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LABOR AND EMPLOYMENT

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1. California Imposes Obligations on Retail and Manufacturing Employers to Evaluate the Risk of Human Trafficking and Slavery in Its Product Supply Chain

On January 1, 2012, the California Transparency in Supply Chains Act of 2010 (the "Act") will go into effect. The Act is codified in California Civil Code § 1714.43. The legislation applies to every retail seller and manufacturer that is doing business in California and has annual worldwide gross receipts in excess of $100 million, even if the company is organized or domiciled outside of California. It is estimated that the Act will impact approximately 3,200 companies.

Companies that fall within the scope of the Act are required to provide consumers with information regarding their efforts to eradicate slavery and human trafficking from their supply chains and to educate consumers and employees on how to purchase goods produced by companies that responsibly manage their supply chains.

The Act does not require companies to eliminate slavery or human trafficking. The Act does, however, require that companies falling within its scope disclose on their websites:

- The actions, if any, they are taking to use third parties to verify the risks of slavery or human trafficking in their supply chains;
- Whether they require their direct suppliers to certify that the materials incorporated into the companies' products comply with laws regarding slavery and human trafficking in the countries in which they are doing business;
- Whether they conduct audits of their suppliers to evaluate compliance with

company standards on human trafficking and slavery;

- Whether they maintain accountability standards and procedures for employees or contractors that fail to meet corporate standards; and

- Whether they provide employees and managers who have direct responsibility for supply chain management with training on the mitigation of slavery and human trafficking risks.

The disclosures must be made available on the companies' website with a conspicuous link to the disclosure placed on the companies' homepage. Companies that do not have a website must provide written copies of the disclosures within 30 days of receiving a written request from a consumer.

The exclusive remedy for a violation of the Act is an action brought by the State Attorney General for injunctive relief. There is no private right of action. However, since the Act does not limit remedies for violating any other state or federal law, the California Unfair Competition Law and the Consumer Legal Remedies Act may allow competitors, consumers, or others to seek damages, injunctive relief, and attorney's fees for failure to comply with the Act or any misstatement in a disclosure made in response to the Act.

There are no affirmative obligations on companies to perform diligence regarding the existence of slavery or human trafficking in their supply chains. However, employers that fall within the scope of the Act may find it prudent to consider whether it is appropriate to adopt policies or procedures to mitigate the risk that slavery or human trafficking exists in their supply chains.

2. Class and Representative Action Arbitration Agreements and Waivers Remain an Open Issue in California after *AT&T Mobility LLC v. Concepcion*

In *Gentry v. Superior Court*, 42 Cal. 4th 443, 450 (2007) ("*Gentry*"), the California Supreme Court held that class arbitration waivers in employment agreements may not be enforced to preclude class arbitration to pursue overtime claims if the trial court determines that class arbitration would be a significantly more effective than individual arbitration at vindicating rights. This holding effectively terminated California employers' ability to preclude class and representative actions in wage and hour cases through the use of class and representative action arbitration waivers and arbitration agreements. In reaching its decision, the *Gentry* court relied heavily on the reasoning in *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005), where the California Supreme Court held that class action waivers in consumer arbitration agreements were unconscionable in certain circumstances (the "*Discover Bank*" rule).

In April 2011, the Supreme Court of the United States, in deciding *AT&T Mobility LLC v. Concepcion*, ____ U.S. ___ 131 S. Ct. 1740 (2011) ("*AT&T*"), held that the *Discover Bank* rule was preempted by the Federal Arbitration Act ("FAA"). The *AT&T* opinion was extremely broad in its reasoning and, from its language, it appeared that the

California Supreme Court's decision in *Gentry* would no longer be valid, thus paving the way for employers to implement arbitration agreements and class and representative action arbitration waivers that would, on a going forward basis, substantially reduce their exposure to these claims in California.

On July 12, 2011, however, the California Court of Appeal decided *Brown v. Ralphs Grocery Company*, 197 Cal.App.4th 489, 128 Cal.Rptr.3d 854 (2011)("*Brown*"), and – in a two to one decision – held that the *AT&T* holding does *not* apply to representative actions under the California Private Attorney General Act of 2004 ("PAGA"). The appeals court remanded the case so the trial court could apply the *Gentry* factors to determine whether the arbitration agreement and class action waivers were enforceable. Also, the appeals court stated it would not "have to determine whether, under *AT&T* – the rule in *Gentry* – concerning the invalidity of class action waivers in an employee-employer contract arbitration clause is preempted by the FAA." *Brown*, 128 Cal.Rptr.3d at 859.

Although it agreed with the majority that "*Gentry* remains the binding law of this state which we must follow," the dissent in *Brown* stated that "*Gentry*'s continuing vitality is in doubt after the decision in *AT&T,"* and flatly disagreed with the holding that the plaintiff could not waive a right to bring a representative action under PAGA, citing a string of U.S. Supreme Court decisions that found California statutory and decisional law that impedes contractual arbitration agreements to be preempted by the FAA. *Brown*, 128 Cal.Rptr.3d at 865. The dissent adopted the reasoning of a U.S. District Court decision in *Quevedo v Macy's Inc.*, 2011 WL 313502 (C.D. Cal 2011), which was issued approximately one month before *Brown,* and concluded that *AT&T* compelled the plaintiff's waiver of representative PAGA claims and the right to arbitrate class wage claims under the arbitration agreement and waiver at issue. *Id.* at 868.

Since *Brown* was decided, one U.S. District Court has refused to follow *Brown*'s holding on the PAGA issue (*Nelson v AT&T Mobility*, 2011 WL 3651153 (N.D. Cal. 2011)), and one has followed it (*Plows v Rockwell Collins, Inc.*, 2011 WL 3501872 (C.D. Cal. 2011)). On August 23, 2011, the defendant in *Brown* filed a Petition for Review with the California Supreme Court, so the prospect of further guidance is on the horizon. Until then, it remains uncertain whether or to what extent arbitration agreements and arbitration waivers will be effective in defending class and representative actions in California.

3. Court of Appeal Decision Gives California Employers More Flexibility to Make Pay Arrangements with Non-Exempt Employees

In *Arechiga v. Dolores Press, Inc.*, 192 Cal.App.4th 567, 572-73 (2011) ("*Arechiga*"), the California Court of Appeal upheld an explicit mutual oral wage agreement that an employee could work 11 hours a day, six days a week for a total of 66 hours per week, at a flat salary of $880.00. This agreement included payment for 26 hours of overtime each week. The employee argued that, because he was a non-exempt employee, Labor Code § 515 governed and his regular hourly rate should have been

1/40th of his weekly salary. The employer, and ultimately the appeals court, disagreed and the appeals court held that California's "explicit mutual wage agreement doctrine" governed. Under this doctrine, the parties may agree to a guaranteed fixed salary as long as the employer pays the employee for all overtime at least one and one-half times the employee's base rate of pay.

In reaching its decision, the appeals court rejected the interpretation set forth in the Enforcement Policies and Interpretation Manual of the Division of Labor Standards Enforcement ("Manual'), which disallowed explicit mutual wage agreements. The appeals court found that the Manual was not entitled to any deference because it was not adopted in compliance with the Administrative Procedures Act. *Arechiga*, 192 Cal.App.4th at 574.

The appeals court found an explicit mutual wage agreement is valid if the agreement specifies: (1) the days that the employee would work each week, (2) the number of hours the employee would work each day, (3) that the employee would be paid a guaranteed salary of a specific amount, (4) that the employee was told the basic hourly rate upon which the salary was based, (5) that the employee was told the salary covered both his regular and overtime hours, and (6) that it was entered into before the work was performed. *Arechiga*, 192 Cal.App.4th at 571.

The California Supreme Court has declined to review this case and, as such, explicit mutual wage agreements providing for the payment of a salary to a non-exempt employee are enforceable if they meet the six requirements set forth above.

4. California Non-Solicits and Overly Expansive Confidentiality Agreements Invite Employer Liability

In 2008, the California Supreme Court decided *Edwards v. Arthur Anderson LLP*, 44 Cal.4th 937 (2008) ("*Edwards*"), which signaled the death knell for customer non-solicits in California. The Supreme Court found such clauses to be void and contrary to the public policy of the State under Business & Professions Code ("B&P") § 16600 as contractual restraints on competition. The Supreme Court held that there were no exceptions to B&P § 16600, which renders void "every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind" other than the statutory exceptions set forth in connection with the sale or dissolution of corporations (§ 16601), partnerships (§ 16602), and limited liability corporations (§ 16602.5).

Although, in *Edwards,* the Supreme Court expressly did not address the applicability of the "so-called" trade secret exception to § 16600, one court, in dicta, expressed doubt about "the continued viability of the common law trade secret exception to covenants not to compete." *Dowell v. Biosense Webster Inc.*, 179 Cal.App.4th 564, 577 (2009).

Based on *Edwards*'s expansive interpretation of B&P § 16600, any covenant not to solicit may be found to be a violation of California public policy. Likewise, a

confidentiality agreement that purports to prohibit an employee from using company information described as confidential or a trade secret, but which does not meet the factual definition of "protectable confidential information" or a "trade secret," may be found to be an unlawful restraint of trade and a violation of California public policy.

Agreements that violate State public policy impose significant risks. An employer that terminates an employee because he or she has refused to sign an agreement that violates public policy will be liable for wrongful termination in violation of public policy, and the company could be subjected to tort damages, including punitive damages, among other remedies. *Richard D'SA v. Playhut, Inc.*, 85 Cal App. 4th 927 (2000). There is also potential liability if an employer does not hire an employee who refuses to sign an agreement that violates the public policy or if an employer interferes with an employee's subsequent employment by asserting that the employee has signed an agreement that violates California public policy.

Since an employer's legitimate trade secrets are protected pursuant to the Uniform Trade Secrets Act (California Civil Code § 3426, *et. seq*.) and under statutory and common law unfair competition law – irrespective of whether the employee has signed a non-solicitation covenant – there is no compelling legal benefit to have a California employee sign an agreement that violates the public policy of the State. Employers with California operations should review their current employment agreements, confidentiality agreements, and non-solicitation agreements to determine whether they violate public policy, and should consider their actions carefully before taking any adverse employment action against an employee based on the employee's refusal to sign an employment agreement containing a non-solicitation provision, or any agreement with an overly expansive "confidentiality" or "trade secrets" definition.

5. The Ninth Circuit Expands Application of Computer Fraud & Abuse Act

The Computer Fraud & Abuse Act ("CFAA"), 18 U.S. § 1030, is a criminal statute that allows an employer to assert civil claims if an employee accesses a computer without authorization or in excess of authorization, and then takes specific forbidden action, ranging from obtaining information to damaging a computer or computer data. *See* 18 U.S.C. § 1030(a)(1)-(7) (2004). The CFAA can be a valuable weapon in protecting trade secrets, particularly if it would be tactically advantageous to commence the action in federal court.

In *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009) ("*Brekka*"), the U.S. Court of Appeals for the Ninth Circuit held that an employee who emailed several business documents to his and his wife's personnel accounts while employed by LVRC Holdings did not access a computer "without authorization" and, therefore, did not violate the CFAA because he was permitted to use the computer. In *United States of America v. Nosal,* 642 F.3d 781, 783-85 (9th Cir. 2011) ("*Nosal*"), the district court, relying on *Brekka*, held that, because the conspirators had authority to obtain information from the database for a legitimate business purpose of their employer, they did not exceed their authorized access by doing so, even if they acted with fraudulent intent. The Ninth Circuit reversed and distinguished *Brekka* on the grounds

that, in *Brekka,* the employer did not affirmatively place limitations on the employee's permission to use the computer. *Nosal*, 642 F.3d at 786-88. In *Nosal*, however, the employer had instituted computer access restrictions. The Ninth Circuit found that, because of those restrictions, the employee had knowledge of the limitations the employer has placed on the use of the computer and, therefore, the employee's use exceeded "authorized access" and violated the CFAA. *Id*. This holding is consistent with decisions rendered by other circuits. *See United States v. John,* 597 F.3d 263 (6th Cir. 2010); *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577, 583-584 (1st Cir. 2001); and *United States v. Rodriguez*, 628 F.3d 1258, 1263 (11th Cir. 2010).

In light of these decisions, employers that wish to invoke the CFAA should implement written policies that clearly communicate to employees the purposes for which company computers can be used.