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More Lessons in Class and Collective Actions From Lyft

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There's been a lot of buzz in the past few weeks surrounding Lyft's proposed class action settlement in *Lyft v. Cotter*, NDCA Case No. 13-cv-04064-VC. Under the terms of the proposed settlement, Lyft will, among other things, (1) pay putative class members $12.25 million; (2) replace its current at-will termination provision with one that allows Lyft to deactivate drivers only for specific reasons or after providing a driver notice and an opportunity to cure; and (3) pay the arbitration fees and costs unique to arbitration for claims brought by drivers against Lyft related to their employment with Lyft.

But what is perhaps more interesting, and certainly more useful for employers, is the proposed settlement's discussion of the hurdles the putative class members likely face in prevailing on class certification and on the merits. These hurdles are worth highlighting here, as they offer employers basic but still valuable guidance for defending class and collective actions:

1. *Considering Using Class Action Waivers:* Following the U.S. Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the inclusion of a class action waiver in an employer's arbitration agreement has proven to be invaluable in avoiding class action exposure.

2. *Update Arbitration Agreements*: Even if an employer has a class action waiver in its arbitration agreement, the employer must still ensure the arbitration agreement is enforceable. Ordinary contract defenses, particularly the defense of unconscionability, can render an arbitration agreement void. Employers should therefore regularly review their arbitration agreements to ensure that they are in accord with current state contract law.

3. *Don't Get PAGA Sticker-Price Shock*: Unfortunately, employers in California can be exposed to civil penalties under California's Private Attorney General Act that can reach dizzying levels. But as *Cotter* reminds us, California employers are not without arguments and defenses. An employer may argue that PAGA claims require individualized inquiries and are therefore too unmanageable to proceed to trial as a class action. *See Ortiz v. CVS Caremark Corp.*, 2013 U.S. Dist. LEXIS 169854 (N.D. Cal. Dec. 2, 2013). An employer may also argue that the court should exercise its discretion to reduce PAGA penalty awards so that they are fair and proportional to the alleged violation. *See*, *e.g.*, *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1214 (2008).

The legal battles surrounding the on-demand economy rage on. On January 27, 2016, a day after the proposed settlement was filed in *Cotter*, the Ninth Circuit denied Uber's request to stay the trial in *O'Connor v. Uber Technologies Inc.*, NDCA Case No. 13-cv-03826. The case is slated to begin trial on June 20, 2016.

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