Proskauer

California Employment Law Notes

November 2021

Ninth Circuit Resurrects California's Anti-Arbitration Statute

Chamber of Commerce of the U.S.A. v. Bonta, 13 F.4th 766 (9th Cir. 2021)

The Ninth Circuit Court of Appeals reversed in part a 2020 preliminary injunction issued by a district court and resurrected California Labor Code Section 432.6, the state's latest attempt to outlaw arbitration in the employment context. As a result, employers in California once again face the prospect of incurring criminal and civil penalties for requesting that employees and applicants agree to arbitrate future disputes.

In a 2-1 ruling, the Ninth Circuit held that at least part of Section 432.6 is not preempted by the Federal Arbitration Act insofar as it prohibits "pre-agreement employer behavior," requiring an applicant or employee to enter into an arbitration agreement — but only in those instances in which the employee fails or refuses to execute the agreement. If, however, the employee does sign the arbitration agreement, then the statute does not apply per Section 432.6(f), and the employer is not in violation of the statute or subject to its criminal and civil penalties, which the Ninth Circuit struck down in that limited context. Section 432.6 applies to arbitration agreements that were entered into, modified or extended on or after January 1, 2020.

In a spirited dissent, Judge Sandra Segal Ikuta noted:

> [I]f the employer offers an arbitration agreement to the prospective employee as a condition of employment, and the prospective employee executes the agreement, the employer may not be held civilly or criminally liable. But if the prospective employee refuses to sign, then the FAA does not preempt civil and criminal liability for the employer under AB 51's provisions. In other words, the majority holds that if the employer successfully "forced" employees "into arbitration against their will" … the employer is safe, but if the employer's efforts fail, the employer is a criminal.

Judge Ikuta went on to observe that the majority's "tortuous ruling is analogous to holding that a statute can make it unlawful for a dealer to attempt to sell illegal drugs, but if the dealer succeeds in completing the drug transaction, the dealer cannot be prosecuted." *See also Patterson v. Superior Court*, 2021 WL 4843540 (Cal. Ct. App. 2021) (prevailing-party employer in a motion to compel arbitration may recover its attorney's fees only if employee's opposition to the motion was groundless). Employment set out in *Dynamex Ops. W., Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) applies to the case. The Court of Appeal held that the *Dynamex* ABC test does not apply because it is limited to claims governed by wage order that employ the "suffer or permit to work" standard, which are not at issue in this case.

However, the Court reversed the trial court's judgment, holding that while the determination of whether the carriers are employees or independent contractors is governed by the common law test of *S.G. Borello & Sons, Inc. v. Department of Indus. Relations*, 48 Cal. 3d 341 (1989), the trial court failed to properly analyze the factors required by that opinion by, among other things, relying upon inapplicable regulations from the Employment Development Department. *See also Lawson v. Grubhub, Inc.*, 13 Cal. 4th 908 (9th Cir. 2021) (worker who did not sign class action waiver could not represent other similarly-situated workers who did; action remanded for decision of whether ABC test applies to expense reimbursement claims); *American Soc. of Journalists & Authors, Inc. v. Bonta*, 2021 WL 4568057 (9th Cir. 2021) (Assembly Bill 5 did not effectuate content-based preferences for certain kinds of speech by providing a narrower exemption for freelance writers and photographers).

In-House Counsel's Claim For Breach Of Oral Promise Of Contingency Fee Was Barred By Statute

Missakian v. Amusement Indus., Inc., 69 Cal. App. 5th 630 (2021)

Former in-house counsel Craig Missakian sued his former employer, Amusement Industry, Inc., based on an alleged oral promise to pay him a bonus and a share of recovery from real estate litigation that was pending in New York, which ultimately settled for $26 million. At trial, the jury found that Amusement had breached the oral contract with Missakian and awarded him $2.25 million and, for a failure to pay the monthly bonus, an additional $275,000. The jury also entered a special verdict in favor of Allen Alevy (founder of the company) but against Amusement on a fraud claim, awarded Missakian $750,000 in compensatory damages and $1.75 million in punitive damages against Amusement. The Court of Appeal reversed the judgment on the oral contract claim based upon Cal. Bus. & Prof. Code § 6147, which requires the specifics of a contingency fee agreement to be in writing signed by both parties. As for the promissory fraud claim, the Court held that the jury entered two inconsistent verdicts (one in favor or Alevy and the other against Amusement) and ordered a new trial on that claim.

Employee Can Proceed With Age Discrimination Lawsuit Against LMU

Jorgensen v. Loyola Marymount Univ., 68 Cal. App. 5th 882 (2021)

Linda Jorgensen sued Loyola Marymount University for retaliation and age and gender discrimination. In opposition to LMU's summary judgment motion, Jorgensen provided a declaration from a former employee (Carolyn Bauer) who swore that Johana Hernandez (the assistant dean) told Bauer that she "wanted someone younger" for another position that was not being sought by Jorgensen. LMU objected to Bauer's evidence on the grounds of relevance, conjecture, speculation and hearsay. In reversing the summary judgment motion, the Court noted that LMU's objections were "wide of the mark." The Court held that a "stray remark" may have relevance in this case because "one might infer that Hernandez could influence [Stephen] Ujlaki, the school's top decision maker on all issues, including hiring and promotion." The Court further held that LMU's other evidentiary objections should have been overruled, including the hearsay objection on the ground that the state-of-mind exception made admissible Bauer's report of Hernandez's remark. *See also Guzman v. NBA Auto., Inc.*, 68 Cal. App. 5th 1109 (2021) (employee's administrative complaint sufficiently identified her employer despite erroneous identification of employer).

Order Denying Attorney's Fees Under UTSA Is Not Separately Appealable

Dr. V. Prods., Inc. v. Rey, 68 Cal. App. 5th 793 (2021)

Dr. V. Productions sued its former employee, Samantha Rey, for misappropriation of trade secrets under the Uniform Trade Secrets Act, breach of fiduciary duty and related claims. After "significant discovery," Dr. V. voluntarily dismissed its misappropriation of trade secrets claim. Rey then filed a motion for an award of attorney's fees under the UTSA, which the trial court denied. The Court of Appeal granted Dr. V.'s motion to dismiss Rey's appeal on the ground that the denial of attorney's fees is not separately appealable.

Company That Retained Independent Contractor Is Not Liable For Injury To Contractor's Employee

Sandoval v. Qualcomm Inc., 12 Cal. 5th 256 (2021)

Qualcomm hired TransPower Testing, Inc., an electrical engineering service company, to inspect and verify the amperage capacity of Qualcomm's existing switchgear equipment. TransPower hired Martin Sandoval, an electrical parts supply and repair specialist, to conduct an inspection during which Sandoval was seriously injured. The jury awarded Sandoval over $1 million for past and future medical expenses and $6 million for pain and suffering/emotional distress damages and apportioned the fault 46 percent to Qualcomm. The Court of Appeal affirmed, but in this opinion, the California Supreme Court reversed, holding that Qualcomm owed Sandoval no injury-prevention duty in that it had turned over control of the worksite and presumptively delegated to TransPower any preexisting duties Qualcomm otherwise owed to Sandoval. The Supreme Court also held that pattern jury instruction CACI No. 1009B does not adequately instruct juries on the applicable law.

Newspaper Delivery Carriers May Be Employees Under *Borello* Independent Contractor Test

Becerra v. The McClatchy Co., 2021 WL 4472625 (Cal. Ct. App. 2021)

Newspaper home delivery carriers for *The Fresno Bee* sued for violation of the Unfair Competition Law for failure to pay their mileage expenses as required by Cal. Lab. Code § 2802. The Trial court determined the carriers were independent contractors and not employees and entered judgement in favor of the *Bee* and its affiliated companies (McClatchy). On appeal, the carriers argued, among other things, that the test for employment set out in *Dynamex Ops. W., Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) applies to the case. The Court of Appeal held that the *Dynamex* ABC test does not apply because it is limited to claims governed by wage order that employ the "suffer or permit to work" standard, which are not at issue in this case.

However, the Court reversed the trial court's judgment, holding that while the determination of whether the carriers are employees or independent contractors is governed by the common law test of *S.G. Borello & Sons, Inc. v. Department of Indus. Relations*, 48 Cal. 3d 341 (1989), the trial court failed to properly analyze the factors required by that opinion by, among other things, relying upon inapplicable regulations from the Employment Development Department. *See also Lawson v. Grubhub, Inc.*, 13 Cal. 4th 908 (9th Cir. 2021) (worker who did not sign class action waiver could not represent other similarly-situated workers who did; action remanded for decision of whether ABC test applies to expense reimbursement claims); *American Soc. of Journalists & Authors, Inc. v. Bonta*, 2021 WL 4568057 (9th Cir. 2021) (Assembly Bill 5 did not effectuate content-based preferences for certain kinds of speech by providing a narrower exemption for freelance writers and photographers).

Class Action/PAGA Release Was Overly Broad, But Not Collusive

Amaro v. Anaheim Arena Mgmt., LLC, 69 Cal. App. 5th 521 (2021)

In 2017, Irean Amaro filed this wage and hour class action and Private Attorneys General Act (PAGA) claim against her employer; there already were two existing class actions asserting the same claims, which were filed in 2014 and 2016. After Amaro reached a global settlement in her lawsuit, which included the claims asserted in the two earlier-filed lawsuits, an employee from one of the two earlier lawsuits (Rhiannon Aller) intervened to object to the Amaro settlement. Ultimately, the trial court approved the settlement over Aller's objections. On appeal, Aller argued that the court's approval of the settlement was erroneous because the settlement agreement was overly broad. The Court of Appeal held that the release was overbroad in that it covered "potential claims… in any way relating" to the facts pled in the complaint, thus potentially including claims that may only be tangentially related to the allegations in Amaro's complaint. The Court further held, however, that the FLSA's written consent requirement does not apply to a release in a class settlement of state wage and hour claims. Finally, the Court held the trial court had not abused its discretion in finding the settlement was not the product of a collusive reverse auction (*i.e.*, a process by which the defendant picks the most ineffectual class counsel with which to negotiate a weak settlement that precludes all the other class action claims).

The Court held there is nothing "inherently wrong" with the settlement process that was followed in this case, which resulted in a settlement being reached that bypassed the plaintiffs from the earlier-filed lawsuits. Also, there was no evidence of unfairness to the class or misconduct to support a collusive reverse auction finding. *See also Turrieta v. Lyft, Inc.*, 2021 WL 4472080 (Cal. Ct. App. 2021) (PAGA plaintiffs from separate actions do not have standing to move to vacate a judgment that resulted from a settlement to which they were not parties; trial court properly denied plaintiffs' intervention request because the settlement was fair and adequate); *Uribe v. Crown Bldg. Maint. Co.*, 2021 WL 4962724 (Cal. Ct. App. 2021) (intervenor had standing to challenge PAGA settlement; settlement should not have included unreimbursed cell phone expenses because PAGA notice did not encompass such a claim).

Court Has Power To Strike PAGA Claims That Will Be Unmanageable At Trial

Wesson v. Staples the Office Superstore, LLC, 68 Cal. App. 5th 746 (2021)

Fred Wesson sued Staples under PAGA, seeking $36 million in civil penalties for Labor Code violations related to an alleged misclassification of its store general managers. At trial, Staples moved to strike Wesson's PAGA claim, arguing that the number of employees and the nature of the allegations made the PAGA action "unmanageable," which would violate Staples' due process rights. The trial court invited Wesson to submit a trial plan showing that his PAGA action would be manageable at trial, but Wesson insisted the trial court lacked authority to require that his claim was manageable. The trial court disagreed and granted Staples' motion to strike the PAGA claim on manageability grounds. The Court of Appeal affirmed, holding that trial courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, further, that defendants are entitled to a fair opportunity to litigate their affirmative defenses and a court's manageability assessment should account for them.

Secretary Of Labor Could Be Compelled To Disclose Identities Of Informants

Skidgel v. CUIAB, 2021 WL 3671434 (Cal. S. Ct. 2021)

The United States Secretary of Labor filed an action against Valley Wide Plastering Construction and various individuals, alleging violations of the Fair Labor Standards Act. During discovery, the employer sought the identities of all informant employees who had provided information to the Secretary. In response, the Secretary filed a motion for protective order, invoking the government's informant privilege and requesting the district court prohibit the employer from soliciting information tending to reveal any informant identities. Although the district court granted the motion, it also ordered the Secretary to reveal the identities of informants who would be testifying at trial by a date certain. The Secretary filed a petition for writ of mandamus with the Ninth Circuit Court of Appeals, challenging the district court's order. The Ninth Circuit denied the petition, holding that the district court's order was not "clearly erroneous as a matter of law."

Gas Station Manager Was An Employee Of Shell Oil

Medina v. Equilon Enter., LLC, 68 Cal. App. 5th 868 (2021)

Santiago Medina worked as a gas station cashier and manager for Equilon Enterprises, which is a Shell Oil Company subsidiary doing business as Shell Oil Products US. Medina sued Equilon and Shell for various wage/hour violations, arguing that Shell was his joint employer. The trial court granted Shell's motion for summary judgment based upon two prior opinions of the California Court of Appeal, but the Court of Appeal reversed, holding that Shell both indirectly controlled Medina's wages and working conditions and suffered or permitted him to work at Shell's gas stations, either of which was enough to make Shell Medina's joint employer. The Court distinguished the earlier cases on the grounds that in this case Shell employees told Medina they had the power to fire him; Shell had control over Equilon's bank accounts and received payments for fuel; and Shell had the power to add or remove individual stations to and from MSO operator clusters at any time for any reason.

Employer That Claimed Employment Records Were Stolen Cannot Challenge Calculation Of Lost Wages

Morales v. Factor Surfaces LLC, 2021 WL 4818687 (Cal. Ct. App. 2021)

Byron Jerry Morales sued his former employer, Factor Surfaces LLC, and its managing agent for unpaid overtime wages, meal and rest break compensation, statutory penalties, and wrongful termination, among other things. After a bench trial, the court awarded Morales $99,394.16, including $42,792 in unpaid overtime wages. On appeal, the employer argued the trial court erred in calculating Morales' regular rate of pay. At trial, the employer testified that all of Morales' employment records were in his truck, which was stolen while parked in his gated complex, and that when the truck was recovered, all of the records were gone. The trial court found the employer's testimony regarding the theft of records to be "unbelievable and afforded no weight to that testimony." In the absence of proof from the employer of the regular rate of pay, the trial court relied upon calculations offered by Morales which were a "fair and accurate estimation of the overtime wages owed to him." The Court of Appeal affirmed the judgment in favor of Morales.

Related Professionals

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