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News & Types: Employment, Labor & Benefits Update

Employment, Labor & Benefits Update - April 2016

4/11/2016

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Practices: Employment, Labor & Benefits

CALIFORNIA SUPREME COURT DELIVERS GOOD NEWS FOR EMPLOYERS WITH RESPECT TO ARBITRATION AGREEMENTS
By Jiwon Juliana Yhee

Plaintiff Maribel Baltazar was an employee at Forever 21, a clothing retail merchandiser, from 2007 to 2011. When Baltazar was hired in 2007, she was asked to fill out an 11-page employment application, which included an arbitration agreement. The agreement stated that the parties "mutually agree[d]" to the arbitration of "any claim or action arising out of or in any way related to the hire, employment, remuneration, separation or termination of Employee." The agreement further provided that, in the event that the parties proceeded to arbitration, "pursuant to California Code of Civil Procedure [section] 1281.8, either party hereto may apply to a California court for any provisional remedy, including temporary restraining order or preliminary injunction." In 2011, after Baltazar resigned from Forever 21, she filed a complaint against the company, alleging that she suffered verbal and physical harassment, race and sex discrimination, and retaliation in violation of California law. Subsequently, Forever 21 sought to compel arbitration. Baltazar opposed Forever 21's motion to compel arbitration, arguing that the arbitration agreement in her employment application was "unconscionable" and therefore could not be enforced. The California Supreme Court reviewed the arbitration agreement at issue to determine if it was, in fact, unconscionable. *Baltazar v. Forever 21, Inc. et al*., Case No. S208345.

In order for an arbitration agreement to be unenforceable on the basis of unconscionability, a court must find that the agreement is both procedurally and substantively unconscionable, although procedural or substantive unconscionability need not be present to the same degree. Procedural unconscionability focuses on situations where there is oppression or surprise on the part of a party due to unequal bargaining power. Substantive unconscionability, on the other hand, looks at whether the terms of a contract are manifestly unfair or one-sided. Where there is a strong showing of substantive unconscionability, less evidence of procedural unconscionability is required to come to the conclusion that a contract term is unenforceable on the basis of unconscionability.

In *Baltazar v. Forever 21*, Baltazar argued, among other things, that her arbitration agreement with Forever 21 was substantively unconscionable because the agreement stated that any party may apply to a California court for any provisional remedy pursuant to California Code of Civil Procedure 1281.8. Baltazar contended that this provision unfairly favored Forever 21 because the employer is more likely than one of its employees to seek provisional relief.

The *Baltazar* Court was unpersuaded by Baltazar's arguments. There is no substantial unconscionability, the Court held, where a provision of the arbitration agreement merely recites the procedural protections already secured by statute, even if it is more likely that one of the parties would pursue the remedies under that provision than another. The *Baltazar* Court disapproved of a previous California Court of Appeal case, *Trivedi v. Curexo Technology Corp*., 189 Cal. App. 4th 387, to the extent that *Trivedi* suggested anything contrary to *Baltazar* in this respect.

The California Supreme Court also remained unconvinced by many other arguments that *Baltazar* offered to demonstrate that her arbitration agreement with Forever 21 was unconscionable, including the argument that the agreement was procedurally unconscionable because Forever 21 was unwilling to hire Baltazar unless she signed the arbitration agreement. The Court, stating that "the unconscionability doctrine is concerned, not with a "simple old-fashioned bad bargain," but with contract terms that are "unreasonably favorable to the more powerful party," found that Balthazar had ultimately decided to accept the arbitration agreement of her own volition in order to work at Forever 21. The Court stated that, by requiring Baltazar to sign the arbitration agreement, Forever 21 had not oppressed, lied to, placed under duress, or otherwise manipulated Baltazar.

Baltazar is a helpful case for employers in California that seek to enforce arbitration agreements. The California Supreme Court has not been shy about striking down arbitration agreements that it has deemed to be one-sided in the past, but *Baltazar* suggests that the Court will reject attempts to strike down arbitration agreements on technical or abstract bases that have little impact on the matter under dispute. At the very least, the California Supreme Court's decision in *Baltazar* demonstrates that an arbitration agreement will not be found unenforceable simply because the employer is more likely to exercise a provision of that agreement where the rights under that provision are secured by already existing law. Additionally, *Baltazar* stands for the proposition that requiring an employee to sign an arbitration agreement as a condition of hire does not necessarily render the arbitration agreement unconscionable. This is good news for employers who either plan to include arbitration agreements in their employment applications or contracts, and for employers who seek to enforce these agreements in the future.

ARE YOU PREPARED FOR QUICKIE UNION ELECTIONS?
By Alan M. Kaplan

As a former hearing officer and prosecuting attorney in the Chicago Regional Office of the National Labor Relations Board and, currently, an attorney assisting companies in maintaining a union-free workplace, I have been closely following the statistics on "quickie elections" ever since the Board implemented its final rule on "quickie elections." The NLRB's final rule on "quickie elections," which is designed to streamline NLRB procedures governing representation, has made it more difficult for employers to take action against union organizing campaigns. Now that the statistics illustrating the effects of the NLRB "quickie elections" rule are in, what are the statistics and what do the statistics mean?

First, the bad news. According to statistics issued by the Board's General Counsel, the median number of days between the date a union files a petition requesting an election and the election has fallen by 12 days from a median of 37 days in 2014, to 25 days in 2015. In other words, companies have lost almost two weeks of a pro-company campaign to convince employees to vote in favor of the company and against a union. This is valuable time the company has lost to educate its employees about unions and the implications of their vote in favor of union representation.

Surprisingly, however, statistics show that, despite the NLRB's "quickie election" rule, the percentage of petitions filed by unions and elections won by unions has stayed relatively the same from before the Board implemented the new rules on April 14, 2015. The total number of petitions for elections filed by unions has increased, but only slightly, from 1,790 to 1,818. These statistics compared the 9-month period of time between April 14, 2015 and January 14, 2016 with a similar 2014-15 time period.

The total number of elections, however, during the 2015-16 year *decreased* from 1,243 to 1,135. This can be explained by a number of different reasons: it could be that the Board dismissed the union's petitions or that the unions voluntarily withdrew their petitions, probably because they realized they could not win the elections. Of the elections that were held, the percentage of wins by unions stayed about the same in 2015 compared to 2014. During the 9-month period between April 14, 2015 and January 14, 2016, unions won 68.9% of the elections, although they won 70.2% of elections during the previous 2014-15 time period.

What can explain the relatively unchanged percentage of union wins despite the streamlined, "quickie election" rule? The answer is that companies are acting proactively to remain union-free even before unions enter into the picture. Before a company knows that its employees are talking about unions and even before a union files a petition for an election, companies have begun to measure the degree to which they are vulnerable to a union organizing campaign. Companies compare their wage rates to those of other companies in the same geographical area or industrial park, draft policies, train supervisors and implement procedures to create and ensure an issue-free workplace. Companies solve their employees' problems and complaints rather than creating an environment in which the employees seek help from an outside, third party.

These actions are important in keeping a company union-free. Statistics show that "quickie elections" are, in fact, taking place even if the numbers are not quite as dramatic as they could have been. Companies who are not taking any of the above-described actions to remain union-free are advised to implement Masuda Funai's Ever Ready Anti-Union Campaign.™

DEPARTMENT OF LABOR RELEASES FINAL VERSION OF ITS CONTROVERSIAL FIDUCIARY RULE
By Mary Shellenberg

On April 6, 2016, the Department of Labor (the "DOL") released the long-awaited final version of its controversial fiduciary rule, which expands definition of "investment advice fiduciary" under the Employee Retirement Income Security Action of 1974 ("ERISA"). The final rule is a substantially revised version of the proposed regulations issued in 2015 and appears to address the thousands of comments received by the DOL from the financial services industry. For the past year, the financial services industry has lobbied against the rule, while, at the same time, bracing itself for changes that the new rule, had it been adopted in proposed form, would have ushered in. Although industry insiders are still in the process of analyzing the new, finalized rule, the initial responses range from muted to favorable.

While the new rule has been streamlined, it still effects important and significant changes by expanding the definition of a fiduciary under ERISA and the Internal Revenue Code to more broadly describe when a person is a fiduciary by reason of rendering investment advice regarding the assets of a plan or an IRA for a fee or other compensation. This expanded definition will include advisers to plan sponsors, plan fiduciaries, plan participants, beneficiaries, IRAs and IRA owners. The new rule also contains accompanying prohibited transaction class exemptions allowing certain broker-dealers, insurance agents and others that act as investment advice fiduciaries to continue to receive a variety of common forms of compensation as long as they adhere to certain standards and rules that are directed to ensuring that the advice is in the best interests of their customers. These standards and rules include the requirement that firms and individual advisers acknowledge their status as "fiduciaries," make prudent investment recommendations without regard to their own interests, or the interests of those other than the customer, charge only reasonable compensation, and make no misrepresentations to their customers regarding recommended investments.

The final rule details the kind of communications that constitute investment advice, which give rise to fiduciary status. Critical to the definition is the concept of "recommendation" and whether a "recommendation" occurred. Importantly, the final rule also addresses certain types of communications which are non-fiduciary communications. These include education, general communications (newsletters, commentary, research, etc.), platform providers, transactions with independent plan fiduciaries with financial expertise, swap and security based transactions, employees of plan sponsors and plan fiduciaries who prepare routine reports and recommendations who do not receive a fee or compensation beyond their normal compensation.

The final rule and the prohibited transaction exemptions become effective June 7, 2016, but they will have a phased-in implementation period. The broader definition of fiduciary will be applicable on April 10, 2017. However, in order to take advantage of the best interests contract (BIC) exemption, a standard-based exemption applying to the receipt of compensation by advisers and their financial institutions for investment advice provided to retirement investors, firms will only be required to comply with more limited conditions, including acknowledging their fiduciary status, adhering to the best interest standard, and making basic disclosures of conflicts of interest. The other requirements of the exemption will go into full effect on January 1, 2018.

The full impact of these new rules on qualified plans and arrangements with service providers is not yet clear. However, it is likely that the rule will result in additional documentation and disclosures and will possibly impact fees and costs as the plans and advisers define their new working relationship.

For more information about this or any other employment law topic, please contact Frank Del Barto, Chair of the Employment, Labor & Benefits Group, at 847.734.8811 or via email at fdelbarto@masudafunai.com.