California Update

Fox Rothschild LLP
ATTORNEYS AT LAW

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New California Laws for 2013

Governor Brown has signed several new bills that will affect employers beginning in 2013:

No Social Media Passwords (AB1844): Employers may not ask employees or applicants for user names or passwords.

Breastfeeding Protected (AB2386): Amends the Fair Employment and Housing Act to add breast feeding and related medical problems to the definition of "sex" discrimination.

Religious Dress Protected (AB1964): Includes "religious dress practice" (e.g., head or face covering) and "religious grooming practice" (e.g., facial hair) in protections against religious discrimination.

Liability for Contractor's Wage & Hour Violations (AB1856): Adds warehouse contractors to the list of firms (garment workers, security guards, janitors) for whose wage and hour practices the prime company can be liable.

Access to Personnel Files (AB2674): Revises the law to allow former employees to obtain personnel files.

Injury from Itemized Wage Statements (AB 1744): Amends Labor Code §226 to define "injury" for purposes of liability where employee alleges defective wage statements.

Vetoed: Significantly, the Governor vetoed a bill (AB1450) that would have prohibited discrimination against "unemployed" job applicants.

Stay Tuned: After the November 6 election, Democrats now have a two-thirds majority in both houses of the California legislature. They will now have a freer hand to pass legislation that the Governor cannot veto.

Other Important 2013 updates:

Minimum Wage Increase: The California minimum wage will remains at $8.00 per hour for 2013. Effective January 1, 2013, the minimum wage for employees who perform at least two hours of work per week in the City of San Francisco is $10.55 per hour. San Jose voters recently approved an ordinance to increase the minimum wage there. In approximately March 2013 (depending on when the election is officially certified), the minimum wage for employees in San Jose will be $10.00 per hour.

Minimum Pay for Software Employees and Physicians: Effective January 1, 2013, to be exempt from overtime, the minimum pay for these workers has been adjusted as follows: computer software employees must make a minimum hourly rate of $39.90, a minimum monthly salary of $6,927.75, or a minimum annual salary of $83,132.93. Licensed physicians and surgeons must make a minimum hourly rate of $72.70.

Mileage Rate Increase: Effective January 1, 2013, the Internal Revenue Service standard mileage reimbursement rate for business travel will be 56.5 cents per mile (up from 55.5 cents per mile in 2012). While California employers need not reimburse employee travel at this standard rate, it is typically the most convenient way for employers to meet their burden of reimbursing employees for this business expense.

PDL Regulations: The Office of Administrative Law issued expanded Pregnancy Disability Leave regulations for 2013. The definition of "disabled by pregnancy" has been broadened to include several specific conditions, such as severe morning sickness, prenatal or postnatal care, bed rest, and post-partum depression. The concept of reinstatement has been clarified so that a woman must be returned to a position "virtually identical" to the position she held prior to any reasonable accommodation, transfer or disability leave. Several other issues have been affected as well. Employers are advised to review the regulations and update their policies accordingly.

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California Supreme Court to Hear Employment Arbitration Cases

The California Supreme Court has on its docket three important cases involving arbitration agreements. These cases will be considered in the wake of *Concepcion v. AT&T Mobility (Concepcion)* in which the U.S. Supreme Court recently gave broad pre-emptive effect to the Federal Arbitration Act (FAA), and struck down California case law that had placed limits on the enforceability of arbitration agreements, specifically class action waivers. This will be an opportunity for the California high court to clarify state law regarding arbitration. The court may even possibly modify its twelve-year-old decision in *Armendariz v. Foundation Health (Armendariz)* which emphasized "unconscionability" in restricting the enforcement of arbitration agreements.

Iskanian v. CLS

This case presents two main issues:

(1) Whether the California Supreme Courts decision in *Gentry v. Superior Court (Gentry)* (striking down class action waivers in employee arbitration agreements) survives the U.S. Supreme Court's decision in *Concepcion* (upholding class waivers in consumer arbitration agreements); and

(2) Even if *Gentry* is no longer good law, can the court refuse to honor the wavier of representative actions under the Private Attorney General Act of 2004 (PAGA). The Court of Appeal opinion said "no" to both issues. The representatives of the putative class appealed.

The appellant will argue that somehow *Gentry* survives, even though the precedent on which it was based was overruled by *Concepcion*, and that, in any event, a PAGA representative action is not merely a procedural vehicle (like a class action), but rather embodies substantive rights that cannot be waived.

(Fox Rothschild represents the defendant in this case.)

Sonic Calabassas v. Moreno

In early 2011, the California Supreme Court issued its first opinion in this case, holding that it was against public policy and unconscionable to include wage and hour issues in an arbitration agreement to the exclusion of the Labor Commissioner hearing provided for in the Labor Code. The employer went to the U.S. Supreme Court, arguing that the FAA precluded such a result. The U.S. Court remanded to the California Court for reconsideration in light of *Concepcion*. Again, the California Court will be asked to consider whether one of its prior decisions has been impliedly overruled and is pre-empted by federal law.

Sanchez v. Valencia Holding Co.

In this case, a car dealer invoked the contractual arbitration agreement and class action waiver when a dissatisfied customer filed suit. The Court of Appeal relied on *Armendariz*, found the arbitration agreement to be "one-sided" (e.g., it exempted repossession), and struck down the agreement as "unconscionable." The California Supreme Court agreed to hear this case on the issue whether *Concepcion* and the FAA preempt the subject matter and command a different result. The defendant and amicus parties will argue that much of *Armendariz* is no longer valid. The decision in this matter will likely also affect employment cases.

Thus, this trifecta of cases has the potential to reset the jurisprudence of arbitration agreements in California — or to set up another showdown with the U.S. Supreme Court over these issues.

Supreme Court To Decide Whether Unions Have Right of Access to Retailer's Private Property

The California Supreme Court will soon decide whether the parking area and sidewalk in front of the entrance to a retail store (part of a larger strip mall shopping center) constitutes a "public forum," and whether the Moscone Act (California Code of Civil Procedure Section 527.3) and California Labor Code Section 1138.1, which limit the availability of injunctive relief in labor disputes, violate the First Amendment in granting preferential treatment to speech concerning labor disputes.

The cases at issue are *Ralphs Grocery Co. v United Food & Commercial Workers Union, Local 8*. Ralphs operates a retail grocery store located in a retail strip mall. The union requested recognition. Ralphs refused, and the union proceeded to engage in picketing and leafleting on the private sidewalk adjacent to and at the entrances to the store. Ralphs asked the union to move the activity off of Ralphs' private property, but the union refused. Ralphs filed suit in state court alleging trespass, and seeking injunctive relief forcing the picketers off Ralphs' property. The union opposed, relying

on the Moscone Act and Labor Code § 1138.1. The trial court denied the injunction based on Labor Code § 1138.1, concluding Ralphs had not met the procedural requirements for injunctive relief. Ralphs appealed.

The Court of Appeal reversed, holding that a private sidewalk in front of the store entrance is not a "public forum" under the state constitution because it is not a place where the public is invited to congregate and socialize. The Court also concluded that the Moscone Act and Labor Code § 1138.1 violated the First and Fourteenth Amendment to the U.S. Constitution because the statutes favored speech concerning labor disputes over other forms of speech. The union appealed and the California Supreme Court agreed to hear the case.

This case could have a far reaching effect on employers in California, and it is unclear which side the Court favors. Should the Court affirm the Court of Appeal, employers will be able to preclude unions and others with whom they disagree from expressing their views on the employer's property in strip malls and other shopping centers. Unfortunately, the NLRB appears to be actively increasing off duty employees' right of access to their employer's business, thus mitigating to some extent the benefit of a favorable decision in the instant case.

Written Commission Agreements Required in California

Last year, Assembly Bill 1396 was passed. It requires any employer who pays commissions to employees to have a written contract setting forth "the method by which the commissions shall be computed and paid" by January 1, 2013. The employer must give a copy of the signed agreement to the employee and keep a signed copy on file. If the commission agreement expires, and the employee keeps working, then it is presumed to remain in effect until superseded or employment is terminated.

Questions may arise as to whether an employer's pay practices actually involve commissions. The Labor Code defines commissions as compensation paid for services rendered in the sale of the employer's property or services and based proportionally upon the amount or value thereof. And certain types of payments are not considered commissions for the purpose of the written requirement. The new statute specifically excludes: (1) short-term productivity bonuses paid to retail clerks, (2) temporary, variable incentive payments that increase, but do not decrease, payment under the written contract, and (3) bonus or profit sharing plans, unless they involve a fixed percentage of sales or profits for work to be performed.

Employers are advised to keep commission agreements simple. Be sure to clearly explain how the commission is calculated. Define terms such as "gross profit" versus "net profit" or "company accounts" versus "employee accounts." Also clarify when the commission is earned versus when it is paid. Clear terms on these issues will avoid ambiguity and disputes upon termination. In addition, employers should include a right to revise the agreement upon notice to the employee.

California Court Allows Rounding of Time Entries

Employers have been rounding off workers' time entries for years without any guidance from California courts on proper practices. Now, California employers finally have a published appellate decision permitting the practice. According to *See's Candy Shops, Inc. v. Superior Court*, filed October 29, 2012, rounding is allowed as long as the policy is not designed to benefit only the employer.

See's Candy used a timekeeping system that rounded employees' time to the nearest six minute (or tenth of an hour) increment. An employee sued arguing the practice unlawfully deprived employees of wages earned. Noting that federal law permits rounding, the Court of Appeal held that the practice is also proper under California law, as long as the "policy is neutral, both facially and as applied." In other words, if an employer is going to engage in a rounding practice, it must round up and down, so that over time the policy does not result in a loss to employees. The Court in this case has not yet ruled on whether See's Candy's rounding practices are lawful. A federal court recently dismissed a class action alleging that the employer conducted improper rounding practices on the basis that the plaintiffs did not allege that the rounding policies could result in a

systematic underpayment of wages or were implemented to clearly favor management. That case is *Mendez v. H. J. Heinz Co. L.P., et al*. Case No. 2:12-cv-05652 (C.D. Cal. 2012).

While these cases are good news for employers, they do not eliminate the risk of exposure from rounding practices. Employers are advised to evaluate whether their rounding practices, on average and over time, properly compensate employees for hours worked. If rounding practices result in a net underpayment to employees, they will be considered unlawful

2013 California Supreme Court Cases to Watch

In addition to the cases mentioned in the previous articles on arbitration and union picketing, there are several other significant employment law cases pending before the California Supreme Court. A few to watch for:

***Harris v. City of Santa Monica*, S181004**: Does the "mixed-motive" defense apply to employment discrimination claims under FEHA?

***Salas v. Sierra Chem. Co.*, S196568**: Can an employer use the after-acquired evidence and unclean hands defenses to defend a FEHA claim based on the plaintiff's use of false documentation to obtain employment in the first instance?

***Duran v. U.S. Bank Nat'l Ass'n*, S200923**: The Court will review what is required to properly certify wage and hour misclassification litigation and the appropriate use of representative testimony and statistical evidence at trial.

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