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Happy Summer!

The heat has finally arrived, after an unusually cool and pleasant June. The hot weather means employers subject to outdoor heat regulations should confirm they are in compliance. Employers should also be aware that Cal/OSHA has proposed indoor heat regulations, discussed in an article below.

In this issue, we also discuss changes in federal law that employers should be aware of, on topics ranging from COVID-19 to artificial intelligence.

But first, a couple of reminders:

- Many areas in California have local minimum wages that exceed the state minimum wage. Many of those increased on July 1. If you are subject to a local minimum wage, make sure you make any required pay rate increases. Note: If you have remote workers in a local jurisdiction with a higher minimum wage, you may need to comply with the local minimum wage for those workers.

- California employers with five or more employees are required to provide training on sexual harassment and abusive conduct prevention to all employees every two years. Employers must provide two hours of training to supervisory employees, and one hour to non-supervisory employees. Make sure you are up-to-date on your training schedules. If you would like to provide an in-person training to your employees, **Aaron Silva**, a partner in Murphy Austin's Employment Law group can provide that. Find more information at the Civil Rights Department **FAQ for Employers**.

- The law governing employee arbitration agreements changed significantly over the past year. Be sure you have an updated arbitration agreement that provides your organization with the maximum benefits. The article below concerning recent court rulings on arbitration agreements details how out-of-date agreements can operate to an employer's detriment.

Read on for important updates.

Sincerely,

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

Beware of Outdated Employee Arbitration Agreements

By Charles R. Hellstrom

As we have discussed in prior newsletters, the rules around Private Attorney General Act ("PAGA") claims have changed and arbitration agreements must be adjusted to reflect those changes. As background, you may recall that in *Viking River Cruises v. Moriana*, the United States Supreme Court held that the Federal Arbitration Act preempts California law prohibiting the division of PAGA claims into individual and representative claims (brought on behalf of other allegedly "aggrieved employees.") As a result, arbitration agreements are now enforceable to the extent they require arbitration of individual PAGA claims, but remain invalid if construed to affect a "wholesale waiver" of PAGA claims.

In *Duran v. EmployBridge Holding Co* (2023) 92 Cal. App. 5th 59, the employer's arbitration agreement contained a PAGA "carve-out" provision that read: "Claims for unemployment compensation, claims under the National Labor Relations Act, claims under PAGA, claims for workers' compensation benefits, and any claim that is nonarbitrable under applicable state or federal law are not arbitrable under this Agreement."

The court held that, because the agreement was construed to preclude arbitration of all PAGA claims, the employer was unable to compel arbitration of the employee's individual PAGA claims. That is, the plaintiff's individual claim would have otherwise been arbitrable (as allowed by *Viking River*) had the agreement not contained the carve-out provision which explicitly prevented all "claims under PAGA."

Shortly after *Duran* came *Westmoreland v. Kindercare Educ. LLC* (2023) 90 Cal. App. 5th 967. In *Westmoreland*, the employer's arbitration agreement included a waiver of "representative actions" but contained a clause providing that, if the waiver was found unenforceable, "then this agreement is invalid and any claim brought on a class, collective, or representative action must be filed in a court of competent jurisdiction[.]" The court referred to this waiver provision as a "poison pill," as it simply "invalidated the agreement" instead of allowing the invalid waiver to be severed from the rest of the agreement. The court emphasized that, had the employer simply "included a waiver of representative claims" without the poison pill, "the result…could have been substantially similar to that in *Viking River*" (where the plaintiff's individual PAGA claim could be severed and sent to arbitration).

Both *Duran* and *Westmoreland* show the consequences of language in arbitration agreements that lack the precision necessary for them to accomplish their purpose. These cases demonstrate the importance of carefully-crafted language in employee arbitration agreements, and why employers should frequently revisit their agreements to keep up with all legal developments.

New Federal Laws and Guidance

By Shawn M. Joost and Charles R. Hellstrom

Since California law provides some of the highest levels of employee protection in the nation, California employers sometimes forget about the applicability of federal law. You have likely read about the recent U.S. Supreme Court decision on accommodating employees' religious practices and the new federal Pregnant Workers Fairness Act ("PWFA"). These new federal requirements essentially bring federal law into line with California law and do not impose any significant new burdens on California employers. We review several recent federal law changes and their impact on California employers below.

Religious Accommodation

The U.S. Supreme Court revised the test for religious accommodation of employees last month in *Groff v. Dejoy*. The federal Civil Rights Act of 1964 requires employers to provide a reasonable accommodation for religious needs unless doing so creates an "undue hardship." The Court defined "undue hardship" as an accommodation that would result in "substantial increased costs in relation to the conduct of [the employer's] particular business." While a significant change in federal law, again, California employers have been governed by a very similar test under state law. State law defines "undue hardship" for providing religious accommodation as "an action requiring significant difficulty or expense." California employers must engage in a good faith, interactive process with employees who request religious accommodations in order to determine if an accommodation can be provided without undue hardship.

Pregnancy Accommodation

The PWFA, effective June 27, 2023, pertains to employers of fifteen or more employees and requires covered employers to provide "reasonable accommodations" to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship." Previously, under federal law, pregnant employees were entitled to an accommodation only if they had a pregnancy-related disability. The PWFA standard is in line with existing California law, which requires employers to offer reasonable accommodations to pregnant employees affected by pregnancy, if the accommodation request is based on the advice of a health care provider. No showing of disability is required.

Artificial Intelligence in Hiring

Employers using algorithmic decision-making tools in the hiring process should review new guidance from the Equal Employment Opportunity Commission. Algorithmic decision-making tools may be considered "selection procedures" under the federal Civil Rights Act. Employers are prohibited from using selection procedures that

disproportionately exclude members of protected classes unless the selection procedure is job-related and consistent with business necessity. Thus, employers using algorithmic tools need to understand how the selected tool operates and how it may be used in personnel decision-making without running afoul of the law.

COVID-19 Guidance on Equal Employment Opportunity Issues

The Equal Employment Opportunity Commission updated its COVID-19 guidance for employers in May. The guidance is presented in a helpful Q&A format. Employers should review the updated guidance to keep abreast of this changing landscape.

Items in the new guidance include:

- Reasonable accommodations for employees with Long COVID: "Some common reasonable accommodations include: a quiet workspace, use of noise cancelling or white noise devices, and uninterrupted worktime to address brain fog; alternative lighting and reducing glare to address headaches; rest breaks to address joint pain or shortness of breath; a flexible schedule or telework to address fatigue; and removal of "marginal functions" that involve physical exertion to address shortness of breath." (Q&A D.19)

- The end of the public health emergency declaration does not mean that employers may cancel all reasonable accommodations put in place for pandemic-related circumstances. (Q&A D.20.)

National Labor Relations Board – Employee Speech

In a return to its pre-2020 standards, the National Labor Relations Board ("NLRB") overturned a 2020 ruling regarding employers' rights to discipline employees for "abusive" conduct. In 2020, the NLRB departed from long-standing principles concerning the proper analysis of employer discipline when employees engage in "abusive conduct" while engaged in activity protected by the National Labor Relations Act (the "Act"). The Act protects employees' rights to engage in concerted activities for mutual aid and protection and applies to all employees, not only unionized employees. Under the NLRB's 2020 ruling, the focus was on whether or not the employer's motive in disciplining the employee was animus toward the protected activity or a legitimate business concern.

The NLRB's May decision in *Lion Elastomers LLC* removes the employer's motive from the equation and returns to the prior "setting-specific" standards test. Under this test, if an employee engages in "abusive conduct" while engaged in activity protected under the Act, the conduct must be evaluated as part of that activity and not as if the conduct occurred in an ordinary workplace context. Thus, an employee's conduct toward management or communications with fellow employees during a dispute over hours, wages, or working conditions must be assessed in that context. Importantly, the NLRB assumes and accepts as a premise that such disputes necessarily "engender ill feelings and strong responses." Therefore, abusive conduct by employees in those circumstances may still be within the protection of the Act and, as a result, an employer may violate the Act by disciplining the employee for abusive conduct that would be impermissible in an ordinary workplace context. Employers are advised to seek counsel before disciplining an employee for abusive conduct that arguably occurs during activity protected by the Act.

Cal/OSHA Evaluating Indoor Heat Illness Prevention Regulations

By Matthew H. Green

The California Occupational Safety and Health Standards Board ("Cal/OSHA") has completed its public comment and discussion period regarding newly proposed Indoor Heat Illness Prevention Regulations. These regulations would generally apply to all indoor work areas where temperatures equal or exceed 82 degrees, and will require employers to:

- Provide employees access to potable drinking water which is fresh, pure, suitably cool, and at no cost to employees;
- Provide employees access to one or more cool-down areas, with a temperature maintained at less than 82 degrees, located as close as practicable to the areas where employees are working;
- Allow and encourage employees to take preventative cool-down rests when the employee feels the need to do so;
- Provide employees with personal protection equipment if they are unable to use engineering or administrative controls to manage temperatures; and
- Establish and implement a heat illness prevention plan and provide employees with applicable training.

While these proposed regulations have not yet been voted on by Cal/OSHA, they could be implemented for summer 2024. Businesses that may be affected by these new regulations should be prepared to evaluate their current policies, practices, and work areas in order to comply with new regulations.

Independent Contractor Test: Not Always Just "ABC"

By Matthew H. Green

As many of you know, in 2020, the California Legislature passed Assembly Bill 5, which codified a strict "ABC" test to evaluate whether a worker is an employee or an independent contractor. However, Assembly Bill 5 also included exemptions from the ABC test for certain industries/jobs; positions falling within one of those exemptions are still evaluated under the prior "*Borello*" test, which allows more latitude in determining the proper classification.

The legality of allowing those exemptions was questioned in a recent court case. In a win for California employers, the California Court of Appeal in *Quinn v. LPL Financial LLC* (2023) 91 Cal.App.5th 370, affirmed a trial court finding that Labor Code Section 2783, which lists certain exemptions from the ABC test, was constitutional. The plaintiff in that case was John Quinn, a financial broker who worked for LPL Financial LLC. Mr. Quinn argued he should have been classified as an employee under the ABC test, and therefore LPL Financial LLC was obligated to reimburse him for various business expenses he incurred. While Mr. Quinn believed Assembly Bill 5 violated his equal protection and due process rights, the Court disagreed, finding that registered securities broker-dealers and investment advisors had more skill and bargaining power than the average worker and therefore were less vulnerable to exploitation by misclassification as independent contractors.

Quinn v. LPL Financial LLC should serve as a reminder for all employers to determine which test applies to their workers and to evaluate whether their workers are properly classified.

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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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Shawn M. Joost is a Partner with Murphy Austin's **Labor and Employment Law Team**. Shawn advises companies in all areas of employment law, including employment classification, employee termination, leave decisions, wage and hour matters and drafting effective and enforceable employment policies, and executive employment agreements.

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**.

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.

Matthew H. Green represents employers in litigation and dispute resolution, including defending class action and Private Attorney General Act lawsuits. Matthew also provides employers with advice and counsel on a wide range of employment law issues. His practice encompasses wage and hour matters, leaves of absence, discrimination and harassment, workplace safety, hiring, and termination.

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