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

NINTH CIRCUIT UPHOLDS $300,000 PUNITIVE DAMAGE AWARD AND $350,000 IN COUNSEL FEES IN CASE WITH $1 IN NOMINAL DAMAGES

By Leila M. Rossetti

In *Arizona v. ASARCO LLC 773 F.3d 1050 (9th Cir. 2014),* plaintiff Angela Aguilar sued her former employer in federal court alleging sexual harassment, retaliation and constructive discharge. After an eight-day trial, the jury awarded no compensatory damages (i.e. they found that the plaintiff did not suffer any financial detriment as a result of her employer's actions), but awarded nominal damages in the amount of $1 and punitive damages of $868,750. Because Title VII imposes a statutory cap on damages, the trial court reduced the punitive damage award to the statutory maximum of $300,000 and granted Ms. Aguilar's request for counsel fees of slightly over $350,000. The Ninth Circuit upheld both the award of punitive damages and the counsel fee award.

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Ms. Aguilar worked for ASARCO's Mission Mine complex, which includes a copper mine and mill, from December 2005 through November 2006 as a mill laborer, a car loader operator, a filter operator and finally as a rod and ball mill person. The court noted that the record from the trial reflected that Ms. Aguilar was subjected to "lewd, inappropriate and sexually aggressive behavior," that ASARCO "did not provide prompt and effective remedial action" and that "ASARCO treated Aguilar's claims dismissively, did nothing to investigate Aguilar's claims, or took steps that were not reasonably calculated to and did not stop the harassment." The court also pointed out that ASARCO did not have an anti-discrimination policy in force.

Taking all of these factors into consideration, along with the fact that Title VII includes a statutory cap on punitive damages, the Ninth Circuit found that the award of $300,000 in punitive damages was proper despite the fact that Ms. Aguilar was not awarded any compensatory damages. Similarly, referencing the fact that her attorneys were able to obtain a jury verdict in excess of $850,000 in punitive damages (later reduced by the court), the court granted Ms. Aguilar's attorneys' request for over $350,000 in counsel fees.

What can employers take away from this?

First and foremost, it is important to remember that California's Fair Employment and Housing Act (FEHA), which governs claims of harassment and discrimination in the workplace, does not provide any cap on punitive damages. Thus, had this case been brought in state court, it is possible that the punitive damage award could have been higher, and even at the jury's original award in excess of $860,000.

As evidenced by the Ninth Circuit's decision in this case, substantial liability cannot necessarily be avoided just because the employee did not technically suffer any financial damage. Also, it is clear that a different standard is not applied to workplaces that are historically staffed by males, (i.e., the copper mines in this instance).

It is absolutely crucial that employers have anti-harassment and anti-discrimination policies in effect, that the policies are conveyed to employees regularly and, if an employer has more than 50 employees, that all managers receive mandatory sexual harassment training every two years. California's laws prohibiting sexual harassment apply to employers regardless of the number of employees and FEHA applies to employers who have at least five employees. Moreover, FEHA provides a cause of action for failure to prevent harassment and discrimination, which means as soon as an employer is on notice that any manner of inappropriate conduct is taking place in the workplace, the employer is under an obligation to address the issue and take steps to ensure that it does not continue.

Employers should take issues of sexual harassment very seriously and, if there is ever any doubt as to whether sexual harassment has occurred or whether all appropriate steps have been taken to address the conduct at issue, consult with an HR professional or employment lawyer right away to avoid future liability.

HEALTH CARE PROVIDER MAY GO TO "CODE BLUE" BY COURT'S DECISION ON MEAL BREAKS

By Michelle T. Harrington

In California, the Industrial Welfare Commission ("IWC") issues industry specific Wage Orders with which employers are expected to comply. In a recent case, *Gerard v. Orange Coast Memorial Medical Center*, 234 Cal.App.4th 285 (2015) review granted and opinion superseded, 2015 WL 2405215 (Cal., May 20, 2015, S225205) the California Court of Appeal ruled that it was improper for an employer to rely upon a provision of the governing Wage Order that expressly authorized healthcare workers to waive one of their two required meal periods on shifts longer than 12 hours. (Wage Order No. 5) The Court of Appeal held that the provision was contrary to the California Labor Code and invalidated it.

"Nurse, get on the internet, go to SURGERY.COM, scroll down and click on the 'Are you totally lost?' icon."

In reaching this conclusion, the court determined that the IWC had no authority to adopt a regulation that conflicts with the express language of California Labor Code Section 512(a), which provides: "An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived." The court found that when the State legislature enacted the meal break statute, it also repealed five of the wage orders, including those that contained the health care exception, and required the IWC to review and revise its orders to conform to the State legislature's expressed intentions. Additionally, it also enacted a statute that prohibited the IWC from enacting any standards that conflicted with the State legislature's meal break statute. Thus, the court found that the IWC exceeded its authority when it readopted the healthcare exception.

The court went on to say that because employers have been on notice that they were required to provide healthcare workers with a second meal period on shifts longer than 12 hours, the employees were entitled to seek the penalty (of one additional hour of pay for each shift in which a meal break was not provided) for any failure by the hospital in the past to provide a second meal break, despite its reliance on the Wage Order healthcare exception. California further compounds these penalties by allowing employees to seek additional penalties, including waiting time penalties, wage statement penalties, and penalties under the Private Attorneys' General Act.

What can employers take away from this?

Because of the retroactive impact of the court's decision, any healthcare employer who currently permits its employees to waive their second meal break on shifts greater than twelve hours must immediately change its policies. This decision serves as a stark reminder of California's complex wage and hour regulations.

SELF-SERVING TESTIMONY BY THE PLAINTIFF IS SUFFICIENT TO DEFEAT MOTION FOR SUMMARY JUDGMENT ON A DISABILITY BASED CLAIM

by Colleen A. Déziel

In a small blow to employers, the federal appellate court in the matter of *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495 (9th Cir. 2015) has found that a self–serving declaration submitted by the plaintiff in opposition to a motion for summary judgment is sufficient, by itself, to overcome the motion. In the *Nigro* matter, in an effort to show that the plaintiff was terminated by Sears because of his disability, Nigro submitted a declaration in opposition to the motion for summary judgment wherein he stated that he had a telephone conversation with a Sears's General Manager, wherein this manager informed him "if you're going to stick with being sick, it's not helping your situation. It is what it is. You're not getting paid, and you're not going to be accommodated." Nigro also submitted portions of his deposition testimony wherein he testified that Sears's District General Manager had indicated that Nigro should not be concerned about his pay issue, because he was "not going to be here anymore." There was no other relevant evidence submitted in opposition to the motion.

"We need to install better virus software. Another computer just filed a disability claim!"

On summary judgment, Sears's counsel argued that the self-serving declarations of the plaintiff should be disregarded (both the declaration and the deposition testimony.) The District Court agreed and thereafter granted the motion. On appeal, the appellate court disagreed and reversed. In doing so, the appellate court noted that while declarations are often self-serving, this would be properly so because the party submitting it would use the declaration to support his or her position. The source of the evidence may have some bearing on its credibility, and thus on the weight it may be given by a trier of fact, but that evidence is to a degree self-serving is not a basis for the district court to disregard the evidence at the summary judgment stage. The court concluded that Nigro's declaration and deposition testimony were indeed uncorroborated and self-serving testimony, but still were sufficient to establish a genuine issue of material fact on Sears's discriminatory animus.

At the end of the decision, the federal appellate court also noted that it should not take much for a plaintiff in a discrimination case to overcome a summary judgment motion, as the ultimate question is one that can only be resolved through a searching inquiry; one that is most appropriately conducted by a fact-finder, upon a full record.

What can employers take away from this?

It is getting more difficult to extract employers from discrimination based cases absent trial or settlement. The courts, at both the state and federal level, are increasingly denying motions for summary judgment brought by employers, even when the only "evidence" to support a purported claim consists of the plaintiff's own statements. Given this, it behooves employers to continue to document every adverse employment decision and counseling of employees, train its managers to refrain from making statements which could be misconstrued as discriminatory, and make every effort to accommodate those employees who need it. That way if an employee decides to sue, and can only submit a declaration in opposition to a motion for summary judgment, the employer will be in a better position to argue that the declaration is a sham, as opposed to "testimony establishing a genuine dispute of material fact."

CLASS ACTION PROPER VEHICLE FOR DETERMINING WHETHER INSURANCE COMPANY AS EMPLOYER IMPOSED OVERTIME OBLIGATION ON EXAMINERS

by Eric A. Schneider

Jack Jimenez filed suit against his employer Allstate Insurance Company on behalf of himself and some 800 other Allstate employees alleging that the company had an unofficial policy of requiring its claims adjusters to work unpaid off-the-clock overtime in violation of California law (*Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161 (2014)). The trial court certified the class with regard to unpaid overtime, timely payment upon termination, and unfair competition finding sufficient evidence to establish the following common questions:

1. Whether class members generally worked unpaid overtime due to Allstate's alleged unofficial policy discouraging the reporting of such overtime such that overtime pay was regarded as an exception;
2. Whether Allstate knew or should have known that the class members were doing so; and
3. Whether Allstate "stood idly by" without compensating the class members for the overtime that they had worked.

Allstate appealed to the Ninth Circuit Court of Appeals. The court reviewed the class certification order under an abuse of discretion standard: did the court apply an incorrect legal rule or rely upon a faulty factual finding?

Allstate claimed the former, raising two substantial legal challenges:

1. That the order did not comply with FRCP Rule 23 because the common questions would not resolve class-wide liability issues; and
2. That the court's approval of statistical modeling violated Allstate's due process rights.

The court examined the first contention in view of a recent US Supreme Court case (*Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012)) which emphasized that the question of commonality required that the class members' claims depend upon a common contention such that the determination of its truth or falsity would resolve an issue that is central to the validity of each claim in one stroke. Under Ninth Circuit law, such common questions may center either on shared legal issues with divergent factual predicates or a common core of salient facts coupled with disparate legal remedies. The court agreed with the District Court's conclusion that the three common questions in this case had that capacity because of their close relationship with the three prongs of the underlying substantive legal test.

The court also considered whether the common questions were apt to drive the resolution of the litigation, and determined that they did. The elements of off-the-clock claims are that the employees performed work for which they were not paid; that the employer knew or should have known that they were doing so; and that the employer

stood idly by. Those were exactly the common questions, and thus there was no abuse of discretion relative to certification.

The court next tackled Allstate's argument that the use of statistical sampling ran contrary to the seminal case of *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011). The Ninth Circuit however has consistently held that since Dukes, statistical sampling and representative testimony are acceptable ways to determine liability so long as those techniques did not expand into the realm of damages. Inasmuch as the District Court had carefully preserved Allstate's right to raise individualized defenses in the damages phase of the proceedings, the plaintiffs could pursue class certification on the common questions of whether Allstate's practices or informal policies violated California labor law.

What can employers take away from this?

Employers cannot burden their employees with more work than they can handle within a 40 hour work week and create an atmosphere where the employees are discouraged from reporting their overtime. If they do, they run the risk of having to defend expensive and time consuming class action lawsuits.

AN EMPLOYER WHO UNLAWFULLY RETALIATES AGAINST AN EMPLOYEE SOLELY TO APPEASE A CUSTOMER MAY STILL BE LIABLE TO THE EMPLOYEE DESPITE LACK OF ANY RETALIATORY MOTIVE

by Leila M. Rossetti

In the case of *Tamosaitis v. URS Inc.*, 781 F.3d 468 (9th Cir. 2015), the Ninth Circuit held that an employee who was terminated from a particular assignment after the client was unhappy with the employee's whistleblowing activities could maintain a claim for retaliation against his employer, despite the fact that the employer terminated him from the assignment upon the request of the client and pursuant to a contract which allowed the client to have an employee removed from the assignment if the client found him to be "objectionable."

"We're hoping to appease the tax gods by offering a human sacrifice and your name came up."

In 2009 and 2010, Walter Tamosaitis, an employee of URSE&C, a subcontractor of Bechtel National, Inc., was appointed to lead a study identifying technical challenges with a $500 million nuclear waste cleanup program known as the WTP (Water Treatment Plant) project. His study identified 28 problems to be addressed, 27 of which were resolved by the planned date of October, 2009.

Dr. Tamosaitis sought to extend the deadline to September, 2010 to resolve the last remaining issue. Bechtel rejected the advice and announced that this issue was resolved by June, 2010, which deadline Bechtel was required to meet to avoid jeopardizing a $6 million fee.

Dr. Tamosaitis objected to this action by Bechtel, and, among other actions designed to publicize his concerns, brought a 50-point list of safety and environmental concerns to a meeting hosted by Bechtel.

Two days later, Dr. Tamosaitis was fired from the WTP project and reassigned to a non-supervisory role in a basement office. URS, a subcontractor of Bechtel, had a contract with Bechtel for the WTP project which provided that Bechtel could require that URS "remove from the work any employee [Bechtel] deems incompetent, careless or otherwise objectionable."

Dr. Tamosaitis filed suit claiming that URS wrongfully terminated his employment in retaliation of his lawful whistleblowing activity on the WTP project. URS argued that Dr. Tamosaitis could not prove retaliation because there was no evidence of any retaliatory motive by URS. Instead, URS claimed it fired Dr. Tamosaitis from the project at the request of its client, Bechtel, which URS maintained it was contractually obligated to do.

The Ninth Circuit rejected the argument by URS and held that as Dr. Tamosaitis's employer, URS could be found liable for retaliation even if there was no evidence of retaliatory motive on the part of URS, because URS ratified the unlawful conduct of Bechtel by firing Dr. Tamosaitis from the project. The Ninth Circuit also rejected the argument that URS had no choice in the matter, finding that the contractual language did not require URS to engage in unlawful retaliation, and if it did, the contract would be void under public policy. Instead, the court cited to the testimony of a URS supervisor who testified that, had Bechtel made a similar request regarding a female employee, the supervisor would not have simply agreed to the request, but instead would have raised the issue with corporate headquarters in protest. Citing to this testimony, the court found that URS did have a choice and, by choosing to fire Dr. Tamosaitis from the project despite knowledge of Bechtel's retaliatory motives, URS could be found liable to Dr. Tamosaitis for retaliation.

What can employers take away from this?

As always, employers need to pay careful attention to the circumstances surrounding a particular employee prior to terminating his/her employment. Although employment in California is at-will, meaning (absent a contract or collective bargaining agreement) it can be terminated by either the employer or employee at any time with or without notice and with or without cause, employers can still be liable to terminated employees if the termination or other adverse employment action (i.e., demotion, lack of advancement, etc.) is found to be for an unlawful reason.

In *Tamosaitis*, the Ninth Circuit provides employers with just one example of a situation where, although the employer may have thought that the employment action was lawful (i.e., because it was on the request of a client who had the contractual right to choose the employees or the project), the court found that the employer could still be liable for effectively sanctioning the unlawfully retaliatory request of a client. Employers must be mindful of such possibilities and, when in doubt, consult with an attorney or HR professional before taking any adverse employment action against an employee.

APPELLATE COURT REVERSES DECISION IN FAVOR OF EMPLOYER, FINDING THAT CLASS ACTION IS PREFERRED METHOD OF RESOLVING CLASSIFICATION ISSUE

by Eric A. Schneider

Martinez v. Joe's Crab Shack Holding, Inc. 231 Cal.App.4th 362 (2014), as modified on denial of reh'g (Dec. 3, 2014), review denied (Feb. 11, 2015) is another wage and hour class action. The plaintiffs asserted that they were salaried managerial employees who had been misclassified as exempt and sought to recover overtime pay. While they had managerial responsibilities, they were also called upon to fill in as needed as cooks, servers, bussers, hosts, etc. They submitted some 22 declarations stating that they spent the majority of their time on such hourly tasks.

"We don't pay extra for overtime. If you work more than 8 hours a day, we figure you owe us a volume discount."

In response, the employers submitted 27 declarations from class members stating that they spent the majority of their time performing managerial tasks, and that even when they were doing other work, they were concurrently monitoring the restaurants and supervising other staff.

The defendants also submitted evidence impeaching the statements of the named plaintiffs, and the latter conceded in deposition that they were unable to estimate the amount of time spent on non-exempt tasks.

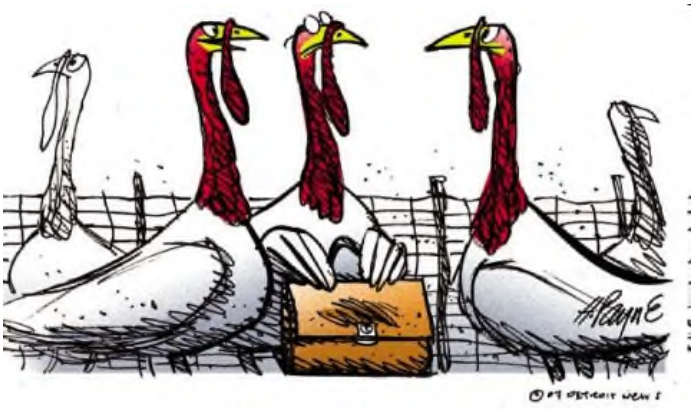
The trial court then denied the certification motion because the plaintiffs had failed to establish:

1. That their claims were typical of the class;
2. That they could adequately represent the class;
3. That common questions predominated the claims; and
4. That a class action is the superior means of resolving the litigation.

The first two findings were based upon the inability of the named plaintiffs to estimate how much time they spent on exempt and non-exempt work and their admissions that the amount of time spent on the various tasks varied on a daily basis.

As to the third and fourth findings, the court acknowledged that there were common questions of law and fact, but that there were significant individual questions relating to the amount of time the individual employees spent on particular tasks.

The Court of Appeals considered whether the questions likely to arise are common or individual, and reviewed the trial court's order under a standard of abuse of discretion.



"This is Phinius. He's a lawyer. He says we might have one heckuva class action here."

It first tackled the question of whether the named plaintiffs' claims were typical of those of the class members as a whole. The test is "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct."

The trial court had found that the named plaintiffs' claims were not typical and that they consequently would not be adequate class representatives because the plaintiffs' claims would be vulnerable to the defense that each of them performed exempt tasks more than 50% of their work time whereas the putative class members' declarations indicated that they had spent more than 50% of their time performing non-exempt tasks.

The Court of Appeals however found that what was common to all plaintiffs was their assertions that their tasks did not change upon their becoming managers, they performed a utility function and routinely filled in for hourly workers in performing nonexempt tasks; and they worked far in excess of 40 hours per week without being paid overtime wages. As a consequence, the named plaintiffs' claims were typical, and they were adequate class representatives.

The appellate court though found that the larger problem arose out of the fact that the proposed class contained too broad a spectrum of employees—ranging from general managers to assistant managers, groups with very different interests and responsibilities. However, the class action need not be dismissed when trial court can use subclasses to remove any antagonism among members of the putative class.

The court also relied on *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319 (2004) with regard to "the employer's realistic expectations" as to the actual requirements of the job rather than any individual manager's

actual work performed which would likely prove susceptible of common proof. It distinguished circumstances where tasks performed by managers represented the same sort of work performed by nonexempt personnel (indicative of the managers being nonexempt employees) from situations where the managers performed such tasks because they are helpful in supervising the employees, it consisted of demonstrating how the work is done, or it contributed to the smooth functioning of the department (exempt status).

Finally, the court stated that "class-wide relief remains the preferred method of resolving wage and hour claims, even those in which the facts appear to present difficult issues of proof. By refocusing its analysis on the policies and practices of the employer and the effect those policies have on the putative class, as well as narrowing the class if appropriate, the trial court may in fact find class analysis a more efficient and effective means of resolving plaintiffs' overtime claims."

What can employers take away from this?

Again, employers cannot focus on "manager" as a title that mandates classification as exempt. The employer must examine the tasks that occupy their employees' time in order to classify them properly.

PREVAILING DEFENDANT IN FEHA ACTION NOT ENTITLED TO RECOVERABLE COSTS UNLESS COURT FINDS THAT THE PLAINTIFF BROUGHT OR CONTINUED TO LITIGATE A FRIVOLOUS CLAIM

by Colleen A. Déziel

In yet another blow to employers, the California Supreme Court has just held that a prevailing defendant in an action pursuant to the Fair Employment and Housing Act, is not necessarily entitled to its costs, and that Government Code section 12965 (FEHA), is an express exception from Code of Civil Procedure section 1032(b)'s mandate for a cost award to the prevailing party.

More specifically, in the matter of *Williams v. Chino Valley Indep. Fire Dist.*, 593 F. App'x 659 (9th Cir. 2015) the plaintiff sued his employer for disability discrimination in violation of FEHA. On summary judgment, the trial court ruled for the defendant and awarded it costs totaling $5,368.88. While the plaintiff argued that before awarding costs the court must make a determination of whether the plaintiff brought or continued to litigate the action without an objective basis for believing it had potential merit, the trial court rejected that argument and held that it must distinguish between attorney's fees, which were subject to this standard, and costs, which are much less expensive and more predictable than fees, and which are subject to Code of Civil Procedure section 1032(b). It also noted that the award of costs can also serve to discourage the filing of unmeritorious claims by plaintiffs. The appellate court agreed with the trial court.

Much to our surprise, the California Supreme Court, in what it called an act of "statutory interpretation" held that the plain language of Government Code section 12965(b) expressly excepts FEHA parties from the entitlement offered prevailing parties under Code of Civil Procedure section 1032(b). We note that Government Code section 12965(b) provides in pertinent part: "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees." Given this language, and after spending a great deal of time attempting to compare and distinguish existing federal and state legal authority on the subject, the court concluded that the government code controls FEHA litigation, and thus, it is within the court's discretion as to whether a prevailing party in such an action will be entitled to its costs.

The Supreme Court then went a step further and held that the courts must apply the *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) standard when determining whether to award costs to a prevailing defendant. The standard in *Christianburg* is that a prevailing plaintiff should ordinarily receive his or her costs and attorney's fees unless special circumstances would render such an award unjust. However, a prevailing defendant should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so.

What can employers take away from this?

The fallout from this case may be twofold:

1. Many more borderline frivolous claims may be filed by plaintiffs. After all, there will be no deterrence to filing these type of claims when they will not likely be statutorily responsible for the employer's costs. All they have to ensure is that there is some basis for their claim(s), no matter how little or small, and they are free to litigate with impunity.

2. Lower value and/or more questionable liability cases may be harder to resolve efficiently and effectively in mediation. As we all know, in an effort to convince a plaintiff in a lower value case to settle, defendant employers sometimes argue that if the plaintiff litigates and loses, while they may not have to pay attorney's fees, they will be responsible for the employer's costs, which are not insignificant in these cases. Now that the Supreme Court has essentially held that prevailing defendants are no longer entitled to their costs as a matter of statutory right, this argument or deterrent goes out the window.

UPDATE: CALIFORNIA SUPREME COURT PARTIALLY OVERRULES MENDIOLA V. CPS SECURITY SOLUTIONS, INC. (2013) INVOLVING SLEEP TIME COMPENSATION OF SECURITY GUARDS

by Leila M. Rossetti

In our Winter 2013 newsletter (link), we reported on the class-action case of *Mendiola v. CPS Security Solutions, Inc.*, 217 Cal.App.4th 851 (2013) review granted and opinion superseded sub nom. Mendiola v. CPS Sec. Solutions 163 Cal.Rptr.3d 1 (Cal. 2013), reh'g denied (Mar. 18, 2015) aff'd in part, rev'd in part sub nom. Mendiola v. CPS Sec. Solutions, Inc. 60 Cal.4th 833 (2015), where the Court of Appeal held that security guards were entitled to be paid for "on-call" hours worked, but also held that the employer and employee could enter into an agreement whereby the guards are not paid for eight hours of "sleep" time during a 24-hour "on-call" period.

In January of this year, however, the California Supreme Court overruled the Court of Appeal and found that the eight hours of "sleep time" must be calculated as hours worked for compensation purposes because the security guards were required to remain on the premises during these "sleep" hours and be ready and available to address any issues which arose, in uniform, at any time.

What can employers take away from this?

There are certain areas of employment, such as ambulance drivers, where an agreement to exclude eight hours during a 24-hour shift for sleep in calculating compensation may be permissible. However, this only applies in very specific industries, and under certain conditions. Employers must be cautious in entering into any such agreement, especially where, as in this case, it applies to a large number of employees who can potentially form a class action down the line. As always, employers are encouraged to raise any doubts about whether employees are being properly compensated to an HR professional or employment attorney right away.

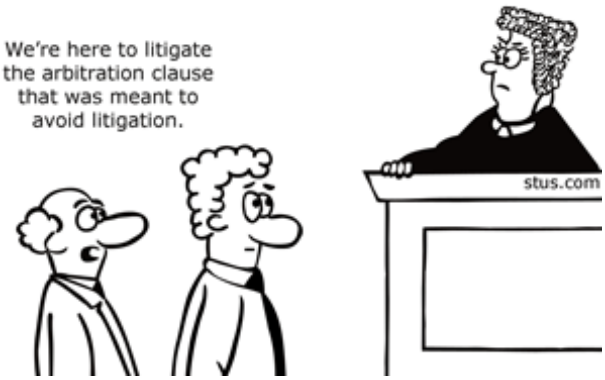
DISPUTE RESOLUTION POLICY IN HANDBOOK IS ENFORCEABLE ARBITRATION AGREEMENT

By Michelle T. Harrington

In a recent case, *Ashbey v. Archstone Prop. Mgmt., Inc.,* No. 12-55912, 2015 WL 2191106 (9th Cir. May 12, 2015) the Ninth Circuit Court of Appeal enforced an arbitration clause in an employee handbook based on the employee's signed acknowledgment of receipt of the handbook, which stated that the handbook contained a dispute resolution policy and that the employee agreed to adhere to all of the policies contained in the handbook.

Here, the employee brought claims for retaliation and discrimination under federal and state law. The employer moved to compel arbitration of the parties' dispute, but the trial court denied the employer's motion. The trial court found that the employee did not "knowingly" waive a right to a jury trial by signing an acknowledgment form regarding receipt of an employee handbook because the acknowledgment did not contain the terms of the dispute resolution policy.

In two prior cases, the Ninth Circuit had previously found no valid arbitration agreement when an employee had signed a generic acknowledgment form stating that the employee had received an employee handbook, which contained an arbitration clause. However, the acknowledgement form in *Ashbey* specifically mentioned that the handbook contained a dispute resolution policy; the acknowledgment forms in the prior cases did not warn employees that the handbook contained an arbitration clause.



Because of the explicit notification in the acknowledgment form referencing the employer's dispute resolution policy, and the employee's express agreement to adhere to all of the policies contained in the handbook and the ease with which the employee could access the handbook and such policies, the Ninth Circuit reversed the trial court and found that the employee had knowingly waived a right to a judicial forum.

What can employers take away from this?

In California, getting an arbitration agreement to conform to all of the new court decisions is like herding cats. Thus, from an administrative standpoint it is much easier to have an arbitration agreement that can be amended from time to time and distributed via handbook revision, along with an acknowledgment of receipt. Just keep in mind that there are limits in doing so, such as providing adequate notice of a change and the implied covenant of good faith and fair dealing (governing the terms of the arbitration agreement) that would apply to any contract.

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