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## pending decisions and potential legislation

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*MSK Client Alert*

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California Supreme Court

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The California Supreme Court granted review in ***Iskanian v. CLS Transportation Los Angeles, LLC***, S204032, to decide whether *AT&T Mobility LLC v. Concepcion* 131 S. Ct. 1740 (2011), impliedly overruled *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), which held that class waivers in arbitration agreements should not be enforced if class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration. The Court will also decide whether arbitration agreements can override the statutory right to bring representative claims under the Labor Code Private Attorneys General Act of 2004 ("PAGA").

The California Supreme Court granted review in ***Sanchez v. Valencia Holding Co. LLC***, S199119, which includes the following issue: Does the Federal Arbitration Act (9 U.S.C. § 2), as interpreted in *AT&T Mobility LLC v. Concepcion*, preempt state law rules invalidating mandatory arbitration provisions in a consumer contract as procedurally and substantively unconscionable?

The California Supreme Court granted review in ***Mayers v. Volt Management***, 203 Cal. App. 4th 1194 (2012), *review granted*, 142 Cal. Rptr. 3d 807 (2012). In *Mayers*, the California Court of Appeal affirmed the trial court's denial of the employer's petition to compel arbitration and found the employer's arbitration agreement unconscionable. The Court of Appeal held that the Federal Arbitration Act and *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), did not prevent it from analyzing the arbitration agreement for unconscionability. The Supreme Court has deferred briefing in this case pending its decision in *Sanchez v. Valencia Holding Co. LLC* discussed above.



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On December 4, 2012, the California Supreme Court heard oral arguments in **Harris v. City of Santa Monica**, S181004, in which the Court will decide whether the "mixed-motive" defense applies to employment-discrimination claims under the FEHA. That defense permits an employer to assert that it would have made the same personnel decision even in the absence of the alleged discriminatory motive.

**Wisdom v. AccentCare, Inc.**, 202 Cal. App. 4th 591 (2012) (No. S200128, *review granted* 3/28/12), has been fully briefed. The California Supreme Court granted review to determine whether an arbitration clause in an employment application that provides "I hereby agree to submit to binding arbitration all disputes and claims arising out of the submission of this application" is unenforceable as substantively unconscionable for lack of mutuality, or whether the language creates a mutual agreement to arbitrate all such disputes.

**Salas v. Sierra Chem. Co.**, 198 Cal. App. 4th 29 (2011) (No. S196568, *review granted* 11/16/11), has been fully briefed. The California Supreme Court granted review to determine whether the after-acquired evidence doctrine bars the contention that the employer would have refused to hire the employee had it known that he used a counterfeit Social Security number at the time of hire.

**County of L.A. v. Los Angeles Co. Emp. Relations Comm'n**, 192 Cal. App. 4th 1409 (2011) (No. S191944, *review granted* 6/15/11), has been fully briefed. The California Supreme Court granted review to analyze the following issues: (1) Under the California Constitution, do the interests of non-union-member public employees in the privacy of their personal contact information outweigh the interests of the union representing their bargaining unit in obtaining that information in furtherance of its duty to provide fair and equal representation of union-member and non-union-member employees within the bargaining unit? (2) Did the Court of Appeal err in remanding to the trial court with directions to apply a specific notice procedure to protect such employees' privacy rights instead of permitting the parties to determine the proper procedure for doing so?

In **Duran v. U.S. Bank Nat'l Ass'n**, 137 Cal. Rptr. 3d 391 (2012) (No. S200923, *review granted* 5/16/12), the Court of Appeal reversed a trial court judgment in favor of a class of bank officers and ordered the class decertified. The Supreme Court granted review and stated that the issues in the case are the "certification of class actions in wage and hour misclassification litigation and the use of representative testimony and statistical evidence at trial of such a class action."

### Federal Court

**U.S. Supreme Court:** *U.S. Airways v. McCutchen*. In *U.S. Airways v. McCutchen* (Case No. 11-1285), the Supreme Court will decide whether the Third Circuit correctly held – in conflict with the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits – that Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA) authorizes courts to use equitable principles to rewrite contractual language and refuse to order participants to reimburse their plan for



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benefits paid, even where the plan's terms give it an absolute right to full reimbursement.

**5th Circuit:** *D.R. Horton, Inc. v. National Labor Relations Board*, No. 12-60031. The NLRB's decision in *D.R. Horton* (discussed above) has been appealed to the U.S. Court of Appeals for the Fifth Circuit and, ultimately could be headed for the U.S. Supreme Court. The NLRB has consistently held that it is not bound by U.S. Court of Appeals decisions, only by U.S. Supreme Court decisions and previous NLRB decisions. Therefore, while the Fifth Circuit may decide the case in *D.R. Horton's* favor, that may not necessarily end litigation over this issue. The validity of class-action waivers in arbitration agreements will be before the courts for a good while. Employers who hope to compel the resolution of disputes with their employees through arbitration should do so with the guidance of counsel.

### Potential Legislation

**Expansion of CFRA held under submission.** AB 2039, a bill that could significantly expand the California Family Rights Act (CFRA), is being held under submission in the California Senate so its fiscal impact may be studied. Under CFRA, an employer with 50 or more employees must permit an eligible employee to take up to 12 weeks of leave in a 12-month period to care for the serious medical condition of a child (under 18 years of age or adult dependent), spouse, or parent. The current definition of "parent" includes stepparents and individuals who act as a parent ("in loco parentis") to the child. AB 2039 would expand the circumstances under which CFRA leave may be taken by (1) eliminating current age and dependency requirements for children, thereby permitting an employee to take leave to care for an adult child; (2) expanding the definition of "parent" to include parents-in-law; and (3) permitting an employee to take leave to care for a grandparent, sibling, or grandchild. The bill also clarifies that employees have the same rights to care for a seriously ill domestic partner as they do for a seriously ill spouse.