

ATTORNEYS AT LAW

LABOR & EMPLOYMENT LAW NEWSLETTER

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February – March 2016 Newsletter



I. The United States Supreme Court Again Upholds the Right to Include Class Arbitration Waivers in Agreements:

Recently, in *Directv, Inc v. Imburgia et al.*, the United States Supreme Court again upheld a company’s right to prohibit arbitration of consumer class actions under the Federal Arbitration Act (“FAA”). This is a big win for employers in California, since class action arbitration waivers contained in Employment Arbitration Agreements have now found even

more support and acceptance from the United States Supreme Court.

In this case, Directv and its customers entered into a service agreement that included a binding arbitration provision with a class arbitration waiver. The waiver specified that the entire arbitration provision was unenforceable if the “law of your state” made class-arbitration waivers unenforceable. The agreement also declared that the arbitration clause was governed by the FAA. Importantly, at the time that the customers in this case (who were California residents) entered into the service agreement with Directv, California law made class-arbitration waivers unenforceable. At the time, the so-called “Discover Bank rule”, named after the case of *Discover Bank v. Superior Court* 36 Cal. 4th 148, prohibited class-action waivers. However, as we informed our Monthly Newsletter readers back in 2011, the U.S. Supreme Court overruled the *Discover Bank* holding and held in *A. T. & T. Mobility LLC v. Concepcion* 563 U.S. 333 that California’s “Discover Bank rule” was in fact pre-empted by the FAA, and that consumer class action waivers of arbitration were in fact valid.

After the state trial court refused to send the matter to arbitration, the California Court of Appeal thought that the critical legal question concerned the meaning of the contractual phrase “law of your state”, which in this case was the law of the State of California. Essentially, the California Court of Appeal was left with two (2) legal questions: (a) Does the law of California make the contract’s class – arbitration waiver unenforceable? If so, as the contract provides, the entire arbitration provision is unenforceable; or (b) Does California law permit the parties to agree to waive the right to proceed as a class in arbitration? If so, the arbitration provision is enforceable. The California Court of Appeal resolved the issue by finding that despite the U.S. Supreme Court’s *Concepcion* holding, “the law of California would find the class action waiver unenforceable.”

Justice Breyer, writing on behalf of the United States Supreme Court, gave clear instruction to the California Court of Appeal that this Court’s interpretation was dead wrong when he stated: “Lower court judges are certainly free to note their disagreement with a decision of this Court. But the ‘Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source [...] The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.”

In 2016, make it a goal of your Company and/or Organization to have valid Employment Arbitration Agreements with your employees that waive the employee's right to be a member of a class action and prohibit class arbitration under the Federal Arbitration Act.

II. The Fair Day's Pay Act – Now the Labor Commissioner has the direct power to collect, on behalf of employees, unpaid Labor Commission judgments:

The Fair Day's Pay Act, SB 588, became effective on January 1, 2016. SB 588 is a negative game changer for Employers because the Labor Commissioner can now directly collect unpaid Labor Commission Judgments on behalf of employees and can utilize all the collection tools previously available only to judgment creditors under the Enforcement of Judgments law. Under the Enforcement of Judgments Law, which provides for the enforcement of money judgments and other civil judgments, a judgment creditor may levy the property of a judgment debtor to satisfy a judgment, and a levying officer holds the property until the final determination of any exemptions claimed by the judgment debtor.

SB 588 now provides for special provisions for the enforcement of judgments against an employer arising from the employer's nonpayment of wages for work performed in this state. SB 588 authorizes the Labor Commissioner to use any of the existing remedies available to a judgment creditor and to act as a levying officer when enforcing a judgment pursuant to a writ of execution. SB 588 authorizes the Labor Commissioner to issue a notice of levy, if the levy is for a deposit, credits, money, or property in the possession or under the control of a bank or savings and loan association or for an account receivable or other general intangible owed to the judgment debtor [employee] by an account debtor [employer].

Currently, existing law authorizes the Labor Commissioner to investigate employee complaints and to provide for a hearing in any action to recover wages, penalties, and other demands for compensation. Under existing law, the Labor Commissioner is required to determine all matters arising under his or her jurisdiction. Existing law makes any employer or other person acting on behalf of an employer who violates or causes to be violated specified provisions regulating hours and days of work in any order of the Industrial Welfare Commission to be subject to a civil penalty, as specified. A violation of the general provisions governing working hours is a crime.

Now, SB 588 authorizes the Labor Commissioner to provide for a hearing to recover civil penalties against any employer or other person acting on behalf of an employer, as defined, for

a violation of those provisions regulating hours and days of work in any order of the Industrial Welfare Commission, as specified. SB 588 provides that any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, other related provisions of law, is authorized to be held liable as the employer for such violation.

In addition, under SB 588, if a final judgment against an employer arising from the employer's nonpayment of wages for work performed in this state remains unsatisfied after a specified period of time after the time to appeal has expired and no appeal is pending, SB 588 *prohibits an employer from continuing to conduct business in this state*, unless the employer has obtained a bond from a surety company and has filed a copy of that bond with the Labor Commissioner. As an alternative to the bond requirement, SB 588 authorizes the employer to provide the Labor Commissioner with a notarized copy of an accord reached with an individual holding an unsatisfied final judgment. SB 588 makes any employer conducting business without satisfying the bond requirement, subject to a specified civil penalty, as provided.

In a situation where an employer is conducting business in violation of the bond requirement, *SB 588 authorizes the Labor Commissioner to issue and serve on such employer a stop order prohibiting the use of employee labor by the employer until the employer complies with the bond requirement* provided that the stop order would not compromise or imperil public safety or the life, health, and care of vulnerable individuals. *SB 588 would also make the failure of an employer, owner, director, officer, or managing agent of the employer to observe a stop order guilty of a misdemeanor.*

By creating a new crime, SB 588 imposes a state-mandated local program. Subject to required prior notice to the employer, SB 588 authorizes the Labor Commissioner *to create a lien on any real or personal property in California of an employer or a successor employer* with respect to real property, as described, that is conducting business without satisfying the bond requirement for the full amount of any wages, interest, and penalties claimed to be owed to an employee, as specified.

SB 588 creates a direct way for employees to enforce Labor Commissioner judgments. As a result, it is now more important than ever to seriously deal with Labor Commissioner Complaints. **If you receive a Labor Commissioner Complaint, immediately contact The Goldstein Law Firm.**

III. AB 1506 provides a “safe harbor” allowing Employers the ability to “cure” paystub violations prior to being hit with a civil action:

The Labor Code Private Attorneys General Act of 2004 (“PAGA”) currently authorizes an aggrieved employee to bring a civil action to recover specified civil penalties that could otherwise be assessed and collected by the Labor and Workforce Development Agency, *on behalf of the employee, and other current or former employees*, for violations of certain provisions affecting employees.

AB 1506 now provides employers with the right to cure certain violations before employees may bring a civil action, as specified. For other violations, the act requires employees to follow specified procedures before bringing an action. Under existing law, employers are required to provide their employees with specified information regarding their wages, including, among others: (a) the inclusive dates of the period for which the employee is paid; and (b) the name and address of the legal entity that is the employer either semi – monthly or at the time of each wage payment.

AB 1506 now provides an employer with the right to “cure” a violation of the requirement that an employer provide its employees with the inclusive dates of the pay period and the name and address of the legal entity that is the employer before an employee may bring a civil action under PAGA. AB 1506 now provides that a violation of that requirement shall only be considered “cured” upon a showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee, as specified. AB 1506 limits the employer’s right to cure with respect to alleged violations of these provisions to once in a twelve (12) month period, as specified.

This is a long over-due improvement on the PAGA statute. **Contact The Goldstein Law Firm for advice on how to cure paystubs violations prior to being faced with a civil action.**

IV. Tips for Avoiding Costly Wage and Hour Individual and Class Action Lawsuits:

1. Make certain that your meal and rest period policies provide that employees who are scheduled to work five (5) or more hours in a day are entitled to a thirty (30) minute unpaid meal period. [Employees are entitled for each four (4) hour period or major fraction thereof worked to a 10 minute paid rest period. Major fraction shall be defined as three and a half (3½) hours or more.]

2. Make certain that your practices comply with California's strict Labor Code by conducting a self audit of how you pay and classify employees.
3. Make certain that you do not misclassify salaried employees as salaried exempt when they do not meet California's strict requirements.
4. Make certain that your time and pay records for non-exempt employees are accurate and have been verified by your employees.
5. Limit the persons who have access to the time keeping system.
6. Make certain that non-exempt employees punch in and out each day.
7. Never pay employees cash for time worked.
8. Make certain that the itemized statement the employee receives with his or her paycheck meets the strict wage itemization requirements set forth in California Labor Code Section 226.
9. Make certain that you have written personnel policies regarding the importance of employees accurately reporting their time.
10. Make certain that you have a written personnel policy stating that the company pays overtime for work over eight (8) hours in a day and over forty (40) hours in a workweek; work on the seventh 7th day, and double time for work over twelve (12) hours in a day.
11. Make certain that all of your employees sign properly drafted, legally enforceable pre-dispute Mandatory Arbitration Agreements that cover wage and hour claims and class action waivers.

The Legal Practice Areas of the Goldstein Law Firm

Employment Law, Wage and Hour Law, Labor Law, Shareholder Disputes, Business Litigation, Corporate Law, Appellate Law, Corporate Investigations, Real Estate Law, Wrongful Death, Training & Workshops, Workers Compensation and
EDD Appeals

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