Proskauer

California Employment Law Notes

September 2016

Ninth Circuit Strikes Down Employer's Class Action Waiver

Morris v. Ernst & Young, LLP, 2016 WL 4433080 (9th Cir. 2016)

As a condition of employment, Stephen Morris and Kelly McDaniel were required to sign agreements not to join with other employees in bringing legal claims via arbitration against their employer. Morris and McDaniel filed a class and collective action against the company, alleging they had been misclassified as employees exempt from overtime under the Fair Labor Standards Act and California state law. In response, the employer filed a motion to compel arbitration pursuant to the agreements the employees had signed; the district court ordered individual arbitration and dismissed the case. In this opinion, the United States Court of Appeals for the Ninth Circuit reversed the judgment, holding that the agreement interferes with the employees' rights under Sections 7 and 8 of the National Labor Relations Act (protecting "concerted activity"). In so holding, the Ninth Circuit joined the Seventh Circuit in adopting the position of the National Labor Relations Board as set forth in *D.R. Horton*, 357 NLRB No. 184 (2012), *enf. denied*, 737 F.3d 344 (5th Cir. 2013) and *Murphy Oil USA, Inc.,* 361 NLRB No. 72 (2014), *enf. denied*, 808 F.3d 1013 (5th Cir. 2015). *See also Young v. REMX, Inc.*, 2016 WL 4386166 (Cal. Ct. App. 2016) (trial court's order compelling arbitration of individual claims, dismissing class claims, and bifurcating and staying the Private Attorneys General Act ("PAGA") representative claims was non-appealable).

Prompt Final Pay Provisions Of California Labor Code Apply To Retiring Employees

McLean v. State of Cal., 2016 WL 4395672 (Cal. S. Ct. 2016)

Janis McLean, a retired deputy attorney general, filed suit against the State of California on behalf of herself and a class of former state employees who, having resigned or retired, did not receive their final wages within the time period set forth in Cal. Labor Code § 202 (72 hours). McLean alleged that defendants violated Section 202 by failing to pay her final wages on her last day of employment or within 72 hours after her last day; failing to deposit wages for her unused leave and vacation time to her supplemental retirement plans within 45 days of the last day of her employment (despite her request that they do so); and failing to transfer to her before February 1 of the following year the wages that she had elected to defer to that tax year. The trial court sustained the employer's demurrer on the ground that McLean had "retired" and, therefore, she had not stated a claim under Section 203, which applies only when employees quit or are discharged. The Court of Appeal reversed the dismissal, holding that Sections 202 and 203 apply when an employee "quits to retire." The California Supreme Court affirmed the judgment of the Court of Appeal, holding that the "ordinary meaning of the word 'quit' is broad enough to encompass a voluntary departure from a particular employment, whatever its motivation: an employee who retires, no less than an employee who ends one job to start another, has 'stopped,' 'ceased,' or 'left' her employment." The Court similarly rejected the state's assertion that McLean had sued the wrong entity because she was employed by the Department of Justice and not the State of California as a whole.

Race Discrimination Claim Was Not Barred By Statute Of Limitations

Mitchell v. California Dep't of Public Health, 1 Cal. App. 5th 1000 (2016)

Reginald Mitchell sued his former employer, the California Department of Public Health, for racial discrimination in violation of the Fair Employment and Housing Act ("FEHA"). The trial court sustained the employer's demurrer based upon the statute of limitations, but the Court of Appeal reversed, holding that the complaint sufficiently established a claim of equitable tolling that prevented dismissal. The California Department of Fair Employment and Housing ("DFEH") issued a right-to-sue letter on September 9, 2011 and stated that the federal Equal Employment Opportunity Commission ("EEOC") would be responsible for processing the complaint. The letter further notified Mitchell that the one-year period to initiate a civil proceeding would be tolled if the investigation of the charge was deferred to the EEOC. The EEOC issued its letter of determination on September 30, 2013, stating that there was "reasonable cause" to believe Mitchell had suffered racial discrimination in violation of Title VII. After conciliation efforts failed, the Department of Justice issued a federal right-to-sue notice, which Mitchell received on March 21, 2014. Mitchell filed his FEHA civil action on July 8, 2014 (17 days beyond the 90-day federal right-to-sue period). In response to the employer's demurrer, Mitchell argued that the one-year FEHA limitation period did not expire until September 30, 2014, one year (not 90 days) from the date of the EEOC's letter of determination. The Court of Appeal agreed that the one-year FEHA limitation period was equitably tolled during the period of the EEOC investigation based upon Mitchell's alleged "reasonable and good faith conduct."

$6.3 Million Attorney's Fees Award (1/3 Of Total Recovery) Was Reasonable In Class Action Settlement

Laffitte v. Robert Half Int'l Inc., 1 Cal. 5th 480 (2016)

An objecting class member in a wage and hour lawsuit challenged the trial court's award of an attorney's fee calculated as a percentage (one-third) of the overall settlement amount of $19 million. The objector asserted that pursuant to *Serrano v. Priest*, 20 Cal. 3d 25 (1977) ("*Serrano III*"), every attorney's fee award must be calculated on the basis of time actually spent by the attorneys in the case and cannot be a percentage of the common fund. The California Supreme Court affirmed the judgment of the Court of Appeal, holding that *Serrano III* permits a trial court to calculate an attorney's fee award from a class action common fund as a percentage of the fund, while using the lodestar-multiplier method as a cross-check on the selected percentage. In this case, the trial court did not abuse its discretion by cross-checking the reasonableness of the percentage award by calculating a lodestar fee and approving a multiplier over the lodestar of 2.03 to 2.13.

Del Mar Fairgrounds/Horsepark Employees Are Exempt From Overtime Under The Amusement Exemption

Morales v. 22nd Dist. Agricultural Ass'n, 1 Cal. App. 5th 504 (2016)

Jose Luis Morales and 177 other similarly situated plaintiffs sued their employer under Cal. Labor Code § 510 and the federal Fair Labor Standards Act ("FLSA") for failure to pay them overtime. Plaintiffs' employer is a California agency that owns and manages the Del Mar Fairgrounds and the Del Mar Horsepark. Plaintiffs are seasonal employees who assist with amusement and seasonal operations and are referred to internally as "119-day employees" because they are limited to working for that period of time during a calendar year. The trial court sustained the employer's demurrer to the state law claims and conditionally certified the case as a collective action under the FLSA. The jury rendered a special verdict in favor of the employer and the court entered judgment, determining the employees are exempt under the amusement exemption that applies to any employee of an establishment whose business is to provide amusement or recreation (29 U.S.C. § 213(a)(3)). The Court of Appeal affirmed the judgment in favor of the employer on the FLSA claim after concluding that the eligibility for the amusement exemption turns on the nature of the employer's revenue-producing activities and not on the nature of the work performed by the employees. The Court further held that while the trial court had properly sustained the employer's demurrer to the Section 510 claim, it should have given plaintiffs leave to amend to allege that they were eligible for overtime when the employer loaned them to outside promoters to support "interim events" such as gun shows, bridal bazaars, private parties, weddings, hot tub sales, etc.

Indian Tribe Did Not Waive Its Sovereign Immunity By Removing Lawsuit To Federal Court

Bodi v. Shingle Springs Band of Miwok Indians, 2016 WL 4183518 (9th Cir. 2016)

The Shingle Springs Band of Miwok Indians is a federally-recognized Indian tribe located on the Shingle Springs Rancheria in California. Beth A. Bodi, a member of the tribe, worked at the tribe's full-service health clinic. Bodi's employment was terminated after she attempted to take job-protected leaved under the federal Family Medical Leave Act ("FMLA"). Although she was rehired, she was fired again after sending a communication to tribal officials complaining about her earlier termination and noting her willingness to seek redress in state court. Bodi subsequently filed suit under the FMLA and state law in California state court, and the tribe removed the action to federal court based upon the federal question presented by the FMLA claim. The tribe then filed a motion to dismiss based upon the tribe's sovereign immunity. The district court denied the motion on the ground that the tribe had waived its immunity by removing the action to federal court. The United States Court of Appeals for the Ninth Circuit reversed, holding that the tribe did not waive its immunity by removing the case to federal court.

Contractor May Be Entitled To Indemnity From Subcontractor For Injuries To Sub's Employees

Aluma Sys. Concrete Constr. of Cal. v. Nibbi Bros., Inc., 2 Cal. App. 5th 620 (2016)

Aluma (the "Contractor") was sued by employees of Nibbi Bros. (the "Employer") for injuries sustained on the job. Contractor sued Employer for indemnification based on the parties' contract. The trial court sustained the Employer's demurrer to the complaint on the ground that the employees' lawsuit set forth claims only against the Contractor and not against the Employer. The Court of Appeal reversed, holding that under Proposition 51 the Employer could be liable for its proportionate share of comparative fault, regardless of what was alleged in the complaint. The Court further held that the duty to defend is different from the duty to indemnify – while the former may depend on the framing of the third party's complaint because the duty is triggered by a claim, the latter does not arise until liability is actually proven.

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