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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *January 2018*

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LEGISLATIVE

Federal

New Tax Legislation Prohibits Business Deduction for Confidential Sexual Harassment Settlements

Section 13307 of the "Tax Cuts and Jobs Act," which went into effect on December 22, 2017, amends section 162 of the Internal Revenue Code ("IRC") pertaining to "ordinary and necessary" business expenses that may be deducted from income. Pursuant to new section 162(1) of the IRC, payments made pursuant to a confidential settlement of sexual harassment allegations are no longer permissible tax deductions for businesses. The new provision does not specify whether a company may deduct legal fees incurred before settlement, or whether some or all of the fees are deductible if there are claims in addition to a claim of sexual harassment. Employers are encouraged to consult with their tax advisors regarding the tax implications of any sexual harassment settlement.

State

California Senate Bill Seeks to Prohibit Confidentiality of Sex-Based Discrimination and Harassment Settlements

The California Legislature is currently considering Senate Bill 820 (Leyva), which, if signed into law, would prohibit the inclusion of nondisclosure terms in settlement agreements relating to actions alleging claims of sexual harassment or discrimination based on sex in the workplace. The bill would permit the inclusion of nondisclosure terms upon the request by the complaining party. The bill would apply only to settlements reached after litigation has commenced.

JUDICIAL

Federal

Ninth Circuit Examines the Classification of Student Workers

In *Benjamin v. B&H Education,* the Ninth Circuit Court of Appeals ("Ninth Circuit") held that a group of student workers were not entitled to compensation for "hands on" training.

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Plaintiffs Jacqueline Benjamin, Bryan Gonzalez, and Taiwo Koyejo (collectively, "Plaintiffs") were students at B&H Education, Inc. ("B&H"), which operates a group of cosmetology and hair design schools located throughout California and Nevada.

In both California and Nevada, individuals seeking a cosmetology license are required to not only receive extensive classroom training but also perform hundreds of hours of hands-on training. To assist students in meeting onerous licensing requirements, B&H allows its students to participate in clinical experience programs in which they work directly with paying customers at salons operated by B&H. As clinical work is considered part of the educational experience at B&H, students do not receive compensation.

Plaintiffs filed a lawsuit on behalf of themselves and other similarly situated individuals (the "Class") claiming that they should have been classified as employees for the tasks performed for customers on behalf of B&H. Plaintiffs claimed that B&H violated state and federal law by requiring students to perform work without compensation and alleged that B&H required students to work with little to no supervision for the express purpose of generating profit for B&H. Plaintiffs sought recovery of minimum wage and overtime compensation, as well as penalties associated with alleged meal and rest break violations.

Plaintiffs filed a motion for summary judgment, claiming that students were employees as a matter of both state and federal law. B&H filed a cross-motion for summary judgment, arguing that members of the Class were students, not employees. The trial court granted summary judgment in favor of B&H, applying the "primary beneficiary" test to hold that Plaintiffs, rather than B&H, were the primary beneficiaries of the clinical work program. As Plaintiffs were not able to show that B&H prioritized profiting from student services over the provision of educational training and experience, the trial court was not moved by Plaintiffs' arguments.

Plaintiffs appealed and the Ninth Circuit analyzed the class' work-study arrangements under both the "primary beneficiaries" test and the "economic realities" test, which examines the totality of the circumstances to determine the existence of an employment relationship. The Ninth Circuit held that Plaintiffs were, in fact, students (not employees), and therefore affirmed summary judgment in favor of B&H.

While the holding in *Benjamin* is relatively narrow in its scope, applying only to a specific subset of alleged (but not actual) employees, the case highlights the analytic tests utilized by the Ninth Circuit in determining the existence of an employment relationship. California employers operating enterprises with work forces arguably impacted by these tests should therefore take this ruling as an opportunity to analyze applicable programming and ensure compliance.

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A Growing Divide: California's Fourth Appellate District Disagrees with *Esparza v. KS Industries, L.P.* regarding the Arbitrability of Labor Code Section 558 Claims

In August 2017, employers secured a rare victory in the context of the Private Attorneys General Act ("PAGA")—in *Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, California's Fifth Appellate District ruled that an employee's claims under Labor Code section 558 ("Section 558") do not constitute PAGA claims and are therefore subject to arbitration. Section 558 permits the recovery of "civil penalties" in the amount of $50 or $100 per pay period, plus the value of unpaid wages, if applicable, for violations of certain Labor Code provisions governing hours worked. Under PAGA, an aggrieved employee can initiate a civil action to collect penalties previously recoverable only by the State, so long as three-quarters of the penalties ultimately recovered are turned over to the Labor and Workplace Development Agency. In *Esparza*, the court determined that, because the relief available under Section 558 is recoverable directly by employees and is not delivered to the State, the relief does not constitute a "civil penalty" within the meaning of PAGA. Now, another Court of Appeal has called *Esparza's* holding into question.

In *Lawson v. ZB, N.A.*, California's Fourth Appellate District opined that the premise underlying the *Esparza* decision was faulty — an employee is *not*, in fact, able to directly recover the remedies available under Section 558. Typically, if a statute does not *expressly* authorize a private right of action, courts will not infer the existence of an *implied* right of private enforcement. The Fourth Appellate District noted that Section 558 does not expressly authorize an employee to privately enforce the statute. Therefore, the only way an employee can recover Section 558 penalties is via a state enforcement action, or, alternatively, via a PAGA claim. Accordingly, the Fourth Appellate District found no basis for concluding that a Section 558 claim is different from a PAGA claim.

Although the California Supreme Court initially declined to review *Esparza*, it is likely that the Court will eventually take up the question of whether Section 558 claims are arbitrable — if only to resolve the disagreement among the Courts of Appeal regarding this issue. For the time being, employers doing business in San Diego, Orange, Imperial, San Bernardino, Riverside, and Inyo Counties are bound by the decision of the Fourth Appellate District in *Lawson*, and may not seek to compel arbitration of an employee's Section 558 claims.

Court of Appeal Reverses Summary Judgment in Connection with Obesity-Based Disability Claim

In *Cornell v. Berkeley Tennis Club*, a California Court of Appeal reversed summary judgment granted in favor of the defendant employer, holding that the plaintiff's obesity could potentially qualify as a "disability" under state and federal law.

The Berkeley Tennis Club ("Club") fired Plaintiff Ketryn Cornell ("Cornell") after she had worked there for 15 years. Cornell is a severely obese woman and has been that way since she was a child. The Club is a members-owned facility, governed by a board of directors ("board"). It employs a general

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manager who oversees a small staff. Cornell began working for the Club in 1997 as a lifeguard and pool manager. By 2011, she was working 40 hours per week as a night manager, day manager, and tennis court washer. She received positive reviews, merit bonuses, and raises throughout this period.

During Spring 2012, a new manager took over the Club and wanted to "change the image of the Club." Despite knowing that Cornell wore a size 5X to 7X shirt, the largest size uniform the Club ordered was 2X. Cornell tried to get a uniform that would fit; however, the manager reported she "continue[d] to resist change and ha[d] not been cooperative." Cornell eventually ordered shirts from a specialty shop, at her own expense, and had them embroidered with the Club's logo. Cornell then received reduced hours, was overlooked for advancement positions, and new hires received greater pay despite her decade of experience. Cornell complained to the board about the actions.

Several months later, a board meeting and dinner were held in an on-site ballroom. The meeting's agenda listed "personnel issues" and "issues of club management," including "[r]ates of pay for staff." Both Cornell and the manager assisted in set-up for the event. During the set-up, the manager allegedly found a recording device positioned to record the board meeting. The manager blamed Cornell. Cornell denied planting the device. The manager allowed Cornell to resign, and when she refused, the manager discharged her.

Cornell sued the Club, making a claim under the Fair Employment and Housing Act ("FEHA") for disability discrimination. The trial court granted summary judgment for the Club, holding that Cornell failed to present medical evidence sufficient to create a triable issue of material fact as to whether she was disabled under the FEHA. She appealed.

The FEHA provides that a "disability" is generally considered a physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that both: 1) affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; and 2) limits a major life activity. In *Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, the Supreme Court specifically addressed obesity as a disability and held "that weight may qualify as a protected 'handicap' or 'disability' within the meaning of the FEHA if medical evidence demonstrates that it results from a physiological condition affecting one or more of the basic bodily systems and limits a major life activity." The Court concluded that "an individual who asserts a violation of the FEHA on the basis of his or her weight must adduce evidence of a physiological, systemic basis for the condition."

The California Legislature has declared that the FEHA typically provides more protections than the federal Americans with Disabilities Act of 1990 ("ADA"), which the Legislature generally views as a floor of protection. However, where the definition of "disability" used in the ADA results in broader protection, the broader protection in the ADA is deemed incorporated into the FEHA and will prevail over conflicting provisions. In 2008, Congress passed the ADA Amendments Act, emphasizing that the definition of "disability" is to be construed in favor of broad coverage of individuals under the ADA. Stemming from the

amendments to the ADA, recent federal case law has eased the burdens associated with demonstrating that obesity is a "disability" under the ADA, and by extension the FEHA.

In a move away from the requirements in *Cassista*, and with recognition of the newer federal precedent, the Court of Appeal determined that the Club failed to demonstrate that Cornell could not establish her obesity is a "disability" under the FEHA. The Court therefore overturned the trial court's grant of summary adjudication of the disability discrimination claim.

This case confirms that obesity should not be ignored as a potential basis for a disability discrimination claim. Just as with other disabilities, employers must increasingly consider the hardships faced by those who are overweight, and determine whether or not such individuals are entitled to reasonable accommodation.

This is Pettit Kohn Ingrassia Lutz & Dolin 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, Jennifer Suberlak, Shannon Finley, Cameron Flynn, Cameron Davila, or Erik Johnson at (858) 755-8500; or Grant Waterkotte, Jennifer Weidinger, Andrew Chung, or Tristan Mullis at (310) 649-5772.