Fenwick Employment Brief

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TIME TO TIDY UP YOUR ARBITRATION CLAUSE

Two California Court of Appeal decisions analyze recent developments in employment arbitration clauses regarding class actions and arbitration acknowledgments.

In *Nelsen v. Legacy Partners Residential, Inc.*, the court interpreted an arbitration clause that only explicitly required arbitration of claims between the employee and employer to compel arbitration of plaintiff employee's individual claims, but refused to infer a requirement to arbitrate class claims.

The plaintiff in *Nelsen* filed a putative class action against Legacy (her former employer) for various wage and hour violations, such as failure to pay overtime and failure to provide meal and rest breaks. Legacy sought to compel arbitration of Nelsen's individual claims pursuant to an arbitration clause in a signed acknowledgement form at the end of its employee handbook. Although the clause covered claims between the employee and the company arising from her employment, there was no mention of arbitration (or waiver) of class claims.

Citing the 2010 United States Supreme Court case of *Stolt-Nielsen S.A. v. Animal Feed Int'l Corp.*, the court stated that absent a contractual basis showing that a party agreed to arbitrate class claims, the party may not be compelled to do so. The court further noted that omission regarding class arbitration cannot be interpreted as acceptance of such a term: specific indicia – separate from the existence of the agreement to arbitrate – are required. Since the clause clearly referred to the employee and the company (e.g., "*either party's* written request," "both *Legacy Partners and I* give up *our* rights to trial by jury," etc.), class arbitration was not required.

However, the court did grant Legacy's motion to compel Nelsen to arbitrate her individual claims because she failed to show that requiring her to do so violated state or federal law or public policy. In making its ruling, the court acknowledged the National Labor Relations Board *D.R. Horton, Inc.* decision (holding that requiring employees to waive class or collective wage and hour claims in an arbitral or a judicial forum as a condition of employment violated the National Labor Relations Act) as persuasive – not controlling – authority.

How to treat class claims in arbitration is a difficult decision that employers should make with the advice of counsel, especially with the case law in a state of flux and the unknown influence of related decisions by government agencies such as the National Labor Relations Board.

In another recent California Court of Appeal decision, *Sparks v. Vista Del Mar Child and Family Services*, the court declined to uphold an arbitration clause that was buried in the employee handbook. The court held that an unsigned acknowledgment of the handbook was insufficient to support the employer's motion to compel arbitration.

The employer in *Sparks*, Vista Del Mar, issued an employee handbook in 2006 with a dispute resolution policy requiring arbitration of claims relating to employment. The policy was on pages 35 and 36 of the handbook, along with a provision stating that the employer could revise or modify the handbook at any time, without notice. Other provisions stated that the handbook was a summary of the company's personnel policies, was designed to acquaint employees with information by highlighting these policies, and was not intended to create a contract of employment or alter the at-will employment relationship.

In 2007, employee Sparks signed a handbook acknowledgement form that stated the following: (1) the handbook contained the company's general personnel policies, (2) the employee understood that he was governed by its contents, and (3) the company could modify the policies in the handbook with or without notice. In 2009, the company issued a new handbook with a nearly identical arbitration clause except for a sentence requiring employees to sign a separate "full arbitration agreement" and a handbook acknowledgement form specifically acknowledging the arbitration policy in the handbook. Sparks claimed that he was unaware of the arbitration clause in the 2006 handbook and that he never signed the 2009 acknowledgement form or a separate arbitration agreement.

The court denied the employer's motion to compel arbitration of Sparks's wrongful termination claim for the following reasons: (1) the arbitration clause was buried in a lengthy handbook; (2) the clause was not called to the attention of Sparks; (3) Sparks did not specifically acknowledge or agree to arbitration; (4) the handbook explicitly stated that it was not intended to create a contract; and (5) the handbook allowed the company to unilaterally modify the policies in the handbook. In addition, Sparks was not provided with a copy of the rules governing arbitration, the provision was not subject to negotiation, the provision required employees to give up certain administrative and judicial rights protected by statute, and it made no express guarantee regarding discovery rights.

The court noted that in order for an employee to effectively waive his or her right to a judicial forum, there must be "more than a boilerplate arbitration clause buried" in a handbook. The minimum requirement is that the employee sign (at the beginning of employment) a handbook acknowledgement form that expressly references the arbitration obligation. The court cautioned against employers trying to "have it both ways": stating that the handbook does not create a contract of employment, yet requiring employees to contractually agree to arbitration. The court noted that such an approach could "backfire" because it creates ambiguity that must be construed against the employer.

If an employer is going to explicitly require, for example, that all employees sign a particular form, then the employer must ensure that this occurs. Uniform onboarding and handbook rollout processes, such as having every new employee sign all of the appropriate forms and acknowledgements, are important in ensuring enforceability of contractual obligations (including arbitration). Human Resources Departments should consider periodically auditing employee personnel files to ensure uniformity and compliance.

These cases underscore the importance of reevaluating and scrutinizing arbitration provisions, whether in offer letters, employee handbooks, invention assignment agreements, or otherwise to ensure they are up to date, legally compliant, and accurately reflect the employer's actual practices.

CALIFORNIA COURT PROVIDES INSIGHT INTO APPLICATION AND SCOPE OF ADMINISTRATIVE EXEMPTION

The California Court of Appeal in *Harris v. Superior Court (Liberty Mutual Ins. Co.)* held that the administrative exemption does not apply to insurance claims adjusters and provided a detailed analysis of the requirement that the work performed be directly related to the employer's management policies or general business operations. This ruling directly contradicts the prior California Supreme Court decision in this case and disregards federal precedent (including Ninth Circuit decisions holding that the administrative exemption does apply to claims adjusters).

In *Harris*, plaintiff claims adjusters sought damages for unpaid overtime as part of a class action. Defendant and employer Liberty Mutual Insurance Company asserted as an affirmative defense that the administrative exemption applied to the claims adjusters and therefore they were not entitled to overtime. Liberty argued that the exemption applied because the adjusters advised management and planned, negotiated, and represented the company in processing insurance claims. Further, it asserted that the adjusters were not mere "production workers" (i.e., employees who do not qualify for the exemption because they simply produce the employer's product rather than perform administrative work related to business operations) because they adjusted claims – Liberty's product is transference of risk, not claims adjusting. Liberty claimed that because the adjusters did not perform production work, their work must be administrative, thus meeting the requirement for the administrative exemption.

Noting that exemptions should be narrowly construed, the court considered the language of California Wage Orders and federal regulations regarding the administrative exemption. The applicable Wage Order states that the administrative exemption applies to an employee whose duties and responsibilities involve "[t]he performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his/her employer's customers." The court focused on the phrase "directly related," stating that it distinguishes between administrative and production or sales work; to be directly related, the work must be qualitatively and quantitatively administrative. The court acknowledged that only the qualitative element was at issue in the case.

The court explained that to meet the qualitative element, the work must relate to the "administrative operations" of a business. It distinguished between duties regarding policy or general operations (e.g., engaging in running the business itself or deciding overall business course and policies), which meets the requirement, and merely carrying out day-to-day operations of the business, which does not. The court determined that the adjusters were engaged in carrying out the day-to-day business operations (i.e., adjusting individual claims by investigating, negotiating settlements, etc.), which did not rise to the level of management policy or general operations of the business, as required by the exemption. The court provided the example of an underwriter consulting with a claims adjuster regarding whether the company should issue certain types of policies to a particular customer versus consulting as to what types of policies the company should offer in general, the latter satisfying the qualitative element. Further, it held that not all duties involving management, planning, negotiating, and representing an employer meet the qualitative element.

This decision provides detailed insight into the requirements of the administrative exemption under California law and significantly narrows its application. We will provide updates on any appellate developments.

NEWS BITES

Employers Can Recover Against Advances On Commissions

In *Deleon v. Verizon Wireless, LLC*, the California Court of Appeal upheld summary judgment in favor of Verizon, holding that it could recover certain payments against future advances on commissions.

Under its compensation plan, Verizon paid out unearned commissions in advance to its sales representatives. These commissions were not earned

until the expiration of a chargeback period (in some instances up to one year), if the client did not cancel service during that period. If the client canceled during the chargeback period, the company could recover that advance on commission from future advances on commissions.

The putative class action plaintiffs in this case argued that recovery of commissions during the chargeback period violated Labor Code Section 223, prohibiting secret underpayment of wages, and sought Private Attorneys General Act (PAGA) penalties. The court recognized that Verizon (1) paid *advances* on commissions, not earned commissions; (2) clearly defined in its compensation plan how such commissions were earned (i.e., after expiration of the chargeback period and without cancellation of service); (3) explicitly explained the chargeback period; and (4) provided regular training on the compensation plan.

By emphasizing the importance of defining how commissions are earned, the court made clear that attempting to recover payment of earned commissions – as distinct from advances on commissions – would be unlawful because earned commissions are considered wages.

Supervisor Using Homophobic Epithets And Exposing Himself To Employee Insufficient To Support Title VII Same-Sex Harassment Claim

In *EEOC v. BOH Brothers Construction Co., LLC*, the Fifth Circuit held that a male supervisor calling a male subordinate "faggot" and "princess," mimicking sexual acts, and exposing himself to the subordinate did not constitute unlawful sexual harassment under Title VII. Title VII protects harassment as a form of sex discrimination. To recover for sexual harassment, a plaintiff must first prove that the alleged conduct constitutes sexual discrimination before the court determines whether the conduct created a hostile work environment. According to the court, the only evidence that plaintiff presented of possible gender-based or sexual-stereotyping discrimination was the supervisor mocking plaintiff because he used "Wet Ones" instead of toilet paper. The court admitted that this comment "did not strike us as overtly feminine." Further, the court pointed out that the supervisor and other employees routinely engaged in this type of "misogynistic and homophobic" banter and that plaintiff was not the only recipient of the comments and conduct.

Ultimately, the court held that plaintiff's evidence was insufficient to support a claim of discrimination, as a threshold issue, and therefore harassment under Title VII. It acknowledged that the alleged conduct was unprofessional – calling the alleged harasser a "world-class trash talker" and "the master of vulgarity" – but emphasized that its role is not to "clean up the language and conduct of construction sites" and that Title VII is not "a general civility code for the American workplace."

Social Media Password Privacy Laws Gaining In Popularity – California May Soon Follow Suit

Illinois becomes the second state to pass a social media privacy law prohibiting employers from requiring applicants or employees to allow employers access to their social media accounts. The law goes into effect on January 1, 2013. It does not prohibit employers from obtaining information about applicants or employees in the public domain and it specifically excludes email from its definition of "social networking website." Maryland was the first state to pass such a law, and at least 14 other states (including California, Washington, and New York) have introduced similar legislation. A House of Representatives committee is considering legislation as well. In light of these legislative developments, employers should seriously consider abandoning or severely curtailing such practices.

Federal "Ban The Box Act" Seeks To Outlaw Questions About Criminal Convictions Prior To A Conditional Job Offer

As part of the "Ban the Box Act," a recent House Bill would prohibit employers from asking applicants about criminal convictions unless (1) a conditional offer of employment has been made or (2) granting employment could pose unreasonable safety risks. Under the Bill, the Equal Employment Opportunity Commission would be required to issue rules and guidelines defining the employment categories in which an individual's criminal history could pose such a safety risk and the factors to consider in deciding whether criminal history poses an unreasonable risk. The goal of the Bill is to curtail recidivism: those with convictions who cannot find jobs are more likely to commit additional crimes, according to the Bill's sponsor. Regardless of whether the Bill passes, employers should exercise care and good judgment when asking applicants about their criminal history.

New Seattle Paid Sick Leave Ordinance Goes Into Effect September 1st

Effective September 1st, employers with employees working in the city of Seattle may need to provide paid sick leave under the new Paid Sick and Safe Time ordinance. The ordinance generally applies to all employers with five or more full time (or equivalent) employees and requires employers to provide paid sick and safe time for employees: (1) for their own or a family member's illness or health condition; (2) when their place of business or their child's school is closed for health reasons; or (3) for reasons related to domestic violence, sexual assault, or stalking. (However, a new employer with less than 250 employees is exempt from the ordinance until 24 months following hire of its first employee.) Employees are eligible for leave if they perform more than 240 hours of work in Seattle within a calendar year and paid leave accrual rates depend on the size of the employer. For more information on other requirements and the ordinance in general, visit http://www.seattle.gov/civilrights/sickleave.htm.

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