THE BKCG BULLETIN

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BKCG
BURKHALTER KESSLER CLEMENT & GEORGE LLP

TIME OFF TO VOTE REQUIRED IN CALIFORNIA

If you are an employer, it is time to think about your employees and ensuring you are in compliance with California law that guarantees them, under certain circumstances, the right to paid, time-off to vote during the statewide November elections.

California Elections Code Section 14001 requires all employers allow their employees to vote in statewide elections. Since California's polling places are open from 7:00 AM to 8:00 PM, most employees should have time to vote before or after their scheduled work hours. However, if an employer has scheduled a shift for an employee that prevents the employee from getting to a polling place before or after the employee's scheduled work day, the employer is required to provide that employee paid leave so that the employee may vote in the statewide election. Under Section 14001, employees who fall within these parameters are entitled to take time off during their working day to vote and the employer is required to pay them for up to a maximum of two hours of that time needed. Under the statute, the employee is supposed to notify the employer at least two days prior to the election of the employee's need for paid-time off from work to vote. In addition, the employer is permitted to require that the employee take the time off at the beginning or the end of their scheduled work-day.

In addition, all California employers are required to post a notice that informs their employees of their rights under Election Code Section 14001. The notice must contain certain required information so we advise employers to visit the Secretary of State's website at www.sos.ca.gov/elections/time-vote-notices/ for versions of the notice that comply with Section 14001. The website has the notice available in several different languages in addition to English so make sure to post notices in all languages necessary to ensure your employees understand their legal rights. Employers are required to post the notices at least 10 days prior to the statewide election. The 10-day period before the upcoming November election starts during the weekend before Halloween, so it would be a safe practice for employers this year to make sure the notice is posted before the close of business, on October 28, 2016. Finally, an employer must post the notice in a "conspicuous" place to ensure the best possibility of employees seeing it.

The requirements of Section 14001 are fairly straightforward and with the extensive hours of operation for polling locations, the requirement for paid-time off is unlikely to impact many employers. However, if you as an employer anticipate any problems or have any questions regarding your obligations, we advise you to contact an attorney to discuss solutions as soon as possible as the elections will be here before you know it.

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Fighting Defamation Online: A New Path Forward

Do you believe someone is maliciously lying about you or your business on Yelp, Facebook, or a similar social media platform? The California Court of Appeals' recent decisions in *Hassell v. Bird* and *Kinda v. Carpenter* provide a roadmap for obtaining relief, including removing the offensive postings. *Hassell v. Bird* involved a dispute between an attorney and her former client. In 2012 Ava Bird hired attorney Dawn Hassell to work on a personal injury case. Bird, upset with Hassell's efforts, terminated the relationship. Bird later posted three untrue and extremely negative reviews about Hassell on Yelp under two different usernames. Hassell responded by suing Bird alleging defamation and obtained an injunction ordering Bird to remove the defamatory comments and an order to Yelp requiring the same. Bird was unresponsive, and Yelp refused comply, joining in the action as a party in order to challenge to ruling. The appellate court dismissed Yelp's challenge of the original judgment against Bird since Yelp, as an unaffected non-party, lacked standing.

However, the court found Yelp did have standing to challenge the court order to take down Bird's comments. On that point Yelp argued (1) it was improper to order a third party to enforce an injunction; (2) the order violated the First Amendment; and (3) the order violated section 230 of the federal Communications Decency Act.

On the first issue, the court affirmed that trial judges have authority to order a third party to enforce an injunction in some instances. California law allows injunctions to apply to classes of people through whom defendant may act, and Yelp qualified as such. On the First Amendment issue, the Court found Yelp more like a vehicle for speech than an actual speaker, viewing Yelp more like a neutral forum operator than a selective publisher or a distributor. This meant user-posted speech, like the speech at issue here, was likely not Yelp's speech and Yelp accordingly lacked a First Amendment interest. The Court still entertained the possibility Yelp might have a First Amendment interest, but found Yelp would still not prevail so long as the injunction only targeted defamatory speech, which falls outside the protection of the First Amendment. Finally, the Court decided whether the injunction order violated Section 230 of the Federal Communications Decency Act, which protects social networks from being treated as "publisher or speaker" of a defamatory statement and bars courts from imposing liability on these entitles for the speech of their users.

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THE RIGHT TIME FOR MEDIATION

Mediation is a non-binding settlement mechanism involving shuttle diplomacy by a neutral third party, usually a retired judge, in an effort to resolve pending or threatened litigation. Although it is completely voluntary, the timing of mediation greatly impacts the chances of settlement. This article is intended to help you, the client, determine when to mediate in order to maximize the chances of settlement.

Option A: Pre-Lawsuit & Pre-Discovery Mediations

Pre-litigation mediations can be very effective in certain circumstances. First, in a case where reputations of individuals or entities are at stake, or whenever a party fears publicity, there is a high likelihood that a confidential process like mediation will lead to early resolution. The possession of damaging information by a plaintiff, coupled with the unavoidable result of public dissemination of that information upon filing suit, often is sufficient to convince a defendant that resolution at mediation is the best option. Once the complaint is filed, these plaintiffs necessarily lose the leverage they may have had at the pre-suit stage.

Second, pre-lawsuit mediation can be very successful when a plaintiff or defendant may not have the wherewithal, either from a financial or emotional standpoint, to see the case through trial. This could be because of weaknesses in the claims or defenses, characteristics of either party, or fear of the discovery process. For example, a corporate defendant may want to avoid the disclosure of corporate documents, such as comparator information or financial disclosures.

Your counsel will weigh the benefits of early resolution and the risks of going forward. In employment cases, early mediation may be attractive to the employer counsel because typically the corporate defendant has within its control most, if not all, of the key documents and witnesses, whereas the plaintiff must rely much more heavily on discovery to uncover documents to support his case.

Option B: Mediating at Either the Close of Discovery or After Filing Dispositive Motions

Believing that they cannot negotiate without knowing all the facts, parties sometimes delay mediation until the close of discovery or until dispositive motions have been filed. While there is merit to this position, several things can harm the chances of settlement once the parties are heavily entrenched in litigation.

First, to reach this point, the litigants have often spent a great deal on attorney fees. Plaintiff's counsel will usually have invested a tremendous amount of time, energy and money to pursue the claims, and that factor invariably plays into the calculation of what his client is willing to accept as a full and final settlement. On the defense side, more often than not, money paid to defense counsel to reach this stage is an element the corporate defendant factors into the equation as well.

Second, if there are dispositive motions pending, such as a motion for summary judgment, defendant clients may prefer to "wait and see" – they have waited this long, why not go ahead and see if any claims survive the motion for summary judgment before putting any significant amount of money on the table. This is a risky proposition. If the plaintiff survives summary judgment, his or her newfound confidence in surviving summary judgment can negatively impact settlement efforts. Even with a questionable claim, a plaintiff who has survived summary judgment might prefer to "roll the dice" with a jury rather than settle for a reasonable amount.

Finally, by this stage in the litigation, the bad feelings between the parties often have been exacerbated by the litigation process itself. There is animosity, distrust, and anger on both sides that can create major obstacles to settlement. Moreover, the parties have now become deeply entrenched in their respective positions, thereby creating a real challenge for even the best mediator.

Option C: Mediation After "Early Limited Discovery"

More and more parties are agreeing to mediate after "early limited discovery." It can be very difficult to evaluate a case without conducting at least some discovery. From a defense perspective, it frequently makes sense to at least depose the plaintiff before assessing the desirability of mediation and the value of settlement.

Moreover, taking the plaintiff's deposition before engaging in mediation can serve other goals. One goal might simply be to demonstrate to the plaintiff that litigation will not be an easy road, or that his background can and will become an issue in the case if it goes to trial. Defense counsel rarely overlooks the potential impact of this strategy on the plaintiff's willingness to engage in reasonable settlement discussions.

Similarly, a plaintiff should consider deposing at least one key defense witness, and serving document requests, before mediation. Not only does this send the clear signal that the plaintiff is actively and thoroughly pursuing evidence to support the claims, but serves to nail down potentially damaging testimony as early in the case as possible.

Agreeing in advance to pursue mediation after clearly defined "early limited discovery" offers a good compromise in the mediation decision. It avoids the concern that decisions are being made blindly, and it helps counsel discuss mediation without the risk that the other side will view it as a sign of weakness. It is a process that reflects the parties' respective beliefs in the strength of the evidence by being confident enough to reveal key aspects of the case or defense without fear of the impact it will have on subsequent negotiations in mediation.

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New Labor Code Section Imposes Strict Penalties on Employers for Misuse of the E-Verify System

The federal "E-Verify" system allows participating employers to utilize the system to verify that employees and applicants are authorized to work in the United States. California Labor Code section 2814, which went into effect on January 1, 2016, expands the definition of an unlawful employment practice to include use of the E-Verify system to check the employment authorization status of an existing employee or an applicant who has not been offered employment.

With regard to applicants that are offered employment, Section 2814 does not prohibit the employer from using the E-Verify system. Nonetheless, section 2814 now requires the employer to furnish to the applicant any notification from the Social Security Administration or the Department of Homeland Security that indicates the information entered into the E-Verify system does not match the federal records.

Violation of these provisions under the Labor Code can result in civil penalties against the employer of up to $10,000 per violation. The steep penalties associated with this code section reflect the legislature's purpose of preventing discrimination based upon immigration status, perceived or otherwise; while at the same time, allowing employers to ensure that new employees are authorized to work in the United States. If your company uses the E-Verify system to verify an applicant's employment status, it is crucial to understand and abide by these new requirements.

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Recent Employment Law Developments in Los Angeles City and County

Like several other municipalities throughout the state and country that recently increased the minimum wage and took other steps to protect employees, the City of Los Angeles and the unincorporated cities within the County of Los Angeles recently followed suit. The City of Los Angeles passed an ordinance effective July 1, 2016 that increased the minimum wage to $10.50 per hour for employees who work at least two hours in a week within the geographical boundaries of the City (the minimum wage for the State of California is $10 per hour) and will gradually increase the minimum wage to $15 per hour by July 1, 2020.

On July 1, 2021 and annually thereafter, the ordinance will increase the minimum wage for employees in accordance with the Consumer Price Index for Wage Earners and Clerical Workers. The ordinance grants employers within the City with fewer than 25 employees an additional year to comply with the wage increase.

In addition to the minimum wage increase, the City's ordinance also requires Los Angeles employers to provide eligible employees with forty-eight hours of paid sick leave in a twelve month period.

The County of Los Angeles also passed an ordinance effective July 1, 2016 that requires employers located in unincorporated cities within the County to comply with the City's minimum wage increase, but also affords small employers with the same delayed compliance. In addition, the County's ordinance mandates that affected employers must display a specific poster in a conspicuous location at the employer's premises, which poster may be downloaded at this website: http://file.lacounty.gov/dca/cms1_245570.pdf. The County ordinance also requires covered employers to provide written notice of certain items to all employees concerning compensation at the time of hiring, which includes new items employers were not required to provide previously, such as company tip policies. Please be advised that the foregoing is merely an overview of the new City and County ordinances and is not a comprehensive review.

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Nursing Students Defeat Arbitration Clause

California courts rarely deny petitions to compel arbitration where the parties contractually agreed to arbitrate disputes. However, a recent California appellate decision demonstrates that there still are rare cases where an arbitration clause is unenforceable. In 2012 a traveling sales representative of The College Network (TCN), a company based in Indiana but operating nationwide, sold a distance learning Registered Nursing program to a group of nurses in California. The salesperson represented that the nurses could complete the requisite coursework through Indiana State University's (ISU) and California State University's online programs. Based on this representation plaintiffs enrolled in the program, signing a contract that included an arbitration clause and a forum selection clause in small print. During their first year of study they learned they would not be eligible for admission to ISU because ISU had suspended its program. Plaintiffs sued claiming misrepresentation. TCN moved to compel arbitration. The trial judge denied arbitration, finding the arbitration provision unconscionable and unenforceable.

The appellate court agreed the contract was procedurally unconscionable, substantively unconscionable, and not severable. On procedural unconscionability, the Court first found there was no negotiation or meaningful choice because this was a contract of adhesion. Next, the Court found discovery of the arbitration clause would be surprising to the plaintiffs. The arbitration clause was in small print on the backside of a two-page contract, and mixed with thirteen other provisions. It was not separately marked, and plaintiffs were not required to initial separately at that portion of the contract. The sales person had annotated and pointed out other portions of the contract to the plaintiffs, but did not point out the governing law section. The salesperson also rushed the plaintiffs through the signing process and gave them multiple assurances that everything would work for them. The contract was also signed on the front side of the contract, not the backside. Plaintiffs had little education and would not think to look for an arbitration clause on their own. Given all of these factors, the signing process was procedurally unconscionable.

The court also found two provisions of the contract substantively unconscionable. First, the forum selection clause was unconscionable because it required "young college-aged students" who resided in California and had been solicited by a traveling salesperson living in California to either travel to Indiana or to arbitrate via videoconference, which would put them at a disadvantage relative to TCN who would have the proceedings take place "in their backyard". It also allowed TCN to choose the arbitrator and prohibited plaintiffs from "unreasonably" withholding consent. These portions would give TCN an unfair advantage in any proceeding. The part of the contract allowing plaintiffs to bring small claims in California court did not save the arbitration clause because it nonetheless forced plaintiffs to choose between a disadvantageous arbitration proceeding or settling for less money. Second, the shortened limitation period also indicated substantively unconscionable because it reduced plaintiffs' time frame to bring suit from four years to one year, giving TCN an advantage.

Given the multiple unconscionable terms the court found unconscionability "permeated" the contract and could only be remedied through rewriting. Therefore, the unconscionable portions could not be severed, and the trial court properly voided the entire arbitration agreement. This case provides insight into the pitfalls for both sides to a contract that contains an arbitration clause, especially when one side is a consumer with little bargaining power. If you or your business has questions about an arbitration clause in a contract, or need assistance drafting one, call us here at BKCG.

Andrew Pepper-Anderson is a rising third year student at The George Washington University Law School clerking at BKCG this summer. He is primarily interested in intellectual property and cyber law. Please contact the firm at (949) 975-7500 or arpepper@law.gwu.edu if you have questions about any issue discussed in this article.

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The Court found that an order of removal based on an injunction against a service's user does not impose liability on the service. It is instead a method of enforcing imposition of liability on the user. Also, Section 230 explicitly provides that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section", and, as addressed in response to Yelp's first argument, California law allows issuance of an injunction order that encompasses a third party when necessary for enforcement.

Hassell's resolution provides clear steps a business can take to get defamatory Internet comments removed. *Kinda v. Carpenter* reveals the first evidentiary step one should take to follow Hassell's successful model. In most instances it will be difficult to identify who posted the allegedly defamatory comment, since most online comments are posted under relatively anonymous usernames. If this is the case, follow the evidentiary steps used in *Kinda v. Carpenter*. First, cross check the poster's name or username against your business records to see if anyone with that name was ever a customer. If so, reach out to the individual. If not, subpoena the Internet service provider (ISP) and request

information about the IP address and the account registered to the address. Once you have a good idea of who posted the comment, bring suit in California state court against that individual. Since just connecting a name to an ISP is likely insufficient to prove the individual in question posted the comment, other proof will likely be necessary unless the individual does not show up to court and you win on default judgment. It is important that you do not bring suit against the website hosting the comment, as it will likely have Section 230 immunity from being sued directly.

Once you have a ruling affirming the comment as defamatory, you will want to follow *Hassell* and request issuance of an injunction against the named party and a removal order to the third-party website hosting the comment (so long as that website is within California's jurisdictional reach). The removal order should be narrowly tailored so that it only covers removal of the speech deemed defamatory by the court. If non-defamatory speech is targeted the order will be deemed overbroad and in violation of the First Amendment.

If you or your business needs assistance dealing with an untrue negative review, BKCG can help. Call us and we can discuss how to best work together to get the defamatory remarks removed.

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New Federal Trade Secret Statute Requires Updates to Policies and Contracts

With the recent passage of the Defense of Trade Secrets Act (DTSA), businesses are welcoming the many benefits the statute brings, including federal jurisdiction, robust equitable relief, and the ability to recover compensatory damages, punitive damages, and attorneys' fees. However, many employers are overlooking a requirement embedded deep within the statute that requires revisions to existing confidentiality agreements and restrictive covenants.

Namely, employers are required to provide employees with notice that they are entitled to immunity if they disclose a trade secret for the purpose of reporting suspected illegal conduct. If employers fail to give notice in the manner required by the DTSA, they will not be able to recover punitive damages or attorneys' fees.

Employers have two options for providing employees with notice of the DTSA immunity. First, they can provide notice within their agreements. Second, employers can include in their agreements a "cross-reference to a policy document provided to the employee that sets forth the employer's reporting policy for a suspected violation of law."

The immunity notification requirements of the DTSA are less than straightforward. If employers intend to avail themselves of the new federal cause of action, they should

carefully analyze their agreements and policies to ensure compliance. Employers should work with counsel to review existing contracts and policies to ensure they meet the requirements of the DTSA. Doing so will enhance employer's ability to avail themselves of the protections and remedies set forth in this new federal statute.

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