MurphyAustin ATTORNEYS

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Welcome to the Summer Edition of **Murphy Austin's Employment Law News**,

There is a lot of news for California employers this quarter – COVID-19 updates, of course, plus court decisions on wage and hour law and employee background checks. If you employ truck drivers, we address two decisions that may be of interest to you in this issue as well.

Finally, there is good news from the U.S. Supreme Court on the applicability of employee arbitration agreements to claims brought under California's Private Attorney General Act ("PAGA"), but you may need to amend your employee arbitration agreements to enjoy the benefit of it.

Sincerely,

Shawn M. Joost, Partner
Murphy Austin Labor and Employment Law Team

CHANGES IN EMPLOYMENT LAW

Filing a PAGA Lawsuit No Longer Guarantees that Employees Can Avoid Their Arbitration Agreements

By Charles R. Hellstrom

California's Private Attorney General Act ("PAGA") permits employees to bring lawsuits against their employers for Labor Code violations, with the employee acting as a "representative" of the State. In these PAGA lawsuits, the employee representative can recover civil penalties for Labor Code violations that the employee representative suffered, as well as for violations suffered by other employees.

Until last month, if an employee filed a PAGA lawsuit, California law prohibited compelling any part of the PAGA claim to arbitration, even if the employee had signed a valid arbitration agreement.

Last month, in *Viking River Cruises, Inc. v. Moriana*, the U.S. Supreme Court changed all that. The Court overruled existing California law, holding that claims under PAGA can be split into "individual" claims and "non-individual" claims (representative claims brought on behalf of other employees), and that an employee's individual PAGA claim may be compelled to arbitration under an arbitration agreement. The Court further held that, once an employee's individual PAGA claims are compelled to arbitration, the non-individual PAGA claims cannot be maintained in court and should be dismissed.

The *Viking River Cruises* opinion confirmed that California's ban on "wholesale waivers" of employee's rights to bring representative PAGA claims in court is still valid.

A key takeaway is that, under a valid employee arbitration agreement, employers can require arbitration of employee PAGA claims on an individual basis. However, because the U.S. Supreme Court found that "wholesale waivers" of PAGA claims are not preempted by the FAA, employers should carefully draft their arbitration agreements.

We recommend that you review your employee arbitration agreements and update them as necessary to take advantage of this change in the law. This is the latest of several changes in the law over the past few months that have caused us to recommend revisions to employee arbitration agreements. So, while it may seem tiresome to revisit those agreements again, the benefits of the *Viking River* decision make it worthwhile for you to do so.

WAGE AND HOUR UPDATES

Keeping yourself up to date on wage and hour law is a critical tool for minimizing your exposure to individual claims and to expensive class action lawsuits. We discuss below two recent court decisions on wage and hour law, starting with the "good news."

Pre-Employment Drug Tests: Hours Worked?

By Shawn M. Joost

Employer control over pre-employment drug tests does not convert "applicants" into "employees." In *Johnson v. WinCo Foods, LLC* (9th Cir. 2022) 34 F. 4th 604, a class action, plaintiffs contended that WinCo Foods was required to pay them for the time they spent on drug tests and to reimburse them for the costs of the drug tests, on the theory that WinCo's control over the manner of testing converted the applicants into employees.

As the *WinCo* court discussed, California law uses the "control" test as the primary test to determine if an employment relationship exists. Generally, under the wage orders, an employer is defined as one who "exercises control over wages, hours, or working conditions." The California Supreme Court has stated that the principal test to determine if an employment relationship exists is whether the hiring entity controls the manner and means of accomplishing a desired service.

There was no dispute that WinCo prescribed the time and date of the tests, the facility where the tests took place, and the scope of the tests. However, the *WinCo* court held that plaintiff Johnson and the class of applicants were not doing WinCo's work when they took the drug test. Additionally, the court found that the drug tests were activities to secure the position, not requirements for those already employed. Since WinCo's control was not over conditions of work, the plaintiff was not an employee when he took the drug test.

The plaintiff's argument that the drug test requirement was not a condition precedent of employment, but was, in fact, a condition subsequent to the formation of the employment agreement also failed. Looking at WinCo's job offers, the Court found that the language was clear that WinCo's offer was contingent on passing the drug test and that the applicant was not hired until after he passed the drug test. As such, no employment relationship was formed prior to the drug test.

A takeaway for employers who require pre-employment drug testing – review the language of your offers to be sure that the offer is *contingent upon* passing a drug test.

Missed Meal and Rest Break Premium Pay May Give Rise to Waiting Time and Wage Statement Penalties

By Shawn M. Joost

The California Supreme Court, in *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal. 5th 93, overturned an appellate court ruling that was favorable to employers, and held that unpaid meal and rest break premium pay is a wage that must be reported on employee wage statements (pay stubs) and paid at the time that final wages are due at separation of employment.

California employers are required to authorize and permit uninterrupted meal and rest breaks to non-exempt employees at legally-required times and durations. If an employer does not abide by these rules, the employer must pay the employee one hour's pay at the employee's regular rate of pay for any day in which there was a violation ("premium pay") (the maximum is one hour's pay for each type of violation).

Under the *Naranjo* holding, employers who do not authorize and permit employees to take timely and complete meal and rest periods and do not pay the "premium pay" are also liable for additional penalties arising from the

resulting inaccurate wage statements and failure to pay all wages due at the end of employment, subject to defenses generally available under those statutes.

So – take steps to lessen your exposure to meal and rest break claims. Be sure that you are providing required breaks, that your written policies reflect the law and best practices, and that your supervisors and employees are properly trained. You should investigate the reasons if employees are not taking breaks and pay premium pay if work conditions or instructions prevented them from taking their breaks. Also, you should discipline employees who fail to abide by meal and rest break policies. Employers who are proactive in these areas will have a stronger shield if claims are made against them.

Employee Background Checks – Compliance with Disclosure Language is Critical

By Charles R. Hellstrom

In *Hebert v. Barnes & Noble, Inc.,* the plaintiff job applicant filed a putative class action against retailer Barnes & Noble, contending it willfully violated the Fair Claims Reporting Act ("FCRA") by providing job applicants with a disclosure that included a footnote with extraneous language unrelated to the topic of consumer reports (i.e., background checks). The plaintiff alleged that this additional language violated the FCRA's requirement that an employer provides a standalone disclosure informing the applicant that an employer may obtain the applicant's consumer report when making a hiring decision.

The FCRA permits background checks for purposes of employment so long as employers obtain authorization from the person subject to the background check, furnish an appropriate disclosure, and comply with certification and notice requirements. An applicant can sue for a "willful" violation of the FCRA by showing that the employer's conduct in violating the FCRA was "intentional" or "reckless," allowing recovery of statutory damages ranging from $100 to $1,000 per violation.

The appellate court allowed the case to proceed, finding that the plaintiff had produced enough evidence to permit a jury to find that Barnes & Noble had willfully violated the FCRA by including the extraneous language in the disclosure. In its ruling, the court focused on the facts that: (i) one of Barnes & Noble's employees was aware the extraneous language would be included in the disclosure and had reviewed the disclosure before it was issued; and (ii) Barnes & Noble had used the disclosure for nearly two years prior to the lawsuit.

This case shows the types of conduct on which a court might rely in concluding that an employer's violation of the FCRA was "willful." Moreover, it could serve to persuade certain applicants to pursue class-wide FCRA stand-alone disclosure claims. Employers should carefully review the disclosure forms that they provide to all applicants to ensure that they are compliant with the FCRA.

This case also serves as a reminder that there are several California and federal laws that govern the type of information employers can obtain from applicant background checks, and the required disclosures. In addition to the FCRA, some of these applicable laws are the California Consumer Credit Reporting Agencies Act, California Investigative Consumer Reporting Agencies Act, and California Child Protective Act of 1994. Fortunately, these laws allow employers to contract with third-party reporting agencies to fulfill the disclosure requirements. However, it is ultimately the employer's responsibility to make sure that the reporting agency follows all

applicable laws. Employers should ensure that these reporting agencies follow all federal and California laws during their performance, and avoid the pitfalls arising from something as simple as accidentally including superfluous disclosure language.

Truck Drivers: The Never-Ending Twists and Turns on Federal Regulation and Its Impact on State Law

By Shawn M. Joost

Two recent decisions affected questions of the applicability of federal regulation of truck drivers on state laws. First, in *Garcia v. Superior Court* (2022) 2022 WL 2205608, a California appellate court found that the Federal Motor Carrier Safety Administration's ("FMCSA") December 28, 2018, opinion on preemption of California meal and rest break rules applies only prospectively.

The FMCSA's December 28, 2018, opinion concluded that California's meal and rest break rules are laws "on commercial motor vehicle safety" and are, therefore, preempted by the Motor Carrier Safety Act, reversing its prior position. Under the 2018 determination, California may no longer apply its meal and rest break rules to drivers who are subject to the FMCSA rules.

Based on the language of the FMCSA's preemption determination, the court in *Garcia* found that employee claims based on conduct prior to December 28, 2018, were not barred by the preemption decision, which governed only conduct after that date.

Second, the U.S. Supreme Court denied a petition for *certiorari* in *California Trucking Ass'n., Inc. v. Bonta* (2022) 2022 WL 2347627, leaving in place the Ninth Circuit's ruling that application of California's independent contractor law, as codified in AB5, is not preempted by the Federal Aviation Administration Authorization Act. As such, the propriety of classifying owner-operators providing trucking services will continue to be analyzed under AB5.

COVID-19: State and Federal Updates

Cal/OSHA COVID-19 Emergency Temporary Standard

By Shawn M. Joost

A revised Cal/OSHA Emergency Temporary Standard for COVID-19 went into effect on May 7, 2022, and is slated to remain in effect until the end of the year, at which time a permanent standard may be adopted.

Key changes for California employers are:

- Employees who are a "close contact" with a COVID-19 case are subject to exclusion from work per the then-current California Department of Public Health ("CDPH") guidance. The new standard does not include its own return-to-work requirements for these employees.
    - Note: Employees who are a COVID-19 case remain subject to return-to-work requirements set forth in the standard. However, as before, those requirements are suspended if they exceed the then-current CDPH applicable quarantine requirements, pursuant to Executive Order N-84-20.

- Acceptable test results to return to work now include a self-administered and self-read test, but only if the employee can provide independent means of verification of the results. (The example given is a time-stamped photo of the test results.)

- Face covering requirements are the same for all employees, regardless of vaccination status.

- Employers are no longer required to provide face coverings to employees, unless face coverings are required by a CDPH or local public health order.

- Cleaning and disinfecting procedures are no longer required.

As you can see, employers must remain up-to-date on the Cal/OSHA requirements and the guidance issued by the CDPH.

Employers should read the new standard in its entirety and the DIR's helpful FAQ for further details. And – importantly – employers must make the necessary revisions to their COVID-19 Prevention Plan and employee notices.

EEOC Guidance

On July 12, 2022, the federal Equal Employment Opportunity Commission ("EEOC") updated its guidance on COVID-19 issues. Among other things, the EEOC's new guidance states that employers should conduct workplace COVID-19 screening only when the screening is "job-related and consistent with business necessity" in order to comply with the Americans with Disabilities Act (ADA). Thus, employers should avoid "blanket" screening.

COVID-19 Paid Sick Leave

Finally, just a reminder – California's current COVID-19 paid sick leave law will expire on September 30.

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*Created and curated by Shawn Joost, **Murphy Austin's Employment Law News** is a quarterly update focused on the top changes affecting California employers.*

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Murphy Austin's Labor and Employment Law Team

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Aaron B. Silva is a Partner and Chair of Murphy Austin's **Labor and Employment Law Team**. Aaron has an extensive background defending employers before state and federal courts and several administrative boards regarding nearly all matters employment-related, including wage and hour, discrimination, harassment, ADA, OSHA, and union relations. Aaron also produces a monthly employment law podcast, **HR Legalcast**.

Dennis R. Murphy is a Partner with Murphy Austin's **Labor and Employment Law Team**. Dennis's experience commenced in 1972 and includes the representation of employers in every aspect of labor and employment law. It includes both trial and appellate advocacy and counseling. He has appeared before the United States Supreme Court, before many state and federal appellate courts, in numerous jury trials and before most of the governmental agencies that handle labor and employment issues.

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Charles R. Hellstrom is a litigation attorney who counsels and represents clients in labor and employment matters and disputes. Charles's experience includes litigating claims under the California Labor Code and Unemployment Insurance Code in both civil litigation and administrative hearings, as well as misclassification, discrimination, and wrongful termination claims. He has also represented businesses in connection with employee misconduct, misappropriation, and embezzlement and assists businesses in revising employee handbooks and separation agreements to prevent future litigation.

Murphy Austin is a premier business law firm based in the Sacramento region with practices focused on Labor and Employment, Employee Benefits and Executive Compensation, Commercial Litigation, Insurance Coverage and Bad Faith Litigation, Appellate Law, Commercial Real Estate and Construction, Corporate and Business, Nonprofits, Public Contracts, Tax and Estate Planning. Murphy Austin attorneys place the highest value on meaningful client relationships. For more information, visit **www.murphyaustin.com.**