Fenwick Employment Brief

June 17, 2014

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NO LIABILITY FOR OFF-THE-CLOCK WORK ABSENT EMPLOYER KNOWLEDGE

A California appeals court refused to hold Kaiser Foundation Health Plan liable for alleged off-the-clock overtime about which it lacked knowledge. In *Jong v. Kaiser Foundation Health Plan, Inc.*, Jong, together with two other Outpatient Pharmacy Managers ("OPMs"), filed a class action lawsuit against Kaiser seeking unpaid overtime. Jong worked as an OPM from 2005 to 2010. In 2009, Kaiser reclassified its OPMs as non-exempt as part of a settlement of a prior lawsuit alleging it had improperly classified OPMs as exempt. Jong asserted that, both prior to the reclassification and thereafter, there was no change in his duties and OPMs were still required to work 50 hours per week to meet Kaiser's expectation. At the same time, Kaiser held OPMs accountable for hitting budget targets, and Jong had been disciplined for going over budget, at least in part due to overtime he had reported and for which he was paid. According to Jong, he was forced to either meet his employer's "lofty expectations" without reporting the overtime, or report the overtime and face discipline for running over budget. In this context, Jong claims that Kaiser knew or should have known of the off-the-clock hours and was liable for the unreported overtime.

Both the trial court and the court of appeal disagreed, citing key admissions from Jong's testimony. Jong acknowledged that he knew of Kaiser's policies to pay employees for all hours worked, including overtime regardless of whether prior approval had been obtained. Jong further knew Kaiser's timekeeping rules, including the requirement that OPMs be on-the-clock whenever working, and how to use its tracking system. He further admitted that he had been told he was eligible to work overtime hours, was never denied a request to work overtime, had always been paid for all hours reported, and was never told to work before clocking in or after clocking out.

As evidence of Kaiser's knowledge, Jong cited a 2010 email exchange in which a Kaiser executive alluded to concerns about potential violation of the company's policy on off-the-clock work. However, a subsequent email to area pharmacy directors addressed this concern, instructing directors to tell staff "that working off the clock is unacceptable" and directing them to require OPMs to sign an attestation acknowledging that "working off the clock is a violation of policy and may subject them to discipline." Jong later signed that attestation.

As a result, the courts concluded that none of the evidence established that Kaiser was aware that Jong had worked off the clock, and they dismissed Jong's claims. In contrast, two other OPMs, who offered evidence of conversations with their directors reflecting the off-the-clock work, were allowed to proceed on their claims.

Kaiser's victory as to Jong's claims is attributable, in significant part, to its diligent work to communicate, enforce, and adhere to its off-the-clock and overtime pay policies. Employers with non-exempt workforces should similarly maintain and adhere to wage and hour policies and take affirmative steps to address any concerns that may arise regarding potential non-compliance.

$15M JUDGMENT REVERSED DUE TO FLAWED STATISTICAL SAMPLING APPROACH TO CLASS ACTION

In a significant victory for California employers, the California Supreme Court threw out a $15 million judgment in favor of allegedly misclassified employees. In *Duran v. U.S. Bank National Association*, a putative class of business banking officers sued U.S. Bank for unpaid overtime, claiming they had been improperly classified as outside salespersons. That exemption applies to employees who spend at least 50% of their time on offsite sales activities. Over U.S. Bank's objection, the trial court certified the class and proceeded to trial using statistical evidence based on 21 employees — 19 randomly selected employees and the 2 class representatives. On appeal, a unanimous

supreme court rejected the established approach and reversed the $15 million judgment for the class. Employers can take away several key lessons from the decision:

- Statistical sampling is not an easy shortcut to determine liability and damages for a group. The trial plan aimed to extrapolate liability and damages for 260 current and former employees using a "random" sampling of twenty employees plus the two class representatives. The selection, however, was not truly random where it included both class representatives, two class members initially in the random sample bowed out at plaintiffs' counsel encouragement, and a third randomly-selected class member did not show for trial. Further, the ultimate award relied on plaintiffs' expert's determination that class members worked an average of 11.87 hours of overtime per week, subject to a 43% margin of error. The Court found the approach "profoundly flawed" as the sample was biased in plaintiffs' favor, was too small to produce reliable information, and had too large an error margin.
- Employers have due process rights to defend their cases, and statistical sampling cannot be used to bypass individualized issues. Under the trial plan, U.S. Bank was not permitted to present evidence that plaintiffs outside the sample group were properly classified as exempt — a key defense to liability. The Court held that class certification is improper when the trial plan cannot "fairly and efficiently" allow employers to pursue their affirmative defenses. Trial management plans cannot deny a party its substantive rights.
- Courts must consider use of statistical evidence and trial plans before certifying a class. The parties must evaluate — early on — case manageability and the role of statistical evidence in the trial management plan. Such issues must be addressed prior to class certification, and a court must be prepared to deny certification if a trial plan cannot be crafted in a way that preserves a defendant's due process rights and to de-certify a class if the issues prove unmanageable on a class basis.

The *Duran* decision did not abandon use of statistical evidence in managing class action lawsuits, but recognized that certain limitations exist on its usefulness. The court's emphasis on due process restrictions on use of statistical evidence in class actions is welcome news for California employers, and represents a significant tool in defending against and managing such actions.

NEWS BITES

Reminder: California Minimum Wage and Minimum Exempt Salary Increase July 1, 2014

Effective July 1, 2014, California's minimum wage will increase from $8 to $9. This hike will affect not only non-exempt, hourly workers, but also workers in various exempt positions that are subject to minimum salary requirements calculated based on the minimum wage. For example, in addition to meeting other requirements, employees in white collar exemptions (i.e., executive, administrative, and professional) must earn at least $3,120 per month ($37,440 per year) and commissioned, inside salespeople must earn at least $13.50 per hour to be exempt from overtime.

Employers should promptly ensure they are paying the appropriate rate to hourly employees and conduct an audit of compensation for salaried employees to ensure compliance with the law.

NYC Pregnancy Accommodation Law in Effect, including Written Notice to New and Existing Employees

In September 2013, the New York City Council amended the New York Human Rights Law to expand accommodation protections for employees based on pregnancy, childbirth and related medical conditions. Effective January 1, 2014, it became unlawful in NYC for an employer with four or more employees to refuse an employee's reasonable request for accommodation due to a medical condition related to pregnancy or childbirth, even if the condition does not qualify as a disability. The law also imposes certain notice requirements: covered employers were required to provide notice to new employees starting January 1, 2014 and to existing employees *no later than May 30, 2014*. The law also encourages employers to post written notice in a conspicuous area accessible to all employees although such posting does not meet the forgoing notice requirements. The NYC Commission on Human Rights has published posters in several

languages to help employers comply with these requirement.

Mixed Bag on Arbitration Agreements – Enforceability Questions May Be Delegated to Arbitrator, but Agreements Still Subject to Scrutiny

A U.S. Supreme Court order and California appellate court decision highlight the continued attention to, and evolving area of the law on, enforceability of arbitration agreements.

The U.S. Supreme Court denied an employer's *certiorari* petition to review the California Supreme Court's decision in *Sonic-Calabasas A, Inc. v. Moreno* (reported in the March 2011 FEB). California employers were hopeful that the Court would take the opportunity to confirm that the Federal Arbitration Act preempts limitations California courts have imposed on mandatory, pre-dispute arbitration agreements. Absent such intervention, employers should anticipate that courts will continue to scrutinize — and employers should ensure compliance with court-imposed restrictions on — such agreements.

In *Tiri v. Lucky Chances, Inc.*, a California appellate court required the plaintiff to submit to arbitration her challenges about the enforceability of the arbitration agreement. The plaintiff claimed that the arbitration agreement, including the clause delegating to the arbitrator disputes about enforceability of the agreement, was unconscionable and unenforceable. On appeal, the court found that the delegation clause, requiring arbitration of all disputes about the interpretation, applicability, enforceability or formation of the agreement "including, but not limited to, any claim that all or part of this [agreement] is void or voidable," to be clear and unmistakable. It further determined that the delegation clause was neither "overly harsh" nor did it "sanction one-sided results" and any *per se* rule to the contrary would violate *AT&T Mobility* (Fenwick's April 28, 2011 Litigation Alert). This case serves as a good reminder to employers to periodically revisit arbitration provisions to ensure they take full advantage of the ever-evolving law in this area.

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