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2021 Winter Addendum to the Fall 2020 Employment Law Update

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2021 WINTER ADDENDUM TO
THE FALL 2020 EMPLOYMENT LAW UPDATE

1. ARBITRATION: DO'S AND DON'TS (1/2020)

Minors and arbitration agreements

Minors can enter into arbitration and other agreements, but employers entering into arbitration agreements, or any other agreements with minors, must be aware of California Family Code Section 6710, which provides, "Except as otherwise provided by statute*, a contract of a minor may be disaffirmed by the minor before majority or within a reasonable time afterwards* or, in case of the minor's death within that period, by the minor's heirs or personal representative." (Emphasis added). In *Coughenour v. Del Taco, LLC* (November 2020), the court allowed a minor to disaffirm an arbitration agreement she signed at age 16. The court found that the employee's act of continuing to work for Del Taco for four months after turning 18, without more, was not a ratification of the previously signed agreement, nor was her eight-month delay in filing her lawsuit after turning 18 (which the court found to be a clear disaffirmation) an unreasonable delay. Based on these rulings, and because the employee's arbitration agreement was disaffirmed, the court denied Del Taco's motion to compel arbitration and the former employee's case was allowed to proceed in civil court.

2. BACKGROUND CHECKS: DO NOT CONSIDER DISMISSED CONVICTIONS (1/2020)

Labor Code section 432.7 prohibits an employer from asking a job applicant to disclose any conviction that has been judicially dismissed, and bars an employer from using any record of a dismissed conviction as a factor in the termination of an employee. In *Garcia-Brower v. Premier Auto. Imports of CA, LLC* (October 2020), the plaintiff did not disclose a dismissed conviction of a misdemeanor on her job application (nor was she required to, under section 432.7). After she was hired, a situation arose in which her employer found out about the past conviction, and had conflicting evidence as to whether it had in fact been judicially dismissed. Rather than undertake any sort of investigation, the employer terminated the plaintiff. The Labor Commissioner, on behalf of the plaintiff, brought suit for violation of Section 432.7, and for retaliation for engaging in a protected activity (deciding not to disclose her dismissed conviction). The lower court granted the employer's motion for non-suit and dismissed the case, but the Appellate Court reversed and remanded, finding sufficient evidence that it was possible the employer terminated the employee in violation of 432.7, and in retaliation for choosing not to disclose her conviction.

3. CLASSIFICATION: EMPLOYEES IN GIG ECONOMY COMPANIES (1/2020)

In May of 2020, the Attorney General of California, joined by city attorneys of Los Angeles, San Diego, and San Francisco, filed a complaint against ride-hailing platforms Uber and Lyft, on behalf of the People of the State of California. The complaint alleged that these companies improperly misclassify their drivers as independent contractors rather than employees, thus depriving them of a host of benefits to which employees are entitled. The complaint further

alleged that this misclassification also gives Uber and Lyft an unfair advantage against competitor companies, while costing the public significant sums in lost tax revenues and increased social-safety-net expenditures that are foisted on the state because drivers must go without employment benefits. The People requested a preliminary injunction that would restrain Uber and Lyft from classifying their drivers as independent contractors until trial. The trial court granted the injunction, which was upheld by the Court of Appeal in *People v. Uber Technologies* (October 2020). The appeals court, however, granted the companies several months to comply with the order to reclassify their drivers. Just weeks after the appellate decision, California voters approved Proposition 22, a ballot measure that allows gig economy companies like Lyft and Uber to continue treating drivers as independent contractors. In light of the passage of Proposition 22, the scope of the lawsuit has been drastically reduced. The People will continue to seek penalties for the time between January and the certification of the election results, when it alleges that Uber and Lyft flouted the law.

PRACTICE TIP: Proposition 22, through which voters decided that persons working for app-based transportation and delivery companies can retain their status as independent contractors if the company does not: (1) require drivers to accept specific deliveries or rides; (2) unilaterally set a number of hours or schedule; and it (3) allows drivers to hold other jobs or to work for other network-based companies. Proposition 22 also provides these contractors with benefits similar to those provided to traditional employees (120% of the applicable minimum wage for all time engaged driving, healthcare subsidies, etc.). Although Proposition 22 was a "win" for the ride-hailing platforms, Proposition 22 is narrowly tailored and does not generally extend to other types of California businesses. Employers should work closely with legal counsel to evaluate current and future independent contractor relationships because of California's strict scrutiny of those relationships and the potential exposure to employers for misclassifying employees.

4. COMMISSIONS: EMPLOYEE MUST MEET SALARY BASIS TEST WITHOUT "LOAN" FROM EMPLOYER THAT MUST BE REPAID (1/2020)

In *Semprini v. Wedbush Securities, Inc.,* Joseph Semprini filed a class action against former employer Wedbush Securities, Inc. (November 9, 2020), a securities broker dealer that offers financial planning and investment products through its financial advisors. He alleged that Wedbush improperly classified him as exempt under the administrative exemption and failed to pay him a "salary" equivalent to at least two times the state minimum wage.

The court agreed that the employer's compensation structure of payment on a commission only basis was insufficient to fulfill the salary basis test. The employer tracked employee trades made in a month and then calculated compensation owed based on the commission tier the employee met that month. The employees' compensation varied based on their total monthly gross product sales. When the monthly commission earned was not at least double the California minimum wage, Wedbush paid the advisor the commission due plus a draw or advance on future commissions in an amount equal to the difference between the commission and double the minimum wage. Financial advisors were expected to repay the draw, however, and carry it forward as a deficit until it is repaid. Wedbush reduced the employee's future monthly commission until the draw was repaid.

The court determined that this compensation structure failed to satisfy the federal salary basis and the California salary basis because the financial advisors' commissions fluctuated each month based on performance and quality of sales. Therefore they were not paid a predetermined amount. Further, the court stated that the recoverable advances the employer made on future commissions did not create a fixed and determined salary, since an advance is not a wage. The court opined that, "The salary basis test requires employers to pay their employees at least double the minimum wage, not loan them that amount."

The court explained that an employee must receive a predetermined amount as a salary that would not be reduced because of variations in the quality or quantity of the work performed. An employer could pay no more than 10% of an employee's salary by the payment of non-discretionary bonuses, incentives and commissions that are paid annually or more frequently **This 10% is only allowed under federal law to reach the salary minimum; California does not allow it.**

PRACTICE TIP: Paying employees by commission can be very complex. Make sure you have a written agreement in place that has been vetted by competent employment counsel.

5. CONFLICT OF LAWS: WHEN DOES CALIFORNIA LAW APPLY? (1/2020)

The issue in *Gulf Offshore Logistics, LLC v. Superior Court* (February 2020) was whether California law governed the employment relationships between an employer and its employees. The employees were crew members of a vessel which provided services to oil platforms located off the California coast, outside of California's boundaries. The employer was a Louisiana-based company, and none of the crew members were California residents. In February 2020, the court held that California law did not apply, but the case later went back to the Court of Appeal, after the California Supreme Court directed the Court of Appeal to reconsider its opinion in light of two cases that decided similar issues using a different standard. After considering the Supreme Court's guidance on the matter, the appellate court issued a new opinion in December 2020, holding that California law applies. In so holding, the court articulated the standard to be used in determining when California law applies:

- California's wage and hour laws apply to workers who perform all or most of their work in California.
- For workers who perform work in multiple jurisdictions, this test is satisfied if the worker performs some work in California and is based here, "meaning that California serves as the physical location where the worker presented himself or herself to begin work."
- Neither the residence of the worker nor the location of the employer is relevant to this analysis.

Here, the crew members performed enough of their work within the boundaries of California, because they travel to/from LAX to Port Hueneme, the vessel sailed through California waters to reach the oil platforms, and they regularly docked in a California port (Port Hueneme) for

extended periods of time. Thus, the crew members were entitled to the protection of California law.

6. FORUM SELECTION: OUT-OF-STATE EMPLOYERS CANNOT FORCE CALIFORNIA EMPLOYEES TO LITIGATE IN ANOTHER STATE (1/2020)

At issue in *Midwest Motor Supply Co. v. Superior Court of Contra Costa County* (October 2020) was whether an out-of-state company could force its California-based employee to litigate his wage and hour claims against the company in Ohio, rather than in California. California Labor Code Section 925 prohibits employers from requiring an employee who primarily resides and works in California to agree, as a condition of employment, to adjudicate claims outside of California if the claims arose in California. However, this section wasn't enacted until January 1, 2017, and only applies to contracts that existed before that date if any part of the contract was modified or extended after January 1, 2017. Here, the plaintiff's employment contract requiring him to litigate claims against his employer in Ohio was signed in 2014, but had in fact been modified after January 1, 2017 (in order to change his compensation). Thus, Section 925 applied, and the provision requiring him to litigate in Ohio could not be enforced.

PRACTICE TIP: California laws are very protective of employees and will apply in most circumstance when an employee works in California, even if only in part. Employers are encouraged to proactively work with counsel to determine which laws and forum apply in advance of a claim or lawsuit. California's employment laws often allow for substantial damages and penalties.

7. INDIVIDUAL LIABILITY: FAILURE TO OBSERVE CORPORATE FORMALITIES = ALTER EGO LIABILITY (1/2020)

In *Kao v. Joy Holiday, et al.* (November 2020), the Court of Appeal held that individually named defendants Jessy Lin and Harry Chen acted as the alter egos of their corporation, Joy Holiday, and were therefore jointly liable with the corporation for unpaid wages and related attorneys' fees and costs owed to former employee Ming-Hsiang Kao.

In certain circumstances the court will disregard the corporate entity and will hold the individual shareholders liable for the actions of the corporation. The Court noted that the "separate personality of the corporation is a statutory privilege" and it must be used for "legitimate business purposes." The separate personality of the corporation may be disregarded if it is abused by individuals.

In this case, the Court pointed to the following facts as a basis for disregarding the separate corporate identity and holding the individuals jointly liable with the corporation as its alter egos. Joy Holiday was founded by Lin and Chen, was jointly owned by Lin and Chen, and was jointly controlled by Lin and Chen (who were married at all relevant times and made business decisions together). Chen was the Chief Executive Officer and Lin was the President. Chen also served as the 'general manager' of Joy Holiday in its daily operations, sales and marketing. Lin and Chen discussed and agreed to hire Kao to work at Joy Holiday, and discussed with Kao that he would

be paid $2,500 per month. Lin and Chen paid for Kao to come to California from Taiwan, and provided Kao a place to stay in their personal home. Lin and Chen had Joy Holiday pay the rent for their home, allegedly as a 'loan,' until the IRS later conducted an audit and required Lin and Chen to pay back the rent money to Joy Holiday. Lin and Chen personally charged Kao 'rent,' which 'rent' they had the Joy Holiday bookkeeper take out of Kao's paycheck. When Kao first started working for Joy Holiday, he only had a tourist visa, and applied for an H-1B work visa. Lin signed the letter to the government in support of Kao's visa. While awaiting the H-1B visa, Lin paid Kao his monthly $2,500 out of her own cash funds – for which she thereafter sought and obtained reimbursement from the corporation. Joy Holiday had a time clock for employees to punch-in and punch-out their hours in the office. Lin and Chen did not require themselves to keep time records for their own time. As part of his job, Kao accompanied Lin on business trips to Asia. These were business networking trips, with the schedule and activities set by Lin. Lin and Chen made the decision to terminate Kao.

Chen and Lin's commingling of their personal time, funds and decisions with that of the corporation led to a finding that they were acting as alter egos of the corporation. Accordingly, they were jointly liable with the corporation.

PRACTICE TIP 1: The best practice is to strictly adhere to California's laws in order to avoid liability in the first place. If the company is a corporation or other type of business entity, work with your general or corporate counsel to ensure that you are following the appropriate business formalities. The business should be kept separate from the individual, meaning that there should be no commingling of bank accounts, funds, records, employees, etc. Principals should only act and sign documents on behalf of the business in their official capacity. Employers should also make sure that all handbooks and employee forms identify the correct employer.

PRACTICE TIP 2: Even with the protections discussed above, Labor Code section 558.1 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, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation." Every individual who is involved in timekeeping and payroll policies, practices and implementation needs to be particularly mindful to ensure compliance or risk potential individual liability. Labor Code section 558.1 was enacted after the case discussed above was originally filed. If the same lawsuit was filed today, Chen and Lin could, and likely would, be named as joint defendants with the corporation under 558.1.

8. LEAVES OF ABSENCE: EMPLOYER CAN EXTEND DAYS COUNTED FOR ABSENTEEISM POLICY BY THE NUMBER OF DAYS EMPLOYEE WAS OUT ON LEAVE (1/2020)

In *Lares v. Los Angeles County Metro. Transportation Auth.* (September 2020), the employer's absenteeism policy allowed employees to "clear" or erase absences that otherwise would count for purposes of disciplinary action by working (or being available to work) during a certain clearance period. When an employee was on CFRA leave, his clearance period was extended by the number of days the employee was on leave to accurately reflect a period of time in which

the employee was working or available to work. The court held that this did not violate the CFRA, because taking a CFRA leave under this policy does not increase the number of scheduled work days (or available-to-work days) that the employee must remain absence-free. In other words, the employee was not being penalized by the extension of this clearance period. Notably, the court reached this result because the employer extended the clearance period by the number of days an employee was on any unpaid leave, not just CFRA leave.

9. PRIVATE ATTORNEYS GENERAL ACT (PAGA): PRACTICE TIPS (1/2020)

PAGA Claims Cannot be Waived in an Arbitration Agreement (10/2020)

The California Court of Appeals in *Olson v. Lyft* (October 2020) rejected Lyft's argument that employees could waive PAGA claims in an arbitration agreement. Although this issue had been settled in California since 2014 in the *Iskanian* decision, Lyft was attempting to argue that *Iskanian* was no longer good law in light of a 2018 U.S. Supreme Court decision, *Epic Systems,* which held that an employee who agrees to individualized arbitration cannot avoid this agreement by asserting claims on behalf of other employees under the FLSA or federal class action procedures. *Epic Systems*, however, did not address PAGA actions. Relying on *Iskanian*, the court denied Lyft's motion to compel, as PAGA claims cannot be compelled to arbitration.

Employers Could Not Force an Employee to Arbitrate a Misclassification Issue Raised in a PAGA-Only Action (12/20)

In *Provost v. YourMechanic, Inc*. (October 2020), a representative plaintiff brought a PAGA-only action against his employer alleging various Labor Code violations including that he, along with other aggrieved employees, were willfully misclassified as independent contractors. Independent contractors are not entitled to bring claims under PAGA. In light of this, the defendant employer sought to enforce its arbitration agreement with the plaintiff in order to compel him to arbitrate the issue of whether he was an independent contractor or employee (i.e., whether he had standing to pursue a PAGA claim) before he could proceed under the PAGA with his representative claim against the company. The appellate court affirmed the lower court's decision that the employer could not compel the plaintiff to arbitrate whether he was an "aggrieved employee" with standing to bring a PAGA claim. To do so, reasoned the court, would have required splitting the single PAGA action into two components: an arbitrable "individual" claim and a nonarbitrable representative claim. The court said it cannot do this, since PAGA claims are indivisible. There is no individual portion, as a PAGA claim is undertaken on behalf of the state.

10. REST BREAKS: PROPOSITION 11 IS RETROACTIVE FOR AMBULANCE WORKERS (1/2020)

In *Calleros v. Rural Metro of San Diego* (November 2020), two ambulance employees filed a class action lawsuit against several ambulance companies claiming that those companies violated wage and hour laws by requiring the employees to remain on call during their rest breaks. One day after the court denied class certification, California voters passed Proposition 11, which enacted provisions requiring ambulance employees to remain reachable by a communications

device during their work shifts, including rest breaks, in order to maximize protection of public health and safety. The Fourth District Court of Appeal dismissed the employees' appeal of the denial of class certification, finding it was moot following the passage of Proposition 11. The Court found that Proposition 11 applied retroactively and did not divest the employees of any vested rights. The retroactive application of Proposition 11 was sought to achieve the public fiscal and safety goals by making clear the ambulance entities would not be penalized for ensuring their workers had been previously available at all times to respond to emergencies.

PRACTICE TIP: Proposition 11 was a "win" for ambulance employers. Its application is narrowly tailored, however. Non-ambulance employers must provide duty-free, uninterrupted paid rest breaks to their employees. Employees should be permitted to leave the premises during their 10-minute rest breaks. Employers can require that employees promptly return at the conclusion of their 10-minute break, however. If the employer attempts to maintain any control over what employees do during their rest breaks, the employer will likely need to pay rest period premium pay and possibly face potential liability in an individual, class action or PAGA lawsuit.

11. STATUTE OF LIMITATIONS: TOLLED WHILE CLASS ACTIONS WITH SIMILAR CLAIMS ARE PENDING IF NO PREJUDICE TO THE EMPLOYER (1/2021)

In *Hildebrandt v. Staples the Office Superstore, LLC* (December 2020), the Second District Court of Appeal held that the applicable statutes of limitations on an employee's individual claims were tolled during the time that two class actions, with similar allegations and claimed damages, were pending.

Hildebrandt was a salaried, exempt general manager of Staples from April 24, 2000, through June 20, 2013. He worked at several California Staples locations.

On March 11, 2014, another former Staples employee, Dianne Hatgis, brought a putative class action lawsuit on behalf of all general managers of Staples California retail locations. Hatgis alleged that Staples misclassified its general managers as exempt and sought damages for failure to pay overtime, meal and rest break violations, inaccurate wage statements, waiting time penalties and unfair business practices. On July 6, 2015, Hatgis's proposed class action was limited to Staples Copy and Print Shop general managers only, which did not include Hildebrandt. On October 23, 2015, Hatgis voluntarily dismissed the class action without prejudice.

On September 4, 2015, another Staples general manager, Fred Wesson, filed a putative class action against Staples on behalf of all current and former general managers at Staples Superstore retail locations in California who were employed on or after May 10, 2010. Wesson's allegations, causes of action and damages mirrored those brought by Hatgis. Hildebrandt filed a declaration in support of class certification of the Wesson action. On April 17, 2017, Wesson's motion for class certification was denied. The court found that class treatment was improper because there was great variation in how the Staples general managers performed their jobs and to what extent they performed non-exempt tasks.

On June 22, 2017, four years and two days after his employment with Staples ended, Hildebrandt filed a lawsuit on his own behalf asserting the same claims as the prior Hatgis and

Wesson class actions. Staples asserted that Hildebrandt's claims were barred by the applicable three and four-year statutes of limitations.

The Court held that the statutes of limitations on Hildebrandt's claims were tolled during the time that the Hatgis and Wesson putative class action cases were pending. The Court found that Staples was readily able to determine the number and generic identity of all potential plaintiffs who might have participated in the Wesson or Hatgis class action cases, and that Staples could do this without an individualized assessment of intervening factors related to causation, damages, or even its affirmative defense. There was no prejudice to Staples in allowing Hildebrandt's individual case to go forward because Staples had received notice of his claims when the prior actions were filed.

The Court of Appeal also heavily focused on the relevant policy consideration which is the protection of the class action device as an efficient and economic method of adjudicating group claims where common facts and harms lie. If Hildebrandt's claims were barred in this situation, it would only serve to induce putative class members to file protective motions to intervene in class action lawsuits, or file their own individual cases during the pendency of class action cases in order to preserve their rights in case the class action was not certified or otherwise did not proceed to a determination on the merits. To induce this type of self-protection would only serve to complicate the process that the class action device was designed to streamline.

NOTE: In this case, Hildebrandt conceded that the failure to furnish accurate itemized wage statements was time barred, even if tolling applied. The Court of Appeal accepted Hildebrandt's concession and did not analyze the wage statement claim. It is unclear why the wage statement claim was time barred whereas the other claims were not.

PRACTICE TIP: Employers should promptly take steps to preserve evidence upon receipt of notice of a potential lawsuit (demand letter, claim, individual complaint or class action complaint). The employer needs accurate time and pay records to defend itself against wage and hour claims. An absence of records weighs in favor of the complaining employee. Upon receipt of notice of a potential class action or PAGA case, employers should broadly determine which former and current employees might be included in the proposed class and take immediate steps to preserve their records. This may include contacting third party companies (payroll companies, for example) that maintain data and records to make sure they are not purging data that the employer will need.

12. WAGE ORDERS: THE PRIMARY PURPOSE OF THE BUSINESS APPLIES (/2020)

In *Miles v. City of Los Angeles* (October 2020), the primary issue for the court was whether wastewater collection workers employed by a city to clean its sewers were subject to Wage Order No. 9, which governs the transportation industry. Plaintiff argued that Wage Order 9 applied because the job required him to drive commercial vehicles needed to clean and pump out sewers and transport refuse to collection locations. The court disagreed, granting summary judgement to the City. For purposes of Wage Orders, a sanitation worker does not become part of the transportation industry simply because the waste collected must be transported to collection

sites. It is the main purpose of the business, not the job duties of the employee, which determines the Wage Order that applies in any given case. Here, the only purpose of the City's sanitation bureau was sanitation, and the transportation of wastewater and pollutants is merely incidental to that purpose. Note that for public agencies, only certain aspects of the applicable Wage Order will apply (in this case the Court was reviewing Wage Order 9).

PRACTICE TIP: The Department of Industrial Relations has published resources to help employers determine which Wage Order applies. See:

https://www.dir.ca.gov/IndexOfBusinessAndOccupations.pdf

https://www.dir.ca.gov/dlse/whichiwcorderclassifications.pdf

When in doubt, contact your attorneys at LightGabler for assistance.