EMPLOYMENT LAW ARTICLES 2015

ARBITRATION: IF YOU CONTRACT FOR IT, YOU GET IT

© Mark C. Phillips
Partner, Kramer, deBoer & Keane, LLP

Perhaps this is a result of the Great Recession, but employment litigation is on the rise in California, and with it is a proportional rise in arbitration claims stemming from employment contracts. In a very recent case, the California Supreme Court felt the need to uphold an arbitration award because the Court thought that the evidence was so compelling that no alternative result was possible even though the arbitrator arguably acted improperly. The same result could happen to you too, so please take note.

The case is *Avery Richey v. Autonation*,[1] which the California Supreme Court decided on January 29, 2015. The facts are straightforward.

Mr. Richey worked as a sales manager for a Toyota dealership while moonlighting as the owner of a seafood restaurant. His supervisors became concerned that this second job was affecting his day job, and they counseled him on his performance and attendance. Shortly thereafter, Mr. Richey injured his back while at home and went on medical leave pursuant to the California Family Rights Act ("CFRA").[2]

The dealership had an employment manual which prohibited its workers from moonlighting while on an approved CFRA medical leave. Nonetheless, various co-workers reported to the dealership that they had spotted Mr. Richey working at his restaurant. The dealership considered such conduct a violation of the employment agreement and terminated him. He sued it for wrongful termination, and the trial court granted the dealership's motion to compel binding contractual arbitration.

Following an 11-day arbitration proceeding, the arbitrator issued an award in favor of the dealership. The trial court denied Mr. Richey's motion to vacate the arbitrator's award because of various procedural errors and granted the dealership's cross-motion to confirm the award. He appealed.

The California Court of Appeal reversed the trial court's decision. It ruled that an employer may not terminate an employee despite having an honest belief that he is violating corporate policies, if that belief eventually turns out to be mistaken. Both CFRA and the Federal Family Medical Leave Act of 1993 ("FMLA")[3] guarantee reinstatement of employment following completion of a medical leave, unless the employer proves why termination is justified. By allowing the dealership to prevail merely by demonstrating an honest belief that Mr. Richey had engaged in prohibited conduct, the arbitrator had improperly shifted the burden of proof to Mr. Richey to prove the dealership had acted in violation of CFRA and FMLA.

On further appeal, it was the Supreme Court's turn to reverse, which had the effect of reinstating the trial court's ruling:

> We granted review to determine whether, in the absence of an express agreement between the parties, courts may review and vacate (or correct) an arbitration award involving both an

[1] *Avery Richey v. Autonation*, 341 P.3d 438 (Cal. 2015).
[2] California Government Code §§ 12945.1 and 12945.2.
[3] 29 U.S.C. §§ 2601-2654.

> employee's unwaivable statutory rights and an employer's written policy forbidding outside employment while on leave. We conclude that although the arbitrator may have committed error in adopting a defense untested in our court, any error that may have occurred did not deprive the employee of an unwaivable statutory right because the arbitrator found he was dismissed for violating his employer's written policy prohibiting outside employment while he was on medical leave.[4]

The dealership's employment manual contained an arbitration clause which the Supreme Court felt obligated to uphold. This prompted the Court to state:

> California law favors alternative dispute resolution as a viable means of resolving legal conflicts. "Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration." [Citation.] Generally, courts cannot review arbitration awards for errors of fact or law, even when those errors appear on the face of the award or cause substantial injustice to the parties. [Citation.] This is true even where, as here, an arbitration agreement requires an arbitrator to rule on the basis of relevant law, rather than on principles of equity and justice. [Citation.] ["A provision requiring arbitrators to apply the law leaves open the possibility that they are empowered to apply it 'wrongly as well as rightly.' "]; . . .[5]

The Supreme Court found that the state and federal Arbitration Acts provide only limited grounds for judicial review of arbitration awards, e.g., if the award resulted from corruption, fraud or undue means. Arbitration awards may be corrected only for evident miscalculation or mistake, issuance in excess of the arbitrator's powers, or imperfection in the form. Otherwise, the agreed-up contractual arbitration and its award will be uphold.

Here, the issue was whether the arbitrator had acted in excess of his power by following the federal "honest belief" defense which is used mostly in federal matters, and not in California state matters. The Supreme Court sidestepped the issue of whether that defense violated California employment law. Instead, it determined that there was overwhelming evidence of wrongdoing by Mr. Richey which meant that the arbitration award was appropriate even if technically the arbitrator might have been wrong. Hence, any technical error by the arbitrator was not deemed prejudicial to Mr. Richey.

There were no dissenting opinions; the Supreme Court was united in its conclusion that the arbitration award must be uphold. Hence, when the plain meaning of an employment manual provides for arbitration and there is overwhelming evidence to support an arbitration award, this opinion shows that an error by the arbitrator will be overlooked because unless it clearly would have caused a different result. That seems like a very difficult matter to achieve.

[4] *Avery Richey v. Autonation*, supra 341 P.3d at 439.
[5] *Id*., 341 P.3d at 441-442.

WHAT EVERY CALIFORNIA EMPLOYER NEEDS TO KNOW ABOUT PREGNANCY LEAVE LAWS

© Michelle B. Baker
Partner, Kramer, deBoer & Keane, LLP

As an employer in California, it is important to understand the interaction of various laws in addressing an employee's need for pregnancy leave. This article provides an introduction to those laws.

In California, four laws provide protected leave to pregnant women or those who recently gave birth.

- Pregnancy Disability Leave Law ("PDLL"), codified as California Government Code Section 2945;
- Fair Employment and Housing Act ("FEHA"), codified as California Government Code Section 12940;
- California Family Rights Act ("CFRA"), codified as California Government Code Section 12945.2; and
- Federal Family and Medical Leave Act ("FMLA"), codified as 29 U.S.C. Section 2601 *et seq*.

There is no "one size fits all" answer to questions concerning employees' pregnancy leave. Employers must understand each law individually as well as how they relate to each other. Furthermore, an analysis of facts must be conducted on a case by case basis. Typical questions are: (1) how much leave is available? (2) when can leave be taken? (3) what reinstatement rights will apply?

Answers to these and similar questions depend on (1) the size of employer, (2) the employee's length of employment; (3) the number of hours worked by the employee; and (4) the type of leave required (disability or bonding). These questions are addressed via an analysis of the current laws applicable to pregnant women or those who recently gave birth.

Pregnancy Disability Leave Law

The Pregnancy Disability Leave Law ("PDLL") is discussed first because it applies to most employees and provides the most job protection. Leave under PDLL is taken in most cases as it is necessary in almost every pregnancy and is and taken before bonding leave. It applies to all employers who have at least five employees.[6] The employees are protected from their very first day of employment (meaning, there is no length of service requirement) and it applies to part time employees also.[7]

The right to leave is not automatic under PDLL. Up to four months of pregnancy disability leave is provided to a woman who is disabled by pregnancy, childbirth or related medical condition.[8] This means the employee must be disabled during leave (of note, its standard to allow six weeks of disability following normal vaginal delivery and eight weeks of disability following a cesarean section).

[6] 2 CCR. § 7291.7(h).
[7] 2 CCR. § 7291.7(a)(1) and (c).
[8] California Government Code § 12945(b)(2).

In addition to providing a leave of absence, PDLL provides that an employer must reasonably accommodate pregnancy related disabilities – such as eating between breaks, use of ergonomic chairs, transfer to a less strenuous position for the duration of the pregnancy, etc. Forcing a woman to take leave when she can be accommodated is a violation of law and should be resisted.

Providing an accommodation may also mean leave beyond four months – such may be reasonable and should be considered. The fact that California Government Code Section 12945(b)(2) says that employers cannot refuse to allow a female employee affected by pregnancy, childbirth, or a related medical condition. To take a leave on account of pregnancy for a reasonable period of time "not to exceed four months" must not be taken literally.

California Fair Employment and Housing Act

PDLL falls within the provisions of the California Fair Employment and Housing Act ("FEHA") because they are set forth within the same division of the Government Code. FEHA is the primary law that provides employees with protection from discrimination, retaliation and harassment in employment.

The recent case of *Sanchez v. Swissport, Inc.*[9] explains the interplay between FEHA's reasonable accommodation for disability and PDLL's requirement that an employer must allow a female employee disabled by pregnancy to take a leave for a reasonable period of time not to exceed four months and thereafter return to work. PDLL's four months of leave are required regardless of the undue hardship to the employer but, after the four months are used, FEHA still requires a reasonable accommodation for disability unless the extended leave would cause undue hardship on the employer. Thus an employee disabled by a high risk pregnancy may be entitled to more than PDLL's four months of leave.

With very few exceptions, employers must return women to their same job position after they take a pregnancy disability leave of four months or less. If an employee is not reinstated, the employer has the burden of proving that the employee would not otherwise have been employed in the same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking leave.[10] An exception may be in cases where leaving the job unfilled or utilizing a temporary employee would substantially undermine the employer's ability to operate the business safely and efficiently. Even if this can be shown, the employer may be obligated to reinstate the employee to a comparable position after a pregnancy disability leave.

There are some distinctions in an employee's reinstatement rights depending on whether or not the leave taken pursuant to PDLL is taken as a reasonable accommodation, or is taken pursuant to FMLA and CFRA. Issues arise when an employee is disabled for more than four months. At this junction, FMLA and CFRA should be considered.

When leave exceeds four months, leave is not governed by the same reinstatement rights. Instead reinstatement is governed the same as other temporarily disabled employees. At this point, an employer may rely on an undue hardship defense. This defense is not available under PDLL.

[9] *Sanchez v. Swissport*, 213 Cal.App.4th1331 (2013).
[10] 2 CCR. § 7291.9(c)(1)).

California Family Rights Act

After a determination of whether PDLL apples, one must consider the California Family Rights Act ("CFRA"). CFRA is used for bonding leave and applies in limited circumstances. It typically does not apply unless the employer has at least 50 employees within a 75 mile radius of the employee seeking to take leave. The employee must have worked for the employer for at least 12 months and must have worked at least 1,250 hours for the employer in the 12 months preceding her CFRA leave. The counting of 1,250 hours counts time before the pregnancy disability leave begins.[11] An employee is provided up to 12 work weeks leave in a 12 month period. It does not need to be taken in one continuous period of time.

CFRA should be considered if a woman continues to be disabled after exhausting her pregnancy disability leave. For example, a woman who qualifies for CFRA and has used all of her pregnancy disability leave but continues to be disabled after she gives birth may immediately begin her bonding leave. To maximize the amount of leave time available, a woman should use her pregnancy disability leave first and preserve her CFRA leave until the pregnancy disability leave is exhausted. PDLL and CFRA leave do not run concurrently.

CFRA leave provides for reinstatement to only "the same or a comparable position" upon employee's return from leave.[12] This means same or similar duties and pay located at the same or similar geographic location. There is an exception for certain highly compensated employees.[13] Notwithstanding the requirement of providing a comparable position upon the end of leave, an employer may refuse reinstatement if the following apply:

(a) The employee is a salaried employee who is among the highest paid 10 percent of the employees who are employed within 75 miles of the worksite where that employee is employed; and
(b) The refusal is necessary to prevent substantial and grievous economic injury to the operations of the employer; and
(c) The employer notifies the employee of the intent to refuse reinstatement at the time the employer determines the refusal is necessary under subparagraph b. above.

Federal Family and Medical Leave Act

The Federal Family and Medical Leave Act ("FMLA") is not as protective as the aforementioned state laws and does not provide more protection because it concerns an assessment of granting time for leave, reinstatement rights, and calculation of intermittent leave. The CFRA provides greater protection than FMLA. FMLA only applies when CFRA applies, i.e., there must be at least 50 employees.

Under FMLA, the employee must have worked at least 1,250 hours for the employer for at least 12 months preceding her FMLA leave, and at a location where the company employs 50 or more employees within 75 miles of the employee's work location. FMLA provides for 12 weeks of protective leave for serious health conditions related to pregnancy and for bonding leave. Time taken off work due to pregnancy complications can be counted against the 12 weeks of family and medical leave. FMLA rarely extends the

[11] California Government Code § 12945.2(a).
[12] Ibid.
[13] California Government Code § 12945.2(r).

leave time available. FMLA leave applies when CFRA applies and runs concurrently with both pregnancy disability leave and CFRA leaves.

An employee who takes pregnancy disability leave and is also covered by FMLA will utilize FMLA for her own serious health condition while utilizing pregnancy disability leave. If she has FMLA remaining after her disability ends, her remaining FMLA leave continues to run concurrently with her CFRA leave. Because the CFRA leave did not begin until pregnancy disability leave ended, she will likely have more CFRA time remaining than she has FMLA. While an employee's job is protected while she is out on leave, job reinstatement is not an absolute requirement under FMLA.

In conclusion, if an employee seeks leave as a result of or related to pregnancy, it is important that all the aforementioned laws as well at the employee handbook are consulted to determine the required covered leave. Please note that the employee enjoys greater protection under the state laws set forth in PDLL, FEHA and CFRA than under the FMLA.