

EMPLOYMENT MATTERS

TWO COURT DECISIONS FURTHER UNDERMINE THE ENFORCEABILITY OF CLASS ACTION WAIVERS AND THREATEN ARBITRATION AGREEMENTS THAT INCLUDE THEM

In our Autumn 2007 newsletter, we reported the California Supreme Court’s holding in *Gentry v. Superior Court* that employees could not, by signing pre-employment agreements, give up their ability to represent a class of employees in a suit affecting “unwaivable statutory rights” if a class action would be a “significantly more effective way of vindicating the rights of affected employees” than individual arbitration or litigation. *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007). This holding of the *Gentry* decision was based on public policy grounds alone, not the principles of unconscionability that are often used by courts to evaluate arbitration agreements. On April 27, 2009, a California appellate court confirmed that principles of unconscionability can still be used to invalidate class action waivers. Earlier, on March 10, 2009, another appellate court determined that an employee’s class claims for alleged missed

meal and rest breaks could not be waived based on the public policy grounds expressed in *Gentry*.

The April decision, *Olvera v. El Pollo Loco, Inc.*, concerned a class action waiver contained in an arbitration agreement distributed to employees as part of an updated set of policy materials. The novelty of *Olvera* is that the Court acknowledged that it *could* apply *Gentry* to assess whether the waiver was enforceable as a matter of public policy, but decided it did not need to apply *Gentry* since it had already determined that the waiver could not be enforced based on the principle of unconscionability, *i.e.*, the principle that agreements will not be enforced if they contain unacceptable levels of both substantive and procedural unfairness. This means employees can challenge class action waivers under both the public policy analysis in *Gentry* and principles of unconscionability.



In the March decision, *Franco v. Athens Disposal Co., Inc.*, a different appellate court considered another class action waiver contained in an arbitration agreement. Unlike in *Olvera*, the Court invalidated the waiver based not on unconscionability but rather on the public policy grounds in *Gentry*. Notably, the court also held based on *Gentry* that the employee could not waive his entitlement under the Labor Code Private Attor-

ney General Act of 2004 (“PAGA”) to seek penalty awards on behalf of *others* (the employer’s waiver did not attempt to limit his own individual recovery of penalties). The court then held that the single controversial provision in Plaintiff’s arbitration agreement, by purporting to waive both class-wide relief and a representative action under PAGA, rendered the arbitration agreement unenforceable in its entirety.

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NINTH CIRCUIT ASKS FOR HELP FROM CALIFORNIA SUPREME COURT ON APPLICATION OF STATE OVERTIME LAW TO OUT-OF-STATE EMPLOYEES

In February, the Ninth Circuit took the unusual step of withdrawing one of its published opinions, *Sullivan v. Oracle Corporation*, 547 F.3d 1177 (9th Cir. 2008). At the same time, the Ninth Circuit asked the California Supreme Court to answer certified questions of state law designed to decide the issues in its now-withdrawn opinion. Proceedings in the case have been stayed pending action by the California Supreme Court which may, but need not, answer the questions posed to it by the Ninth Circuit.

The central issue, which the Ninth Circuit characterized

as of “considerable practical importance,” is whether California’s overtime laws apply to out-of-state residents when they perform work in California for a California employer. The employees at issue in the case spent relatively few days in California; the most time worked in California by any of the three plaintiffs was 80 working days over a four-year period.

The Ninth Circuit’s decision to submit this issue to the California Supreme Court was a significant about-face from the court’s assertion in *Sullivan* that “the California Labor Code is clearly intended

to apply to work done in California by nonresidents.” (See discussion of *Sullivan* in our Winter 2008 newsletter). The court acknowledged in February that “there is no directly controlling precedent on the question.”

What this Means for Employers

The questions posed to the California Supreme Court in *Sullivan* deal with overtime claims of out-of-state employees of a California employer. Even if the Court chooses to decide those questions, however, other related issues may remain open, including: (1)

whether the myriad of other California wage and hour laws apply to work performed in California by out-of-state employees; and (2) whether any of these laws apply in the situation where both the employer and the employee reside outside California, but the work at issue was performed inside California.

Pending the outcome of *Sullivan*, the safest course for employers is to follow California’s wage and hour laws regarding work performed in California by out-of-state employees, whether the employer is headquartered inside or outside California.

EMPLOYERS MUST USE NEW FORM I-9 TO VERIFY EMPLOYMENT ELIGIBILITY AS OF APRIL 3, 2009

U.S. Citizenship and Immigration Services (CIS) announced new rules for verifying employment eligibility, the most significant of which bars employers from relying on any expired documents. The changes became effective on April 3, 2009.

Under past regulations, U.S. passports and all “List B” documents were acceptable even if they had expired. The new regulations require the employer to only rely on unexpired documents. Consistent with this rule, CIS has eliminated from “List A” three discontinued identity cards

that were last issued so long ago that any in circulation have expired. One addition to “List A” concerns citizens of Micronesia and the Marshall Islands. A number of relatively minor changes have also been made, all of which are incorporated in the new form.

Employers can access the new form and familiarize themselves with the rule changes by visiting the CIS website at www.uscis.gov. CIS maintains an employer handbook pertaining to Form I-9, also available online, which has been updated to reflect the new rules.

REMINDER: NEW FMLA REGULATIONS BECAME EFFECTIVE JANUARY 16, 2009

As we reported in our Winter 2008 newsletter, the U.S. Department of Labor issued new Family and Medical Leave Act (FMLA) regulations. The regulations are designed primarily

to implement leave requirements for military families, but they also address many other aspects of the FMLA. As the regulations recently became effective, employers should con-

sult the summary we provided in our Winter 2008 newsletter. Additional information is available from the Department of Labor, which has issued a fact sheet on the new regulations, a

revised FMLA poster, and new and revised forms at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.

EMPLOYERS MUST ASSIST IN PROVIDING NEW COBRA SUBSIDIES

Employers have been given new COBRA obligations by the American Recovery and Reinvestment Act of 2009 (ARRA), enacted February 17, 2009. The new COBRA provisions are designed to reduce the cost of continuation coverage for individuals and families.

The new law primarily affects larger employers covered by federal COBRA (generally, employers with group health plans that employ 20 or more employees). Such employers must advance 65% of the cost of coverage for “assistance eligible individuals” (AEIs), such that AEIs only pay 35% of what they would have paid otherwise. The federal government will reimburse employers through a credit against their payroll taxes, reportable for most employers on Form 941, filed quarterly. Subsidies are available for a maximum of nine months.

AEIs are defined as any COBRA-qualifying employee whose qualifying event consists of an involuntary termination during the period of September 1, 2008 to December 31, 2009. This definition includes employees terminated “for cause,” unless the cause amounts to “gross misconduct.” Employees who have agreed to quit in exchange for severance payments are also considered AEIs, at least where the employer has signaled its

intention of laying off some number of employees in that person’s work group.

AEIs whose modified adjusted gross incomes exceed \$125,000 (or \$250,000 for joint filers) may receive the subsidy, but they must pay back the federal government some or all of the amount in their taxes, with the repayment amount determined by each AEI’s level of income. Employers should therefore provide the subsidy without consideration of AEI income. However, the repayment obligation may motivate some high-income AEIs to waive their entitlement to the subsidy in order to avoid future tax liability. Such waivers are allowed and should be honored by the employer so long as the waiver is permanent: individuals who have waived the subsidy cannot later seek to recover it if it turns out that their incomes would not have triggered the repayment obligation.

Employers must provide notice of the COBRA subsidy to AEIs, whether or not those individuals have already elected COBRA coverage. The Department of Labor has made forms for notice available at www.dol.gov/ebsa/COBRAmode notice.html.

AEIs who previously declined COBRA coverage are given another opportunity to elect subsidized coverage. Such

AEIs have 60 days to elect coverage, measured from the date they are provided the mandatory notice.

Generally, employers with between 2 and 19 employees are not covered by COBRA, but are subject to the California equivalent, Cal-COBRA. The new COBRA subsidy must be

plan providers must give to qualifying employees and the extent to which AEIs who previously declined coverage must be given a second election opportunity. In its present form, the primary new burden on employers from AB 23 will be its requirement that employers promptly respond to inquiries from health plan



made available to employees of these smaller businesses, but small businesses subject to Cal-COBRA should feel little additional burden since the administration of Cal-COBRA is performed by health plan providers, not employers.

The California legislature is currently considering Assembly Bill 23 which, when final, will resolve questions about the implementation of the subsidy with respect to employees covered by Cal-COBRA, including questions about the notice that health

providers about whether individuals have been subject to an involuntarily termination (and thus whether they may qualify as AEIs).

Additional information about the federal subsidy is available at www.irs.gov/newsroom/article/0,,id=204505,00.html.

A copy of California’s Assembly Bill 23 can be accessed at <http://www.leginfo.ca.gov/bilinfo.html>.

TWO COURT DECISIONS (CONTINUED FROM PAGE 1)

What this Means for Employers

Class action waivers affecting employment disputes were placed in doubt long ago, particularly since *Gentry*. Employers that favor arbitration and utilize class action waivers have even more to worry about now, particularly because of *Olvera*. Enforcing arbitration agreements, even in single plaintiff cases, may now be more difficult because

the existence of the waiver could demonstrate substantive unconscionability. This is a worrisome development because it jeopardizes class action waivers in cases in which the *Gentry* rule would likely not apply, *e.g.*, common law claims that do not implicate unwaivable statutory rights or high-dollar claims, like discrimination, that do not need class treatment to attract legal representation. Meanwhile, the *Franco* decision makes it

more difficult to argue that an unenforceable class action waiver should simply be severed and that the arbitration agreement be enforced without it, since anytime the waiver purports to eliminate both class and representative actions—which probably includes every broadly worded waiver—*Franco* suggests that the entire agreement should be invalidated.

Given these developments, employers should consult

with counsel to determine whether they want to accept the risks of including a class action waiver in their arbitration agreements. Other options should also be discussed, such as narrowing the waivers to certain types of claims or seeking waivers from only highly compensated employees. The reasoning in *Olvera* suggests that safeguards such as these may free the waiver from unconscionability.

NEW PRECEDENT UPHOLDS VALIDITY OF WAGE CLAIM SETTLEMENTS

Section 206.5 of the Labor Code, enacted in 1959, prohibits employers from requiring that their employees sign a release of claims in order to receive wages due. But what happens when the employer and employee disagree about the amount of wages due, or disagree about whether any wages are due at all? Under section 206.5, are releases void whenever they resolve a wage dispute

in which wages, although disputed, could later be found owed to those signing the release? In *Chindarah v. Pick Up Stix, Inc.*, 171 Cal. App. 4th 796 (2009), a California Court of Appeal upheld the validity of releases where the employer proved it had a good faith dispute that any wages were owed to those who had signed the releases. Because of *Chindarah*, employers can take

comfort in knowing that wage claim releases will be enforced when the employer can prove it has a good faith dispute that any wages are owed. However, when employers know that some wages are due (*i.e.*, when employers cannot dispute in good faith that at least some portion of the requested wages are due), they should be sure to pay the undisputed amount before seeking to

settle claims for the disputed amount. Section 206.5 could still be interpreted as forbidding any release covering both disputed and undisputed wages. Employers should also bear in mind, when settling wages claims, that settlements of claims under the federal Fair Labor Standards Act still must be approved by a court or the U.S. Department of Labor.

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