CASE NO. S244630

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OTO, LLC, AN ARIZONA LIMITED LIABILITY COMPANY, DBA ONE TOYOTA OF OAKLAND, ONE SCION OF OAKLAND,

Plaintiff and Appellant.

v.

KEN KHO,

Defendant and Respondent, Real Party in Interest,

v.

JULIE A. SU IN HER OFFICIAL CAPACITY AS THE STATE OF CALIFORNIA LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA,

Intervenor and Appellant.

AFTER DECISION BY THE COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION 1 CASE NO. A147564

ON APPEAL FROM THE SUPERIOR COURT FOR THE COUNTY OF ALAMEDA CASE NUMBER RG15781961 HONORABLE EVELIO GRILLO, PRESIDING

REAL PARTY IN INTEREST'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Constitutions

Federal Statutes

State Statutes

Federal Regulations

State Regulations

Other Authorities

I. ISSUES PRESENTED

Whether, in light of this Court's decision in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 (*Sonic II*), holding that any arbitration agreement must be "accessible and affordable," a procedurally unconscionable arbitration provision is also substantively unconscionable where it removes the protections and advantages of the Berman hearings and it also imposes all heightened obligations of civil litigation which significantly burdens individual wage claimants?

The Labor Commissioner has presented a second issue: "[W]hether mere notice of an arbitration agreement on the same day the Berman process is to commence divests the Labor Commissioner's jurisdiction to proceed with the Berman process[?]"

Plaintiff and Appellant OTO, LLC, dba One Toyota of Oakland, One Scion of Oakland ("OTO"), in its Combined Answer to Petitions for Review, has raised the related issue of whether the Labor Commissioner should have proceeded with the Berman hearing when presented with a filed Petition to Compel Arbitration and whether the Labor Commissioner violated OTO's "right to a fair administrative hearing (Berman hearing) ... where the Labor Commissioner conducted the Berman hearing in the absence of the employer ...."

II. INTRODUCTION

California, through its Constitution, statutes, regulations, Industrial Welfare Commission wage orders, and various state agencies, has long protected workers and their wages. It has further tilted enforcement of those provisions so as to advantage the worker over an employer who does

not comply. This Court has repeatedly addressed substantive and procedural enforcement issues under California's wage and hour laws and other laws that are protective of the rights of workers in California. It has repeatedly confirmed that the laws regulating the workplace are to be interpreted liberally in favor of employees.

This case involves the Berman statues, which provide a comprehensive scheme of wage enforcement procedures, described more thoroughly below. Consistent with this Court's nomenclature, we use the term "Berman statutes" to refer to the entire statutory scheme. (See Lab. Code, § 98.[1]) We refer to the administrative hearing before a Deputy Labor Commissioner as the "Berman hearing."

On several occasions, most recently in *Sonic II*, this Court has reaffirmed the importance of the Berman statutes to the long history and purpose of protecting workers' interests. The Court in *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348 (*Iskanian*) reinforced this finding by recognizing the Legislature's intent to create additional remedies for the enforcement of many laws found in the Labor Code.

This case again presents to the Court a critical issue impacting the viability of Berman statutes and the Berman hearing. The Court is faced with addressing the extent to which an employer can implement an arbitration procedure that is designed to eliminate employees' access to the Berman hearing and substantially reduce the effectiveness of the Berman

[1] All further statutory references are to the Labor Code unless otherwise indicated.

statutes. The Arbitration Agreement at issue tilts the entire scheme substantially in favor of the employer.

California's wage and hour laws and other provisions of the Labor Code are far too important to permit this effort to undermine those enforcement procedures through eroding employees' access to them. Such an effort contravenes California's long-standing recognition that state employment laws are to be construed in a manner protective to workers. The Legislature has recognized the common problem of Wage Theft[2] and has enacted many provisions to protect workers' wages and other statutory rights in the workplace.

In this brief, we reemphasize this Court's findings in *Sonic II* (relying on many previous cases) as to the importance and value of the Berman statutes, including the Berman hearing. We then describe in detail how, as this case and other sources exemplify, there are numerous pro-employee features of a Berman hearing that protect the Claimant before the Labor Commissioner and safeguard the Claimant's access and ability to enforce his or her rights arising under the Labor Code. This protective treatment extends to the trial de novo and other procedures provided for in the Berman statutes.

We then analyze OTO's Arbitration Agreement to show how it tilts the enforcement procedures dramatically in favor of the employer and against the interests of the Claimant. We then demonstrate how the

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[2] Section 2810.5. (Assem. Bill No. 469 (2011-2012 Reg. Sess.) § 1 ["Wage Theft Prevention Act of 2011"].)

Arbitration Agreement is substantively unconscionable on additional grounds.

We conclude by showing that the Arbitration Agreement contradicts the very principles of the Federal Arbitration Act (9 U.S.C. § 1, *et seq.*) ("FAA"), and that it undermines over 175 years of California law meant to "foster, promote, and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment." (Lab. Code, § 50.5.)

III. APPLICABLE STATUTES

Attached as Appendix A is a copy of Labor Code sections 98, 98.1 and 98.2, which are the primary statutes at issue. The Policies and Procedures for Wage Claim Processing are found at LC165-168 in the Labor Commissioner's Request for Judicial Notice ("RJN"), Exhibit 20 ("Policies and Procedures").[3]

IV. STATEMENT OF THE CASE

There are no factual disputes. The disputed Arbitration Agreement is attached as an exhibit to the Opinion. It is in small font and hard to read. (See *OTO, L.L.C. v. Kho* (2017) 14 Cal.App.5th 691, 717-718.) It is densely written in legalese. This obfuscation was part of OTO's purpose, which rendered the Agreement procedurally unconscionable and contributes to its substantive unconscionability. The following description is adopted largely from the Opinion below.

[3] These are referred to in prior Opinions of this Court as issued by the Department of Labor Standards Enforcement, which is now the Department of Industrial Relations.

Petitioner and Real Party in Interest Ken Kho ("Kho") worked as an auto mechanic for OTO from January 2010 through April 2014, when his employment was summarily terminated. He was employed as a flat rate mechanic, meaning that he was paid for each job based on an estimated number of hours and his wage rate. He was not an hourly employee, and much of his wage claim involved the failure to receive pay for all time worked and overtime. Several months after his discharge, in October 2014, Kho filed a wage claim with the Labor Commissioner. (Clerk's Transcript ("CT") 9.)

In November 2014, Kho and OTO participated in an unsuccessful Settlement Conference initiated by the Labor Commissioner and mediated by a Deputy Labor Commissioner. The parties continued settlement discussions for the following month, until, in mid-December, OTO requested that the Labor Commissioner's office forward a proposed settlement agreement to Kho. After Kho decided not to accept the offer, he requested a statutory "Berman hearing" on his claim.

On January 30, 2015, the Labor Commissioner notified OTO of Kho's request, and in March the hearing was scheduled for August. (CT 8.)

On the morning of the Berman hearing, a Monday, OTO's attorney faxed a letter to the Labor Commissioner's office requesting that the hearing be taken off calendar because OTO had filed a Petition to Compel Arbitration and Stay the Administrative Proceedings ("Petition") on the prior Friday in the Alameda County Superior Court. By return fax, the Labor Commissioner's office informed counsel that the hearing would proceed as scheduled. At the noticed time, counsel for OTO appeared,

served Kho with the Petition, and left. OTO chose not to participate in the hearing. The Hearing Officer proceeded with the hearing in OTO's absence and shortly after issued a detailed "Order, Decision, or Award" ("ODA") finding that Kho was entitled to $102,912 in unpaid wages and $55,634 in liquidated damages, interest, and penalties. (CT 67-76.)

OTO thereafter sought de novo review of the ODA in the trial court pursuant to section 98.2 by filing an appeal and posting the requisite cash bond to secure payment of the award to protect Kho. At the same time, OTO supplemented its Petition with the filing of a motion to vacate the ODA. By stipulation, the Labor Commissioner was allowed to intervene in the trial court proceedings.

The trial court denied the employer's Petition. The trial court found that there was "a high level of procedural unconscionability connected with the execution of the arbitration agreement in this case." (*OTO, L.L.C. v. Kho*, *supra*, 14 Cal.App.5th at p. 701.) The trial court also vacated the ODA and remanded to the Labor Commissioner to hold a further hearing on OTO's theory that it was prejudiced because the Hearing Officer went forward in its absence.

The Court of Appeal affirmed the finding of the trial court in strong language that Kho's signing of the Arbitration Agreement was procedurally unconscionable given the forceful manner in which he was required to sign as "a condition of his employment." (*OTO, L.L.C. v. Kho*, *supra*, 14 Cal.App.5th at p. 708.) "The circumstances of Kho's execution of the Agreement demonstrated a high degree of oppression." (*Ibid.*) "For these

reasons, we conclude that the degree of procedural unconscionability was extraordinarily high." (*Id.* at p. 709.)

The court below, however, found that the Arbitration Agreement was not substantively unconscionable and reversed the trial court, vacated the ODA and remanded for purposes of compelling arbitration.

V. ARGUMENT

A. THE BERMAN STATUTES PROCESS

The case hinges on whether OTO's Arbitration Agreement respected the command of this Court that an arbitration procedure can supplant the Berman statutes only if it is "accessible and affordable." This Court has addressed this issue now twice within the last seven years. Our brief then relies in part on quotations from this Court's prior Opinions recognizing the value of the Berman statutes.

In *Sonic II*, this Court described the Berman statutes process, quoting in large part from *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659 (*Sonic I*), *judg. vacated and cause remanded* (2011) 565 U.S. 973. This Court summarized the Berman statutes process in these words: "[W]e explained [in *Sonic I*] how Berman hearings and related statutory protections benefit employees with wage claims against their employers ... ." (*Sonic II*, *supra*, 57 Cal.4th at p. 1127.) The Court went on at length to describe the process in its Opinion. This Court enumerated and summarized the major benefits to employees throughout the process established in the Berman statutes. (*Id.* at pp. 1129-1130.) We explain those benefits more fully below, Part D(3), *infra*.

In summary, this Court has forcefully recognized the important features of the Berman statutes that assist wage claimants in bringing their claims to collect unpaid wages.[4]

B. KHO'S USE OF THE BERMAN HEARING PROCESS

When Kho was hired, he signed documents in a hurry, without reading them. He was not provided a copy.[5] He worked as a technician until he was summarily terminated, allegedly because of an issue over a repair order. (CT 120.) When Kho was hired, there was no reference to any arbitration provision until he was forced to summarily sign it. (CT 109.)

Kho has limited English proficiency as a Chinese immigrant whose first language is Chinese. (CT 109.) He had limited opportunity to review those initial documents, and he signed them in less than 10 minutes. (CT 109.)

After working more than three years at the dealership, a "Porter," who was actually a Human Resources Representative, approached Kho at his work station and asked him to sign some additional work-related documents on February 23, 2013. Kho was asked to sign those documents and return them immediately. (CT 109.) One of those documents was the

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[4] The Labor Commissioner has a broader jurisdiction than wage claims. Kho's case involves only wages and the associated penalties and interest, but this Court's decision will have an effect upon additional matters brought before the Labor Commissioner that may not exclusively involve the payment of wages.

[5] He would have been entitled to a copy under California law if he had known to ask for it. (See § 432.) Section 2810.5 became effective January 1, 2012, after Kho was hired, requiring employers to provide a notice of an employee's employment conditions. Kho would have been entitled to a notice of the implementation of the new compensation plan. (CT 115-116.)

Arbitration Agreement at issue in this case and is in 7-point font. (CT 48-49.)

Kho was not excused from his work, nor was he allowed sufficient time to thoroughly review the small font-sized documents provided to him. He was not given the opportunity to come into the Human Resources office to review the documents or seek an explanation. He was simply told that he had to sign. (CT 109.) Kho was not provided a copy of the documents, and he was not advised in any respect that he was forfeiting his rights to a Berman hearing and agreeing to this arbitration procedure. (CT 109.)

A year-and-a-half later, Kho was summarily terminated on May 2, 2014. (CT 110, 120.) Obviously unaware that he had entered into an arbitration agreement, Kho filed a wage claim at the Labor Commissioner's office against OTO on October 9, 2014. (CT 110.) A blank copy of the current claim form, known as the "Initial Report or Claim," is found in Exhibit 20, LC132-135 of the RJN.[6] Kho had the assistance of the Labor Commissioner in filling out the claim form. (CT 110-111.)[7] Such assistance is available to any claimant filing claims with the Labor Commissioner's office.

Eight days after Kho filed the wage claim, on October 17, 2014, the Labor Commissioner sent a Notice of Claim and Conference to OTO and to Kho, setting a Settlement Conference for November 10, 2014. On that

[6] The record does not contain Kho's claim form. The Complaint, which is issued by the Deputy Labor Commissioner, sets out the issues and the remedy sought. (Cal. Code Regs., tit. 8, § 13501.5; RJN LC187-188.)

[7] As we explain later, and should be obvious, if forced to proceed with arbitration, Kho would not have the assistance of the employer or a retired Superior Court Judge to fill out the claim form or to draft the pleadings that are required by OTO's Arbitration Agreement.

date, both OTO and Kho showed up. OTO was represented by counsel, and Kho represented himself. Through the assistance of the Labor Commissioner, OTO and Kho attempted to resolve the dispute, but they were not successful.

The Labor Commissioner assisted further efforts to resolve the dispute by transmitting to Kho a proposed settlement offer from OTO, which Kho rejected. (CT 110, 123 and 129.)

On March 26, 2015, the Labor Commissioner sent out a Notice of Hearing, notifying OTO and Kho that a hearing would be held before a Hearing Officer on August 17, 2015, at 1:00 p.m. This Notice of Hearing was delivered both to OTO's agent and its counsel. (CT 134 and 136.) OTO did not request any continuance of that hearing. The Notice included the Complaint signed by Kho, which set out the issues for the Berman hearing. (CT 52.)

On the Friday before the Monday hearing date, OTO filed its Petition in Alameda County Superior Court. (CT 1-13.)

Shortly after 9:00 a.m. on Monday, August 17, the date of the scheduled hearing, OTO faxed a letter with a copy of its court filing to the Labor Commissioner and concurrently requested that the hearing scheduled for 1:00 p.m. that day be taken off calendar until completion of the arbitration process. (CT 41 and 124.)

The Labor Commissioner rejected that request and immediately informed OTO that the hearing would not be taken off calendar and would proceed as scheduled at 1:00 p.m. (CT 124 and 146-147.) The Labor

Commissioner also advised OTO that it could raise the issue of the Arbitration Agreement at any trial de novo if it appealed.

The Labor Commissioner then held the scheduled hearing. OTO appeared solely for the purpose of serving Kho with a copy of its filed Petition. The Labor Commissioner informed OTO that there was no order requiring the Labor Commissioner to stay its proceedings before the Hearing Officer. (CT 69, fn. 1.) OTO's counsel left and did not participate.

After hearing evidence, on August 25, 2015, the Hearing Officer issued an ODA that was served on Kho and OTO on August 31, 2015. (CT 66-75.) The Hearing Officer, acting as the Labor Commissioner, determined that the employer did not properly compensate Kho for all hours worked and awarded him $102,912 for wages; $30,208 in liquidated damages; $17,506.21 in interest; and $7,920 in waiting time penalties.

As permitted by the Labor Code, OTO filed a de novo appeal of the Labor Commissioner's ODA on September 15, and on the next day filed a motion to vacate the ODA.

After various hearings, the trial court denied OTO's Petition. (CT 207-223.) The trial court found that the Arbitration Agreement was both procedurally and substantively unconscionable. (CT 222.) On the other hand, the trial court vacated the ODA and remanded the matter to the Labor Commissioner's office for another hearing, finding that OTO had been deprived of a fair hearing because even though it showed up at the hearing and left, the hearing should have been postponed.

The Court of Appeals agreed with the Labor Commissioner with respect to OTO's Arbitration Agreement, "that the degree of procedural unconscionability was extraordinarily high." (*OTO, L.L.C. v. Kho*, *supra*, 14 Cal.App.5th at p. 709.) The Court, however, concluded that the Agreement was not substantively unconscionable. (*Ibid.*) This Court then granted review and also granted review in the related Petition for Review of the Labor Commissioner.

C. THE COURT BELOW FOUND THAT THE AGREEMENT WAS PROCEDURALLY UNCONSCIONABLE

The court below found the "circumstances of Kho's execution of the Agreement demonstrated a high degree of oppression." (*OTO, L.L.C. v. Kho*, *supra*, 14 Cal.App.5th at p. 708.) Kho was given limited time to sign (but not even to read) the Arbitration Agreement. This was found to be "highly unconscionable." OTO does not challenge that critical finding

The circumstance underlying Kho's signing of OTO's Arbitration Agreement is also unconscionable for another reason related to Kho's employment as a mechanic. As a flat rate mechanic, his employment agreement provided he would be paid only for each job performed. (CT 115-116.) Thus, any time he took to review the Agreement resulted in unpaid time.[8]

[8] See section 226.2, effective January 1, 2016 (requiring payment for unallocated time for employees paid on a piece rate).

D. THIS COURT MEANT WHAT IT SAID IN *SONIC II*

1. The Berman Procedures Provide Benefits and Protections That the Arbitration Process Eliminates

In *Sonic II*, this Court extensively addressed the question of whether an arbitration agreement preempted the provisions of the Berman hearings, allowing wage claimants to bring their claims before the Labor Commissioner in an informal process. The Court was required to address this issue a second time because its earlier decision in *Sonic I* was reversed by the Supreme Court in light of *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 (*Concepcion*).

This Court need only apply its careful and extended analysis in *Sonic II* to find the Arbitration Agreement at issue in this case unconscionable. This Court concluded that California state courts could continue to enforce unconscionability rules with respect to arbitration agreements that eliminate the Berman process.

In *Sonic II*, the Court emphasized the informality and employee-protective provisions of the Berman hearing. It did so while reaffirming that the state could create a procedural mechanism to enforce wage and hour laws that favored wage claimants. The Court initially summarized the "statutory protections [that] benefit employees with wage claims against their employers." (*Sonic II, supra*, 57 Cal.4th at pp. 1127-1128.)

The Court described, in great detail, those protections and benefits available to employees in the Berman statutes. (*Sonic II, supra*, 57 Cal.4th at pp. 1127-1130.) The Court summarized these advantages as follows:

> In sum, the Berman statutes provide important benefits to employees by reducing the costs and

> risks of pursuing a wage claim in several ways. First, the Berman hearing itself provides an accessible, informal, and affordable mechanism for laypersons to seek resolution of such claims. (See *Cuadra v. Millan* (1998) 17 Cal.4th 855, 858 [Citations.] (*Cuadra*).) Second, section 98.2, subdivision (c) discourages unmeritorious appeals of Berman hearing awards by providing that a party who unsuccessfully appeals an award must pay the other party's costs and attorney fees. (citation omitted). Third, section 98.2, subdivision (c) provides that an employee will not be saddled with the employer's attorney fees and costs unless the employee appeals from a Berman hearing award and receives a judgment of zero on appeal. This rule differs from section 218.5, which provides for attorney fees for the "prevailing party" in wage actions initiated in the superior court. Fourth, section 98.4 provides that a wage claimant who is "financially unable to afford counsel" may be represented by the commissioner in the event the employer appeals and "shall" be represented by the commissioner if the employee seeks to uphold a Berman hearing award. Fifth, the Berman statutes ensure that an employee will actually collect a judgment or award by mandating that the Labor Commissioner use her best efforts to collect a Berman hearing award and by requiring the employer to post an undertaking for the amount of the award if it takes an appeal. (See *Sonic I*, *supra*, 51 Cal.4th at p. 674; § 98.2, subds. (b), (e), (i).) Finally, the Berman process ensures that employees have assistance in resolving their claims, including the use of a translator if needed. (§ 105.)

(*Id.* at pp. 1129-1130.)

As to the Berman procedures' primary role of protecting workers' ability to feasibly bring wage claims, the Court further noted:

> We went on to explain: "Although the statutory protections that the Berman hearing and the posthearing procedures afford employees were added piecemeal over a number of years, their common purpose is evident: Given the dependence of the average worker on prompt

> payment of wages, the Legislature has devised the Berman hearing and posthearing process as a means of affording an employee with a meritorious wage claim certain advantages, chiefly designed to reduce the costs and risks of pursuing a wage claim, recognizing that such costs and risks could prevent a theoretical right from becoming a reality. These procedures, including the employer undertaking and the one-way fee provision, also deter employers from unjustifiably prolonging a wage dispute by filing an unmeritorious appeal. This statutory regime therefore furthers the important and long-recognized public purpose of ensuring that workers are paid wages owed. The public benefit of the Berman procedures, therefore, is not merely incidental to the legislation's primary purpose but in fact central to that purpose. Nor can there be any doubt that permitting employers to require employees, as a condition of employment, to waive their right to a Berman hearing would seriously undermine the efficacy of the Berman hearing statutes and hence thwart the public purpose behind the statutes." (*Sonic I*, *supra*, 51 Cal.4th at p. 679.)

(*Sonic II*, *supra*, 57 Cal.4th at pp. 1131-1132.)

This Court determined that an arbitration procedure can make financially unattainable the numerous procedural, remedial and enforcement benefits and protections the Labor Commissioner process affords, concluding that:

> "[A]n employee going directly to arbitration will lose a number of benefits and advantages. He or she will not benefit from the Labor Commissioner's settlement efforts and expertise. He or she must pay for his or her own attorney whether or not he or she is able to afford it—an attorney who may not have the expertise of the Labor Commissioner. Moreover, what matters to the employee is not a favorable arbitration award per se but the enforcement of that award, and an employee going directly to arbitration will have no special advantage obtaining such enforcement. Nor is

> there any guaranty that the employee will not be responsible for any successful employer's attorney fees, for under section 218.5, an employee who proceeds directly against an employer with a wage claim not preceded by a Berman hearing will be liable for such fees if the employer prevails on appeal. In short, the Berman hearing process, even when followed by binding arbitration, provides on the whole substantially lower costs and risks to the employee, greater deterrence of frivolous employer claims, and greater assurance that awards will be collected, than does the binding arbitration process alone." (*Sonic I*, *supra*, at p. 681, fns. omitted.)

(*Sonic II*, *supra*, 57 Cal.4th at pp. 1132-1133.)

The U.S. Supreme Court "granted certiorari in [*Sonic I*], vacated the judgment, and remanded the case to this court for consideration in light of [*Concepcion*]." (*Sonic II*, *supra*, 57 Cal.4th at p. 1124.) This Court, recognizing the scope of *Concepcion*, then held that *Sonic I* was improperly decided because it categorically rejected any arbitration procedure as a substitute for the Berman hearing.

2. ***Sonic II* Established That Any Arbitration Procedures That Are a Substitute to the Berman Process Must Be "Affordable and Accessible"**

This Court, in language carefully crafted to preserve the important principles behind the Berman statutes, which it had taken great lengths to explain originally in *Sonic I* (and earlier cases cited in *Sonic I* and *II*) and then restate in *Sonic II* in light of the tension created by *Concepcion*, stated in relevant part:

> But the waivability of a Berman hearing in favor of arbitration does not end the unconscionability inquiry. The Berman statutes include various features designed to lower the costs and risks for employees in pursuing wage claims, including procedural informality,

> assistance of a translator, use of an expert adjudicator who is authorized to help the parties by questioning witnesses and explaining issues and terms, and provisions on fee shifting, mandatory undertaking, and assistance of the Labor Commissioner as counsel to help employees defend and enforce any award on appeal. Waiver of these protections does not necessarily render an arbitration agreement unenforceable, nor does it render an arbitration agreement unconscionable per se. But waiver of these protections in the context of an agreement that does not provide an employee with an accessible and affordable arbitral forum for resolving wage disputes may support a finding of unconscionability. As with any contract, the unconscionability inquiry requires a court to examine the totality of the agreement's substantive terms as well as the circumstances of its formation to determine whether the overall bargain was unreasonably one-sided. In the present case, we remand to the trial court to conduct this fact-specific inquiry.

(*Sonic II*, *supra*, 57 Cal.4th at 1146.)

This Court adopted a formula that it directed the lower courts to apply in determining whether an arbitration procedure is not considered "accessible and affordable," and thus, is substantively unconscionable:

> Rather, in the context of a standard contract of adhesion setting forth conditions of employment, the unconscionability inquiry focuses on whether the arbitral scheme imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable, and thereby "effectively blocks every forum for the redress of disputes, including arbitration itself." (*Gutierrez* [*v. Autowest, Inc.* (2003)] 114 Cal.App.4th [77,] 90.)

(*Sonic II*, *supra*, 57 Cal.4th at p. 1148.)

The Court reemphasized the necessity that the arbitration procedure be "accessible and affordable" for wage claimants. The phrase or variations of

"accessible and affordable" permeate this Court's opinion and are shorthand for the greater inquiry that a court must make as to the unconscionability of an arbitration procedure. The phrase, including grammatical variations, was used 14 times in the majority opinion. (*Sonic II, supra*, 57 Cal.4th at pp. 1128-1129, 1146-1149, 1150, 1154-1155, 1158 [e.g., "[A]dhesive [A]rbitration [A]greement [must] provide for accessible, affordable resolution of wage disputes." *Id.* at p. 1150.].) This Court also added the word "informality" into the phrasing nine times. (*Id.* at pp. 1128-1129, 1147, 1149, 1154-1155.) The arbitration procedure imposed by OTO is the very contradiction of "informality."

This Court refrained from making any decision as to what arbitration provisions would meet the test of "accessible and affordable." It remanded the case to the lower court for further consideration, and this Court has not addressed the issue since..[9]

This Court was clear, however, that loss of the many substantive benefits of the Berman hearing process was one factor to consider in the unconscionability analysis:

> In sum, we do not hold that any time arbitration is substituted for a judicial or administrative forum, there is a loss of benefits. Nor do we hold that the proponent of arbitration will invariably have to justify the agreement through provision of benefits comparable to those otherwise afforded by statute. Both California and federal law treat the substitution of arbitration for litigation as the mere replacement of one dispute resolution forum for another, resulting in no inherent disadvantage. (*See Armendariz* [*v. Foundation Health Psychcare Services, Inc.* (2000)] 24 Cal.4th

[9] Counsel has been informed the matter settled.

> [83,] 98–99 [(*Armendariz*)]; *Mitsubishi Motors* [*Corp. v. Soler Chrysler-Plymouth* (1985)] 473 U.S. [614,] 626–628 [(*Mitsubishi Motors Corp.*)].) But where, as here, a particular class has been legislatively afforded specific protections in order to mitigate the risks and costs of pursuing certain types of claims, and to the extent those protections do not interfere with fundamental attributes of arbitration, an arbitration agreement requiring a party to forgo those protections may properly be understood not only to substitute one dispute resolution forum for another, but also to compel the loss of a benefit. The benefit lost is not dispositive but may be one factor in an unconscionability analysis.

(*Sonic II*, *supra*, 57 Cal.4th at p. 1152.)

There is no doubt in this case that the unilaterally imposed arbitration procedure eliminated the favorable provisions of the Berman hearing process.

The Court elaborated on the unconscionability doctrine by stating that the analysis must look to whether the agreement is unreasonably favorable to one side:

> The unconscionability doctrine is instead concerned with whether the agreement is unreasonably favorable to one party, considering in context "its commercial setting, purpose, and effect." (Civ. Code, § 1670.5, subd. (b).)

(*Sonic II*, *supra*, 57 Cal.4th at p. 1148.)

3. The Advantages of the Berman Statutes

This Court has recognized many of the advantages of the Berman statutes. We list the advantages that make the process both affordable and accessible to wage claimants:

(1) Assistance is provided to the claimant by the Labor Commissioner's office in filling out the Initial Report or Claim form and processing the claim;[10]

(2) There is a simple and available Initial Report or Claim form to fill out;[11]

(3) The Labor Commissioner publishes detailed instructions on how to fill out the form and explaining the various statutes involved;[12]

(4) The Labor Commissioner investigates the claim and has the discretion not to issue a Notice of Hearing, which limits unnecessary litigation for both parties;

(5) The Labor Commissioner must decide within 30 days of the filing of the Initial Report or Claim whether a hearing will be held, no action will be taken, or an action will be initiated under section 98.3;

(6) If the Labor Commissioner decides to take the case, the Notice of Hearing must issue within 90 days;

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[10] Videos are available to assist wage claimants. (Department of Industrial Relations, *How to file a wage claim* <https://www.dir.ca.gov/dlse/HowToFileWageClaim.htm> [as of Mar. 8, 2018].) Kho was given assistance. (CT 110-111.) The current form is found at RJN LC176-179.

[11] The form is available in English, Spanish, Chinese, Korean, Vietnamese, Tagalog, and Punjabi. For the English-language form, see https://www.dir.ca.gov/dlse/Forms/Wage/English.pdf. The availability of the form in other languages is relevant given that Mr. Kho's first language is Chinese.

[12] RJN LC172-175.

(7) After investigation, a Notice of Claim and Conference is issued. That Notice summarizes the claim and sets a conference before a Deputy Labor Commissioner to attempt to resolve the claim;

(8) If the matter is not settled with the assistance of the Deputy Labor Commissioner, the Deputy prepares the complaint for the employee to sign;[13]

(9) No discovery is permitted in the administrative process, except to the extent information is learned at the Conference both by the claimant and the employer;

(10) Subpoenas for production of records at the Berman hearing are available and are issued by a Deputy Labor Commissioner (CT 138-141);[14]

(11) The Labor Commissioner unilaterally issues the Notice of Hearing setting the date and location and stating the issue(s) and the remedy;

(12) The hearings are conducted informally (§ 98, subd. (a));[15]

(13) No pleadings are allowed except the complaint and an answer (§ 98, subd. (d));[16]

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[13] *Cuadra, supra*, 17 Cal.4th at p. 861.

[14] California Code of Regulations, title 8, section 13506; RJN LC195.

[15] California Code of Regulations, title 8, sections 13502, 13505 and 13506; RJN LC193-195.

[16] The Notice of Hearing includes the Complaint, which sets out the claim. (CT 53, 131, 133 and 135.)

(14) The Hearing Officer may assist the unrepresented employee or employer in presenting evidence and explaining the procedures and applicable law;[17]

(15) The Labor Commissioner must make an interpreter available (§ 105);

(16) The hearing is recorded, and, if one party requests the transcript or recording, the other party is to be provided a copy free of charge;[18]

(17) Informal rules of evidence are applied;[19]

(18) The Order, Decision or Award must issue within 15 days after the hearing (§ 98.1);

(19) The informality of the Berman process is preserved because the Administrative Procedure Act does not apply;

(20) Any appeal must be filed within 15 days from the service of the ODA;

(21) If no appeal is timely filed, a judgment is automatically entered (§ 98.2(e))

(22) Legal representation may be provided for free to the wage claimant by the Labor Commissioner's office in the de novo appeal (§ 98.4);

(23) The appeal is de novo;

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[17] Policies and Procedures, RJN LC167.

[18] California Code of Regulations, title 8, section 13502; RJN LC193.

[19] This reinforces the evidentiary burdens imposed on employers who do not maintain records required by law. (See *Hernandez. v. Mendoza,* (1998) 199 Cal.App.3d 721; Cal. Code Regs., tit. 8, § 13502; RJN LC193.)

(24) The appeal does not require the preparation of any pleadings except the Notice of Appeal which is an available form;

(25) No response is required by the wage claimant to the Notice of Appeal;

(26) The trial court has the discretion to allow limited discovery, consistent with the de novo nature of the appeal;[20]

(27) A bond is required to be secured by the employer in the amount owed in order to ensure prompt payment;[21]

(28) An attorney representing the wage claimant on appeal can receive attorney's fees (§ 98.2, subd. (c));

(29) Interest runs on the ODA from the date wages were due and payable;[22]

(30) A claimant can expand the issues beyond those presented at the hearing, subject to the discretion of the trial court;

(31) The employer is not limited in its defenses;

(32) The Labor Commissioner assists the wage claimant to collect "claims for wages, judgments, and other demands" in other states (§ 103);[23]

(33) Special procedures exist for the collection of judgments entered by courts from Berman hearings. (§ 96.8.)[24]

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[20] *Sales Dimensions v. Superior Court* (1979) 90 Cal.App.3d 757.

[21] The failure to post the bond is jurisdictional, and any appeal without a bond must be dismissed. (See *Palagin v. Paniagua Construction, Inc.* (2013) 222 Cal.App.4th 124, 127; § 98.2.)

[22] A similar interest provision applies to any action for nonpayment of wages in court. (§ 218.6.)

[23] Respondent is an out-of-state corporation, although the place of business where Mr. Kho worked was in Alameda County.

The Labor Commissioner must enforce any judgment, and attorneys' fees are provided for a judgment creditor to enforce a judgment (§ 98.2, subd. (k));

(34) Employees can make wage assignments to the Labor Commissioner who then can collect the wage claims (§ 96).

The entire process of the Berman statutes contains many safeguards and advantages to a claimant in enforcing his or her rights under the Labor Code. These advantages are present from the beginning of the process to its completion, including the expeditious collection of amounts owed pursuant to a court judgment.[25] Each step, to some degree, is tipped in favor of prompt, fair and full resolution of claims for workers.

It should not be lost that this process has advantages to employers. The process is quick, inexpensive, resolved before Hearing Officers who are trained to know the law involved and who can help resolve the case, and is "accessible and affordable" to employers. The complicated burdens imposed by OTO's Arbitration Agreement can only be seen as intentional impediments to claimants rather than genuine efforts to provide a means to fairly and efficiently resolve such claims for both sides.

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[24] Those procedures would not be available in arbitration because any successful claimant in arbitration would have to petition to confirm an arbitration award in order to obtain an enforceable judgment. No fees would be available for the enforcement of the award. (Cf. § 98.2, subds. (j) & (k) [providing for attorneys' fees to enforce judgments].)

[25] Code of Civil Procedure section 690.040 gives the Labor Commissioner additional powers to collect unsatisfied judgments.

E. OTO'S ARBITRATION AGREEMENT IS NEITHER ACCESSIBLE NOR AFFORDABLE AND TILTS THE ENFORCEMENT PROCESS AGAINST THE WORKER BY ERECTING SUBSTANTIAL BARRIERS TO PURSUIT OF ANY CLAIM, WHICH MAKES IT SUBSTANTIVELY UNCONSCIONABLE

1. OTO's Arbitration Agreement Provides Neither an Accessible nor Affordable Forum

The Court's use of the phrase "accessible and affordable" establishes that any substitute forum must satisfy both prongs of the test. They do overlap to some degree. We address those qualifications below.

a. The Forum Is Not Accessible

OTO made it difficult for Kho to access and initiate arbitration. The Arbitration Agreement itself does not provide any provision for how to initiate arbitration. The Agreement is deliberately silent as to procedure. OTO failed to provide any rules of arbitration and did not indicate whether and how to contact an arbitration provider or identify those that would be acceptable to it. While the Arbitration Agreement requires that "any arbitrator herein shall be a retired California Superior Court Judge," and that judge "shall be subject to disqualification on the same grounds as would apply to a judge of such court," the agreement is entirely silent on where Kho would be able to find a retired Superior Court Judge experienced in similar cases, and who would be willing to hear such a case. In contrast, Kho could easily locate the Labor Commissioner's office or its user-friendly Web site and initiate the Berman process. (RJN 124-147.) The court below correctly noted that "a well-drawn arbitration clause would have specified such means ..." to commence arbitrations. (*OTO, L.L.C. v. Kho, supra*, 14 Cal.App.5th at p. 712.)

This omission leaves the arbitration process totally in the control of OTO, except for the burdensome rules of civil litigation that are mandated by the Arbitration Agreement, further contributing to its severely one-sided nature. Through its silence on claims' initiation, this Agreement intentionally erects barriers to employees' meaningful invocation and participation in the process. Kho could not be expected to go to the employer who fired him and ask how he could initiate a proceeding against it. Nor would any current worker ever have the courage to make such a request. OTO could, at the time of any request for arbitration, impose an onerous procedure without the employee being able to find or assert clear guidance to the contrary. Moreover, the one-sided nature of the Agreement would allow OTO to discourage or even retaliate before the process ever began. Nor, as noted below, would OTO have any obligation to inform the worker that she or he would not have to pay any of the costs of arbitration because the Labor Commissioner imposes no costs.

The following are the significant barriers erected by the OTO Agreement, which show it is not "accessible and affordable" when compared to the Berman process:

(1) The necessity of providing a pleading, in the nature of a complaint;

(2) Responding to demurrers, motions to strike and similar motions;[26]

(3) Extensive discovery, including requests for admission,

[26] See section 98, subdivision (d).

request for production of documents and so on, which contain procedural traps;

(4) Motion practice, including motions for summary judgment and summary adjudication;

(5) The lack of an adjudicator who is trained in Labor Code matters;

(6) All the other formalities of court proceedings;

(7) The formal Rules of Evidence;

(8) Adverse choice of law by imposing the Federal Arbitration Act;[27]

(9) The elimination of the Berman hearing process fee shifting

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[27] The Arbitration Agreement states that "the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act ...." By imposing this choice of law on California law, the Agreement eliminates many of the otherwise protective provisions contained in the Code of Civil Procedure governing arbitration. (See Code Civ. Proc., § 1282.) We recognize that even without this choice of law provision some of these provisions may be preempted by the FAA, but the Court need not address which would be preempted without the choice of law provision. The FAA imposes limitations, such as the inability of arbitrators to issue subpoenas for third parties to produce documents before a hearing, which can truly impede litigation. (See *CVS Health Corp. v. Vividus, LLC* (9th Cir. 2017) 878 F.3d 703.

California law disfavors such choice of law provisions in employment agreements. (See § 925 [effective January 1, 2017]. See also *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191 [California law applies to out of state worker present in state for one day].) This is particularly true where California law differs from federal law. (See *Alvarado v. Dart Container Corp.* (March 5, 2018, S232607) __ Cal. 5th __ [2018 Cal. LEXIS 1123, *10.)

Finally, we note that the quoted phrase seems contradictory, but it would not have been necessary to refer first to the FAA unless OTO intended for the FAA to prevail. These and other confusing provisions make the Arbitration Agreement inaccessible.

provisions;[28]

(10) The lack of any requirement to post a bond to discourage unmeritorious appeals;

(11) Narrower grounds to disqualify a judge selected as arbitrator since a retired judge is disqualified under the Agreement based only upon the reasons to disqualify a judge contained in Code of Civil Procedure section 170.1, while an arbitrator can be disqualified on broader grounds (Code Civ. Proc., § 1281.9).

(12) The wage claimant would be required to hire a licensed lawyer if he or she sought representation in an arbitration where in the Berman hearing, a non-attorney may represent any party;[29]

(13) The wage claimant can only enforce an arbitration award by filing a petition to confirm the arbitration award and then enforcing that judgment in contrast to the simple and direct enforcement mechanisms for an ODA or collecting on a bond posted by an employer from an appeal from an ODA;

(14) The arbitration process is "private," which prevents workers from sharing their information, evidence, decisions and assistance with others or disclosing to the public the proceedings. Without such

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[28] The court below noted that the wage claimant could assert fees under section 218.5, but did not recognize the trap for wage claimants because the claim for fees must be asserted "upon initiation of the action." If an employee filed for arbitration by contacting a retired judge and claimed wages, no attorneys' fees would be available later if an attorney agreed to represent him. This Court noted this difference. (*Sonic I, supra*, 51 Cal.4th at p. 681.)

[29] See Code of Civil Procedure section 1282.4; *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119. The parties are expressly advised that they can be represented in a Berman hearing by someone who is not an attorney. (See CT 133.)

information and precedent readily available, enforcement of similar claims is more difficult and, thus, less accessible.

It is apparent, therefore, that the procedures imposed by OTO are substantially burdensome and make it extremely difficult for a worker, particularly a worker who is unrepresented, to meaningfully pursue any claim in the arbitration process.

The term "accessible" must mean accessible throughout, from the attempt to initiate any process to the conclusion, which includes enforcing or collecting any judgment. At every step of the process set out in OTO's Arbitration Agreement, there are barriers and hurdles to that goal.

b. The Procedure is Not Affordable

The Berman process imposes no costs. Thus, to qualify as "affordable," the wage claimant in an arbitration procedure must also be able to process his or her claim without cost. The imposition of any costs on the wage claimant acts, in effect, as an unlawful deduction from the wages owed as the claimant otherwise would have retained the full payment of his unpaid wages through an ODA.[30] Moreover, the costs wage claimants incur when they retain counsel violate the fee shifting provisions of the Labor Code. Any costs reduce the value of the wages owed to the worker. For some, that could drive the wages well below the statutory minimum wage even after a successful claim. A worker should not have to pay any portion of his wages to collect his wages.

The Arbitration Agreement intentionally omits any mention of who

[30] The public policy of California is that all wages must be paid "without abatement or reduction." (§ 203; see also §§ 221, 224, 225.5.)

will bear the very substantial costs of arbitration. This is very misleading. The Arbitration Agreement cites to the Code of Civil Procedure section 1284.2 and states that "[i]f CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP §1284.2."

For 18 years, the applicable law has been that the employer must bear the cost of arbitration, but OTO leaves that critical information out of the Agreement. (*Armendariz, supra*, 24 Cal.4th at pp. 110-111.) OTO could have transparently stated that it was responsible for the costs of arbitration, as required by *Armendariz*, but instead it was deliberately confusing and opaque about what costs Kho must bear in arbitration, including the up-front cost of initiating the claim.[31]

To determine what costs Kho must pay, he would first have to review Code of Civil Procedure section 1284.2 and then somehow find applicable case law. Then he would have to determine whether any of that case law controls the issue of costs in arbitration.[32] And, if Kho had sought to initiate proceedings through contacting a retired judge, he would have learned that he, as the claimant, has to pay to initiate any such proceedings. Any judge, to avoid any claim of partiality, would likely not have advised him on this issue. These tasks are almost insurmountable for

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[31] Under *Armendariz*, where a court filing is the only option, the employee can be required to pay the equivalent of court costs towards the arbitration. Because Kho chose the free Berman process, he cannot be required to pay any costs.

[32] The Arbitration Agreement elsewhere states in a contradictory phrase that the FAA will control.

a layperson without legal training, access to legal research sources and financial means to retain an attorney.

OTO drafted the Arbitration Agreement in this misleading manner to discourage employees from filing any claims. Most employees will not pursue arbitration without assurances that they will not be required to cover extensive costs, which in many cases will exceed the value of unpaid wages. As noted in his fee waiver request before the trial court, Kho is a low-wage claimant whose cost waiver request was granted by the court. (CT 30-32.) The risk of incurring arbitration costs would discourage Kho, or any worker, from proceeding in arbitration. By creating uncertainty as to who will be stuck paying the costs, OTO has effectively erected yet another barrier and rendered the arbitration route inaccessible to many, if not all, of its employees. The Agreement provides OTO the one-sided flexibility of not owning up to its responsibility to pay the costs until pressed by a legally schooled wage claimant.

Even though the wage claim may be for a small amount, the complicated nature of the arbitration process imposed by OTO was designed with the purpose of making it infeasible and unmanageable for individual workers to bring wage claims in this arbitration process without the assistance of an attorney. The wage claim would have to have a statutory fee provision or be very large before an attorney could feasibly accept representation. By imposing the complexities of civil litigation without the assistance of a Deputy Labor Commissioner, the employee is effectively required to hire an attorney in circumstances where, in many cases, an attorney is economically unavailable to assist in the enforcement

of the wage claim when the value of the individual wage claims are eclipsed by the legal fees. Kho was not able to afford an attorney. (CT 111.) The claimant cannot use a friend, worker center, union or other person to assist him in the arbitration procedure because, under California law, only attorneys may represent parties in arbitration.[33] We recognize that, alternatively, individual claimants could dedicate days to learn the law and represent themselves to their severe disadvantage. We are confident this Court did not contemplate such a result when it required that any arbitration procedure be "accessible and affordable."[34]

The efforts to research, prepare, attend multiple hearings and engage in discovery that litigation entails result in substantial cost and thus, a resulting reduction in the wages recovered. Individual claimants would have to face the considerable resources of an employer represented by an attorney, or often a team of attorneys, experienced in civil litigation and its associated complex procedural traps and requirements. This is an extraordinary disadvantage and cost in terms of the time and effort required to maneuver through the complicated burdens of civil litigation compared to the simplicity of a Berman hearing.

Because the Arbitration Agreement prevents claimants from joining their claims together, each claimant must separately bear the costs rather than engage in cost sharing. It also prevents the Labor Commissioner from

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[33] See footnote 29. Some provisions of the Labor Code expressly allow third party representation. (§ 1198.5, subd. (b)(1).)

[34] Although fee awards apply to wages under section 218.5, they would not apply to other claims that could be made in the Berman process, e.g., claims for rest breaks or meal periods under section 226.7.

intervening to support the claimant's position.[35]

The ODA or trial court judgment is enforceable through efficient and effective statutory collection procedures, including collecting on any bond. In contrast, the only way to enforce an arbitration award is by filing a court action to confirm the arbitration award and then using the normal procedures to enforce any award.

The OTO Agreement is neither accessible nor affordable, and it is accordingly substantively unconscionable.

2. OTO's Arbitration Agreement is Substantively Unconscionable for Additional Reasons

There are additional provisions in the Arbitration Agreement that are substantively unconscionable:

- It is "private," thus precluding disclosure of the proceedings and obtaining assistance from other employees. (§§ 232 and 232.5.)[36]
- It lacks complete mutuality because it allows for "owners, directors, officers, managers, associates, agents and parties affiliated with its associate benefit and health plan," to compel arbitration but does not require arbitration should they wish to bring an employment-related claim against an employee, such as theft of trade secrets.[37]

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[35] See section 98.5.

[36] A confidentiality provision would be unconscionable. (*Sonic II*, *supra*, 57 Cal.4th at p. 1145.)

[37] *Armendariz*, *supra*, 24 Cal.4th at pp. 117-118.

- It applies to ERISA benefit plans for which there are separate procedures to resolve benefit claims. (See 29 U.S.C. § 1133; 29 C.F.R. § 2560-503-1.)
- The procedure requires the application of the FAA[38] even though it is the employer's burden to establish that the dispute affects commerce. (See *Shepard v. Edward Mackay Enterprises, Inc.* (2007) 148 Cal.App.4th 1092, 1101; *Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, 213-214.)
- The arbitration procedure requires that the arbitrator decide the "enforceability and/or scope of this Agreement," a function that is left to the courts.[39]
- The Arbitration Agreement prevents workers from jointly defending common claims.
- The Arbitration Agreement prevents consolidation of claims where the only effective relief is through consolidation or where others may be necessary parties.[40] (See Code Civ. Proc., § 389.)

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[38] Curiously, the reference is only to 9 U.S.C. §§ 3 and 4, which is only part of the FAA. These ambiguities and sometimes contradictions between the FAA and state law are part of the intentional complexities of the Arbitration Agreement, which are not navigable by a wage claimant without a lawyer and probably not even by an attorney experienced in these issues.

[39] See *Rent-A-Center, W., Inc. v. Jackson* (2010) 561 U.S. 63, 70 (challenges to contract as a whole are different than challenges to the arbitration agreement). See *In re Van Dusen* (9th Cir. 2011) 654 F.3d 838, and *Oliveira v. New Prime, Inc.* (1st Cir. 2017) 857 F.3d 7, cert. granted Feb. 26, 2018, No. 17-340, 2018 U.S. LEXIS 1402 (conflict as to whether court or arbitrator decides applicability of FAA).

[40] This also prevents joint employer claims and claims against supervisors or owners jointly. (Cf. *Reynolds v. Bement* (2005) 36 Cal.4th 1075 [claim against supervisors could not be stated under the circumstances of the case].)

- The Arbitration Agreement prohibits the arbitrator from awarding injunctive relief that would affect other employees.[41]
- The Arbitration Agreement provides that the arbitration procedure governs "the length of my employment, and the reasons for termination." Thus, it seeks to eliminate many of the protections of the Labor Code that could be considered in determining whether an employee was wrongfully terminated, including anti-retaliation provisions. (See §§ 96, subd. (k), 98.)[42]
- The Arbitration Agreement prohibits representative Private Attorney General Act, Labor Code sections 2698, *et seq.* (PAGA) claims, which are not waivable under California law. (See *Iskanian, supra*, 59 Cal.4th at p. 383.) The FAA does not preempt the California rule against PAGA waivers. (*Id.* at pp. 384-389.)

F. OTO'S ARBITRATION PROVISION IS INCONSISTENT WITH THE FAA'S PURPOSE AND STATE LAW REGARDING UNCONSCIONABILITY IS NOT PREEMPTED BY THE FAA

1. OTO's Arbitration Agreement Undermines the Purposes of the FAA to Encourage the Use of Arbitration Because It Does Not Provide for "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes" as Compared to Litigation

As described above, OTO's Arbitration Agreement creates a process inconsistent with what is traditionally viewed as arbitration under the FAA

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[41] Some provisions of the Labor Code allow individuals to seek injunctive relief. (§ 226, subd. (h).)

[42] This appears to be an attempt to avoid any claim of wrongful termination based on any theory that might be cognizable by a court but that is beyond the jurisdiction of the Labor Commissioner.

or state law. Rather, it is much closer to comprehensive civil litigation except that no jury is afforded and class actions are virtually eliminated. The elimination of both of these procedural rules benefits the employer and certainly not the employees.

The Supreme Court has made clear that arbitration serves a different purpose than civil litigation. "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" (*Preston v. Ferrer* (2008) 552 U.S. 346, 357-358 [quoting *Mitsubishi Motors Corp.*, *supra*, 473 U.S. at p. 633].)

In *Sonic II*, this Court recognized this fundamental principle from two perspectives. First, it recognized the Supreme Court had rejected state law restrictions on class action waivers precisely because class actions interfere with this fundamental attribute of a streamlined process. (*Sonic II*, *supra*, 57 Cal.4th at pp. 1143-1147.) The Court found that class actions undermine "*Concepcion*'s precept that 'efficient, streamlined procedures' is a fundamental attribute of arbitration with which state law may not interfere. [Citation.]" (*Id.* at p. 1140.)

On the other side of the coin, California has an equally strong interest in preserving the informality of the Berman statutes, which "offer a 'speedy, informal, and affordable method of resolving wage claims.'" (*Sonic II*, *supra*, 57 Cal.4th at p. 1147 [quoting *Cuadra*, *supra*, 17 Cal.4th at p. 858].)[43]

[43] Presumably, OTO would assert a wage claimant could not use the small claims court procedures. (Code Civ. Proc., § 116.110, *et seq.*)

Thus, the imposition of all the burdens of civil litigation interferes with the fundamental attributes of arbitration and the Berman statutes.

The OTO Agreement, which provides for all other burdens and rights of civil litigation, violates this fundamental attribute of arbitration as repeatedly emphasized in so many United States Supreme Court cases. This Court recently addressed this in *McGill v. Citibank, N.A* (2017) 2 Cal.5th 945, 964-65 (*McGill*):

> The court then added that the FAA preempts even a "generally applicable" state law contract defense if that defense (1) is "applied in a fashion that disfavors arbitration" (*Concepcion*, at p. 341), or (2) "interferes with fundamental attributes of arbitration" (*id.* at p. 344), such as "'lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes'" (*id.* at p. 348). The *Discover Bank* rule fails the latter test, the high court held, because by requiring a class arbitration procedure, the rule (1) "sacrifices" arbitration's "informality" (*Concepcion*, at p. 348), (2) "makes the process slower, more costly, and more likely to generate procedural morass than final judgment" (*ibid.*), (3) "requires procedural formality" (*id.* at p. 349), and (4) "greatly increases risks to defendants" (*id.* at p. 350).

As the Court pointed out, in quoting from *Concepcion*, procedural attributes imposed by law can undermine the very purpose animating arbitration. So too can overly burdensome and complicated procedures imposed by an employer invalidate the justification for arbitration.

The Supreme Court in *Concepcion* addressed this and suggested that "judicially monitored discovery or adherence to the Federal Rules of Evidence" (*Concepcion, supra*, 563 U.S. at p. 344) would interfere with arbitration similar to mandated class actions. This Court in *Sonic II* noted

exactly this point. (*Sonic II, supra*, 57 Cal.4th at p. 1143.) OTO's agreement attempts to force precisely that which statutes or the courts could not do without facing preemption.

The United States Supreme Court invalidated this Court's decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (invalidating class action waivers). The reasons that the United States Supreme Court used to allow arbitration agreements to prohibit class actions were noted by this Court in *McGill* and exist here:

(1) The informality of the arbitration procedure is eliminated;

(2) This arbitration process will invariably be slower, more costly and more likely to generate procedural morasses because of the right of the parties to engage in all of the motion practice and other procedures available in civil litigation; and

(3) The process greatly decreases the risk to OTO and greatly increases the risk, expense and burdens imposed upon an individual like Kho.

Finding the OTO Agreement unconscionable does not disfavor arbitration, but rather promotes arbitration because it would require OTO to implement an arbitration procedure that has all the "fundamental attributes of arbitration [lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes]." (*McGill, supra*, 2 Cal.5th at p. 964 [quoting *Concepcion, supra*, 563 U.S. at p. 344].) This is exaggerated by the fact that the OTO Agreement voids the Berman statutes, which more closely adhere to the principles of arbitration as envisioned by the FAA, than civil litigation.

OTO claims that it has offered an arbitration agreement that recognizes the core principles behind arbitration with the boilerplate recitation that it seeks to promote "the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide" and "the efficient and timely adjudication of claims." The Agreement is quite to the contrary.

To be sure, if there were no procedural unconscionability, it might be appropriate to find an arbitration agreement between equal bargaining parties with similar procedures to be enforceable. In the commercial context, the parties could reasonably agree to all sorts of barriers to resolving claims. In contrast, this case evinces a high level of procedural unconscionability and the principles of contract formation that apply between two businesses cannot be equally applied to the arbitration of employee claims against an employer. The OTO Agreement is unconscionable and contrary to the animating purposes of the FAA.[44]

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[44] See, e.g., *Concepcion*, *supra*, 563 U.S. at p. 351 ("Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation.... But what the[se] parties ... would have agreed to is not arbitration as envisioned by the FAA [and] lacks its benefits"); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662, 685 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"); *Mitsubishi Motors Corp.*, *supra*, 473 U.S. at p. 628 ("By agreeing to arbitrate a statutory claim, a party ... trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration"); *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 123 ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts").

Here, the incompatibility with the FAA is inarguable because the Arbitration Agreement does not provide for "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." (*Concepcion, supra*, 563 U.S. at p. 348.) To the contrary, all of the costs are greater, there is less efficiency and speed, and the adjudicator is predetermined to be a retired superior court judge who has no special expertise in determining wage claims or other claims within the jurisdiction of the Labor Commissioner, but only has experience with court proceedings.

In summary, then, the FAA cannot preempt the state law that holds this Arbitration Agreement unconscionable because the Berman statutes, as compared to the Arbitration Agreement, more closely align with the fundamental attributes that the FAA has come to promote.

G. WHERE THE ARBITRATION AGREEMENT ELIMINATES STATE ESTABLISHED REMEDIES THAT BENEFIT PUBLIC PURPOSES IN ENFORCING THE LABOR CODE, THE PROCEDURE IS UNCONSCIONABLE

This Court addressed the question of whether an arbitration procedure can restrict the pursuit of a statutory claim where enforcement serves a public purpose. In *McGill*, this Court held that an arbitration agreement could not prohibit the right to seek a remedy of public injunctive relief under various statutes. (*McGill, supra*, 2 Cal.5th at p. 963.) This Court specifically noted that even in early arbitration cases, the Supreme Court made clear that an arbitration agreement could not require an individual to forfeit any statutory rights. (*Id.* at pp. 962-963 [referencing

Mitsubishi Motors, *supra*, 473 U.S. at pp. 628, 637, fn. 19 and *Armendariz*, *supra*, 24 Cal.4th at pp. 99-100].)

Although not applicable to Kho's claims addressed in the ODA, there are many provisions of the Labor Code that are only enforceable by the Labor Commissioner. None of these provisions of state law were adopted for the purpose of disfavoring arbitration. Rather, the Legislature crafted the enforcement mechanism to encourage the efficiencies and simplicity of having these issues resolved by the Labor Commissioner, a subject matter expert and part of an agency charged with enforcement of these statutes. Moreover, in effect, these provisions limit litigation, which is one of the fundamental reasons for arbitration itself. They foreclose class litigation. Consistent development and enforcement of state law through a specialized agency serves the interests of the state.

The Labor Commissioner does not provide a neutral adjudication process. She is charged with enforcing these laws on behalf of workers. The Berman statutes are an important part of that role. (See § 50.5 ["One of the functions of the Department of Industrial Relations is to foster, promote, and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment"].)

Sections 210, 218.7, 225.5, 226, subdivision (f), 226.3-.5, 226.8, 238, 238.2-.4, 240, 245-250, 558, 1197.2, 1198.5, subdivision (k) and 1741, are examples of provisions that are not enforceable in court or arbitration but are only enforceable by the Labor Commissioner. (See also *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 298-300 [only the Labor

Commissioner can enforce the provisions of § 6310].) Some of these provisions are enforceable by the Labor Commissioner in a Berman hearing and through the Berman statutes, some other form of hearing,[45] or alternatively by a direct suit by the Labor Commissioner. OTO's Arbitration Agreement would thus preclude the employee from obtaining a remedy because he or she could not invoke the procedures of the Labor Commissioner who then would otherwise have the power to bring an action either through the administrative process or a civil complaint.

Presumably, OTO would agree that the Arbitration Agreement cannot prevent the Labor Commissioner from initiating such actions, but it is not apparent to an individual worker, like Kho, that the remedy is available to him and other workers.

The Arbitration Agreement also interferes with many statutes that authorize penalties payable to the state. (See §§ 210, subd. (b); 225.5; 2699, subds. (i), (j).) There is no meaningful way to assure that the parties are paying the penalties to the state in this "private" arbitration.

In addition, there are provisions of the Labor Code where a remedy may be obtained by way of a court suit but additional penalties are limited to actions brought by the Labor Commissioner. (See, e.g., § 558, subd. (b).)

This problem was partially addressed by this Court in *Iskanian*. The Legislature recognized that there were some statutes that allowed the Labor Commissioner to obtain remedies and penalties but there was a lack of enforcement. The Legislature helped fill this enforcement gap with PAGA.

[45] Sections 1741-1742.

Additionally, the state has an interest in limiting litigation and ensuring that the Labor Commissioner prosecutes violations of the Labor Code. Thus, to the extent the state legislature chooses to put enforcement of certain provisions entirely within the power and jurisdiction of the Labor Commissioner and thus preclude both court litigation and arbitration, there is no interference with the arbitration process. Consider, for example, California's new and somewhat experimental paid sick leave law, which vests enforcement solely in the Labor Commissioner. (§ 248.5.) This serves many valid purposes, none of which serve to disadvantage arbitration. The enforcement provision ensures uniformity of application and development of the law, reduces litigation, and offers all parties a consistent and simplified approach to enforcement.

The Arbitration Agreement undermines the establishment of the Bureau of Field Enforcement, which was established "to ensure that minimum labor standards are adequately enforced [by] the Labor Commissioner." (§ 90.5.) The Bureau does not adjudicate individual claims but targets "industries, occupations and areas in which employees are relatively low paid and unskilled."[46] (§ 90.5(c).) Thus, when multiple claims exist from workers, the individual and private nature of the Arbitration Agreement would mean the complaint would not come to the attention of the Bureau for enforcement. (See also § 98.9 [Labor Commissioner required to notify Contractor's License Board of willful or deliberate violations].)

[46] See Department of Industrial Relations, *Overview of Bureau of Field Enforcement* <https://www.dir.ca.gov/dlse/BOFE_Brochure.pdf> (as of Mar. 12, 2018).

OTO's Arbitration Agreement prohibits employees from vindicating public rights created by the Labor Code and additionally limits their ability to obtain penalties and other remedies provided by the Labor Code that are exclusively within the jurisdiction of the Labor Commissioner. The loss of these public rights renders the Arbitration Agreement unenforceable.

H. THE IMPORTANCE OF WORKER PROTECTIONS IN CALIFORNIA SUPPORTS THE CONCLUSION THAT OTO'S ARBITRATION PROCEDURE SUBSTANTIALLY WEAKENS THOSE PROTECTIONS AND THE ARBITRATION AGREEMENT IS UNCONSCIONABLE

California has a venerable history of labor protective provisions.[47] The state adopted a 10 hour work day in 1853. (See Stats. 1853, ch. 131, p. 187.) An eight hour day provision was then adopted in 1868. (See Stats. 1868, ch. 70, p. 63.) The first prevailing wage statute on public buildings was adopted in 1870. (See Stats. 1870, ch. 519, § 1, p. 777 [codified in the form of Political Code, § 3222].) Minimum standard legislation began in the middle of the 19th century. As part and parcel of these protections, the Legislature enacted laws to protect the earned wages of the labor force and make the statutes enforceable. Various mechanic lien laws were adopted; the first in 1850. (See Stats. 1850, ch. 87, pp. 211-213.)

The Legislature created the first Labor Commissioner position when the first Bureau of Labor Statistics was approved in 1883. (Stats. 1883, ch.21, pp. 27-30.) Labor Commissioners were appointed and had staff to investigate labor conditions and provide reports and statistics to the Legislature.

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[47] See generally Eaves and Sackman, A History of California Labor Legislation (Queen Calafia Publishing 2012).

Between 1911 and1913 there was a wave of labor protective legislation. This included the creation of the Industrial Welfare Commission, which was charged with setting minimum wages and working conditions. Its first efforts were directed at setting minimum conditions for women and children and then later, in the 1970s, they were expanded to include men. (See generally *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690.) The IWC's power was limited to setting standards; enforcement was outside its scope. In that same period, the Legislature enacted the earliest version of section 203, requiring the payment of all wages due upon termination. (See *Moore v. Indian Spring Channel Gold Mining Co.* (1918) 37 Cal.App. 370.)

In 1976, the Berman process was created and has been in existence ever since. The Berman hearing was created just after statutory changes in 1972 and 1973 that allowed an expansion of the IWC Orders requiring more enforcement mechanisms. (See *Industrial Welfare Com. v. Superior Court*, *supra*, 27 Cal.3d at pp. 700-701.)

The function of the Industrial Welfare Commission was incorporated into the California Constitution:

> The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive and judicial Powers.

(Cal. Const., art. XIV, § 1.)

In summary, California's commitment to worker protection includes both substantive and procedural protections, including the adjudicatory mechanisms established in the Berman statutes. These protections provide

civil and criminal penalties and define the evidentiary standards to be applied. These statutes are interpreted liberally in favor of employees. (See, e.g., *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 592 [citing *Industrial Welfare Com. v. Superior Court*, *supra*, 27 Cal.3d 690].).

Additionally, the Labor Code provides many anti-retaliation provisions. (§§ 98.6, 98.7, 230.1, subd. (d).)[48] The Arbitration Agreement could prevent the Labor Commissioner from seeking injunctive relief now specifically authorized by statute. (§ 98.7, subd. (f).)[49]

The entire legal regime of enforcement is definitively tilted by the Labor Code in favor of employees and against employers who do not comply with the law. This tilt is both substantive and procedural, and as a cohesive enforcement scheme, they cannot be separated.

This is reflected in this Court's decision in *Iskanian*. As this Court recognized, the Legislature determined that the existing mechanisms were inadequate and that additional penalties and procedures to enforce state wage and hour laws were necessary. (*Iskanian*, *supra*, 59 Cal.4th at pp. 379-383.) This was not a matter of simply holding an individual private employer accountable, but rather of enforcing a statute on behalf of the public. On that basis, this Court upheld the non-waivability of PAGA claims in arbitration proceedings. (See also *McGill*, *supra*, 2 Cal.5th 945.)

This history must inform the Court's decision in this case. The substantive protections that are part and parcel of statutory procedural

[48] Section 98.7 was strengthened by the Legislature by Senate Bill No. 306 (2017-2018 Reg. Sess.) (effective Jan. 1, 2018).

[49] There is no assurance of non-retaliation in the Arbitration Agreement except for the discrete act of challenging the right of employees to bring a class claim.

protections cannot be waived by an arbitration agreement. OTO's Arbitration Agreement eliminates the very procedure that is designed to protect these substantive rights. The arbitration forum imposed by OTO effectively dilutes those protections in a way that does not afford Kho and others any meaningful way to enforce their rights.

I. UNCONSCIONABILITY ANALYSIS DOES NOT PLACE KHO'S EMPLOYMENT AGREEMENT ON AN UNEQUAL FOOTING WITH OTHER CONTRACTS; IT SERVES TO PRESERVE THE WORKER PROTECTION PROVISIONS OF CALIFORNIA LAW

The touchstone of the enforceability of arbitration agreements depends on whether the state law places the arbitration agreement on "equal footing with all other contracts." (*DIRECTV, Inc. v. Imburgia* (2015) 136 S.Ct. 463, 471 [quoting *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 443].) Scrutiny of the OTO Agreement in light of this standard shows that it is substantively unconscionable in light of California's extensive regulation of wage and hour issues. California, in many ways, substantively protects workers and their wages. The Berman statutes substantially tilt the enforcement and collection process for wages in favor of workers and against employers who do not comply with the law. Like most provisions of laws protecting workers, they cannot be waived. (See, e.g., Lab. Code, § 1194 ["Notwithstanding any agreement to work for a lesser wage"]; *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 455 ["Labor Code section 1194 confirms 'a clear public policy ... that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers.']; § 219; Civ. Code, § 3513.)

The Berman statutes have many advantages. The OTO Arbitration Agreement was drafted to disable those advantages and to prevent workers like Kho from effectively asserting and enforcing their rights. Although Kho was an at-will employee, his employer was required to comply with state law in the payment of wages and all the provisions of the Labor Code. The Agreement is palpably one-sided in favor of the employer and is unconscionable.[50] The state has a legitimate interest in ensuring that the advantages of the Berman process survive and are not eviscerated. Without the Berman process, workers are uniquely disadvantaged in collecting unpaid wages and enforcing their rights under the Labor Code. The OTO Agreement is substantively and procedurally unconscionable precisely because it serves to render Kho's right to be paid according to California law less enforceable by depriving him of an "accessible and affordable" means to effectuate his statutory rights.[51]

This is the application of the simple proposition that employers, corporations, or any other person, cannot force a party to waive rights that are deemed unwaivable by law. California does not permit waivers of wage claims. (§§ 219, subd. (a), 205.5; see also § 2804.) Any contract that attempts to avoid the law is void and unconscionable. The unconscionability doctrine applied here is no different than the doctrine that

[50] His flat rate agreement is similarly unconscionable and unenforceable since it does not comply with section 226.2 by paying him for rest breaks and unallocated time, and it shifts the costs of doing business onto the employee. (CT 115-116.)

[51] It would also be unconscionable for OTO to require employees to waive the Berman statutes and force them to proceed directly to court on any issue within the Labor Commissioner's jurisdiction.

any contract would be unconscionable if it violated state law or eliminated rights afforded to any person under law.

The Court is not called upon to construe the arbitration clause unfavorably; it is called upon to construe California's employment laws favorably and to reject a process that disfavors and undermines the law of the workplace because it makes those laws much less effective.

VI. EMPLOYERS CAN ADOPT ARBITRATION PROCEDURES THAT ARE ACCESSIBLE AND AFFORDABLE

As established above, OTO's Arbitration Agreement is unconscionable. It is skewed too far in favor of the employer and suppresses workers' access to enforcing their rights under California law. This does not mean, however, all arbitration provisions would suffer the same defects. There are ways an arbitration provision could be drafted to effectuate the goals of the Labor Code and the Berman statutes.

Recognizing the goals of arbitration and worker protection would occur in an arbitration agreement that:

(1) allows the employee to exercise his or her right to a Berman hearing and any appeal to be heard in an arbitration de novo similar to the provisions of section 98.2;

(2) expressly excludes all claims the Labor Commissioner has authority to enforce.[52] This would permit the employer and employee to agree to arbitrate other claims and would not interfere with the state law purposes behind the Berman statutes;

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[52] Such exclusions would be enforceable and consistent with the obligation to arbitrate other claims. (See *McGill*, *supra*, 2 Cal.5th at p. 966.)

(3) is generally consistent with the procedure available to employees and employers under the Berman statutes. For example, an arbitration agreement could provide:

> With respect to any claims that could be brought to the Labor Commissioner under California Labor Code § 98, the arbitrator shall have jurisdiction over such claims and shall, to the extent practical, apply the procedures available in Berman hearings and in a trial de novo under Labor Code § 98 for such appeals. The arbitrator shall tailor the proceedings to afford both parties the rights and remedies available in those proceedings as to such claims that are within the Labor Commissioner's jurisdiction. Nothing herein shall prevent the parties from agreeing to other procedures in arbitration as long as such procedures reflect the informality and accessibility of the Berman hearings and the trial de novo appeal process.

In all cases, however, the arbitration agreement must make clear that the employer will bear the entire costs of such arbitration procedures for any claims.

VII. THE COURT SHOULD REMAND

The trial court issued an order vacating the ODA "because enforcing the ODA would violate the right of Petitioner to a fair administrative hearing. (Code Civ. Proc., sec. 1094.5(b).)" (CT 204.) The court held that because the law regarding arbitration was not settled, "Petitioner was substantially justified in their refusing to participate in the hearing and relying on the arbitration agreement, and it would be unfair to enforce the ODA." (CT 251.)

The trial court erred in relying on Code of Civil Procedure section 1094.5, subdivision (b). The provisions of the Writ of Mandate procedures are not applicable to appeals from the Labor Commissioner's ODAs, which

are exclusively governed by Labor Code section 98.2. Moreover, Berman hearings are not governed by the Administrative Procedure Act and are therefore not hearings within the meaning of Code of Civil Procedure section 1094.5. (Lab. Code, § 98, subd. (g).)

The trial court and the court below were wrong in "vacating" the ODA because it became a nullity upon the filing of a timely Notice of Appeal. The trial court lacked the power to remand to the Labor Commissioner because the Labor Commissioner's jurisdiction had been terminated with the filing of the appeal. (See *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 836.) Since the trial court lacked the power to vacate the decision, the only choice was to proceed to a trial de novo.

OTO had the right to raise new issues, subject to the court's discretion as part of the trial de novo, including its arbitration defense.[53] (See *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1119 [an employer is not bound by the defenses it raises in the Berman process]. See also *Post v. Palo/Haklar & Associates* (2000) 23 Cal.4th 942, 950.) It had no obligation to appear at the Berman hearing to preserve issues properly and timely raised in the trial de novo.[54] OTO's only risk was that an adverse ODA would issue and that it would have to appeal with the statutorily required bond, a component of the overall protections of the Berman statutes.

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[53] Mr. Kho is not waiving his position that OTO's failure to seek relief before the Labor Commissioner bars it from challenging the ODA. (§ 98, subd. (f).)

[54] A claimant who does not appear at the hearing will have their claim dismissed. (See Policies and Procedures, RJN LC167.) The hearing will proceed against a non-appearing employer. (RJN LC167.)

Petitioner Kho will also be able to raise any issues as appropriate, just as OTO can raise any appropriate and timely defenses without regard to the proceeding before the Labor Commissioner.[55]

Finally, the Labor Commissioner had an obligation to proceed with the Berman hearing on the date scheduled. We adopt the arguments made by the Labor Commissioner in her brief on this point and note that filing the Petition on the Friday before the Monday scheduled hearing disrupts the timely and efficient processing of claims under the Berman statutes.[56]

VIII. CONCLUSION

The Court should reverse the Court below and remand to the trial court to conduct as appropriate a trial de novo.

Dated: March 13, 2018

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
David A. Rosenfeld
Caren P. Sencer
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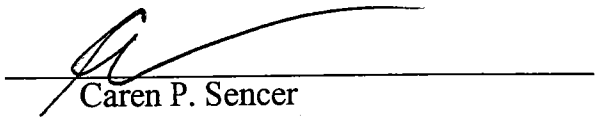
By: 
Caren P. Sencer

Attorneys for Petitioner and Real Party in Interest KEN KHO

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[55] Mr. Kho has already given notice of such intent to seek additional damages. (RJN LC24-25.) OTO will have to reinstate the bond required by section 98.2, subdivision (b).

[56] See California Code of Regulations, title 8, section 13508; RJN LC197 (continuances ordinarily not granted).

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(d)(1)

Pursuant to Rule 8.504(d)(1) of the California Rules of Court, I certify that the attached Opening Brief of Petitioner and Real Party in Interest was prepared with a proportionately spaced font, with a typeface of 13 points or more, and contains 13,471 words. Counsel relies on the word count of the computer program used to prepare the brief.

Dated: March 13, 2018

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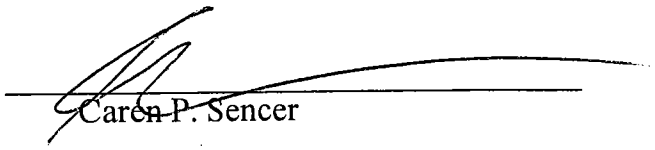
By: 
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PROOF OF SERVICE
(Code Civ. Proc. § 1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On March 13, 2018, I served the following documents in the manner described below:

OPENING BRIEF OF APPELLANT AND REAL PARTY IN INTEREST

☑ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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☑ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the California that the foregoing is true and correct. Executed on March 13, 2018, at Alameda, California.

Karen Kempler

Attachments

Highlight

LABOR CODE - LAB
DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS [50 - 176] *(Division 1 enacted by Stats. 1937, Ch. 90.)*

CHAPTER 4. Division of Labor Standards Enforcement [79 - 107] *(Heading of Chapter 4 amended by Stats. 1976, Ch. 746.)*

98. (a) The Labor Commissioner is authorized to investigate employee complaints. The Labor Commissioner may provide for a hearing in any action to recover wages, penalties, and other demands for compensation, including liquidated damages if the complaint alleges payment of a wage less than the minimum wage fixed by an order of the Industrial Welfare Commission or by statute, properly before the division or the Labor Commissioner, including orders of the Industrial Welfare Commission, and shall determine all matters arising under his or her jurisdiction. The Labor Commissioner may also provide for a hearing to recover civil penalties due pursuant to Section 558 against any employer or other person acting on behalf of an employer, including, but not limited to, an individual liable pursuant to Section 558.1. It is within the jurisdiction of the Labor Commissioner to accept and determine claims from holders of payroll checks or payroll drafts returned unpaid because of insufficient funds, if, after a diligent search, the holder is unable to return the dishonored check or draft to the payee and recover the sums paid out. Within 30 days of the filing of the complaint, the Labor Commissioner shall notify the parties as to whether a hearing will be held, whether action will be taken in accordance with Section 98.3, or whether no further action will be taken on the complaint. If the determination is made by the Labor Commissioner to hold a hearing, the hearing shall be held within 90 days of the date of that determination. However, the Labor Commissioner may postpone or grant additional time before setting a hearing if the Labor Commissioner finds that it would lead to an equitable and just resolution of the dispute. A party who has received actual notice of a claim before the Labor Commissioner shall, while the matter is before the Labor Commissioner, notify the Labor Commissioner in writing of any change in that party's business or personal address within 10 days after the change in address occurs.

It is the intent of the Legislature that hearings held pursuant to this section be conducted in an informal setting preserving the rights of the parties.

(b) When a hearing is set, a copy of the complaint, which shall include the amount of compensation requested, together with a notice of time and place of the hearing, shall be served on all parties, personally or by certified mail, or in the manner specified in Section 415.20 of the Code of Civil Procedure.

(c) Within 10 days after service of the notice and the complaint, a defendant may file an answer with the Labor Commissioner in any form as the Labor Commissioner may prescribe, setting forth the particulars in which the complaint is inaccurate or incomplete and the facts upon which the defendant intends to rely.

(d) No pleading other than the complaint and answer of the defendant or defendants shall be required. Both shall be in writing and shall conform to the form and the rules of practice and procedure adopted by the Labor Commissioner.

(e) Evidence on matters not pleaded in the answer shall be allowed only on terms and conditions the Labor Commissioner shall impose. In all these cases, the claimant shall be entitled to a continuance for purposes of review of the new evidence.

(f) If the defendant fails to appear or answer within the time allowed under this chapter, no default shall be taken against him or her, but the Labor Commissioner shall hear the evidence offered and shall issue an order, decision, or award in accordance with the evidence. A defendant failing to appear or answer, or subsequently contending to be aggrieved in any manner by want of notice of the pendency of the proceedings, may apply to the Labor Commissioner for relief in accordance with Section 473 of the Code of Civil Procedure. The Labor Commissioner may afford this relief. No right to relief, including the claim that the findings or award of the Labor Commissioner or judgment entered thereon are void upon their face, shall accrue to the defendant in any court unless prior application is made to the Labor Commissioner in accordance with this chapter.

(g) All hearings conducted pursuant to this chapter are governed by the division and by the rules of practice and procedure adopted by the Labor Commissioner.

(h) (1) Whenever a claim is filed under this chapter against a person operating or doing business under a fictitious business name, as defined in Section 17900 of the Business and Professions Code, which relates to the person's business, the division shall inquire at the time of the hearing whether the name of the person is the legal name under which the business or person has been licensed, registered, incorporated, or otherwise authorized to do business.

(2) The division may amend an order, decision, or award to conform to the legal name of the business or the person who is the defendant to a wage claim, if it can be shown that proper service was made on the defendant or his or her agent, unless a judgment had been entered on the order, decision, or award pursuant to subdivision (d) of Section 98.2. The Labor Commissioner may apply to the clerk of the superior court to amend a judgment that has been issued pursuant to a final order, decision, or award to conform to the legal name of the defendant, if it can be shown that proper service was made on the defendant or his or her agent.

(Amended by Stats. 2015, Ch. 803, Sec. 3. (SB 588) Effective January 1, 2016.)

California. LEGISLATIVE INFORMATION

Highlight

LABOR CODE - LAB

DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS [50 - 176] *(Division 1 enacted by Stats. 1937, Ch. 90.)*

CHAPTER 4. Division of Labor Standards Enforcement [79 - 107] *(Heading of Chapter 4 amended by Stats. 1976, Ch. 746.)*

98.1. (a) Within 15 days after the hearing is concluded, the Labor Commissioner shall file in the office of the division a copy of the order, decision, or award. The order, decision, or award shall include a summary of the hearing and the reasons for the decision. Upon filing of the order, decision, or award, the Labor Commissioner shall serve a copy of the decision personally, by first-class mail, or in the manner specified in Section 415.20 of the Code of Civil Procedure on the parties. The notice shall also advise the parties of their right to appeal the decision or award and further advise the parties that failure to do so within the period prescribed by this chapter shall result in the decision or award becoming final and enforceable as a judgment by the superior court.

(b) For the purpose of this section, an award shall include any sums found owing, damages proved, and any penalties awarded pursuant to this code.

(c) All awards granted pursuant to a hearing under this chapter shall accrue interest on all due and unpaid wages at the same rate as prescribed by subdivision (b) of Section 3289 of the Civil Code. The interest shall accrue until the wages are paid from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2.

(Amended by Stats. 2005, Ch. 405, Sec. 2. Effective January 1, 2006.)

Highlight

LABOR CODE - LAB
DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS [50 - 176] *(Division 1 enacted by Stats. 1937, Ch. 90.)*

CHAPTER 4. Division of Labor Standards Enforcement [79 - 107] *(Heading of Chapter 4 amended by Stats. 1976, Ch. 746.)*

98.2. (a) Within 10 days after service of notice of an order, decision, or award the parties may seek review by filing an appeal to the superior court, where the appeal shall be heard de novo. The court shall charge the first paper filing fee under Section 70611 of the Government Code to the party seeking review. The fee shall be distributed as provided in Section 68085.3 of the Government Code. A copy of the appeal request shall be served upon the Labor Commissioner by the appellant. For purposes of computing the 10-day period after service, Section 1013 of the Code of Civil Procedure is applicable.

(b) As a condition to filing an appeal pursuant to this section, an employer shall first post an undertaking with the reviewing court in the amount of the order, decision, or award. The undertaking shall consist of an appeal bond issued by a licensed surety or a cash deposit with the court in the amount of the order, decision, or award. The employer shall provide written notification to the other parties and the Labor Commissioner of the posting of the undertaking. The undertaking shall be on the condition that, if any judgment is entered in favor of the employee, the employer shall pay the amount owed pursuant to the judgment, and if the appeal is withdrawn or dismissed without entry of judgment, the employer shall pay the amount owed pursuant to the order, decision, or award of the Labor Commissioner unless the parties have executed a settlement agreement for payment of some other amount, in which case the employer shall pay the amount that the employer is obligated to pay under the terms of the settlement agreement. If the employer fails to pay the amount owed within 10 days of entry of the judgment, dismissal, or withdrawal of the appeal, or the execution of a settlement agreement, a portion of the undertaking equal to the amount owed, or the entire undertaking if the amount owed exceeds the undertaking, is forfeited to the employee.

(c) If the party seeking review by filing an appeal to the superior court is unsuccessful in the appeal, the court shall determine the costs and reasonable attorney's fees incurred by the other parties to the appeal, and assess that amount as a cost upon the party filing the appeal. An employee is successful if the court awards an amount greater than zero.

(d) If no notice of appeal of the order, decision, or award is filed within the period set forth in subdivision (a), the order, decision, or award shall, in the absence of fraud, be deemed the final order.

(e) The Labor Commissioner shall file, within 10 days of the order becoming final pursuant to subdivision (d), a certified copy of the final order with the clerk of the superior court of the appropriate county unless a settlement has been reached by the parties and approved by the Labor Commissioner. Judgment shall be entered immediately by the court clerk in conformity therewith. The judgment so entered has the same force and effect as, and is subject to all of the provisions of law relating to, a judgment in a civil action, and may be enforced in the same manner as any other judgment of the court in which it is entered. Enforcement of the judgment shall receive court priority.

(f) (1) In order to ensure that judgments are satisfied, the Labor Commissioner may serve upon the judgment debtor, personally or by first-class mail at the last known address of the judgment debtor listed with the division, a form similar to, and requiring the reporting of the same information as, the form approved or adopted by the Judicial Council for purposes of subdivision (a) of Section 116.830 of the Code of Civil Procedure to assist in identifying the nature and location of any assets of the judgment debtor.

(2) The judgment debtor shall complete the form and cause it to be delivered to the division at the address listed on the form within 35 days after the form has been served on the judgment debtor, unless the judgment has been satisfied. In case of willful failure by the judgment debtor to comply with this subdivision, the division or the judgment creditor may request the court to apply the sanctions provided in Section 708.170 of the Code of Civil Procedure.

(g) (1) As an alternative to a judgment lien, upon the order becoming final pursuant to subdivision (d), a lien on real property may be created by the Labor Commissioner recording a certificate of lien, for amounts due under the final order and in favor of the employee or employees named in the order, with the county recorder of any county in which the employer's real property may be located, at the Labor Commissioner's discretion and depending upon information the Labor Commissioner obtains concerning the employer's assets. The lien attaches to all interests in real property of the employer located in the county where the lien is created to which a judgment lien may attach pursuant to Section 697.340 of the Code of Civil Procedure.

(2) The certificate of lien shall include information as prescribed by Section 27288.1 of the Government Code.

(3) The recorder shall accept and record the certificate of lien and shall index it as prescribed by law.

(4) Upon payment of the amount due under the final order, the Labor Commissioner shall issue a certificate of release, releasing the lien created under paragraph (1). The certificate of release may be recorded by the employer at the employer's expense.

(5) Unless the lien is satisfied or released, a lien under this section shall continue until 10 years from the date of its creation.

(h) Notwithstanding subdivision (e), the Labor Commissioner may stay execution of any judgment entered upon an order, decision, or award that has become final upon good cause appearing therefor and may impose the terms and conditions of the stay of execution. A certified copy of the stay of execution shall be filed with the clerk entering the judgment.

(i) When a judgment is satisfied in fact, other than by execution, the Labor Commissioner may, upon the motion of either party or on its

own motion, order entry of satisfaction of judgment. The clerk of the court shall enter a satisfaction of judgment upon the filing of a certified copy of the order.

(j) The Labor Commissioner shall make every reasonable effort to ensure that judgments are satisfied, including taking all appropriate legal action and requiring the employer to deposit a bond as provided in Section 240.

(k) The judgment creditor, or the Labor Commissioner as assignee of the judgment creditor, is entitled to court costs and reasonable attorney's fees for enforcing the judgment that is rendered pursuant to this section.

(Amended by Stats. 2013, Ch. 750, Sec. 1. (AB 1386) Effective January 1, 2014.)