PETTITKOHN
PETTIT KOHN INGRASSIA LUTZ & DOLIN

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *July 2020*

AGENCY

California

DFEH Sexual Harassment Prevention Training Now Available

Pursuant to SB 1343, employers with five or more employees must provide sexual harassment prevention training to all employees by December 31, 2020. SB 1343 also required the Department of Fair Employment & Housing ("DFEH") to publish compliant training materials for use by employers. The DFEH's free sexual harassment prevention training materials are now available through the DFEH's website: https://www.dfeh.ca.gov/shpt/.

JUDICIAL

California

Court Declines to Stay PAGA Claims Pending Arbitration or to Permit Non-Signatories to Compel Arbitration

In *Thomas Jarboe v. Hanlees Auto Group, et al.*, plaintiff Thomas Jarboe ("Plaintiff") was hired by one of twelve automobile dealerships that comprise Defendant Hanlees Auto Group ("Hanlees") in Northern California. During his onboarding process, he signed an employment application and, a few days later, an employment agreement. Both forms contained arbitration provisions. Following the termination of his employment, Plaintiff brought a wage and hour class action lawsuit (which included a PAGA claim) against Hanlees, its twelve dealerships, and three individual owners of Hanlees (collectively, "Defendants").

Defendants moved to stay the entire action and compel arbitration based on the arbitration clauses in Plaintiff's initial employment application and agreement. But the trial court only granted the motion as to claims against the hiring dealership. The other Defendants appealed, arguing the arbitration agreement should extend to them because they were third party beneficiaries to Plaintiff's employment agreement. Their argument failed, however, due to the later-signed employment agreement narrowly defining "the Company" signatory as only the hiring dealership, and the fact that the employment agreement expressly superseded the terms of the application (which had a broader definition of "the Company").

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.

Alternatively, Defendants argued that the principle of equitable estoppel should apply. Per the equitable estoppel doctrine, non-signatories of an arbitration agreement can compel a signatory to arbitrate when the causes of action against the non-signatories are intimately founded in, and intertwined with, the underlying obligations of the contract. The court was unpersuaded by this argument, since arbitration was expressly limited to claims against the hiring dealership and the evidence suggested each dealership maintained its own separate grounds of employees. Though there was "some" relationship among the dealerships due to their common ownership, proof of a corporate relationship alone is insufficient to invoke the estoppel doctrine.

The appellate court concurrently determined that a trial court has broad discretion to deny a request to stay a PAGA claim pending the arbitration of any individual claims. Defendants argued that permitting the individual claims to proceed in arbitration while the PAGA claim proceeded in court could result in inconsistent rulings on overlapping issues. The court disagreed, emphasizing the fact that a PAGA claim is brought on behalf of the State, which was not a signatory to the arbitration agreement, and therefore the employer cannot dictate how and when the PAGA action should proceed.

Employers should be sure to verify that all arbitration clauses, including definitions therein, are consistent and extend to all intended signatories and non-signatories. Affiliates should alternatively be prepared to present evidence as to how their working relationship to their affiliates' employees is inextricably intertwined and amount to more than just having similar owners. Employers should also anticipate that even if a court finds an arbitration agreement enforceable, plaintiffs' attorneys will likely be more aggressive in opposing requests to stay PAGA claims pending arbitration. Companies therefore run a greater risk of having to simultaneously litigate individual claims and costly representative PAGA claims in different forums.

Hospital Successfully Demonstrates Its Break and Timekeeping Policies Satisfy California Law

In *David v. Queen of the Valley Medical Center*, a California Court of Appeal upheld an employer's compliant meal and rest break policies and facially neutral time rounding policy. Plaintiff Joana David ("Plaintiff") worked as a registered nurse for Defendant Queen of the Valley Medical Center ("QVMC"). QVMC employees recorded their hours worked on electronic timeclocks, which automatically rounded time to the nearest quarter hour. After her employment ended, Plaintiff sued QVMC alleging she was not provided compliant meal and rest breaks and that the employer's rounding policy resulted in underpayment of wages. The trial court granted summary judgment in favor of QVMC, and the Court of Appeal affirmed the ruling.

The appellate court determined that QVMC provided meal and rest breaks as required by law. As a preliminary matter, QVMC maintained compliant break policies, authorizing employees to take a first meal break for every five hours worked, a second meal break for shifts over ten hours, and a 15-minute rest break for every four hours of work. During her deposition, Plaintiff admitted she always waived her second meal break, was relieved by another nurse during her first meal

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

San Diego | Los Angeles | Phoenix | Tucson

www.pettitkohn.com

breaks, always received a break by the end of her shift, and did not recall missing any breaks or having her breaks interrupted by her supervisors. Though her coworkers occasionally asked her work-related questions during her breaks, as soon as she told them she was on break, they left her alone. Moreover, Plaintiff's supervisors never told her to end a break early or discouraged her from taking a break. Though her supervisors "looked at the clock" when Plaintiff told them she was on break, this was not sufficient to create a triable issue of fact as to whether she was "coerced" or "pressured" to end her breaks early, particularly in light of Plaintiff's testimony that her supervisors did not discourage her from taking breaks.

QVMC's recordkeeping practices also supported the conclusion that meal and rest breaks were provided in compliance with the law. Whenever Plaintiff reported a break violation on QVMC's "edit" or "correction" form, she received a meal or rest break premium. Further, she averred on her timesheets that she was provided the opportunity to take all breaks and had reported any issues with her breaks. In light of the foregoing evidence, the appellate court concluded that QVMC satisfied its obligation to provide Plaintiff with meal and rest breaks.

The court also determined that QVMC's rounding policy was lawful. A rounding policy is permitted under California law if it is fair and neutral on its face and is used in such a manner that it will not result, over a period of time, in failure to compensate employees properly for all time they have actually worked. Rounding policies that favor neither overpayment nor underpayment have been upheld by the courts, even if they ultimately result in some underpayment to the employee. Applying these principles to QVMC's rounding policy, the appellate court concluded that the policy was facially neutral, as time was rounded to the nearest quarter of an hour regardless of whether it benefitted the employee or the hospital. Moreover, rounding was neutral in practice, because sometimes Plaintiff gained extra time and compensation, and other times she lost time and compensation. According to QVMC's records, Plaintiff was paid for a total of 2,995.75 hours of work. Had QVMC calculated Plaintiff's hours worked based upon her actual time punches, she should have been paid for 3,003.5 hours of work—a difference of 0.26%. The court found the 0.26% rate of underpayment to be statistically insignificant, and therefore rejected Plaintiff's claim for unpaid wages.

The *David* opinion highlights the importance of maintaining compliant meal and rest break policies and practices. QVMC positioned itself for a successful result in this litigation because it not only "checked the box" of disseminating lawful written policies, but also put those policies into practice by requiring the reporting of violations, training supervisors to leave employees alone while on break, hiring staff specifically to provide break coverage, soliciting certifications from employees that breaks were provided and/or violations were reported, and paying premiums. Though QVMC prevailed in showing its rounding policy to be permissible, employers are discouraged from adopting or continuing such policies because the possibility that such policies are not facially neutral or neutral in practice simply invites costly litigation.

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 | Tucson

www.pettitkohn.com

Court Rejects Employer's Bid for Summary Judgment on Commute Time and Mileage Claims Where Service Technicians Were Required to Carry Tools and Parts in Personal Vehicles

In *Oliver v. Konica Minolta Business Solutions U.S.A., Inc.*, a class of service technicians sued their employer alleging they should have been paid for their commute time and reimbursed for mileage incurred during the commute. Although the trial court determined commute time was not compensable nor was commute mileage reimburseable, the appellate court disagreed, finding that triable issues of fact existed that precluded an award of summary judgment.

Konica's service technicians maintained and repaired copier machines and other devices at customers' worksites. Service technicians were required to drive their personal vehicles to these worksites and to carry tools and parts necessary for such repairs and maintenance in their vehicles. Though they were paid for all time spent traveling from one customer to another and were reimbursed for all mileage incurred for such trips, service technicians were not paid for time spent commuting to and from the first and last stops, nor were they provided mileage reimbursement for commuting.

As a general matter, an employee's time spent commuting is not compensable. However, compulsory travel time is compensable, and the level of employer control over the travel, whether part of a commute or otherwise, is determinative of whether such time is compensable. While commuting, employees must be able to use their time effectively for their own purposes; otherwise, the commute is compensable as hours worked. In reviewing the trial court's award of summary judgment, the Court of Appeal noted that, if carrying tools in the employee's vehicle is optional, then the employee is not subject to the employer's control and the commute is not compensable. Moreover, even if the employee is required to carry tools, if the employee can nonetheless use the commute time effectively for the employee's own purposes, then the commute remains non-compensable. Ultimately, the appellate court found that factual disputes existed as to whether the employees were required to carry tools in their personal vehicles and whether service technicians could effectively use their commute time for their own purposes.

Konica maintained a written policy requiring service technicians to store tools and parts in their vehicles; any exceptions required managerial approval. Service technicians were permitted to house tools in storage facilities, but not all service technicians had access to such facilities, and all were forbidden from storing company property at home. According to Konica's performance grading criteria, a service technician who completed his or her duties in a shorter amount of time and/or on the first visit to the customer's worksite would receive a more favorable performance rating. The court determined this gave rise to a reasonable inference that an employee would satisfy performance criteria more readily if the employee commuted with tools and parts in the car, rather than losing time during the workday retrieving tools and parts from a storage facility. Thus, a dispute existed as to whether carrying tools and parts in the car was optional and therefore whether sufficient employer control existed to convert the commute period into compensable time.

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Community Association Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

San Diego | Los Angeles | Phoenix | Tucson

www.pettitkohn.com

A dispute also existed as to whether service technicians could effectively use their commute time for their own purposes, due to the volume of tools and parts they carried in their vehicles. Several technicians testified that their vehicles were full of tools and parts, sometimes to the extent they could not see out the back window of the vehicle. Technicians also testified that, in order to engage in personal pursuits, such as carrying a passenger or stowing personal items in the vehicle, they had to first remove tools and parts. In light of the foregoing, a reasonable inference arose that some service technicians' personal pursuits during commute time were restricted by the volume of parts in their vehicles. Accordingly, the trial court should not have granted summary judgment in favor of Konica.

Konica conceded that, if commute time was compensable, then commute mileage must also be reimbursed. The appellate court therefore determined that summary judgment as to the mileage reimbursement claim was improper, as summary judgment could not be granted as to the underlying commute wage claim.

In light of the *Oliver* opinion, employers who require employees to travel in their personal vehicles are encouraged to revisit compensation and mileage reimbursement practices for such employees, to ensure that employees subject to employer control are paid for commute time and reimbursed for commute mileage, if necessary, and/or to eliminate or reduce measures of employer control over employees during such periods.

When Interviewing Potential Current Employees during Class Litigation, Employers Must Proceed with Caution

In *Barriga v. 99 Cents Only Stores LLC*, a Court of Appeal confirmed a trial court's duty to carefully scrutinize declarations of potential class members submitted in connection with a motion to certify a class action lawsuit. Plaintiff Sofia Barriga ("Barriga") filed a class action wage and hour lawsuit against her employer, 99 Cents Only Stores LLC ("99 Cents"). Eventually, Barriga moved the court to certify the class (a procedural hurdle a plaintiff must overcome in order to proceed on a class action basis). In opposition to the certification motion, 99 Cents submitted 174 declarations from current and former employees. All of the declarations included nearly identical language stating that the declarants knew their declarations could be used by 99 Cents to defend itself against a class action lawsuit about its wage policies and practices, and that the declarants had not been coerced into signing their declaration and understood what they were signing. Barriga deposed twelve of the employee declarants. While most of the deponents testified that they understood what they were signing and did so without coercion, some testified that they had no idea what the lawsuit was about or why they had been called upon to testify. Most of the deponents testified that they had been summoned during work hours to an office by a representative from human resources and presented with a declaration for their signature.

Barriga moved to strike all 174 declarations on the ground that the process in which they had been obtained was improper, and the declarations were substantively inconsistent with the deposition testimony of the twelve deponents. The trial court denied Barriga's motion to strike and declined to certify the class. Barriga appealed.

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 | Tucson

www.pettitkohn.com

The Court of Appeal explained that the trial court had a duty to carefully scrutinize the declarations submitted by 99 Cents for coercion or abuse. In the event the trial court found evidence of coercion or abuse, "it had broad discretion to either strike some or all of the declarations or to discount the evidentiary weight to be given the declarations when deciding the class certification motion." The court noted that declarations "between a class opponent and its current employees are fraught with potential abuse" and so "courts should be cognizant of the imbalance of power and interests when carefully reviewing employee statements." The appellate court instructed the trial court to reconsider Barriga's motion to strike in light of these principles.

Following *Barriga*, when obtaining declarations from current employees during class action litigation, employers should take steps to ensure that such statements are not procured by coercion or abuse. Employees should be adequately informed about: (1) the details underlying the lawsuit; (2) the nature and purpose of the communications; and (3) the fact that any defense attorneys conducting the communications represent the *employer* and not the *employee*. Moreover, employees should have the option of declining to participate in any interview regarding the litigation or to provide any written statement. Further, employers should avoid having supervisors or human resources representatives conduct interviews of potential class members, and instead consider retaining outside counsel to perform any interviews. In sum, transparency of information with employees and a neutral, noncoercive setting are the keys for employers to ensure the declarations they obtain from current employees will not be stricken by the trial court.

This is Pettit Kohn Ingrassia Lutz & Dolin PC's employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Jennifer Suberlak, Blake Woodhall, Carol Shieh, Shelby Harris, Brittney Slack, or Rio Schwarting at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Jennifer Weidinger, Rachel Albert, Mihret Getabicha, or Sevada Hakopian at (310) 649-5772.