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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *September 2019*

LEGISLATIVE

California

California Legislature Extends Deadline to Comply with Harassment Training Requirements

Governor Newsom has signed into law SB 778, which extends the deadline for employers to comply with the new harassment training requirements that went into effect last year. Under the prior law, employers with five or more employees were required to provide at least two hours of harassment training to all supervisory employees, and at least one hour of harassment training to non-supervisory employees by January 1, 2020. The prior law also specified that an employer that had provided this training to employees after January 1, 2019 would not be required to provide harassment training again by the January 1, 2020 deadline.

The new law extends the deadline for employers to provide the aforementioned training to January 1, 2021 (and thereafter once every two years). The law confirms that new non-supervisory employees must be provided the training within six months of hire, and that new supervisory employees must be trained within six months of assuming a supervisory position. The law also confirms that an employer who has provided the training in 2019 is not required to provide it again until two years thereafter.

This new law takes effect immediately.

JUDICIAL

California

California Supreme Court Rules Conversion Claims May Not Arise from Unpaid Wages

In *Voris v. Lampert,* the California Supreme Court recently held that the tort of conversion does not apply to claims for unpaid wages. In *Voris*, plaintiff Brett Voris ("Voris") launched three start-up ventures with defendant Greg Lampert ("Lampert"), with the agreement that some of Voris's wages would be deferred until a later date. After a personal falling out, Voris was fired and never received his promised compensation. Voris filed a lawsuit seeking a recovery of unpaid wages and separately sought to hold Lampert personally responsible for the unpaid wages under a theory of common law conversion (which generally concerns the

wrongful taking of another's property). The trial court held that Voris failed to adequately support his claims of alter ego liability and granted Lampert's motion for summary judgment as to the conversion claim. Voris appealed, but the Court of Appeal upheld the trial court's ruling, finding that neither existing case law nor policy considerations warranted extending the tort of conversion to the wage context. It also cautioned that if a conversion claim were allowed, any wage and hour violation could give rise to tort liability, including a potential punitive damages award.

The California Supreme Court affirmed the ruling of the Court of Appeal, holding that a tort claim for conversion was not the proper means for Voris to seek his unpaid compensation. In its decision, the Court observed that there was no precedential decision holding that a cause of action for conversion could be maintained based on the ordinary nonpayment of wages. The cases in which conversion claims were successfully pursued were distinguishable, as they generally involved situations where an employee's wages had been garnished or assigned to a third party. The California Supreme Court also pointed out that the Labor Code already requires prompt payment to a discharged employee and authorizes penalties for noncompliance. Critically, the Supreme Court also recognized that Voris was not alleging that his employer had wrongfully exercised dominion over a specifically identifiable pot of money that already belonged to him – which is the harm a conversion claim is designed to remedy. Rather, Voris' claim was that his employer failed to reach into its own funds to satisfy its debt. As such, a finding that a conversion applied to the mere failure to pay a debt would authorize plaintiffs to append conversion claims to every garden-variety suit involving wage nonpayment or underpayment. The California Supreme Court concluded that "the effect would thus be to transform a category of contract claims into torts, and to pile additional measures of tort damages on top of statutory recovery, even in cases of a good-faith mistake."

The decision serves as a win for employers, as it eliminates uncertainty as to whether or not a plaintiff may maintain a cause of action for conversation in addition to claims under the Labor Code. However, the overall impact of the case may be somewhat limited, as the Labor Code provides extensive remedies – and steep penalties – for the underpayment or nonpayment of wages. Accordingly, employers must remain diligent in ensuring accurate and timely payment of all wages owed.

California Supreme Court Invalidates Arbitration Agreement

In *OTO, LLC v. Kho*, the California Supreme Court invalidated an employment arbitration agreement. Under the agreement, Ken Kho (the "Employee") was required to arbitrate wage claims instead of having them decided in court or in an administrative hearing conducted by the California Labor Commissioner ("Berman hearing"). A Court of Appeal upheld the agreement, even though it was "disturbed" by how it was drafted and presented. But the California Supreme Court struck down the agreement, insisting that an agreement waiving a Berman hearing must be particularly fair, given the "full panoply" of benefits employees would enjoy in a Berman hearing.

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In this case, the Employee signed an arbitration agreement to resolve employment disputes with OTO, LLC (the "Employer"). The Employee subsequently filed a wage claim to initiate a Berman hearing. The employer filed a petition in state court to compel the Employee to arbitrate his wage claim.

The trial court denied the petition because the arbitration agreement was "highly" unfair as it blocked the Employee of benefits he could obtain in a Berman hearing, including the right to free advice and assistance by the Labor Commissioner. But the appellate court reversed, finding that, under *Sonic II*, the arbitration agreement allowed the Employee to have his wage claim heard in an accessible, affordable forum that mirrored normal civil litigation, even though the form of the agreement and the way it was presented to the Employee were "extraordinarily" unfair.

The Supreme Court reversed the Court of Appeal, finding the arbitration agreement unenforceable. The Supreme Court highlighted the "unusually coercive setting" in which the Employee signed the agreement. Specifically, the Employee was presented with the agreement three years into his employment with the Employer and he had to sign it to keep his job. The terms of the one-and-a-quarter page agreement appeared in one block paragraph, all in seven-point font. The agreement included long, complex statutory references and dense legal jargon. Rather than state that arbitration costs would be paid by the employer, the agreement stated that costs would be controlled by the Code of Civil Procedure and "controlling case law." The Supreme Court concluded that the agreement's "visually impenetrable" text aimed to "thwart, rather than promote, understanding." The agreement was delivered to the Employee at his desk by a "low-level employee" who lacked both the knowledge to explain it and the authority to negotiate it. The employee waited in front of the Employee as he read it, creating the expectation that the Employee had to sign immediately. The Employee signed the agreement within four minutes. Had the Employee spent any time reviewing the agreement, his pay would have been reduced because he was paid by piece rate. The Employee had no chance to review the agreement outside of work or in his native language. In addition, the Employee was not given a copy of the agreement he signed.

In 2013, the California Supreme Court held in *Sonic Calabasas A, Inc. v. Moreno (Sonic II)* that if the terms and circumstances in which an arbitration agreement are particularly unfair, or are "procedurally unconscionable," then it would only take a "relatively low degree" of unfairness in the terms of the agreement to make it unenforceable. The Supreme Court in *Kho* found several parts of the arbitration agreement to be unfair or substantively unconscionable, particularly when contrasted with the "simplified," "efficient," "affordable" Berman hearing. The agreement did not explain how to initiate arbitration. Rather, the Employee would have to submit a pleading to start an arbitration, serve and respond to discovery, comply with state rules of evidence, and make his case before a retired judge who, unlike a Berman hearing officer, would have no duty to assist him. The complexity was such, the Employee argued, that he would have to hire an attorney to pursue his claim in arbitration.

Kho, like *Sonic I* before it, may end up before the U.S. Supreme Court. In the interim, employers should give special attention to the structure and terms of

their arbitration agreements – particularly with respect to wage claims – and the manner in which they are presented. While the burden of proof as to procedural and substantive fairness of arbitration agreements properly falls on the employee, the Supreme Court's decision will be read by some to reverse the burden. With that thought in mind, employers should find ways to draft, design, and present arbitration agreements that emphasize accessibility, promote understanding, and eliminate surprise.

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California Supreme Court to Determine Whether Employers Must Maintain a Formal Meal and Rest Break Policy

The California Supreme Court will soon decide two questions that may greatly affect the landscape of meal and rest break class action litigation. In *Cole v. CRST Van Expedited, Inc.*, the Ninth Circuit Court of Appeals asked the California Supreme Court to answer the following questions under California law (as no California court has yet resolved these issues):

1. Does the absence of a formal policy regarding meal and rest breaks violate California law?

2. Does an employer's failure to keep records for meal and rest breaks taken by its employees create a rebuttable presumption that the meal and rest breaks were not provided?

The last time the California Supreme Court extensively examined an employer's meal and rest break obligations was in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. In *Brinker*, the Court clarified that, in order to abide by the Labor Code's meal and rest break requirements, an employer must relieve an employee of all duty for the designated break but does not need to ensure that the employee does no work. Thus, an employer satisfies its obligation to provide meal periods "if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30 minute break, and does not impede or discourage them from doing so." However, the Court did not directly address whether the absence of a policy providing for meal and rest breaks constitutes a violation of California law. Post-*Brinker*, no California state court has decided this issue, and some federal courts have held that merely posting the applicable Wage Order satisfies an employer's obligation.

If the California Supreme Court answers the first question in the affirmative, then any employer without a formal policy will be subject to class action or PAGA liability for meal and rest break violations. California state and federal courts are already inundated with wage and hour litigation, but employers should expect a deluge of additional meal and rest break lawsuits if a new, heightened standard for compliance is adopted.

Employer's Arbitration Appeal Rejected Where Agreement Reserved a Critical Decision for the Arbitrator Instead of the Court

In *Locayo v. Catalina Restaurant Group, Inc.*, a former employee filed a class action lawsuit on behalf of managers who were allegedly misclassified as

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exempt employees. Plaintiff Yalila Lacayo ("Lacayo") asserted claims for: failure to pay overtime wages; failure to pay minimum wages; waiting time penalties; failure to provide meal breaks; failure to provide rest breaks; failure to provide wage statements; and violation of the unfair competition law ("UCL"). She sought both monetary relief for unpaid wages and injunctive relief under the UCL.

Because Locayo had signed a binding arbitration agreement, the employer moved to compel her individual claims to arbitration, to dismiss the class action claims, and to stay the rest of the litigation pending the completion of arbitration. Notably, the arbitration agreement stated that the *arbitrator* would have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the arbitration agreement. The arbitration agreement further stated, in a section entitled "Claims Not Covered by the Agreement," that either party could seek immediate injunctive and/or equitable relief in court for unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information.

The trial court granted the motion to compel Lacayo's individual arbitration claims to arbitration but ordered that the arbitrator must resolve the issue of whether the class claims could be dismissed. The trial court also denied the motion to compel the UCL claim to arbitration, as it was expressly exempted from arbitration under the agreement.

The appellate court affirmed the trial court's decision. Before examining the merits of the appeal, the court first determined that the employer lacked the right to appeal the order requiring the arbitrator to decide whether class claims could be dismissed. Generally, a party can only appeal the *denial* of a motion to compel arbitration and must seek a "writ of mandate" – a form of appellate relief available only in extraordinary circumstances – to challenge the granting of a motion to compel arbitration. The appellate court determined that no extraordinary circumstances existed warranting the granting of writ relief to reconsider the order requiring the arbitrator to decide class arbitrability. The court also noted that parties are free to agree to permit the arbitrator to resolve matters of arbitrability, and the parties had done exactly that in the subject arbitration agreement by stating that the arbitrator must resolve issues relating to the interpretation and application of the agreement.

Turning to the merits of the appeal, the court then analyzed whether it was erroneous for the trial court to deny the motion to compel arbitration of the UCL claim. Again, the appellate court answered this question in the negative. The arbitration agreement contained a specific exemption for unfair competition claims, expressly stating that such claims were not covered by the arbitration agreement. Because there is no law favoring the arbitration of claims *not* covered by an arbitration agreement, the court of appeal affirmed the trial court's denial of the motion to compel arbitration of the uncovered UCL claim.

In light of the *Locayo* decision, employers are encouraged to review their arbitration agreements. Although the parties may choose to include a provision authorizing or requiring the arbitrator to decide whether class action claims are covered by the agreement, employers should remember that decisions by the arbitrator are typically not appealable. Therefore, employers should consider

removing any language delegating such a decision to the arbitrator, in order to preserve the right to appeal that issue to a court.

Meal Periods, Whether On-Duty or Off-Duty, Must Be at Least 30 Minutes

In *L'Chaim House, Inc. v. Division of Labor Standards Enforcement*, the California Court of Appeal rejected an employer's contention that on-duty meal breaks need not conform to the general rule that meal breaks must be at least 30 minutes long. The employer, L'Chaim House, Inc. ("L'Chaim"), was cited by the Division of Labor Standards Enforcement ("DLSE") for various wage and hour violations, including failing to provide 30-minute meal breaks in violation of the applicable Wage Order. Because L'Chaim operated a 24-hour residential care home for seniors, the parties agreed that Wage Order No. 5, governing the public housekeeping industry, applied to L'Chaim.

Notably, Section 11(E) of Wage Order No. 5 carves out an exception for on-duty meal breaks at 24-hour residential care facilities for the elderly. Specifically, Section 11(E) permits employers to require on-duty meal breaks "without penalty" when necessary to meet regulatory or approved program standards.

L'Chaim espoused an interpretation of Section 11 that would: (1) permit the company to require on-duty meal breaks without making the heightened showing usually required for on-duty breaks and (2) avoid liability for failing to provide at least 30 minutes for such breaks. The appellate court rejected this interpretation of Wage Order No.5, holding that employees of 24-hour residential care facilities for seniors are entitled to meal breaks of at least 30 minutes, regardless of whether the breaks are on-duty or off-duty. According to the court, "an on-duty meal period is not the functional equivalent of no meal period at all," and thus employers cannot relieve themselves of their obligation to provide a full 30 minute break simply because they satisfy a narrow exception permitting that break to occur while the employee is on duty.

In light of the court's decision, employers operating residential care facilities for the elderly are encouraged to review their meal break policies and procedures to ensure they provide for meal breaks of at least 30 minutes, even where on-duty meal breaks are lawful.

California Appellate Courts Further Divided on Arbitrating Claims Under Labor Code Section 558

Mejia v. Merchants Building Maintenance ("*Mejia*") further complicates the question of when a defendant can compel arbitration of claims brought under California's Private Attorneys General Act ("PAGA"), which deputizes workers to recover civil penalties – as well as "underpaid wages" – on behalf of both the State and other "aggrieved employees." Courts have generally ruled that PAGA claims cannot be compelled to arbitration.

Mejia involved a developing area of PAGA: how state and federal arbitration laws apply to Labor Code section 558, under which workers can recover back pay for "underpaid wages" and a payment of $50 or $100 per violation of that

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code section. California's appellate courts are divided on this issue, and, in an earlier case, another California appellate court ruled that workers can be forced to arbitrate Labor Code section 558 claims for "victim-specific relief" (i.e., claims for back pay) even if those claims are technically brought under PAGA. This decision gave employers a tactical advantage in the fight against the increasing number of PAGA lawsuits. Since then, however, other appellate courts have refused to split Labor Code section 558 claims, holding instead that the entire claim – for both back pay and civil penalties – must be litigated in court. The Supreme Court is currently considering this issue.

The plaintiff ("Mejia") in *Mejia* was a union member covered by a collective bargaining agreement ("CBA") that required employees to resolve private wage and hour disputes on an "individual basis" by following a mediation and arbitration protocol in the CBA. In her lawsuit, Mejia alleged the defendants' policies and practices violated the California Labor Code and sought recovery under PAGA. Among other things, Mejia sought both back pay and civil penalties under Labor Code section 558. The defendants moved to compel arbitration on Mejia's bid for back pay under Labor Code section 558, arguing the general prohibition against arbitrating PAGA claims did not apply because Mejia sought "victim-specific relief."

The trial court denied the motion, and the *Mejia* court affirmed. The *Mejia* court refused to order arbitration of that aspect of Mejia's Labor Code section 558 claim that sought to recover a portion of the PAGA penalty that represents "underpaid wages." Stated differently, although Mejia may have agreed to arbitrate individual claims and asked the court for wages the defendants allegedly denied her personally, the *Mejia* court refused to sever that aspect of her suit from her request for civil penalties. The court ruled instead that both claims had to remain and be litigated in court.

Unless and until the California Supreme Court provides clarity on this issue, the question as to whether or not plaintiffs can avoid arbitration agreements in their quests to recover back pay by bringing PAGA claims under Labor Code section 558 remains murky. Given that the majority of PAGA lawsuits are difficult, complex, and expensive to litigate – whether in court or arbitration – employers should regularly audit their wage and hour policies and procedures and consider requiring employees to sign arbitration agreements.

Employers May Only Recover Litigation Costs for Frivolous FEHA Claims, Even Under Code of Civil Procedure Section 998

The Fair Employment & Housing Act ("FEHA") authorizes a court to award attorneys' fees and litigation costs to the prevailing party in the action. Over the years, however, courts have confirmed that prevailing *employers* may only recover via FEHA's fee and cost provision if the plaintiff's action was frivolous, meritless, or objectively without foundation. Effective January 1, 2019, California enacted legislation amending the FEHA fee and cost provision to bar prevailing employers from recovering litigation costs under Code of Civil Procedure section 998 ("Section 998") unless the action was frivolous, unreasonable, or groundless. In *Scott v. City of San Diego*, a California Court of Appeal ruled that the

amendment regarding Section 998 merely clarified existing law, rather than changed the law, and therefore the amendment applies retroactively.

Employers should be advised that Section 998 offers in pending litigation (including offers made prior to January 1, 2019) will be impacted by the *Scott* decision, such that employers will be unable to recover costs under the FEHA cost provision or Section 998 unless the plaintiff's action was frivolous, unreasonable, or groundless.

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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, Erik Johnson, Carol Shieh, Shelby Harris, Kristina Magcamit, or Brittney Slack at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Jennifer Weidinger, or Rachel Albert at (310) 649-5772.