PETTITKOHN
PETTIT KOHN INGRASSIA & LUTZ

EMPLOYMENT LAW UPDATE

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

San Diego | Los Angeles | Phoenix

www.pettitkohn.com

LEGISLATIVE

California

Pending Legislation

There are a number of pending bills, which, if passed and signed into law, would impact California employers and employees. These bills include:

AB 5: AB 5 (Gonzalez Fletcher) would require California employers with 10 or more employees to offer additional work hours to existing staff before hiring new employees or contracting with staffing firms. Specifically, "The Opportunity to Work Act" would require employers to offer additional hours or work to an existing employee if, in the employer's "reasonable judgment," the employee "has the skills and experience to perform the work." The bill would also require employers to use a "transparent and nondiscriminatory process" to distribute the additional hours or work amongst existing employees. AB 5 would exempt employers from offering additional work hours if doing so would require paying overtime compensation. Finally, the bill would authorize employees to file civil actions against employers for any violations. AB 5 is currently pending before the Assembly Committee on Labor and Employment.

AB 353 and AB 1477: AB 353 (Voepel) and AB 1477 (Brough) would update and expand current veteran hiring preferences and would allow private employers to extend preferences to any dishonorably discharged veterans and insulate such preferences from discrimination claims. AB 353 has been referred to the Committee on Veterans Affairs as well as the Committee on Labor and Employment. AB 1477 has not yet been referred to committee.

AB 569: AB 569 (Gonzalez Fletcher) would prevent employers from taking any adverse action because of an employee's or dependent's use of a drug, device, or medical service related to reproductive health. The bill would prohibit employers from requiring employees to sign a waiver or other document denying their right to make their own reproductive health decisions. The bill has been referred to the Committee and Labor and Employment as well as the Judiciary Committee.

AB 1008: AB 1008 (McCarty) would amend the Fair Employment and Housing Act to prohibit private employers from inquiring about a job applicant's criminal record or conviction history under after a conditional offer of employment

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

is made. The bill would also impose new notice and disclosure requirements if the information is sought. AB 1008 has not yet been referred to committee.

AB 168: AB 168 (Eggman) would ban all employers from asking job applicants about salary history. Private employers would be required to provide the pay scale for a position. AB 168 has not yet been referred to committee.

SB 62: SB 62 (Jackson) would expand the California Family Rights Act. The bill would expand "child" to include a domestic partner's children and would remove restrictions based on age and dependent status. SB 62 would also permit employees to take leave to care for a grandparent, grandchild, sibling, or domestic partner with a serious health condition. Moreover, the definition of "parent" would be revised to include a parent-in-law. The bill has been referred to the Committee on Labor and Industrial Relations.

SB 63: The California legislature is currently considering SB 63 (Jackson). SB 63 is similar to legislation that Governor Brown vetoed in the last legislative session. If signed into law, SB 63 would seek to expand the California Family Rights Act and mandate that a California employer who employs 20 employees within a 75-mile radius provide 12 weeks of protected parental leave per year. SB 63 has been referred to both the Senate Labor and Industrial Relations Committee and the Senate Judiciary Committee. No hearing dates have been set.

JUDICIAL

Federal

Ninth Circuit Finds Prospective Employer Violated The Fair Credit Reporting Act By Requiring A Liability Waiver In Its Consumer Report Disclosure

In this case of first impression, *Sarmad Syed v. M-I, LLC*, the Ninth Circuit Court of Appeals ("Ninth Circuit") reversed the district court's dismissal of an action under the Fair Credit Reporting Act ("FCRA"). The panel held that a prospective employer violated the FCRA when it procured a job applicant's consumer report after including a liability waiver in the same document as a statutorily mandated disclosure.

Sarmad Syed ("Plaintiff") applied for a job at M-I in 2011. M-I provided Plaintiff with a document labeled "Pre-employment Disclosure Release" ("release"). The release informed Plaintiff that his credit history could be collected and used as a basis for an employment decision ("disclosure"). Along with the disclosure, the release included a section which stated that by signing the Release, Plaintiff was waiving his rights to sue M-I for violations of the FCRA ("liability waiver"). Plaintiff subsequently alleged that M-I's inclusion of the liability waiver violated the FCRA requirement that the disclosure consist "solely" of the disclosure related to his credit history. In 2014, Plaintiff filed a putative class action in district court against both M-I and PreCheck, the company hired by M-I to obtain the consumer report. He sought statutory damages, punitive damages, and attorney's fees.

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

The district court initially dismissed the complaint. However, Plaintiff filed an amended complaint which included allegations that M-I's inclusion of the liability waiver in the disclosure was "willful." The district court dismissed the amended complaint as well, for a failure to state a valid cause of action. The Ninth Circuit reviewed, and ultimately reversed, the dismissal. The Court found that the FCRA unambiguously requires the disclosure to contain only a disclosure related to obtaining the consumer report. The disclosure could contain an authorization and signature line for the consumer/applicant to sign, however it could not contain any additional terms, clauses, or waivers. The Court also found that M-I's inclusion of the additional liability waiver was indeed willful and intentional.

Many employers routinely obtain consumer reports and background checks as part of their employee application process. This case spotlights the importance of drafting a consumer report disclosure that strictly complies with the FRCA. The Court indicated that a prospective employer does not violate the statute by providing a disclosure that violates the FCRA, but when it actually *procures, or causes to be procured*, a consumer report about the job applicant. Employers should review their disclosures carefully, as well as their guidelines for procuring consumer reports for applicants.

Ninth Circuit Affirms Enforceability of Arbitration Agreement

In *Poublon v. C.H. Robinson*, the Ninth Circuit Court of Appeals ("Ninth Circuit") held that the employer's arbitration agreement was valid and enforceable. Plaintiff Lorrie Poublon ("Poublon") was an account manager with Defendant C.H. Robinson. While employed at C.H. Robinson, Poublon signed an agreement titled "Incentive Bonus Agreement" each December in order to receive a financial bonus. The Incentive Bonus Agreement ("Agreement") was a short one-page document that included an arbitration provision and incorporated by reference the company's Employment Dispute Mediation/Arbitration Procedure ("Arbitration Procedure"), which was available on its intranet. After an unsuccessful mediation, Poublon filed a civil complaint alleging that C.H. Robinson had misclassified her as exempt. The district court denied C.H. Poublon's motion to compel arbitration, holding that the provision was unconscionable under California law. The Ninth Circuit disagreed and reversed.

In order to establish the defense of unconscionability under California law, the party asserting the defense must show that the agreement is both procedurally and substantively unconscionable. Procedural and substantive unconscionability need not be present in the same degree. Rather, there is a sliding scale: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to result in a conclusion that the agreement is unenforceable, and vice versa.

Here, the Ninth Circuit analyzed the Agreement and determined that there was a low degree of procedural unconscionability. Although it was a contract of adhesion (presented on a take-it-or-leave-it basis), Poublon did not establish that there were any other elements of oppression or surprise present.

With respect to substantive unconscionability, the Court rejected Poublon's argument that a venue provision in the Arbitration Procedure, which required her to

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

arbitrate in Minnesota instead of California, rendered the Agreement substantively unconscionable. The Court also rejected Poublon's arguments that a confidentiality provision (requiring all aspects of arbitration to be confidential and not open to the public), a sanctions provision (authorizing the arbitrator to award attorneys' fees based on improper conduct of a party), and reasonable limitations on discovery were unconscionable.

While the Ninth Circuit did find that a judicial carve-out provision of the Agreement was unconscionable because it required employees to submit all claims against C.H. Robinson to arbitration but preserved C.H. Robinson's right to seek judicial resolution of claims that include a request for injunctive or equitable relief, certain restrictive covenants, and intellectual property rights, it concluded that the presence of this one unconscionable provision did not render the entire Agreement unenforceable.

California

Court of Appeal Rules Los Angeles Police Department Failed to Accommodate Injured Recruits After Modifying its Light-Duty Program

In *Atkins v. City of Los Angeles*, a California Court of Appeal affirmed a jury verdict in favor of a group of former Los Angeles Police Department ("LAPD") recruit officers who had been terminated from their light-duty positions in violation of the Fair Employment & Housing Act ("FEHA").

Five recruit officers ("Plaintiffs") were injured while training at the LAPD Police Academy between 2008 and 2009. They were assigned to light duty administrative jobs on a temporary basis while they recovered under a system called the "Recycle" program. In September 2009, the LAPD modified the Recycle program, and set a strict six-month recovery period after which recruits needed to be medically cleared or discharged from their temporary administrative assignments. Plaintiffs were unable to resume working after six months, at which point they were all forced to resign or discharged.

Plaintiffs sued the City of Los Angeles ("City") on the grounds that their dismissals constituted disability discrimination and a failure to accommodate under the FEHA. At trial, the jury found in favor of Plaintiffs on both claims. The City appealed on the grounds that Plaintiffs could not perform the duties of LAPD recruits, and that because the recruits were merely "pre-probationary trainees," they were not entitled to reasonable accommodations.

The Court of Appeal ruled that Plaintiffs could not establish disability discrimination under the FEHA because their injuries prevented them from performing the duties of a police recruit—which required substantial physical capacities. However, the Court ruled that recruits had a right to a reasonable accommodation, distinguishing their probationary status from mere applicants. Whether trainees and probationary employees were entitled to a reasonable accommodation under the FEHA had previously been uncertain. The Court concluded that the FEHA provided this right to such employees.

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

Because Plaintiffs were entitled an ongoing accommodation, the LAPD's decision to withdraw the temporary administrative positions after six months violated the FEHA. While California law holds that employers are not required to make temporary positions permanent as an accommodation, the fact that the LAPD had a longstanding practice of placing injured recruits in light-duty jobs in the Recycle program indefinitely without incurring an undue burden made the abrupt ending of that policy unlawful under the FEHA.

Atkins highlights several key employment issues. First, employers must be circumspect when evaluating potential accommodations, and should be extremely cautious when considering discharging an employee based on the apparent absence of an available accommodation. Second, potential reassignments should be evaluated in any situation where a disabled employee cannot perform his or her job duties. Finally, all employees, including trainees and probationary employees, are protected under the FEHA, and should be accommodated where necessary and appropriate.

A Delectable Treat for Employers: See's Candy Wins Summary Judgment of Class and PAGA Claims

A California Court of Appeal tackled a tangled web of summary judgment and adjudication issues in *Silva v. See's Candy Stores, Inc*. What began as a standard wage and hour class and representative action (including a claim under the Private Attorneys General Act of 2004, or "PAGA"), morphed into a revolving door of appeals and summary judgment and adjudication motions. Plaintiff Pamala Silva ("Silva") claimed that defendant See's Candy Stores, Inc. ("See's") maintained timekeeping policies that resulted in underpayment to employees, violated meal and rest break rules, failed to provide accurate paystubs, and failed to reimburse employees for business expenses. In an initial appeal, See's challenged the trial court's award of summary adjudication on See's affirmative defense that its rounding policy did not violate state or federal law. In *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, the Court of Appeal reversed the trial court's decision, explaining that rounding policies are not per se violative of California law—if a rounding policy is neutral on its face and is applied in a manner such that, over time, it does not fail to properly compensate employees for all time worked, then it is permissible. In this appeal, Silva challenged the following decisions of the trial court: (1) summary judgment on her class timekeeping claims; (2) summary judgment of her individual Labor Code claims; and (3) summary adjudication of her PAGA claim.

Summary Judgment of the Rounding Policy

See's maintained a policy by which employees' time punches were rounded up or down to the nearest tenth of an hour.[1] On summary judgment, See's presented evidence from an expert witness who conducted two analyses of thousands of shifts and determined that the company's rounding policy was neutral on its face and as applied (that is, over a period of time it did not result in the underpayment of wages). See's expert further concluded that Silva herself was

[1] For instance, if an employee punched in a 7:58 a.m., the employee's time was rounded to 8:00 a.m. If the employee punched in at 8:02 a.m., time was rounded down to 8:00 a.m.

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

fully compensated for all hours worked. The Court of Appeal concluded that See's met its initial burden of proving a neutral rounding policy. As there was no evidence to controvert See's position, summary judgment was properly granted.

Summary Judgment of the Grace Period Policy

Under See's grace period policy, employees whose schedules have been programmed into See's electronic timekeeping system may voluntarily punch the time clock up to 10 minutes before their scheduled start times and 10 minutes after their scheduled end times. Since company policy prohibits such employees from working during the grace period, if an employee punches in or out of the system during the grace period, the employee is paid based solely on his or her scheduled start and end times. Silva claimed that these employees were under the control of See's during the grace period, and therefore such time was compensable. The Court held, however, that See's employees could and did use the grace period to engage in personal business, including applying makeup, drinking coffee, leaving the store to run quick errands, and using their personal cell phones. Summary judgment was therefore proper as to the grace period policy.

Summary Adjudication of the PAGA Claim

The Court of Appeal affirmed the trial court's summary adjudication of Silva's PAGA claim with respect to the timekeeping policies. Because See's proved that its timekeeping policies did not result in underpayment of employee wages, Silva failed to establish that the policies violated the Labor Code. Accordingly, her PAGA claim, as it pertained to the timekeeping policies, necessarily failed.

Conclusion

From this procedural morass emerges a few lessons for employers. First is the importance of maintaining a rounding policy that does not improperly favor the company. Though courts have sanctioned the use of rounding policies, employers should carefully review those policies to determine whether, over a period of time, they result in net loss of time, and therefore pay, to employees. Second, this case highlights the importance of maintaining and enforcing strict policies prohibiting off-the-clock work. Had See's not been able to show that it prohibited work during the grace period and simultaneously permitted employees to conduct their own business during that time, the company would likely have faced significant minimum and overtime wage liability.

Court of Appeal Reverses Summary Judgment Granted in Employer's Favor on CFRA Claim

In *Bareno v. San Diego Community College District*, a California Court of Appeal reversed summary judgment granted in the employer's favor in connection with a California Family Rights Act ("CFRA") claim.

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

Plaintiff Leticia Bareno ("Bareno") was an administrative assistant at San Diego Miramar College ("College"). In 2013, the College disciplined Bareno for performance issues with a 3-day suspension. On the day she was to return to work, a Monday, Bareno alerted the College she would be absent that day because she was seeking medical attention. The same day, she alerted the College she would be out on medical leave for at least the week. She provided a "work status report" from Kaiser Permanente documenting her medical leave.

The following week, Bareno continued to be absent. She contends that she provided a second work status report indicating she would be out for at least another week. However, the College denies ever receiving such report. Based on her missing the week of work addressed in the second work status report, the College claimed Bareno voluntarily resigned due to her absence extending for five consecutive days.

When Bareno received the notice of her "voluntary resignation," she contacted the College and provided another copy of her second work status report, as well as additional documentation of her medical leave. However, the College refused to change its position that it had accepted her voluntary resignation.

Bareno filed a lawsuit alleging that her discharge violated the CFRA because it was in retaliation for her taking medical leave. The College moved for summary judgment and the trial court granted the motion. Bareno appealed.

A California Court of Appeal reversed the trial court's decision. The College argued that Bareno could not show that she exercised her right to take leave for a qualifying CFRA purpose, arguing 1) she did not show she requested leave; and 2) if she had, it was not a "reasonable request" under CFRA. In reversing the trial court's decision, the appellate court reasoned that even if the College had not received the second work status report, the first one put it on notice that Bareno was taking medical leave. The Court noted that the College should have inquired further, if necessary, to determine whether the employee was requesting CFRA leave, and to obtain the necessary information concerning the leave.

This case highlights the employer's duties in the context of CFRA-based leaves of absence. Where an employer has any question about the basis for employee's leave, it should endeavor to confer with the employee to obtain all of the necessary information before taking an adverse employment action against the employee in connection with his or absence.

In Refusing to Enforce a PAGA Waiver, a California Court of Appeal Rejects the Argument that *Iskanian* Was Wrongly Decided

In *Montano v. Wet Seal Retail, Inc.*, a California Court of Appeal opted not to defy the California Supreme Court's opinion in *Iskanian v. CLS Transportation Los Angeles*, in which the Supreme Court held that waivers of claims under the Private Attorneys General Act of 2004 are unenforceable as a matter of public policy.

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

When Plaintiff Elizabeth Montano ("Montano") filed a lawsuit alleging class and PAGA claims against her employer, Defendant Wet Seal Retail, Inc. ("Wet Seal"), the company sought to enforce an arbitration agreement signed by Montano. The arbitration agreement contained an express waiver of class and representative claims, and also stated that, if that waiver were found to be unenforceable, *the entire arbitration agreement would also be void and unenforceable*. Wet Seal moved to compel Montano's individual claims to arbitration and to stay the PAGA claim pending the completion of arbitration.

The trial court determined that, pursuant to *Iskanian*, the arbitration agreement's waiver of PAGA claims was unenforceable. Having made this initial finding, the trial court further concluded that it must also invalidate the entire arbitration agreement, since the plain language of the agreement expressly required that result. Accordingly, the trial court denied the motion to compel arbitration.

On appeal, Wet Seal argued that the California Supreme Court reached the wrong result in *Iskanian*, since multiple federal district courts in California have found PAGA waivers to be enforceable. The Court of Appeal acknowledged the rulings of the federal courts, but noted that such decisions do not bind California state courts. Because state courts *are* bound by decisions of the California Supreme Court, the Court of Appeal had no choice but to abide by the ruling in *Iskanian*. Thus, the denial of the motion to compel arbitration was affirmed.

In rejecting Wet Seal's argument that *Iskanian* was wrongly decided, the Court of Appeal confirmed that the only way the California Supreme Court's decision in *Iskanian* will not be followed by lower state courts is if the U.S. Supreme Court reviews and reverses that decision. For now, employers must adhere to *Iskanian's* mandate that PAGA waivers in arbitration agreement are unenforceable.

Pettit Kohn San Diego Attorneys Named in Super Lawyers 2017

Pettit Kohn Ingrassia & Lutz is proud to announce that two of the firm's Employment Law attorneys have been named to the 2017 San Diego Super Lawyer list. In addition, two attorneys were named to the 2017 San Diego Rising Stars list. Special honors went to Thomas Ingrassia who was recognized as one of the "Top 50" attorneys in San Diego County. In addition to being in the "Top 50", Mr. Ingrassia obtained his 10th consecutive year as a "Super Lawyer" of San Diego.

Members of the firm's employment team being honored include:

San Diego Super Lawyers

- Thomas Ingrassia (2008-2017); Top 50 Attorneys (2016, 2017)
- Jennifer Lutz (2011-2017)

San Diego Rising Stars

- Lauren Bates (2017)
- Jenna Leyton-Jones (2015-2017)

Super Lawyers, part of Thomson Reuters, is a research-driven, peer influenced rating service of outstanding lawyers who have attained a high degree of peer recognition and professional achievement. Attorneys are selected from more than 70 practice areas and all firm sizes, assuring a credible and relevant annual list. The annual selections are made using a patented multiphase process involving peer nomination, independent research evaluation of candidates and peer evaluation. The objective of Super Lawyers is to create a credible, comprehensive and diverse listing of exceptional attorneys to be used as a resource for both referring attorneys and consumers seeking legal counsel.

Please join us in congratulating our attorneys on their selection!

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

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 Cameron Flynn, or Cameron Davila at (858) 755-8500; or Jennifer Weidinger, or Tristan Mullis at (310) 649-5772.