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ARBITRATION

SCOTUS rules class arbitration must be expressly authorized

by Jim Brown and Allegra Jones
Duane Morris LLP

A recent decision by the U.S. Supreme Court raises the bar for workers who want to pursue claims in arbitration on a classwide basis. In a case that began in federal district court in California, the Supreme Court overturned a decision by the 9th Circuit Court of Appeal (whose rulings apply to all California employers) in favor of an employee who argued his employer's arbitration agreement was ambiguous on the issue of classwide arbitration. Now, under the Federal Arbitration Act (FAA), which applies in both state and federal courts, an arbitration agreement must affirmatively authorize class arbitration for a court to compel it. This is a clear victory for employers.

Background

Lamps Plus sells light fixtures and related products. In 2016, a hacker posing as a Lamps Plus official tricked an employee into disclosing tax information for approximately 1,300 employees. Soon after the data breach, a fraudulent tax return was filed in Frank Varela's name. Varela subsequently filed a putative class action in federal court against Lamps Plus on behalf of the employees whose information had been compromised.

Most employees, including Varela, signed an arbitration agreement when they began working for Lamps Plus. Based on the agreement, the employer asked the district court to dismiss Varela's lawsuit and compel individual arbitration. The company argued a reference in the arbitration agreement to "purely binary claims" meant class arbitration was prohibited.

Valera, however, countered that other language created ambiguity on the issue of class arbitration. He pointed to a statement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." That language is standard in many typical form arbitration agreements.

Forcing class arbitration when agreement is vague

The district court dismissed the lawsuit and granted Lamps Plus' request to compel arbitration but also ruled that Varela could proceed with arbitration on a classwide, rather than an individual, basis. On appeal, the 9th Circuit affirmed the district court's decision. Both the district court and the 9th Circuit determined the language in the arbitration agreement was ambiguous on the issue of class arbitration.

In California, an agreement is ambiguous when it can be interpreted in two or more reasonable ways. The 9th Circuit applied California contract law to conclude that the Lamps Plus

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arbitration agreement was ambiguous about whether it compelled class arbitration. Under California's doctrine of *contra proferentem* (Latin for "against the offeror"), an ambiguity in a contract is construed against the party that drafted the contract. Because Lamps Plus drafted the arbitration agreement, the 9th Circuit interpreted the ambiguous arbitration provision against the employer.

The 9th Circuit also concluded that a case in which the U.S. Supreme Court determined an agreement's silence on class arbitration isn't sufficient to require arbitration wasn't controlling in this case. The appellate court reasoned that because the agreement Varela signed was ambiguous rather than silent, the Supreme Court case didn't apply.

Express authorization is required to compel class arbitration

The U.S. Supreme Court reversed the 9th Circuit's decision. The Court pointed out that the FAA requires courts to enforce covered arbitration agreements according to their terms. Even though it agreed with the 9th Circuit that the Lamps Plus agreement was ambiguous, the Court concluded that an ambiguous agreement, like an agreement that is silent on the issue, cannot provide the necessary contractual agreement for concluding the parties affirmatively consented to class arbitration under the FAA.

The Supreme Court highlighted the three core principles underlying arbitration:

(1) The parties must agree to arbitrate, and the FAA requires courts to enforce arbitration agreements according to their terms.

(2) Courts interpret arbitration agreements by applying state contract law, but the FAA preempts state laws that treat arbitration contracts differently than other contracts.

(3) There is a "fundamental difference" between class arbitration and the individualized form of arbitration envisioned by the FAA.

The last principle was the focus of the Supreme Court's decision.

Consistent with its earlier decision involving an arbitration agreement that was silent on the issue of class arbitration, the Court noted that individual and class arbitrations are "fundamentally" different. In individual arbitration, the two parties elect to avoid the often rigorous procedural aspects of a civil lawsuit and forgo appellate review in favor of lower costs and a more efficient process of resolving disputes. However, class arbitration doesn't have those benefits and can wind up "looking like the litigation it was meant to displace."

The Court also expressly recognized there could be due process concerns in arbitrating the rights of absent class members, especially with the very limited ability to obtain judicial review. In light of those concerns and because consent between the parties is essential under the FAA, the Court held that consent to participate in class arbitration may not be inferred, even if there is ambiguity in the agreement. Class arbitration can be compelled only when it is affirmatively authorized in an arbitration provision.

The Court noted that the rule of *contra proferentem*—i.e., interpreting ambiguous terms against the drafter—applies only as a last resort, after a court determines it cannot discern the parties' intent. Instead of using that doctrine, the Court relied on FAA case law holding that ambiguities in the scope of an arbitration agreement must be resolved in favor of arbitration. *Lamps Plus v. Frank Varela* (U.S. Supreme Court, 4/24/19).

Bottom line

The *Lamps Plus* ruling is a win for employers and other businesses that enter into arbitration agreements. Ambiguous class arbitration waivers or agreements that are silent on the issue may be relied on to bar class arbitration proceedings. However, the Supreme Court's decision also highlights the importance of drafting clear, unambiguous, enforceable arbitration agreements.

The Court's ruling was a 5-4 opinion by the conservative majority, and the four other justices wrote strong dissents in which they pointed out the unequal bargaining power between workers and the powerful economic entities that employ them. Although it may no longer be necessary to include an explicit class arbitration waiver in an arbitration agreement, it's still the best practice to include one to eliminate any doubt the parties haven't consented to class claims.

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INDEPENDENT CONTRACTORS

California's strict ABC test for independent contractor classification applies retroactively

by Cathleen S. Yonahara
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The 9th Circuit recently held the California Supreme Court's landmark 2018 decision in Dynamex Operations West, Inc. v. Superior Court, which makes it significantly harder for companies to classify their workers as independent contractors, applies retroactively. Accordingly, Dynamex's stringent ABC test will be applied to independent contractor classification disputes under the California Wage Orders, even if the claims arose before the Dynamex decision was issued.

Janitors sue franchisor over independent contractor classification

In 2008, janitorial workers filed a class action against Jan-Pro International Franchising, Inc., a major international cleaning business. The janitors alleged Jan-Pro had developed a sophisticated three-tier franchising model to avoid paying them minimum wage and overtime by misclassifying them as independent contractors. Under the model, the janitors are treated as "unit franchisees" who purchase their franchises for $2,800 to $9,000 from different regional master franchisors (aka "master owners") and perform the cleaning services.

Master owners purchase franchises from Jan-Pro for the right to operate exclusively in a specific region, advertise cleaning services under the Jan-Pro name, and pay Jan-Pro 10 percent of the franchise fee paid to them by the janitors and four percent of the revenues they collect from the janitors' customers for their cleaning services. The agreements between master owners and Jan-Pro require master owners to use the Jan-Pro name, logo, and trademark; maintain specific amounts of insurance; attend Jan-Pro training sessions; provide training for janitors; and sell a specific number of unit franchises.

In turn, the agreements between master owners and the janitors require the janitors to obtain the master owners' consent before assigning their unit franchises and include noncompetition clauses that forbid the janitors from performing or franchising their janitorial services outside their Jan-Pro franchise.

The U.S. District Court for the Northern District of California concluded that the janitors failed to establish they had an employment relationship with Jan-Pro because they were unable to show the company exercised or retained the right to control their activities or suffered or permitted them to work. Accordingly, the court dismissed the case without a trial.

The janitors appealed. The issue before the 9th Circuit was whether *Dynamex,* which was decided after the district court's ruling, applied retroactively.

Dynamex's ABC test to establish independent contractor status

A worker is classified as an employee when a putative employer "suffers or permits" him to work. The California Supreme Court explained in *Dynamex* that the "suffer or permit to work" standard in the California Wage Orders is meant to be "exceptionally broad" because "wage orders are the type of remedial legislation that must be liberally construed in a manner that serves [their] remedial purposes." The supreme court held that a "hiring entity" (the putative employer) suffers or permits a person to work if it cannot satisfy the ABC test.

The ABC test requires the hiring entity to establish three elements to disprove employment status:

(A) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The worker performs work that is outside the usual course of the hiring entity's business.

(C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

All three elements must be established for the hiring entity to prevail.

Does ABC test apply retroactively?

The general rule is that statutes operate only prospectively, while judicial decisions operate retrospectively. However, there is an exception to the rule of retroactivity when a judicial decision changes a settled rule on which the parties relied. The 9th Circuit concluded *Dynamex* should be applied retroactively.

In *Dynamex,* the California Supreme Court applied the new ABC test to the case before it, and its subsequent denial (albeit without comment) of a request to modify the opinion to apply the ABC test only prospectively strongly suggested the usual retroactive application should apply. Furthermore, three lower courts in California have applied the test retroactively. In one of those opinions, *Garcia v. Border Transp. Grp., LLC,* the court observed that since *Dynamex* merely extended principles stated in past California cases, "it represented no greater surprise than tort [personal injury] decisions that routinely apply retroactively."

The supreme court carefully explained in *Dynamex* how the ABC test remains faithful to the fundamental purpose of California's Wage Orders:

(1) To compensate workers and ensure they can provide for themselves and their families;

(2) To ensure that responsible companies aren't injured by unfair competition from other businesses that use substandard employment practices; and

(3) To benefit society at large because, without the Wage Orders, the public would be left to assume responsibility for the ill effects of substandard wages on workers and their families.

The 9th Circuit stated that applying *Dynamex* retroactively would ensure the California Supreme Court's concerns are respected. Specifically, retroactivity ensures that (1) the janitors can provide for themselves and their families, (2) Jan-Pro is placed on equal footing with other janitorial businesses that treat janitors as employees, and (3) California will not have the burden of supporting the janitors because of the ill effects that result from substandard wages.

Since the district court did not have an opportunity to consider whether the janitors are employees of Jan-Pro under the *Dynamex* standard, the 9th Circuit remanded, or returned, the case to the lower court to make that determination.

Application of Dynamex on remand

The 9th Circuit offered some guidance with respect to the application of the *Dynamex* standard in this case. First, the franchise context of the case doesn't alter the *Dynamex* analysis. According to the 9th Circuit, the "ABC test applies to a dispute between a putative employee and a hiring entity even if they are not parties to the same contract. As long as the putative employee was providing a service to the hiring entity even *indirectly,* the hiring entity can fail the ABC test and be treated as an employer." Accordingly, Jan-Pro could be the janitors' employer under the ABC test even though it has no contract with them.

Second, to establish the janitors are independent contractors, Jan-Pro must satisfy all three prongs of the ABC test. Prong "B" of the test is the most difficult to satisfy, and it may be determinable in this case based on the facts already on record. Prong B requires the hiring entity to establish that it isn't engaged in the same "usual course of business" as the putative employee. The supreme court offered the following example in *Dynamex*: "When a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee."

Courts have framed the Prong B inquiry in several ways. For example, courts have considered (1) whether the work of the putative employee is necessary to, or merely incidental to, that of the hiring entity, (2) whether the work of the putative employee is continuously performed for the hiring entity, and (3) what business the hiring entity proclaims to be in. All of those formulations should be considered in determining whether Jan-Pro is the janitors' employer and not merely an indirect licenser of a trademark.

Are the janitors necessary to Jan-Pro's business? The 9th Circuit observed that Jan-Pro's business ultimately depends on the janitors performing the cleaning. Jan-Pro depends on a supply of janitors for its business and thus requires its master owners to sell a minimum number of unit franchises. The company earns a percentage of the fees customers pay for cleaning services. Jan-Pro isn't merely licensing its trademark to independent

entities to perform cleaning services. Rather, it's continuously profiting from the janitors' performance of cleaning services.

Do the janitors continuously work in Jan-Pro's business system? In analyzing Prong B, courts will consider whether the services of the putative employee are continuously used by the hiring entity. This inquiry captures the distinction between traditional contractors, such as electricians and plumbers who perform incidental services for otherwise unrelated businesses, and improperly classified independent contractors who continuously perform work for the hiring entity. The 9th Circuit directed the district court to consider whether Jan-Pro's business model relies on the janitors continuously performing cleaning services.

Does Jan-Pro hold itself out as a cleaning business? In determining the usual course of a hiring entity's business, courts will examine how the business describes itself. Jan-Pro's website describes the company as an "environmentally responsible commercial cleaning company" and states that it provides "cleaning services." Nevertheless, Jan-Pro argued it is in the business of "franchising," not cleaning.

The 9th Circuit observed that characterization has been criticized by various courts. For example, a district court in Massachusetts stated:

> Franchising is not in itself a business[;] rather[,] a company is in [the] business of selling goods or services and uses the franchise model as a means of distributing the goods or services to the final end user without acquiring significant distribution costs. Describing franchising as a business in itself . . . sounds vaguely like a description of a modified Ponzi scheme—a company that does not earn money from the sale of goods and services, but from taking in more money from unwitting franchisees to make payments to previous franchisees.

Vazquez v. Jan-Pro Franchising International, Inc. (9th Circuit, 5/2/19).

Bottom line

Employers should have no doubt that the stringent new ABC test applies to disputes about whether a worker should be characterized as an employee or an independent contractor under the California Wage Orders, even if the dispute arose before the *Dynamex* decision was issued in April 2018. The 9th Circuit emphasized the critical nature of Prong B of the ABC test, which requires the hiring entity to prove an independent contractor performs work "outside the usual course of the hiring entity's business." That is an extremely difficult test to satisfy, and the courts will examine how the hiring entity describes the nature of its business on its website, in its advertising, and in other promotional materials.

Assemblymember Lorena Gonzalez (D-San Diego) has introduced Assembly Bill (AB) 5 to codify the *Dynamex* decision into California law. In its current form, AB 5 provides that for purposes of the provisions of the California Wage Orders, the California Labor Code, and the California Unemployment Insurance Code, a worker will be considered an employee unless the hiring entity satisfies the ABC test. AB 5 exempts from the ABC test certain insurance occupations, physicians, securities broker-dealers, and direct salespersons. Various businesses, including gig economy companies, are lobbying for additional exceptions that would allow them to continue to classify their workers as independent contractors.

Last month, AB 5 unanimously passed the Labor and Employment Committee and was referred to the Committee on Appropriations. Stay tuned for further developments on this critical issue. In the meantime, it would be wise to conduct an internal audit to ensure your organization is properly classifying workers.

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WHISTLEBLOWING

The law (and juries) protects whistleblowers

by Judith Droz Keyes
Davis Wright Tremaine LLP

As painful and expensive as they may ultimately prove to be for their employers, whistleblowers have a valuable role to play: They expose wrongdoing. They are in many ways the eyes and ears of society, seeing and hearing things from the inside that no one from the outside can access. They can set wrong to right.

But whistleblowers aren't always right. Sometimes they don't have the whole picture or hear only half the story—and their perception of wrongdoing turns out to be wrong. Nonetheless, their whistleblowing may be protected under California law. A recent case illustrates just how protected.

Whistleblower: I spoke truth to power and was fired

Tansi Casillas was a respiratory therapist who worked for a medical group in Fresno from November 2008 until her employment was terminated in January 2014. She received high ratings in her performance appraisals in September 2011 and November 2012.

Beginning in April 2013, Casillas began telling the medical director that she thought the way the medical group was staffing certain patient visits violated Medicare billing requirements and that some of her job duties exceeded the scope of her therapist license. When the

WORKPLACE TRENDS

NFIB speaks out against predictive scheduling laws. The National Federation of Independent Business (NFIB) issued a statement in March in opposition to state and local laws requiring employers to provide hourly workers their work schedules weeks in advance. The organization said such laws aren't always possible or realistic for small businesses. "It severely limits owners' control over their scheduling decisions and urgent business needs," the statement said. The organization pointed to laws in Oregon, Seattle, and San Francisco and said the unpredictability of staff needs in certain industries like construction and hospitality raises concerns. "The laws not only prevent employers from adjusting to market changes, bad weather, or other demands outside their control, but they also prevent employees from picking up additional work hours at a moment's notice or requesting unanticipated time off," the statement said.

Report calls gender parity in company leadership a significant issue. A study released in March by Korn Ferry and The Conference Board shows that while there has been some progress in advancing women in business, there is still significant work to be done to move toward gender parity. Researchers surveyed nearly 300 HR executives as part of the study, titled "Effective Leadership Development Strategies at Pivotal Points for Women: Chief Human Resources Officers and Senior HR Leaders Speak." While 62% of respondents believe representation of women in leadership positions has improved during the last five years, 66% believe there still is an inadequate representation of women in leadership positions in their organization today.

Most employers willing to train applicants lacking skill requirements. Research from staffing firm Robert Half revealed that 84% of HR managers reported their company is open to hiring applicants who lack some required skills but can develop the needed skills through training. HR managers in the survey said on average, 42% of the résumés they receive are from candidates who don't meet the job requirements. Among the 28 cities in the survey, Charlotte, North Carolina (74%), San Diego, California (72%), Austin, Texas (71%), and Washington, D.C. (71%), have the most professionals who have landed a position without meeting the requirements. "When it's challenging to find candidates who check off all the boxes, companies may need to reevaluate their job requirements to hire the right talent," said Paul McDonald, senior executive director for Robert Half. "Workers can be trained on duties for a role, but individuals with the right soft skills and fit with the corporate culture are often harder to come by." ✤

medical director didn't take her complaints seriously enough (in her view), she reported her concerns to the medical group's compliance manager.

On January 4, 2014, the medical group terminated Casillas' employment for what it considered to be unrelated legitimate business reasons. In February 2015, more than a year after her employment was terminated, Casillas sued the medical group for violating California's whistleblower protection statute.

Jury: We believe her

Casillas filed her whistleblower claim under Labor Code Section 1102.5—specifically, under Subsections (b) and (c). She added a claim for wrongful termination in violation of public policy, with the public policy based on Labor Code Section 1102.5.

A year and a half later, in September and October 2016, Casillas' claims were decided by a Fresno jury. Rejecting the medical group's defense that it had legitimate reasons to discharge her independent of her whistleblower activity, the jury ruled in favor of Casillas on all counts.

The jury awarded Casillas $66,947 in lost wages and benefits, $44,253 for unspecified economic losses, and $20,000 in emotional distress damages, for a total of $113,200. The jurors also assessed $500,000 in punitive damages against the medical group. The medical group appealed.

Court of appeal: The trial court—and the jury—got it right

The court of appeal considered the medical group's technical argument that an amendment to Labor Code Section 1102.5 that became effective January 1, 2014, shouldn't have applied to Casillas' January 4, 2014, termination because her whistleblowing activity occurred in 2013, before the amendment took effect.

The court of appeal agreed with the trial court that the date of the termination was what mattered for purposes of the statute. Therefore, there was no improper retroactive application of

the statute, and the jury's ruling was confirmed. *Tansi A. Casillas v. Central California Faculty Medical Group, Inc.* (California Court of Appeal, 5th Appellate District, 4/23/19, unpublished).

Lessons

The *Casillas* decision doesn't break new legal ground in whistleblower protections (and the decision is unpublished, so it cannot be cited as legal precedent), but it is a good reminder of the scope and seriousness of California's protection for whistleblowers.

Labor Code Section 1102.5 was amended in 2014 to strengthen its protection of employees—specifically, to broaden that protection to include not only complaints to government agencies but also internal complaints. Here's how the statute now reads:

> (b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, *to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance,* or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, *if the employee has reasonable cause to believe that the information discloses a violation* of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, *regardless of whether disclosing the information is part of the employee's job duties.*
>
> (c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for *refusing to participate in an activity that would result in a violation* of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation. [Emphasis added.]

The *Casillas* case provides some helpful lessons about complying with the statute.

Lesson #1: The whistleblower doesn't have to be right. It's enough if the employee has reasonable cause to believe there is a legal violation, even if she is wrong. When you're confronted with an employee who is wrong, it behooves you to devote some time and care to explaining to her why she's mistaken. Note that Subsection (c) permits an employee to refuse to participate in an activity only if it would actually be a legal violation, so it's particularly important, if you expect the employee to continue to participate in the challenged activity (and if you will subject her to discipline, reassignment, or discharge for refusing), that you explain her mistake—and document that you set her straight.

Lesson #2: The whistleblower gets credit for being right. If the whistleblower accurately points out a legal problem, you should recognize her for discovering the issue, regardless of whether the news is welcome. The recognition need not be public, but it should be genuine, and the whistleblower's actions should be acknowledged. And, of course, the problem should be fixed.

Lesson #3: You should proceed with caution. Especially in the face of positive performance reviews and no history of discipline, you should lay considerable groundwork before discharging a whistleblower for anything other than a serious clear-cut violation. The passage of time helps, but it may not be enough to overcome the inference that in spite of your words, you harbor some resentment against the employee for exposing a violation or for thinking there was a violation when there wasn't.

Bottom line

There's no question it can be challenging when an employee insists your organization has violated a law or regulation and you know it isn't true but the employee refuses to accept that reality. It's just as challenging when you accept the employee's report and fix the problem and she then acts like she's untouchable and refuses legitimate work-related direction. But in the face of the law and the potential legal consequences, you should proceed with caution in such a situation. Make clear to the employee—and make a clear record—that you genuinely appreciate her good-faith report of perceived wrongdoing, and lay careful groundwork before taking any disciplinary action against her for subsequent performance or behavior issues.

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UNION ACTIVITY

AFL-CIO calls proposed overtime rule a setback for working people. AFL-CIO President Richard Trumka spoke out in March against the Trump administration's proposed rule to set a new salary threshold for employees eligible for overtime pay. The administration's proposed rule would require that employees make at least $35,308 a year to be exempt from overtime eligibility under the Fair Labor Standards Act (FLSA). Exempt workers also must perform work that is executive, administrative, or professional in nature. The Obama administration had proposed a rule setting the threshold at $47,476 a year, but the proposal was struck down by a federal judge. "Lowering the threshold ignores the economic hardships faced by millions of working families," Trumka said. "This disappointing announcement is part of a growing list of policies from the Trump administration aimed at undermining the economic stability of America's working people."

Union secures agreement on targeted Facebook ads. The Communications Workers of America (CWA) announced in March an agreement in which Facebook will make changes to its paid advertising platform to prevent discrimination in employment, housing, and credit advertising. The CWA joined with three workers to challenge Facebook's paid ad platform for enabling advertisers to exclude older Facebook users from receiving job ads. "Our campaign seeks justice for workers who have been unfairly locked out of opportunities by employers who deny their ads to older workers or women," said CWA Secretary-Treasurer Sara Steffens. "All workers deserve a fair chance to get a good job."

UAW announces strike fund increase. Gary Jones, president of the United Auto Workers (UAW), in March announced the union's leadership has raised the weekly strike fund pay from $200 to $250. It will increase to $275 per week in January 2020. The UAW Strike and Defense Fund totaled out at more than $721 million in 2018. Delegates voted at the UAW's Constitutional Convention to keep a 2011 dues increase that funds the Strike and Defense Fund until it reaches $850 million—at which point the fund will trigger dues to go back down to pre-2011 levels. If the Strike and Defense Fund ever dips below $650 million, the dues increase will kick back in.

Farm Workers hail law preserving pesticide rules. The United Farm Workers (UFW) applauded the passage in March of the Pesticide Registration Improvement Extension Act of 2018 (PRIA). "Placing into the law standards protecting agricultural workers and pesticide applicators will end decades of exclusion of farm workers from basic protections that have safeguarded other U.S. workers," Teresa Romero, UFW president, said. ✤

LABOR LAW

Giants strike out with preemption defense against claims by ballpark security guards

by Mathew A. Goodin
Seyfarth Shaw

Section 301 of the Labor Management Relations Act (LMRA) preempts state law claims for violation of a collective bargaining agreement (CBA) as well as claims that require interpretation of a CBA's provisions. In the following case, a security guard at AT&T Park filed a class action lawsuit against the San Francisco Giants claiming the team discharged security guards at the end of every homestand, at the end of the baseball season, and at the end of any other event at the park at which they worked, and they were therefore entitled to be paid all final wages when those assignments ended. The Giants argued the security guard's case was preempted by Section 301 because its CBA with the union had to be interpreted to determine whether and when the security guards were discharged. The court of appeal agreed with the Giants, but the California Supreme Court gave the guard another at bat.

Giants take a swing at compelling arbitration

California Labor Code Section 201 provides that if an employer discharges an employee, the wages he earned that are unpaid at the time of the discharge are due and payable immediately. George Melendez was employed as a security guard at what was then AT&T Park (and is now Oracle Park). He filed a class action lawsuit against San Francisco Baseball Associates LLC (aka the Giants) claiming security guards were entitled to be paid their final wages immediately after they were discharged at the end of every Giants homestand, at the end of the season, and after concerts and other special events at the park. The Giants disputed that the guards were discharged at those times and instead contended the payment of their wages is governed by California Labor Code

Section 204, which generally requires wages to be paid on a semimonthly basis.

The Giants asked the court to compel arbitration, arguing Melendez's action was preempted by the LMRA because resolution of the controversy required an interpretation of terms in the CBA between the guards' union and the Giants. The trial court held that the dispute didn't require an interpretation of the CBA and denied the Giants' motion.

The Giants appealed, and the court of appeal reversed the trial court's decision. The court of appeal cited numerous provisions in the CBA that should be interpreted to determine the duration of the employment relationship. Melendez appealed, and the California Supreme Court agreed to review the limited question of whether this action is preempted because it requries interpretation of a CBA.

California Supreme Court: Employee is safe (to file claims in court)

The supreme court began by explaining that Section 301 of the LMRA preempts not only state law claims for violations of a CBA but also any state law claims that require interpretation of the terms in a CBA. The policies behind the preemption rule seek to ensure nationwide uniformity with respect to the interpretation of CBAs and to preserve arbitration as the primary means of resolving disputes arising under such agreements.

When examining the Section 301 preemption issue, courts should apply a two-part test. First, if the claim arises directly from a CBA, it's preempted as a matter of law. If the claim arises from independent state law, the court should proceed to the second step, in which it determines whether the claim requires the interpretation of a CBA. Claims are preempted only to the extent there's an actual dispute over the meaning of a CBA's terms. Preemption isn't required if a court simply must "look at" or "refer to" the agreement to resolve the claim.

In this case, the claims arose under the California Labor Code, so the court proceeded to the second step. Although the parties disagreed about what constitutes a "discharge" under Labor Code Section 201, the court

CALIFORNIA NEWS IN BRIEF

Staffing company settles sexual harassment complaint for $600,000. The California Department of Fair Employment and Housing (DFEH) announced in April that Ramco Enterprises, LP, a staffing company based in Salinas that specializes in providing workers in the food-processing and agricultural industries, settled a sexual harassment complaint for $600,000. The complaint involved an employee who alleged he was sexually harassed and assaulted by a supervisor when he was 17 years old.

The employee, who worked the night shift as a sanitation crew member, filed a complaint with the DFEH in 2017 claiming he was sexually harassed by his supervisor while he was working for Ramco at a food-processing facility in Gonzales owned by Taylor Fresh Vegetables, Inc. Taylor has also reached a settlement with the DFEH. The employee claimed his supervisor verbally and physically harassed him at work by making unwelcome sexual comments that escalated to unwanted touching. He also said he was sexually assaulted, and when he reported the assault to police, Ramco terminated his employment, allegedly because of his age.

Farm labor contractor pays back wages, penalties. The U.S. Department of Labor (DOL) announced in April that J. Carmen Mora, a Northern California farm labor contractor, paid $143,078 in back wages to 199 employees after a Wage and Hour Division (WHD) investigation found multiple violations of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). In addition to the back wages, the employer was assessed $23,048 in civil penalties.

WHD investigators found that Mora—doing business as J.C. Mora in Brentwood—violated the MSPA by illegally deducting up to 12 percent in federal and state tax withholdings from employees' earnings and then failing to remit the withholdings to the IRS and state tax officials. Investigators also found the farm labor contractor failed to disclose employment conditions, provide wage statements, display MSPA posters, and keep employment records as required.

Investigation of plumbing company shows overtime wage violations. M&L Plumbing Co. Inc, based in Fresno, was ordered to pay $113,351 in back wages to 39 employees after the DOL found violations of the Fair Labor Standards Act's (FLSA) overtime requirements, the agency announced in April.

Investigators determined that M&L Plumbing Co. failed to record or pay employees for the time they spent loading equipment and materials at the company's location before they traveled to the first worksite of the day. That resulted in overtime violations when employees worked more than 40 hours in a workweek but weren't paid overtime. The practice also led to FLSA record-keeping violations because the employer failed to accurately record the total number of hours employees worked. ✤

noted that their dispute was relevant to the merits of the case, not to the preemption analysis.

The court of appeal pointed to terms in the CBA stating that seniority is based on the number of hours security guards work in a year, classification as a "regular" employee requires at least 1,700 hours of work in a year, and employees reach "senior" or "super senior" status by working a minimum number of hours each year for five or 10 years. The court concluded those provisions implied the security guards were not "discharged" at the end of each assignment.

The supreme court acknowledged that the terms cited by the court of appeal were relevant to the dispute, but it pointed out that neither party claimed that any terms in the CBA were ambiguous or were in actual dispute. The court therefore concluded that although the trial court may need to consult the CBA to resolve the claims, none of the CBA's terms required interpretation.

The supreme court expressed no view on the parties' interpretations of the term "discharge" under Labor Code Section 201. That dispute will have to play out in the trial court. *Melendez v. San Francisco Baseball Associates LLC* (California Supreme Court, 4/25/19).

Bottom line

This case illustrates why preemption under Section 301 of the LMRA is about as rare as a triple play. First, the parties must be subject to a CBA. Second, even if a CBA is involved, there's a big difference between needing to consult its terms to resolve a claim and actually needing to interpret a term that's ambiguous and in dispute. Nonetheless, you should always explore a possible Section 301 preemption argument if an employee's claim might depend on the terms in a CBA.

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HR ISSUES

What's in a name? Maybe a lot more than you realize

All too often, it seems, you've discovered negative reviews about your company on Glassdoor or Indeed, readily available for your employees, job candidates, and customers to read. You're tired of seeing them. You're tired of feeling employee disaffection in the workplace. Instead, you want to be known as the best place to work in your area, an organization with an "engaged culture." But how do you begin changing the perceptions—or maybe even the realities—of your workplace?

Call me by my name

Sam Walton, the founder of Walmart, was known to "manage by walking around" in stores, distribution centers, and the corporate office. It was important to "Mr. Sam" to be visible and greet employees by their first name. From his perspective, saying hello wasn't enough. If he could look someone in the eye and use his name, it made that individual feel important and appreciated. How did he know everyone's name? Next time you're in a Walmart or Sam's Club, look at the employee badges. By design, all employees' first names are on their badges in **bold** letters.

In the early 1990s, Limited Brands developed Bath and Body Works, selling personal care products from shelves inside Express stores. Today, Bath and Body has more than 1,600 stand-alone locations. Beth Pritchard, the first president of the brand, focused on engagement with customers and employees to grow the business. The early success of the brand was dramatic, and Pritchard decided to personally thank every corporate and distribution center employee at the company's headquarters in Columbus, Ohio. She made it her mission to shake hands and thank each employee by name, and if she hadn't already met someone, she made a point to ask their name.

The feedback from employees was extraordinary. Store leadership adopted Pritchard's actions and thanked employees across the organization in a similar manner. The move contributed to very low turnover in a seasonal retail business, strong employee engagement, and positive comments about the culture, which allowed the company to add more than 1,500 stores in nine years.

David Alexander, the former CEO of TruGreen, the largest residential lawn care provider in the United States and Canada, joined the company during a time when revenue and earnings were declining and employee engagement was low. His branch visits and the results of employee engagement surveys showed it was clear that field employees (200 branches and 11,000 employees) lacked trust in the corporate team.

Before Alexander's arrival, operating systems and marketing strategies were changed without input from employees in the field. Trust disappeared across the organization. Although he had many ideas on how to build engagement, Alexander recognized that the process should begin with learning every manager's name, their location, and their identity by sight. He created flash cards to accomplish that task. As a result, in the corporate office, at company meetings, and during branch visits, he addressed managers by name and talked about their role in the company.

Alexander shared with managers the importance of knowing their employees, and his ability to demonstrate the impact of his engagement was remarkable. The executive team was encouraged to do the same. Leadership engagement rose from 49% to 78% over a few short years, and overall employee engagement climbed from 45% to 68%.

It's the little things that count

While it might seem silly to think something as small as learning someone's name can make such an impact, building a culture of engagement starts with knowing your employees. Best-in-class leaders make an effort to ensure their employees don't feel invisible. They know who their workers are and how they function within the company. Start small and learn your employees' names. ✤

WORKPLACE ISSUES

Feeling stressed? Take it outside

We all need a breath of fresh air sometimes. The favorable temperatures and sunny conditions in California are a perfect cure for employees' work-related stress. This article addresses the unwanted consequences of work stress, and the benefits of encouraging employees to spend time outside.

How can workplace stress affect my company?

In today's fast-paced workplace, deadlines, evaluations, customer relationships, personal and company goals, and family matters remain constantly embedded in the minds of many employees. Unfortunately, these thoughts often cause a great deal of stress. The American Psychological Association states that stress can affect the body in a multitude of ways, wreaking havoc on the musculoskeletal, respiratory, cardiovascular, endocrine, gastrointestinal, and nervous systems, just to name a few. (We'll leave stress eating off of the list, but we've all been there.) While some employees thrive under such pressures, others can crumble.

As a result of all that stress, you may see drastic changes in employees' job performance and productivity. *Forbes* has reported that excessive work stress can lead to increased employee disengagement and absenteeism. Further, the slippery slope of employee stress can lead to unexpected financial costs for your company. For example, employees suffering from the physical effects of stress may need to seek medical help. Some employees may even need time off.

So, what's a cost-effective way to shake off the winter blues, lowering employees' stress levels, and prevent burnout? The answer could be as easy as opting to get outside for a bit.

The perks of fresh air

Interestingly enough, a survey conducted by L.L.Bean in 2018 found that 75 percent of indoor workers rarely or never took the time to work outside. The survey found more than half of indoor workers (57 percent) spent less than 30 minutes outside during the workday. Understandably, that same survey found 42 percent of indoor workers reported that weather was the biggest barrier to spending time outdoors.

There are many perks to encouraging employees to spend some time outside. According to *Forbes,* five science-backed benefits of enjoying our natural surroundings that can improve employee well-being include:

- Increased happiness;
- Reduced inflammation;
- More energy;
- Improved memory; and
- Stress relief.

Certainly, everyone has heard that physical activity can relieve stress. Getting up and moving throughout the day, using standing desks, and taking stretching breaks are all great ideas for lowering employees' stress levels inside the workplace. But what about outside?

Outdoor opportunities at the workplace

Undoubtedly, the feasibility of our recommendations will depend on your building location and layout, financial feasibility, or similar factors. If possible, however, consider providing the following options to employees:

- **Patio areas.** To be most beneficial, workplace patio areas should be equipped with Wi-Fi, power outlets, tables, chairs, and umbrellas.
- **Patio meetings.** Instead of reserving a conference room, consider the option of reserving a patio area for meetings.
- **Walking meetings.** Need a quick status meeting with your team? Consider putting your ideas into motion while walking around the block.

TRAINING CALENDAR

Call customer service at 800-274-6774 or visit us at the websites listed below.

WEBINARS & AUDIO SEMINARS
Visit store.BLR.com/hr/events for upcoming seminars and registration.

5-21 Hiring Danger Zones: How to Avoid Legal Risks When Interviewing and Preemployment Testing

5-23 Form W-4 Employee Withholding Certificate: How to Correctly Withhold Taxes and Avoid Common Pitfalls that Could Lead to Costly Penalties and Fines

5-23 Opioids at Work: Legal Policy, Program, and Practice Improvements to Address Workplace Conditions and Better Protect Workers from Drug Misuse

5-28 Sexual Harassment Training: How to Educate the Supervising Workforce on Anti-Harassment & Reporting Requirements

5-29 Drugs and Alcohol in the Workplace: Marijuana and Other Considerations

5-29 Proven Employment Documentation: How to Minimize Discrimination and Retaliation Claims with Objective, Evidence-Based Writings

5-30 Behavior-Based Interviewing Skills: How to Evaluate What to Look for in Candidates and Design Questions to Get the Answers You Need

5-30 Succession Planning: Do's and Don'ts for Smooth Transitions and Changes from Within

6-4 Conflicts at Work: Handling Employee Interactions and Solving Interpersonal Conflicts in the Workplace

6-5 Drafting and Updating Job Descriptions: Why You Need Them, What to Include, and What to Leave Out

6-6 Form I-9 Recordkeeping: How to Complete, Re-Verify, Store, and Destroy Paper and Electronic Files in Compliance with Federal Law

- **Outside lunch meetings.** Department meeting at noon on a sunny 60-degree day? Give participants the option of conducting it outside.

Bottom line

It's inevitable that employees will experience work-related stress. However, you can avoid some of the financial and productivity-related effects of that stress at little to no cost to your company. As nicer weather approaches, consider implementing or suggesting outdoor programs for your employees to take part in. ✤

SETTLEMENTS OF NOTE

Healthcare network settles disability and pregnancy discrimination suit for $1.75M

The Equal Employment Opportunity Commission (EEOC) has announced that California-based Family Health Care Network agreed to pay $1.75 million and furnish other relief to settle a systemic disability and pregnancy discrimination lawsuit filed by the agency. The network operates over 20 healthcare sites throughout California.

According to the lawsuit, the network used its rigid leave policies and practices to deny reasonable accommodations to its disabled and/or pregnant employees, refusing to accommodate them with additional leave and firing them when they were unable to return to work at the end of their leave. In some instances, it discharged individuals before they had even exhausted their approved leave and failed to rehire them when they tried to return to work.

In addition to the $1.75 million in monetary relief, the network agreed to a three-year consent decree that requires it to retain an equal employment opportunity (EEO) monitor to review and revise its policies, as appropriate.

The network also agreed to implement effective training to prevent discrimination and harassment based on disability and/or pregnancy for the owners and HR and supervisory personnel and staff. It also agreed to develop a centralized tracking system for employee requests for accommodations and discrimination complaints and is required to submit regular reports to the EEOC verifying its compliance with the decree. *EEOC v. Family Health Care Network,* DC, Ca. Case No.: 1:18-CV-00893-DAD-BAM. ✤