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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

“Son or Daughter” Defined for FMLA Enforcement

On June 22, the U.S. Department of Labor issued an interpretation letter (No. 2010-3) clarifying the definition of “son or daughter” under the Family and Medical Leave Act (“FMLA”), as it relates to whether leave may be taken by employees raising children “in loco parentis” (where they lack a biological or legal relationship to a child). In determining whether an employee is eligible for FMLA leave, the interpretation provides that “the employer may require the employee to provide reasonable documentation or statement of family relationship. A simple statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no legal or biological relationship.” The letter also states that “regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child.”

The letter specifically mentions its application to unmarried partners and same-sex partners, and adds that the fact that a child has a biological parent at home or has both a mother and a father does not prevent a finding that the employee with a non-biological relationship is eligible for FMLA leave.

New Bill Seeks to Criminalize Pay Disputes

AB 2187 (Aramdula) would amend the California Labor Code to include a provision providing that “an employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine of not less than \$1,000 and not more than \$10,000, or by imprisonment . . . for not more than six months, or by both, who, having the ability to pay, willfully fails to pay all wages due to an employee who has been discharged or has quit within 90 days of the date that those wages became due.” The statute adds that employers will also be required to pay restitution to the aggrieved employee in the amount equal to the total amount of unpaid wages. Finally, the bill would also require that offending persons or employers pay the “prosecution costs” to the entity that prosecutes the charge. The bill, which has been referred to the Committee on Appropriations, is currently being considered by the State Senate.

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Bereavement Leave – Law Under Consideration

AB 2340 (Monning) would make it illegal for an employer to “discharge, discipline, or in any manner discriminate against an employee for inquiring about, requesting, or taking up to three days of [unpaid] bereavement leave off upon the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner.” Pursuant to the proposed statute, employees seeking such bereavement leave must be employed for at least 60 days prior to the commencement of the leave. This bill has been referred to the Committee on Appropriations and is currently being considered by the Senate.

II.

JUDICIAL UPDATE

U.S. Supreme Court Rules on Timeliness of Disparate Impact Claims

In *Lewis v. City of Chicago*, the United States Supreme Court unanimously held that disparate impact claims were timely even though the plaintiffs did not challenge the original implementation of the alleged discriminatory practice.

In this case, the City of Chicago conducted an examination for firefighters in 1995. The city announced it would begin selecting from among the highest scorers, whom were deemed “well-qualified.” The middle tier performers were titled as “qualified.” The “qualified” applicants were also kept on an eligibility list. Importantly, no applicant brought suit attacking the examination at the time it was given.

Over time, the city exhausted the “well-qualified” list. On March 31, 1997, some African-American applicants filed a charge with the U.S. Equal Employment Opportunity Commission. These applicants claimed the use of the “well-qualified” score had a disparate impact on black applicants. In other words, the use of the “well-qualified” score resulted in exclusion of a disproportionate number of black applicants. After receiving right-to-sue letters from the EEOC, the applicants filed a class action on behalf of 6,000 “qualified” applicants.

The city argued that the charges were untimely and that the scoring was justified by business necessity. The city lost at the district court level because the court rejected the business necessity of the test as a justification for the admittedly “severe” disparate impact.

The Supreme Court decided that the city’s use, rather than adoption, of the practice was the discriminatory act. Therefore, the city’s selection of well-qualified applicants within the limitations period was sufficient to establish a disparate impact claim.

U.S. Supreme Court Weighs In On Employees' Expectation of Privacy in Work-Provided Communication Devices

In *City of Ontario v. Quon*, the United States Supreme Court held that the city of Ontario, California (“the city”) did not violate a police officer’s Fourth Amendment rights when it audited his text messages. This is the first time the nation’s highest court has addressed a *public* employee’s expectation of privacy in the workplace as it relates to new forms of communication—specifically, text messaging.

Quon (“Plaintiff”), a member of the city’s SWAT team, was issued a police department-owned pager as part of a move to help members of the department coordinate quickly during emergency situations. Plaintiff and others were informed that their text messages were subject to the same policies as other electronic communications, and that they had no expectation of privacy or confidentiality when using these resources. However, Plaintiff’s supervisor made verbal representations that personal use of the pagers would not be audited if overage charges were reimbursed to the city.

Over the course of several months, Plaintiff and others exceeded their monthly usage limits. Seeking to determine whether the existing usage limit was too low (i.e., whether the officers were being forced to pay fees for sending work-related messages), or conversely, whether the overages were for personal messages, the city’s chief of police obtained transcripts of the messages that had been sent by Plaintiff and others. Upon reviewing these messages, the city discovered that many of Plaintiff’s messages were not work related, and that some were sexually explicit. Plaintiff was disciplined for violating the department’s rules. He then filed a lawsuit alleging, among other things, that the city had violated his Fourth Amendment rights by obtaining and reviewing the transcripts of his text messages.

In ruling in favor of the city, the United States Supreme Court held that Plaintiff’s constitutional rights were not violated because the text message search was motivated by a legitimate, work-related purpose and was not excessive in scope. That is, the city had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or, on the other hand, that the city was not paying for extensive personal communications. Reviewing the transcripts was an efficient and expedient way to determine whether either of these factors had caused Plaintiff’s overages. Moreover, the search was not excessively intrusive: although Plaintiff had exceeded his monthly allotment of texts a number of times, the city requested only two month’s worth of transcripts, and had obtained redacted transcripts of the messages that were sent while Plaintiff was off duty.

Although the Court ultimately held that “the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis,” and that where an employee has a legitimate privacy expectation an employer’s intrusion on that expectation for work-related purposes should be “judged by a standard of reasonableness under all the circumstances,” this case highlights the importance of establishing and clearly communicating policies that address employees’ expectations of privacy in the workplace.

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Do Judges or Arbitrators Decide Whether an Arbitration Agreement is Unconscionable?

Arbitration is a matter of contract. In many arbitration agreements, the parties agree that the arbitrator has exclusive authority to decide all claims, including claims concerning the enforceability of the arbitration agreement. But what happens when, despite the agreement to arbitrate arbitrability, one party asks a court to find an arbitration agreement unconscionable or unfair? Who decides – the court or the arbitrator?

In a 5-4 decision, the United States Supreme Court resolved this issue in *Rent-A-Center, West, Inc. v. Jackson*. Jackson had filed an employment discrimination lawsuit against his former employer, Rent-A-Center, in federal district court. Rent-A-Center then filed a motion to compel arbitration based on the arbitration agreement (“Agreement”) Jackson had signed as a condition of his employment. Jackson opposed the motion on the ground that the Agreement was unconscionable, claiming that it was one-sided, and that the fee-splitting provision and limitations on discovery rendered the Agreement invalid.

The Agreement provided that 1) all disputes arising from Jackson’s employment were to be arbitrated (“Arbitration Provision”); and 2) the arbitrator had exclusive authority to resolve any dispute relating to the Agreement’s enforceability (the “Delegation Provision”).

Reversing a decision of the Ninth Circuit Court of Appeals, the Court applied the Federal Arbitration Act and distinguished between the enforceability of the agreement to arbitrate all disputes (i.e., the Arbitration Provision) and the enforceability of the agreement to arbitrate arbitrability (i.e., the Delegation Provision). The Court held that where an agreement to arbitrate includes a particular agreement that the arbitrator will determine the enforceability of the agreement, if a party specifically challenges the enforceability of that particular agreement, the district court considers the challenge. But if a party challenges the enforceability of the agreement as a whole, the arbitrator considers the challenge.

Applying this to the Agreement between Rent-A-Center and Jackson, the Court found that the Delegation Provision was severable from the remainder of the Agreement. Therefore, unless Jackson challenged the Delegation Provision specifically, a court must treat that provision as valid and enforce it, leaving any challenge to the Agreement as a whole for the arbitrator. Jackson had challenged only the fairness of the Agreement as a whole, and therefore the arbitrator was to decide whether the Agreement was enforceable. The basis of Jackson’s challenge had to be directed specifically to the Delegation Provision before a court would intervene.

Application of this case will depend on the specific agreement of the parties contained in an arbitration agreement. Although it is a very technical issue, it is an important decision which makes it more difficult for employees seeking to challenge arbitration agreements on the ground they are unfair or unconscionable.

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California Supreme Court to Review Employer Liability for Employee Actions

The California Supreme Court has agreed to review *Diaz v. Carcamo*, an important case addressing employer liability for employee actions at work and whether certain evidence may be used after the employer admits such liability. The Court will determine whether once an employer admits liability for an employee driver's negligence in causing an accident, a plaintiff can use evidence related to the employee's driving record to pursue other legal theories, such as negligent hiring and/or retention, against the employer, and recover damages.

Diaz also addresses Proposition 51, a 1986 ballot initiative approved by the voters. Proposition 51 provided that parties to a negligence action pay no more than their respective percentage of fault for an injured party's noneconomic damages. In the lower courts in *Diaz*, the employer was made responsible for both the 20 percent of fault determined for its driver's negligence in causing the accident and an additional 35 percent for its own alleged negligent retention of its driver. As a result, the employer was responsible for 55 percent of the loss.

Employers are generally held liable only for negligent and intentional acts of employees done in the course and scope of employment when such acts injure others, under the doctrine of respondeat superior. Under that doctrine, injured third parties generally cannot recover against employers if the wrongful acts occurred outside the scope of the employee's employment or were not in furtherance of the employer's business. Under the negligent hiring/retention theory, however, injured third parties have, in certain situations, successfully sued employers for negligent hiring/retention of employees who engage in criminal or violent acts that occur after working hours or outside the scope of employment.

We will be certain to keep you posted as matters transpire.

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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, Robert Hudock, Tyler Theobald, Jenna Leyton, Andrea Kaplan, Vanessa Maync or Christine Mueller at (858) 755-8500 or Eric DeWames or Mark Bloom at (310) 649-5772.