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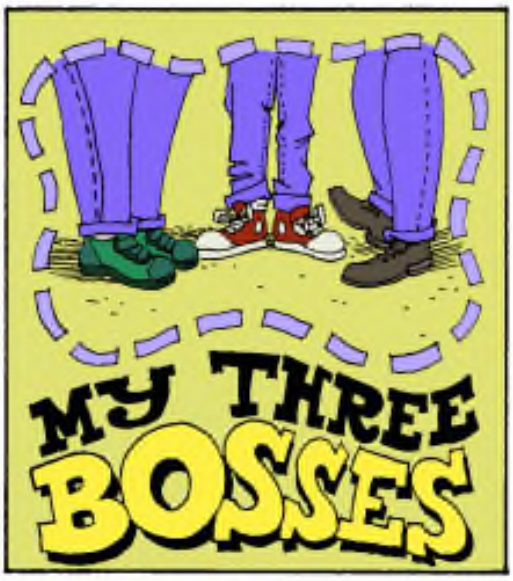
A NEWSLETTER ON EMPLOYMENT, LABOR AND BENEFITS LAW FOR CLIENTS AND FRIENDS OF ANDERSON, MCPHARLIN & CONNERS LLP

EMPLOYEE SUED AS AN EMPLOYER CANNOT CLAIM ATTORNEY FEES AS AN EMPLOYEE

By Eric A. Schneider

In the matter of *Ramos v. Garcia*, 248 Cal.App.4th 778 (2016), Rogelio Ramos sued Jose Robledo, Dora Garcia (Dora), and Manuel Garcia (Manuel) to recover unpaid wages, minimum wages and other compensation and job related penalties. He prevailed on some of his claims against Robledo and Dora, but lost on all of his claims against Manuel because the court determined that Manuel was not Ramos's employer as Robledo and Dora were.

The trial court awarded Manuel not only costs but attorney fees as well under Labor Code section 218.5. In so doing, it stated that it was not necessary to determine whether Ramos acted in bad faith in suing Manuel. Manuel had alleged that the claims against him were in bad faith because it was clear from the outset that he was not a proper party. Ramos appealed that fee award.



On appeal, Ramos asserted that while Manuel was found to have been an employee of the other two defendants and not himself an employer, section 218.5 was not designed to allow him to recover attorney fees in this situation.

The Court of Appeal agreed. Section 218.5 does not provide for unfettered reciprocity. Instead the bad faith requirement was intended to protect employees claiming unpaid wages and the like from the chilling effect of fees being awarded in favor of the employer which would be devastating to such plaintiff employees. Further, the fact that he prevailed on some of his claims demonstrated that Ramos was not acting in bad faith, and that Manuel was not a prevailing aggrieved employee.

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What can employers take away from this case?

At first glance, this would seem to be a very unusual case in that employees ordinarily know who their employers are. However it is certainly possible that an employer may have a structure involving holding companies or other similar situations where the precise identity of the employer may be confusing. In this case, no information was provided as to what led Ramos to believe that Manuel was not merely an employee manager but an employer (although perhaps it was because Manuel was married to Dora), and the reasonableness of Ramos's belief cannot be assessed.

The real moral for employers is that they should not expect courts to rely on clever interpretations of the law to the detriment of employees seeking unpaid wages. Employees who lose cases of this nature generally cannot be looked upon to satisfy fee awards, both because the law does not require it other than in extreme situations and because they often do not have the means to pay the employer's attorney fees.

CALIFORNIA APPELLATE COURT AFFIRMS THAT SIMPLY ENSURING THAT EMPLOYEES ARE PROVIDED WITH THE OPPORTUNITY TO TAKE A MEAL BREAK IS SUFFICIENT

By Colleen A. Déziel

In the matter of *Driscoll v. Granite Rock Co.*, 6 Cal.App.5th 215 (2016), a California appellate court held that Granite Rock Co. complied with wage and hour laws by having a policy of providing uninterrupted meal periods or paying for a missed meal period when requested, by informing the employees of their right to have such a meal period, by not discouraging the taking of meal breaks and by having such a policy in its handbook. The fact that certain employees chose to work through lunch did not change the court's finding on this issue.

Granite Rock Co. is a company that manufactures, delivers and pours concrete. Its customers include private residences, governmental entities and private construction contractors. The concrete is a perishable product which cannot be stored. It is made up of sand, rock and cement. When water is added to the mixture the chemical reaction causes the substance to harden. Thus, the product must constantly rotate in the drum of a cement mixing truck. The mixture also must be poured within 60-90 minutes in order to ensure structural integrity. One of the job duties of Granite Rock Co. truck drivers is to monitor the constant rotation of the truck's drum: an employee cannot simply walk away to take his/her meal break.

Granite Rock Co. provides its drivers with the option of signing an On-Duty Meal Period Agreement wherein the employees essentially agree that when the duties of their job require them to work during meal breaks, they will do so. Such agreement provides that it is revocable with one day's notice. If an employee does not want to sign the agreement but was required to have an on-duty meal break, such employee would be compensated one hour special pay.

The representative plaintiffs in this matter complained that the On-Duty Meal Period Agreement violates the wage and hour laws and that Granite Rock Co. failed to provide the required off duty meal periods.

The evidence presented at the court trial reflected that the truck drivers were aware of their right to a 30 minute uninterrupted meal period, were aware that they could revoke the Agreement, if they signed it, at any time, were aware that they could take an off duty meal break even if they signed the Agreement, and were never denied an off duty meal break when one was requested. There was also evidence that the drivers took "on-duty" meal breaks because they wanted to. Under these circumstances, the trial court found that while the Agreement did not comply with the wage and hour laws, the above facts supported a finding that Granite Rock did not force employees to work through meal periods.

The plaintiffs appealed the court's ruling, and Granite appealed the finding that its Agreement failed to comply with applicable wage and hour laws. Essentially, the appellate court agreed with the trial court in regard to Granite Rock Co.'s meal period policy. It did not analyze or rule on the issue of whether Granite Rock Co.'s On-Duty Meal Period Agreement violated wage and hour laws. The appellate court noted that since it concluded that the meal policy complied with applicable law, it did not need to address the On-Duty Meal Period Agreement.

What can employers take away from this case?

The appellate courts continue to follow *Brinker Restaurant Co. v. Superior Court*, 53 Cal.4th 1004 (2012), in regard to the issue of rest and meal breaks. As you are aware, the Supreme Court in *Brinker* found that it is sufficient that employers ensure that off duty meal periods are made available, but does not require the employer to ensure that the breaks are actually taken. The instant case shows us that as long as the employees are made aware of their rights in regard to meal periods, they may voluntarily and knowingly relinquish an off-duty lunch period in favor of an on-duty meal period. What we do not know is whether the appellate court will limit such a finding to jobs/positions like these truck drivers who, at times, cannot take an off-duty meal period due to the nature of the product the company manufactures and sells.

Regardless, employers should continue to maintain their rest and meal break policies in writing in their employee handbooks and should continue to keep their employees informed of their rights. And, if an employee elects to take an on-duty meal break due to the nature of his/her job, be sure to get in writing the fact that the employee is waiving his/her off-duty meal period.

Unfortunately, we do not know how the appellate court would have ruled on the legality of the On-Duty Meal Period Agreement. As noted above, the trial judge found that it did not comply with wage and hour laws and the appellate court refused to review that aspect of the lower court ruling.

SUPREME COURT FINDS THAT ON-DUTY/ON-CALL REST AND MEAL BREAKS VIOLATE THE LAW

By Colleen A. Déziel

In the matter of *Augustus v. ABM Security Services, Inc*., (Cal., Dec. 22, 2016, No. S224853) 2016 WL 7407328, the California Supreme Court decided the issue of whether an employer's policy of requiring its security guards to remain "on-duty" or on-call during their rest and meal breaks violates wage and hour laws. The short answer is yes: an employer must relinquish all control during employees' rest and meal breaks. In coming to this conclusion, the Supreme Court recognized that the history and intent behind the creation of wage and hour laws were to protect employees. It also decided that this history and intent mandated that employees be allowed to take uninterrupted rest and meal breaks and requiring employees to keep their phone and/or radio on during such breaks "just in case" an emergency arose is not consistent with that mandate. We note that this matter is an unpublished opinion and thus, cannot be cited. However, this case is certainly instructive on how the Supreme Court will rule in similar cases.

So how is this case different from *Driscoll v. Granite Rock Company* (a case we also address in this newsletter) wherein the appellate court held that employees may forgo "off-duty" rest and meal breaks? While these two decisions may seem inconsistent, there are several significant differences between the two which reflect that they are not inconsistent. First, the employer in *Driscoll* maintained a written policy of providing "off-duty" rest and meal breaks to all employees. This policy is clearly consistent with the history and intent behind the wage and hour laws as discussed in *Augustus*. In contrast, the employer in *Augustus* maintained a policy of requiring employee security guards to keep their cell phones and/or radios on during any rest and meal breaks. According to the Supreme Court this "on-call" requirement does not relieve the employees of all duties. Second, the employees in *Driscoll* maintained control over the decision of whether to take such breaks "on" or "off-duty." In *Augustus* the employer maintained control over this issue. Third, the employer in *Driscoll* ensured that any employee who wished to take an "off-duty" break but was unable to do so was paid special pay. It is clear in *Augustus*, given ABM's policy of requiring "on-duty" breaks, that ABM did not pay the employees "special" or "extra" pay for taking such "on-duty" breaks.

What can employers take away from this case?

Best practices dictate that all employers adopt a policy which provides all employees with uninterrupted rest and meal breaks, and that all employer control be relinquished during these times. However, if an employer decides that it needs certain employees to be "on-call" or "on duty" during any such breaks, then it should pay these employees for having to be on call during the break(s). And, while the court in Driscoll allowed employees to decide whether to take "on" or "off" duty breaks without extra compensation, it behooves an employer to ensure that these employees are properly compensated. The reason for this is that it could help prevent expensive and time consuming class action lawsuits for alleged wage and hour violations when certain employees dispute whether they actually agreed to take "on-duty" breaks.

SIGNIFICANT PROCEDURAL FAILURES RENDER ARBITRATION AGREEMENT UNENFORCEABLE

By Michelle T. Harrington

In *Flores v. Nature's Best Distribution, LLC,* (Cal. Ct. App., Dec. 2, 2016, No. G052410) 2016 WL 7451142, the Court of Appeal affirmed an order denying an employer's petition to compel arbitration because the employer failed to establish the existence of an arbitration agreement, even though there was an independent arbitration provision and one contained in a collective bargaining agreement.

Julie Flores filed a complaint against Nature's Best Distribution, LLC, Nature's Best, KeHe Distributors, Inc. and KeHe Distributors, LLC alleging several claims under the California Fair Employment and Housing Act. The complaint does not specifically allege which entity or entities served as plaintiff's employer. All defendants filed a petition to compel arbitration of Flores's claims based on evidence that she signed an agreement for arbitration.

The trial court denied the petition. The defendants contend the trial court erroneously concluded that defendants failed to prove plaintiff agreed to arbitrate her claims and that the arbitration provision was unenforceable because it was unconscionable.

"That's your best advice? Play nice!"

The Court of Appeal affirmed the trial court's order holding that the defendants failed to establish the existence of an agreement to arbitrate. The Court's holding was based on three factors. First, the Court observed that the agreement states that it is between "employee and Company," but the signature block for the employer is not filled in, dated, or signed under the heading "Authorized Employer Signature." Therefore, the agreement does not identify with which entity or entities plaintiff had agreed to submit her claims to arbitration.

Second, the Court noted that the agreement fails to define which disputes would be subject to arbitration before the AAA, and which would be subject to resolution through the grievance and arbitration procedure contained in a collective bargaining agreement. The agreement requires Flores to submit all legal, equitable and administrative disputes to the American Arbitration Association for mediation and binding arbitration. This applies to all employee disputes, except those actually covered by the grievance and arbitration procedure in the agreement between Nature's Best and Teamsters Local 692. The defendants' petition to compel arbitration did not include any analysis addressing why Flores's claims were not subject to the arbitration provision in the collective bargaining agreement. The Court also observed the existence of multiple collective bargaining agreements, namely one signed with Local 692 in 2001 when Flores was hired and another with effective dates of June 1, 2014 to May 31, 2018 covering the time period when Flores was terminated.

Third, the agreement fails to identify which set of the AAA rules would apply to binding arbitration. Although the defendant initially argued that the AAA's Labor Arbitration Rules applied and submitted a copy of such rules, the Court found that those rules state that they became effective about 12 years after Flores signed the agreement. To make matters worse for the defendants, they later asserted that the AAA's Employment Arbitration Rules and Mediation Procedures applied but failed to submit a copy of those rules to the trial court. The defendants did not produce evidence that identified any particular set of AAA rules that were in effect at the time Flores signed the agreement.

Although the authentication of the agreement was also questioned by Flores (i.e., whether or not he signed the agreement), and he argued the agreement was unconscionable, the Court opined that it did not need to address those issues in order to affirm the order denying the petition to arbitrate.

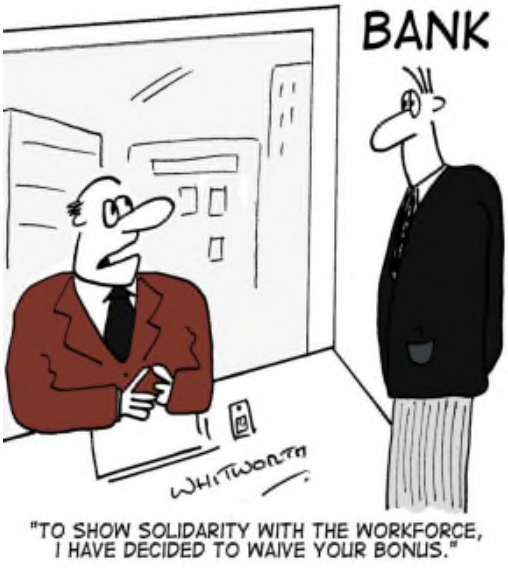
What can employers take away from this case?

This decision serves as an important reminder to employers to periodically review and update existing arbitration agreements to ensure compliance with current laws and to make certain that such agreements are enforceable.

NLRA Prohibits Waiver of Rights of Employees to File Class Actions

By Leila M. Rossetti

One of the biggest pitfalls that employers consistently seek to avoid is "concerted" legal action by their employees, which refers to legal claims brought on behalf of more than one party, including class action suits. Ernst & Young sought to circumvent this risk by including a "concerted legal action waiver" in its employment contracts, which required that employees could only bring claims against the company through arbitration and further that they could only arbitrate as individuals in "separate proceedings." In other words, Ernst & Young was trying to ensure that none of its employees could work together to bring consolidated work-related claims against the company, and instead would have to each initiate a separate proceeding against the employer.



In *Morris v. Ernst & Young*, 834 F.3d 975 (2016), the Ninth Circuit ruled that this language in Ernst & Young's employment contracts was unenforceable under the National Labor Relations Act (NLRA). Plaintiffs Stephen Morris and Kelly McDaniel, despite having signed the employment agreements containing the concerted legal action waiver, brought a class-action lawsuit in federal court claiming that Ernst & Young had intentionally misclassified many employees, resulting in a failure to pay the requisite overtime wages under the Fair Labor Standards Act (FLSA). The lower court enforced the contract and ordered the plaintiffs to separate arbitrations. The Ninth Circuit reversed that ruling, finding that "[t]his restriction is the very antithesis of [the NLRA's] substantive right to pursue concerted work-related legal claims" and employees' rights under the NLRA "would amount to very little if employers could simply require their waiver." Accordingly, the court definitively found that "[a]n employer may not condition employment on the requirement that an employee sign" a contract waiving his/her right to file a concerted legal action.

It is important to note that the court also specified that the ruling does not mean that the NLRA prohibits arbitration clauses in employment contracts, and specified that, "[i]ndeed, federal labor policy favors and promotes arbitration." However, the language requiring that employees each bring a separate action was found to be unlawful under the NLRA.

It is possible that this ruling will not stand for very long. The United States Supreme Court recently granted certiorari to review this decision. Given the likelihood that a conservative justice is appointed to the Court in the near future, together with the fact that this ruling could be found to conflict with the Supreme Court's 2011 ruling in the matter of *AT&T Mobility v. Concepcion* (where the Court upheld class action arbitration waivers in *consumer* contracts), there is a distinct possibility that this ruling will ultimately be overruled.

What can employers take away from this case?

For now, the Ninth Circuit has made clear that contractual language barring any concerted legal actions is impermissible as a matter of law. Unfortunately for employers, this ruling confirms employees' right to work together in bringing work-related claims against employers for the time being. While there is no way to guarantee that no such claims are ever brought against your company, taking steps to ensure that your company is in compliance with all applicable labor laws can go a long way towards preventing such complaints and minimizing the damage caused by any claims which are brought.

EMPLOYER OVERREACTS TO PERCEIVED DISABILITY

By Eric A. Schneider

In the matter of *Moore v. The Regents of the University of California*, (N.D. Cal., Dec. 5, 2016, No. 15-CV-05779-RS) 2016 WL 7048991, Deborah Moore's quickly ascending career in UC San Diego's Marketing and Communications Department was derailed when her direct supervisor left suddenly. The supervisor's replacement (Kennedy) grossly misinterpreted the impact of Moore's health condition, and seemed to have retaliated against Moore for needing time off for surgery. Ultimately Moore brought suit against the Regents of the University of California for various FEHA violations.

The trial court granted summary judgment in favor of the Regents. Moore appealed. The Court of Appeal reversed and remanded.

This case is instructive relative to the concept of perceived disability in a FEHA context and claims under the California Family Rights Act (CFRA).

Moore's career at UCSD began auspiciously. She started as a temp in 2008, but was promoted to Director of Marketing in early 2010. The job was going quite well until Kennedy was hired as Executive Director

In September, 2010, Moore was diagnosed with a heart condition that required her to wear a "Life-Vest" which was equipped with a monitor and external defibrillator. The Life-Vest is worn outside the person's clothing.

Notwithstanding Moore telling her that she would be able to continue to do her job, Kennedy responded "the first thing we need to do is lighten your load to get rid of the stress." There is no indication in the opinion that Moore needed any such accommodation or was suffering stress. Moore expressly declined any differential treatment or accommodation.

Kennedy then contacted the human resources department to ask what she should do if one of her employees "has a medical event" and then asked what she should do with an employee "with adverse health issues."

Moore then told Kennedy that she had been informed that she no longer needed to wear the LifeVest because it had been "over-prescribed" to her. Inexplicably, Kennedy told Moore that she had been in touch with HR to ask how to handle Moore "as a liability to the department."

Even though Moore expressed no need for accommodation, Kennedy began to reduce Moore's responsibilities, and then she demoted her albeit without a reduction in pay.

Moore then informed Kennedy that she would be having a pacemaker surgically implanted, but told Kennedy shortly thereafter that she was delaying the surgery and would just need a few days off. Kennedy did not respond.

Kennedy, however, wrote the director in the human resources department to say that she wanted to eliminate Moore's position because the job functions she was performing had dwindled to such a point that Kennedy herself could assume them.

The HR director then asked Kennedy to explain why Karen Shea (also a marketing director like Moore) should be retained over Moore in light of the University's policy calling for retention on the basis of seniority unless the junior employee (in this case Shea) "possesses special skills, knowledge, or abilities that are not possessed by other employees in the same classification and same salary grade."

Kennedy responded as to why a reduction in force was in order but did not provide information as to Shea possessing skills, knowledge or abilities that Moore was lacking.

The university also had a policy of giving staff preferential opportunities for reassignment or transfer prior to layoff. The marketing department increased staff by eight from the period three months before Moore's layoff and three months afterward. The most significant increases were in internet marketing and design. Even though Kennedy knew that "Moore's career had been devoted to being a graphic designer, production manager, and art director," she did not ask Moore if she would accept a pay reduction or a freelance assignment or any of the positions that were filled around the time of or after her layoff.

Moore brought suit alleging FEHA claims for disability discrimination, failure to accommodate, failure to engage in the interactive process, and retaliation. She also presented claims under CFRA. We will address only the disability discrimination in this article.

The trial court granted the defendant's motion for summary judgment. Moore appealed.

With regard to discrimination, the appellate court applied the standard *McDonnell Douglas* analysis: the plaintiff bears the initial burden of establishing a prima facie case of discrimination, i.e., that she suffered from a disability or was perceived to have suffered from a disability, that she could perform the essential functions of her job with or without reasonable accommodation, and that she suffered an adverse employment action due to the disability or perceived disability.

The burden then shifts to the defendant to produce evidence that it took the adverse action for a legitimate, nondiscriminatory business reason.

The burden then shifts back to the plaintiff to prove that the claimed legitimate, nondiscriminatory reason was false or pretextual.

In applying the analysis in this case, the appellate court observed that the lower court properly first determined that Moore had demonstrated that even though she was not in fact disabled, there was a triable issue of fact as to whether the employer perceived her to have been disabled.

The Court of Appeal also agreed with the trial court's assessment that the University had demonstrated a legitimate nondiscriminatory basis for the termination.

The appellate court however did not see eye to eye with the lower court with regard to the third element of the *McDonnell Douglas* analysis and on that basis reversed the summary judgment.

The defendant maintained that the layoff stemmed from restructuring or reorganization of the marketing department. In response, Moore pointed out:

1. Kennedy began to remove responsibilities from Moore after she had been promoted and upon Moore beginning to wear the LifeVest;

2. Kennedy also brought in freelancers to do some of the work that Moore could have done;

3. Kennedy decided to eliminate Moore's position shortly after she indicated that she would need some time off for surgery (which she opted to defer), and did so without considering moving her to a different director position or demoting her;

4. The defendant did not follow its own policies when Kennedy not only eliminated Moore's position but terminated her as well;

5. The defendant and Kennedy elected to keep Shea on notwithstanding her having less seniority and without any determination that Shea had special skills, abilities or knowledge that would justify not following the seniority protocol;

6. Kennedy did not adhere to the policy that regular status employees be given preferred status prior to indefinite layoff; and

7. Kennedy's made comments and took actions indicative of discriminatory animus after Moore first showed up with the LifeVest, referring to Moore having an "adverse health condition" and seeking assistance from human resources as to how to handle Moore as a "liability to the department."

These factors taken as a whole demonstrated why summary judgment was inappropriate, and that a jury should hear the evidence and render a verdict.

What can employers take away from this case?

While Kennedy clearly took inappropriate action in a multitude of respects, fault falls even more heavily on the shoulders of the human resources department. It should have recognized that Kennedy lacked a basic understanding of how disabled employees or employees perceived to be disabled must be handled. Human resources stood by as Kennedy first reduced Moore's duties and then terminated her even though it was aware of her having regarded Moore as a "liability to the department" and her having an "adverse health condition" with no justification for those beliefs. The HR professionals should have made themselves part of the process. Inasmuch as Moore denied the need for any accommodation (other than some time off in the future for surgery), engaging in the interactive process would have resulted in no need to consider reasonable accommodations because the employee denied being disabled or in need of any accommodation.

WORKER'S OT CLASS CLAIM IS A QUESTION FOR ARBITRATOR

By Michelle T. Harrington

In *Nguyen v. Applied Medical Resources Corp.*, 4 Cal.App.5th 232 (2016), the California Court of Appeal held that the question of class arbitration availability of a former employee's claims against a surgical products manufacturer for unpaid overtime and rest and meal break violations was one for the arbitrator to decide.

Da Loc Nguyen, a former production line employee of Applied Medical Resources Corp, brought suit against the company alleging individual and class claims under the California Labor Code, Unlawful Competition Law, and the

Private Attorney General Act (PAGA). The trial court granted the company's petition to compel arbitration based on an arbitration provision in Nguyen's employment application. The court ordered Nguyen to arbitrate his individual claims and dismissed all class claims except the PAGA claims, which were stayed. Nguyen appealed asserting the court erred in finding the arbitration clause was not unconscionable, severing the cost provision, and dismissing the class claims with prejudice.

The Court of Appeal rejected all but Nguyen's last argument holding that the trial court erred by dismissing the class claims because, pursuant to the California Supreme Court's holding in *Sandquist v. Lebo Automotive, Inc.*, 1 Cal.5th 233, as to whether the arbitration provision contemplated class arbitration is one for the arbitrator to decide rather than the trial court. In so holding, the Court found that the language of Applied's arbitration clause was similar to that in *Sandquist*, namely that it provided that all disputes should go to arbitration, which weighed in favor of allowing the arbitrator to make all decisions regarding the case including the arbitrability of class claims.

Additionally, the Court applied two principles of law: first, "when the allocation of a matter to arbitration or the courts is uncertain, all doubts are resolved in favor of arbitration. Second, ambiguous terms in contracts are construed against the drafter. Because Applied drafted the arbitration clause and could have expressly stated whether class claims could be arbitrated but did not do so, it could not benefit from that ambiguity after the fact.

In rejecting the employee's procedural unconscionability argument, the Court of Appeal held that although the arbitration agreement was a contract of adhesion offered on a take it or leave it basis, the adhesive aspect established only modest procedural unconscionability. The Court found that the company's failure to attach a copy of the AAA arbitration rules did not increase the procedural unconscionability of the application or its arbitration provision. The Court also rejected Nguyen's assertion that he was not fluent in speaking or reading in English where he had indicated in his employment application that he had English as a special skill and because he knew enough English to obtain both an associate's degree and go through four years at a university in Australia.

Likewise, the Court rejected Nguyen's contention that the agreement was substantively unconscionable because the inclusion of the phrase "I agree" did not destroy the bilateral nature of the agreement. Further, the Court found that the agreement's provision that internal grievance procedures be exhausted before proceeding to arbitration was reasonable and laudable. Finally, the Court held that the arbitration cost splitting provision in the agreement could be severed because the agreement was not permeated with unconscionability.

What can employers take away from this case?

While the holdings in this case generally present a win for the employer, it nevertheless underscores the importance of a well drafted arbitration agreement which should include a provision that prohibits class claims. It also serves as a reminder that employers should always include a provision that the employer will pay for all costs that are unique to arbitration to avoid the assertion that the agreement is substantively unconscionable.

Employment Practices Group at Anderson, McPharlin & Conners LLP

Our Employment Practices Group places a special emphasis on keeping pace with rapidly changing employment laws and providing employers with effective representation in this constantly evolving area. For twenty years, our clients have known that we understand the challenges they face and that we will work with them in assessing risks and developing cost-effective strategies to bring employment matters to prompt and satisfactory resolution.

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