Fenwick Employment Brief

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CALIFORNIA COURT REJECTS OUTRIGHT BAN ON CLASSWIDE RELIEF IN EMPLOYMENT ARBITRATION AGREEMENTS

The California Supreme Court has provided guidance regarding the enforceability of a ban on class actions in employment arbitration agreements.

In *Gentry v. Superior Court,* Mr. Gentry served as a customer service manager for defendant Circuit City Stores. He filed a class action overtime lawsuit against Circuit City on behalf of all other similarly situated current and former managers. Circuit City responded by seeking to remove the matter to mandatory, binding arbitration (pursuant to an arbitration agreement Gentry signed during his employment), and to prevent Gentry from pursuing the action on behalf of others in light of a class action waiver in the agreement.

The supreme court held that class action waivers in arbitration agreements will be unenforceable if a court concludes "that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations…" In making this determination, courts must evaluate: (i) the amount of the potential individual recovery for the purported class members (*i.e.* whether individual recovery will be insignificant so as to deter the filing of individual claims); (ii) the potential for retaliation against class members who would otherwise be forced to bring individual claims as a result of a class waiver; (iii) the likelihood that class members will be ill-informed of their rights such that a class action will be an effective method to educate them; and (iv) other practical factors that may create an unfair obstacle for employees to pursue individual claims.

The upshot of this case is that employers which include class waivers in their arbitration agreements will not know whether the waiver is in fact enforceable unless and until a class action is pursued and the above-referenced factors are applied.

We encourage employers to consult with counsel about the impact of this case on existing or planned class action waivers in arbitration agreements with employees.

CLAIMS PURSUANT TO CALIFORNIA'S "SUE YOUR BOSS" LAW MAY BE BROUGHT ON BEHALF OF A GROUP OR CLASS OF EMPLOYEES WITHOUT HAVING TO SATISFY CLASS CERTIFICATION REQUIREMENTS

A California court of appeal held that lawsuits to recover penalties for California Labor Code violations, filed pursuant to the state's Private Attorney General Act ("PAGA"), a/k/a the "Sue Your Boss" law, may be brought as a "representative actions" on behalf of multiple current and/or former employees without the need for class certification.

In *Arias v. Super. Ct. of San Joaquin County*, plaintiff Jose Arias sued his former employer, Angelo Dairy, on behalf of himself and many other current and former employees. Arias alleged that Angelo Dairy failed to pay overtime, provide rest or meal breaks, and provide habitable employee housing. Arias sued under both the PAGA and California's Unfair Competition Law ("UCL"), which prohibits unfair business practices.

The trial court struck Arias' representative claims under both laws, based on his failure to meet class certification requirements (*e.g.* that Arias is an adequate representative for the class; that the

issues raised are common to the purported class; and that the class is sufficiently numerous to warrant representative or class status). The court of appeal reversed as to the PAGA claims. The court concluded that the PAGA permits individuals to bring representative actions on behalf of other current and/or former employees, and makes no reference to or requirement of class certification. Conversely, the UCL specifically requires certification of representative actions.

This decision is yet a further reminder to California employers that they face profound exposure for Labor Code violations, and it confirms that the PAGA can serve as a convenient and efficient tool for one current or former employee to recover penalties on behalf of many.

EMPLOYERS MAY CONSIDER WORKERS COMPENSATION COSTS WHEN CALCULATING PROFIT SHARING PLAN DISTRIBUTIONS TO EMPLOYEES

California law generally precludes employers from deducting business losses (including costs attributable to workers compensation claims) from their employees' wages. However, in a recent California Supreme Court decision, the court upheld a profit sharing plan for Ralphs Grocery, whereby Ralphs computed store profits by taking into account various store costs, including workers' compensation costs. A Ralphs manager sued, claiming that the company's inclusion of such costs in profit calculations constituted an unlawful deduction against wages.

The supreme court disagreed, holding that such costs did not constitute an unlawful "pass-through" of business expenses to employees. The court specifically distinguished prior case law where courts concluded that deductions for business losses against a promised, set amount to employees violated California law. The Ralphs profit sharing plan did not offer or promise a specified amount to employees (unlike, for example, a commission plan where salespersons are promised a set commission formula when quotas are met). Rather, the Ralphs plan simply calculated store profits (revenue minus expenses) from which Ralphs made distributions to employees, and the distributions were not subject to any set-off or deduction for losses.

This decision provides helpful guidance to employers regarding how to structure profit sharing and other incentive plans so as not to violate well-established California laws prohibiting deductions against wages.

NEWS BITES

Harassment Prevention Training Regulations Approved

The State of California has now formally approved the Fair Employment and Housing Commission's ("FEHC") regulations governing sexual harassment prevention training for supervisors in companies with 50 or more employees. You may find our summary of the regulations, which the FEHC proposed to clarify ambiguities in the original law, in our August 17, 2006 FEB Publication and a complete version of the regulations through the following link [http://www.fehc.ca.gov/act/harass.asp].

Fourth Circuit Re-Affirms Invalidity of FMLA Waivers Lacking Court or DOL Approval

The Fourth Circuit Court of Appeals (encompassing Maryland and other mid-Atlantic states) has re-affirmed its prior ruling regarding the need for prior court or federal government approval of waivers of FMLA claims. In its initial 2005 ruling in *Taylor v. Progress Energy*, the Fourth Circuit invalidated an employee's waiver of FMLA claims because it was not approved in advance by a court or the Department of Labor ("DOL"). [http://www.fenwick.com/docstore/publications/Employment/EB_09-26-05.pdf]. The court later granted a re-

hearing, in part to allow the DOL to weigh in. However, despite the DOL's position that the applicable regulations permit employers to obtain waivers of retrospective FMLA rights, a divided panel of the Fourth Circuit held that the FMLA regulations prohibit both the prospective waiver of substantive FMLA rights (*i.e.* the right to take protected leave), as well as the retrospective waiver of FMLA claims (*e.g.* a waiver of a potential claim that an employee was retaliated against for taking a FMLA leave of absence).

We encourage employers which seek to obtain a release of claims from employees who live in states covered by the Fourth Circuit to discuss the impact of this decision with counsel.

UPS's Alleged "100% Healed" Return to Work Policy Will Be Scrutinized as Part of a Certified Class Action

A Pennsylvania federal district court recently certified a nationwide Americans with Disabilities Act ("ADA") class action against United Parcel Service. In *Hohider v. United Parcel Serv. Inc*, current and former UPS employees allege that UPS discriminates against workers who were absent from work for medical reasons by not allowing them to return to work unless they met certain unreasonable criteria, including an unwritten requirement that workers be "100% healed."

The court certified a nationwide class of several thousand current and former UPS employees. The class action will primarily address whether UPS's alleged practice of not allowing workers to return to work unless they are "100% healed" violates the ADA's requirement that employers provide reasonable accommodations to workers with disabilities.

Although this ruling relates solely to certification of a class and not the merits of the dispute, it is a timely reminder to employers to evaluate their return-to-work polices and unwritten practices to ensure compliance with state and federal reasonable accommodation laws.

Compensatory damages held to be taxable income

The federal D.C. Circuit Court of Appeal recently reversed itself and held that compensatory damages are taxable income. In *Murphy v. Internal Revenue Serv.*, the plaintiff received a $70,000 award of emotional distress damages based on her former employer's retaliation against her, the resultant injury to her professional reputation, and mental pain and anguish. The court initially ruled that taxation of the award was unconstitutional because the award was not "income" to her. Later, however, the panel held that damages for mental anguish and injury to reputation are taxable income, even if damages for physical harms are not taxable income.

"Cleansing" Rituals Support Discrimination Verdict In Favor Of Christian Employee

The Eighth Circuit Court of Appeal upheld a jury verdict against an employer which fired a Christian employee after the employee expressed discomfort with mandatory "Mind Body Energy" cleansing rituals. In *Ollis v. HearthStone Homes*, the company's president required workers to attend rituals designed to "cleanse negative energy." Plaintiff Ollis objected, claiming that the rituals conflicted with his religious beliefs, after which HearthStone terminated his employment (purportedly on other grounds). The jury concluded that HearthStone discriminated against Ollis on the basis of his religious beliefs and terminated him in retaliation for complaining about the rituals. The Court of Appeals agreed.

Employers should be mindful that activities of this sort bearing religious overtones, whether discretionary or mandatory in nature, can form the basis for discrimination and retaliation claims by employees who oppose such practices.