Labor & Employment News

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Class Action Waivers Are Enforceable, but Waivers of Representative Actions under PAGA Are Not

By Branden M. Clary
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The California Supreme Court recently issued a decision with widespread ramifications for employers. Previously, the Court determined that class action waivers in employment contracts may be enforceable as long as they were not unconscionable or violative of public policy. The California Supreme Court, following intervening U.S. Supreme Court precedent, determined that its prior decision was abrogated and reversed itself. Class action waivers in employment contracts are enforceable in California notwithstanding unconscionability or State public policy to the contrary.

In Iskanian v. CLS Transp. Los Angeles, LLC, 2014 WL 2808963 (June 23, 2014), an employee brought a wage and hour class action lawsuit. The employer sought to enforce an arbitration agreement whereby the employee had waived the right to proceed by class and representative proceedings. The lower courts ordered individual arbitration and dismissed the class claims with prejudice. Similarly, the California Supreme Court determined that the class action wavier was enforceable because the Federal Arbitration Act ("FAA") does not permit States to refuse to enforce class action waivers on public policy or unconscionability grounds.

Individual arbitration of employee claims can be advantageous for employers. For example, it can prevent employees from aggregating otherwise small dollar claims that may not otherwise be economically feasible for an employee to bring as an individual claim. Employers will want to make sure their arbitration agreements do not contain overbroad language that could invalidate otherwise enforceable class action waivers (e.g. waivers of representative actions). PAGA representative actions cannot be waived as a condition of employment in any forum, including arbitration and state and federal court.

DID YOU KNOW...

The Equal Employment Opportunity Commission ("EEOC") issued new guidance on the application of federal employment discrimination law under Title VII to religious dress and grooming practices, and what steps employers can take to meet their legal responsibilities in this area. The guidance can be viewed at: **http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm**.

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Overtime is compensable when employers have actual or constructive knowledge that non-exempt employees worked unreported overtime hours

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Employers are generally required to pay nonexempt California employees overtime for any hours worked in excess of eight in one day or forty in one week, and for the first eight hours worked on the seventh consecutive day in a workweek. Employees are entitled to payment for overtime - even if not reported - when their employers have actual or constructive knowledge that they are working overtime. A recent court of appeal decision is instructive, and affirmed judgment for the employer because the employee could not prove his employer was aware of his off-the-clock hours.

In Jong v. Kaiser Foundation Health Plan, Inc., 226 Cal.App.4th 391, 399 (2014), Jong, and other non-exempt employees, brought a putative wage and hour class action against Kaiser for non-payment of overtime compensation. Jong argued that his job could not be completed unless he worked overtime, and that he was criticized for working overtime, which was why he worked overtime hours off-the-clock. But Jong was unable to demonstrate that Kaiser knew or should have known that he was working unreported overtime hours. He had no evidence that his supervisors told him he could or should work off the clock, or that he should not report his overtime. When Jong reported overtime work, he was paid for that time. Jong also signed an attestation acknowledging that off-the-clock work was a violation of Kaiser's policies. Accordingly, Jong could not prove that Kaiser should have paid him for his unreported overtime hours because Kaiser was not aware of his unreported overtime.

Employers should be particularly sensitive to wage and hour claims, which are particularly ripe for class action lawsuits. Additionally, failing to compensate employees for overtime can subject employers to civil lawsuits to recover unpaid overtime, including interest, attorney fees, and costs of suit. Once employers become aware of unreported overtime, they should address it. They may require employees to sign attestations that failing to report all hours worked violates company policy, and to verify the hours worked on their timesheets. If they have policies prohibiting overtime work without prior approval, they may discipline employees for working unapproved overtime. However, employers should still compensate employees for all time worked of which they are aware.

DID YOU KNOW...

All employers, regardless of size, are subject to sexual harassment claims pursuant to California's Fair Employment and Housing Act. Kim v. Konad USA Distribution, Inc., 226 Cal.App.4th 1336, 1350 (2014). Sexual harassment training may help prevent and assist in defending against sexual harassment claims, and is required every two years for supervisory employees, or within six months of an employee assuming a supervisory position, for employers with 50 or more employees.

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Employees of subcontractors on public works projects may not be entitled to prevailing wages

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Public works projects are publicly financed construction projects done under contract. California law generally requires contractors and subcontractors who are working on public works projects to pay their employees the rates of wages ("prevailing wages") set by the Director of the Department of Industrial Relations ("DIR") in the location where the work will be performed. However, a recent court of appeal decision determined that employees of a subcontractor on a public works project who fabricated materials from a permanent, offsite facility were not entitled to prevailing wages.

In Sheet Metal Workers' International Association, Local 104 v. Duncan (Cal. Ct. App., Aug. 27, 2014) 14 Cal. Daily Op. Serv. 10205, the employee of a subcontractor for a public works project filed a complaint with the DIR alleging non-payment of prevailing wages for materials he fabricated for a public works project. The employee fabricated custom sheet metal materials away from the project site. The Court of Appeal determined that the employee's work was not work done in the execution of a public works contract. Neither the custom-nature of the materials nor the fact that the subcontractor did not sell fabricated materials to the general public were determinative. What was determinative was that the work was done at a permanent, offsite facility, and the location and existence of that facility was established independent of the public works project.

Previously, a materials supplier exemption for "on-hauling" materials onto public works sites was recognized for contractors who sold their supplies to the general public. This case now recognizes another exemption for contractors who do not sell their fabricated materials to the general public. Contractors and subcontractors should ensure they meet the exemption. In other words, verify that their facility is truly a permanent, offsite facility, as opposed to an off-site, temporary facility established specifically for the public works project. Subcontractors, in particular, will also want to review their contracts to ensure that the contracts do not obligate them to pay prevailing wages whether or not prevailing wage law applies.

DID YOU KNOW...

The Equal Employment Opportunity Commission (EEOC) recently released guidance concerning its enforcement of the Pregnancy Discrimination Act and the Americans with Disabilities Act. This is the first time in 23 years that the EEOC updated its guidance on these laws governing pregnant employees. The guidance may be accessed at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

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Undocumented employees can bring FEHA claims despite the use of false employment documentation that would otherwise have made them ineligible to work

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The California Supreme Court recently determined that employees who are not authorized to work in the United States may still bring claims against their former employers for violating the Fair Employment and Housing Act ("FEHA"), and may even recover damages (e.g., lost wages) against them.

In Salas v. Sierra Chemical Co., (2014) 59 Cal.4th 407 a former employee sued his employer under the FEHA for failure to provide reasonable accommodations for his physical disability, and for retaliation. During his employment, the employee suffered a couple of back injuries. The employee filed a workers' compensation claim after one of the injuries. Shortly thereafter, the employer laid the employee off as a part of a seasonal reduction of workers, and the employee sued his employer. During the litigation, the employer discovered that the employee used false identification documents, without which, the employee would not have been eligible to work. The employer argued that this "after-acquired" evidence completely barred the employee's claims. The California Supreme Court determined it did not. It concluded that FEHA's antidiscrimination provisions apply to employees regardless of their immigration status, and therefore, the employee could continue with his suit against his former employer.

This case is important for employers who unknowingly hire undocumented workers. On the one hand, employers must comply with federal work eligibility requirements, including verification of identity and work eligibility of new employees. On the other hand, California employers may not discriminate against unauthorized employees who misrepresent their work status, even though the employees were never authorized to work for the employer in the first place. Those employees may still recover lost wages for the period before the employer learned the employee was not legally eligible to work, but not for the period after the employer learned of their unauthorized work status.

DID YOU KNOW...

Beginning July 1, 2015, California employers, subject to limited exceptions, are required to provide paid sick leave to exempt and non-exempt employees. Employers are not required to allow employees to accrue more than 6 work days of sick leave, and may limit an employee's annual use of sick leave to 3 work days. Employers do not have to pay employees for accrued, unused sick leave upon separation from employment.

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U.S. Equal Employment Opportunity Commission Guidance on Pregnancy Discrimination: What Employers Need to Know

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In July of 2014, the U.S. Equal Employment Opportunity Commission ("EEOC") issued its first comprehensive guidance on pregnancy discrimination and pregnancy-related disabilities since 1983 concerning the federal Pregnancy Discrimination Act ("PDA"). The PDA prohibits discrimination on the basis of past, current and intended pregnancy. With respect to intended or future pregnancy, employers may be liable for any adverse actions taken on the basis of (1) perceived or actual reproductive risks, (2) intention to become pregnant, (3) fertility treatments, and/or (4) the use of contraceptives. Additionally, the PDA prohibits discrimination against employees based on medical conditions related to pregnancy or childbirth, including lactation, breastfeeding and abortion. The EEOC's guidance brings federal law more in line with California law.

One of the most discussed provisions in the EEOC guidance involves the EEOC's position that employers must provide reasonable accommodations to pregnant employees or those with pregnancy-related conditions. While pregnancy does not automatically constitute a disability under the ADA, the guidance requires employers to treat pregnant employees who are temporarily unable to perform the functions of their job the same as it treats other employees with similar inabilities to perform their jobs, including those with disabilities. Thus, pregnant women with work restrictions must be offered light duty if the employer offers light duty, even if light duty is typically only offered to employees recovering from job-related injuries.

Another key highlight from the EEOC guidance concerns parental bonding leave. Parental bonding leave is generally offered so that new parents can bond with or care for a new child. The guidance requires that men and women must be offered bonding leave on equal terms. Thus, if female employees are offered five weeks of parental leave, male employees must also be offered five weeks of parental leave.

Employers should review their pregnancy, discrimination, leave and disability accommodation-related policies and practices to ensure compliance with the PDA and ADA's requirements and EEOC guidance. Employers should also monitor their compensation practices and performance appraisal systems for patterns of potential discrimination based on pregnancy, childbirth or related medical condition

DID YOU KNOW...

As of January 1, 2015, California-mandated sexual harassment training must now include training and education on the prevention of bullying. (AB 2053) The training must be provided every two years for supervisory employees, or within six months of an employee assuming a supervisory position, for employers with 50 or more employees.

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Employees are always entitled to reimbursement for personal cell phone use when they are required to use personal cell phones to make work-related calls

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Employers must reimburse employees for all necessary business expenditures or losses incurred in the course of their employment. This requirement applies to employee personal cell phone use when employees must use their personal cell phones for business purposes, even when employees have unlimited minutes and do not incur any extra charge by using their personal cell phones.

In Cochran v. Schwan's Home Serv., Inc., 228 Cal. App. 4th 1137 (2014), a group of customer service managers brought a putative class action against their employer for failing to reimburse them for work-related use of personal cell phones. The trial court did not certify the class action; in part because it determined that too many questions existed concerning individual cell phone plans (unlimited or limited minutes) and payment of the cell phone bills (by the employee or by someone else). The court of appeal simplified the issue for the trial court by determining that employer-required use of personal cell phones is always required. It makes no difference whether employees incur an additional expense that they would not have incurred if they did not have to use their cell phones for work. Employers must still pay a reasonable percentage of their employees' personal cell phone bills. Another key highlight from the EEOC guidance concerns parental bonding leave. Parental bonding leave is generally offered so that new parents can bond with or care for a new child. The guidance requires that men and women must be offered bonding leave on equal terms. Thus, if female employees are offered five weeks of parental leave, male employees must also be offered five weeks of parental leave.

Nowadays, employers would be hard pressed to identify one employee who does not have a personal cell phone. As discussed in an earlier issue this year (Volume 17, Issue 4), employers may be liable for constructive discharge based on failing to reimburse employees for necessary work expenditures. Employers, therefore, should take their reimbursement obligation seriously and ensure that employees are not required, and are aware that they are not required, to use their personal cell phones for business purposes. Alternatively, where employees are required to use their personal cell phones for business purposes, employers should ensure that they receive reimbursement for the expense.

DID YOU KNOW...

The United States Supreme Court recently determined that time spent by hourly warehouse employees waiting for and participating in antitheft security screenings before they could leave work each day was not compensable under the federal Fair Labor Standards Act. See, Integrity Staffing Solutions, Inc. v. Busk, No. 13-433, 2014 WL 6885951 (Dec. 9, 2014).