THE BKCG BULLETIN

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BKCG

BURKHALTER KESSLER CLEMENT & GEORGE LLP

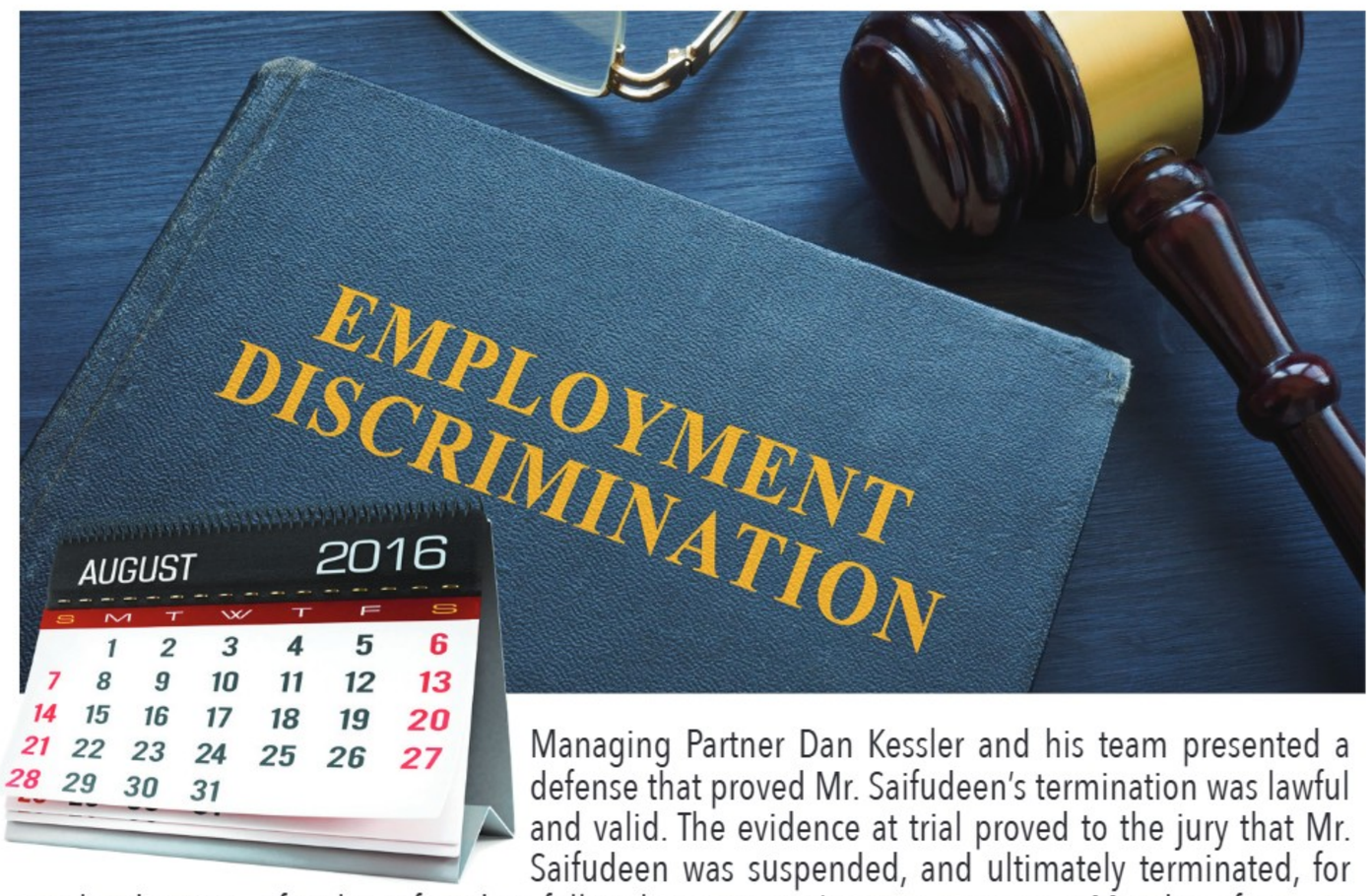
12-0 Verdict Rejects $7.2 Million Ask

Jury Unanimously Agrees With BKCG In Another Hard-Fought Victory For Ralphs

After an intense three-week jury trial in the Los Angeles Superior Court, BKCG delivered a big win for its client Ralphs Grocery Company over a familiar foe. The trial team of Dan Kessler, Michael Oberbeck, Monique Bartley and Jamie Coley defeated a six person team from the Shegerian law firm, who represented a former Ralphs employee named Mohamed Saifudeen alleging a potpourri of discrimination and harassment claims.

Mr. Saifudeen worked for Ralphs for more than 25 years, primarily as the head of dairy department at a Ralphs store in Woodland Hills. Mr. Saifudeen is a devout Muslim, and although department heads normally work on Saturdays, Ralphs accommodated his religion by giving him more than 90% of his Saturdays off work so that he could participate in activities at his mosque with his family. Nevertheless, Mr. Saifudeen complained to the jury that Ralphs had not done enough to accommodate his religious preferences.

During the three weeks of testimony, Mr. Saifudeen's lawyers tried to show the jury that Mr. Saifudeen was the victim of religious, racial and even age-based harassment and discrimination at the hands of every manager he had over the last ten years of his employment. Mr. Saifudeen admitted, however, that none of his managers ever used insulting or derogatory language about him, his religion, his race or his Sri Lankan national origin. Instead, his claims were based on perceived slights, like the time he did not meet the company president who visited the store, or an instance where pork sandwiches were served during a weekly store meeting.



Managing Partner Dan Kessler and his team presented a defense that proved Mr. Saifudeen's termination was lawful and valid. The evidence at trial proved to the jury that Mr. Saifudeen was suspended, and ultimately terminated, for insubordination, after he refused to follow his manager's instruction on a Monday afternoon in August 2016. That day, Mr. Saifudeen arrived at work over an hour late, failed to follow his manager's instruction to call the dairy clerk and have him come in early, and then left his shift without permission after being told to work overtime and finish his work.

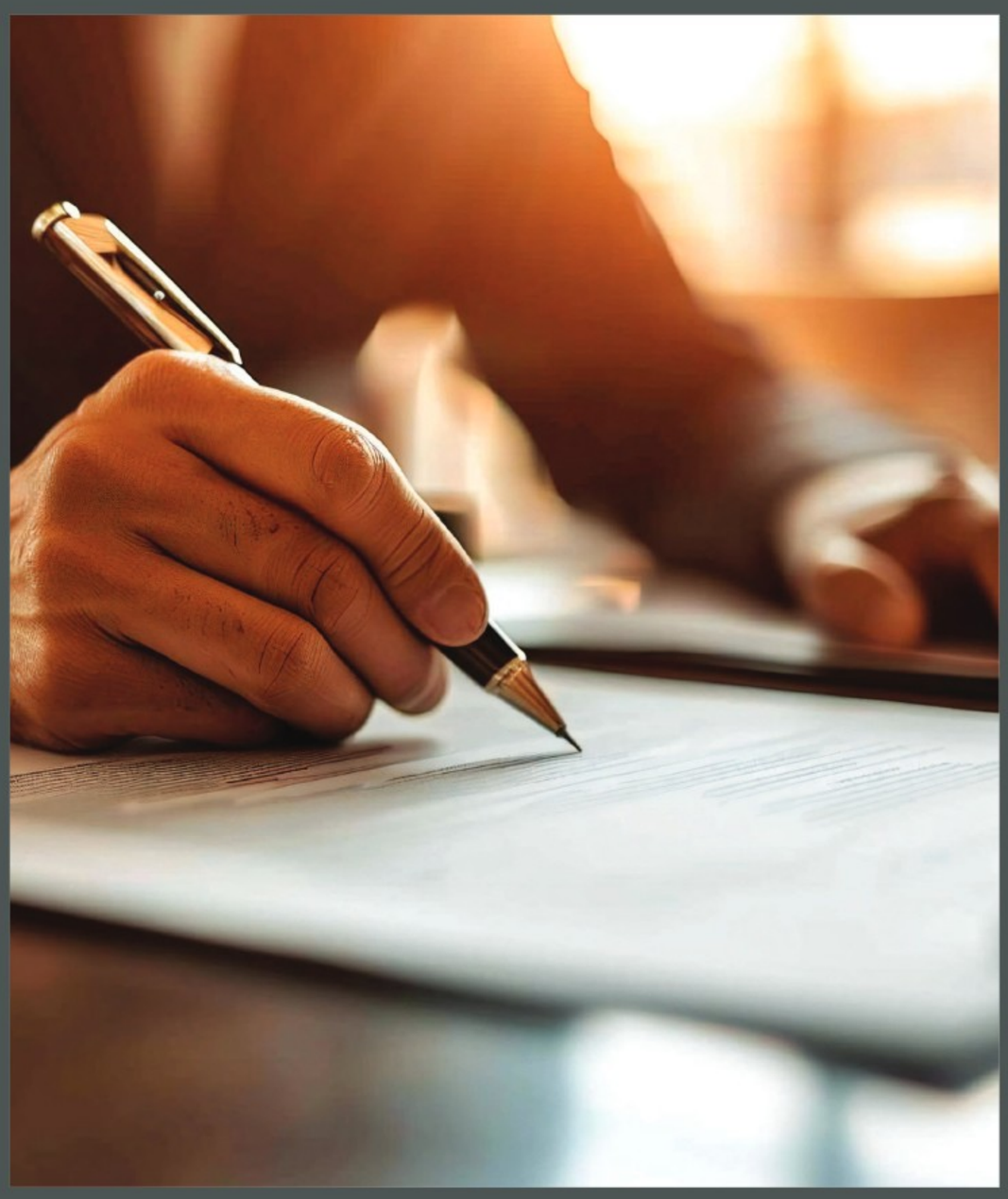
After suspending Mr. Saifudeen pending investigation, Ralphs still offered Mr. Saifudeen the chance to return to work with a temporary demotion, as this was now the third documented incident of insubordination in Mr. Saifudeen's career, and the prior two had both resulted in "last and final" warnings. Mr. Saifudeen refused the opportunities, and Ralphs lawfully terminated his employment. (continued on page5)

Congratulations To Daniel J. Kessler On His Admission To ABOTA

Managing Partner, Dan Kessler was voted in as a new member of the American Board of Trial Advocates (ABOTA) at the National Board Meeting in Banff, Canada, on Saturday, July 12, 2025. This is a prestigious and exclusive invitation only membership based on high personal character and honorable reputation. We are proud to now have two ABOTA lawyers at BKCG, as Dan joins Alton Burkhalter, who has been a member since 2019. Dan's election builds on BKCG's tradition and commitment to trial advocacy at the highest level.

In This Issue

Three Costly Mistakes Our Clients Make



As a transactional business lawyer, perhaps my main goal is to keep my clients out of trouble, whether it be the risk of having a lawsuit filed against them, needing to file a lawsuit, wasting money on a poorly drafted contract, or having to deal with stressful uncertainty.

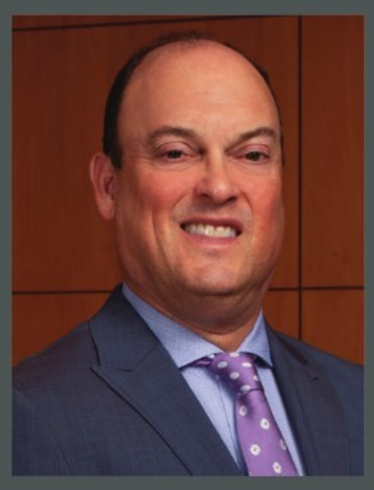
Based upon my experiences with hundreds of business clients, here are 3 costly errors that many of our clients have made. I hope you will learn from this list and avoid making the same avoidable mistakes.

Skimping on Professional HR and Employment Advice. It is often said, with some degree of accuracy, that a company's greatest asset is its people. Unfortunately, it is also true that employees can also be one of the largest sources of a company's liabilities, too. It is well known that California's employment laws are, together with Massachusetts', probably the most pro-employee in the country. The rules on hiring, firing, paying and disciplining employees are numerous, complicated and ever-changing; however, many businesses fall into the trap of thinking that, once they have been set up to hire employees, retained a payroll company and issued their employees with an initial employee handbook, they can leave things on autopilot and concentrate on other things. Regrettably, such indifference often leads to disaster, whether it be hiring employees who are incompetent at their jobs, poor employee morale, threats of lawsuits from former or current employees or, equally bad, audits or investigations by governmental agencies such as the Employment Development Department, the Franchise Tax Board or the Internal Revenue Service. Employer ignorance on issues such as proper calculation of overtime pay, misclassification of non-exempt employees as exempt, changes in the law, improperly hiring individuals as independent contractors, failing to properly reimburse employees for business expenses and mishandling employee terminations – among other mishaps – have probably cost our clients millions of dollars over the years. And why? Often, because our clients did not have an experienced, qualified HR manager on staff, or thought that hiring an outsourced HR consultancy firm (or BKCG) to assist them with employment law matters was an extravagant or unnecessary expense. Trust me, getting competent, ongoing employment law advice is way, way cheaper than the cost of defending and settling an employment claim or government agency investigation.

Failing to Calendar Important Contract Deadlines. On many occasions, I have had the unfortunate experience of having to tell clients that they were stuck with a vendor agreement they no longer wanted or needed, or could not extend the term of their premises lease, or buy the building they were leasing. And why? All because, when they signed the agreement in question, figuratively speaking, they threw it in a drawer, forgot all about it, and failed to calendar the critical deadlines in the agreement. Deadlines such as the last date to give notice of non-renewal of a contract with an automatic renewal clause, or the last day to exercise an option to extend a lease term, or an option to purchase a property. Once those deadlines have passed, the rights associated with them are typically gone forever and the other contracting party has no obligation to honor them, so you might be stuck with that overpriced employee uniform contract for 3 more years, or lose the opportunity to extend your premises lease at a significantly below market rent, or buy the building you've been in for 5 years at far below its current value. So, when those contract negotiations are over and the agreement has been signed, take the time to go through the contract, look at the termination clause to see if and when the agreement auto renews, or what the deadline to exercise any option is, together with any other time-sensitive provisions in the agreement, and calendar those important dates, **preferably with a pre-deadline reminder a week to two earlier, too**. It will be time well-spent.

Reviewing Contracts Without Involving a Lawyer. Lawyers are expensive, I get it. And I know the temptation is great, sometimes, to try and save a few bucks by not using an expensive lawyer to look over that - seemingly - "straightforward, boilerplate" contract. But often, that can end up being a false economy, which results in a client ultimately paying out far more money to deal with the consequences of that unreviewed contract than the initial attorney cost saving. Why might that be the case? Well, there are numerous reasons. For one thing, clients are often unaware of things that *aren't* in the agreement which should be, such as a mutual indemnification clause, or a provision that gives *them* the right to terminate the agreement if certain conditions aren't met, or for any reason at all, whereas the agreement as written only provides that right to *the other party*. Or, the agreement contains a provision which appears, to a layperson, to be innocuous, but which absolutely is not! As an example, I have recently seen an increasing number of contracts that contain a provision requiring our clients to waive a statutory protection under the California workers' compensation law. The result of this seemingly harmless waiver is that the client could end up having to defend and provide indemnity to the other party for a potentially catastrophic personal injury lawsuit brought by the client's own employee against the other party. The problem is that, for various reasons related to the workers' compensation system, *the client's insurance will not cover this type of potentially multi-million dollar claim*, which could therefore bankrupt the company.

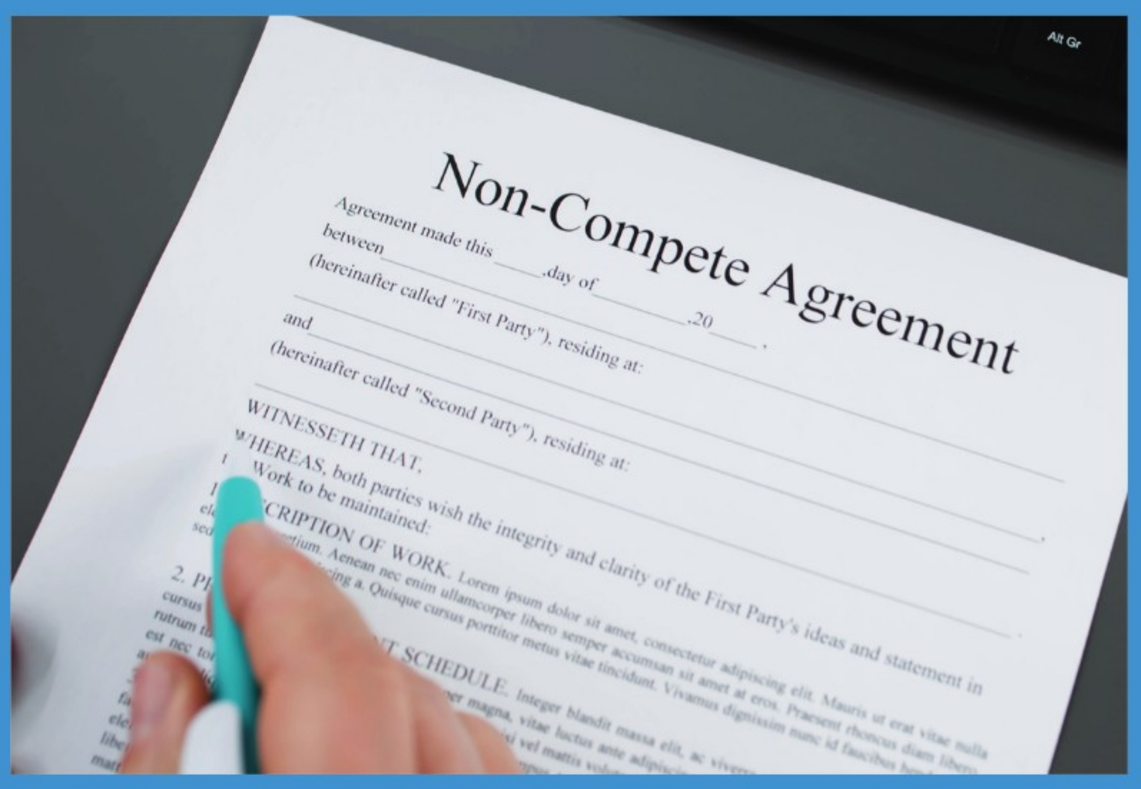
In addition, since businesses generally enter into agreements because of their anticipated benefits, clients tend to be focused solely on the potential upside of the contract, and not on what will happen if things don't go to plan. Consequently, clients reviewing their own contracts often fail to notice that the contract does not adequately address the remedies that are available if the other party does not hold up its end of the bargain. For example, the agreement might contain a liquidated damages clause which limits the client's potential damages to a fraction of the client's actual loss; or the agreement does not articulate clear and ambiguous grounds which permit the client to terminate the contract; or the client discovers that it has agreed to have any contractual disputes resolved exclusively by binding arbitration in New York, where the other party is based (even though the underlying transaction took place in California), and decided by a panel of three arbitrators, who will together cost a total of $2,500 per hour, half of which the client has to pay, as well as his or her own lawyer.



The moral of this tale is that speaking, reading and writing fluent English does *not* make the average business owner qualified to act as his or her own contract lawyer! Once that unreviewed agreement is signed, very often all I can do (on the client's dime) is to explain to the client just how powerless he or she is to terminate the agreement, or to be adequately compensated, despite the serious transgressions of the other contracting party. Don't let this happen to you!

Please contact Greg Clement at gclement@bkcglaw.com or call (949) 975-7586 if you have any questions about any issue discussed in this article, or any contractual or corporate law matter.

California Doubles Down On Non-Compete Bans



California has long taken a very aggressive stance against non-compete agreements, but recent legislative changes have pushed that prohibition even further. With amendments to the Business and Professions Code which took effect on January 1, 2024, employers now face new compliance obligations, expanded employee protections, and greater litigation risk. These changes reinforce California's position as the most restrictive jurisdiction in the country on non-compete agreements.

Under California law, any contract that restrains an individual from engaging in a lawful profession, trade, or business is void, except in limited cases involving the sale of a business. While this principle has been part of California law for decades, enforcement was historically inconsistent, especially when agreements were executed in other states, or were narrowly tailored. The new statutes close those gaps.

Business and Professions Code Section 16600.5 declares that any non-compete agreement is void in California, even if the agreement was signed outside the state or with an out-of-state employer. Employers are prohibited not only from enforcing such agreements but even from attempting to do so. Critically, this new Code Section also creates a private right of action for employees, allowing them to sue for injunctive relief, actual damages, and attorney's fees. This represents a significant shift from prior law.

Business and Professions Code Section 16600 et seq. also adds new compliance requirements for California employers. It codifies California case law confirming that non-compete agreements are void "no matter how narrowly tailored," and it imposes a new notice obligation on employers. By February 14, 2024, all employers were required to notify both current employees and former employees (employed after January 1, 2022) that any non-compete or similar restriction in their agreements is void. Failure to provide this notice is considered an unfair business practice under the Unfair Competition Law, opening the door to UCL claims, potential class actions, and Private Attorney General Act derivative actions.

While Business and Professions Code Section16600 et seq. explicitly targets non-compete agreements, related restrictions such as non-solicitation and non-servicing clauses are also under increasing scrutiny. Recent court decisions have found that these provisions, when drafted broadly, can function as de facto non-competes and are therefore void. Confidentiality and trade secret agreements remain enforceable, but only when carefully drafted to protect legitimate proprietary information rather than to restrain competition. Employers should ensure their confidentiality clauses are narrowly tailored and clearly distinguish between protected trade secrets and general skills or experience.

California's new non-compete laws reflect the state's unwavering commitment to employee mobility and open competition. For employers, these changes demand proactive compliance, not passive observation. Reviewing existing agreements and ensuring clear, lawful drafting is no longer optional–it's essential to avoid being the next test case in California's expanding non-compete enforcement landscape.

Please contact Ethan Robinson at erobinson@bkcglaw.com or call (949) 975-7500 if you have any questions about any issue discussed in this article, or any other related matter.

California Supreme Court Softens The Blow On Late Arbitration Payments

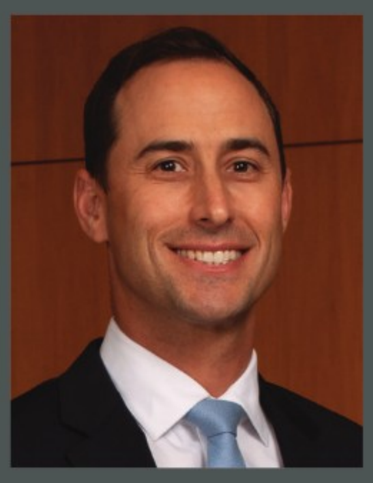
Through its recent decision in *Hohenshelt v. Superior Court of Los Angeles County* ("Hohenshelt"), the California Supreme Court has upended the long-held understanding that a party's failure to pay arbitration fees and costs on time automatically results in a waiver of its right to arbitrate.

Until Hohenshelt, the rule was rigid: if a party missed an arbitration payment deadline, even by a day or two, whether intentional or not, that party was deemed to have forfeited its right to arbitrate. Plaintiffs who preferred a courtroom over arbitration often capitalized on this, using even minor administrative payment lapses as a way to escape otherwise enforceable arbitration agreements.

No longer. The California Supreme Court's decision makes clear that a delayed payment that is excusable, unintentional, or otherwise understandable may not strip a party of its right to arbitrate.

Before Hohenshelt, courts routinely held that missing an arbitration payment deadline resulted in waiver under California Code of Civil Procedure section 1281.98. That statute requires the drafting party, typically the employer in employment cases, to pay certain arbitration fees and costs in employment disputes. Significantly, failure to pay within 30 days of the due date constituted a "material breach," waiving the party's ability to compel "the employee or consumer to proceed with that arbitration." Code Civ. Proc., § 1281.98.

In Hohenshelt, the plaintiff sued his former employer for various claims under the Fair Employment and Housing Act (FEHA). The Los Angeles Superior Court granted the employer's motion to stay the lawsuit and compel arbitration. When the employer allegedly failed to timely pay the arbitration fees and costs, the plaintiff moved to lift the stay and return the case to court. The Superior Court denied that motion, but the Court of Appeal reversed. The issue eventually reached the California Supreme Court, which was asked to determine whether section 1281.98 was preempted by the Federal Arbitration Act (FAA). The Supreme Court held that the FAA does not preempt section 1281.98. Importantly, the Court explained that the statute's purpose is to deter strategic nonpayment and not to punish good-faith mistakes.



For California employers, Hohenshelt provides a bit of breathing room. Going forward, courts will look beyond the threshold issue of whether the payment was late or not and instead consider whether the delay was an honest oversight or a calculated attempt to avoid arbitration.
That said, prevention remains the best policy. Set calendar reminders, confirm due dates, and make payments well in advance to steer clear of this issue entirely. But if a payment is delayed for good reason, Hohenshelt ensures that an employer's right to arbitrate may still be preserved.

Please contact Joshua Malter at jmalter@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

Browsewrap, Clickwrap Or Scrollwrap – Which Form Of Online Contract Is Best?

As e-commerce continues to dominate more of the economy, online contracts that seek to govern internet transactions are critically important. Without an enforceable agreement governing online transactions, a business operating online may be sued in a class action, forced to litigate in inconvenient, distant locations, and/or subjected to unlimited liability, among other problematic consequences. As such, an online business should take appropriate steps to ensure its terms and conditions governing the online transaction are enforceable.

Because no one physically signs a contract in connection with an internet transaction, online businesses generally use one of three broad types of online agreements: (1) browsewrap agreements, (2) clickwrap agreements, and (3) scrollwrap agreements. As detailed below, while courts may enforce all three of these types of online agreements depending on the specific circumstances, certain types of online agreements are clearly better than others and provide greater assurances of enforcement.

The type of online agreement that a court is least likely to enforce is a browsewrap agreement, which reflects language on the website that states something to the effect of "by visiting this website you agree to Acme Co.'s terms of service." The primary feature of a browsewrap agreement is that it does not require a user to manifest her agreement to the terms and conditions expressly–the user need not sign a document or click on an 'accept' or 'I agree' button." Rather, a party provides her assent to the online business' governing agreement merely by using the website. Because a browsewrap agreement is easy to employ from a technological standpoint, these types of agreements are common. Unfortunately, courts tend to view browsewrap agreements skeptically because it is difficult to confirm that the user actually manifested her assent to the website's governing agreement (or even saw them). As such, a court will only enforce a browsewrap agreement if it concludes that the website put a reasonably prudent user on inquiry notice of the agreement's governing terms. This means that the language on the site that advises a user that her use of the site signifies her assent to the terms of service, as well as the terms of service themselves, must be conspicuous and easy for the user to navigate. As such, a court would be more likely to enforce a browsewrap agreement if the language advising the user that visiting the website signifies her consent to the company's terms of service is conspicuous (i.e., in all-caps, bolded font in a color that differs from the surrounding website), and the online agreement itself was easily found on the website, ideally via a clearly identified hyperlink. Even though browsewrap agreements are disfavored under the law, courts may still enforce them if the website satisfies the foregoing requirements.

Second, online businesses can use clickwrap agreements, which is a type of online agreement that requires the user to check a box on the webpage adjacent to language akin to "I agree to the terms of service", with the words "terms of service" hyperlinked to the company's online contract. Clickwrap agreements are increasingly common, and courts all over the country routinely enforce them. A court will generally enforce a clickwrap agreement if the website provides reasonably conspicuous notice of the terms to which the user will be bound; and the user takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms. Unless the website includes confusing language and/or the look and feel of the website would prevent a typical user from understanding the significance of clicking the box, courts generally enforce an online business' terms of service presented though clickwrap agreements.

Finally, the "gold standard" for online contracts are known as scrollwrap agreements, which require the user to actually scroll through the online businesses' governing terms before the website even permits the user to click a box representing her agreement to be bound to those terms. Because scrollwrap agreements ensure that the website provided the user with the governing agreement, as well as confirm the user took affirmative action to express her intent to be bound, courts throughout the country almost always enforce scrollwrap agreements. If it is critical that a court would enforce your internet company's online terms and conditions, then a scrollwrap agreement is the most effective type of online agreement that your business could employ.

If you have any questions concerning whether your company's online agreement is enforceable or want advice as to how better ensure your online agreement will be enforced if challenged, please contact BKCG.

Please contact Joshua Waldman at jwaldman@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

Does Your Onboarding Paperwork For New Employees Comply With Labor Code Section 2810.5?

It is a good idea for employers to routinely review their onboarding documents used when new hires join their business. It is easy to trust that you have compliant documents and that your business has ticked all of the required boxes but, as we all know, California can be a particularly tough place to be an employer so taking the time for a yearly audit of documents simply makes sense.

To this end, one document that may be easy to miss is one required by Labor Code Section 2810.5. This statute requires that employers provide their new employees "at the time of hiring" with, among other things, a Notice that details the employee's rates of pay including "whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime", the name of the legal name of the employer if it is using a "dba", and details surrounding the employer's provider for workers' compensation insurance.

There are other required disclosures but, fortunately, employers are not left on their own to figure out if all the necessary disclosures have been made. On the website for the California Department of Industrial Relations, a PDF of a compliant Notice form is available (https://www.dir.ca.gov/dlse/lc_2810.5_notice.pdf). That being said, please remember to reach out to legal counsel on a routine basis to ensure that this Notice form and other employment forms and documents comply with California's ever-changing laws.

Please contact Ros Lockwood at rlockwood@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

New Changes To The Song-Beverly Act Give Manufacturers The Option To Streamline Discovery And Facilitate Faster Settlements

In line with California's prioritization of consumers, the Song-Beverly Consumer Warranty Act aims to protect buyers and lessees of defective new motor vehicles subject to the manufacturer's express warranty. Since its initial enactment nearly 55 years ago, there have been several iterations of Song-Beverly as the legislature continually amends the Act. The most recent amendment which went into effect this year streamlines discovery and facilitates faster settlements–likely a response to the overwhelming amount of lemon law cases clogging the dockets. Significantly, vehicle manufacturers may opt-in and choose to be governed by the new law or they may elect to adhere to the prior established law governing restitution and vehicle replacement. If a manufacturer opts in, then it will be obligated to adhere to Section 871.26 of California Code of Civil Procedure.

Section 871.26 requires that 60 days after the defendant files an answer or other responsive pleading, the parties are required to complete a mutual exchange of initial disclosures. Furthermore, the parties must schedule a mediation within 90 days of defendant's answer and the mediation must take place within 150 days of defendant's answer filing. Additionally, each party, within 120 days of the filing of the responsive pleading, is entitled to take a deposition not exceeding two hours of plaintiff and the person most qualified to testify on behalf of the defendant.

Defendant's initial disclosures must include, among other things, the warranty transaction history for the vehicle, published technical service bulletins for the same make, model, year reasonably related to the alleged nonconformities, all call recordings of pre-suit communications between defendant and consumer, and all communications between the manufacturer or dealership and the owner or lessee of the vehicle.

Plaintiff's initial disclosures must include, but are not limited to, repair orders from third-party repair facilities, mileage of the vehicle as of the date of the disclosure, identities of the primary drivers of the vehicle, a statement as to whether the vehicle is primarily used for a business purpose and whether there are more than five vehicles registered to the business, whether plaintiff is still in possession of the vehicle, whether the vehicle has undergone any after-market modifications, and the address of the vehicle's location. This information is useful to evaluate the potential of a dispositive motion.

Where the defendant fails to comply with the mandatory initial disclosures or mediation or fails to properly participate in a requested deposition, the defense attorney will be sanctioned $2,500 for each violation. In cases where the violations are at the hands of plaintiff, the plaintiff's attorney will be sanctioned $1,500 for each violation.

As stated earlier, a manufacturer may opt into the new procedures, otherwise pre-amendment procedures will apply. If a manufacturer elects to opt in, then the manufacturer is bound by the new procedures for a period of five years, and at the end of that time period, may elect to opt-in again or be governed by older status-quo law.

While the new law will have the most significant impact on vehicle manufacturers that opt-in, dealerships will also be impacted as they are often named as a defendant in litigation. In instances where a consumer initiates litigation against a vehicle manufacturer who has opted in to the new law, dealership defendants will also be obligated to adhere to the new requirements. The practical effect of this is that dealerships selling cars made by manufacturers who have opted in need to be prepared to quickly respond to document demands and identify its person most knowledgeable with respect to the dealership's repair efforts.

Please contact Monique Bartley at mbartley@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

12-0 Verdict Rejects $7.2 Million Ask

Jury Unanimously Agrees With BKCG In Another Hard-Fought Victory For Ralphs (continued from page 1)

Three times over three months, Ralphs offered Mr. Saifudeen his job back with a temporary demotion and a $1/hour pay cut (after 6 months, Mr. Saifudeen could re-apply for a position as a department head with full pay). Mr. Saifudeen refused all offers to return to work, and instead sued Ralphs for discrimination based on his religion and national origin, retaliation, failure to accommodate and harassment (among other claims that were dismissed before trial). At trial, Mr. Saifudeen's trial team asked the jury for over $7.2 million in emotional distress damages and falsely alleged that Ralphs had forced him to "choose" between his job and his religion.

The jury rejected Mr. Saifudeen's claims whole cloth. After less than three hours of deliberation, the jury returned a unanimous verdict in Ralphs's favor, voting 12-0 on all questions asked. Ralphs made several reasonable offers to settle prior to trial, and the jury's swift verdict validated both the decisions Ralphs made during Mr. Saifudeen's employment and the decisions Ralphs made during settlement talks.

CASE UPDATE: Trial Judge Awards Ralphs Nearly $90,000 in Costs. Although under California law, employers that prevail in discrimination cases can only obtain statutory costs in extremely narrow circumstances, BKCG was able to persuade the Court that the Saifudeen case was just such a case. The legal standard requires the employer to show that the employee plaintiff's claims were "unreasonable, frivolous, meritless, or vexatious." BKCG pointed out the fact that Mr. Saifudeen's primary piece of evidence–the claim that a supervisor told him to "choose his mosque or his job"-- was a complete fabrication, in addition to other blatant weaknesses in the case. The judge agreed, stating that the case was the "rare" case where costs should be awarded to the employer.

Please contact Dan Kessler at dkessler@bkcglaw.com or Michael Oberbeck at moberbeck@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

Appraisal Award Gets Thrown Out On An Unforced Error

Question: What happens when one of the three appointed appraisers in an insurance dispute do not follow the appraisal process set forth in an insurance policy? Answer: A colossal headache and a waste of time, money, and effort. That is exactly what occurred recently when a U.S. District Court threw out a $187 million insurance appraisal decision in favor of the plaintiff insured after one of the appointed appraisers failed to state the "amount of the loss" as required by the property insurance policy.

Most all property insurance policies contain an appraisal provision that comes into play when there is an undisputed covered loss but the insured and the insurer cannot agree on the amount of the loss (i.e., what is the dollar value of the loss). The typical appraisal provision sets up a "baseball appraisal" where the insured and the insurer each select an appraiser of their choosing to decide the valuation issue. The two appraisers then select a third appraiser – the umpire. The parties present their case and the two appraisers then state the value of the property damage. On issues where the two appraisers disagree on the valuation, the umpire appraiser resolves the issue with his/her deciding vote. The key to the appraisal, however, is that the two appraisers chosen by the parties must each state their opinion on the value of the loss.

In *Westchester Surplus Lines Insurance Company et al v. Portofino Master Homeowners Association Inc. et al* (2025 WL 2697481 – September 22, 2025), the insured's chosen appraiser failed to provide a valuation of the loss which led to the final award being tossed out. In the case, the insured - Portofino Master Homeowners Association ("Portofino") – sustained a massive amount of property damage arising from Hurricane Sally in 2020 and submitted a claim to its insurer, Westchester Surplus Lines Insurance Company ("Westchester"). The damage was undisputed. Also undisputed was that the damage was covered. The parties, however, could not agree on the value of the damage so the parties went to appraisal as set forth in the insurance policy.

After the presentation of evidence, Portofino's selected appraiser prepared a $233 million "Statement of Loss" rather than provide his valuation of the damaged property. The Statement of Loss was simply a menu of pricing options for repair costs. Portofino's appraiser even admitted that his list of pricing options was just "a starting point" to restore the property. According to the Court, "He [the insured's appraiser] merely supplied 'à la carte pricing' for the [repair] project." In other words, because Portofino's selected appraiser thought there would be no agreement with Westchester's selected appraiser, he would simply provide pricing options and let the umpire decide the scope of work plugging in his unit pricing to arrive at a final decision. At the conclusion of the proceeding, the appraisal award came in at $187 million in Portofino's favor.

Westchester sought to have the court vacate the award arguing that Portofino's appraiser failed to follow the process set forth in the insurance policy; that is, Portofino's appraiser never stated the dollar value of the covered damage. The Court agreed. The Court held that Portofino's appraiser "never established a final scope for the proposed repair work before he submitted his "statement of loss". By not following what was required of him by the contractual appraisal provision, he did not fulfill his obligations under the contract. The Court then granted Westchester's motion, declared the appraisal award invalid, and ordered the parties to conduct a new appraisal before a new appraisal panel. The take-away from this case is to make sure that if you are part of an appraisal proceeding, the appraisers are both instructed to strictly follow the terms of the contract when issuing their respective determinations. Failure to do so can lead to a waste of time and money.

Please contact Keith Butler at kbutler@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

Introducing New BKCG Team Member – Tesleem Azeez

BKCG is pleased to announce the addition of Tesleem Azeez as an associate attorney to our expanding team. Tesleem earned his B.A. in Political Science and Sociology from the University of California, Riverside, and his J.D. from Chapman Dale E. Fowler School of Law. He is admitted to practice in law in the State of California and the U.S. District Court for the Central District of California.

Tesleem brings four years of experience representing clients in business disputes, employment matters, and defending companies from various tort claims. He is eager to utilize his comprehensive experience in handling matters throughout the litigation process to support BCKG's clients with their business and employment needs.

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