Fenwick Employment Brief

May 11, 2012

Michael A. Sands 650.335.7279
Dan Ko Obuhanych 650.335.7887

Fenwick
FENWICK & WEST LLP

ATTORNEY FEES NOT RECOVERABLE FOR PREVAILING PARTY IN MEAL AND REST PERIOD CASES

In *Kirby v. Immoos Fire Protection, Inc.*, the California Supreme Court determined that a party prevailing on a claim of failure to provide rest periods in violation of Labor Code § 226.7 is not entitled to attorney fees under the attorney fee-shifting wage statutes.

The plaintiffs in *Kirby* alleged that their employer, Immoos Fire Protection, violated various labor laws and the unfair competition law by (among other things) failing to provide rest breaks in accordance with Labor Code § 226.7 and in addition, alleged that various builders unlawfully entered into contracts with Immoos knowing that the contracts did not provide sufficient funds for Immoos to meet its obligations under the California wage laws. After settling with the builder defendants, plaintiffs dismissed all claims against all parties with prejudice. Immoos then moved for attorneys' fees under Labor Code § 218.5, arguing that it prevailed in an "action brought for the nonpayment of wages" because it prevailed on the rest period claims. The trial court ordered plaintiffs to pay $49,846 in attorneys' fees to Immoos, and the Court of Appeal affirmed the award of fees. The California Supreme Court granted review to determine whether attorneys' fees can be awarded to a party that prevails in a cause of action for failure to provide rest periods under Labor Code § 226.7.

The primary issue in dispute was whether a claim for failure to provide rest periods was an action covered by either of the fee-shifting wage statutes, Labor Code §§ 218.5 and 1194. Labor Code § 218.5 contains a two-way attorneys' fees shifting provision for the prevailing party (meaning either the employee-plaintiff or the defendant-employer can recover), while Labor Code § 1194 provides a one-way shifting of fees to only employees who prevail in claims for unpaid minimum wages and overtime.

The court first dismissed plaintiffs' argument that Section 1194 exclusively governs rest period claims, and therefore only plaintiffs are allowed to recover attorneys' fees. The court held that Section 1194 applies to claims for unpaid minimum wages and unpaid overtime, and nothing else. Therefore, employees who prevail on a claim for missed rest (or meal) periods under Labor Code § 226.7 are not entitled to recover attorneys' fees.

The court further determined that a claim for missed rest periods does not amount to an "action brought for the nonpayment of wages" for purposes of the two-way fee shifting statute, Section 218.5. The court found that the legislature intended that Section 226.7 was to be governed by the "American rule" that each side must pay their own attorneys' fees. Accordingly, the court reversed the Court of Appeal and denied Immoos recovery of its attorneys' fees.

While the employer in *Kirby* was denied its right to recover attorneys' fees, the *Kirby* holding should still come as very welcome news to California employers: The ability to recover a large mandatory attorneys' fees award – which may exceed even the recovery by a claimant on the underlying claims – is a significant incentive for employees to pursue litigation. Without this incentive, plaintiffs and plaintiffs' attorneys may be less inclined to pursue meal and rest period claims. However, the best way for employers to prevent unnecessary claims remains to be vigilant in ensuring that they are in full compliance with their obligations under the wage and hour laws.

EEOC PROVIDES GUIDANCE REGARDING USE OF CRIMINAL HISTORY IN EMPLOYMENT DECISIONS

On April 25, 2012, the U.S. Equal Employment Opportunity Commission published its guidance on the use of arrest and conviction records in employment-related decisions. While Title VII does not specifically prohibit discrimination on the basis of an individual's criminal background, courts have long held that employment decisions based upon arrest and court records that have a disparate impact on individuals' protected characteristics (e.g., race, color, religion, sex, national origin, etc.) are unlawful under Title VII.

Under established case law, employers seeking to make a decision based on an individual's criminal conviction should establish that the exclusion of an

applicant or employee due to a criminal conviction was job-related and consistent with business necessity, taking into account the following factors: (1) the nature and gravity of the offense or conduct; (2) the time period elapsed since the offense was committed and/or completion of the sentence; and (3) the nature of the job held or sought.

The EEOC publication embraces this recognized standard, but also provides further guidance and recommendations designed to help employers comply with Title VII:

- *Employers may consider convictions but not arrests*. Employers should never consider arrests because an arrest is not evidence that criminal conduct has occurred. However, while an employer cannot make a decision based on the mere fact that an arrest occurred, it certainly can (and should) investigate whether the conduct underlying the arrest justifies an adverse action. The EEOC guidance emphasizes that the underlying conduct, and not the arrest itself, is potentially relevant for employment purposes.

- *Employers should develop a "targeted screen."* Targeted screens – *i.e.*, those that consider the nature of the crime, the time elapsed, and the nature of the job – are more likely to meet the "job-related and consistent with business necessity" test, whereas blanket inquiries (e.g., "have you ever been convicted of a crime?") are more likely to be problematic.

- *Employers should not ask about criminal convictions on job applications*. Instead, employers should inquire into criminal records only after the employer is knowledgeable about the applicant's qualification and experience. If employers do ask about convictions on job applications, the inquiries should be limited to convictions that are job-related and consistent with business necessity.

- *Employers should perform an "individualized assessment."* An individualized assessment would consist of notice to the individual that he or she has been screened out because of a criminal conviction, providing the individual an opportunity to explain and present information to show why he or she should not be excluded, and consideration by the employer of the explanation and information presented by the individual. Evidence that may be considered by employer as part of this assessment includes: the circumstances surrounding the offense, the number of offenses for which the individual was convicted, the age of the individual at the time of conviction or release, evidence that the individual performed the same type of work for the same or another employer without incident, the length and consistency of employment history before and after the offense, rehabilitation efforts, employment or character references and whether the individual is bonded under a government bonding program.

In light of this new guidance, employers that currently utilize criminal background checks as part of the employment screening process should thoroughly examine their policies and procedures. At very least, employers should not categorically screen out applicants or employees based on criminal convictions, but rather should perform an individualized assessment that includes discussing the conviction with the individual. (Employers should also note that state laws often contain additional requirements regarding criminal background checks that must also be complied with.)

NEWS BITES

Court Enjoins Enforcement Of NLRB Posting Requirement

Adding to the confusion surrounding the controversial requirement of the National Labor Relations Board that employers post notices informing employees of their rights under the National Labor Relations Act (reported in our January 2012 FEB), the Court of Appeals for the District of Columbia issued an emergency injunction blocking enforcement of the rule. The injunction will remain in place pending an appeal of a federal district court ruling that upheld the rule in part. This action

followed a South Carolina federal district court ruling that invalidated the NLRB notice posting requirement. The rule was to have gone into effect April 30, but is now in limbo pending further court action. Stay tuned for more information.

Court Enforces Employment Arbitration Agreement That Contains Class Action Waiver

Following the guidance set forth by the United States Supreme Court in *AT&T Mobility v. Concepcion* (discussed in our April 28, 2011 Litigation Alert) and finding the NLRB's decision in *D.R. Horton and Michael Cuda* (discussed in our February 2012 FEB) unpersuasive, a United States District Court in the Northern District of California determined that a mandatory arbitration agreement entered into as part of an employment agreement must be enforced according to its terms despite the existence of a class action waiver provision.

The decision in *Jasso v. Money Mart Express, Inc.* is in line with other federal district court decisions (discussed in the February 2012 FEB) that have also declined to follow the holding of the NLRB's *D.R. Horton* decision and instead have applied the principles of *Concepcion* to enforce arbitration agreements despite the class action waiver provisions.

Party May Not Be Compelled To Arbitrate Class Claims Where Arbitration Agreement Silent On Class Arbitration

Finding that a party "may not be compelled . . . to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so," a California Court of Appeal held that an employer could not be required to submit to arbitrate the plaintiff's class claims where the arbitration agreement at issue neither authorized nor prohibited class arbitration.

The plaintiff in *Kinecta Alternative Financial Solutions, Inc. v. Malone* brought both individual and class claims against her employer for various wage and hour violations. The employer moved to compel arbitration of the individual claims and dismiss the class claims from the arbitration, on the grounds that the arbitration agreement at issue did not contemplate arbitration of class claims. The California Court of Appeal agreed, and held that the employer was only obligated to arbitrate the individual claims for relief and not the class claims.

Maryland Prohibits Employers From Requesting Disclosure Of Personal User Names and Passwords

On May 2, Maryland became the first state in the country to enact legislation that prohibits employers from asking employee or job applicants to disclose user names, passwords or other login data for personal electronic accounts, including social media accounts. The law was enacted in response to an incident in which a former Maryland corrections officer was asked by a supervisor to disclose his Facebook log in information.

While similar legislation has not yet been enacted in other states, asking employees or applicants to provide access information to personal accounts may be in violation of state privacy laws.

Multiemployer "No Poaching Agreements" Spawn Civil Antitrust Claims

Following the settlement between the Department of Justice and seven prominent high tech companies regarding the companies' conduct in agreeing not to cold call employees of the other companies – which the DOJ concluded was "anticompetitive" and *per se* unlawful – a class of software engineers filed a civil lawsuit against the same companies for alleged antitrust violations. The employers claimed that the plaintiffs could not establish facts evidencing an antitrust violation – *i.e.*, a conspiracy to suppress wages – and moved to dismiss the claims. However, the court determined that the plaintiff alleged sufficient facts to support their claims. Thus the antitrust claims survived dismissal and the case continues.

Follow us on Twitter at: http://twitter.com/FenwickEmpLaw