NATIONAL HOME DELIVERY ASSOCIATION

JANUARY 9, 2024

LOOKING FORWARD AND BACKWARD: 2023/2024

1. Beware of the progressive nature and activist agenda of the California State Legislature, which has never before confronted regulations such as:

   a. Assembly Bill 1076 – "Contracts in Restraint of Trade; Noncompete Agreements"

      Existing law voids contractual provisions by which a person is restrained from engaging in a lawful profession, trade, or business of any kind, except as otherwise provided. Existing case law, as established in the case of "*Edwards v. Arthur Andersen LLP"* (2008) 44 Cal.4th 937, interprets this provision to void noncompete agreements in an employment context and noncompete clauses within employment contracts, even if that agreement is narrowly tailored, unless an exception applies.

      This bill would codify existing case law by specifying that the statutory provision voiding noncompete contracts is to be broadly construed to void the application of any noncompete agreement in an employment context, or any noncompete clause in an employment contract, no matter how narrowly tailored, that does not satisfy specified exceptions. The bill would state that this provision is declaratory of existing law. The bill would make these provisions applicable to contracts where the person being restrained is not a party to the contract.

      This bill would also make it unlawful to include a noncompete clause in an employment contract, or to require an employee to enter a noncompete agreement, that does not satisfy specified exceptions. The bill would require employers to notify current and former employees in writing by February 14, 2024, that the noncompete clause or agreement is void, as specified. This bill would make a violation of these provisions an act of unfair competition pursuant to the UCL.

      Approved by Governor – October 13, 2023

      Source: Legislative Counsel's Digest (official)

   b. SENATE BILL 699 – "Contracts in Restraint of Trade"

      Existing law regulates business activities in order to maintain competition. Existing law voids contractual provisions by which a person is restrained from engaging in a lawful profession, trade, or business of any kind, except as otherwise provided.

      This bill would establish that any contract that is void under the law described above is unenforceable regardless of where and when the contract was signed. The bill would prohibit an employer or former employer from attempting to enforce a contract that is void regardless of whether the contract was signed and the employment was maintained outside of California.

      The bill would prohibit an employer from entering into a contract with an employee or prospective employee that includes a provision that is void under the law described above. The bill would establish that an employer who violates that law commits a civil violation. The bill would authorize an employee, former employee, or prospective

employee to bring an action to enforce that law for injunctive relief or the recovery of actual damages, or both, and would provide that a prevailing employee, former employee, or prospective employee is entitled to recover reasonable attorney's fees and costs.

Approved by Governor – September 1, 2023

Source: Legislative Counsel's Digest (official)

2. CARB'S IGNOMINIOUS RETREAT:

The State turns tail and retreats from enforcement of its "Electric-Truck Mandates" which have yet to be approved by the U.S. EPA.

The state's rule would require manufacturers to produce zero-emission trucks beginning in 2024 and raises production targets through 2035. The rule aims to put 300,000 zero-emission trucks on the road by 2035.

However, the State lacks sufficient capacity with respect to electricity supply, range, hauling capacity and charging.

3. CARB's JURISDICTION FACES A TRIFECTA OF RECENT COURT CHALLENGES:

Currently, there are three legal challenges to the California Air Resources Board (CARB) regulations mandating the sale of only zero-emissions trucks and that fleets can only add zero-emissions trucks to their fleet, the Western States Trucking Association (WSTA) has asserted two legal challenges.

a. Western States Trucking Association, et al v. U.S. EPA:

Filed in the U.S. Court of Appeals, D.C. Circuit on June 5, 2023, the WSTA and the Construction Industry Air Quality Coalition is challenging the U.S. EPA's waiver granting California the ability to enforce the Advanced Clean Trucks (ACT) regulation which mandates a zero-emissions truck manufacturing and sales in California. Seven other states have adopted the rule as well. Opening briefs were filed in the D.C. Circuit on November 3, 2023, and joined by numerous petitions, including 18 state Attorneys General.

b. Western States Trucking Association v. California Air Resources Board:

Filed in the Superior Court of California, County of Fresno on July 21, 2023, this petition challenges the Advanced Clean Fleets (ACF) regulation based on the position that CARB violated California's Environmental Quality Act and the states Administrative Procedures Act in developing the Advanced Clean Fleets regulation.

c. California Trucking Association v. California Air Resources Board:

Filed in the United States District Court for the Eastern District of California on October 16, 2023, this case challenges the Advanced Clean Fleets (ACF) regulation on several fronts, including: its adoption is a violation of the Federal Aviation Administration Authorization Act of 1994, impermissibly burdens interstate commerce in violation of the Dormant Clause of the U.S. Constitution, and violates the due process clauses of the 5th and 14th amendments to the Constitution.

All three cases bring distinctly different legal challenges in attacking CARB's zero-emissions truck rules and the industry only needs one win to prevail and send CARB back to the drawing board.

4. A.B. 5 IS BACK ON THE FRONT BURNER – "*OLSON V. CALIFORNIA"* IS BACK BEFORE THE 9th CIRCUIT COURT OF APPEALS.

On the first pass, the Ninth Circuit determined that the District Court correctly dismissed Plaintiffs' Due Process claims, Contract Clause claims, and Bill of Attainder claims. It concluded that the District Court erred in dismissing Plaintiffs' Equal Protection claims, and remanded to the District Court for reconsideration its order denying Plaintiffs' motion for a preliminary injunction.

The District Court denied Plaintiff's motion for preliminary injunction. The 9th Circuit Court of Appeals is scheduled to revisit the case, en banc, during the week of March 24, 2024.

5. THE CONFLICT BETWEEN THE U.S. SUPREME COURT'S DECISION IN "*VIKING RIVER CRUISES"* AND THE CALIFORNIA SUPREME COURT'S JUDGMENT IN "*ADOLPH V. UBER TECHNOLOGIES*:"

The U.S. Supreme Court held in "*Viking River Cruises, Inc. v. Moriana*" that, under the Federal Arbitration Act, employers may compel their employees to arbitrate individual Private Attorney General Act (PAGA) claims and seek dismissal in court of any remaining non-individual PAGA claims for others based on lack of standing.

In contrast to the U.S. Supreme Court decision in "*Viking River Cruises, Inc. v. Moriana*", the California Supreme Court's recent ruling in "*Adolph v. Uber Technologies*" (Adolph) provides further guidance on statutory standing under the Private Attorney General Act. In *Adolph*, the California Supreme Court held that if an employee is compelled to arbitrate individual claims for labor code violations, and that employee is found to be aggrieved, the employee can maintain statutory standing to pursue PAGA claims in court arising out of the same events involving other employees. The California Supreme Court also suggested that a stay of the court action regarding other employees would be appropriate to allow the arbitrator to determine if the plaintiff is an aggrieved employee and can therefore pursue the PAGA claim in court. The Supreme Court reached a contrary result in *Viking River Cruises.*

6. SMORGASBORD: HITS AND MISSES

a. Will the Supreme Court scuddle the longstanding *Chevron* doctrine which should greatly circumscribe the jurisdiction of federal administrative agencies, as well, potentially comparable state agencies, on due process grounds?

The doctrine says that courts should generally defer to agencies' interpretations of their regulatory power under federal laws — such as the Clean Air Act — when the language in those statutes is unclear. For decades, federal agencies used *Chevron* to defend their rules and rollbacks against legal attack.

b. U.S. District Court Judge for the Eastern District of California (Sacramento) issues a permanent injunction which reinforces A.B. 5's prohibition by employers to require that existing or new employees waive their rights under the law to sue in State court rather than mandate arbitration as the forum to decide employment issues.

c. "*Stone v. Kim*," a California Court of Appeal decision dated 11/23/23, affirmed the dismissal of a PAGA claim brought by an individual claimant who sought to enforce his

claim *pro per* but without first submitting the claim to the applicable State agency as required by the terms of PAGA. To add insult to injury, the Court held that by filing his complaint, the plaintiff was illegally practicing law without a license.

d. A California Court of Appeal decided in two separate cases, with related issues, that each representative plaintiff could pursue their own respective PAGA claims outside of the prior and settled actions in which each were not part of the original classes. "*LaCour v. Marshalls" and* "*Accurso v. In-n-Out Burgers*."

7. THE U. S. SUPREME COURT WILL DECIDE, IN WHOLE OR IN PART, WHETHER THE SEC CAN USE ADMINISTRATIVE LAW JUDGES TO DECIDE ENFORCEMENT PROCEEDINGS.

The Supreme Court agreed to hear "*Jarkesy vs. SEC*" after the SEC petitioned it to review the case following a May 2022 decision from the 5th U.S. Circuit Court of Appeals. The 5th Circuit sided with the plaintiff and ruled that the SEC's Administrative Law Judge system was unconstitutional. Specifically, the decision found that the SEC's use of ALJs violated the right to trial by jury, that Congress unconstitutionally delegated to the SEC the power to decide whether securities fraud cases were heard in federal courts or before an ALJ, and that the job removal protections given to SEC ALJs were unconstitutional because the president couldn't simply fire them.

If the Court finds that the SEC administrative law judges do not have jurisdiction to adjudicate proceedings on the basis that such is an illegal usurpation of the agency's statutory authority, the administrative process will be in serious jeopardy across the board.

8. ALL CORPORATIONS SHOULD BE AWARE OF AND ACT WITH DILIGENCE AS TO COMPLIANCE WITH THE NEW CORPORATE TRANSPARENCY ACT (CTA) WHICH BECAME EFFECTIVE ON JANUARY 1, 2024.

The Corporate Transparency Act (CTA), which went into effect January 1, 2024, will implement uniform federal information disclosure requirements for domestic and foreign reporting companies registered to do business in the United States, unless otherwise exempt. The CTA will require such reporting companies to disclose to the Financial Crimes Enforcement Network (FinCEN) certain information about the company and its beneficial owner. For entities that are created or first registered beginning in 2024, the report must also include information about individuals who primarily control or directly file the formation documents for a domestic entity or the registration documents for a foreign entity.

The CTA is aimed at enhancing corporate transparency and combating financial crimes, particularly money laundering and terrorist financing. Noncompliance with the CTA may result in significant fines and prison terms.

Its requirements are onerous and require careful attention. For further information on the CTA, consider reviewing the publication of my colleague, Jonathan Storper, which can be found online at: https://www.hansonbridgett.com/publication/231204-0400-understanding-corporate-transparency-act

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