- Whether the work is part of the regular business of the hiring party.

The court of appeal held that for the AVP carriers, the primary issue was subject to common proof. Specifically, the court noted that both sides agreed that AVP maintained policies applicable to all carriers—although they disagreed on the terms of some of those policies—and each side argued that the policies affected the classification of all the carriers. Because the issues of the applicable policies' content, as well as whether the policies controlled only the desired result of the work or also the manner and means used to obtain that result, were subject to common proof, the determination of whether the workers were independent contractors was suitable for class treatment. Similarly, the court observed that the determination of all other factors at trial was subject to common proof.

In a victory for employers, the court of appeal also held that at least three of the claims asserted by the carriers—those for overtime pay and penalties for missed meal period and rest breaks—weren't suitable for class certification because some of the workers never worked more than four hours in a day or seven days in a week and therefore couldn't be entitled to overtime pay or meal or rest periods under the law. Because the evidence that work schedules varied substantially was uncontested, the carriers couldn't show that AVP's liability was subject to common proof, and they didn't offer any other proposal to manage proof of liability effectively in a class action. The court of appeal returned the case to the trial court to determine whether the remaining claims were suitable for class certification. *Ayala v. Antelope Valley Newspapers, Inc.* (California Court of Appeal, Second Appellate District, 9/9/12).

Bottom line

California employers are facing a steady wave of wage and hour class action lawsuits. To the extent that the members of a putative class are subject to similar work procedures, policies, and practices that may—by themselves—determine an employer's liability, California courts are more likely to certify a class action. On the other hand, to the extent that there are variations in the application of work procedures, policies, and practices that will affect liability on a case-by-case basis, California courts are less likely to certify a class action. Employers should therefore continue to review both uniform employment policies and the application of those policies to ensure legal compliance. Updating your policies and ensuring compliance through individual supervisor review will minimize the risk of classwide liability. It's most cost effective to review your policies and ensure compliance before having to respond to a class action lawsuit.

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ARBITRATION

Employee has no obligation to arbitrate

by Karimah J. Lamar

The California Court of Appeal recently examined whether an unsigned arbitration agreement was enforceable as an "implied-in-fact" contract. Let's take a look at the case.

Request to compel arbitration denied

The Sports Club Company revised its team member handbook to include an arbitration agreement that stated, "[A]s a condition of employment, all Team Members must sign the Mutual Agreement to arbitrate claims." Before this revision, there was no arbitration provision. Susan Gorlach, Sports Club's HR director, was charged with making sure all employees signed the new agreement. She misled Sports Club into believing that she signed the agreement, later resigned, and then sued the company and others for wrongful termination.

Relying on its purported arbitration provision, Sports Club asked the court to compel arbitration based on an implied-in-fact contract to arbitrate. An implied-in-fact contract is an unwritten contract that's implied from the parties' actions, their conduct, and the circumstances. Sports Club asserted that although Gorlach didn't sign the agreement to arbitrate, she assented to it by her continued employment with the company. In support of that position, it obtained several declarations stating that Gorlach informed people she had signed the agreement and was aware that signing the agreement was a condition of employment.

Gorlach opposed the request to compel arbitration, in large part based on her position that she didn't sign the agreement to arbitrate. Sports Club emphasized that she was bound by the agreement because she continued to work for the company after she learned that signing the agreement was a condition of employment. Sports Club reasoned that the arbitration agreement was thus an implied-in-fact contract between the company and Gorlach. Furthermore, it argued that she couldn't claim the arbitration agreement didn't apply to her because she deliberately misled the company about whether she signed it. The lower court denied the request to compel arbitration, holding that Sports Club failed to present an agreement to arbitrate between the parties. The employer appealed that decision.

No agreement to arbitrate

The California Court of Appeal affirmed the trial court's order denying the request to compel arbitration. The right to arbitration depends on a contract. Accordingly, courts will seek first to determine whether there

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is an agreement to arbitrate. It isn't necessary for the agreement to be in writing; it can be implied by the actions, conduct, circumstances, or relationship of the parties. Accepting that the agreement may not have been in writing, the court will ascertain if there was a mutual agreement and intent to promise.

In this case, the trial court didn't find any evidence to support the inference that Gorlach intended to arbitrate disputes with Sports Club. Indeed, the court found that instead of unilaterally imposing an arbitration agreement, the handbook statement that all team members must "sign" the mutual agreement to arbitrate claims implied that the agreement to arbitrate wasn't effective unless and until team members signed it. Requiring that team members sign the agreement undermined Sports Club's argument that there was an implied contract.

Notably, the court pointed out that Sports Club was still in the process of collecting signatures for its arbitration agreement when Gorlach resigned. According to the court, if Sports Club had believed it collected all team members' signatures and Gorlach misled the company about whether she signed the agreement, then perhaps this case would have been decided differently. Instead, her deception was irrelevant because Sports Club was still "rolling out" its revised handbook with the newly added arbitration provision, and it knew that all employees hadn't yet signed the agreement. *Gorlach v. The Sports Club Company* (California Court of Appeal, Second Appellate District, 10/16/12).

Bottom line

This decision doesn't mandate that arbitration agreements be signed and in writing, but prudent employers should nevertheless get all agreements to arbitrate signed and in writing, making the intent of the parties clear. While you can unilaterally impose arbitration agreements through clear language informing employees that their employment is subject to a mandatory arbitration agreement, regardless of whether they sign the agreement, that practice is risky. As Sports Club discovered in this case, you might find it difficult to prove an agreement exists. The better practice is to get a signed agreement clearly setting forth the intent of the parties.

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CALIFORNIA NEWS IN BRIEF

DOL seeks enforcement of subpoena issued to Forever 21. The U.S. Department of Labor (DOL) is taking action to enforce a subpoena issued to Los Angeles-based apparel retailer Forever 21 that seeks documents related to the company's apparel contractors and manufacturers. The DOL's Wage and Hour Division (WHD) maintains that its investigation showed evidence of violations of the Fair Labor Standards Act's (FLSA) minimum wage, overtime, and record-keeping provisions by vendors supplying goods to Forever 21. The retailer has refused to provide the documents requested in the subpoena.

The DOL's investigation was conducted under an enforcement initiative in Southern California's garment industry. The WHD claims it has found repeated and widespread violation of the FLSA in the region's garment industry. The enforcement initiative is concentrated on employers in Los Angeles and Orange counties as well as those operating out of large garment buildings in Los Angeles' fashion district.

State sues for $1.6 million in wages for agriculture workers. In October, the state labor commissioner filed a $1.6 million lawsuit in Monterey County Superior Court against a Greenfield farm labor contractor, Salvador Zavala Chavez, doing business as Zavala Farms. The employer is accused of failing to pay minimum wage and overtime to approximately 150 workers in more than 10 work locations, primarily in Monterey County. The suit seeks unpaid wages, overtime, and penalties. The lawsuit stems from an investigation conducted by the California Department of Industrial Relations' Division of Labor Standards Enforcement. The investigation revealed evidence that the employer willfully violated the law by failing to pay proper wages and overtime to its employees from April 1, 2009, to April 1, 2012.

Forestry employer settles EEOC national origin discrimination suit. Redding-based Sierra Pacific Industries, which owns and harvests forests in California and Washington, has agreed to pay $95,000 to settle a federal discrimination lawsuit, the Equal Employment Opportunity Commission (EEOC) announced in October. In the lawsuit, the EEOC charged that after the September 11 attacks and continuing until his discharge, Sierra Pacific allowed coworkers to harass a worker of Egyptian national origin employed at its Red Bluff plant. According to the suit, coworkers called the employee derogatory names, and when he complained, the company retaliated by subjecting him to harsh discipline, ultimately terminating him in 2004. ✤