KOUMAS LAW GROUP

Legal Update

August 2009

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INSIDE THIS ISSUE:

ARBITRATION AGREEMENTS: *TO HAVE OR NOT TO HAVE…THAT IS THE QUESTION.*

Employers and attorneys often debate the advantages and disadvantages of utilizing an arbitration agreement to resolve employment disputes. One potential disadvantage seems to be bolstered by some courts exhibiting reluctance to enforcing such agreements, especially where they contain improper clauses.

In our June 2009 newsletter, we reported to you about a California Court of Appeal decision upholding the enforcement of an arbitration agreement which waived an employee's right to file an administrative wage claim with the Labor Commissioner for unpaid accrued vacation benefits, following his separation of employment. That ruling, which was favorable to the employer, relied upon the specific language included in the *validly* drafted arbitration agreement, which excluded such administrative claims.

By its terms, the arbitration agreement applied to "all disputes that may arise out of the employment context ... that either [party] may have against the other which would otherwise require or allow resort to any court or *other governmental dispute resolution forum* [,] ... whether based on tort, contract, statutory, or equitable law, or otherwise." As shown by the contractual provisions of the arbitration agreement, the parties contemplated that the employee could pursue only those administrative remedies that were listed as exceptions to the agreement, none of which included the Labor Commissioner or DLSE.

The practical impact of the waiver was that it eliminated the administrative "Berman" hearing, and the employer was not exposed to the risks associated with appealing a potential adverse decision, which include certain protections extended to the employee, such as the requirement that the employer post a bond equivalent to the amount of any award issued by the Labor Commissioner. This requirement can often be so costly that it deters an employer from appealing what is actually an erroneous administrative decision.

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By comparison, two other California court of appeal decisions found two arbitration agreements, which contained a provision waiving the employee's right to bring class actions, unenforceable. The courts also found other provisions of the agreements *unconscionable*, thus leading to a finding the agreements, as a whole, were unenforceable.

In evaluating whether a class action waiver is enforceable, the court will focus on the factors articulated in *Gentry v Superior Court,* 42 Cal.4th 443 (2007), which include: (a) the potential size of individual recoveries, (b) the likelihood of retaliation against class members, and (c) the absent class members awareness of his or her legal rights, and (d) other real life obstacles to the vindication of class members' rights to overtime pay through individual arbitration. The court will conclude, based on these factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than *individual* litigation or arbitration, and invalidate a class arbitration waiver.

Key to drafting valid and enforceable arbitration agreements are the following factors set forth in the case of *Armendariz v Foundation of Health* Pyschare Services, Inc.:

- The agreement must be bilateral—employer must agree to submit its claims to arbitration, just as it requires employees to do so, absent a legitimate commercial need to exempt a particular right.
- Neutral arbitrator.
- Employer pays arbitrator's fees and all costs unique to arbitration.
- Adequate discovery permitted.
- No limits on damages or other relief.
- Written award that permits limited judicial review.

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APPELLATE COURT OVERTURNS PRIOR STARBUCKS TIP POOLING DECISION

In our May 2008 newsletter, employers in industries utilizing **tip pools** were cautioned to review any tip sharing policies to ensure compliance with Labor Code section 351, which prohibits employers (and agents) from taking, collecting, or receiving any portion of a gratuity left for or given to or left for an employee by a patron. In the prior newsletter we reported the financially significant adverse decision against Starbucks, where a San Diego trial court concluded Starbucks' policy was *illegal tip pooling*.

Background: Baristas brought a class action against employer Starbucks under the Unfair Competition Law (UCL), for alleged violation of the statute prohibiting employers or their agents from taking gratuities left for employees. The Superior Court, San Diego County, No. GIC836925, Honorable Judge Patricia Cowett, awarded millions of dollars in restitution to the employees after a court trial. The employer appealed. Now, the California Court of Appeal, Fourth District, has reversed that decision, concluding that the applicable statutes did *not* prohibit Starbucks from permitting "shift supervisors" to share in the proceeds placed in the collective tip boxes.

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Baristas and shift supervisors, two of the four levels of employees Starbucks uses in its stores are both part-time hourly employees. Shift supervisors perform all the same functions of a barista, plus supervising and coordinating employees within store, opening and closing store and depositing money into safe. The stores also have managers and assistant managers, but they are full time, salaried employees who have authority to recruit, hire, fire, transfer, discipline, promote and terminate the other levels of employees. Each customer is serviced by a "team," rather than one individual employee. Because of this method of service, a collective tip box is provided for customers who choose to tip the group of employees, rather than an individual. Starbucks has a detailed policy of collecting, storing and distributing the collective tips. The only employees eligible to share in the tip pool are baristas and shift supervisors.

After assessing the legislative intent and language of Labor Code section 351, the Appellate Court found that it does not prohibit an employee (who is also an agent) from keeping his or her own tip. The court, essentially, found that shift supervisors were only keeping *their portion* of the gratuity and did not 'take" any portion of the tip intended for services by baristas. Because the two levels of employees perform virtually the same functions, and work as a team, the employer did not violate section 351 by equitably distributing the tips left in the collective box for all of these employees. The statute seeks to prevent the public from being deceived when leaving tips for employees and the court found its conclusion consistent with this legislative intent. When a customer leaves a tip in a *collective tip jar,* the customer understands that the tip is not intended for a specific individual and will be divided among the behind-the-counter service employees.

A number of other California Court of Appeal decisions have been issued recently addressing the legality of tip pooling policies and whether employees can sue their employer directly for violating California Labor Code section 351. Because of conflicting decisions between districts, the California Supreme Court has granted review of two of these decisions: *Lu v Hawaiian Gardens (*170 Cal.App.4th 466) and *Grodensky v Artichoke Joe's Casino* (171 Cal.App.4th 1399). In *Lu*, the Second District Court of Appeal found that Labor Code section 351 does not provide for a private right of action by an employee against their employer for violation of section 351. By contrast, the *Grodensky* First District Court of Appeal found that employees *did* have a private right of action to sue their employer. The court of appeal also held that although a casino maintained a tip pooling policy where dealer tips were distributed among the chip sellers, day and night shift cage workers, board persons, floor and shift managers, the arrangement was found valid, commenting employees engaging in an establishment's "chain of service" may share in tip pooling. However, employer's *managing agents* were prohibit from doing so.

Grodensky was taken up on review in late June, 2009, on a "grant and hold" pending the Supreme Court's decision in *Lu*, the first of the two cases granted review. Watch for our future newsletter to learn about the decision, once issued.

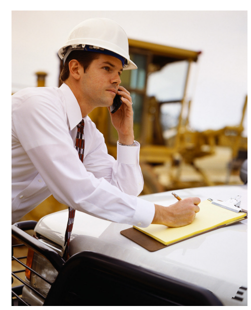
PRACTICE TIP: Employers that maintain a tip pooling policy should review it to make sure that employees who are managing agents are not improperly receiving money from the tip jar.

VALID USE OF MOST RECENT I-9 FORM EXTENDED

All U.S. employers must complete and retain a Form I-9 for each individual they hire for employment in the United States (which includes citizens and non-citizens). The last version of the I-9 form was revised on February 2, 2009. The revision date is located on the lower right hand corner of the form. **No previous editions of the form are acceptable.** On June 26, 2009, the U.S. Citizenship and Immigration Services ("USCIS") announced that the I-9 Form (Employment Eligibility Verification) will continue to be valid for use beyond June 30, 2009. The extended validity period was prompted by the USCIS requesting that the Office of Management and Budget ("OMB") approve the continued use of the current version of the form, and the version of the form will not expire during the pendency of that request. The USCIS stated it will update the Form I-9 when the extension is approved. Notably, there is also a Spanish version of the I-9 Form available, which may *only* be used by employers and employees in Puerto Rico, but may be used *for reference only* by Spanish-speaking employers and employees in the U.S.

Practice Tips: Employers are reminded of the following:
(1) an I-9 Form must be completed no later than 3 days of hire;
(2) I-9 Forms must be retained by the employer either for 3 years after the date of hire or 1 year after employment ends, which ever is later;
(3) The forms must be available for inspection by authorized governmental officials (*e.g.*, Dept. of Labor, Dept. of Homeland Security, or Office of Special Counsel); and
(4) The most recently issued I-9 Form is available on the firm's website at www.koumaslaw.com.

FEDERAL CONTRACTORS E-VERIFY REQUIREMENT POSTPONED, AGAIN



The E-Verify Program of the United States Department of Homeland Security, in partnership with the United States Social Security Administration, enables participating employers to use the program, on a *voluntary* basis, to verify that the employees they hire are authorized to work in the United States. However, last year President Bush issued Executive Order 12989, which would require *all* federal contractors to use the Department of Homeland Security's (DHS) E-Verify system to confirm the employment eligibility of employees who perform work on a government contract. The Executive Order would mandate that as a condition of each contract, the contractor must agree to use E-Verify to verify employment eligibility of: 1) all individuals hired during the contract term by the contractor to perform employment duties within the United States, and 2) all individuals the contractor assigns to perform work within the United States on the federal contract.

In November, 2008, a rule was published by the Federal Acquisitions Regulatory Council, setting forth the responsibilities under the Order, that applies to prime federal contracts covering a period

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longer than 120 days and valued in excess of $100,000, and to subcontracts or construction valued at $3,000 or more. That rule was to go into effect January, 15, 2009, but the federal government delayed implementation under February 20, 2009, after a business group filed suit challenging the rule. The interested parties (business collation and government) agreed to postpone the implementation until September 8, 2009, to provide an opportunity for the new Obama Administration to review the rule.

PRACTICE TIP: Employers with federal government contracts should determine which of their employees/worksites are affected by the order and get ready with procedures to ensure that E-Verify is part of the employment verification process, if not already in place.

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Although arbitration agreements vary from employer to employer, common pitfalls found in older agreements include, but are not limited to:

- Agreement does not specify all types of employee claims (including statutory claims) are subject to arbitration.
- Parties share costs of arbitration.
- Arbitration policy is found in the handbook, but the terms are not properly incorporated into a separate agreement signed by the employee.
- Employer is not required to arbitrate some claims against employee. For example, older agreements commonly reserve the right of the employer to seek injunctive relief against former employees to prevent misuse of trade secrets or customer lists. These provisions should be revised to carve out only temporary emergency relief rather than all injunctive relief.
- Incorporation of arbitration rules from an outside source (such as AAA) that may or may not be compliant with case law.

Unless the agreement is carefully worded, your company may end up in front of a jury should an employee assert a legal claim relating to his or her employment.

Practice Tips: In order to ensure employment disputes that arise are arbitrated rather than litigated in court, employers are recommended to do the following:
(1) audit existing arbitration agreements to ensure they are enforceable;
(2) revise any agreements which contain unenforceable or questionable provisions;
(3) Upon receipt employment claims, promptly review personnel files to determine if an arbitration agreement exists;
(4) Immediately advise any legal counsel, who is handling an employee claim, of the existence of any arbitration agreement signed by the employee.

For drafting or review of your agreement, please contact Elizabeth Koumas at ejk@koumaslaw.com or (619) 398-8301.

Do You Have A *Real* Secret Which Is Protectable?

Will employees have access to what your believe is confidential, proprietary information? Do you have them sign an agreement promising not to disclose this information to anyone either during employment (unless required to perform their jobs) or after employment ends? Does that agreement also contain a promise not to solicit customers for a specified period after employment ends? If the answer is "yes" to any of these questions, then you should familiarize yourself with some basics about trade secrets and what can be protected from inappropriate disclosure or misappropriation. A real trade secret has three basic characteristics: (a) It is secret (not generally known by or readily ascertainable to competitors through public or other easily accessible sources); (b) It confers a competitive advantage on its owner; and (c) It is subject to reasonable efforts to maintain its secrecy.

Something frequently overlooked by employers is actually taking affirmative steps and implementing a procedure for the handling of proprietary information which *the employer* classifies as a trade secret. If a company takes reasonable measures to protect its information, and if the information is valuable because it is kept secret, California courts will usually recognize that common, every-day pieces of data (*e.g.,* customer lists, business plans, and bid specifications) can be afforded protection as a trade secret. "Misappropriation" has a specific legal definition which includes two distinct types of misuse: 1) the acquisition by improper means, and 2) the use or disclosure of trade secrets. Many employers share the common fear of a former employee's use or disclosure of confidential customer information to solicit new accounts on behalf of a new employer. Such conduct *can* constitute the misappropriation of a trade secret under certain circumstances. Confidentiality/ Non-Disclosure agreements can be one invaluable step to eliminating or reducing the improper use or disclosure of trade secrets. What else?......

Practice Tips: Any Confidentiality/Non-Disclosure agreement should define what a trade secret is with examples, and include a warning that improper use or disclosure of trade secrets is a crime carrying severe civil and criminal penalties. To help assure the agreement will be enforceable, do not include it in your employee handbook, but rather a separate agreement. Part Two of this Article in next month's update. For assistance with your agreements, contact Elizabeth Koumas at (619) 398-8301.

Governor Signs Electronic Discovery Legislation Into Law

On June 29,2009, Governor Schwarzenegger signed A.B. 5 into law, as an urgency bill, which took effect *immediately*. The stated objective is to improve the practices and procedures for handling discovery of ESI (electronically stored information) through new rules that will be incorporated into the civil discovery law. This will, essentially, effect the nature and costs of all lawsuits since most information is now stored in electronic rather than paper format. Do you have a policy defining acceptable uses of your company's computer system, including Internet access and e-mail? Have you notified employees in writing that their electronic communications are not private? Please see a future newsletter for more details on this new law and the practical impact it will have on the workplace.

SIGN UP NOW!

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