

Areas of Practice

Business Litigation

Civil Litigation & Trials

Employment / Labor

Healthcare Litigation

Premises Liability Litigation

Product Liability Litigation

Professional Liability Litigation

Real Estate Litigation

Restaurant / Hospitality Litigation

Retail Litigation

I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

Mandatory Sick Leave Legislation Re-Introduced in Congress

On May 18, 2009, the Healthy Families Act of 2009 (“the Bill”) was introduced to both houses of Congress. The measure (which was also introduced during the last session of Congress but did not pass) would require employers with 15 or more employees to provide seven to eight sick days per year to workers, in order to care for their own or a family member’s medical needs. The Bill would allow employees to accrue paid sick days at one hour for every 30 hours worked, and would also permit the benefits to be used to recover from incidents related to domestic violence, stalking, and sexual assault. The Bill would also allow workers to use sick days for preventative care or to provide care to a sick family member. Similar legislation has passed in San Francisco, Washington, D.C., and Milwaukee, and is being introduced in Philadelphia and New York City. Paid leave bills such as this are also pending in several states, including Connecticut and Massachusetts.

California Supreme Court Upholds Ban on Same-Sex Marriage

On May 26, 2009, the California Supreme Court upheld a ban on same-sex marriage, ratifying a decision made by California voters last November. The decision, however, preserves approximately 18,000 marriages performed between May 2008 (when the Court ruled that same-sex marriage was lawful) and the November passage of Proposition 8, which amended the California Constitution to ban such marriages.

The Court noted that same-sex couples still have the right to civil unions, which give them the ability to “choose one’s partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all the constitutionally-based incidents of marriage.” The term “marriage,” however, will be reserved for opposite-sex couples as a matter of California law.

Several groups supporting same-sex marriage immediately pledged to “put the matter back on the ballot,” in a future election.

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II.

JUDICIAL UPDATE

California Appellate Court Invalidates Another Employer-Friendly Arbitration Agreement

In *Olvera v. El Pollo Loco, Inc.*, the California Court of Appeal affirmed the lower court's denial of an employer's motion to compel arbitration, finding that the arbitration agreement at issue was both procedurally and substantively unconscionable, and therefore unenforceable.

El Pollo Loco, Inc. ("El Pollo") attempted to enforce its arbitration agreement ("the Agreement") after one of its employees filed a class action complaint alleging, among other things, that the company failed to properly compensate employees for overtime hours worked, failed to provide meal breaks, and engaged in other unfair business practices. The Agreement, which had been distributed as part of a larger packet of written materials outlining El Pollo's employee policies and benefits, was typed in English only¹ and in a smaller size font than most of the other documents in the packet. It provided that the parties "may agree" to mediation, but that the sole means to resolve any dispute not resolved through other means was through binding arbitration;² and "class action" arbitration was prohibited.

The appellate court first confirmed that although arbitration agreements are ordinarily enforced according to their terms, their enforceability may be limited by a finding of fraud, duress, or unconscionability. The court then concluded that the agreement was procedurally unconscionable³ for two reasons: (1) the inequality in bargaining power between the low-wage employees and the company made it likely that the employees felt at least some pressure to sign the policy; and (2) it appeared that the employees' consent to be bound by the agreement was not an informed decision given its small font, lack of Spanish translation, and contradiction with the other page in the packet (which suggested that only mediation was required).

The court also found the agreement to be substantively unconscionable because the class arbitration waiver would insulate El Pollo from employee class actions and class arbitrations on behalf of those employees who signed the agreement, many of whom are low-wage earners. As the court explained, a class action or class arbitration

¹ A majority of the other pages in the packet presented information in both English and Spanish.

² An earlier page in the written materials indicated that an employee with a work-related problem should first contact management personnel. If all attempts to resolve the problem were unsuccessful, the employee and the company were then required to use a mediator to assist them in reaching a resolution. There was no mention of arbitration on that page.

³ Procedural unconscionability focuses on "oppression or unfair surprise," whereas substantive unconscionability focuses on overly harsh or one-sided terms.

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may be the most, and perhaps only, effective way for those employees to vindicate their rights, particularly in light of the fact that many of them have limited English language skills and are likely ill-informed of their legal rights. The court further found the class arbitration waiver to be unfairly one-sided because it benefitted only El Pollo, which was unlikely to sue its employees in a class action lawsuit.

Because El Pollo did not request that any unconscionable provisions in the agreement simply be severed and the rest of the agreement be enforced according to its terms, the court invalidated the entire agreement.

Wage and Hour Issues Before the California Supreme Court

Already slated to determine the thorny meal period enforcement issue for California employers in *Brinker Restaurant Corporation v. Superior Court* and *Brinkley v. Public Storage, Inc.*, the California Supreme Court recently agreed to weigh in on two other wage and hour issues. In *Pineda v. Bank of America*, the high court will determine whether California employees have one year, three years, or four years to file a claim for waiting time penalties. Under current California law, employees who are discharged must be paid all wages due on the last day worked (resigning employees must be paid within 72 hours of the last day of employment); for each day that the employee must wait for a final paycheck, a waiting time penalty (one day's wages) is imposed, for up to 30 days.

The Supreme Court will also review *Lu v. Hawaiian Gardens Casino*, deciding whether the California Labor Code provides employees the ability to file a civil lawsuit for tip-pooling violations. Tips can be shared ("pooled") among all employees who are in the direct chain of service to the customer leaving a tip (i.e., waiters, buspersons, and bartenders). However, California law prohibits owners, supervisors or managers from receiving any part of a gratuity left by a customer. The Court will determine whether an employee can file a civil lawsuit for such violations.

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This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Cara Patton, Tyler Theobald, Jenna Leyton or Andrea Kaplan at (858) 755-8500 or Eric DeWames at (310) 417-1137. For access to previous updates and reports, please go to <http://www.pettitkohn.com/EmployLabor.html>.