Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

Updates on Three Important Issues: Family and Medical Leave Act Developments, Arbitration Agreements and Trade Secret Protection

New FMLA Poster, Notice and Forms Required by March 8, 2013

Recently, the U.S. Department of Labor ("USDOL") issued new regulations pertaining to the federal Family and Medical Leave Act ("FMLA"). The majority of the changes address military family leave, eligibility requirements for certain airline industry employees, and other circumstances that should not substantially impact most employers. However, effective March 8, 2013, all covered employers must use an updated FMLA poster, and updated FMLA notice and certification forms. Employers may access the new USDOL poster requirements on the USDOL website. If you have any questions regarding updating your existing FMLA policies to conform with the new regulations, please contact us.

Trend by Federal Courts to Uphold Class and Collective Action Waivers in Arbitration Agreements

The trend to uphold class and collective action waivers in arbitration agreements continues, despite the National Labor Relations Board's ("NLRB") controversial January 2012 ruling in *D.R. Horton*, which held that it is a violation of federal labor law to require employees to sign arbitration agreements that prevent them from joining together to pursue employment-related legal claims in any forum, despite the

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mandate of the Federal Arbitration Act ("FAA"). Notably, *D.R. Horton* applied to both union and non-union private sector employees.

In a recent decision, the Eighth Circuit Court of Appeals in *Owen v. Bristol Care, Inc.* upheld the validity of a class action waiver provision in a mandatory arbitration agreement and ordered the arbitration of an employee's collective action claims under the Fair Labor Standards Act, expressly rejecting *D.R. Horton*. The Eighth Circuit relied on the U.S. Supreme Court's landmark decision in *AT&T Mobility LLC v. Concepcion*, which held that when a private party to a consumer agreement contracts to arbitrate disputes individually, the FAA requires that contract to be enforced.

Owen is now one of several court decisions that have either distinguished or rejected *D.R. Horton*. For instance, another recent decision from the California Court of Appeals in *Outland v. Macy's Departments Stores, Inc.*, refused to revive a former employee's putative class claims in an overtime case and compelled arbitration of the Plaintiff's individual claims. *Outland* expressly rejected *D.R. Horton*. The United States District Court for the Eastern District of New York, in *Torres v. United Healthcare Servs.*, distinguished *D.R. Horton*, finding that because the arbitration agreement in that case did not preclude an employee from filing a claim or charge with a governmental agency or prevent the Department of Labor from filing suit, the holding in *D.R. Horton* is inapplicable on those facts.

Significantly, the viability of *D.R. Horton* may also be questionable based on the U.S. Court of Appeals for the D.C. Circuit's recent decision in *Canning v. NLRB*, which held that President Obama's three recess appointments to the NLRB, made on January 4, 2012, were unconstitutional. Although *Canning* potentially could void all NLRB decisions dating back to that date, its impact on *D.R. Horton* remains unclear.

It remains prudent for employers to continue to implement carefully drafted class and collective action waiver provisions within arbitration agreements in employment contracts, though the issue is still in flux.

Trade Secret Protection Strengthened by Federal Theft of Trade Secret Clarification Act

On December 28, 2012, the Theft of Trade Secrets Clarification Act (the "Clarification Act") was signed into federal law. The Clarification Act was enacted to strengthen

the scope of the Economic Espionage Act of 1996 ("EEA"), a criminal law that targets trade secret misappropriation by protecting trade secrets.

The Clarification Act expands the EEA from merely protecting *products* produced for or placed in interstate commerce to covering both products and services that are "*used in or intended for use* in interstate or foreign commerce."

In addition to expanding the scope of the EEA to include services, the Clarification Act should serve to protect a broader range of trade secrets by protecting trade secrets developed by companies for their own use. It serves as a vital remedy for employers seeking to protect their trade secrets and demonstrates that Congress has a keen interest in providing for such protection.

If you have any questions regarding any of the foregoing developments or would like assistance or guidance on implementing changes to policies, notices, forms or employment contracts impacted by same, please contact any of the following Sills Cummis & Gross attorneys.

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