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JUDICIAL

Federal

Arbitration Agreements Must be Evaluated Individually

In *O'Dell v. Aya Healthcare Servs.*, four former employees (the “Former Employees”) of Aya Healthcare Services (“Aya”) filed a putative class and collective action in 2022 alleging that Aya reduced travel nurses’ pay mid-contract, misclassified compensation, and violated state wage laws and the Fair Labor Standards Act (“FLSA”). As a condition of employment, Aya required employees to sign arbitration agreements containing delegation clauses that assigned arbitrators the authority to determine the agreements’ validity.

The Former Employees’ claims proceeded to arbitration, where two arbitrators upheld the agreements and two found them unenforceable due to unconscionable fee and venue provisions. The United States District Court for the Southern District of California subsequently confirmed three of the four arbitral awards. Meanwhile, 255 additional employees opted into the action under the FLSA. Aya moved to compel arbitration as to these opt-in plaintiffs based on their individual agreements. The district court denied the motion, applying non-mutual offensive collateral estoppel to hold that the prior arbitral decisions invalidating the agreements rendered them unenforceable as to all plaintiffs.

The United States Court of Appeals for the Ninth Circuit reversed, holding non-mutual offensive collateral estoppel cannot be invoked to avoid enforcement of an arbitration agreement. Specifically, the Ninth Circuit held that applying non-mutual offensive collateral estoppel in this context is inconsistent with the Federal Arbitration Act (“FAA”), as it undermines the statute’s core principles of individualized arbitration and party consent. The court concluded that the FAA does not permit using that doctrine to invalidate arbitration agreements and remanded the case for further proceedings.

California

Outside Counsel’s Findings in Workplace Investigation Not Protected by Attorney-Client Privilege

In *Paknad v. Superior Ct.*, Michelle Paknad (“Paknad”) sued her former employer, Intuitive Surgical, Inc. (“Intuitive”), alleging sexual harassment, gender discrimination, and retaliation. While still employed, Paknad filed two formal internal complaints. Intuitive retained outside counsel, Andrea Kelly Smethurst

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(“Smethurst”), to investigate those complaints, and Smethurst prepared two reports that were shared with company management and litigation counsel.

In discovery, Paknad sought the reports and related investigative materials. Intuitive refused, invoking attorney-client privilege and the work product doctrine, and produced only the names of witnesses interviewed and non-privileged documents reviewed. Paknad moved to compel production, but the trial court denied the motion.

Paknad then petitioned the Supreme Court for review. The Supreme Court granted the petition and directed further proceedings. On review, the Court of Appeal held that Intuitive had placed the investigations at issue—particularly by asserting the avoidable consequences defense and through its discovery responses—thereby waiving attorney-client privilege. The court also determined that disclosure of the materials was necessary.

Although the parties disputed whether the waiver extended to core work product, the Court of Appeal initially ordered production of the reports and materials subject to Intuitive’s proposed redactions. Because those redactions removed all of the investigator’s factual findings, Paknad again sought mandamus relief.

The Court of Appeal clarified that the waiver did not extend to unrelated legal advice, but did encompass the underlying factual findings and investigative materials. It therefore ordered the trial court to remove the redactions, conduct an in-camera review, and produce all materials within the scope of the waiver.

The decision underscores that in employment discrimination cases, an employer cannot use privilege doctrines to withhold factual findings from an internal investigation conducted by outside counsel when those findings are directly relevant and have been placed at issue in the defense.

In Class Action, a Different Bonus Does Not Amount to Unique Bonus

In *Martinez v. Sierra Lifestar, Inc.*, Adam Martinez (“Martinez”), a former emergency medical technician, brought a class action against private ambulance company Sierra Lifestar, Inc. (“Lifestar”), alleging that his employer systematically miscalculated the regular rate of pay by excluding certain nondiscretionary bonuses from that calculation. Martinez claimed this practice led to underpayment of overtime, double time, and meal and rest period premiums for himself and roughly 135 other employees during the class period. Although Lifestar offered 10 different types of bonuses, Martinez had received only one—a National Emergency Medical Services Week bonus (“EMS Bonus”)—on a single occasion.

Lifestar opposed class certification, arguing that Martinez was not typical because he received only one category of bonus, and only once. Lifestar argued that the EMS Bonus might be excluded from the regular-rate calculation because it could be characterized as a gift, a discretionary payment, or both. The trial court accepted the argument and denied certification on the ground that Martinez failed to establish typicality, finding he would be subject to unique defenses regarding whether his bonus should be included in the regular rate of pay.

The California Court of Appeal, Fifth Appellate District, reversed. The appeals court held that the asserted defenses concerning whether the bonus was discretionary or a gift were not unique to Martinez, as other employees received the same type of bonus under similar conditions. The appellate court concluded that the trial court erred in its typicality analysis and remanded the case for further proceedings on class certification.

The decision reinforces that a defense is not unique merely because it is framed around one subset of facts. A defense is unique only if it is peculiar to the named plaintiff, such that the case risks becoming an individual sideshow instead of a class case.

Ambiguities and Inconsistencies Across Multiple Arbitration Agreements May Not Invalidate Agreement

In *Santana v. Studebaker Health Care Center, LLC*, J. Asencion Santana (“Santana”) began working at a skilled nursing facility that was later acquired by Studebaker Health Care Center, LLC (“Studebaker”). As part of his onboarding with Studebaker, Santana was required to sign three related arbitration agreements covering most employment disputes and including a class action waiver. One of the agreements also contained an all-caps provision purporting to waive the right to bring representative actions under the California Private Attorneys General Act (“PAGA”) in any form—a so-called wholesale PAGA waiver that is unenforceable under controlling case law.

After his employment ended, Santana filed a class action alleging various wage-and-hour violations, including a PAGA claim. Studebaker moved to compel arbitration of Santana’s individual claims, including his individual PAGA claim, and sought to enforce the class action waiver. The superior court denied the motion, concluding that inconsistencies and ambiguities among the three arbitration agreements and related documents prevented formation of an enforceable agreement. In the alternative, the court found the agreements unconscionable due to both procedural and substantive defects, including the wholesale PAGA waiver.

The California Court of Appeal, Second Appellate District, Division Seven, reversed. The appellate court held that, despite some ambiguities and minor inconsistencies, the agreements demonstrated a clear mutual intent to arbitrate employment-related disputes and were not so uncertain as to be unenforceable. Any conflicting provisions, the court explained, could be severed. The court also found that although the agreements exhibited some procedural unconscionability as contracts of adhesion, they did not contain substantively unconscionable terms. Accordingly, the appellate court directed the trial court to grant the motion to compel arbitration.

Arbitration Agreement Not Upheld When Contract of Adhesion with Pervasive Unconscionable Provisions

In *Stoker v. Blue Origin, LLC*, Craig Stoker (“Stoker”) was employed by Blue Origin, LLC (“Blue Origin”). At the outset of his employment, Stoker signed an agreement containing a broad arbitration clause requiring most employment-related disputes to be resolved through arbitration, with limited exceptions for matters such as unemployment benefits, workers’ compensation, and, if voluntarily elected, claims involving sexual harassment or assault. After his discharge, Stoker filed suit alleging sexual and gender discrimination, harassment, retaliation, wrongful termination, and intentional infliction of emotional distress.

Blue Origin moved to compel arbitration. Stoker opposed the motion, arguing that his claims fell within the federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (“EFAA”) and that the arbitration agreement was both procedurally and substantively unconscionable. The trial court agreed that the EFAA applied, finding the allegations sufficient to constitute gender-based discrimination, and denied the motion to compel arbitration without addressing unconscionability. Blue Origin appealed.

On de novo review, the California Court of Appeal, Second Appellate District, affirmed the denial of the motion, but on different grounds. Rather than deciding the applicability of the EFAA, the court held that the arbitration agreement was unenforceable because it was both procedurally and substantively unconscionable. The court found procedural unconscionability due to the adhesive nature of the agreement, which was presented on a take-it-or-leave-it basis. The appellate court found substantive unconscionability based on the agreement's overly broad scope, lack of mutuality, and provisions waiving the right to a jury trial and to bring representative actions, including those under the California Private Attorneys General Act. The court further determined that severance was not appropriate because the unconscionable terms were pervasive and central to the agreement. Accordingly, the Court of Appeal affirmed the trial court's order denying the motion to compel arbitration.

This is Pettit Kohn Ingrassia Lutz & Dolin PC's employment update publication intended to be educational regarding recent legislative changes and court decisions affecting California employers. If you would like more information regarding our employment team, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Christine Clark, Kristin Kameen, Nicole Allen, Ethan Anderson, Ruby Carlon, Kevin Chicas, Melina Corona, Alec Dea, Will Dischmann, Kendall Garald, Emma Hill, Gabriella Kelly, Celeste Leung, Haley Murphy, Jessica O'Malley, Nia Perkins, Mariam Saleh, Shayan Shirkhodai, Jenny Sturman, Jackson Sullivan, Lisa Thorsson or Ben Watson at our San Diego office: 11622 El Camino Real, Suite 300, San Diego, CA 92130, (858) 755-8500; or Colette Asel, Steven Dawson, Jenny Che, Brett Greenberg or Jacob Schwartz at our Los Angeles office: 101 Continental Blvd., Suite 820, El Segundo, CA 90245, (310) 649-5772.