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EMPLOYMENT LAW UPDATE

Early Bird Rate ENDS 9/30!

9th Annual Employment Law Symposium

Thursday, November 5th
Hilton San Diego Resort
(Mission Bay)

Topics Include:

Managing the Managers

Wellness Programs

Harassment, Discrimination & Retaliation

"The HR Professional's Nightmare"

Wage & Hour Developments

Constructing Commission Plans

Know Your Audience: Advice for Avoiding Litigation

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I.

LEGISLATIVE

Governor Signs Bill Clarifying That Employee Immigration Status is Irrelevant to Employer Liability for Illegal Conduct

Governor Brown has signed into law AB 560 (Gomez), which confirms that all protections, rights and remedies available under state law are available to all individuals in the state who have applied for employment or are currently employed, regardless of immigration status. The bill further provides that for purposes of enforcing state labor, employment, civil rights and employee housing laws, a person's immigration status is irrelevant to the issue of liability, and discovery into a person's immigration status is prohibited unless the person seeking to make the inquiry has shown by clear and convincing evidence that the inquiry is necessary to comply with federal immigration law.

Governor Signs Bill Making Requests for Reasonable Accommodation a Protected Activity

Governor Brown has signed into law AB 987 (Levine), which provides that an employer may not retaliate or otherwise discriminate against a person for requesting accommodation of his or her disability or religious beliefs, regardless of whether the accommodation request is granted. This bill was drafted in response to a recent judicial decision, *Rope v. Auto-Chlor System of Washington,* wherein a California appellate court held that an employee's request for reasonable accommodation was not protected activity under the Fair Employment and Housing Act.

This new law abrogates the *Rope* decision and makes request(s) for reasonable accommodation protected activity such that an employer may be held liable for retaliation if it takes an adverse employment action against an employee because of such request(s).

California Legislature Targets Employment Arbitration Agreements

The California Legislature has passed AB 465, a bill that prohibits employers from obtaining arbitration agreements with employees as a condition of employment unless an employee has his or her own attorney to negotiate the terms. The bill would prohibit any person from requiring another person to waive any legal right, penalty, remedy, forum, or procedure as a condition of employment. The bill would also prohibit a person from threatening, retaliating against, or discriminating against another person based on a refusal to agree to such a waiver, and would render any such waiver

unconscionable, against public policy, and unenforceable. The bill would apply to any waiver agreement entered into after January 1, 2016, and would authorize an award of reasonable attorney's fees to a prevailing claimant.

If the Governor signs AB 465 into law, we expect the law will be challenged as contrary to the Federal Arbitration Act ("FAA") and the United States Supreme Court's decision in *AT&T Mobility v. Concepcion*, which held that when a state law attempts to prohibit the arbitration of a particular type of claim, that law is displaced by the FAA. Employers should continue to track this legislation and, if necessary, consult legal counsel regarding their arbitration agreements.

II.

JUDICIAL

Federal

Ninth Circuit Holds that Arbitrator, Not Court, Should Decide Enforceability of Arbitration Agreement Based on its Incorporation of AAA Rules

In *Brennan v. Opus Bank*, a banking executive ("Brennan") sued his former employer Opus Bank ("Bank") for wrongful termination and breach of contract. The Bank moved to compel arbitration pursuant to an arbitration clause in the employment agreement Brennan had signed. The district court granted the motion and Brennan appealed. The primary issue before the Ninth Circuit Court of Appeals ("Ninth Circuit") was who - an arbitrator or a judge - should decide whether or not the arbitration clause was unconscionable and therefore unenforceable.

In affirming the district court's decision to compel arbitration, the Ninth Circuit held that federal law governed the arbitrability question by default because the arbitration agreement was covered by the Federal Arbitration Act ("FAA"). Under the FAA, the question of arbitrability is to be determined by an arbitrator "absent clear and unmistakable evidence that the parties agreed to apply non-federal arbitrability law." In this case, the employment agreement was silent on arbitrability and incorporated the American Arbitration Association ("AAA") rules, which provide that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the . . . validity of the arbitration agreement." According to the Ninth Circuit, the agreement's incorporation of the AAA rules constituted "clear and unmistakable" evidence that the parties intended to have an arbitrator decide the threshold question of arbitrability.

Brennan is yet another case in a multitude of arbitration-related decisions issued by California state courts and the Ninth Circuit over the past few years. *Brennan* reminds employers that incorporation of the AAA rules - or any set of arbitration rules - in an arbitration agreement can have a significant impact on the ultimate enforceability of the agreement. Employers are advised to have their arbitration agreements drafted and/or reviewed by counsel to maximize the likelihood that they will be enforced in the manner intended.

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

California Supreme Court Clarifies Arbitration Agreement Unconscionability Standard

In *Sanchez v. Valencia Holding Company, LLC*, the California Supreme Court enforced an arbitration agreement that was not substantively unconscionable. The plaintiff ("Sanchez") filed a class action lawsuit against defendant Valencia Holding Company, LLC ("Valencia"), alleging that Valencia had violated the Consumer Legal Remedies Act ("CLRA"). Sanchez alleged that Valencia misrepresented the condition of a pre-owned automobile he had purchased, and also improperly charged him various fees relating to the transaction.

Pursuant to an arbitration clause contained within the sale contract, Valencia moved to compel the dispute to arbitration. Valencia also sought dismissal of Sanchez's class claims pursuant to a class action waiver appearing in the arbitration clause. The trial court denied the motion, holding that the class action waiver was unenforceable because the CLRA expressly provides for class action litigation and declares that the right to a class action is unwaivable. Valencia appealed. The court of appeal affirmed on other grounds, concluding that the arbitration clause contained elements of procedural and substantive unconscionability.

In reversing the court of appeal's ruling, the California Supreme Court first discussed the standard for proving unconscionability. The Court explained that traditional descriptions of substantive unconscionability - contract terms that are "overly harsh," "so one-sided as to shock the conscience," "unduly oppressive," "unreasonably favorable," or "unfairly one-sided" - all mean the same thing. That is, substantive unconscionability requires a substantial degree of unfairness beyond a "simple old-fashioned bad bargain."

Applying this principle, the court concluded that although the arbitration clause was procedurally unconscionable because the sales contract was a contract of adhesion, it was not substantively unconscionable (for reasons not relevant to employment disputes). The California Supreme Court also upheld the class action waiver pursuant to *AT&T Mobility LLC v. Concepcion*. In *Concepcion*, the U.S. Supreme Court held that a state rule invaliding class waivers interferes with the fundamental attributes of arbitration and is therefore preempted by federal law. The California Supreme Court concluded that *Concepcion* preempted the trial court's invalidation of the class action waiver. As such, the court reversed the trial court's denial of the motion to compel arbitration.

Though decided in the context of a consumer arbitration agreement, the *Sanchez* case provides helpful guidance to employers seeking to enforce arbitration agreements. *Sanchez* makes it clear that the many formulations of "substantive unconscionability" in fact represent the same standard. Thus, a plaintiff employee will likely be unable to argue that any particular formulation requires a greater or lesser evidentiary showing. Moreover, a plaintiff employee will likely have greater difficulty avoiding a contractual agreement to arbitrate by simply arguing that such agreement was unfavorable to him or her; rather, an employee will be required to demonstrate that he or she was subjected to something substantially more than a "bad bargain."

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Court of Appeal Affirms Class Certification in Unfair Competition Case

In *Safeway, Inc. v. Superior Court*, a California Court of Appeal affirmed the certification of a class of employees seeking restitution for unfair competition under California Business & Professions Code section 17200 based on the employer's alleged denial of premium pay for missed meal and rest breaks.

The class alleged that Safeway, which operates a chain of supermarkets in California, had maintained a policy of not paying premium wages to employees who had been denied compliant meal or rest breaks, in violation of California Labor Code section 226.7. This policy allegedly created an unfair business practice that harmed the entire class. In support of this claim, the class representatives offered evidence that Safeway had no mechanism for calculating or making timely premium payments prior to June 2007, at which time remedial steps were taken. The class representatives also offered evidence that employees were pressured to forego, shorten, or delay their breaks.

Safeway opposed class certification on the ground that it maintained a legally compliant meal and rest break policy. As such, premium pay was unnecessary because the underlying violations had not occurred. Safeway further argued that because the company-wide policy was to provide compliant breaks, determining why employees had missed meal or rest breaks required an individualized inquiry, which made the question unsuitable for class treatment.

The appellate court ruled that the unfair competition claim was amenable to class treatment, as Safeway's alleged practice of not paying premium wages under any circumstance was unfair. The class representatives' evidence that employees were pressured not to take compliant meal breaks further evidenced a violation that could be adjudicated on a class-wide basis.

This decision serves as a reminder that employers must be vigilant in their creation and enforcement of legally compliant wage and hour policies. Employers are advised to have their policies reviewed by legal counsel, and to train their managers and supervisors with respect to employees' meal and rest break rights.

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EARLY BIRD RATE ENDS SOON

Employment Law Symposium

Thursday, November 5, 2015

Hilton San Diego Resort & Spa (Mission Bay)

For topics and registration information visit our Events page at www.pettitkohn.com.

Pre-approved for 5.50 (CA-Specified) recertification credit hours.

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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, Christine Mueller, 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.