Fenwick Employment Brief

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U.S. SUPREME COURT UPHOLDS CLASSWIDE ARBITRATION, FINDING ARBITRATOR "ARGUABLY" (EVEN IF INCORRECTLY) CONSTRUED AGREEMENT

In *Oxford Health Plans LLC v. Sutter*, the United States Supreme Court affirmed an arbitral decision allowing the plaintiff to proceed with classwide arbitration even in the absence of express language to that effect in the arbitration clause. The decision follows the Court's trend in recognizing and enforcing the bargain two parties reach through an arbitration agreement, including the finality of arbitral rulings subject to very limited review.

In reaching its decision, the Court recognized the limited role courts play in reviewing arbitral rulings and awards under Section 10(a)(4) of the Federal Arbitration Act ("FAA"): "the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Here, although the arbitration clause was silent on the subject, the arbitrator concluded that a class action "is plainly one of the possible forms of civil action that could be brought in court" such that "on its face, the arbitration clause . . . expresses the parties' intent that class arbitration be maintained." The Court refused to vacate that conclusion: "So long as the arbitrator was arguably construing the contract—which this one was—a court may not correct his mistakes under [the FAA]. ...The arbitrator's construction holds, however good, bad, or ugly."

The Court's general deference to the arbitral decision is founded in the concept that the parties "bargained for" the arbitrator's construction "and so far as the arbitrator's decision concerns the construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." That deference, shown through a series of decisions giving parties increased latitude to design the terms of arbitration and increased enforcement of that bargain, stands in stark contrast to the California Supreme Court's continued scrutiny and attempts to reign in arbitration agreements, particularly in the consumer and employment contexts, at the state level. Further developments from both courts are sure to come.

As a practical matter, this decision provides a powerful example of the fact that arbitrations have the potential for the full range of "good, bad, or ugly" outcomes. In this instance, the arbitrator allowed the plaintiff to seek classwide arbitration over Oxford's strenuous objections that such class treatment was never the parties' intent. While the Court did not take a position—either way—on the arbitrator's construction of the arbitration clause, the outcome certainly begs the question of what parties should do to avoid Oxford's predicament. An obvious option would be to expressly disallow classwide arbitration. That strategy, however, invokes other considerations, especially in the employment context in California: Would the disallowance operate as a waiver of class (or even representative) actions generally or would the parties retain the right to bring such actions in court? Would such a waiver violate public policy or otherwise be unconscionable? There is much debate over these issues, and the "right" answer for any organization is neither crisp nor clear; employers should tread cautiously in this area, with appropriate guidance from legal counsel.

COURT REJECTS WALMART'S BID TO KICK NEGLIGENT HIRING CLAIM BY CONTRACTORS' EMPLOYEES

A California federal district court held that companies may owe a duty of care to their prospective contractor's employees in the hiring of such contractors. In *Carrillo v. Schneider Logistics, Inc.*, plaintiff Everardo Carrillo and others were workers at three California warehouses that Walmart owned or leased, but were actually operated by Walmart contractors. Plaintiffs sued both the contractor-employers and Walmart, alleging the contractor-employers failed to pay them wages

(including overtime) in violation of state and federal law and that Walmart was responsible, among other reasons, because it negligently hired the contractor-employers.

According to plaintiffs, "Walmart knew or should have known that each [contractor-employer] had a track record of violating state and federal employment laws, and Walmart's agreement with [these contractor-employers] created economic pressure to violate these laws." Walmart engaged the contractor-employers and then allegedly failed to implement procedures to ensure legal compliance and turned "a willful blind eye to rampant violations." Specifically, plaintiffs claimed it was not reasonably possible for the contractor-employers to meet the productivity requirements and labor cost goals set by Walmart's contract while complying with the law and maintaining a profit. Walmart moved to dismiss, but the federal district court rejected Walmart's arguments and found plaintiffs' allegations sufficient—at least at the pleading stage—to support a duty of care between Walmart and the employees of its contractors.

The negligent hiring claim is particularly important to note because it provides a separate theory under which one company may be held accountable for the actions of another, in addition (or in the alternative) to joint employer liability. Typically, employees will claim that two distinct companies are, in fact, a single enterprise or joint employers such that both companies may be held liable for the actions of either company. Here, the negligent hiring claim purports to extend wage and hour liabilities one step further because, even if Walmart is found not to be an employer under typical theories, it may still be liable for the wage and hour violations of its contractors if the plaintiffs prove it was negligent in hiring those contractors. It remains to be seen whether plaintiffs will be successful in proving up the theory or, if appealed, whether the theory will stand.

In the interim, companies should be mindful that at least one court recognized a potential duty of care in hiring contractors, and California Labor Code Section 2810(a) specifically prohibits companies from entering into an agreement for certain labor or services (such as janitorial or security services) where the company has reason to know the agreement will not provide sufficient funds to allow the contractor to comply with applicable law.

ALLEGEDLY "ROGUE" EMPLOYEES EXPOSE EMPLOYER TO POTENTIAL MISAPPROPRIATION LIABILITY

Even though a company took proactive steps to ensure new employees did not bring or use a former employer's information to their new job, the company may still be on the hook for the subsequent misconduct of allegedly "rogue" employees.

In *Language Line Services, Inc. v. Language Services Associates, Inc.*, plaintiff Language Lines Service ("LLS") alleged Language Services Associates ("LSA") and two of LSA's then-employees, Patrick Curtin and William Schwartz, misappropriated LLS trade secrets. On cross-motions for summary judgment, the evidence showed that Curtin and Schwartz were former LLS employees. While employed by LLS, Curtin emailed an LLS spreadsheet containing customer data to his personal account. After complying with his one-year non-compete, Curtin took a position with LSA in December 2009. At that time, LLS reminded him of his ongoing confidentiality obligations stemming from his prior employment at LLS. In January 2010, while interviewing with LSA but still employed at LLS, Schwartz sent LSA a 60-day plan outlining his strategy for bringing in new business including projected revenue. Upon learning that Schwartz was interviewing with LSA, LLS fired him and he joined LSA in March 2010.

LSA required both Curtin and Schwartz to sign an acknowledgement stating that they did not have any trade secrets or confidential information from a former employer. Further, Schwartz signed an addendum to his employment agreement stating that he did not have any property or proprietary information belonging to LLS. In March 2010, LSA conducted an orientation for Curtin and Schwartz, which they attended remotely from Schwartz's home. While there, Schwartz gave Curtin an LLS report with customer and pricing information. From March to May 2010, Curtin used the spreadsheet he obtained while employed at LLS and Schwartz's report to create several lists of "quality leads" that he shared

with his sales team. LSA later learned that the lists possibly contained LLS information, and interviewed Curtin who agreed to discard immediately any LLS information. Less than one month later, LLS filed the instant lawsuit.

In its summary judgment motion, LSA argued that it was not liable for the alleged misconduct. Among other reasons, it asserted "that blame, if any, rests squarely on two 'rogue' employees." LSA claimed it did not know and had no reason to know the circulated lists were acquired by improper means. LLS disagreed, asserting that LSA knew Curtin and Schwartz were former LLS employees and, prior to hire, Schwartz sent LSA executives the 60-day strategic plan containing LLS information. LSA disputed that Schwartz's conduct was sufficient to raise suspicions of misappropriation and offered that executives "made clear to Schwartz" that he should not use or rely on LLS information.

The court rejected both sides' motions for summary judgment on the issue. The court noted that, LLS' efforts with Schwartz notwithstanding, "such preemptive warnings may be insufficient if a company has 'reason to know' of a possible trade secret violation," and held that material issues of disputed facts existed. For instance, a jury would need to decide whether the contents and circumstances of Schwartz's disclosure of the 60-day plan should have alerted LSA to a possible trade secret violation.

Here, LSA's well-intended efforts to on-board the new employees fell short, leaving it mired in litigation and facing potential liability for its employees' conduct. Requiring acknowledgements about former employer information and ongoing obligations is a good start, but it is also essential, especially with competitor hires, to ensure employees actually understand their obligations and to be attentive to any "red flags" that an employee may be using a former employer's information.

ALERT: "UNPAID INTERNS" HELD TO BE EMPLOYEES WHO SHOULD HAVE BEEN PAID

As this FEB went to publication, a federal district court in New York issued an important—and very instructive—decision on the compensation of unpaid interns at for-profit companies. In *Glatt v. Fox Searchlight Pictures*, the court found that plaintiffs, who worked as interns on the "Black Swan" movie, were actually employees entitled to minimum wage, among other protections.

While the defendants claimed the interns were "trainees" for purposes of the Fair Labor and Standards Act and were not entitled to wages, the court disagreed. It emphasized that the interns did work that, had they not been there, would have fallen on other workers (through increased hours or additional hiring). It further noted that the benefit the unpaid interns received—"such as knowledge of how a production or accounting office functions or reference for future jobs—are the results of simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns and of little utility to the employer."

It is a common practice for people trying to get a "foot in the door" in the entertainment industry—which is notoriously difficult to do—to accept unpaid positions. But, as this decision shows, the practice (whether in the entertainment or any other industry) has come under significant scrutiny, and the decision has great relevance to all for-profit companies using unpaid interns. We will cover this decision in further detail in the July 2013 FEB. Until then, for-profit companies should be aware that treating workers as "unpaid interns" can be a risky proposition and should be done only after careful consideration and consultation with legal counsel.

NEWS BITES

Washington State Joins Growing Trend to Protect Employee Social Media Privacy

Washington Governor Jay Inslee signed into law Substitute Senate Bill 5211, which prohibits employers from requiring current or prospective employees to:

- disclose account passwords for social media accounts;
- pull up their password-protected personal social media accounts or profiles; or
- add people as contacts associated with, or give anyone access to view the contents of, the social media account or profile.

The law further prohibits adverse action against someone who refuses a request in violation of the law and prescribes monetary remedies ($500 penalty, compensatory damages and attorneys' fees) and injunctive relief for violations. Limited exceptions apply, including in the context of an investigation for misconduct or as otherwise required by law, and the law does not restrict employer access of otherwise publicly-available information.

With the governor's signature, the law will become effective July 28, 2013, and Washington will be the ninth state with such protections, joining states such as Illinois and Maryland (see August 2012 FEB), California (see October 2012 FEB), and Arkansas, New Mexico, and Utah (see May 2013 FEB). Similar bills are pending before Congress and in New Jersey and Oregon.

U.S. Supreme Court: Does SOX Protect Employees of a Public Company's Private Contractor?

The United States Supreme Court agreed to review whether the Sarbanes-Oxley Act whistleblower protections apply to employees of a public company's *contractor or subcontractor*. Plaintiffs Jackie Lawson and Jonathan Zang each filed SOX whistleblower claims against FMR LLC ("Fidelity") first with the United States Labor Department and then in a Massachusetts federal court. *See Lawson v. FMR LLC* and *Zang v. FMR LLC*. Lawson claimed she was harassed and forced to quit because of certain reporting and accounting information she provided to Fidelity management; Wang claimed Fidelity fired him for notifying management that Securities and Exchange Commission disclosures were inaccurate.

Fidelity asked the trial court to dismiss each action, arguing that SOX whistleblower protections did not apply to plaintiffs because Fidelity is a private company. Plaintiffs argued that, because Fidelity is the contractor to a covered public entity, SOX whistleblower protections applied to them. The trial court denied Fidelity's motions to dismiss; but, on appeal, the First Circuit Court of Appeals reversed finding no SOX protections for plaintiffs.

The United States Supreme Court's review is anticipated to resolve a split between the First Circuit and the Department of Labor Administrative Review Board's decision in *Spinner v. David Landau and Associates* that extended SOX whistleblower protections to employees of contractors and subcontractors of a public company.

Assistant Store Manager Non-Exempt Even Though Purportedly Performing Exempt and Non-Exempt Duties Concurrently

In *Heyen v. Safeway Inc.*, an advisory jury found that plaintiff Linda Heyen, a former assistant store manager, was improperly classified as exempt due to substantial time she spent checking out customers and performing routine work typically done by hourly employees. Safeway argued that the exempt and non-exempt duties performed concurrently by store managers, such as checking out customers while supervising the front of the store, should be considered exempt, but the court disagreed. Rather, employers must identify each discrete duty, the amount of time spent on that particular duty, and whether the duty is exempt or non-exempt. Where a manager performs a duty that does not entail actual management of the department or supervision of employees, then the employer must assess the reason or purpose for performing the task; if the task helps in supervising employees or contributes to the functioning of the department, then the task may be exempt.

In *Heyen*, the evidence showed managers performed non-exempt tasks such as cashier duties, stocking shelves and routine bookkeeping because Safeway

understaffed hourly workers and had unreasonable store performance expectations that could not be achieved unless managers did non-exempt work. Thus, those duties — and all time spent on them — were non-exempt.

Latest California Appeals Court: PAGA Claims Not Subject to Mandatory Arbitration

Since the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (see Fenwick's April 28, 2011 Litigation Alert), California appellate courts have disagreed about the ability, through private arbitration agreements, to waive an employee's right to bring class action claims and/or representative claims under the California Private Attorneys' General Act of 2004 ("PAGA"). *See, e.g., Iskanian v. CLS Transportation of Los Angeles* (October 2012 FEB) and *Franco v. Arakelian Enterprises* (December 2012 FEB), both now pending before the California Supreme Court. In *Brown v. Superior Court,* the Sixth Appellate District recently sided with those decisions finding that the Federal Arbitration Act does not mandate enforcement of such private arbitration agreements. The court found that "[a] PAGA claim is necessarily a representative action intended to advance a predominately public purpose" and "a private agreement purporting to waive the right to take representative action is unenforceable because it wholly precludes the exercise of this unwaivable statutory right."

Notwithstanding this recent decision, this issue will remain unsettled until the California Supreme Court ultimately decides this matter. In *Iskanian*, the lead case on the issue, the parties' replies to recent *amicus curiae* briefs are due July 15, 2013. Stay tuned for further developments on this issue.

Record EEOC $240M Verdict For Severely Abused Disabled Workers

An Iowa jury awarded the Equal Employment Opportunity Commission $240 million in damages — the largest verdict in the EEOC's history — for the long-term disability discrimination and severe abuse suffered by 32 intellectually disabled workers on a turkey farm.

In 2009, the Iowa Fire Marshall shut down the bunkhouse where the workers lived for unsafe, unclean and unhealthy conditions, including a leaky roof and insect infestation. The workers were removed and, in 2011, the EEOC sued the employer, Hill Country Farms ("HCF"), for disability discrimination. In 2012, a court ordered HCF to pay the workers $1.3 million for unlawful disability-related wage discrimination. In May, a jury awarded each worker an additional $5.5 million in compensatory damages and $2 million in punitive damages, for a combined verdict of $240 million. Among other abuse, the EEOC presented evidence that supervisors called the workers "retarded," "dumb ass" and "stupid," and kicked, hit, and handcuffed them. The EEOC also showed that HCF restricted the workers' freedom of movement, forced workers' to live in deplorable living conditions and deprived workers of adequate medical care when needed.

Termination Over Derogatory Facebook Comments Not Unfair Labor Practice

A medical office lawfully terminated its employee for sharing profanity-laced, derogatory comments on Facebook. A former employee set up a group Facebook message to coordinate a social event with seven current employees and three former employees. In the course of discussions, a current employee ("Employee") bemoaned that the office would be re-hiring a former employee and speculated the person would be supervisor. She also stated that the office was "full of shit . . . They seem to be staying away from me, you know I don't bite my [tongue] anymore . . . [F---] . . . FIRE ME . . . Make my day . . . ." No current employees participated in this portion of the group message. About two hours later, Employee observed that she felt abandoned and there was "[n]o one to make me laugh." Another current employee responded that she made Employee laugh and "it's getting bad there [at the office], it's just annoying as hell. It's always some dumb shit going on." Employee confirmed the other current employee made her laugh.

In an Advice Memorandum, an associate general counsel for the National Labor Relations Board concluded that Employee's speech was a "personal gripe" and not concerted activity. Employee's "comments reflected her personal contempt for her returning coworker and her supervisor, rather than any shared employee concerns over terms and conditions

of employment. Further, "there was no thread connecting [Employee's] comments to those of any coworker pertaining to shared concerns about working conditions."

Refusal to Provide Alternative Pre-Employment Testing to Pregnant Applicant Violated ADA

An Orange County jury awarded plaintiff Dahlia Vargas, a candidate for a dispatcher position in Long Beach's police department, $54,000 in damages and an additional $376,316 in attorneys' fees and costs following her unsuccessful application for employment. Vargas' application was accepted and she passed the civil service exam, typing test, interviews, and physical exam. Her candidacy stalled during the final stage of the application process, however, when the polygraph administrator refused to screen her because she was pregnant. Vargas alleged she offered to waive any claims associated with the test so that she could complete the process, but was denied. Her other requests to accommodate the pregnancy—for instance, by placing her candidacy on hold until she had given birth (rather than starting the process anew)—were also denied. The jury found the city unlawfully failed to accommodate Vargas' pregnancy.

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