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EMPLOYMENT LAW UPDATE

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JUDICIAL

Federal

Ninth Circuit Court of Appeals Provides Guidance Regarding Applicability of California Wage and Hour Law in *Bernstein v. Virgin America*

In a class action lawsuit filed on behalf of California-based flight attendants employed by Virgin America ("Virgin"), the Ninth Circuit Court of Appeals addressed whether certain provisions of the California Labor Code apply to an interstate transportation company's relationship with its employees, and whether class certification was appropriate in light of that analysis.

During the relevant time period, and across the proposed class, approximately 25% of Virgin's flights operated through California airports, while affected employees spent approximately 31.5% of their time working within California's borders. No evidence suggested that employees spent more than 50% of their time working in any one state, or that they worked in any other state more than they worked in California. The Court certified a Class, Subclass, and Waiting Time Penalties Subclass, differentiating between non-California resident California-based flight attendants, resident flight attendants, and flight attendants no longer working for Virgin, respectively.

In its lengthy opinion, the appellate court addressed numerous issues, most notably relating to the dormant commerce clause, the provision of minimum wage for all hours worked, alleged overtime violations, potential imposition of waiting time penalties, allegations of the applicability of heightened Private Attorneys General Act ("PAGA") fees, and the award of attorneys' fees to Plaintiffs' counsel.

Dormant Commerce Clause

Virgin argued that the dormant commerce clause prevents application of California labor law under this factual scenario, based on an argument that any law that impedes the free flow of commerce must be prescribed by a single body having nationwide authority. The Court rejected this argument, holding that California Labor laws did not violate the dormant commerce clause. The Court further explained that application of California labor law is based on the parties' various contacts with the state, which were significant enough under the circumstances to warrant applicability.

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Minimum Wage and Compensation for All Hours Worked

Virgin paid its flight attendants based on a block of time worked each day. The Court held that, as in *Oman v. Delta Air Lines, Inc.* (Cal. 2020) 466 P.3d 325, 339, this practice did not violate California minimum wage requirements. It explained that, under the specific circumstances applicable to this matter, the mere fact that pay is not specifically attached to each hour of work does not mean that California law was violated.

Overtime Pay

The Court held that California overtime laws applied to time worked by both the Class and Subclass outside of California, and Virgin therefore violated California Labor Code section 510. The Court reasoned that the California Supreme Court has applied overtime provisions to non-residents performing work in California for a California-based employer because of the state's important public policy goals of "protecting health and safety and preventing the evils associated with overwork." (*Sullivan v. Oracle Corp.* (Cal. 2011) 254 P.3d 237, 247.) The Court stated that these public policy goals would be "thwarted by permitting residents to work outside of California for a California employer without the protection of its overtime law."

Meal and Rest Period Violations

Virgin argued that Federal Aviation Administration ("FAA") regulations preempted California meal and rest break requirements. It presented arguments for field preemption, conflict preemption, and obstacle preemption.

Addressing field preemption, Virgin contended that California law negatively impacts aviation safety because it prohibits employers from assigning duties to employees while on meal or rest periods. Virgin cited Ninth Circuit authority holding that the FAA merely preempts California law when those laws encroach upon, supplement, or alter the federally occupied field of safety. (*Ventress v. Japan Airlines* (9th Cir. 2014) 747 F.3d 716.) The Court rejected this argument, holding that meal and rest break requirements have "no bearing on the field of aviation safety."

Virgin argued conflict preemption, contending that California requirements conflicted with the FAA's regulations that restrict duty periods. The Court was unmoved by this argument, as an employer is able to comply with both the FAA's regulations prohibiting a duty period of longer than fourteen hours and California's requirement that meal and rest periods be taken at specific intervals.

Regarding obstacle preemption, Virgin contended that application of California meal and rest period requirements would "frustrate the operation and natural effect of the federal safety scheme," pointing to FAA regulations that impose a duty on flight attendants to remain uniformly distributed throughout the airplane. The Court held there was no obstacle preemption because FAA regulations did not require all attendants to be on duty to accomplish these requirements.

The Court also rejected Virgin's argument that California's meal and rest break requirements were not preempted by the Airline Deregulation Act ("ADA"). It explained that the ADA's field preemption clause was similar to the Federal Aviation Administration Authorization Act of 1994 clause, in which the Ninth Circuit has held that "Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not otherwise regulate prices, routes, or services" and that "an increase in cost associated with compliance was not sufficient to show a relation to prices, routes, or services."

The Court therefore applied meal and rest break requirements to both the Class and Subclass, holding that "[l]ike overtime pay, meal and rest break requirements are designed to prevent 'the evils associated with overwork,' mandating that employers treat employees humanely even when employees have been unable to bargain for that contractual right."

Waiting Time Penalties

The Court held that waiting time penalties were recoverable as applicable, reasoning that penalties are similar to the wage statement requirements of Labor Code section 226, which the Supreme Court has held apply to interstate employees.

Class Certification

Virgin argued that class treatment was not appropriate because choice-of-law analyses would be required for each individual. The Court rejected this argument, stating California law applied to both the Class and Subclass and therefore class certification was appropriate.

PAGA Penalties

While Plaintiffs argued that Virgin was subjected to heightened PAGA penalties, the Court reasoned that, because neither the Labor Commissioner nor any other court put Virgin on notice that it was subject to the California Labor Code prior to this action, Virgin was not subject to heightened penalties for subsequent violations. It explained that, without notice, there could be no good faith dispute, which is a requirement to apply penalties greater than the statutory minimum.

Attorneys' Fees

The Court vacated the trial court's award of attorneys' fees to Plaintiffs' counsel and remanded the issue, noting that it could not be sure whether the trial court would exercise its discretion in the same manner given that Plaintiffs did not prevail on each of their claims.

While the applicability of *Bernstein* is relatively narrow in light of the particularity of the aviation industry, its implications may be more far-reaching. California employers, and particularly those whose employees do some portion of their work outside of the state, should continue to appreciate the willingness of California courts to apply California employment law broadly.

California

California Supreme Court Confirms in *Ferra v. Loews Hollywood Hotel, LLC* that Premium Pay Must Be Compensated at an Employee's Regular Rate of Pay

In a long-awaited decision, the California Supreme Court confirmed, much to the chagrin of California employers, that the rate of pay for premium penalties is, in fact, equal to the "regular rate of pay" utilized under overtime calculations. California employers must now carefully review all policies and ensure compliance with the Court's retroactive ruling.

Defendant Loews Hollywood Hotel, LLC ("Loews") formerly employed plaintiff Jessica Ferra ("Ferra") as a bartender. Loews paid Ferra hourly wages as well as quarterly nondiscretionary incentive payments. When any hourly employee in Ferra's position was not provided with a compliant meal or rest period, Loews paid the employee an additional hour of pay according to the employee's hourly wage at the time the meal or rest period was not provided. If the employee earned any nondiscretionary payments in addition to an hourly wage, such as Ferra's quarterly incentive payments, Loews did not factor these payments into the calculation of premium pay owed. Ferra filed a class action suit against Loews alleging (among other claims) that Loews, by omitting nondiscretionary incentive payments from its calculation of premium pay, failed to compensate her for noncompliant meal or rest breaks in accordance with her "regular rate of compensation" as required by the Labor Code.

After considerate (and lengthy) appellate analysis of the issue, the California Supreme Court definitively ruled that the calculation of premium pay for a noncompliant meal, rest, or recovery period, like the calculation of overtime, must account for not only hourly wages but also other nondiscretionary payments for work performed by the employee. Further frustrating California employers, the state's highest court applied its decision retroactively, meaning that employers are tasked with auditing prior premium pay to ensure compliance with the newly clarified standard. Those that fail to do so run a substantial risk of exposure to class and/or PAGA liability, even despite efforts to remain compliant with prior understandings of applicable law.

California Court of Appeal Compels Arbitration Despite Ambiguity in Arbitration Agreement in *Western Bagel Company, Inc. v. Superior Court of Los Angeles*

In *Western Bagel Company, Inc. v. Superior Court of Los Angeles (Jose Calderon)*, the California Court of Appeal resolved a dispute concerning ambiguities in an arbitration agreement in favor of the employer, ordering the employee to binding arbitration.

Under the Federal Arbitration Act ("FAA"), ambiguities in an arbitration agreement must be resolved in favor of arbitration, as envisioned by the act, and a fundamental attribute of the FAA is a binding arbitral proceeding. Somewhat paradoxically, under the doctrine of *contra proferentem*, ambiguities in the interpretation of an arbitration agreement are generally construed *against* the

employer as the drafter of the agreement. This doctrine is only implicated, however, when a court cannot discern the intent of the parties. Moreover, the doctrine is preempted to the extent that it stands as an obstacle to accomplishing the objectives of the FAA.

Jose Calderon ("Calderon") is a Spanish-speaker who can read and write English at a basic level. Calderon initiated a class action lawsuit against his employer, Western Bagel, for allegedly failing to provide legally compliant meal and rest periods. Western Bagel moved to compel Calderon's claims to arbitration based upon the arbitration agreement (the "Agreement") executed between Western Bagel and Calderon (collectively, the "Parties") at the start of Calderon's employment. The original version of the Agreement was written in English and included an express agreement to submit matters to *binding* arbitration. When the Agreement was translated into Spanish for Calderon, however, it referred to *nonbinding* arbitration, even though other provisions in the translated version of the Agreement strongly supported the conclusion that the Parties consented to *binding* arbitration. The trial court held that: (1) the Agreement was governed by the FAA; (2) the English and Spanish versions of the Agreement were inconsistent and ambiguous as to whether the Parties agreed to binding or nonbinding arbitration; and (3) ambiguity should be construed in favor of Calderon by ordering the Parties to nonbinding arbitration.

Western Bagel appealed, and the California Court of Appeal ultimately disagreed with the trial court's ruling. In its decision, the appellate court held that the FAA preempted the use of *contra proferentem* in this scenario because the doctrine should only be applied when a court is unable to discern the intent of the contracting parties. Here, those circumstances were not present, as a court could readily conclude that the Parties' intended to consent to binding arbitration.

Further, even assuming *arguendo* that ambiguity exists as to the Parties' intent, a court is compelled to employ the rules of interpretation under the FAA. Applying the FAA, the ambiguities in the Agreement must be resolved in favor of the fundamental purpose of binding arbitration. For these reasons, the Court vacated the trial court's order and ordered the Parties to binding arbitration.

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, Rio Schwarting, Christopher Reilly, Tina Robinson, Zachary Rankin, Christine Robles, Brian Jun, or Christine Dixon at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Jennifer Weidinger, Rachel Albert, Sevada Hakopian, or Catherine Brackett at (310) 649-5772.