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November 2003

CALIFORNIA IS AT IT AGAIN: A DOZEN NEW LAWS WILL SIGNIFICANTLY IMPACT THE STATE'S EMPLOYERS

By Stephen Berry, Shelby Angulo & Stephen Harris

California voters overwhelmingly responded to a key theme in the recent gubernatorial recall campaign – to heal California's ailing economy in part by eliminating laws and regulations that drive business, and therefore, jobs out of the state. The Legislature apparently was not listening as it passed a dozen new employment-related laws that, for the most part, impose additional responsibilities, burdens and costs on California employers. Despite the urgings of Governor-elect Schwarzenegger that he veto many of these laws, Governor Davis signed nearly all of them. All but two of the laws take effect on January 1, 2004. The exceptions are AB 205, which takes effect on January 1, 2005 and SB 2, which takes effect over two years, starting January 1, 2006.

This Alert highlights the changes resulting from the recently-completed legislative session. Paul Hastings is presenting complimentary seminars on the many practical interpretation and compliance questions these laws evoke. For dates, locations, and to register, please go to www.paulhastings.com, select 'News', and click on 'Seminars'.

SENATE BILL 727 (Paid Family Leave)

This law amends SB 1661, which was passed last year and created a new disability compensation program called "Family Temporary Disability Insurance" (FTDI). AB 727 renames this government-provided (employee-paid) benefit "Paid Family Leave" (PFL) and makes other "conforming and clarifying changes" to the laws enacted as part of SB 1661.

Currently, the State Disability Insurance (SDI) program provides temporary disability compensation for employees who cannot work due to a non-work related injury or illness and who are not covered by a disability insurance program provided by the employer. PFL benefits will be provided to employees who are unable to work due to the serious health condition of a family member or the birth or adoption of a child or placement of a foster child. Employees will start paying for these benefits with increased SDI withholdings in January 2004. They will be eligible to receive PFL benefits beginning July 1, 2004. Benefits will be 55% of the employee's base pay rate, up to a maximum of $728 per week in 2004 and $840 in 2005.

Eligible Employees

Any employee who presents medical certification establishing a serious health condition of a family member that "warrants the participation of the employee" is eligible for PFL benefits. The phrase "warrants the participation of the employee" includes, but is not limited to, "providing psychological comfort, and arranging 'third party' care for the child, parent, spouse or domestic partner, as well as directly providing and participating in the medical care." "Family member" means a child, parent, spouse or registered domestic partner. A "serious health condition" has the same meaning as this term is defined in the California Family Rights Act (CFRA).

An employee is **not** eligible for PFL benefits on any day in which:

- the employee receives unemployment compensation;
- the employee receives or is entitled to receive cash benefits as defined in Section 2629 of the Unemployment Insurance Code (*e.g.*, temporary disability payments for work-related injuries);
- the employee is entitled to receive SDI benefits; or
- another family member is able and available to provide the required care for the same period of time that the employee claims a need to provide such care.

The last disqualifier depends on whether the other family member (spouse, child, parent or domestic partner) is "ready, willing, able and available for the same period of time of the day as the employee who is providing the required care." In addition, an employee can avoid this limitation by providing medical documentation showing that the other family member's physical and mental condition makes him or her "unavailable" to provide the required care. Presumably, if two family members are "available" to provide the required care at the same time, only one would be disqualified from receiving PFL benefits and on expiration of one family member's benefits, the other would be entitled to receive PFL.

Must An Employee Satisfy Any Minimum Period of Employment to be Eligible?

Neither the new law nor the proposed regulations contain or directly incorporate the eligibility criteria of the CFRA (i.e., 12 months employment and 1250 hours of service). To the contrary, the EDD has publicly stated that an employee does not need to work a minimum number of hours or days before becoming eligible for PFL.

Did SB 727 or 1661 Create a New Leave Entitlement?

Probably not. The law states: "An individual who is entitled to leave under the FMLA and the CFRA must take PFL concurrent with leave taken under the FMLA and the CFRA." Though an argument can be made that the law creates a new six-week leave without regard to FMLA/CFRA eligibility, and that the foregoing language simply means that an employee cannot tack on six weeks to the FMLA/CFRA leave, this interpretation does not appear reasonable . The legislative history suggests that PFL benefits are intended to provide compensation for employees (1) who are eligible for an FMLA/CFRA leave, but cannot afford to take the time off on an unpaid basis, and (2) whose employer voluntarily allows them to take time off even though the employees are not otherwise eligible for leave under FMLA or CFRA.

Amount of Benefits

As with SDI, an employer may establish a voluntary plan for payment of PFL benefits. If the employer has no such plan, an eligible employee may receive up to six weeks of PFL benefits from the state within any rolling 12-month period. PFL benefits are subject to a 7-day waiting period. In addition, an employer may require an employee to take up to two weeks of earned but unused vacation time before applying for PFL benefits. However, any such required use of vacation time will count toward the waiting period. Employers may not require employees to use sick leave before applying for or while receiving PFL benefits. However, employees may have the right to use sick leave under California's "kin care" sick leave law (Labor Code § 233) or under company policy. As with SDI, an employer presumably can require employees to coordinate PFL benefits with available vacation time to provide full wage replacement.

Notice to Employees

Employers must provide notice of PFL benefits to all employees hired on or after January 1, 2004, and to all current employees who leave work on or after July 1, 2004, due to pregnancy, non-occupational injury or illness, or the need to care for an ill family member or new child. The employer also must provide a "bonding certificate" to employees who take leave for the purpose of child bonding. The EDD has stated it will mail information to all California employers in November 2003 regarding these obligations including, presumably, copies of a brochure and bonding certificate for employee distribution.

ASSEMBLY BILL 76 (Liability for Sexual Harassment by Non-Employees)

In 2002, the California Court of Appeal in *Salazar v. Diversified Paratransit, Inc.*, ruled that an employer could not be held liable under the Fair Employment and Housing Act (FEHA) for sexual harassment of an employee by a customer or other third party. AB 76 overturns that decision and makes employers liable for sexual harassment not just by co-workers and managers, but also by customers, clients, and other third parties. In addition to employees, the law protects "persons providing services [to the employer] pursuant to a contract." An employer will be liable if it knew or should have known of the conduct and failed to take "immediate and appropriate corrective action." AB 76 states that the "extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those non-employees shall be considered."

AB 76 could make it difficult for employers to avoid joint-employer status with respect to outsourced operations, since a cautious employer will want to treat contract workers similar to its own employees by ensuring that the contractor's employees are aware of the company's anti-harassment policy and the procedures for reporting any alleged harassment of them by a non-employee of the company. Perhaps unintended, one benefit of the addition of the specific language to the FEHA is that employers can argue they cannot be held liable under the FEHA for harassment by third parties based on protected characteristics other than sex.

Employers should immediately review their anti-harassment policy for compliance with this new law.

SENATE BILL 2 (Mandatory Health Insurance)

SB 2 has been characterized as an employer "pay or play" health care bill. If it actually takes effect, it will require employers with 20 or more California employees to provide medical coverage for their workers, either directly or by buying it through a statewide insurance pool.

According to Governor Davis' office, the new law could provide coverage for over one million California employees and their families and the Economic Policy Institute estimates that the first year cost to California employers could exceed $11 billion. Some estimates place the annual cost per employee in the $1,300 to $3,500 range, which will have the practical effect of raising California's minimum wage for many California employees.

Effective Dates

Large Employers (200 or more employees in California) must comply by January 1, 2006; Medium Employers (50-199 employees in California) by January 1, 2007; and Medium Employers (20 and 49 employees in California) after enactment of a special tax credit of 20% of the net cost of the fee for these employers. Small Employers (fewer than 20 employees in California) are exempt from the law.

Eligibility For Insurance Coverage

SB 2 provides insurance coverage for individuals who (1) work "at least 100 hours per month for any individual employer and [have] worked for that employer for three months"; and (2) are (i) employees (and their dependents) of Large Employers, or (ii) employees (but not their dependents) of Medium Employers.

How Insurance Will Be Provided

All employers with 20 or more employees that do not qualify for a waiver (discussed below) will be required to pay a fee into a statewide insurance pool, the Health Insurance Purchasing Program (HIPP), that will buy insurance for the employees. The HIPP will be administered by the Managed Risk Medical Insurance Board (Board). The Board will determine the amount of each employer's fee, which will be collected by the Employment Development Department (EDD). Employers will be able to charge most employees up to 20% of the fee attributable to the employee. To facilitate this limit, the law also requires insurance companies to include a provision in their contracts with most employers restricting the amount the employer can charge employees for coverage. *Employers that provide minimum coverage through certain health plans, including HMOs, PPOs, and ERISA-governed plans, are eligible for a fee waiver.*

Insurance coverage provided through a Taft-Hartley plan or in connection with a collective bargaining agreement is deemed to satisfy the minimum standards, even if it actually does not.

Does the Law Limit Employee Contributions?

While employers who currently provide employees with medical coverage may believe that this new law does not affect them, this is not necessarily so. The law can be interpreted to impose the 20% cap on mandatory employee contributions to an employer's ERISA-governed health plans.

Privacy Protections

SB 2 prohibits employers from seeking information relating to an employee's (or his or her family members') income or eligibility for public programs (except for information the employer otherwise knows).

Legal and Legislative Challenges

There likely will be legal challenges to SB 2. There are strong arguments that the federal Employee Retirement Income Security Act (ERISA) preempts SB 2 and that SB 2 runs afoul of the California Constitution's 2/3rds majority vote required for new taxes. The California Chamber of Commerce already has filed a referendum with the California Attorney General, which, if successful, would allow voters to decide SB 2's fate.

ASSEMBLY BILL 227 & SENATE BILL 228 (Workers' Compensation Reform)

Though touted as a meaningful effort to overhaul a workers' compensation system that is driving employers from California, critics claim that AB 227 and SB 228 do not go far enough. The primary focus of these new laws is on the type and extent of medical treatment available for work-related injuries. The laws are projected to stave off the 12% increase in workers' compensation insurance premiums that had been forecasted for 2004, but they likely will not reduce the average 7% increases employers faced this year.

New Job Displacement Benefit

The laws repeal Labor Code § 139.5 (vocational rehabilitation benefits) and replace it with a new § 139.5 that provides a "job displacement benefit" in the form of educational vouchers, which

range from a minimum of $4,000 to a maximum of $10,000. The job displacement benefit is available if the work-related injury causes a permanent partial disability and the employee fails to return to work within 60 days of termination of temporary disability benefits.

The laws also add Labor Code § 4658.6, which excuses an employer from paying the job displacement benefit if all of the following conditions exist:

- Within 30 days of termination of temporary disability payments, the employer offers, and the employee rejects or fails to accept, modified work within the employee's medical restrictions that is guaranteed to last at least 12 months OR within 30 days of termination of temporary disability payments, the employer offers, and the employee rejects or fails to accept, "alternative work;"
- The employee is able to perform the essential functions of the job;
- The offered position is guaranteed to last 12 months;
- The total compensation for the job is at least 85% of the employee's compensation at the time of the injury; and
- the job is located within a "reasonable commuting distance" of the employee's residence at the time of the injury.

NOTE: FOLLOWING THE ABOVE STEPS TO AVOID PAYING THE JOB DISPLACEMENT BENEFIT WILL NOT NECESSARILY SATISFY AN EMPLOYER'S OBLIGATION TO REASONABLY ACCOMMODATE AN EMPLOYEE'S DISABILITY UNDER THE DISABILITY DISCRIMINATION LAWS. EMPLOYERS SHOULD CONSULT WITH THEIR EMPLOYMENT LAW COUNSEL BEFORE TERMINATING ANY SUCH EMPLOYEE.

IIPP Review

The laws also amend Labor Code § 6401.7, requiring an Injury and Illness Prevention Program (IIPP). The workers' compensation insurer must conduct a review of the employer's IIPP within four months of the commencement of the "initial insurance policy term." The review must determine whether the insured has implemented all the required components of the IIPP, evaluate their effectiveness, and determine whether the required training is being provided to employees, supervisors and upper management. Following the insurer's review, it must prepare a written report specifying its findings and any recommended changes.

ASSEMBLY BILL 196 (Prohibition of Transgender Discrimination)

California's already long list of protected categories will be longer in 2004. AB 196 amends the FEHA's definition of sex to include a person's "gender," as defined in § 422.76 of the Penal Code. By incorporating that definition, the FEHA now protects employees and applicants from discrimination because they look or act differently from what the employer considers to be traits "traditionally associated with the employee's sex at birth" (e.g., transsexuals and transvestites). The legislative history states that the law is designed to prohibit sexual stereotypes. Thus, an employee whose mannerisms, hairstyle, or vocal pitch are characterized as being too feminine or too masculine for his or her gender will now be protected under the FEHA. Recognizing the likely impact of this law on employer dress and grooming policies, the law also adds Section 12949 to the Government Code (FEHA), which provides that the law is not intended to affect the ability of an employer to require a reasonable dress code that is otherwise lawful, so long as the employer allows employees "to appear or dress consistently with the employee's gender identity."

ASSEMBLY BILL 205 (Expansion of Rights for Registered Domestic Partners)

Also known as the California Domestic Rights and Responsibilities Act of 2003, this law will take effect on January 1, 2005, and broadly provides that under California law, registered domestic partners have the same rights and obligations, as spouses. It also expands the rights and obligations of domestic partners and former domestic partners vis-à-vis a child of either of them so that they are treated the same as spouses. In addition, the law recognizes legal unions of the same sex validly formed in another jurisdiction that are substantially equivalent to domestic partnerships in California. It effectively amends all California laws that concern spouses (including all statutes, administrative regulations, government policies, common law, or any other provisions or sources of California law) and expands the application of those laws to registered domestic partners. For example, currently the CFRA requires an employer to allow an eligible employee to take time off to care for a spouse with a serious health condition. Starting in 2005, an employer also must allow the time off to an employee for care of an ill registered domestic partner.

As a result of poor drafting, an argument can be made that, under certain circumstances, a registered domestic partner could take up to 24 weeks of protected leave per year (12 weeks under the CFRA to care for a domestic partner and 12 weeks under the FMLA to care for a family

member). This certainly was not the intent of the Legislature, but employers will be at risk unless and until the Legislature or the courts clarify the law.

SENATE BILL 796 (Employee Wage and Hour Claims)

Currently, the Labor Code provides monetary penalties for many of the numerous potential technical violations of the Labor Code. However, an employee's ability to sue his or her employer for Labor Code violations is limited. SB 796, labeled the "Private Attorney's General Act of 2004," will allow employees and former employees to bring private lawsuits, with the ability to recover attorneys' fees, for any provision of the Labor Code that allows for a monetary penalty to be imposed by the Labor Commissioner.

Any amount recovered by an employee as a result of bringing such a claim will be distributed as follows: 50% to the state's general fund; 25% to the Agency for Education (to be available for expenditure upon appropriation by the Legislature); and 25% to the employee.

New Penalties

SB 796 also establishes civil monetary penalties for violations of the Labor Code where previously only misdemeanor criminal charges were possible. The new penalties are as follows:

- $500 per violation if, at the time of the alleged violation, the employer has no employees; and
- $100 per employee per pay period for initial violations up to a maximum of three years, and $200 per employee per pay period for each subsequent violation, up to a maximum of three years, if the employer has one or more employees.

Retroactivity

The general rule is that a new law will not be applied retroactively absent a clear expression of this intention by the Legislature. Notwithstanding the general rule, courts will allow a new law to be applied to *pending litigation* if the law is determined to be "procedural" in nature (meaning, it does not change the legal effect of past conduct). SB 796 does not contain a clear indication that the Legislature intended it to apply retroactively. However, employers can expect plaintiffs' lawyers to argue in existing cases that the new law, especially those portions providing for recovery of existing civil penalties, is not a substantive change, but rather merely is a procedural change and, therefore, that they should be allowed to amend the complaint to seek these additional penalties and attorneys' fees.

This law unquestionably will result in more wage and hour class actions and more claims in those cases.

SENATE BILL 478 (Time Off for Crime Victims and Family Members)

Current law requires California employers to provide unpaid time off to victims of sexual assault crimes and to parents whose children have been sexually assaulted to attend to matters relating to those crimes. SB 478 adds a new Section 230.2 to the Labor Code, which requires employers to grant unpaid time off to an employee who is (1) a victim of a violent felony, a serious felony or a felony involving theft or embezzlement (as defined in California's criminal laws), or (2) an immediate family member or registered domestic partner of a victim or child of a registered domestic partner who is a victim *to attend judicial proceedings related to the crime*.

An employee requesting time off must provide the employer with written notification of each scheduled proceeding, "unless advance notice is not feasible." If an employee claims that it was not feasible to provide advance notice, the employer is prohibited from taking any adverse action against the employee as long as the employee provides documentation "within a reasonable time after the absence."

The employee may use (but may not be required to use) accrued paid time off, including vacation time, sick time or compensatory time to cover the leave.

Privacy Protection

Employers are required to keep records regarding the reason for the employee's leave under this provision confidential.

No Discrimination/Retaliation

Employers may not discharge, discriminate or retaliate (or threaten any of the foregoing) against any employee who takes time off as provided under this law.

An employee who is denied a leave required by this law or is subjected to an adverse action for taking the time off has up to one year to file a complaint with the Division of Labor Standards Enforcement (DSLE). In addition, because of SB 796, employers can now expect private lawsuits for alleged violations of this law based on the penalty provisions of related Labor Code § 230.

ASSEMBLY BILL 223 (Attorneys' Fees for Employees in Wage/Hour Appeals)

Labor Code § 98.2 currently provides that a party who files an appeal in court to challenge a DLSE decision must pay the other party's attorneys' fees and costs if the appeal is not "successful." In *Smith v. Rae-Venter Law Group*, 29 Cal. 4th 345 (2002), the California Supreme Court ruled that an employee is not "successful" in such an appeal unless he or she obtains an award from the court that is *more favorable* (i.e., larger) than what the DLSE awarded. AB 223 overturns the *Smith* holding and provides that an employee appealing a DLSE ruling is deemed "successful" (and thus, must not pay the employer's attorney's fees and costs, and is entitled to his or her fees and costs) if the employee obtains ***any*** judgment in his or her favor from the court (even $1), even if the court award **is less than** what the DLSE had awarded.

This law likely will encourage employee appeals of DLSE rulings because, unless the employee recovers nothing, the only downside is a smaller award. On the other hand, the law clearly will deter employers from appealing an unfavorable DLSE ruling because the risk of paying the employee's attorneys' fees now is substantially greater. Even if the employer "succeeds" by reducing the amount of the award, the employer will be "unsuccessful" and will be liable for the employee's attorney's fees and costs (including those incurred by the DLSE if one if its attorneys handles the appeal for the employee), as long as the employee recovers anything.

SENATE BILL 179 (Responsibility for Contractor Compliance with Labor Laws)

Under current law, a company that obtains labor or services from an independent contractor is not liable for the contractor's violations of the Labor Code, unless it is a joint employer of the contractor's employees. SB 179, which was sponsored by organized labor, prohibits a company from entering into any contact for labor or services with a **"construction, farm labor, garment, janitorial, or security guard contractor,"** if the company knew or should have known that the contract did not include sufficient funds to ensure that the contractor complies with all the applicable local, state and federal employment laws and regulations (e.g., payment of legally required wages, workers' compensation insurance, etc.).

The law excludes from its coverage any person or company that has signed a collective bargaining agreement with a union covering the workers providing the labor or services.

Safe Harbor

SB 179 includes a "rebuttable presumption" that companies meeting specified requirements did not violate the law. However, to qualify for the rebuttable presumption protection, the contract must be a single written document containing **each** of the following provisions (and any others that may be adopted by the Labor Commissioner in the future):

- the name, address and telephone number of the company and the contractor that will provide the labor or services;
- a description of the labor or services to be provided, and the start and completion date of the contract;
- the contractor's state tax employer identification number;
- the contractor's workers' compensation insurance policy number, and the name, address and telephone number of the contractor's workers' compensation carrier;
- the vehicle identification number of each vehicle owned by the contractor that may be used for transportation in connection with the services provided, and the vehicle liability insurance policy number and name, address and telephone number of the insurance carrier covering the vehicle;
- the address of any housing provided by the contractor to the workers performing services;
- the total number of workers to be employed in connection with the contract, the total amount of wages to be paid, and the dates when those wages will be paid;
- the service fee, commission or other payment made to the contractor for providing the services;
- the total number of independent contractors that will be utilized by the contractor, along with the local, state and federal contractor license identification numbers for each of the independent contractors; and
- the signature of all parties to the contract, and the date the contract was signed.

A company that fails to obtain any of the required information from the contractor is presumed to have knowledge of that information.

The company must keep a copy of the written contract for at least four years after its termination.

Remedies for Violations

If an employee of the contractor is "injured" as a result of any violation of an employment law or regulation in connection with performing services under the contract, he or she may, if the safe harbor requirements are not met, does not apply, bring an action against the company that hired the contractor for the greater of actual damages or $250 per employee per violation for the initial violation and $1,000 per employee for each subsequent violation. The employee also may bring an action for an injunction (court order) requiring compliance with applicable employment laws. The law provides for recovery of attorneys' fees and costs by a successful employee of the contractor.

ASSEMBLY BILL 1536 (Service of DFEH Complaint by Private Counsel)

Under current law, an employee must file a complaint for violation of the FEHA with the Department of Fair Employment and Housing (DFEH), which in turn must send it to the employer within 45 days after the complaint was filed. AB 1536 will make it easier for employees to file FEHA complaints because the employee's own attorney now is authorized to serve the complaint (by personal service or certified mail), and the law extends the time for doing so to 60 days after the filing of the complaint.

PRE-DISPUTE ARBITRATION PROGRAMS SURVIVE, JUST BARELY

Many California employers have implemented pre-dispute binding arbitration programs. These programs provide an inexpensive and efficient means for resolving disputes. Like last year, the Legislature passed a measure (AB 1715) that would have severely limited the scope of such programs in California by prohibiting any agreement to arbitrate FEHA claims as a condition of employment or continued employment. Governor Davis vetoed the similar measure in 2002, but, in light of the recall election, it was unclear whether he would do so again this year. On the last possible day to act on the bill (six days after the recall election), Governor Davis vetoed it.

Employers may not take complete solace from this development, however. Arbitration programs continue to be challenged in the courts. The Ninth Circuit has decided two cases affecting whether and how employers may enter into pre-dispute arbitration agreements.

The Ninth Circuit's Luce, Forward Decision

In its 1998 ruling in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.), *cert. denied*, 199 S. Ct . 445 (1998), the Ninth Circuit held that pre-dispute arbitration agreements were not enforceable as to statutory discrimination claims. Thereafter, however, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the United States Supreme Court held that arbitration provisions in employment agreements are covered by and enforceable under the Federal Arbitration Act ("FAA"). That statute provides, that with some narrow exceptions, arbitration agreements "shall be valid, irrevocable, and enforceable." Some employers argued that the Supreme Court's ruling in *Circuit City* overruled the Ninth Circuit's earlier *Duffield* decision . A three-judge Ninth Circuit panel reached just this conclusion in *EEOC v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994 (9th Cir. 2002). But the Ninth Circuit granted rehearing *en banc* (i.e., by the full court).

In the *en banc* decision, 345 F.3d 742 (9th Cir. September 30, 2003), the Ninth Circuit held that *Duffield* had been incorrectly decided, and that pre-dispute arbitration agreements are enforceable, even as to statutory discrimination claims. But there is one important hitch: the Ninth Circuit sent back to the lower court for further consideration the question of whether refusing to hire or terminating an employee for his or her refusal to sign an arbitration agreement might amount to unlawful retaliation. Although this issue will be one to watch, we are hopeful that the courts will agree that it cannot be unlawful retaliation to insist on an agreement that is protected and enforceable under federal law.

The Ninth Circuit's Kyocera Decision

That arbitration agreements are *generally* enforceable does not mean that they are *invariably* enforceable. Courts examine them case by case to ensure that the agreement is properly drafted and not unconscionably one-sided. In *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. August 29, 2003), the Ninth Circuit *en banc* overruled a prior decision by a three-judge panel on the important issue of whether arbitration awards could be subjected to appellate review. The FAA states that a federal court may vacate an arbitration award only in four narrow circumstances:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators;

(3) where the arbitrators were guilty of misconduct or refusing to postpone the hearing, upon sufficient cause shown, or in refusing the hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

Some employers had included in their arbitration agreements a provision expanding the grounds under which a court can set aside an erroneous arbitration decision. In *Kyocera I* the Ninth Circuit enforced such a provision. But now, in *Kyocera II* the court overruled itself. The arbitration agreement at issue in *Kyocera* contained a provision that purported to require federal courts reviewing the arbitration award to vacate the award if it was "not supported by substantial evidence" or a result of "erroneous conclusions of law." The Court found that it was invalid, noting: "The parties are powerless to select a different standard of review [than that set out in the FAA]." *Id.* at 1003. Although the Court found that the standard of review provision was invalid, it declined to find the entire agreement unenforceable. Instead, it severed the standard of review provision and enforced the remainder of the agreement.

Because *Kyocera II* is consistent with decisions of California state courts refusing to enforce "designer" appellate review provisions, California employers should reconsider including such provisions in their agreements.

Additional Warning for California Employers

California employers must also be mindful of the "unconscionability" rules outlined by the California Supreme Court in *Armendariz v. Foundation Health Psychcare Servs*,, Inc., 24 Cal. 4th 83 (2000), which require that mandatory agreements to arbitrate employment disputes must: (1) provide for a neutral arbitrator; (2) not limit the employee's statutorily imposed remedies, such as punitive damages and attorney fees; (3) permit adequate discovery by the employee; (4) provide for a written decision from the arbitrator; (5) not require the employee to cover any cost that the employee would not be required to pay in court; and (6) be symmetrical in scope by providing in most cases that employer claims against the employee be arbitrable as well. Employers with arbitration programs should review their agreements to ensure that they are consistent with the latest legal twists and turns.

Though Governor-elect Schwarzenegger has promised a more business-friendly Sacramento, employers will want to monitor developments in this area over the coming year, both in the Legislature and the courts.

If you have any questions regarding any of these new laws, please contact the Paul Hastings attorney with whom you regularly speak, or contact any of the attorneys listed below:

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