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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *July 2015*

Recent Attorney and Firm Awards

Pettit Kohn Ingrassia & Lutz
listed as one of San Diego's **Top 10 Litigation Firms** in the *Union- Tribune's* "San Diego's Best" readers poll

Tom Ingrassia
recognized by his peers for *The Daily Transcript's* **2015 Top Attorneys Award** and *San Diego Business Journal's* **"Best of the Bar" 2015**

Jenna Leyton-Jones
selected for inclusion in *San Diego Business Journal's* **"Best of the Bar" 2015** and based on a peer review survey received an **AV Preeminent** rating from Martindale-Hubbell - highest rating for legal ability and ethical standards

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I.

AGENCY

New California Family Rights Act Regulations Took Effect July 1st

New California Family Rights Act ("CFRA") regulations took effect on July 1, 2015. The revised regulations are designed to bring the CFRA into closer alignment with the federal Family and Medical Leave Act, although some differences between the two laws remain. Changes to the CFRA regulations include several revisions to defined terms, including:

- Revising the term "covered employer" to include successors in interest;
- Explaining that a "joint employer" relationship will be found where the employee performs work that simultaneously benefits two or more employers or works for two or more employers at different times during the workweek;
- Defining "eligible employee" as a full- or part-time employee working in California who has been employed for a total of *at least* 12 months (52 weeks) with the employer at any time before the start of a CFRA leave, and who actually worked for the employer at least 1,250 hours during the 12-month period immediately before the date the CFRA leave begins;
- Allowing an employee who has met the 1,250 hour requirement, but not the 12-month requirement when CFRA starts, to nonetheless meet the 12-month requirement while on leave (because the leave counts toward length of service); in that case, the employer shall designate the portion of the leave in which the employee has met the 12-month requirement as CFRA leave;
- Clarifying that "reason of the birth of a child" includes bonding with a child after birth; and
- Expanding the definition of "spouse" to mean a partner in marriage (including same-sex marriage) or a registered domestic partner.

The new regulations also clarify that the employee's right to reinstatement applies even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. The employee is entitled to return to the same position or a comparable position that is equivalent in terms of pay,

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benefits, shift, schedule, geographic location and working conditions. However, if a shift has been eliminated or overtime has been decreased, an employee is not entitled to return to that shift or the original overtime hours upon reinstatement.

The employee's duty to provide notice of the need for CFRA leave was also updated. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially CFRA-qualifying. Failure to respond to permissible employer inquiries regarding the leave request may result in denial of CFRA protection if the employer is unable to determine whether the leave qualifies.

The provisions regarding medical certification were amended to clarify that the employer may not contact a health care provider for any reason other than to authenticate a medical certification. Employers are also prohibited from requiring an employee to undergo a fitness-for-duty examination as a condition of the employee's return to work. After an employee returns from CFRA leave, any fitness-for-duty examination must be job-related and consistent with business necessity.

Finally, the amended regulations enhance the anti-retaliation provisions to include protection from interference with CFRA rights, and expand an employer's duty to post notice. Employers are required to prominently post a notice explaining the CFRA's provisions and the procedures for filing complaints with the Department of Fair Employment and Housing. Employers must translate the notice into every language that is spoken by at least ten percent of the workforce.

Additional information regarding the new regulations can be found at www.dfeh.ca.gov.

II.

LEGISLATIVE

California Paid Sick Leave Law Amended and Clarified

On July 13, 2015, Governor Jerry Brown signed a bill (AB 304) amending and clarifying California's recently enacted paid sick leave law. The bill was passed as an urgency statute and took effect immediately.

The Healthy Workplaces, Healthy Families Act of 2014 took full effect on July 1, 2015. The law mandates that employers are to provide paid sick leave to employees who work 30 or more days in California in a calendar year. The new bill amends several provisions of the law.

The new bill clarifies that an employee must work 30 days for the same employer in California to be eligible for sick leave, and not simply work 30 days in California. As originally enacted, the law allowed employers to provide paid sick leave either by: (1) providing 24 hours in bulk at the beginning of the year or (2) allowing employees to accrue sick leave at a minimum rate of one hour for every 30 hours of work. These options were problematic for employers who tie sick leave accruals to pay periods, as opposed to time worked. The new bill provides greater flexibility by allowing the following two additional accrual methods. First, an employer may use a different accrual method, provided the accrual is on a regular basis

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and the employee will have 24 hours of accrued paid sick leave available by his or her 120th calendar day of employment. Second, if an employer provided paid sick leave prior to January 1, 2015 pursuant to an accrual method, that program will satisfy the law's accrual requirements if an employee (including any employee hired after January 1, 2015) will accrue eight hours of paid sick leave within three months, and the employee is eligible to earn at least 24 hours within nine months.

The new bill also provides that if an employer provides unlimited paid sick leave or unlimited paid time off, the law's written notice requirement may be satisfied by indicating on the notice or the employee's itemized wage statement that such leave is "unlimited." The new law also clarifies rate of pay. Specifically, employers may pay out paid sick leave to nonexempt employees either at the regular rate of pay for the workweek in which the employee uses paid sick leave, or by dividing the employee's total wages (not including overtime) by the employee's total hours worked in the full pay periods of the prior 90 days of employment. Paid sick leave for exempt employees should be calculated the same way as other forms of paid leave time.

III.

JUDICIAL

Federal

U.S. Supreme Court Rejects "Actual Knowledge" Standard in Favor of "Motivating Factor" Analysis in Religious Discrimination Case

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from discriminating against employees on the basis of, among other things, religion. In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the U.S. Supreme Court broadened protections afforded to employees by explicitly prohibiting employers from using religion as a "motivating factor" in employment decisions.

Samantha Elauf ("Elauf"), a Muslim woman, wore a headscarf to a job interview with clothing retailer Abercrombie & Fitch ("Abercrombie"). Her headscarf was not addressed during the interview and Elauf received interview ratings at a level which would have qualified her to receive an employment offer. Her interviewer, however, harbored concern that Elauf's headscarf could run afoul of Abercrombie's "Look Policy," which forbids Abercrombie employees from wearing "caps."

The interviewer asked her district manager whether the headscarf should be considered a "cap" under the Look Policy, noting her belief that Elauf wore the headscarf for religious purposes. The district manager instructed that, regardless of whether it was worn for religious purposes, the headscarf was a violation of Abercrombie's policy. Based on this appraisal, Elauf did not receive a job offer.

The Equal Employment Opportunity Commission ("EEOC") sued Abercrombie on Elauf's behalf, alleging religious discrimination in violation of Title VII. The trial court granted the EEOC's motion for summary judgment, holding that Abercrombie had discriminated against Elauf on account of her religion. Abercrombie appealed. The Court of Appeals for the Tenth Circuit reversed the trial court's decision and instead granted Abercrombie's motion for summary judgment. In doing so, the appellate court held that a claim for religious discrimination against

Abercrombie could not survive, as Abercrombie lacked "actual knowledge" of Elauf's need for a religious accommodation.

In reversing the Tenth Circuit, the U.S. Supreme Court refused to utilize the appellate court's "actual knowledge" test. Instead, the Court held that a plaintiff need only show that a protected characteristic played a "motivating factor" in an employer's decision. Accordingly, the appellate court erred in granting summary judgment for Abercrombie based on an "actual knowledge" standard.

While the Supreme Court failed to elaborate on the level of employer knowledge or suspicion regarding employees' religious beliefs that may constitute a "motivating factor" in the employment decision, employers must remain vigilant of their legal duties and refrain from engaging in behavior that could create an impression of discriminatory animus.

California

Court of Appeal Limits Plaintiff's Expansive Request for Employee Information in PAGA Action

In *Williams v. Superior Court*, the plaintiff ("Williams") worked at a retail store in Costa Mesa, California operated by Marshalls of California, LLC ("Marshalls"). Williams filed suit against Marshalls, wherein he alleged a host of wage and hour violations and set forth a representative claim under the Private Attorneys General Act ("PAGA"). In his written discovery requests, Williams demanded that Marshalls provide names and contact information for all of its nonexempt employees in California. When Marshalls refused to turn over the information, Williams sought to compel its production. The trial court ordered Marshalls to produce the requested information for employees at the Costa Mesa store, but denied Williams' demand for state-wide employee information.

The court of appeal affirmed, first concluding that state-wide discovery of employee contact information was premature given that no depositions had been taken and no other discovery requests had been made. Moreover, the complaint alleged no facts reasonably indicating that Marshalls had a company-wide policy that violated California law.

The court also rejected Williams' argument that because the PAGA entitled him to serve as a proxy for the Division of Labor Standards Enforcement ("DLSE"), he was entitled to "free access to all places of labor," just as the DLSE would be. According to the court, the PAGA only entitled Williams to bring a civil action to enforce the Labor Code; it did not entitle him to the same level of access to employee information as the DLSE would have.

Finally, the appellate court explained that the privacy rights of Marshalls' employees throughout the state outweighed Williams' "practically nonexistent" need for the information at such an early stage of litigation, particularly since Williams had not even established that *he* had been subjected to any violations of the Labor Code.

In light of the foregoing, the court held that it was reasonable for the parties to proceed with incremental discovery, starting with disclosure of information pertaining to Williams and the Costa Mesa employees. This case provides much-needed guidance regarding discovery in representative actions.

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Court of Appeal Reverses Denial of Petition to Compel Arbitration Despite Employer's Fourteen Month Delay in Seeking to Arbitrate

In *Khalatian v. Prime Time Shuttle, Inc.*, the defendant ("Prime Time") owned and operated an airport charter transport business. Valo Khalatian ("Khalatian") worked for Prime Time as an airport shuttle van driver. Khalatian entered into a contract (the "Agreement") with Prime Time providing that the parties must arbitrate "any controversy or claim between the parties arising out of or relating to this Agreement or any alleged breach thereof, including any issues…that this Agreement or any part hereof is invalid, illegal, or otherwise voidable or void." Khalatian later sued Prime Time for wage and hour violations. He also alleged that he was misclassified as an independent contractor. The trial court denied Prime Time's petition to compel arbitration.

The appellate court reversed, explaining first that the Agreement was subject to the Federal Arbitration Act ("FAA"). In order for the FAA to govern an arbitration agreement, the agreement must "evidenc[e] a transaction involving commerce." While Khalatian argued that he did not operate in interstate commerce because all of his activities took place within California, the court of appeal rejected this argument because some of the passengers he transported were traveling out of state, Prime Time advertised on websites like Expedia, and Prime Time permitted customers to make and pay for reservations online.

The appellate court next concluded that Khalatian's misclassification claim was arbitrable. According to the court, resolution of this allegation would require determination of whether the Agreement was "illegal, or otherwise voidable or void" for inaccurately characterizing the parties' relationship. Thus, Khalatian's claim constituted a controversy "arising out of or relating to [the] Agreement."

Finally, the appellate court rejected the trial court's determination that Prime Time waived its right to pursue arbitration even though fourteen months had passed between the filing of the complaint and the motion to compel arbitration. The court reasoned that minimal discovery had been conducted, and there was no evidence that Khalatian had provided any information he would not have been required to provide in arbitration. Furthermore, Prime Time did not wait until the eve of trial to compel arbitration, as trial was set for more than one year after the motion to compel arbitration was filed. Finally, Khalatian suffered no prejudice from Prime Time's delay in seeking arbitration. As such, the court concluded that there was no waiver of the right to arbitrate and instructed the trial court to issue an order compelling arbitration.

Court of Appeal Holds Employer Waived Its Right to Arbitrate Wage Dispute After Engaging in Extensive Discovery

In *Oregel v. PacPizza, LLC,* a California Court of Appeal upheld a trial court's denial of PacPizza's petition to compel arbitration, finding that PacPizza had waived its right to enforce the subject arbitration agreement.

In 2008, Oregel was hired as a delivery driver for PacPizza. As part of the hiring process, Oregel submitted a written application that included an agreement to arbitrate all claims. In 2012, Oregel filed a class action lawsuit against PacPizza, alleging that PacPizza failed to fully reimburse delivery drivers for necessary expenses associated with their use of personal vehicles to deliver pizza on PacPizza's behalf.

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PacPizza asserted fifteen affirmative defenses to Oregel's complaint, none of which alleged the existence of an agreement to arbitrate the dispute.

Over the next seventeen months, the parties engaged in extensive written discovery, conducted over 25 depositions, posted jury fees, and attended case management conferences and hearings on discovery disputes. Oregel also filed a motion for class certification. At no time did PacPizza give any indication that it intended to seek enforcement of the arbitration agreement.

A few weeks before PacPizza was due to oppose Oregel's motion for class certification was due, and seventeen months after Oregel filed his complaint, PacPizza's counsel sent a letter to Oregel's counsel demanding arbitration of Oregel's claims. After Oregel's counsel rejected the demand, PacPizza filed a petition to compel arbitration, stay the proceedings, and dismiss Oregel's class allegations.

In opposition to PacPizza's petition, Oregel's counsel testified that he and other attorneys in his office had spent more than 1300 hours working on the case, which he estimated exceeded $500,000 in fees, and had incurred out-of-pocket costs exceeding $19,000. The majority of the hours were spent performing tasks related to preparing the class certification motion, and preparing for and defending depositions of putative class members who filed declarations in support of class certification.

PacPizza contended that it would have been futile to seek enforcement of the arbitration agreement earlier given the uncertainty surrounding the enforcement of class action waivers, but the trial court found this argument flawed because the arbitration provision in Oregel's job application did not contain a class action waiver. PacPizza provided no other explanation justifying its delay. The trial court found that PacPizza's strategic tactics (i.e., conducting extensive discovery on the class claims and then asserting its purported right to arbitrate in order to preempt class certification) should not be rewarded.

In affirming the trial court's decision, the appellate court found that PacPizza had engaged in substantial conduct inconsistent with its claimed right to arbitrate, and that Oregel was prejudiced by PacPizza's delay in seeking enforcement of the arbitration agreement. Notably, the court did not address the validity of the arbitration provision; it ruled only on the issue of waiver.

This case emphasizes the importance of enforcing an arbitration agreement as early as possible in order to avoid any argument that the right to arbitrate has been waived.

Court of Appeal Rejects Employer's Attempt to "Split" PAGA Claim for Arbitration Purposes

In *Williams v. Superior Court*, a California Court of Appeal rejected an employer's attempt to compel arbitration of an employee's individual Private Attorneys General Act ("PAGA") claim while simultaneously litigating a representative PAGA claim in court.

Andre Williams ("Williams") filed suit against Pinkerton Governmental Services, Inc. ("Pinkerton"), asserting a PAGA claim on behalf of himself and other employees based on Pinkerton's alleged rest break violations. Pinkerton moved to enforce Williams' previous waiver of his right to assert a PAGA claim or, in the

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alternative, for an order which would stay Williams' representative PAGA claim while his individual claim proceeded in arbitration. The trial court denied Pinkerton's motion to enforce the PAGA waiver but granted the alternate relief. Accordingly, Williams was required to arbitrate his individual claim against Pinkerton while his representative PAGA claim remained in court.

On appeal, Williams argued that the order contradicted the California Supreme Court's ruling in *Iskanian v. CLS Transportation* that an employee cannot waive his or her right to assert a PAGA claim. Pinkerton argued that *Iskanian* was inapplicable, as it addressed a PAGA waiver that was a "condition of employment," whereas the waiver signed by Williams was not. The appellate court held that regardless of the fact that Williams could have refused to sign the waiver, public policy still prohibits an employee from privately agreeing to waive his or her right to bring a public, representative PAGA action.

The appellate court also rejected Pinkerton's request that Williams' action be divided into an arbitrable individual action and a non-arbitrable representative PAGA action, interpreting the dearth of case law in support of Pinkerton's request as a lack of legal authority to grant the relief sought. Thus, both the individual claim and the representative claim must proceed in the court.

The decision in *Williams* is an interesting one, as the willingness (or unwillingness) of other appellate courts to reach the same ruling may foretell a coming decision on this matter by the California Supreme Court. In the meantime, *Williams* serves as a reminder to California employers to carefully consider the implications of each provision in their arbitration agreements, and to have such agreements reviewed by legal counsel in order to ensure their enforceability.

Court of Appeal Vacates Order Compelling Arbitration, Holds Trial Court Must First Adjudicate Exemption to Federal Arbitration Act

In *Garcia v. Superior Court*, the plaintiffs ("Plaintiffs") - a group of truckers hired by Southern Counties Express, Inc. ("Defendant") to haul shipment containers to various facilities in California - filed an administrative claim with the Division of Labor Standards Enforcement ("DLSE") alleging that they were misclassified as independent contractors. Defendant attempted to stay the DLSE proceedings and compel arbitration because Plaintiffs had signed independent contractor and vehicle lease agreements containing arbitration provisions. After an evidentiary hearing, the trial court granted Defendant's petition to compel arbitration.

Plaintiffs sought reversal of the trial court's ruling, arguing that the Federal Arbitration Act ("FAA"), which generally favors the enforcement of arbitration provisions according to their terms, exempts from its purview employment contracts of transportation workers who are engaged in the movement of goods in interstate commerce. Defendant argued that this exemption to the FAA did not apply since the truckers were independent contractors, and thus, did not sign any contracts of employment.

Without specifically ruling on the applicability of the FAA exemption, the appellate court found that it was error for the trial court to rule on the petition to compel arbitration without first determining whether Plaintiffs signed contracts of employment with Defendant. Accordingly, the matter was remanded to the trial court for consideration of this issue.

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Garcia has a narrow application since it involves a specific exemption of the FAA as applied to truckers involved in interstate commerce. However, employers in the transportation industry should be mindful of this decision when crafting independent contractor agreements.

Appellate Court Holds Inability to Work for Particular Supervisor is Not a "Disability" Under the FEHA

In *Higgins-Williams v. Sutter Medical Foundation*, a California Court of Appeal held that a plaintiff's inability to work for a particular supervisor was not a "disability" under the Fair Employment and Housing Act ("FEHA"). Plaintiff Michaelin Higgins-Williams ("Higgins-Williams") worked as a clinical assistant for Sutter Medical Foundation ("Sutter"). She sought treatment for work-related stress and anxiety, and her doctor diagnosed her as having adjustment disorder with anxiety. He reported her disabling condition as "stress when dealing with human resources and her manager."

Sutter granted Higgins-Williams' request for leave. Thereafter, Higgins-Williams' doctor extended her leave several times and stated that she would only be able to return to work if she were permanently transferred to another department and worked for different supervisors. Sutter terminated Higgins-Williams' employment.

Higgins-Williams sued for disability discrimination, failure to engage in the interactive process, retaliation, wrongful termination, and discrimination. The trial court found that Higgins-Williams was not "disabled" within the meaning of the FEHA. Higgins Williams appealed.

The court of appeal agreed, holding that an employee's inability to work under a particular supervisor because of anxiety and stress related to the supervisor's standard oversight of the employee's job performance does not constitute a "disability" under the FEHA. The court reasoned that being unable to work for a specific supervisor is not a limit on a major life activity. Accordingly, an employer need not accommodate an employee's request to work under a different supervisor merely because the employee is anxious or stressed while working for a particular supervisor.

Court of Appeal Finds Forum Selection Clause Violates California Public Policy Where An Employee's Statutory Rights Could Be Diminished

In *Verdugo v. Alliantgroup, L.P.*, a California Court of Appeal found that enforcing the forum selection clause in an employment agreement violated California public policy where the employee's statutory rights and remedies under the California Labor Code were not available in the designated forum.

Alliantgroup, L.P. ("Alliantgroup"), headquartered in Harris County, Texas, hired Rachel Verdugo ("Verdugo") as Associate Director of its Irvine, California office. Upon hire, Verdugo signed an employment agreement that included a combined forum selection and choice-of-law clause establishing Harris County, Texas as the proper jurisdiction and venue for all disputes related to the agreement. Verdugo performed inside sales work and provided clerical support for sales staff in California; she had minimal contact with the corporate Texas office. Verdugo was subsequently discharged and brought a class action lawsuit alleging several causes of action under the California Labor Code. Alliantgroup sought to enforce the forum selection clause

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(i.e., force Verdugo to file a new lawsuit in Texas), and the trial court granted Alliantgroup's motion.

Verdugo appealed. In reversing the trial court's order, the appellate court noted that California generally favors contractual forum selection clauses as long as they are entered into freely and voluntarily, and as long as their enforcement would not be unreasonable. However, California courts will refuse to enforce such a clause if doing so would substantially diminish the rights of California residents in a way that would violate California public policy. Where statutory rights are at issue, such as those in the California Labor Code, the party seeking to enforce a forum selection clause bears the burden of demonstrating that the employee's statutory rights will not be diminished.

Though Alliantgroup argued that a Texas court would "most likely" apply California law, this speculation was deemed insufficient. Alliantgroup failed to identify comparable Texas law related to overtime pay, meal breaks, and the other compensation issues, and failed to show that Verdugo's remedies under Texas law would be "adequate" (or even comparable to those under California law).

The appellate court essentially found that the rights afforded to employees under the California Labor Code are "unwaivable"; accordingly, employers that operate in multiple states and seek to include non-California forum selection clauses in their employment agreements may want to consult legal counsel.

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