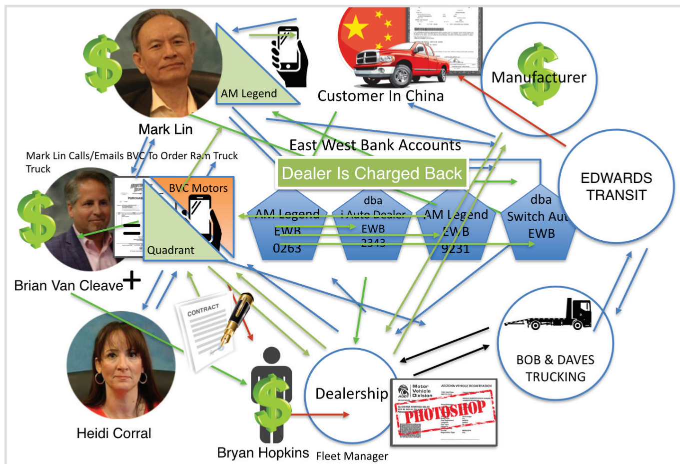
THE BKCG
# BULLETIN
FALL 2016 Edition

## BKCG Nets RICO Victory Against Auto Export Con Artists

In legal terms, RICO stands for the Racketeer Influenced and Corrupt Organizations Act, and refers to violations of 18 USC Chapter 96. RICO cases refer to the prosecution and defense of individuals who engage in organized crime. Although almost exclusively prosecuted as a criminal case, the law permits civil action for money damages.

Following a three week trial, Alton Burkhalter and Ros Lockwood recently obtained a unanimous civil jury verdict against three individuals for violation of the RICO statute. This novel legal theory allowed the Court to award treble damages plus attorney fees for BKCG's client.




The victim was a local car dealer. The RICO defendants perpetrated a massive con job in which they created shell companies, forged critical documents, paid kick backs and mislead the dealer into believing that the buyer was a legitimate leasing company that would be "upfitting" and then leasing vehicles to high-end clients in Nevada. In actuality, the vehicles were being exported to China. The profit to the RICO defendants was derived almost entirely from manufacturer's rebates and incentives unwittingly passed on to them by the dealer. The scam was discovered when the manufacturer conducted a routine incentive audit and then contacted US Customs who revealed that the vehicles had actually been exported. As a result, the manufacturer threatened to charge back the dealer and to rescind various monthly performance bonuses. Using BKCG, the dealer challenged the manufacturer charge backs and also sued the RICO defendants.

After contentious litigation in which the defendants repeatedly challenged the viability of the RICO claims, Burkhalter and Lockwood were able to establish all the elements necessary to prove a civil violation of the RICO statute. To do so, Burkhalter designed demonstrative evidence illustrating each of the complex steps used by the defendants to conceal their identities, the true source of the money and where the vehicles were actually going. BKCG also called upon industry experts to rebut defendants' claims that "half the dealers want to sell cars for export" and that this dealership knew the vehicles were being exported but wanted to be able to portray "plausible deniability" to the manufacturer. At the close of the trial the jury voted 12-0 in favor of the dealership. Not only did the win ensure that the dealership was fully reimbursed for its loss, it also fully vindicated the dealership in the eyes of the manufacturer. The only remaining question is whether or not these defendants will now be criminally prosecuted.

For more information on RICO and how it might apply to protect your business, please contact Alton Burkhalter or Ros Lockwood at (949) 975-7500 or at aburkhalter@bkcglaw.com / rlockwood@bkcglaw.com.

## Employer Best Practices: Why You Should Track Your Exempt Employees' Time

Under the Fair Labor Standards Act ("FLSA"), employers must track and record time for non-exempt (i.e., overtime-eligible) employees. To be classified as exempt, the employee's job generally must satisfy both a salary basis test and a duties basis test. Exempt employees generally must be paid on a salary basis, meaning they must be paid a fixed salary each pay period. The U.S. Department of Labor (DOL) enforces regulations that define the salary basis requirement to satisfy the exempt status tests. Exempt, Administrative, Executive, and Professional employees must be paid a predetermined amount each pay period that is at least the minimum weekly salary required by the regulations. The current federal minimum is $455 per week, but will increase to $913 per week on December 1, 2016; however some states require a higher minimum weekly salary to satisfy this test. The amount paid may not be reduced because of a variation in the quality or quantity of the work performed.

Employers are now realizing that there are benefits to also tracking and recording time for exempt employees as well (even though they are not eligible to receive overtime pay). First, tracking and recording the time of all employees protects the employer in the event of a misclassification. If an employee was misclassified as overtime-exempt, when under the law they should have been classified otherwise, the employer will have the backup data needed to determine the precise amount of overtime, if any, that the employee earned. Without this backup, the issue can quickly devolve into a matter of the employee claiming that he or she worked overtime and the employer not having the valuable contemporaneously recorded data needed to refute that claim.

As unpaid overtime can carry with it significant monetary penalties and attorney fee awards, the cost of recording and tracking all employee time can pay dividends if even one employee is incorrectly classified.

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# My Employees Are Bad Mouthing My Company on Facebook – I Can Fire Them, Right?!

It is becoming increasingly common for disgruntled employees to air their employer's dirty laundry on social media sites like Facebook, and in so doing, publicly share unflattering information about his or her employer that it wants to remain private. For example, an employee might post on Facebook that his "boss is a jerk", that the company treats its clients poorly, or even discriminates against certain classes of employees or customers. In response to an employee's public disclosure on social media of unflattering company information, employers may want to terminate their loose-lipped employees. However, would such a termination be lawful?

The answer is that it depends. The National Labor Relations Act (NLRA), which governs employers of both union and non-union employees, protects employees from discipline for engaging in what is called "concerted activity". "Concerted activity" means circumstances in which individual employees seek to initiate, induce, or to prepare for group action, for the purpose of improving their working conditions. If a communication satisfies the foregoing criteria and is not too opprobrious, then an employer may not terminate or discipline an employee for making the statement, even in a public forum. If an employer does terminate an employee in violation of this law, then the NLRA may reinstate the employee and award back pay. The purpose of this law is to enable employees to communicate amongst themselves in an effort to improve their work conditions without concern for resulting discipline by their employer.

Of course, this law came into existence long before the creation of Facebook and other social media sites, and determining whether an employee's post on social media publicly criticizing his employer satisfies the legal requirements for protected concerted activity is difficult, as some of the examples below make clear. In one case, an employee posted on Facebook that a supervisor told her that "we don't help our clients enough", which is obviously information that most employers would not want shared publicly on social media. After the employer terminated the employee responsible for the Facebook post, the National Labor Relations Act Board overruled the termination, concluding that the post was "concerted activity" since it was engaged with the object of initiating group action amongst the employees. However, in a different case, an employee wrote several Facebook posts regarding his supervisor, complaining that the supervisor had hired incompetent employees and suggesting the supervisor was having affairs at work. The posts also referred to the supervisor as a "bitch." In this case, the NLRA board upheld the termination, finding that the complaints about the supervisor and her treatment of coworkers were made solely on behalf of the employee, with no intention of instigating group action or bringing group concerns to management.

In sum, although employers may want to deter and terminate employees who post negative information about the companies on social media, employers need to be careful to make sure they do not run afoul of the NLRA by terminating or disciplining an employee engaged in protected concerted activity. .

Please contact Joshua Waldman at (949) 975-7500 or at jwaldman@bkcglaw.com if you have questions about any issue discussed in this article.

# Employer Best Practices: Why You Should Track Your Exempt Employees' Time

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There are also valuable business reasons to track all employee time. For example, an employer may opt to track an exempt employee's hours for purposes of client billing. Tracking time also assists employers in determining the accrued benefits employees have earned under the Family Medical Leave Act (FMLA) or for company-specific programs such as 401(k) eligibility or hours-based benefits calculations. Some employers opt to track exempt employees' hours simply to ensure the equitable treatment of all employees, regardless of classification in the company.

Should an employer opt to track the hours of exempt employees, the company must be careful in using this information. The exempt employee's salary should not fluctuate based on the number of hours worked within the workweek, as pro-rating an exempt employee's salary based on hours worked may result in the loss of the exemption which may be very costly for the business. The company may only take a deduction from an exempt employee's salary under limited circumstances without jeopardizing the exempt status, such as when an employee is absent from work for one or more full days for personal reasons other than sickness or disability, or for penalties imposed in good faith for infractions of safety rules of major significance. While the company may opt to track the hours of exempt employees, the company must ensure that such information is not used to take deductions from their employees' regular salaries, unless such deductions comply with the relevant guidelines.

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## The Resurrection of California Code of Civil Procedure Section 128.5 Combats Frivolous Litigation Conduct

California Code of Civil Procedure section 128.5, dormant since 1995, was revived on January 1, 2015 and authorizes the imposition of monetary sanctions against parties and their counsel for litigation "actions or tactics" that are frivolous or solely intended to cause delay. This section broadened trial courts' inherent authority to impose sanctions upon parties and their counsel for bad faith litigation conduct.

Section 128.5, first enacted in 1981, defines "actions" and "tactics" broadly to include (but is not limited to) the filing and service of a complaints, cross-complaints, answers, other responsive pleadings, or the filing or opposing of motions. The oft-used statute was interpreted by courts to require both objective and subjective bad faith which proved difficult to establish. In 1995, the Legislature responded by limiting section 128.5's application to proceedings initiated on or before December 31, 1994, while at the same time, enacting Code of Civil Procedure section 128.7. Section 128.7 requires that all pleadings and motions filed with the court be signed by an attorney or unrepresented party, and by signing, the signer generally certifies that the document is not presented for an improper purpose and that the allegations contained therein are supported by law and evidence. In furtherance of these requirements, section 128.7 authorizes monetary sanctions against the signer for violation of these requirements. In other words, sanctions under 128.7 are directed at particular pleadings or motions, and not the more general "actions or tactics" implicated under section 128.5.

Thus, the resurrection of section 128.5 gives litigators and their parties another tool to combat frivolous litigation tactics which have become all too common in today's litigation landscape.

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## Car Dealers Beware: Failure to Settle Song-Beverly Consumer Warranty Act Claims Quickly Can Result in Liability for Huge Legal Fees

A recent Court of Appeals decision, *Goglin v. BMW of North America, LLC, et al.* reveals the risk to the dealer of of failing to quickly settle a consumer demand for restitution under the Song-Beverly Act. BMW and the dealer recently lost an appeal of an award of over $185,000 in attorney fees following settlement of a consumer claim. In April 2011, Goglin purchased a 2008 BMW 535i from a BMW dealer. The total sale price for the vehicle was $45,762, payable in 60 monthly installments of $762.70.

In June 2013, Goglin alleged that BMW and the dealership had violated the Consumer Legal Remedies Act by selling her a used vehicle with prior collision damage and a protracted history of mechanical failures. She requested that they remedy the violation by unwinding the transaction, refunding her payments, reimbursing her for her reasonable expenses, and paying off her outstanding loan balance. She also demanded that the dealership enter into a stipulated injunction requiring it to disclose collision damage in writing.

The dealership responded by questioning her claims, but nonetheless offering to resolve the matter by repurchasing the vehicle for all costs incurred by Goglin, including paying off her existing loan and reimbursing her for her down payment and any loan proceeds she made, less an offset for depreciation due to her use of the vehicle, plus the dealership offered to reimburse Goglin for her reasonable attorney fees. The offer was contingent upon Goglin agreeing to a general release and a nondisparagement clause. Goglin countered. She would accept the dealership's offer to the extent the offer was to reimburse her in full without offsets. She refused to agree to sign a general release, arguing that the applicable consumer protection laws "do not require that consumers waive their rights in order to have a dealer comply with statutory obligations."

The settlement discussions failed and Goglin sued the dealership and BMW. Both responded with routine answers and then Goglin's attorney engaged in discovery which BMW challenged. BMW was sanctioned by the trial court $7,295 before the dealer and BMW finally capitulated and went to mediation, where the matter was finally settled. The terms of the settlement required that BMW and the dealer pay Goglin $75,000 less Goglin's loan balance. They also agreed to pay Goglin's attorney fees in an amount to be separately negotiated or resolved by a motion before the trial judge. When the dealer balked at Goglin's fee demand, she brought a motion for an award of fees. As a result, the trial court then awarded Goglin an additional $185,000 in fees and costs.

The Court of Appeal affirmed the award, finding that Goglin was not acting unreasonably in rejecting the pre-litigation settlement that included "unfavorable extraneous terms". The appellate court also rejected the dealer's argument that Goglin could have avoided litigation and settled the matter earlier had she negotiated more at the outset. Finally, the appellate court also awarded Goglin "her costs on appeal." In total, BMW and the dealership ultimately paid the consumer over $250,000 plus all fees/costs associated with their losing appeal–likely an additional $50,000. Along the way, the dealership spent substantial legal fees to defend the claim.

We have consistently advised our dealer clients to settle these types of cases immediately, and to not allow the consumer's legal fee demand to impede an otherwise prudent settlement. On one occasion, we even had our client leave our firm because the dealer felt we had not fought hard enough or defended it aggressively enough. But, as this case proves, there are times when it makes sense to fight, and there are times like this, where fighting a consumer is lose-lose proposition.

Please contact Alton Burkhalter at (949) 975-7500 or aburkhalter@bkcglaw.com if you have questions about any issue discussed in this article, or any other related matter.

# Mandatory Class Action Waivers in Arbitration Agreements Are Now Prohibited in California

In a recent decision, which affects all employers in California, the Federal Ninth Circuit Court of Appeals in the case of *Morris v. Ernst & Young, LLP,* --- F.3d ---- (2016) recently outlawed the use of mandatory class action waivers in arbitration agreements in California.

The practical effect of this decision is that, at least for now, California employers can no longer require employees to sign an arbitration agreement giving up their right to participate in a class action lawsuit as a condition of employment. BKCG, along with many other employment defense law firms in Southern California, has long since advocated employers' use of such arbitration agreements, including class action waiver clauses, as a practical way of protecting themselves against rampant employment class action lawsuits filed by contingency plaintiffs' employment lawyers, for claims ranging from wage and hour violations to misclassification of employees as independent contractors.

In the *Ernst & Young* case, the accounting firm required all new employees to sign an arbitration agreement prohibiting them from joining with other employees in bringing legal claims against the company, with the result that employees could not initiate concerted legal claims against the company in any forum, they were required to bring only their own individual claims in an arbitration proceeding.

However, not deterred by the arbitration agreement he had signed, the plaintiff in the *Ernst & Young* case brought a class action lawsuit against his employer alleging misclassification under the Fair Labor Standards Act and challenging the validity of the very class action waiver which purported to prohibit him from filing the lawsuit in the first place. The Ninth Circuit held in Mr. Morris' favor and invalidated the class action waiver on the basis that it violated the National Labor Relations Act (the "Act")[1] by impermissibly interfering with the right of employees to engage in "concerted activity", as protected by the Act.

As a result of this decision, mandatory waivers purporting to restrict the right of California employees to bring class actions are no longer enforceable. Whilst the Court in *Ernst & Young* suggested that non-mandatory class action waiver provisions may still be a potential option, BKCG believes that, as a practical matter, this option is highly unlikely to be useful to California employers. Nevertheless, BKCG continues to recommend that employers have their employees sign arbitration agreements, since arbitration remains a much more favorable forum for employers to resolve employment disputes than trial by jury in a California court. Arbitrators tend to be far more objective, more apt to apply the law and far less likely to be swayed by emotions in employment matters than jurors - many of whom may themselves have been wronged by former employers.

Ernst & Young has appealed the Ninth Circuit Court of Appeals' adverse ruling to the United States Supreme Court, which is a discretionary appeal, the vast majority of which are rejected. However, there is a possibility that the United States Supreme Court may accept the case, because the Ninth Circuit's ruling is in conflict with rulings on the same issue by two other Federal appeals courts, an outcome which the Supreme Court disfavors. BKCG will monitor the progress of this appeal and provide an update as and when appropriate.

[1] The National Labor Relations Act is a Federal statute enacted in 1935 to protect the rights of employees and employers and to curtail certain private sector labor and management practices.

Please contact Greg Clement at (949) 975-7500 or gclement@bkcglaw.com if you would like your company's current arbitration policy reviewed, in light of this development, or have questions about this or any other aspect of employment law.

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