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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *February 2021*

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JUDICIAL

Federal

Ninth Circuit Court of Appeals Clarifies Overtime Calculations Under FLSA in *Clarke v. AMN Services, LLC*

Plaintiffs Verna Clarke and Laura Wittman worked as traveling clinicians for healthcare staffing company AMN Services. On behalf of two certified classes of employees, Plaintiffs filed suit against AMN alleging claims for unpaid overtime under both the California Labor Code and the Fair Labor Standards Act ("FLSA"), as well as other derivative state law claims. After the district court certified California-wide classes for the state law claims and conditionally certified a nationwide FLSA collective, the parties filed cross motions for summary judgment focusing on the central question in the case: whether certain per diem payments to class member employees should be considered part of the employees' "regular rate" and therefore considered when calculating overtime pay rates.

Plaintiffs argued that the per diem payments issued to employees working away from home operated as wages and should therefore be included in calculation of regular rates of pay for purposes of overtime. AMN averred that per diem benefits were not wages but, instead, reasonable reimbursement for work-related expenses incurred while traveling on assignment, and therefore were properly excluded from an overtime rate calculation. The district court granted summary judgment in AMN's favor on the FLSA and state unpaid wage claims. The Court of Appeals disagreed, holding that the contested benefits functioned as compensation for work rather than as reimbursement for expenses incurred, and that per diem benefits were thus improperly excluded from Plaintiffs' regular rate of pay for purposes of calculating overtime.

The Court of Appeals noted several features of AMN's per diem payments which made evident that they functioned as renumeration for hours worked rather than reimbursement for expenses:

(1) AMN's policy was to prorate the traveling clinicians' per diem payments based on hours worked. AMN's pro rata deductions from its per diem payments were unconnected to whether employee remained away from home while incurring expenses for AMN's benefit. Instead, the deductions connected the amount paid to hours worked while still away from home,

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thereby functioning as work compensation rather than expense reimbursement.

(2) Employees were able to offset missed or incomplete shifts with hours they had "banked" on days in which they worked more than the minimum required hours. The only reason to do so when calculating a weekly per diem payment is to compensate employees for total hours worked, rather than for reasonable expenses incurred.

(3) AMN paid local clinicians the same per diems that it would have paid traveling clinicians. That both local and traveling clinicians received per diems supported the assertion that payments were expected as part of an employee's pay package and therefore function as supplemental wages.

The Court of Appeals surmised that, in sum, a combination of the above factors meant that payments functioned as compensation for hours worked. The Court of Appeals reversed the district court's grant of summary judgment, and remanded for the district court to enter partial summary judgment in Plaintiffs' favor as to whether the per diem payments to class member employees should be considered part of the employees' regular rate of pay and to conduct further proceedings.

California

California Appellate Court Affirms Policy Favoring Arbitration in *Alvarez v. Altamed*

In *Alvarez v. Altamed*, California's Second District Court of Appeal reversed a trial court's order denying defendants' motion to compel arbitration. The Court of Appeal found that, although the disputed provision authorizing review by a second arbitrator was substantively unconscionable, the provision was severable, thus leaving the remaining arbitration agreement enforceable.

On December 8, 2014, Altamed Health Services Corporation ("Altamed") offered employment to Plaintiff Erendira Cisneros Alvarez ("Alvarez") and sent an offer letter to Alvarez the same day. The offer letter contained an arbitration agreement and stated that, to accept the offer, Alvarez must respond by email or fax by December 9, 2014. Alvarez accepted Altamed's offer on the required date, and worked for Altamed from January 2015 through April 2017, at which time Altamed terminated Alvarez's employment.

In April 2019, Alvarez filed a lawsuit against Altamed, alleging violations of the FEHA, wrongful discharge in violation of public policy, defamation, and intentional infliction of emotional distress. One month after filing its answer, Altamed moved to compel arbitration. Its motion was denied by the trial court, which declined to opine specifically on the validity of the arbitration agreement, although it did address the issue of conscionability.

On appeal, the court rejected Alvarez's contention that she did not knowingly waive her right to a jury trial, finding the agreement was not difficult to read. It was written in the same size font as the offer letter, split into short,

understandable paragraphs, was only two pages long, and contained clear, explicit language establishing both that Alvarez waived trial by jury and that Alvarez's sole and exclusive means to resolve all disputes was through binding arbitration. Altamed was not required to bold, highlight, or increase the font size of the portion of the agreement stating that Alvarez waived her right to a jury trial.

The court also found no procedural unconscionability for Altamed's failure to provide a Spanish translation of the arbitration agreement. Alvarez not only confirmed her comfort speaking English during her job interview, but also had 24 hours to review the short agreement. There was similarly no appreciable procedural unconscionability created by the circumstances of the agreement's formation. Alvarez had ample time to review the agreement, and while there is inherent pressure where arbitration is a condition of employment, that pressure alone gives rise to only minimal procedural unconscionability.

While the appellate court did find limited substantive unconscionability in the provision authorizing review by a second arbitrator, it reasoned that the offending provision was not fatal to the agreement and was easily severable. As the remaining agreement was enforceable, it passed muster.

While the ruling in Alvarez marks a victory for the enforcement of arbitration agreements, California employers must remain wary of the regular flow of litigation on this subject. Maintaining enforceable, legally compliant arbitration agreements must remain of vital importance to employers that wish to utilize their protections.