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LEGISLATIVE

Federal

Department of Labor Issues Revised Regulations Interpreting the Families First Coronavirus Response Act

In response to a federal court's invalidation of certain provisions of the regulations interpreting the Families First Coronavirus Response Act ("FFCRA"), the U.S. Department of Labor ("DOL") has issued new guidance for employers and workers. The revised regulations became effective September 16, 2020. The clarifications and revisions to prior regulations are identified below:

The Work-Availability Requirement

The initial regulations stated that an employee was entitled to take FFCRA leave only if the qualifying reason for the leave was the but-for cause of the employee's inability to work. That is, an employee could not take FFCRA leave if the employer had no work available for the employee (for instance, if the employee was furloughed). The federal court challenged this regulation on the grounds that the statutory basis for such an interpretation was ambiguous and the DOL failed to sufficiently explain its reasoning for such a rule. The new regulations flesh out the DOL's rationale for the work-availability requirement, and reaffirm that an employee may take emergency paid sick leave or expanded family and medical leave only to the extent that any qualifying reason is a but-for cause of the employee's inability to work.

Employer Approval of Intermittent Leave

The federal court also challenged the initial regulations' proviso that intermittent FFCRA leave is permissible only if the employer and employee agree to such an arrangement. The court again determined that the DOL failed to articulate its reasoning for requiring employer approval. After more thoroughly identifying the rationale for such a requirement, the revised regulations confirm that intermittent leave is available under the FFCRA, so long as the employer consents.

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Definition of "Health Care Provider"

The FFCRA permits employers to exclude employees who are "health care providers" or "emergency responders" from eligibility for expanded family and medical leave and emergency paid sick leave. The initial regulations defined these categories of employees very broadly as almost any worker in the healthcare (or adjacent) field. The court found this definition to stray too far from the text of the FFCRA, which largely adopts the definition of "health care provider" applicable to the Family and Medical Leave Act ("FMLA"). Accordingly, the new regulations define "health care provider" as follows:

A. Any employee who is a health care provider as defined in the FMLA regulations (e.g., a doctor of medicine or osteopathy, podiatrists, dentists, clinical psychologists, nurse practitioners, etc.); or

B. Any other employee who is capable of providing health care services, meaning he or she is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.

The types of employees who fall within foregoing definition include: nurses, nurse assistants, medical technicians, and any other persons who directly provide the services described in paragraph (B) above; any employees providing the foregoing services under the supervision, order, or direction of, or providing direct assistance to, a person described in paragraphs (A) or (B) above; or employees who are otherwise integrated into and necessary to the provision of health care services, such as laboratory technicians who process test results necessary to diagnoses and treatment. Notably, the revised regulations clarify that employees who do not provide health care services as described above are not health care providers even if their services could affect the provision of health care services, such as IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers.

The new regulations further specify that employees who may fall within the revised definition of "health care provider" often work at such locations as: a doctor's office, hospital, health care center, clinic, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar permanent or temporary institution, facility, location, or site where medical services are provided. However, an employee does not need to work at one of these facilities to be a health care provider and working at one of these facilities does not necessarily mean an employee is a health care provider.

Notice and Documentation Requirements

Finally, the revised regulations address the court's concern about requiring documentation of the need for FFCRA "prior to" taking such leave. According to the revised regulations, documentation must be provided "as soon as practicable."

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California

AB 1867 (Committee on Budget)

This bill creates Labor Code sections 248 and 248.1, which authorize supplemental paid sick leave for employees of large employers and other groups of employees ineligible for emergency paid sick leave under the Families First Coronavirus Response Act ("FFCRA"). This bill goes into effect on September 19, 2020 and will remain in effect until December 31, 2020 or upon the expiration of the FFCRA, whichever is later. Covered employees may immediately request and use supplemental paid sick leave, beginning on September 19.

Under AB 1867, employees of health care providers, emergency responders, and businesses with 500 or more workers are entitled to supplemental paid sick leave if they are unable to work because: (1) the worker is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) the worker is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or (3) the worker is prohibited from working by the worker's hiring entity due to health concerns related to the potential transmission of COVID-19. Other workers eligible for supplemental paid sick leave include those ineligible for California paid sick leave as identified in Labor Code section 245.5, including: employees covered by collective bargaining agreements; flight and cabin crews; and employees of the state or local public entities.

Like emergency paid sick leave under the FFCRA, supplemental paid sick leave is capped at $511 per day and $5,110 in the aggregate for each covered worker, and must be paid at a rate *equal or greater to* the worker's regular rate for the last pay period, the state minimum wage, or the local minimum wage. Notably, this supplemental paid sick leave is *in addition to* any paid sick leave the worker is already entitled to under California law (the Healthy Workplace Healthy Family Act, as codified in Labor Code section 245 et seq.). However, if the hiring entity already provides a similar benefit (such as other supplemental paid leave) that would permit a worker paid time off for reasons (1), (2), and (3) above, and such benefit is equal to or greater than the supplemental paid sick leave required by AB 1867, then the hiring party need not provide supplemental paid sick leave under AB 1867. As under the FFCRA, employers may not require covered workers to use any form of paid leave prior to using supplemental paid sick leave.

A covered worker is entitled to 80 hours of supplemental paid sick leave if the hiring entity considers the worker to work "full time" or if the worker worked or was scheduled to work, on average, at least 40 hours per week for the hiring entity in the two weeks preceding the date of leave. If a worker does not satisfy the foregoing criteria, then the worker is entitled to supplemental paid sick leave as follows: (a) if the worker has a normal weekly schedule, the total number of hours the food sector worker is normally scheduled to work for or through a hiring entity over two weeks; or (b) if the worker works a variable number of hours, 14 times the average number of hours the worker worked each day for or through the hiring entity in the six months preceding the date the worker took supplemental paid sick leave.

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Employers must also identify the amount of supplemental paid sick leave available for use either on employees' paystubs or on a separate writing provided on the designated pay date, as is the case for California paid sick leave.

AB 1867 also codifies the supplemental paid sick leave authorized for food sector workers under Executive Order N-51-20.

JUDICIAL

California

Arbitration Agreements Forbidding Negotiation and Eliminating Discovery Are Unlikely to Be Enforced

In *Davis v. Red Bull North America, Inc.*, a California Court of Appeal affirmed a trial court's refusal to enforce the entirety of an arbitration agreement because it was unconscionable. Plaintiff Scott Davis ("Davis") was employed by Red Bull North America, Inc. ("Red Bull") for 15 years. Davis signed an arbitration agreement at the start of his employment, specifying that any claims which involved his employment (or termination of employment) "shall be submitted to and resolved by final and binding arbitration." However, the agreement contained one notable exception—any disputes relating to Davis' Employee Confidentiality Agreement could be litigated in court. Shortly after his employment ended, Davis sued Red Bull alleging, among other things, discrimination, harassment, and wrongful termination. Red Bull filed a motion to compel arbitration. Davis argued that the arbitration agreement was unenforceable under principles of unconscionability.

Unconscionability is a defense to the enforcement of a contract. In adjudicating the merits of an unconscionability defense, the court analyzes whether the terms and circumstances surrounding the formation of a contract were procedurally and substantively unfair such that enforcement of the contract would be inappropriate. Both procedural and substantive unconscionability must be proven to avoid enforcement.

Procedural unconscionability often arises where the parties possess unequal bargaining power or the process results in unfair surprise to the less sophisticated party. Here, the court found the arbitration agreement to be procedurally unconscionable because it failed to identify which rules would apply in arbitration and Davis was required to "take it or leave it."

Substantive unconscionability, on the other hand, often turns on whether the terms of the contract are overly one-sided. The court found Red Bull's arbitration agreement to be substantively unconscionable because it limited the parties' ability to engage in discovery—specifically, the parties could each take a maximum of two depositions and there was no mechanism by which the parties could exchange written interrogatories or requests for the production of documents. The court determined this limitation restricted Davis' ability to vindicate his rights in arbitration and was therefore unfair. Moreover, the agreement exempted from arbitration the types of claims Red Bull was likely to pursue against Davis, in that claims relating to breach of an employee

confidentiality agreement were permitted to proceed in court. Thus, the court declined to enforce Davis' arbitration agreement.

The ruling in *Davis* reinforces the fact that arbitration agreements should be carefully drafted and presented to employees in a fair manner.

Arbitration Agreements Permitting Negotiation and Reasonable Discovery Are Likely to Be Enforced

In *Torrecillas v. Fitness International,* a California Court of Appeal overturned a trial court's decision to deny an employers' motion to compel an employment dispute to arbitration. Jose Torrecillas ("Torrecillas") had a lengthy and successful career at Fitness International ("Fitness") from 1998 to 2018. During his employment, there were two arbitration agreements between Torrecillas and Fitness; one in 2008, and another in 2013. The 2013 agreement superseded earlier agreements, yet partially incorporated the 2008 arbitration agreement. The trial court denied Fitness's motion to compel arbitration finding the agreement to arbitrate was unconscionable. The trial court reasoned that the controlling 2013 arbitration agreement was a non-negotiable contract of adhesion that was procedurally unconscionable. The trial court further deemed that the arbitration agreement's limits on discovery were also substantively unconscionable. The Court of Appeal reversed because there was little or none of either element of unconscionability.

The Court of Appeal found that there was little procedural unconscionability when analyzing the arbitration agreement. Torrecillas argued that his 2013 agreement was a contract of adhesion. The Court of Appeal found that this was not accurate because (1) the parties customized this agreement specifically to Torrecillas; and (2) Torrecillas had an opportunity to negotiate. Fitness encouraged Torrecillas to consult a lawyer and their agreement included a term allowing amendments if both parties agreed. Torrecillas had the opportunity to bargain and had meaningful bargaining power. Most importantly, the arbitration agreement had no elements of surprise or oppression; it was in conventional font, with clear and direct language, and there was no absence of negotiation or meaningful choice.

The Court of Appeal also found there was little or no substantive unconscionability when analyzing the arbitration agreement. Though the agreement limited the parties to five depositions and 30 interrogatories each, this limitation was not unreasonable, particularly where either side could petition the arbitrator to permit additional discovery. Moreover, the agreement was mutual, in that it required both parties to arbitrate all claims against the other. Finally, the agreement did not limit the remedies Torrecillas could recover. Thus, substantive unconscionability was minimal.

Torrecillas highlights the needs for employers to carefully review and understand their arbitration agreements. Due to the ongoing volatile nature of the arbitration landscape in California, employers should consider having their arbitration agreements reviewed by counsel to ensure they are compliant with the most recent legal precedent in the area.

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An Employer Has No Duty to Point Out an Arbitration Clause in an Employee Handbook

In the recent decision of *Conyer v. Hula Media Services, LLC*, the California Court of Appeal held that Plaintiff Michael Conyer ("Conyer") demonstrated assent to Defendant Hula Media Services, LLC's ("Hula") arbitration clause by signing the "receipt and acknowledgement" form of the employee handbook, and Hula had no duty to call the arbitration clause to the Conyer's attention. The court further held that provisions in Hula's arbitration clause concerning arbitrator's fees and costs and attorney fees were unenforceable, but may be severed without affecting the enforceability of the agreement.

When Conyer was hired, he received a copy of Hula's employee handbook, which at that time did not contain an arbitration clause. Conyer signed a receipt and acknowledgement of the handbook stating that he understood and agreed that it was his responsibility to read the handbook and that he was bound by its provisions. In August and October 2017, Conyer submitted written complaints to Hula's then-president alleging sexual harassment and retaliation by Hula's Chief Executive Officer ("CEO"). In November 2017, Hula distributed a revised employee handbook, which included an arbitration clause, and instructed all employees to review the handbook. On November 7, 2017, Conyer signed and returned the receipt and acknowledgement form of the employee handbook.

Conyer later sued Hula and its CEO alleging sexual harassment and six other causes of action under the Fair Employment and Housing Act ("FEHA"). Hula filed a motion to compel arbitration. Conyer challenged the enforceability of the arbitration agreement, arguing that he had never received a copy of the revised employee handbook, and that even if he had been given a copy, he would never have known that Hula added an arbitration clause unless Hula had specifically pointed out the addition of such a clause. The trial court denied Hula's motion to compel arbitration, holding it was reasonable for Conyer to assume the distribution of the handbook was routine, with no particular reason for Conyer to read it again. Hula appealed the trial court's decision.

The Court of Appeal rejected Conyer's argument that Hula had to specifically notify him about the inclusion of the arbitration provision in the November 2017 handbook, noting that any state law requiring an employer to call attention to an arbitration clause would be preempted by the Federal Arbitration Act, which compels courts to enforce arbitration agreements according to their terms. Moreover, under California law, a party is bound by a contract even if he or she did not read the contract before signing it.

However, Hula's arbitration clause required each party to pay a pro-rata share of the arbitrator's fees and costs and permitted the arbitrator to award attorneys' fees to the prevailing party. The court found these provisions to run afoul of settled law forbidding employment arbitration agreements from requiring employees to bear any costs unique to the arbitral forum and prohibiting employers from recovering attorneys' fees unless the action was frivolous, unreasonable, or groundless. The court struck the attorneys' fees provisions but ordered the remainder of the arbitration agreement to be enforced.

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This decision highlights the following lessons for employers: First, an employer has no duty to specifically highlight that an arbitration provision has been added to an employee handbook (though the provision should still be noted in the table of contents and set off from other handbook policies), particularly where employees have been instructed to review the handbook, are given an opportunity to read and review the handbook, and sign an acknowledgement of such review. Second, even where an arbitration agreement contains some problematic fee terms, such terms likely can be severed without affecting the enforceability of the entire arbitration agreement.

Court Denies Employee's Untimely Attempt to Intervene in a Settled PAGA Lawsuit

In *Starks v. Vortex Industries, Inc.*, the Court of Appeal made clear that once the Labor and Workforce Development Agency ("LDWA") accepts settlement for claims under the Private Attorneys General Act of 2004 ("PAGA"), the case covered by the settlement is concluded.

Under PAGA, an employee aggrieved by his or her employer's Labor Code violations may be authorized to act as an agent of the LWDA to recover civil penalties. To become an agent of the LWDA for purposes of PAGA, an aggrieved employee must first notify the employer and the LWDA of the specific violations alleged, along with the facts and theories supporting the claim. If the LWDA does not take timely action, the employee is empowered to file a lawsuit seeking penalties. Seventy-five percent of civil penalties recovered in a PAGA action are paid to the LWDA; the remaining 25 percent are paid to the aggrieved employees. If the parties in a PAGA lawsuit agree to settle, the proposed settlement is submitted to the LWDA and the presiding court for approval. However, the standard to be applied by courts reviewing PAGA settlements remains somewhat unresolved.

On June 30, 2015, former employee Chad Starks ("Starks") gave notice to the LWDA that Vortex violated certain Labor Code requirements. On August 10, 2015, Starks filed a complaint against Vortex in the Superior Court ("Starks Action"), which included a single cause of action seeking PAGA penalties based on Labor Code violations. On October 11, 2016, another former employee, Adolfo Herrera ("Herrera"), gave notice to the LWDA and Vortex of his intention to sue Vortex based upon allegations of Labor Code violations similar to those Starks had previously alleged. On December 16, 2016, Herrera filed his own complaint against Vortex ("the Herrera Action") alleging a single cause of action under PAGA, nearly identical in substance to the Starks Action.

In early 2017, the court declared the two cases related, and indicated it would consider a motion to consolidate them. However, Herrera did not file a motion to consolidate. By early October 2017, Starks and Vortex reached a settlement to resolve the Starks Action. On October 24, 2017, the trial court in the Starks Action issued an order and judgment approving the settlement agreement, thereby terminating the case. The order stated that the settlement agreement "shall be binding on all [a]ggrieved [e]mployees and the State of California, who are hereby barred from re-litigating" the claims released in the settlement agreement. Vortex gave the LWDA its legally mandated portion due under the judgment by

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check dated November 7, 2017; the LWDA deposited the check sometime prior to December 13, 2017.

Three weeks after the court approved the settlement in the Starks Action and entered judgment thereon, Herrera field a motion to intervene in that case. The trial court denied Herrera's motion. Vortex then moved for summary judgment on the Herrera Action on the basis that it was barred by the Starks Action settlement. On July 13, 2018, the trial court granted Vortex's motion in the Herrera Action, noting that Herrera (whose wife cashed the check) and LWDA had both accepted benefits of the settlement by cashing their checks. Herrera timely appealed both rulings on the grounds that the Stark judgment was not a final ruling and should not bar his intervention motion.

In his appeal, Herrara argued that the Stark judgment impeded his ability to protect his interest, and that he had not been adequately represented based on the settlement agreement's "disproportionate allocations" of funds to Starks and his counsel. Further, he claimed that his motion to intervene was timely because Starks' alleged inadequate representation did not become apparent until the terms of the settlement were disclosed.

Courts evaluate the timeliness of a motion to intervene based on the totality of the circumstances. (*NAACP v. New York* (1973) 413 U.S. 345, 366.) Courts consider three factors: (1) the stage of the proceeding when the prospective intervenor moved to intervene; (2) the reason for and length of the delay; and (3) the prejudice to parties to the existing action if intervention is allowed.

The Court of Appeal ruled that the first factor—the stage of the proceedings (here, post-judgment) supported denial of the motion. The court noted that once settlement efforts are completed via final judgment, the parties expect to be able to tailor their future actions and decisions in reliance on that judgment. The second factor—the reason for and length of the delay—also supported the court's exercise of discretion, as Herrera's motion was filed more than two years after the Starks Action began, more than eight months after Herrera learned of Stark's lawsuit, and seven months after he could have moved to consolidate the two actions. Had he consolidated the cases, he would have received notice of the proceedings between Starks and Vortex and had a voice in settlement discussions. Although Herrera claimed that he did not learn of Stark's "inadequate representation" until the terms of the settlement were disclosed in October 2017, the court rejected his argument. While the court was somewhat receptive to the notion that there were aspects of the Stark Action that would be unknown to Herrera, he was culpable for his delayed action in light of the circumstances known to him. Third, Herrera's late intervention was prejudicial because it would increase the expense and burden on the parties in the Starks Action without assurance that the LWDA would obtain a better result from reopening the case. Therefore, the court held that the lower court did not abuse its discretion in finding that Herrera's motion to intervene was untimely.

Multiple takeaways arise from this decision. First, where multiple concurrent actions are ongoing with similar circumstances, litigants must remain diligent in monitoring and intervening as necessary in the other cases, as a failure to do so can lead to rights or interests being subsumed by another party's

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settlement. Second, for defendants, focusing settlement efforts on one plaintiff may be a worthwhile strategy, and the negotiating leverage created by multiple plaintiffs could be beneficial. Finally, for all parties, the need to ensure settlement agreements are carefully planned and timely effected is essential.

Court of Appeal Rejects PAGA and Class Action by Plaintiff Who Opted Out of Prior Class Settlement

In the recent decision of *Robinson v. Southern Counties Oil Company*, the First Appellate District rejected a truck driver's attempt to assert a representative action under the Private Attorneys General Act ("PAGA") and other class claims based on claim preclusion and a lack of standing. The case clarifies the effect of prior class and PAGA settlements on subsequent actions asserting the same settled claims.

Plaintiff Richard Robinson ("Robinson") worked for Defendant Southern Counties Oil Company ("Southern Counties") as a truck driver from February 4, 2016 through June 14, 2017. His complaint alleged claims for meal and rest break violations which resulted in failure to timely pay wages, failure to furnish complete and accurate wage statements, and failure to pay timely wages upon termination. Another employee brought a class action for individual damages and a PAGA action for civil penalties for certain Labor Code violations ("the *Gutierrez* Action"). The *Gutierrez* Action settled claims brought on behalf of employees who worked for Southern Counties between March 17, 2013 through January 26, 2018. Four employees, including Robinson, opted out of the settlement in the *Gutierrez* Action.

After the approval of the *Gutierrez* settlement by the Superior Court, Robinson amended his complaint to represent only the employees who opted out and were employed by Southern Counties from January 27, 2018, to the present. However, Robinson continued to allege the same kinds of claims settled in the *Gutierrez* Action. The trial court sustained a demurrer in favor of Southern Counties for two reasons. First, Robinson's claims were previously settled in the *Gutierrez* Action and, therefore, the doctrine of claim preclusion barred his claims. Second, Robinson lacked standing to bring a representative action where he was not employed during the time period for which he sought relief. Robinson appealed.

The Court of Appeal first analyzed the representative nature of PAGA claims in determining the effect of the *Gutierrez* settlement. According to the recent decision in *Kim v. Reins International, Inc.* (2020) 9 Cal.5th 73, PAGA actions are essentially enforcement actions between the Labor and Workforce Development Agency ("LWDA") and an employer. Class actions, on the other hand, aggregate individual employees' claims against an employer. The Court of Appeal explained that a critical difference between these two procedural devices is that a judgment in an enforcement action for civil penalties (e.g., PAGA actions) binds both the government and nonparty employees. Thus, although Robinson opted out of the class claims for individual damages, the Court of Appeal determined that no mechanisms existed for opting out of a PAGA judgment. This outcome is based on the doctrine of claim preclusion which, in simple terms, prohibits relitigating the same claims by parties to a prior action. Essentially,

Robinson could not opt out of a settlement and later assert the same claims as the prior action—he was bound by the prior PAGA judgment.

Further, Robinson could not prove that he had standing to bring claims based on violations occurring after his termination. *Kim* notably held that a plaintiff may remain "aggrieved" for the purposes of bringing a PAGA claim despite the settlement of that plaintiff's individual claims. The Court of Appeal noted that the reasoning from *Kim* did not apply to Robinson, especially where the doctrine of claim preclusion barred Robinson's claims from the period of time when he was employed. Thus, an individual may only maintain standing to bring a PAGA action for claims arising during the period of time in which the individual was actually employed.

This decision is notable in the increasingly complex field of representative wage and hour litigation. As the number of PAGA cases filed against employers increases, *Robinson* demonstrates the importance of understanding the effect of every class and PAGA settlement on subsequent cases. Employers should take note of the claim preclusive effects of a PAGA settlement when dealing with later litigation—especially when the subsequent claims are by employees who worked during the same PAGA period as a prior settlement.

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