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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *December 2020*

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JUDICIAL

Federal

United States Court of Appeals for the Ninth Circuit Denies Plaintiff's Motion to Certify a Class Regarding Her Overtime Wage Claim Under California Law

In *Cindy R. Castillo v. Bank of America,* a Ninth Circuit panel affirmed a trial court's order denying a plaintiff's motion to certify a class regarding her overtime wage claim under California law. This case arises from a dispute regarding the proper method of calculating overtime wages. Under California law, employers must pay non-exempt employees an overtime premium calculated based on a given employee's regular rate of pay.

Cindy Castillo ("Castillo") worked as an hourly employee at a Bank of America ("BOA") call center until September 2016. BOA operates thirteen call centers in California where, from March 2013 through September 2018, BOA employed 5,031 employees to handle calls regarding banking and investment services. During that period, employees were eligible to receive flat-sum, nondiscretionary incentive bonuses ranging from $350 to $2,100 per month. When employees worked overtime and received a bonus during the same period, BOA applied the bonus to the employee's straight pay prior to calculating overtime premiums.

In March 2017, Castillo filed a class action complaint against BOA. She filed for class certification in May 2019, and her request was denied by the trial court. At issue on appeal were a number of issues, most notably including: 1) whether the class action affected a sufficiently numerous group of employees (numerosity); 2) whether common questions of law or fact predominated over individualized inquiries (predominance); and 3) whether Castillo's individual claims were typical of those of other employees (typicality).

The trial court held that Castillo established commonality and typicality, but not predominance. The general rule is that "if the plaintiffs cannot prove that damages resulted from the defendant's conduct, then the plaintiffs cannot establish predominance." To ensure that common questions predominate over individual ones, the court must ensure that the class is not defined "so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct." The panel stated that those employees

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who did not work overtime or did not earn a bonus during the same period in 2016 or 2017 would have no claim for compensation based on an apparently improper method of overtime rate calculation.

While ostensibly a victory for employers, this ruling should serve as a reminder that class litigation against employers for alleged improper calculation of overtime is becoming increasingly commonplace. Wise employers ensure that policies are appropriately structured and tailored to help avoid litigation before it commences.

California

Reliance on United States Supreme Court Cases Does Not Compel Claims Under the PAGA to Arbitration

In recent years, California courts have regularly and consistently declined to enforce arbitration agreements' waiver of representative claims brought under the Private Attorneys General Act of 2004 ("PAGA"). *Olson v. Lyft, Inc.* marks yet another affirmation of that refusal. Brandon Olson ("Olson") was a driver for Lyft, Inc. ("Lyft"), and signed Lyft's Terms of Service, which included, in most pertinent part, concessions that Olson would not assert a PAGA claim and that, instead, disputes with Lyft would be resolved via individual arbitration.

After his employment ended, Olson filed a class action lawsuit which was amended to add, among other inclusions, a series of claims seeking recovery under PAGA on behalf of Olson and other allegedly similarly aggrieved employees. Lyft petitioned to compel arbitration of Olson's PAGA claims, arguing that the applicable arbitration provision contained a PAGA representative-action waiver, and was thus governed by the Federal Arbitration Act (FAA). Lyft therefore argued that federal law required Olson to arbitrate on an individual basis. The Court of Appeal rejected Lyft's argument.

The court explained that a PAGA claim is inherently based on state law and state statutory interpretation – both of which are subject to review and decision by state court. On this issue, California Supreme Court cases have been clear – employers cannot compel causes of action under PAGA to arbitration based on an arbitration agreement entered into by an employee. Moreover, because the United States Supreme Court cases relied upon by Lyft do not address that exact issue, the Court of Appeal's ruling did not run afoul of controlling precedent.

Olson further cements the position of California courts that PAGA claims cannot be compelled to arbitration. Despite this, while arbitration agreements may not ensure that *all* of a plaintiff's claims reach arbitration, they can still certainly play a valuable role in the prevention of class action claims.

California Appellate Court Rules That Commissions-Only Compensation Plan Fails Salary Basis

Under California law, employees are entitled to overtime compensation unless an exemption applies. As a primary example, an individual employed in an administrative capacity is exempt from overtime if he/she performs certain duties

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and is paid a monthly salary equivalent to at least twice the state minimum wage for full-time employment. The recent decision in *Semprini v. Wedbush Securities Inc*. by the California Court of Appeal, Fourth Appellate District, however, held that employees paid on a compensation plan based solely on commissions, with recoverable advances on future commissions, do not satisfy the applicable salary requirement for purposes of exemption.

Wedbush Securities, Inc. ("Wedbush") provides financial planning and investment products through a team of financial advisors. Wedbush's financial advisors are paid on a commissions-only basis, as calculated by a computer-program that tracks trades in a given month and calculates compensation owed based on certain pre-determined commission tiers. If the amount of commissions a financial advisor earns in a month is not at least double the California minimum wage, Wedbush pays the advisor commission due plus a "draw" which is an advance on future commissions in an amount equal to the difference between the commission and double the minimum wage. Draws are repaid in subsequent paychecks as additional commissions are earned.

Current and former financial advisors of Wedbush (collectively, "Plaintiffs") filed a putative class action on behalf of all similarly situated employees in California, alleging various wage and hour claims based on their alleged misclassification. The trial court initially ruled in favor of Wedbush on the issue of whether the compensation plan satisfied the administrative exemption's salary basis test. Plaintiffs appealed, and the Court of Appeal reversed.

In its decision, the court noted that California courts follow the federal salary basis test to a substantial degree and look to the federal regulations implementing the Fair Labor Standards Act for guidance in interpreting the salary basis test. (*Kettenring v. Los Angeles Unified School Dist.* (2008) 167 Cal.App.4th 507, 513.) The federal regulations state an employee is paid on a salary basis if the employee "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." (29 CFR § 541.602(a) (2019).) Effective January 1, 2020, this regulation was amended to add that "[u]p to ten percent of the salary amount required by § 541.600(a) may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions, that are paid annually or more frequently." (29 CFR § 541.602(a)(3) (2019).)

Based on the above, the court noted that a commission-only compensation plan does not satisfy the federal salary basis test. The court also noted that federal regulations require that, in order to meet the salary basis test, an employee must regularly receive "a predetermined amount constituting all or part of the employee's compensation, which amount is *not subject to reduction because of variations in the quality or quantity of the work performed*." (29 CFR § 541.602(a) (2019).) Wedbush's model did not fit within that definition because commissions fluctuated each month based on employee performance and quantity of sales. Moreover, although earned commissions are wages under California law, advances on not-yet-earned commissions are not, and Wedbush could not rely on advances to satisfy the salary basis test because the test requires employers to pay their employees at least double the minimum wage, not loan them that amount.

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California Court of Appeal Strikes Forum Selection Clause in *Midwest Motor Supply v. Superior Court*

Patrick Finch ("Finch) began his employment with Midwest Motor Supply ("Midwest") in 2014. His employment agreement (the "Agreement") stated: "[t]his Agreement shall be construed in accordance with Ohio Law" and that any litigation "must be venued in Franklin County, Ohio."

After receiving a promotion in May 2016, Midwest revised exhibits to the Agreement to reflect Finch's promotion. Most notably, Finch's compensation was amended by a revised exhibit, which referenced current and future "Compensation and Annual Plan Letter(s)" as the means of updating Finch's compensation moving forward. Subsequent letters were sent in March 2017 and March 2018, which noted revisions to Finch's compensation for 2017 and 2018, respectively.

Finch sued Midwest in California in 2019 for various alleged Labor Code violations, and Midwest filed a motion to dismiss or, alternatively, stay the action on the basis of the Ohio forum selection clause. Finch opposed the motion, arguing that the forum selection clause was unenforceable under Labor Code section 925, which renders such a clause in an employment contract voidable by an employee if the contract containing the clause was "entered into, modified, or extended on or after January 1, 2017." (Lab. Code § 925, subd. (f).)

The trial court denied Midwest's motion on the ground that the modifications to the compensation plan in 2017 and 2018 occurred after January 1, 2017. Midwest claimed this was an error, arguing that section 925 applies only when a forum selection clause *itself* is modified on or after January 1, 2017. The Court of Appeal disagreed and denied Midwest's petition for writ of mandate, holding that ***any*** modification to an employment agreement after January 1, 2017, triggers a California employee's right to void a forum selection clause under section 925.

In light of this ruling, California employers, and particularly those that utilize forum selection clauses, should be wary of revisions made to employment agreements, as changes could have far more broad-reaching impact than anticipated or desired.

Cruz v. Fusion Buffet, Inc., et al. Confirms Attorneys' Fees Award

In *Cruz v. Fusion Buffet, Inc., et al.,* Plaintiff Justine Cruz ("Cruz") filed a complaint against employer Fusion Buffet, Inc. ("Fusion") for various wage and hour claims, including alleged failure to pay minimum and overtime compensation, meal and rest period compensation, and provide accurate wage statements. Cruz extended the claims to Fusion's owners ("the Owners") under an alter ego theory of liability, arguing that the Owners should be held personally liable for Fusion's actions.

During the course of litigation, Fusion and the Owners moved to reclassify the action as a limited jurisdiction matter on the basis that Cruz's claimed damages could not exceed the minimum $25,000.00 required to proceed as an unlimited

jurisdiction matter. The motion was denied after Cruz presented purported evidence in support of a claim that her damages exceeded the minimum. Prior to trial, the owners made settlement offers of $1.00 under Code of Civil Procedures ("CCP") section 998, which provides for cost recovery if the offer is declined and the declining party fails to recover more than the offered amount at trial. Cruz declined the offer.

At trial, Cruz prevailed against Fusion on seven of ten causes of action, but was awarded damages less than the $25,000 limited jurisdiction minimum threshold. The Owners prevailed against Cruz's alter ego theory of liability.

Cruz subsequently sought recovery of attorneys' fees for prevailing on her fee-recoverable wage claims against Fusion. Fusion argued that denial of Cruz's fee request was appropriate, as her damage award was less than the limited jurisdiction minimum. Simultaneously, the Owners sought recovery of their costs under CCP section 998, as Cruz was unsuccessful in establishing the alter ego theory of liability. The trial court granted Cruz's motion but denied the Owners' motion, and the Court of Appeal affirmed.

The Court of Appeal held that trial courts have discretionary authority to deny fee recovery when a plaintiff is awarded less than the limited jurisdiction threshold. While the possibility of frivolous claims exists, here, the court found that Cruz's claims were not frivolous, as she presented substantial evidence of damages in excess of the minimum. The Court of Appeal also held that, given the inextricably intertwined nature of the non-fee-recoverable claims (for meal and rest break payments) and the other fee-recoverable wage claims, the total fee amount requested could not be apportioned based on claim.

The Court of Appeal also held that Cruz's failure to recover more than the $1 settlement offer from the Owners at trial did not necessarily allow the Owners to recover their costs. The court held that CCP section 998's provision for recovering costs does not apply when cost recovery is addressed by other Labor Code sections. The applicable Labor Code sections in this case precluded the Owners from recovering costs, even as prevailing parties, unless the action was brought in bad faith. Though Cruz failed to establish the alter ego theory of liability against the Owners, she presented substantial evidence in support of the theory, demonstrating that her claims against them were brought in good faith.