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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *November 2020*

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LEGISLATIVE

California

App-Based Drivers May Remain Independent Contractors

Earlier this month, Californians voted to pass Proposition 22 ("Prop 22"), the App-Based Drivers as Contractors and Labor Policies Initiative. Pursuant to Prop 22, app-based drivers may be lawfully classified as independent contractors as opposed to employees and are expressly exempt from AB 5's ABC Test. The new law covers those workers who (a) provide delivery services on an on-demand basis through a business's online-enabled application or platform or (b) use a personal vehicle to provide prearranged transportation services for compensation via a business's online-enabled application or platform, such as Uber, Lyft, and DoorDash. App-based drivers are now entitled to a net earnings floor based upon minimum wage, limited from working more than 12 hours in a 24-hour period, and eligible for healthcare subsidies and accident insurance. Prop 22's passage does not affect the application of the ABC Test to any other category of workers.

JUDICIAL

California

California Courts to Employers: Stop Trying to Split a PAGA Claim into "Individual" and "Representative" Components

In *Provost v. YourMechanic, Inc.*, Plaintiff Jonathan Provost ("Provost") filed a lawsuit against his former employer, asserting a single cause of action to recover civil penalties under the Private Attorneys General Act of 2004 ("PAGA") on behalf of all "aggrieved employees." Because Provost had signed a binding arbitration agreement at the start of his employment, YourMechanic moved to compel arbitration, contending Provost was first required to establish in arbitration that he was an "aggrieved employee" with standing to sue for the violations alleged. The trial court disagreed and denied the motion. YourMechanic appealed.

The appellate court found that the arbitration motion was properly denied. An expanding line of California Supreme Court and Court of Appeal cases hold that an employer may not attempt to split a single cause of action under PAGA into an arbitrable "individual claim" and a non-arbitrable "representative claim." That is, an employer cannot require an employee to first demonstrate that the employee

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personally suffered the violations asserted (i.e., was an "aggrieved employee") before litigating the representative aspects of the PAGA claim (i.e., whether other employees suffered the same or other violations). The law is clear—a PAGA claim is a single cohesive claim, the entirety of which must be resolved in the same forum. The law is also clear that a PAGA claim may not be resolved in the arbitral forum, but rather in court. Based upon these established principles, the refusal to compel Provost's so-called "individual PAGA claim" to arbitration was affirmed.

The *Provost* opinion confirms that appellate courts will not countenance the argument that some aspects of a PAGA claim should be arbitrated while others may proceed in court. Employers can expect to see an increase in lawsuits asserting a single claim under PAGA, as such litigation can permissibly remain outside the scope of arbitration.

Conflicting Background Checks Put Employer on Notice of Judicially Dismissed Conviction

In *Garcia-Brower v. Premier Automotive Imports of CA, LLC*, the Labor Commissioner successfully argued that an employer's failure to investigate conflicting information from two background checks supported a finding that an employee was fired for failing to disclose a dismissed conviction. Years before she was hired by Defendant Premier Automotive Imports of CA, LLC ("Premier"), Plaintiff Tracey Molina ("Molina") pled no contest to misdemeanor grand theft. After paying restitution, completing community service, and serving probation, Molina successfully obtained a judicial dismissal of her conviction in November 2013. In January 2014, Molina applied for an open position with Premier. Her job application asked if she had ever pleaded guilty or no contest to, or been convicted of, a crime. The application further instructed that the question should be answered in the negative as to any conviction for which probation had been completed and the case dismissed. Molina truthfully answered "no" to this question. The company's background check did not disclose her prior conviction, and Molina was hired.

However, Molina's position required that she pass another background check conducted by the Department of Motor Vehicles ("DMV"). The DMV's background check was run through the California Department of Justice database, which is not necessarily updated regularly. Though Molina's conviction was set aside in November 2013, the Department of Justice did not enter the dismissal into its database until March 25, 2014—after the DMV ran its background check. On Friday, March 7, the DMV notified Premier of Molina's conviction. By the following Monday morning, Premier decided to terminate Molina's employment for "falsification of job application." No investigation was conducted into the conflict between the initial background check and the DMV background check. When Molina was notified of her discharge on Monday, she explained that her conviction had been dismissed. Nevertheless, Premier proceeded with Molina's discharge for falsifying her job application.

Molina filed a retaliation complaint with the Labor Commissioner, contending that Premier violated Labor Code section 432.7, which prohibits employers from asking applicants to disclose convictions that have been judicially dismissed and from using any record of a dismissed conviction as a factor in the

termination of employment. The Labor Commissioner found in Molina's favor and ordered her to be reinstated. Premier appealed the ruling to the Superior Court and the case went to trial. Premier argued that the Labor Commissioner's evidence was insufficient to support a claim of retaliation because Premier did not know, at the time of the termination decision, that the conviction had been dismissed. The trial court agreed, but the Court of Appeal reversed the judgment.

According to the appellate court, there was sufficient evidence to establish that Premier's employment decision was substantially motivated by Molina's failure to disclose her dismissed conviction on her job application—in other words, that Premier violated Labor Code section 432.7. The conflicting background checks and Molina's disclosure in the termination meeting put the company on notice that her conviction had been dismissed. Premier's failure to investigate these circumstances before firing Molina supported the inference that Premier knew she could have been telling the truth and that the company's basis for firing her (a "falsified" job application) was pretextual. Thus, the trial court should have submitted the case to the jury.

Following *Garcia-Brower*, employers should carefully assess employment decisions made on the basis of a criminal conviction and can likely expect increased enforcement of "ban-the-box" statutes by government agencies. *Garcia-Brower* also underscores the importance of thoroughly vetting any termination decision that could give rise to a retaliation claim; understanding what the employer knew and when may be crucial to defending that decision in litigation.

An Overly Broad Confidentiality Agreement Operated as an Unlawful Noncompetition Covenant

In *Brown v. TGS Management Company, LLC*, Plaintiff Richard Brown ("Brown") appealed a Superior Court order confirming an arbitration award in favor of his former employer, TGS Management Company, LLC ("TGS"). During his employment, Brown signed several employment agreements forbidding the use or disclosure of confidential company information for two years after his employment ended. Per the agreements, if Brown violated the confidentiality provisions, he forfeited his right to bonuses. The pertinent agreements defined TGS' "confidential information" very broadly, as any "information, in whatever form, used or usable in, or originated, developed or acquired for use in, or about or relating to, the Business." In essence, the definition of "confidential information" included all information relating to the securities industry in which TGS operated and thereby foreclosed Brown from working in the industry for two years after separation.

After Brown published confidential information about TGS' bonus calculation practices (a clear violation of the confidentiality agreement), TGS declined to pay him several bonuses. The parties commenced arbitration proceedings. Though TGS only sought to enforce the forfeiture provision of the contracts, Brown alleged the contracts constituted unlawful noncompete agreements and sought a formal declaration that the contracts were unenforceable. The arbitrator rejected Brown's noncompete argument, asserting that Brown's claim was not "ripe" for review because he had not yet engaged in any potentially competitive conduct and therefore there was no need to determine whether the

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contracts were unlawful as applied to Brown's circumstances. The arbitrator found in favor of TGS and the award was confirmed by the trial court.

On appeal, Brown argued that the arbitrator had exceeded his powers by ruling in a manner inconsistent with his statutory rights. Brown argued that the arbitrator's refusal to find the confidentiality agreement invalid ran afoul of Business and Professions Code section 16600, which voids contractual agreements restraining a person from engaging in a lawful profession, trade, or business. The Court of Appeal agreed, noting that any such agreement is void from the outset and unenforceable, and, under established case law, there is no need to conduct further examination into whether a claim under such agreement is ripe. According to the court, so firmly entrenched in California public policy are the notions of employee mobility and open competition that any contracts impinging on these freedoms are invalid on their face. The court therefore determined that, by failing to find the confidentiality agreement unenforceable, the arbitrator ruled in a manner inconsistent with Brown's rights under section 16600.

Brown presents the rare occasion on which review of an arbitrator's ruling is appropriate. Typically, arbitration awards are beyond the scope of judicial review, unless the decision is blatantly unfounded or, as here, inconsistent with a party's statutory rights. In addition to the opinion's unusual procedural posture, *Brown* also exemplifies California courts' commitment to promoting employee mobility to the fullest extent. Employers should routinely review employment and confidentiality agreements to ensure their terms do not constitute unlawful restrictions on an employee's ability to compete.

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, Brittney Slack, Rio Schwarting, Christopher Reilly, or Tina Robinson at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Jennifer Weidinger, Rachel Albert, Mihret Getabicha, or Sevada Hakopian at (310) 649-5772.