Ridgemark Insurance Services

MARCH 2023 | VOLUME 4 | ISSUE 3

NEWSALERT

Employee Arbitration Agreements

Law Barring Mandatory Agreements Shot Down

A U.S. COURT of appeals has struck down a landmark California law that prohibits employers from requiring their workers to sign agreements to arbitrate any disputes arising from their employment.

The ruling clears the way for employers to continue using arbitration agreements without risking criminal liability that the law – AB 51 – calls for. The law took effect Jan. 1, 2020, but after a coalition of employers led by the California Chamber of Commerce sued to block the measure's implementation, a lower-court judge issued a temporary restraining order, halting enforcement until the matter could be resolved by the courts.

Arbitration agreements usually require both the employer and employee to submit any employment-related disputes to arbitration, rather than to the traditional court process. They are designed to reduce tension and save both parties money and time.

The Chamber said the Feb. 15, 2023 ruling by the Ninth U.S. Circuit Court of Appeals invalidating the law was a win for the state's employers. The business advocacy group had asserted that the law contradicted federal legislation and would result in increased litigation and higher costs for employers and workers alike.

The ruling by the Ninth Circuit upheld a lower court's preliminary injunction order and holding that AB 51 is preempted by the Federal Arbitration Act (FAA).

What did AB 51 require?

The law made it a criminal misdemeanor for an employer to require an existing employee or a job applicant to sign an arbitration agreement as a condition of employment.

However, due to a quirk in the law, even though an employer could be subject to criminal prosecution if it required employees to sign arbitration agreements, the contracts, if signed, would still be enforceable.

The law was written in this way to avoid conflicting with the FAA. But in the end, the court opined that AB 51 was preempted by the federal law after all.

The takeaway

The ruling paves the way for employers to continue using arbitration agreements with employees in the Golden State. That said, if you are using such agreements or plan to, you should consult with your legal counsel to ensure your agreement is up to date.

If the case is not appealed, the court's opinion will likely lead to the law being nullified.

But an appeal would be an uphill battle, legal observers say. "SCOTUS (the U.S. Supreme Court) has clearly said that state rules burdening the formation of arbitration agreements are at odds with the FAA," the law firm of Fisher Phillips wrote in a blog about the ruling.

One important note: The Ninth Circuit's decision does not affect the federal Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which gives employees the right to opt for arbitration agreements and class- or collective-action waivers if they are making sexual assault or sexual harassment claims. ❖

Ridgemark Insurance Services

Ridgemark Insurance Services

2130 Professional Drive, Ste 225,
Roseville, CA 95661

Phone: 916-306-1550
www.ridgemarkinsurance.com

If you would like to receive this newsletter electronically, e-mail us at:
info@ridgemarkinsurance.com

EEOC Steps Up Discrimination Enforcement

THE EQUAL Employment Opportunity Commission has signaled that it plans to step up enforcement of workplace discrimination for all protected classes, particularly at firms that engage in "systemic" discrimination.

Employee and job applicant discrimination complaints filed with the EEOC grew about 15% in 2022 from the year prior. The total for all class-based employment discrimination cases settled grew to nearly $600 million last year, nearly double from 2021.

While disability discrimination and sexual harassment cases account for a majority of EEOC actions, other types of discrimination complaints have been growing, in particular sex and religious discrimination.

In fact, nine out of the 10 highest settlements involving class-based employment claims in 2022 involved sex-bias claims, and the tenth case concerned a religious-discrimination claim related to a company's COVID-19 vaccination requirements.

Recent EEOC Actions

- After the EEOC investigated allegations that the Joe & the Juice restaurant chain failed to recruit, hire and promote females at its restaurants, the employer agreed to pay $715,000 and hire an employment monitor.
- The EEOC in December 2022 sued the Hometown IGA grocer for religious discrimination after it allegedly refused to hire a job applicant because of his Spiritualist Rastafarian dreadlocks hairstyle.
- After the EEOC investigated an allegation against Qualtool, Inc., a Florida tool manufacturing company, over allegations that it had refused to accept applications from or hire women who sought positions on the evening shift because of their gender, the employer agreed to pay a $50,000 settlement.

What you can do

To ensure your business doesn't get caught up in a discrimination complaint, make sure that you have appropriate personnel policies in place and that your managers and supervisors are trained to avoid taking actions that could appear discriminatory.

Familiarize yourself with Title VII of the Civil Rights Act of 1964, which makes it illegal for an employer to discriminate against a person based on race, color, religion, sex – including pregnancy, sexual orientation and gender identity – or national origin.

In an article by the Society of Human Resources Management, Peter Spanos, an attorney with Taylor English Duma LLP in Atlanta, recommended that employers:

- Adopt clear anti-harassment and anti-discrimination policies.
- Conduct periodic training for the workforce, management and HR personnel.
- Update mission statements that emphasize the company's commitment to a workplace free from harassment and discrimination.
- Host employee forums to explore whether workers feel that any discrimination or harassment is occurring.

Other steps you may want to consider include:

- Conducting pay-equity audits at regular intervals to assess whether your systemic compensation and benefits practices are susceptible to a disparate-treatment or disparate-impact claim.
- Consulting your counsel before making decisions that affect all or most of your staff in a given position, department or division, and if any of those groups pose any issues with employees' protected status.
- Analyzing your current employee benefits offerings and rules for them (employee benefits issues are a common theme in discrimination lawsuits). If you are considering changes that reduce or change benefits, discuss your plans first with your counsel. ❖

Digital License Plate Law Creates Privacy Headache

A NEW STATE law that allows for digital license plates to be installed on vehicles in California, may have created a privacy nightmare for employers.

The Motor Vehicle Digital Number Plates Act, which took effect Jan. 1, enables fleet and commercial vehicle owners to purchase and install digital license plates and soon-to-be-approved alternative devices for tags, stickers, tabs and registration codes that can track vehicles and make registration easier.

The new law has significant implications for fleet and commercial vehicle owners that want to track vehicles using a digital license plate or alternative GPS device, and they will need to follow the law's driver disclosure requirements to avoid fines.

What employers can and can't do

The law allows fleet and commercial vehicle owners to track vehicles through the digital license plate as long as it is "strictly necessary for the performance of the employee's duties." Employers may only monitor them during work hours.

If you choose to monitor employees, you are required to provide them with a notice, which under AB 984 must – at a minimum – include the following:

- A description of the activities that will be monitored.
- A description of the worker data that will be collected.
- A notification of whether the data gathered through monitoring will be used to make or inform any employment-related decisions, including disciplinary and termination decisions.
- A description of the vendors or other third parties, if any, to which information collected through monitoring will be disclosed or transferred.
- Names of personnel authorized to access the data.
- Dates, times and frequency of monitoring.
- Where the data will be stored and for how long.
- A notification of employees' rights to disable monitoring, including vehicle location technology, outside of work hours.

JAN California 2023

THE PLATES EXPLAINED

Currently Reviver Auto is the only firm currently approved to sell digital license plates in California.

There are two types of plates available: battery and hard-wired plates:

- Battery-powered plates go for $19.95 a month, or $215.40 for a four-year agreement.
- The hard-wired plates, which are only available to businesses, cost $24.95 a month.

Firms that violate the law can be subject to:

- Civil penalties of $250 for the initial violation, and
- $1,000 per employee for each subsequent violation. For subsequent violations, penalties will be calculated per employee, per violation and per day an employer monitors its workers without proper notice.

The takeaway

With potential civil penalties at stake, employers that want to use these plates should tread carefully, legal experts say.

If you want to use them, you should revise your employee handbook to include the required notice. Additionally, if you plan to monitor employees using these plates, ensure you get their signatures on the disclosure form.

Be aware that you may need to comply with other legal requirements to protect your employees' privacy, including how you handle, store and convey data from the plates. ❖

Credit: Reviver

Lawsuit Threat Grows; What to Watch Out For

ONE OF THE biggest lawsuit threats businesses face is from their own employees. Any company with staff – be that one or 500 – can be sued, and even if the case never goes to court, it can create a significant burden for any business.

While most cases are settled out of court, they can drag on for as long as two years. Even if they are dismissed as meritless, the employer is often out thousands of dollars as a result.

To best protect your business from these types of claims, and more, you need to learn how to identify potential claims, avoid practices that can expose you to litigation, and create formal policies for your personnel and management. To do that, you can tailor your focus on the current employee-initiated litigation trends:

Discrimination

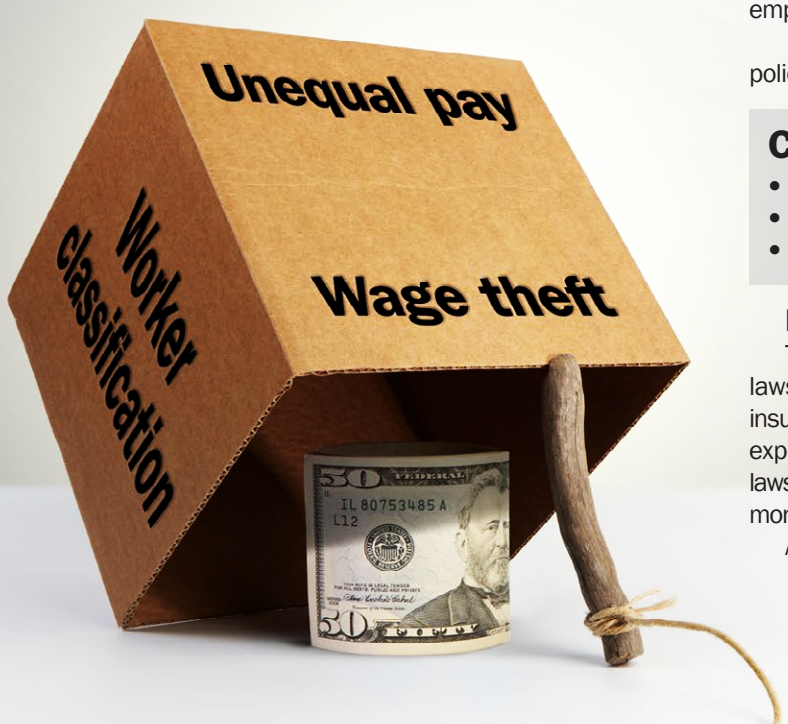
There are a number of protected classes in the U.S. workforce and, as we march forward, more are being added.

The key for employers is to have policies in place that treat everyone equally in the organization, ensure that certain groups of people are not kept from advancing in their jobs, and ensure a harassment-free workplace.

Unequal pay

Most of these actions are filed under the Federal Equal Pay Act or state laws, like the more stringent California Fair Pay Act.

The Golden State's Fair Pay Act bars employers from paying workers of one gender less than those of another for "substantially similar" work.



Violations can result in penalties for the wage differential, plus interest and liquidated damages.

To avoid liability, conduct a self-audit that looks at the following:

- Have you updated job descriptions, including established criteria for assigning values such as skill, education, seniority and responsibility?
- Are you consistent in your pay for similar jobs performed by individuals with similar skills, education, seniority and responsibility?
- Are your male and female employees given projects or clients with commission or bonus potential on a consistent basis?

Worker classification

As a California employer, you'll need to make sure you are complying with the landmark AB 5 legislation, that made the state's independent contractor laws the most stringent in the nation.

As a result of the law, which went into effect in 2020, California employers have a narrow set of rules to follow if they want to classify a worker as an independent contractor. Here's what you can do:

- If you are considering classifying anybody as an independent contractor, be sure of their status and ensure the arrangement complies with the law.
- Classify workers who perform similar tasks consistently.
- Conduct classification audits on a regular basis if you use many independent contractors.

Wage theft

These kinds of lawsuits typically involve accusations that the employee was not paid what they were due.

To avoid being sued, you should write clear and consistent policies and train managers and supervisors on them.

Common wage-theft allegations

- Requiring staff to work off the clock.
- Not providing meal and rest breaks as required by law.
- Failure to pay overtime.

EPLI coverage: A solid backstop

To protect yourself against the high costs of defending these lawsuits, you should have in place employment practices liability insurance. You might think you have ironclad personnel policies, but experts say that between 30% and 40% of employee-generated lawsuits against their employers are frivolous. Those lawsuits still cost money to defend, and your EPLI policy may pick up the tab.

An EPLI policy will cover you for:

- Legal costs, including costs of defending a lawsuit in court, whether your company wins or not.
- Judgments and settlements. ❖