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News & Types: Employment, Labor & Benefits Update

Employment, Labor & Benefits Update - January 2016

1/11/2016

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Practices: Employment, Labor & Benefits

EMPLOYMENT – A LIMITATION ON THE ENFORCEABILITY OF FORUM-SELECTION CLAUSES IN CALIFORNIA
By Jiwon Juliana Yhee

Executive Summary: In *Verdugo v. Alliantgroup*, a California case decided on May 28, 2015, employer Alliantgroup sought to enforce a forum-selection clause located in an Employment Agreement it had signed with one of its California employees. The employee had brought a class action lawsuit alleging, on behalf of all similarly situated past and present employees of the employer, violations under the California Labor Code. The employer moved to dismiss or stay the action based on the forum selection clause in the Employment Agreement, which designated Texas as the proper forum. The trial court granted the motion, but a California Court of Appeal, upon review of the case, reversed, holding that forum-selection clause cannot be enforced where the employee's claims were based on unwaivable rights under the California Labor Code and where the employer could not prove that: (1) the court in the forum designated in the Employment Agreement would provide the same or greater rights than California, or that (2) a court in the designated forum would apply California law to claims at issue.

Plaintiff employee, Rachel Verdugo, was an Associate Director at Alliantgroup, a company providing tax consulting services. Alliantgroup's corporate headquarters were located in Harris County, Texas, and Alliantgroup has regional offices in 11 states, including California. In October 2007, Verdugo was hired as an Associate Director at Alliantgroup's California office. When Verdugo was hired, she signed an "Employment Agreement" with Alliantgroup that included a forum-selection and choice-of-law clause that stated that the Agreement would be governed "in all respects, including, but not limited to validity, interpretation, effect and performance by the laws of the State of Texas."

According to the Agreement, proper subject matter and personal jurisdiction "shall be had solely" in the State of Texas. The sole venue would be Harris County, Texas. Verdugo only had minimal contact with the Texas office.

In April 2013, Verdugo brought a class action lawsuit against Alliantgroup in California, alleging, amongst other things, that Alliantgroup had violated the California Labor Code in the following ways: (1) unpaid overtime wages; (2) failure to provide accurate itemized wage statements; (3) failure to provide meal breaks; (4) failure

to pay all wages due at the time of termination; (5) failure to pay commissions; (6) failure to pay vacation pay; (7) unfair and unlawful business practices. Alliantgroup moved to dismiss or stay the action based on the forum-selection clause in the Employment Agreement. The trial court granted Alliantgroup's motion, and Verdugo appealed. On review, the California Court of Appeal reversed the trial court's decision.

Pursuant to the U.S. Supreme Court's decision in *Atlantic Marine Construction Co. Inc. v. U.S. District Court for the W. District of Texas*, forum selection clauses are enforceable except in exceptional circumstances, such as fraud. Additionally, pursuant to *Atlantic Marine*, the party moving to defy a forum-selection clause has the burden of establishing that the transfer to the forum for which the parties have bargained is unwarranted. Unless the party resisting the forum-selection clause can establish that the clause is invalid, which may be difficult to do in light of *Atlantic Marine*, a forum-selection clause allows the transfer of a case to the selected forum. Consequently, in California, courts generally enforce forum-selection clauses unless enforcement would be "unreasonable or unfair." Inconvenience or additional expense, by itself, does not establish the unreasonableness of a forum-selection clause. A clause is considered to be reasonable if "it is has a logical connection with at least one of the parties or their transaction."

However, California's enforcement of forum-selection clauses is not without limits. In *Verdugo v. Alliantgroup*, the Court of Appeal held that a forum-selection clause will not be enforced if doing so would "substantially diminish the rights of California residents in a way that violates [the] state's public policy." Further, where the claims at issue are based on unwaivable rights created by California states, the party *seeking to enforce* the forum-selection clause carries the burden of showing that the enforcement of the forum-selection clause will not diminish "in any way the substantive rights accorded under California law." Because the California Labor Code, on which Verdugo's claims were based, contained explicit language prohibiting the setting aside/contravention of the Labor Code rights by private agreement, the Court stated that Alliantgroup was faced with proving that Texas, the forum designated in its forum-selection clause, would provide the same or greater rights than California, or that the Texas courts would apply California law to Verdugo's claims.

Accordingly, Alliantgroup argued that Verdugo's rights would not be diminished if its Texas forum-selection clause were enforced. There would be no diminishment of Verdugo's rights, Alliantgroup argued, because a Texas court "would most likely apply California law," and, further, that, if a Texas court did not apply California law, Texas law provided for "adequate" wage and hour rights. Alliantgroup, however, refused to stipulate that California law would apply if the case were transferred to a Texas court.

The Court was unconvinced. The Court held that the "likelihood" that California law would be applied to the instant case was insufficient to meet Alliantgroup's burden of proof because the burden required Alliantgroup to show that the enforcement of the Texas forum-selection clause, in fact, *"will not diminish in any way"* Verdugo's rights. Further, the Court observed that Alliantgroup's refusal to stipulate to the application of California law demonstrated that Alliantgroup later argue to a Texas court that Texas law should be applied to the case at bar. The Court found that Alliantgroup's forum-selection clause to be unenforceable.

Considering the above, employers planning to include a forum-selection clause in their employment agreements should be aware of the risk that the forum-selection clause may not be enforceable in California in situations involving unwaivable rights. Employers seeking to enforce a forum-selection clause should note that

Verdugo v. Alliantgroup suggests that a forum-selection clause may be enforced in a case involving unwaivable rights in the following circumstances:

1. Where the employer stipulates to have the court in the designated forum apply California law.
2. Where the case law in the designated forum state requires that California law be applied.
3. Where the employer successfully shows that the laws of the designated forum state will provide equal or greater protection to the plaintiff employee.

LABOR – RISK MANAGEMENT FOR UNION AVOIDANCE
By Alan M. Kaplan

As companies enter 2016, risk management includes analyzing the company's vulnerability to a union organizing campaign and its ability to take effective action. Early in 2015, the National Labor Relations Board ("Board") enacted new regulations which reduce the period of time between the date a union files a petition for an election and the date of the election. The average time has decreased from approximately 40 to 21 days. The time between the filing of a petition and the date of a hearing at the Board to determine issues, such as which employees are eligible to vote, has dropped from approximately 15 to 7 days. These changes make it imperative that companies be prepared to respond even before a union files a petition to become the exclusive collective bargaining representative of the company's employees.

Being prepared is crucial because unions overwhelmingly win elections in which they file petitions for an election. According to LRI Online, a union avoidance consulting company, unions won 70% of all elections in which they filed a petition during the one-year period ending October 31, 2015. In the one-year period ending October 31, 2014, unions won 69% of elections when they filed a petition for an election.

Chicago was the 8th most active region in the country for unions filing petitions during the one-year period ending October 31, 2015. Atlanta was the 4th most active, following Brooklyn, Seattle and New York. For the one-year period ending October 31, 2014, Atlanta did not appear among the top 10 regions. Chicago was the 6th most active region, following Boston, Portland, Baltimore, Philadelphia and Tampa. Nationally, the Teamsters Union was the most active union participating in elections in both one-year periods, followed by the Electrical Workers and the Machinists Unions.

To manage risk, companies can implement Masuda Funai's Ever Ready Anti-Union Campaign.™ The Campaign begins with a vulnerability analysis and continues with a review, drafting and implementation of policies and practices all companies should adopt. Companies also need to analyze how their wages and benefits compare and contrast with the wages and benefits of unionized workplaces located in the same geographic area in which the company is located. Other practices to implement include safety committees, supervisory and employee training, internal grievance procedures, among other practices, in order to ensure that the company can create and maintain a union-free working environment.

Benefits – Health Care Reform
By Frank J. Del Barto

Cadillac Tax Delayed Until 2020

On December 18, 2015, President Obama signed the Consolidated Appropriations Act of 2016 (the "Appropriations Act") into law. Among other things, the Appropriations Act provides a two-year delay in the so-called Cadillac Tax (originally scheduled to take effect in 2018) and allows a deduction for the tax.

As originally drafted, the Cadillac tax imposed a 40% *non-deductible* excise tax on the amount of monthly group health insurance premiums that exceeded the applicable annual limits and was slated to become effective January 2018. Due to significant lobbying efforts by plan sponsors, industry trade groups, and other interested stakeholders, the delay of the excise tax until 2020 is a welcome step which provides employers additional time to plan for its implementation while politicians consider its ultimate repeal.

Whether or not the Cadillac tax is ultimately repealed or modified in other ways will now fall to a new Congress and President. In the meantime, we recommend that employers continue to work with their insurance brokers and consultants to implement cost reduction measures to avoid the Cadillac tax in 2020. We will continue to provide updates on any new developments.

IRS Extends Due Dates for Information Reporting

On December 28, 2015, the Internal Revenue Service (the "IRS") released Notice 2016-4 which extended the due dates for the 2015 Affordable Care Act information reporting requirements for insurers, self-insuring employers, and other providers of minimum essential coverage under Internal Revenue Code Section 6055, and the information reporting requirements for applicable large employers under Internal Revenue Code Section 6056.

Internal Revenue Code Section 6055 requires health issuers, self-insuring employers, government agencies, and other providers of minimum essential coverage to file and furnish annual information returns and statements regarding the coverage provided. Internal Revenue Code Section 6056 requires applicable large employers (those with 50 or more full-time employees, including full-time equivalents in the previous year (2015)) to file and furnish returns and statement relating to the health insurance offered (or not offered) to its full-time employees.

According to Notice 2016-4, the Department of Treasury and the Internal Revenue Service determined that "some employers, insurers and other providers needed additional time to adapt and implement systems and procedures to gather, analyze and report this information." Although the IRS is prepared to accept filings of the information returns beginning in January 2016, Notice 2016-4 extends the due dates as follows:

Furnishing Statements to Individuals (from February 1, 2016 to March 31, 2016)

1. **Form 1095-B**, Health Coverage
2. **Form 1095-C**, Employer-Provided Health Insurance and Offer of Coverage

Furnishing Statements to the IRS (from February 29, 2016 to May 31, 2016, if not filed electronically, and from March 31, 2016 to June 30, 2016 if filed electronically)

1. **Form 1094-B**, Transmittal of Health Coverage Information Returns
2. **Form 1095-B**, Health Coverage

3. **1094-C**, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns
4. **Form 1095-C**, Employer Provided Health Insurance and Offer of Coverage

Because of the permissible extensions provided for furnishing Forms 1095-B and 1095-C to individuals, employees may not have the necessary information needed to confirm minimal essential coverage before they file their tax returns for 2015. As a result, Notice 2015-4 provides that individual employees can rely on information received from their coverage providers about their coverage for purposes of filing their tax returns and need not amend their returns once they receive Form 1095-B or 1095-C or any corrections.

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.