Fenwick Employment Brief

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CALIFORNIA APPELLATE COURT COMPELS ARBITRATION AND CLASS ACTION WAIVER, FOLLOWING *CONCEPCION* AND EXPRESSLY REJECTING *D.R. HORTON*

In a significant victory for California employers, a California Court of Appeal recently upheld a ruling that compelled arbitration of an employee's wage and hour claims and dismissed his class and representative claims. In *Iskanian v. CLS Transportation Los Angeles, LLC*, plaintiff Archavir Iskanian, a former CLS truck driver, sued CLS for various wage and hour violations, including failure to pay overtime and provide rest and meal breaks, alleging individual and putative class claims. CLS moved to compel arbitration of the individual claims and to dismiss the class and representative claims consistent with the agreement he signed at the inception of employment, which provided that "any and all claims" arising out of his employment would be subject to mandatory, binding arbitration and that expressly waived each party's right to bring representative and class claims. The trial court granted the motion, and Iskanian appealed. Shortly thereafter, the California Supreme Court issued its decision in *Gentry v. Superior Court* (September 2007 FEB), which held that certain class action waivers in arbitration agreements should not be enforced if class arbitration would more effectively vindicate employee rights. Accordingly, the appellate court directed the trial court to reconsider its ruling in light of *Gentry*. On remand, CLS withdrew its motion, and the lawsuit proceeded. Iskanian amended his complaint to add representative Private Attorney General Act ("PAGA") claims and certified his other claims for class treatment.

Shortly after the U.S. Supreme Court issued its decision in *AT&T Mobility v. Concepcion* (Fenwick's April 28, 2011 Litigation Alert) – in which the Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA" – CLS renewed its motion and the trial court granted it. On appeal by Iskanian, the court dealt three major blows to prior challenges to class action waivers in employment arbitration agreements.

First, the court recognized that "the *Concepcion* decision conclusively invalidates the *Gentry* test." A plaintiff who successfully meets the *Gentry* test would proceed to class arbitration, with the procedure imposed on a party that never agreed to it – a concept "thoroughly rejected" by *Concepcion* as inconsistent with the FAA. Further, as recognized by *Concepcion*, "'[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.' The sound policy reasons identified in *Gentry* for invalidating certain class waivers are insufficient to trump the far-reaching effect of the FAA, as expressed in *Concepcion*."

Second, the court rejected Iskanian's attempt to invoke the recent decision of the National Labor Relations Board ("NLRB") in *D.R. Horton* (February 2012 FEB) that found class action waivers in arbitration agreements violate the National Labor Relations Act. Refusing to give any deference to the decision, the court observed that "the FAA is not a statute the NLRB is charged with interpreting." It then followed *CompuCredit Corporation v. Greenwood*, in which the U.S. Supreme Court held that "unless the FAA's mandate has been 'overridden by a contrary congressional command,' agreements to arbitrate must be enforced according to their terms . . . ." Because *D.R. Horton* failed to identify such a congressional command, it did "not withstand scrutiny in light of *Concepcion* and *CompuCredit*."

Third, the court rejected Iskanian's claim that his representative Private Attorney General Act claims were inarbitrable. Expressly departing from a prior California appellate decision (August 2011 FEB), the court held that "the public policy reasons underpinning PAGA do not allow a court to disregard a binding arbitration agreement. The FAA preempts any attempt by a court or state legislature to insulate a particular type of claim from arbitration."

This decision represents a significant pro-employer arbitration and class action ruling, at least for now. It also creates a split among California appellate courts on the enforceability of waivers of PAGA representative claims, such that future California Supreme Court review is likely. Thus, employers should carefully consider the potential benefits and pitfalls of such waivers, with the guidance of seasoned legal counsel, before implementing class or representative action waivers.

NLRB ISSUES LATEST MEMORANDUM ON SOCIAL MEDIA POLICIES

On May 30, 2012, the National Labor Relations Board's Office of General Counsel issued its third guidance memorandum on social media and the workplace, this time specifically focusing on employer policy language. By way of background, an employer's social media policy may violate Section 8(a)(1) of the National Labor Relations Act ("NLRA") if it would reasonably tend to chill an employee's exercise of Section 7 rights. This concept applies to even nonunionized workforces. Employers may glean the following key points from the latest memorandum:

- Any provision that may reasonably be understood by an employee to prohibit protected activity, such that the activity would be chilled, will run afoul of the NLRA. The General Counsel has applied this concept broadly to find unlawful provisions that, without further explanation, prohibit the release of "confidential information" or "non-public company information," require employees to obtain employer permission before posting or communicating with the media, prohibit "disparaging" or "defamatory" comments or "offensive, demeaning, abusive or inappropriate remarks," instruct employees to "think carefully" before "'friending' co-workers," or require employees to report "unusual or inappropriate internal social media activity."

- Using specific examples to better define provisions that could be ambiguous or interpreted too broadly may reign in otherwise overbroad provisions. Thus, in the sample policy (referenced below), a provision the required employees to be "respectful" and "fair and courteous" in posting to social media could have been overbroad. However, the provision went on to advise employees to avoid posts that could be viewed as "malicious, obscene, threatening or intimidating" and explained that prohibited postings would include "offensive posts meant to intentionally harm someone's reputation" or posts that could contribute to an unlawful hostile work environment. This further detail, according to the General Counsel, addressed legitimate employer concerns without burdening an employee's Section 7 rights.

- A savings clause providing that the social media policy will not be interpreted or enforced in a way that will interfere with concerted activity or other conduct protected by the NLRA is highly unlikely to save an otherwise problematic social media clause. The General Counsel has repeatedly reasoned that employees are not expected to know the scope of their rights or, where an activity is explicitly not allowed by the policy, to assume that the savings clause overrides the prohibition.

- The General Counsel provided an example of a lawful social media policy, reportedly from Wal-Mart, along with commentary on key aspects of the policy. Employers preparing a new policy or reviewing an established one should review this policy as part of their consideration process;

however, they should do so with a critical eye. No one policy is the right fit for every organization. Further, aspects of the policy appear to be inconsistent with discussion earlier in the memorandum. Thus, the policy should not be adopted wholesale simply because the General Counsel has offered it up.

While potentially helpful guidance, the memorandum and opinions on which it reports are not binding NLRB precedent; rather, they comprise the Office of the General Counsel's position used for determining whether to prosecute an unfair labor charge. While these positions may reasonably be construed as unreasonable or otherwise subject to challenge, employers should nevertheless carefully consider this guidance when implementing a new or revised social media policy.

NEWSBITES

Employee Entitled to Commissions Earned on Improperly-Assigned Account

Sciborski v. Pacific Bell Directory, a recent California Court of Appeal decision, emphasizes the importance of clear language in commission plans and agreements. Pacific Bell clawed back a commission payment to plaintiff Sciborski on the grounds that she had not earned the commission – i.e., the prior payment was merely an advance – because she was improperly assigned to an account for which she was not eligible. Sciborski argued that Pacific Bell's admitted clerical error was an improper basis to claw back the commission, because the at-issue bargaining agreement did not include proper account assignment as a prerequisite for earning commissions. The court agreed with Sciborski: "Absent an express provision to this effect, Pacific Bell was not entitled to unilaterally declare that the commission was not earned and use self-help measures to deduct funds from Sciborski's wages that had already been paid to her."

Post-*Concepcion*, Arbitration Agreements Still Subject To *Armendariz* Test

A California Court of Appeal recently affirmed the applicability of the *Armendariz v. Foundation Health Psychare Services, Inc.* standard for assessing unconscionability challenges to arbitration agreements, notwithstanding the U.S. Supreme Court's ruling in *AT&T Mobility v. Concepcion* (*see* above link). In *Samaniego v. Empire Today LLC*, plaintiffs – carpet installers – sued Empire claiming it misclassified them as contractors. In denying Empire's motion to stay the action and compel arbitration, the trial court found the agreement containing the arbitration provision was "highly unconscionable from a procedural standpoint," demonstrated "strong indicia of substantive unconscionability" and was thus unenforceable under *Armendariz*. The trial court also denied Empire's motion for reconsideration in light of *Concepcion*, which issued several weeks after the trial court's decision.

The appellate court affirmed, and further recognized that *Concepcion* "explicitly reaffirmed that the FAA 'permits agreements to arbitration to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.'" As such, the court concluded that "arbitration agreements remain subject, post-*Concepcion*, to the unconscionability analysis employed by the trial court in this case."

Employers Paying Salaries to Non-Exempt Employees Beware of Proposed Legislation

AB2103 would eliminate agreements with non-exempt employees to pay a fixed salary covering regular and overtime hours. Specifically, AB 2103 provides that such a fixed salary "shall be deemed to provide compensation only for the employee's regular, nonovertime hours, notwithstanding any agreement to the contrary." AB2103 express takes aim at – and

overturns – the decision in *Arechiga v. Dolores Press* that recognized and enforced an agreement to pay a non-exempt employee a fixed salary for 66 hours of work per week. Advocates claim the bill would restore California law to its pre-*Arechiga* status. The Assembly passed AB2103 on May 7, and the bill is now pending for review before the Senate's Committee on Labor and Industrial Relations.

California Partnerships Subject to Anti-Retaliation Laws

In *Fitzsimons v. California Emergency Physicians Medical Group*, a California court of appeal revived an emergency room physician's retaliation claim against the partnership of which she is a member. The physician claimed that the partnership removed her from her regional director position and created a hostile working environment for her because she reported that officers and agents of the partnership were sexually harassing female employees. The partnership argued, and the trial court agreed, that the anti-retaliation protections applied only to employees and did not extend to members of the partnership. The appellate court disagreed, finding the statutory language and legislative purpose supported a broader reading of the statute and recognizing protection for partners who oppose sexual harassment of the partnership's employees.

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