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ARBITRATION

CBA insufficient to compel arbitration of nurse's wage and hour claims

by Michael Futterman and Jaime Touchstone Futterman Dupree
Dodd Croley Maier LLP

A nurse filed a class action lawsuit against her former employer alleging wage and hour violations, including failure to provide meal and rest breaks and pay overtime. The hospital asked the court to compel arbitration, relying on arbitration provisions in a collective bargaining agreement (CBA). The trial court denied the motion to compel, finding the CBA did not contain a “clear and unmistakable” waiver of the right to a judicial forum for statutory claims. The court of appeal affirmed.

Nurse files class action against hospital for wage and hour violations

Tanya Vasserman worked as a registered nurse at Henry Mayo Newhall Memorial Hospital from March 10, 2014, to April 3, 2014. Her employment was subject to a CBA between the California Nurses Association and the hospital. Article 12 of the CBA, titled “Grievance and Arbitration,” defined a grievance as “any complaint or dispute arising out of the interpretation or application of” the CBA. It required nurses to follow a three-step procedure, including binding arbitration of unresolved claims.

Article 14 of the CBA governed members’ entitlement to overtime but did not refer to the grievance procedure or any other statutes and did not discuss arbitration. Article 15 stated that the hospital would comply with applicable law on meal and rest periods, including the payment of penalties for missed breaks. Vasserman did not file any grievances during her short tenure with the hospital.

After her employment terminated, Vasserman filed a class action lawsuit against the hospital alleging violations of California’s Labor Code and Business and Professions Code. Specifically, she claimed that the hospital:

- (1) Required hourly employees to work shifts exceeding eight hours per day and 80 hours per pay period but failed to pay overtime;
- (2) Did not provide rest periods and meal breaks or premium pay for missed meal breaks;
- (3) Did not provide itemized wage statements;
- (4) Calculated wages through a “rounding policy,” which resulted in a failure to pay employees for their actual time worked; and
- (5) Forced employees to perform unpaid work before their hiring date, including completing paperwork and attending a physical examination.

Vasserman sought injunctive relief, restitution, monetary damages, attorneys’ fees, and civil penalties.

The hospital asked the trial court to stay (halt) the case and compel arbitration, arguing that Vasserman and the other class members were represented by two different unions and covered by four different CBAs, each of which included mandatory arbitration provisions. The trial court denied the hospital's motion to compel, finding that Vasserman's CBA did not contain sufficiently explicit language waiving the right to a jury trial on statutory claims. The hospital appealed, and the court of appeal affirmed the trial court's decision.

CBA did not contain a 'clear and unmistakable' agreement to arbitrate

California has a strong public policy favoring contractual arbitration if the parties have agreed to arbitrate. The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement. Courts apply general principles of contract law to determine whether both parties formed a valid agreement to arbitrate their dispute.

Here, Vasserman and the other class members sued for violations of state wage and hour law, not for breach of the CBA. As a result, the presumption of arbitrability that typically applies to contractual disputes arising out of a CBA was inapplicable. A CBA may require arbitration of a *statutory claim* if it is "clear and unmistakable" in an "explicitly stated" waiver that the parties intended to waive a judicial forum for statutory claims. The "clear and unmistakable" standard is difficult for employers to meet, as the hospital discovered.

Vasserman asserted that the CBA did not contain an explicit waiver of nurses' rights to pursue statutory claims in court and therefore did not evince a clear and unmistakable intent to waive the right to a judicial forum on statutory causes of action. Specifically, the grievance and arbitration provisions in Articles 12 and 14 of the CBA did not refer to the California Labor Code or any other statute, and did not mention the waiver of a judicial forum or include any agreement to submit statutory claims to arbitration.

The hospital countered that Vasserman's wage claims were arbitrable CBA "grievances" because they required the interpretation of whether rounded time and purported off-the-clock work constituted compensable "time worked" as defined in the CBA. The court of appeal disagreed, finding that nothing in the language of the CBA contained an explicit "clear and unmistakable" agreement to arbitrate statutory wage and hour claims. Although Article 15 required the hospital to pay for violations of wage and hour laws, it did not contain an explicit "clear and unmistakable" waiver of nurses' rights to a judicial forum for statutory violations.

In sum, the court of appeal found that the "broad, nonspecific" language of the CBA with regard to the issue of arbitration prevented the hospital from satisfying its burden of proving that the nurses' union had agreed to an explicitly stated "clear and unmistakable" waiver of the right to a judicial forum for claims based on statutes. *Vasserman v. Henry Mayo Newhall Memorial Hospital* (California Court of Appeal, 2nd Appellate District, 2/7/17).

Bottom line

This case demonstrates how the "standard of review" a court chooses to apply can be the critical factor in determining the outcome of a case. Once the court decided to apply the "clear and unmistakable" waiver standard to the arbitration issue, it became exceedingly difficult, and ultimately impossible, for the hospital to identify language in the CBA that could meet that standard. Hence, we have another example of a case in which a court has whittled back the presumption of arbitrability of employment claims.

The authors can be reached at Futterman Dupree Dodd Croley Maier LLP in San Francisco, mfutterman@fddcm.com and jtouchstone@fddcm.com.