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RECENT CASES PROVIDE HELPFUL REMINDERS REGARDING BEST PRACTICES (AND PITFALLS) WITH EMPLOYMENT ARBITRATION CLAUSES

Scrutiny of mandatory, pre-employment arbitration agreements continues before California state and federal courts. Several recent decisions provide helpful reminders for employers drafting, reviewing or enforcing arbitration clauses:

- *DO consider a class action waiver, but remember that Private Attorneys' General Act ("PAGA") claims are neither waivable nor subject to mandatory arbitration.* In *Franco v. Arakelian Enterprises, Inc.*, a California appellate court required a waste truck driver to arbitrate his individual wage and hour claims, dismissed his class claims, and stayed his PAGA claims until resolution of the arbitration. The court followed the California Supreme Court's lead in *Iskanian v. CLS Transportation* (*see* July 2014 FEB) that waivers are valid as to class claims but not as to PAGA claims, in which the employee acts as a representative of the state.

- *DON'T overlook the impact of designated rules; if important, DO designate person to decide issues of arbitrability*. In the absence of a specific agreement to the contrary, by default, courts decide whether claims are subject to arbitration. In *Universal Protective Service v. Superior Court*, the employer designated use of the American Arbitration Association's employment arbitration rules under which the arbitrator was responsible to determine whether the agreement permitted class-wide arbitration. Thus, the court rejected the employer's request to compel arbitration of the plaintiff's individual claims and dismiss the class claims, instead ordering the issue to arbitration for resolution.

- *DO include a savings clause and, if arbitration is a priority, DON'T override the savings clause with contrary language.* A savings clause – one that allows a court to sever from the agreement any unenforceable provision – is a smart way to preserve the enforceability of an arbitration provision. As recently shown in *Securitas Security Services USA, Inc. v. Superior Court*, however, the clause is only as effective as its drafting. There, the arbitration agreement included a savings clause, a waiver of class and representative claims (the "Waiver Provision"), and a statement that the savings clause did not apply to the Waiver Provision. The court determined it was unable to sever the unenforceable waiver of representative claims (*see* above discussion of *Franco*) from the agreement, found the entire agreement unenforceable, and permitted the employee to proceed with his claims in court.

- *DO be up front with employees about the arbitration obligation*. In *Serafin v. Balco Properties Ltd., LLC*, the employment arbitration agreement was in a two-page, stand-alone document and, as a matter of process, a Serafin HR representative would present the agreement to the employee and be available to respond to any questions. An employee's later attempt to challenge the enforceability of her arbitration agreement failed. The court found the arbitration obligation was not a surprise buried among other terms and the employer provided immediate avenues for the employee to ask questions and request a copy of the arbitration rules, so the court severed one problematic provision regarding attorneys' fees and enforced the remaining agreement.

NEWS BITES

Legally-Married Spouses, Including Same-Sex Couples, Now Enjoy FMLA Protection Regardless of Law of Residence

On February 25, 2015, the federal Department of Labor ("DOL") issued a Final Rule revising the definition of the term "Spouse" under the federal Family and Medical Leave Act ("FMLA") regulations. The FMLA affords eligible employees of covered employers with

job-protected leave, including to care for a spouse, stepchild or stepparent. Under the Final Rule, eligible employees in marriages recognized under the law where the marriage took place will be eligible for FMLA protections regardless of the law of their state of residence. According to the DOL, this rule "allows all legally married couples, whether opposite-sex or same-sex, or married under common law, to have consistent federal family leave rights regardless of where they live."

WA Industrial Insurance Applied to Independent Contractors Who Provided Own Specialized Equipment

In *B&R Sales v. Labor & Industries*, a Washington appellate court affirmed the Board of Industrial Insurance Appeals' decision that the at-issue independent contractors were "workers" for purposes of industrial insurance. Washington law requires companies to provide industrial insurance to their "workers." Whether or not an independent contractor is a "worker" depends on the "essence" or "primary object" of the contract. Where "the contracting party's primary object is to obtain the personal labor of a skilled contractor, the contractor is a worker . . . even if the contractor must use specialized equipment" in providing the labor. In *B&R Sales,* although the independent contractors provided their own specialized equipment valued at $7,000-$20,000 and customized vans to perform the services, the court found the primary object of the contract to be their "learned skills and experience" in installing floor coverings. The court observed that the "tools were merely ancillary to the contractors' performance of their skilled, personal labor."

Court Preliminarily Approves $415M Settlement of High-Tech No-Poaching Lawsuit

A California federal district court has preliminarily approved settlement of a class action by high-tech workers who claimed several major technology companies unlawfully agreed not to poach each other's employees, thereby reducing employee mobility and suppressing compensation. In May 2014, the plaintiffs settled with three prominent high-tech companies for about $20 million. In August, the court rejected a proposed settlement between plaintiffs and four high-tech heavy-weights for $324.5 million, comparing class members' proportional share to the prior settlement agreement and finding it below the range of reasonableness. In preliminarily approving the $415 million settlement, the court observed that it "appear[ed] to be the result of arm's-length negotiations among experienced counsel" and the settlement amount was "substantial, particularly in light of the risk that the jury could find no liability or award no damages." The court ordered that the class be notified and set a final approval hearing for July 9, 2015.

Office of General Counsel of NLRB Issues Further Memorandum on Employer Policies

Earlier this month, the Office of the General Counsel ("OGC") of the National Labor Relations Board (the "Board") issued a thirty-page position statement regarding employer policies and compliance with the National Labor Relations Act (the "Act"). The memorandum underscores the Board's and the OGC's continued policing of even non-unionized employers' policies. In his opening comments, the General Counsel observed, "Although I believe that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the [Act], the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act."

This is consistent with OGC and Board scrutiny of policies over the last several years, even in the absence of an unfair labor practice charge. As with prior memoranda on the issue, the memorandum provides insight into the OGC's positions on employer policies and their potential to chill concerted activity regarding employees' terms and conditions of employment. Among other things, the memorandum reviews what the OGG considers lawful and unlawful versions of confidentiality, professionalism, anti-harassment, trademark, photograph/recording, and media contact policies.

The OGC's memorandum serves as a reminder that all employers must be careful that their policies do not overreach and potentially chill activity protected by the Act. Periodic review of handbooks and stand-alone policies by counsel knowledgeable in this area is an important step to ensure compliance.

Tacoma Employers Must Provide Paid Leave Starting February 2016

The City of Tacoma recently passed an ordinance requiring employers to provide employees paid leave for absences due to the employee's own illness or injury or to care for a family member, among other specified reasons. The ordinance requires that each Tacoma employer (of one or more employees) provide its employees with one hour of paid leave for every forty hours worked in Tacoma, up to a total of twenty-four hours. Consequences for violating the ordinance may include payment of the amount of paid leave due plus interest and a $250 (or more) civil penalty. The ordinance takes effect February 1, 2016.

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