to proceed with caution and consult legal counsel in situations where an employee may be perceived as having to "work" during breaks.

Court of Appeal Holds Successor Company Can Enforce Arbitration Agreement

In *Marenco v. DirecTV LLC*, a California Court of Appeal held that a non-signatory could enforce an arbitration agreement as the successor to an arbitration agreement between an employee and his previous employer. Francisco Marenco ("Marenco") filed a putative class action against employer DirecTV LLC ("DirecTV") for alleged violations of state wage and unfair competition laws. Marenco had entered into an arbitration agreement with DirecTV's predecessor, 180 Connect. DirecTV had acquired 180 Connect and retained 180 Connect's employees, including Marenco. The agreement required both parties to submit all claims arising from the employment relationship to binding arbitration. The agreement also waived both class actions and representative actions under the Private Attorneys General Act ("PAGA").

Marenco argued that DirecTV lacked standing to enforce the arbitration agreement because DirecTV did not sign the agreement. The Court of Appeal held that, as a general rule, continued employment constitutes an implied-in-fact acceptance of an agreement

proposed by an employer. Accordingly, the 180 Connect employees who continued their employment after the merger implicitly accepted DirecTV's decision to maintain their existing terms of employment, including those contained in the arbitration agreement. The court of appeal also held that the class action waiver was enforceable under state and federal precedent. Accordingly, the class claims were dismissed and Marenco's individual claims were compelled to arbitration.

Although Marenco's complaint did not include a PAGA claim, the appellate court noted that, according to recent California Supreme Court precedent in *Iskanian v. CLS Transportation*, representative action waivers are contrary to public policy and unenforceable as a matter of state law. The opinion also noted that while some federal district courts have found PAGA waivers to be enforceable under the Federal Arbitration Act and U.S. Supreme Court precedent, California state courts are compelled to follow *Iskanian* for the time being.

While this area of law is in flux, employers can be confident that class action waivers in employment arbitration agreements will generally be enforced by California state courts, however, representative action waivers will not. Moreover, while federal courts will also enforce most class action waivers, their enforcement of representative action waivers will be determined on a case-by-case basis. Employers are strongly advised to have their arbitration agreements reviewed by employment counsel in order to maximize their enforceability.

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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