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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *October 2021*

LEGISLATIVE

California

At the close of each legislative cycle, California signs into law a host of new laws with significant impact on California employers. Below is a list of key pieces of legislation, arranged in order by bill name, for ease of reference.

AB 654 (Reyes)

AB 654 clarifies and expands existing provisions related to the notification of employees that have (or may have) been in close contact with an individual infected with COVID-19. Employers must now notify "all employees who were on the premises at the same worksite as the qualifying individual within the infectious period." This departs slightly from the previous standard of notifying all "employees who may have been exposed."

Notification must not only identify the exposure but also describe benefits to which employees may be entitled and the efforts taken to clean and disinfect under Cal/OSHA standards. The law, which took immediate effect upon approval on October 5, 2021, phases out via sunset provision on January 1, 2023.

AB 701 (Gonzalez)

AB 701 requires that any warehouse worker required to satisfy a "quota" be provided with a detailed written description of the applicable quota. An employer subject to this legislation may thereafter not take adverse employment action against a covered employee for failure to meet the quota unless a description of that quota has been provided to the employee in writing in the manner required by law. Quota obligations that prevent covered employees from taking meal or rest periods or using bathroom facilities are also deemed unlawful.

A covered employee may request a copy of his/her applicable quota(s), as well as records of the employee's "work speed data" over the preceding 90 days. If an employer takes adverse employment action against any employee that makes a valid request under the law, a rebuttable presumption of retaliation is created.

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AB 1003 (Gonzalez)

AB 1003 adds section 487m to the California Penal Code, deeming theft of wages (including gratuities) as "grand theft" when the amount stolen is in excess of $950 from any one employee or $2,350 from a group of employees. "Employer" is notably defined to also include a "hiring entity of an independent contractor."

This revision marks a significant change to applicable law, as wage theft had previously been classified as a misdemeanor. While the likelihood of actual prosecution remains relatively low, California employers should take note of the heightened focus on preventing wage theft.

AB 1033 (Bauer-Kahan)

AB 1033 expands the definition of "parent" under the California Family Rights Act ("CFRA") to include parents-in-law. The legislation also provides further guidance regarding implementation of the small employer mediation program, recently established for employers with between 5 and 19 employees.

AB 1561 (Committee of Labor and Employment)

AB 1561 continues a flow of legislation amending and clarifying the scope of AB 5's independent contractor classification by extending the exception for licensed manicurists, construction trucking industry contractors/subcontractors, and newspaper carriers through December 31, 2024. It also amends the "data aggregators" exception and adds insurance claims adjustors and insurance third-party administrators to the list of occupations subject to the *Borello* test for independent contractor classification.

SB 331 (Leyva)

SB 331 significantly broadens restrictions to non-disclosure provisions in settlement agreements beyond only sexual harassment allegations. Under the new legislation, a settlement agreement may not chill an individual's ability to disclose any type of alleged employment discrimination prohibited by the Fair Employment and Housing Act.

While a claimant may still seek to maintain his or her confidentiality, and nothing prevents the parties to the agreement from agreeing to maintain confidentiality of a settlement figure, any non-compliant provision in an agreement executed on or after January 1, 2022, is deemed void as a matter of law.

The protections of SB 331 also extend to the use of non-disclosure agreements in employment severance agreements. These protections apply even if no lawsuit has been threatened or commenced. Under SB 331, an employer offering a severance agreement must notify the offered employee of the right to consult with an attorney and must provide a reasonable amount of time (at least five business days) within which to seek and obtain that consultation. The review period may be waived by the employee, but waiver must be knowing and

voluntary, and cannot be induced or otherwise improperly influenced by the employer.

Helpful to employers, the legislation offers sample language to be used to "carve out" protections from confidentiality clauses: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

SB 639 (Durazo)

SB 639 phases out the issuance of licenses for the provision of sub-minimum wage compensation to persons with disabilities. New licenses will no longer be issued beginning on January 1, 2022, and existing licenses will not be renewed after 2025.

SB 807 (Wieckowski)

SB 807 increases the required maintenance of employee personnel records from two years to four years. Notably, however, records must also be maintained for at least the duration of the statute of limitations or the duration of litigation when a claim is threatened or initiated. The new legislation also provides means by which a statute of limitations can be tolled during a Department of Fair Employment and Housing ("DFEH") investigation.

JUDICIAL

Federal

Ninth Circuit Clarifies Applicability of ABC Test in *Lawson v. Grubhub*

Plaintiff Rael Lawson ("Lawson") worked for Defendant Grubhub, Inc. ("Grubhub") as a food delivery driver for four months in late 2015 and early 2016, during which time Grubhub classified Lawson as an independent contractor rather than an employee. After his engagement ended, Lawson sued Grubhub, arguing that his independent contractor classification was improper, and that he was therefore entitled to recovery under the California Labor Code for failure to pay minimum wage and overtime, as well as an alleged failure to reimburse business expenses. Lawson asserted his claims in his individual capacity, as well as on behalf of allegedly similarly situated delivery drivers, for whom he sought penalties under California's Private Attorneys General Act ("PAGA").

The court bifurcated the matter to address two primary issues: 1) whether Lawson was misclassified as an independent contractor; and 2) whether Grubhub owed PAGA penalties due to the alleged misclassification of its drivers in California. On the first issue, the district court held that Lawson was properly classified as an independent contractor under *S.G. Borello & Sons, Inc. v. Department of Industrial Relationship* (1989) 769 P.2d 399. At that time and for many years prior, *Borello* supplied the framework under California law for determining whether a worker is properly classified as an employee or independent contractor. The primary *Borello* factor – the hiring entity's "right to

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control" the work – weighed strongly in favor of independent contractor status because Grubhub did not control the manner and means by which Lawson performed his food deliveries. Because of its holding on the threshold issue, the trial court did not address the PAGA penalty issue.

In April 2018, shortly after the trial court's initial ruling, the California Supreme Court held that *Borello* did not apply to analysis rooted in California wage orders. The Court formulated a new "ABC Test" to be applied to classification cases, and subsequently held that the test applied retroactively. In doing so, the ABC Test installed a framework that significantly restricted the types of workers that qualify as independent contractors.

Despite the blow to independent contractor classification struck by the ABC Test and its subsequent codification via Assembly Bill 5 ("AB 5"), in November 2020, California voters passed Proposition 22, which generally provided that, provided certain conditions are met, "app-based drivers" (like Lawson) may be considered independent contractors rather than employees.

Lawson filed an appeal on several grounds, most notably including an argument that he should not have been considered an independent contractor. Grubhub argued that Proposition 22 "abated" application of the ABC Test to Lawson's claims, reasoning that the subsequent passage of Proposition 22 prohibited the collection of any benefits owed to Lawson under the ABC Test because those benefits were not reduced to judgment before the proposition was passed. The Ninth Circuit rejected the abatement argument, observing that Proposition 22 did not wholly abolish causes of action under the ABC Test and instead crafted a conditional and prospective exemption from the test for some workers.

Ultimately, the Ninth Circuit vacated the judgment for Grubhub on the minimum wage, overtime, and expense reimbursement claims, holding that the protections of Proposition 22 did not apply retroactively, and the matter therefore had to be remanded to allow for application of the ABC Test to Lawson's claims.

The Lawson ruling proves, once again, the willingness of courts to affirm the guidance of the ABC Test as it applies to California employers. Even despite limited carveouts created by legislation and ballot initiative, the vast majority of California employers must assume that the ABC Test will continue to guide classification analysis.

AB 51 Receives New Life from the Ninth Circuit in *Chamber of Commerce of the United States of America et al. v. Bonta*

In *Chamber of Commerce of the United States of America et al. v. Bonta*, the Ninth Circuit vacated a preliminary injunction and held that employers may be prohibited from requiring mandatory arbitration agreements as a condition of employment. This split-decision from the Ninth Circuit creates risk and uncertainty for California employers currently utilizing mandatory arbitration agreements.

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In 2019, Governor Gavin Newsom signed Assembly Bill 51 ("AB 51") into law, which adds section 432.6 to the Labor Code and section 12953 to the Government Code. Labor Code section 432.6 prohibits imposing "as a condition of employment, continued employment, or the receipt of any employment-related benefit" the requirement that an individual "waive any right, forum or procedure" available under the California Fair Employment and Housing Act ("FEHA") and the Labor Code. A violation of section 432.6 is punishable by imprisonment for up to six months, a fine of up to $1,000, or both. Government Code section 12953 makes it unlawful to violate Labor Code section 432.6 and creates civil sanctions for unlawful employment practices, including investigation by the Department of Fair Employment and Housing ("DFEH") and potential civil litigation brought by either the DFEH or by a private citizen.

AB 51 was set to take effect on January 1, 2020. Two days before its effective date, however, AB 51 was challenged by the Chamber of Commerce of the United States of America as well as several other business groups. The District Court granted a temporary restraining order, barring enforcement of AB 51 under a legal theory that the Chamber of Commerce was likely to prevail on its argument that AB 51 is preempted by the Federal Arbitration Act ("FAA").

In a 2-1 decision, the Ninth Circuit reversed the District Court's decision, providing a pathway for AB 51 to go into effect. The Ninth Circuit held that AB 51 "was not preempted by the FAA because it was solely concerned with the pre-agreement employer behavior." Notably, the Ninth Circuit upheld the District Court's determination that AB 51's enforcement mechanisms (civil and criminal penalties) are preempted by the FAA. The Ninth Circuit's decision in *Chamber of Commerce v. Bonta*, however, does not invalidate written arbitration agreements that are otherwise enforceable under the FAA.

In recent years, California laws relating to the validity and enforcement of employment-related arbitration agreements have been heavily litigated. This, coupled with the Ninth Circuit's split-decision in *Chamber of Commerce v. Bonta*, suggests that this issue is ripe for review by the United States Supreme Court. While we continue to monitor whether review from the Supreme Court will be sought, California employers should review their current arbitration agreements to ensure compliance and enforceability.

California

Court of Appeal Recognizes Trial Courts' Inherent Authority To Strike PAGA Claims as Unmanageable in *Wesson v. Staples the Office Superstore, LLC*

In *Wesson v. Staples the Office Superstore, LLC*, the California Court of Appeal expressly confirmed that trial courts have the inherent authority to ensure a plaintiff's claim under the Private Attorneys General Act ("PAGA") will be manageable at trial, and that this authority provides the ability to strike PAGA claims not deemed manageable.

Fred Wesson ("Wesson") was employed by Staples the Office Superstore, LLC ("Staples") as a General Manager ("GM") responsible for overseeing

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operations at several Staples stores in Los Angeles County. In a lawsuit filed against Staples in 2015, Wesson asserted claims seeking civil penalties under PAGA of nearly $36 million, alleging Staples was liable for labor violations against himself as well as nearly 350 other Staples GMs. Wesson's PAGA claim accused Staples of misclassifying its GMs as exempt executives rather than non-exempt, hourly employees entitled to overtime pay and off-duty meal and rest periods.

Staples moved to strike Wesson's PAGA claim, invoking the court's inherent authority to manage complex litigation. Staples argued that litigating its affirmative defense that each GM was exempt would require individualized proof as to each GM, rendering the action unmanageable at trial.

The trial court granted Staples' motion to strike Wesson's PAGA claim. The trial court emphasized that courts have inherent powers to control litigation before them and confirmed that such powers include the authority to ensure the manageability of PAGA litigation. The court highlighted the great variation in the manner in which Staples GMs performed their jobs and spent their time performing managerial versus non-managerial tasks, ultimately determining that Wesson's proposed trial plan failed to address how the parties might litigate Staples' affirmative defenses. The court noted that, even if it vastly curtailed proposed estimates of time needed to evaluate affirmative defenses as to each GM, trial could still last more than four years and would therefore be exceed the scope of manageability.

The Court of Appeal affirmed the judgment in Staples' favor, concluding "that courts have inherent authority to ensure that a PAGA claim will be manageable at trial – including the power to strike the claim, if necessary – and that this authority is not inconsistent with PAGA's procedures and objectives, or with applicable precedent." The appellate court then affirmed the trial court's ruling that Wesson's PAGA claim was unmanageable, citing Staples' proffered evidence that the GM position was not standardized; that there was great variation in how Staples GMs performed their jobs and spent their time; that each store varied as to size, sales, staffing, and budgets; and that the GMs had varied experience, aptitude, and managerial approaches. The court also rejected Wesson's argument that the manageability inquiry need not consider a defendant's affirmative defenses; rather, the court stressed that defendants must have a fair opportunity to litigate their affirmative defenses and, in applying this principle to Wesson's PAGA claim, determined that there was no apparent way to fairly and effectively litigate Staples' affirmative defenses given the necessary individualized inquiry.

The *Wesson* ruling's confirmation that trial courts have the authority to strike unmanageable PAGA cases marks a small victory for California employers tasked with defending such cases. The ruling may also serve to deter (or at least delay) plaintiffs' attorneys from filing PAGA claims before first considering whether litigation will be deemed manageable. While it remains to be seen whether the California Supreme Court or the legislature will weigh in on this issue, employers should be pleased to now have a manner to attempt to attack and/or limit unwieldy PAGA claims.

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California Court of Appeal Opines on Acceptability of "Reverse Auction" Settlements, Among Other Issues, in *Amaro v. Anaheim Arena Management*

In a strategy referred to as a "reverse auction," Plaintiff Irean Amaro ("Amaro") filed a claim under the Private Attorneys General Act ("PAGA") even despite the existence of two concurrent class action lawsuits (the "Class Actions") addressing nearly identical claims, then negotiated a settlement of all pending claims. On review, the California Court of Appeal permitted the vast majority of the utilized tactics, remanding the matter only to address a limited set of issues.

The subject series of lawsuits against Defendant Anaheim Arena Management ("AAM") began when the first of the Class Actions was filed in 2014, claiming that non-exempt employees were deprived of breaks, had their time improperly rounded, and were not paid for time spent waiting for shuttle buses. In 2016, the second of the Class Actions was filed, asserting nearly identical claims. Settlement negotiations in each of the Class Actions were unsuccessful.

Amaro thereafter filed her PAGA lawsuit, asserting a similar variety of claims, as well as an additional allegation that employees did not receive proper reimbursements. Seizing an opportunity to negotiate as broad a settlement as possible, Amaro began negotiating with AAM to resolve not only the Amaro litigation but also the Class Actions. A global settlement was ultimately reached, styled to resolve claims in all three pending actions.

Amaro sought approval of the settlement, and was opposed in her efforts by intervenor Rhiannon Aller ("Aller"). While the trial court initially refused to approve the settlement on grounds that insufficient information had been provided to justify the figure, Amaro engaged in extensive informal discovery and obtained the court's approval, even despite Aller's objections.

Aller appealed, arguing that the agreement was improper for two reasons. First, she argued that the settlement extended to claims outside of Amaro's complaint, waived class claims arising from the Fair Labor Standards Act ("FLSA") despite not obtaining written consent, and waived PAGA claims outside the limitations period applicable to Amaro. The appellate court generally disagreed with Aller, noting that the FLSA written consent requirement was not implicated and that PAGA does not preclude Amaro from releasing claims outside of the limitations period of her own claim. The court did, however, agree that the release language was overly broad, and therefore remanded the matter to address that limited topic.

The second issue argued by Aller on appeal was that the "reverse auction" method of negotiating a global settlement of all pending claims was not proper. The Court of Appeal disagreed, holding that there is nothing inherently wrong with the process. In fact, absent evidence of unfairness to the class or of collusive effort in negotiating the reverse auction, neither of which were present in this case, the global settlement could be approved.

The *Amaro* ruling offers a rather uncommon glimpse into the rationale and process associated with judicial consideration and approval of class settlements.

While the appellate court was unwilling to approve the overly broad and ultimately unworkable settlement as styled, it showed a strong willingness to permit breadth in claims covered by a settlement. California employers should attempt to use this to their advantage in negotiating concurrent class actions.

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