Fenwick Employment Brief

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FLURRY OF NEW CALIFORNIA EMPLOYMENT STATUTES CONTINUES

The California Legislature passed and Governor Brown approved the following new statutes impacting California employment law that shortly take effect in 2014.

Employment Discrimination – FEHA amendment prohibits discrimination on account of military or veteran status

The California Fair Employment and Housing Act ("FEHA") prohibits discrimination against employees on account of race, religion, gender and other protected categories. AB 566 amended FEHA to add "military and veteran status" as additional protected categories. Existing federal and state laws protect employees in military service and veterans from discrimination; now, FEHA protection and remedies will be available to such employees. Employers are, however, permitted to inquire about military or veteran status for the purpose of awarding a veteran's preference where such preferences are allowed by law.

Leaves of Absences

- Time off and reasonable accommodations must be afforded to victims of stalking (in addition to existing protections for victims of domestic violence and sexual assault)

Existing law protects employees who are victims of domestic violence or sexual assault from discrimination or retaliation for taking time off to appear in court or to obtain legal relief to ensure their health, safety or welfare. SB 400 extends such protections to victims of stalking. In addition, employers must provide reasonable accommodations to victims of stalking that would increase the safety of the victim while at work, such as implementing additional safety measures (for example, a transfer, reassignment, modified schedule, changed work telephone and work station, and the like).

- Required time off (and other reasonable accommodations) that must be afforded to victims now applicable to an expanded list of crimes

The current law prohibits discrimination or retaliation against an employee who is a victim of a felony crime and who takes time off to attend judicial proceedings related to that crime. AB 288 expands the list of covered crimes including victims of a crime involving driving under the influence and crimes involving violence (not limited to crimes charged as a felony). In addition, the protection to attend judicial proceedings has been expanded to cover delinquency proceedings, sentencing, post-conviction release hearings, and the like.

- Time off for volunteer fire and law enforcement training expanded to cover emergency rescue training

Presently, employers who employ 50 or more employees must allow an employee who is a volunteer firefighter to take a leave of absence of up to 14 days for firefighting training. AB 11 expands this leave of absence right to reserve peace officers and emergency rescue personnel to attend law enforcement and emergency rescue training.

CALIFORNIA COURTS CONTINUE TO RULE IN FAVOR OF ARBITRATION

California Supreme Court reverses rule that first required administrative hearing by state Labor Commissioner before permitting arbitration of wage and hour claims

In 2011, the California Supreme Court in *Sonic-Calibasas A, Inc. v. Moreno* refused to enforce an arbitration agreement where an employee had filed a wage and hour claim with the state Labor Commissioner, and required the employer to first participate in the administrative hearing with the Labor Commissioner before allowing arbitration of the claim. If the employer was dissatisfied with the results of the administrative hearing (referred to as a "Berman

hearing"), then the employer would be permitted to appeal the determination to an arbitrator who would issue a final determination. The court held that the public policy in favor of administrative Berman hearings was not preempted by the federal Arbitration Act ("FAA").

On appeal, the U.S. Supreme Court ordered the California Supreme Court to reconsider its decision. On remand, the California Supreme Court reversed course, and ruled that a court may not force the employer to first participate in the administrative action and permitted the arbitrator to decide the matter in the first instance. The court concluded that such a court-imposed delay of arbitration was contrary to, and preempted by the FAA.

However, the California Supreme Court also remanded the matter to the lower court to consider whether the arbitration agreement at issue was unconscionable and unenforceable, i.e., whether the arbitration agreement at issue imposed costs and risks on the wage claimant that would make the resolution of the wage dispute inaccessible and unaffordable. In making the determination of unconscionability, the issue for the court is not whether the arbitration agreement was a "bad deal" for the employee, but rather whether the agreement was so "unreasonably one-sided" as to render the provision legally unenforceable, for instance, an arbitration agreement that effectively deprives wage claimants of an accessible and affordable dispute-resolution mechanism.

Carefully crafted employment arbitration provisions that require the employer to bear the costs unique to the arbitral forum and call for a speedy and fair hearing by a neutral arbitrator should satisfy this legal standard and avoid an unconscionability challenge.

Federal Appeals Court in California strikes down rule that prohibited arbitration of injunctive-relief claims that affect the public interest

In a non-employment case, the federal Ninth Circuit Court of Appeals (which covers California) in *Ferguson v. Corinthian Colleges, Inc.* re-considered the so-called "Broughton-Cruz" rule that claims for injunctive relief under California's unfair competition law were exempt from arbitration because the claims sought "public injunctive relief." Ferguson on behalf of a class of college students sued the college over alleged misrepresentations about the quality and cost of the education and career prospects of graduates. They sought, among other remedies, injunctive relief to prevent further violations of California's unfair competition and false advertising laws.

In *Broughton v. Cigna Health Plans* and a second case *Cruz v. PacifiCare Health Systems*, the California Supreme Court had previously held that arbitration agreements could not prohibit court claims, on behalf of the general public, to obtain injunctive relief against deceptive practices. The Ninth Circuit adopted this reasoning in *Davis v. O'Melveny & Myers*, allowing employees to pursue court action for injunctive relief under the unfair competition laws.

Reversing its ruling in *Davis*, and rejecting the Broughton-Cruz rule, the court held that the Broughton-Cruz rule was preempted by the federal Arbitration Act ("FAA"), and that claims for public injunctive relief for alleged violations of the California unfair competition laws must also be resolved through arbitration. Since the arbitration agreement between the college and its students covered "all claims … arising from my enrollment," and did not exclude claims for injunctive relief, the court directed arbitration of the entire action including the students' claims for public injunctive relief.

In *Iskanian v. CLS Transportation Los Angeles, LLC*, pending before the California Supreme Court, the court is scheduled to decide whether the Private Attorney General Act ("PAGA") claims and claims for violation of the unfair competition laws are exempt from arbitration under the Broughton-Cruz rule. The *Ferguson* court's conclusion that the FAA preempts the Broughton-Cruz rule, while not binding on the California court, may nonetheless be persuasive to convince the California court to also abandon the Broughton-Cruz rule. If so, then the California court in *Iskanian* may decide to compel arbitration of PAGA and unfair competition claims that are commonly alleged in employment wage and hour cases.

NEWS BITES

Company not required to reinstate temporary employee after FMLA leave of absence where temp agency did not request that employee be reinstated

In *Cuellar v. Keppel Amfels LLC*, the Fifth Circuit Court of Appeals addressed the relatively novel issue of whether a company has an obligation to reinstate a temporary employee returning from FMLA-covered leave. Jessica Cuellar was assigned by a staffing agency Perma-Temp (the "primary employer") to work at Keppel (the "secondary employer") in Texas. Cuellar went on a maternity leave, and Perma-Temp assigned another temporary employee to work at Keppel. After having her baby, Cuellar sought reinstatement at Keppel. Perma-Temp did not request Keppel to reinstate Cuellar and Keppel continued to use the services of the temporary employee who replaced Cuellar. Accordingly, Keppel denied Cuellar's request for reinstatement and she sued Keppel for violation of the FMLA. Dismissing the lawsuit, the court explained that Perma-Temp was the primary employer, and only the primary employer is responsible for providing FMLA leave to a temporary employee like Cuellar and restoring her to the job. A secondary employer like Keppel is only responsible for accepting a temporary employee back from FMLA leave if: 1) Keppel continued to use the services of a temporary employee from the temporary agency; and 2) the temporary agency chooses to place the employee returning from leave with the secondary employer. Here, Perma-Temp did not request Keppel to reinstate Cuellar. Accordingly, Keppel had no obligation under the FMLA to reinstate Cuellar from her FMLA leave.

Company allowed to pursue suit against former employee for unfair competition despite absence of trade-secret violation

In *Angelica Textile Services, Inc. v. Park*, a California court of appeal considered the issue whether Angelica's common-law claims for breach of contract, unfair competition, and interference with business relations would be allowed to proceed against a former employee despite the absence of any trade-secret violation. Angelica operated a large-scale laundry business serving hospitals and other health care facilities. While employed and in preparation for starting his new competing business, Park disparaged Angelica to Angelica's bank, and he negotiated contracts with Angelica's customers that included early cancellation rights that were not customary in the industry. As a result, when Park started his new competing businesses, these customers were able to cancel their contracts with Angelica and immediately transfer their business to Park. There were admittedly no trade secrets at issue, and Park convinced the lower court to dismiss the breach of contract and other claims on the ground that the claims were displaced by the Uniform Trade Secrets Act ("UTSA") such that a violation of trade secrets was an essential element for a UTSA claim. Reversing, the court held that the common-law claims were not displaced by the statutory claim for violation of the UTSA, and that Park's alleged misconduct during his employment was independent of and not predicated on any violation of Angelica's trade secrets.

Returning military reservist allowed to invoke USERRA "escalator principle" for failure to reinstate into higher-level job

The federal First Circuit Court of Appeals in *Rivera-Melendez v. Pfizer* considered a returning veteran's claim that Pfizer violated the "escalator principle" that is a unique element of the federal Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Unlike other forms of leave that require reinstatement after the leave into the same or comparable position, the USERRA escalator principle requires reinstatement of an employee returning from military service into the position s/he would have been employed if his/her continuous employment had not been interrupted by military service. Rivera-Melendez, a navy reservist, was employed by Pfizer when he was called to active service and served a year in Iraq. Upon his return, Pfizer reinstated him in an "API Service Coordinator" position, comparable to the position he held before his military service. In his lawsuit, he alleged that under the escalator principle, he should have been reinstated into a higher-level "API Group Leader" position. Rivera-Melendez asserted that Pfizer would have promoted him into the Leader position had his employment not been interrupted by military service. The lower court dismissed the suit on the ground that the escalator principle only applied to promotions that were "automatic," and that a promotion to Leader was "discretionary" on the part of Pfizer management.

Rejecting the lower court's "automatic" versus "discretionary" dichotomy, the court held that the proper inquiry was not whether a promotion was automatic, but "whether it was reasonably certain that the returning servicemember would have attained the higher position but for his absence due to military service" and that a jury must decide this issue. Interestingly, the court also observed that the "escalator" does not run in only one direction, i.e., depending on the circumstances, the escalator may cause an employee to be reemployed in a lower position, or even laid off or terminated if the employee would have been laid off or terminated had the employment not been interrupted by military service.

Employee's criminal conviction affirmed for denying employer's access to its computer network

A California court of appeal affirmed a criminal conviction of a former employee in *The People v. Childs* arising out of the employee denying his employer's access to its own computer systems. Terry Childs worked as a network engineer for the City of San Francisco. As part of the City's integration of its law enforcement database with state and federal databases, City network employees had to pass a criminal background check in order to have continued access to these law enforcement databases. Childs' background check revealed a felony conviction which he had not disclosed in his employment application. Rather than immediately discharge Childs, the City notified Childs that he would be reassigned to work that would not involve access to law enforcement databases. Childs was asked to give the City access to the databases. Childs refused. City employees and networks consultants began an intensive but unsuccessful effort to regain control of the City's network. Childs was placed on unpaid leave and arrested. After his arrest, Childs disclosed the passwords and information necessary for City officials to recover control of its network. Costs incurred by the City to regain control amounted to about $1.4 million. Childs was charged and convicted of violations of the Section 502 of the California Penal Code, which is the California state analog of the federal Computer Fraud and Abuse Act. In defense, he argued that the law only applied to external hackers and not to an employee who, at the time, had authorized access to the employer's network. Rejecting the argument, the court explained that the statute prohibited not only external hacking but also a "malicious employee's victimization of an employer" by "maliciously tamper[ing] with a company's database." As a result, Childs' conviction was affirmed. He was sentenced to four years in state prison and ordered to pay more than $1.4 million in restitution.

Yelp sued by volunteer writers for alleged misclassification and unpaid wages

In *Panzer v. Yelp*, plaintiffs filed a lawsuit in the U.S. District Court for the Central District of California alleging they should be compensated for their work as writers and editors of online reviews on Yelp, and that they were improperly classified as volunteers. Plaintiffs, on behalf of themselves and a class purporting to number thousands of other volunteer contributors, allege that Yelp controlled the quality and quantity of their work, and that their work (developing content for the Yelp website) was integral to Yelp's business operating a website containing reviews of businesses such as restaurants and the like. Volunteers were rewarded with recognition such as "Reviewer of the Day," titles such as "Duke/Duchess" and "King/Queen," and membership in an "Elite Squad." However, plaintiffs allege that they were entitled to minimum wage and overtime pay under the federal Fair Labor Standards Act.

Massachusetts employee did not violate non-solicitation provision by posting new contact information on LinkedIn

In *KNF&T Staffing v. Muller*, a staffing agency in Boston sought injunctive relief against a former employee over alleged violation of a noncompetition agreement (such agreements are enforceable in Massachusetts, unlike in California). In rejecting the employer's request for relief, the court concluded that the company's evidence that Charlotte Muller had violated the agreement was "somewhere between very weak and nonexistent." The court noted that Muller's updating of her LinkedIn profile to disclose her new employer, job title, and contact information was not "solicitation" of KNF&T's customers as to violate her noncompetition agreement.

U.S. Senate passes the Employment Non-Discrimination Act; House passage is uncertain

The U.S. Senate passed the Employment Non-Discrimination Act ("ENDA"). Like Title VII of the Civil Rights Act, ENDA applies to employers with 15 or more employees, and prohibits discrimination against employees on the basis of sexual orientation or gender identity. California's Fair Employment and Housing Act already includes a prohibition against sexual orientation and gender identity discrimination. However, the fate of ENDA in the House of Representatives is uncertain.

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