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— Labor & Employment Law —
Defending Employer's Rights

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In This Issue

$36 Million Wage-and-Hour Class Action Settlement Against Bank of America for Misclassification of Employees as Exempt From Overtime

Lead plaintiff Boyd brought a class action as an individual and on behalf of all others similarly situated against their employer LandSafe Inc., a subsidiary of Bank of America, for violations of the Fair Labor Standards Act. The class of residential staff appraisers alleged that their employer misclassified the companies' in-house staff appraisers as exempt from overtime. The class further alleged that defendants failed to pay them appropriate overtime compensation, failed to provide or authorize meal and rest periods, failed to pay waiting time, failed to provide lawful itemized wage statements, and failed to maintain accurate time records. Defendants LandSafe and Bank of America denied all of the allegations; claimed administrative, professional and highly compensated exemptions; and settled with the class for $36 million.

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DISCRIMINATION

$4.75 Million Jury Verdict for Age and Gender Discrimination

Barbara Anderton, a 61 year old, brought a lawsuit against her former employer Bass Underwriters, after she was terminated as a branch manager. She alleged she was terminated based on her age and gender and in retaliation for speaking out against the company's age and gender discrimination. Defendants contended that Anderton quit after they expressed dissatisfaction that eight other employees, including her subordinates and relatives, had left to go work for a competitor, and that Anderton herself immediately began working for that same competitor after she quit. After a two-week trial, the jury found that Bass has discriminated against her on the basis of age and gender, and that they had retaliated against her. The jury awarded her $4.75 million, which included $1.2 million in past lost earnings, $800,000 for emotional distress, and $2.75 million in punitive damages.

Anderton v. Bass Underwriters (February 5, 2016) Sacramento Superior Court, Case Number: 34-2013-00149236-CU-WT-GDS.

RETALIATION

$3 Million Jury Verdict for Wrongful Termination and Retaliation for Using Family Medical Leave

Plaintiff, who had worked for the Permanente Medical Group for nearly 20 years, informed her supervisor that she was considering back surgery. After the surgery plaintiff was placed on medical leave from September 2011 to January 2012. Plaintiff alleged that upon returning to work in March 2012, she was placed on a Performance Improvement Plan, which she did not pass and ultimately led to her termination in January 2013. Plaintiff alleged that her termination was in retaliation for taking her protected medical leave under the Family Medical Leave Act. A jury awarded plaintiff $3 million in damages for emotional distress and for economic loss related to her inability to secure another job for three years.

Patricia Metzner v. The Permanente Medical Group (March 4, 2016) Alameda Superior Court, Case Number: RG13702356.

$1 Million Jury Verdict for Sexual Harassment, Retaliation and Wrongful Termination

Dinham, a 69 year old, was chief nursing officer for Prime Healthcare's Encino Hospital Medical Center. She contended that she was wrongfully terminated for reporting or opposing sex discrimination or harassment relating to the hospital's director of respiratory services. She also alleged she was retaliated against for reporting patient safety issues. She brought claims under the Fair Employment Housing Act for age discrimination, retaliation, and for failure to prevent harassment, discrimination and retaliation. Defendant contended that Dinham never made any complaints and that she was terminated for legitimate reasons due to a reduction in force. After a 20-day trial, the jury found in favor of plaintiff on her FEHA claims, finding that although defendant did need to reduce staff for financial reasons, retaliation was a motivating factor in plaintiff's termination. The jury awarded Dinham $1 million dollars including $120,000 for emotion distress, $333,000 for past lost earnings, and $554,000 for future lost earnings.

Dinham v. Prime Healthcare Service Foundation, et al., LA Daily Journal, Verdicts and Settlements (February 12, 2016) Los Angeles Superior Court, Case Number: BC 518509.

LABOR / UNION

Employer's Right to Implement Portions of Last, Best and Final Offer Is Permissive and Not Mandatory.

The Public Employment Relations Board (PERB) held that once impasse has been properly reached, the public agency "may" implement its last, best, and final offer, but it doesn't have to. Here, after five bargaining sessions, the County of Tulare presented the union with its last, best, and final offer (LBFO), which included the suspension of previously imposed furloughs and elimination of a 1.9% wage reduction that had been unilaterally imposed. The union did not respond to the County's LBFO believing that the County would simply impose the LBFO, suspend the furloughs, and eliminate the wage reduction. The County, however, decided not to impose its LBFO and instead chose to simply do nothing and continue the status quo. The union filed unfair practice charges arguing that the County had engaged in surface bargaining and had prematurely declared impasse. PERB, however, held that while the County may have engaged in "hard bargaining," it was not surface bargaining. Further, PERB found that the County's imposition of a three-week timeline for the union to respond to their LBFO did not amount to an arbitrary halt to negotiations. In rejecting the union's argument that the County was obliged to impose its LBFO, PERB held that the word "may" is permissive and not mandatory.

Service Employee's Int'l Union, Local 521 v. County of Tulare, (2015) PERB Dec. No. 2461 -M.

NLRB

Employer Ordered To Cease and Desist Use of Overly Restrictive Arbitration Policy

The National Labor Relations Board concluded that respondents violated the NLRA and ordered them to cease and desist from maintaining an arbitration policy that violated the law and to take affirmative action to put into effect the policies of the Act. The Board affirmed that the employer's Arbitration Agreement violated the NLRA because employees reasonably would believe that the agreement restricts their rights to file unfair labor practices with the NLRB.

CPS Security (USA), Inc., et al. (2015) 363 NLRB no. 86 slip op at 1.

As a Result of The Improper Appointment of NLRB's General Counsel, Charges and Petitions Initiated After He Was Nominated Must Be Dismissed

The Ninth Circuit Court of Appeal affirmed a decision that former National Labor Relations Board acting general counsel Lafe Solomon's appointment was invalid. The Court further ruled that since his appointment was invalid, the NLRB's suit over allegedly unfair firings by a home health aide company, which was initiated while he was acting general counsel, must be dismissed.

The Court ruled that because Solomon was nominated by President Barack Obama for an official appointment as NLRB general counsel during the period that Solomon was serving as acting general counsel, he was not properly appointed under the Federal Vacancies Reform Act (FVRA). The Court held that the NLRB's bid for an injunction while it processed an unfair labor practices

charge filed against Kitsap Tenant Support Services Inc. must, therefore, be dismissed. The Court stated, "We conclude that because Solomon served in that acting capacity while also being the nominee to the permanent position, he held his post in violation of the FVRA." "Accordingly, we affirm the district court's dismissal of the Board's petition."

Here, the Washington Federation of State Employees had filed charges against Kitsap Tenant Support Services alleging that Kitsap refused to meet with the union at reasonable times, delayed bargaining on a contract and discharged employees for engaging in protected activity. Under Solomon's direction, the NLRB investigated the various charges and then filed administrative complaints against Kitsap.

While hearings before an administrative law judge were proceeding, the NLRB regional director filed a petition that, if granted, would have ordered Kitsap to maintain the status quo while the NLRB processed the unfair labor practice charge. In August 2013 however, the lower court dismissed the NLRB's petition because Solomon was appointed to the position of general counsel in violated of the FVRA. The FVRA authorizes the president to temporarily fill vacancies in offices in the Executive Branch that ordinarily require Senate confirmation, but it also has certain conditions which must be satisfied before a person serving in an acting role can be nominated for the position. Because Solomon did not meet any of the conditions, he lacked the authority to serve. Once he was improperly nominated, the petition requesting maintenance of the status quo had to be dismissed.

Associate General Counsel of the NLRB Suggests Swift Settlements as a Potential Practice and Strategy as the NLRB Faces a Budget Shortfall

Anne Purcell, an associate general counsel who oversees the division of operations management of the National Labor Relations Board (NLRB) sent a memo to regional directors and other personnel acknowledging that the agency is facing a budget shortfall the rest of the fiscal year and suggested various cost cutting measures, including working toward early settlements in unfair labor practice and election disputes. Purcell stated, "… significant savings of agency staff and budget resources result from high settlement and election agreement rates. Accordingly, in all regional offices, and especially in those offices where performance in these areas is below the national experience, redoubled efforts should be made to resolve cases."

OTHER

Unconscionable Arbitration Clauses Will Not Be Enforced When They Are Both Procedurally and Substantively Unconscionable

The California Court of Appeal ruled that a court can only refuse to enforce an arbitration provision when the clause is found to be unconscionable both procedurally and substantively. Martha Carbajal was hired by CW Painting to sell its services and manage its painting crews. Carbajal was required to sign an employment agreement that included an arbitration provision requiring the parties to submit any and all disputes to arbitration in accordance with the rules of the American Arbitration Association. After Carbajal filed a class action against CW Painting alleging various wage and hour claims, CW filed a motion to

compel Carbajal to arbitrate on an individual pursuant to the arbitration clause in the employment agreement she signed. The Court held that while the two elements, procedural unconscionability and substantive unconscionability, need not be present in the same degree, the terms of the arbitration clause must be "sufficiently unfair" before the motion to compel arbitration will be denied. Here, the arbitration provision was procedurally unconscionable because it was an adhesion contract imposed as a term of Carbajal's employment. It also did not identify which of the AAA's many different rules would apply. It was substantively unconscionable because it allowed CW Painting to obtain injunctive relief without posting bond, and waived Carbajal's statutory right to recover attorney's fees if she prevailed on certain Labor Code claims. Because both types of unconscionability were present, the arbitration provision was unenforceable.

Carbajal v. CWPSC Inc. (2016) ___ Cal.App. 4th ___.

IN THE TRENCHES

$8 Million Wage-and-Hour Class Action Settlement against Bank of America for Failure to Pay Final Wages Timely Upon Termination

Lead plaintiff Pineda filed a wage and hour class action against his employer Bank of America. The class alleged that their employer failed to pay wages upon termination. Plaintiff Pineda further alleged that even though he gave two week's notice of his resignation on May 11, 2006, the defendant did not pay his final wages until four days later on May 15, 2006. Plaintiff filed this class action on behalf of all other similarly situated individuals for alleged failure to timely pay final wages. Defendant Bank of America denied the allegations, but ultimately settled with the class for $8 million, with a guaranteed payment of $4 million to the eligible class members.

Jorge Pineda v. Bank of America, LA Daily Journal, Verdicts and Settlements (February 26, 2016) San Francisco Superior Court, Case Number: CGC-07-468417.

$7.46 Million Wage-and-Hour Class Action Settlement against CVS Pharmacy

Lead plaintiff Connell, individually and on behalf of 1683 other class members, brought a wage and hour class action against their employer CVS Pharmacy. The class alleged that CVS failed to pay non-exempt pharmacists all wages owed, including premium overtime wages for working more than six days in a row. The class asserted causes of action for failure to pay overtime compensation, failure to provide accurate itemized wage statements, waiting time penalties, conversion and unfair business practices. CVS agreed to settle for $7.46 million.

Connell et al v. CVS Pharmacy, LA Daily Journal, Verdicts and Settlements (February 12, 2016) Los Angeles Superior Court, Case Numbers: BC523172, BC523491, BC525991.

$5.75 Million Wage-and-Hour Class Action Settlement

Plaintiffs alleged that their employer failed to pay non-exempt employees minimum wages for all hours worked, because they compensated employees with commissions rather than hourly wages. They also alleged multiple other wage violations. The parties settled for $5.75 million. Each commission-only stylist will receive $814; each non-exempt employee will receive $262; and those entitled to waiting time penalties will receive $150.

Melissa Fong, et al. V. Regis Corp., LA Daily Journal, Verdicts and Settlements (March 4, 2016) U.S. District Court for the Northern District of California, Case Number: 3:13-cv-04497-VC.

$4.5 Million Class Action Settlement against Coldwell Banker for Unfair Business Practices

Plaintiff brought a class action on behalf of himself and other similarly situated real estate agents and associates against their employer Coldwell Banker for unfair business practices and violations of the California Labor Code. The class alleged that they had been misclassified as independent contractors and that as a result the class was denied access and eligibility for employee benefits, including reimbursement for business expenses. Coldwell denied any wrongdoing, and settled with the class of approximately 5,600 members for $4.5 million.

Bararsani v. Coldwell Banker Residential Brokerage Company, LA Daily Journal, Verdicts and Settlements (February 19, 2016) Los Angeles Superior Court, Case Number: BC495767.

$3.63 Million Wage-and-Hour Class Action Settlement against Pacific Bell

Justin Lefevre, individually and on behalf of all others similarly situated, brought a wage-and-hour class action against their employers Pacific Bell Directory and Western Directory. The class alleged that defendants failed to properly compensate telephone sales representatives for all hours that they worked in violation of both California Labor Code and Fair Labor Standards Act. Specifically, the class alleged failure to pay overtime compensation, failure to provide meal periods, failure to provide rest periods, and failure to furnish proper wage statements. Defendants denied any wrongdoing and the parties settled for $3.63 million.

Lefevre v. Pacific Bell Directory, LA Daily Journal, Verdicts and Settlements (March 18, 2016) U.S. District Court for the Northern District of California, Case Number: 3:14-cv-03803-WHO.

As always, please do not hesitate to contact any of our attorneys if you have any questions or comments.

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