Publications

Post-Proposition 64: What Remains of California's Unfair Competition Law?

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On November 2, 2004, California voters went to the polls and overwhelmingly passed Proposition 64. Proposition 64 amended the California Business & Professions Code ("B&P"), Section 17200 et seq., more commonly known as the Unfair Competition Law ("UCL"). The question for California employers now is what remains of California's UCL?

Patterned after a portion of the Federal Trade Commission ("FTC") Act, California’s UCL prohibits any person from engaging in unlawful, fraudulent, or unfair business practices. Prior to the passage of Proposition 64, the UCL differed from the FTC Act by allowing litigants to file lawsuits on behalf of unnamed plaintiffs without satisfying class action procedures and standards or demonstrating any "injury in fact" (i.e., a concrete, actual, or imminent harm).

Prior to the recent amendments to B&P Section 17204, litigants sued employers for various alleged unfair business practices, including items such as underpayment of wages, meal and break period violations, and the failure to have required workplace posters. These litigants, many of whom were not employees of the entity sued, pursued such claims on behalf of all of the employer’s current and former employees.

Proposition 64 substantially modifies the UCL. Effective November 4, 2004, only individuals who have suffered an actual injury—in the form of lost money or property—may bring a UCL action. In addition, B&P Section 17203 as revised provides that an individual may pursue “representative” claims on behalf of others only if the claimant meets the standing requirements of Section 17204 (injury in fact) and complies with Code of Civil Procedure Section 382 (the class action procedure).

Finally, the UCL still provides for a maximum of $2,500 in civil penalties per violation. Prior to the passage of Proposition 64, local and state governments could utilize these civil penalties for general purposes. Proposition 64 now requires civil penalties assessed under the UCL be designated for the "exclusive use" of public prosecutors for the enforcement of consumer protection laws.

Despite the substantial restrictions Proposition 64 imposes on the UCL, employers should understand significant portions of the UCL remain.

What Proposition 64 Does Do
Proposition 64 dramatically limits the ability of individuals to pursue lawsuits against businesses, unless these individuals can establish they suffered actual harm as a result of the employer’s allegedly unfair business practices.

Proposition 64 also requires litigants seeking relief on behalf of others to comply with established class action procedures. Under those procedures, a representative plaintiff must demonstrate each of the following: (1) an ascertainable, manageable class of plaintiffs; (2) a well-defined “community of interest” among class members; and (3) litigating the controversy as a class action is a “superior method of resolving the dispute” which “substantially benefits the litigants and the court.”

As many California employers have come to realize, the battle in most class actions is fought during the class certification process. Employers generally argue the class action device is not appropriate for employment claims because “individual issues predominate” and there is no commonality in the application of the wage-hour laws to the facts of the individual employee’s workplace. This type of defense is now available in “representative” UCL actions, although employers may have difficulty successfully asserting it due to a recent California Supreme Court decision.
In *Sav-On Drugs v. Superior Court (Rocher)*, the Court let stand a lower court's decision to certify a class action filed by hundreds of assistant managers in the retail setting, holding there was substantial, albeit disputed, evidence of commonality. The Court confirmed the broad discretion afforded trial courts in determining whether a particular case should be certified as a class action. The *Sav-On* decision will make it more difficult for employers to defeat class certification.

**What Proposition 64 Does Not Do**

Proposition 64 does not alter an individual's ability to utilize B&P Section 17200 for the individual's own benefit. For instance, an employee who believes she has been unlawfully underpaid, denied meal and/or rest periods, misclassified as an exempt employee, sexually harassed, etc., may still assert a separate cause of action under the UCL. The employee may recover a wide array of damages including lost wages, attorneys' fees, and penalties.

Likewise, Proposition 64 does not prevent a group of employees from combining their individual claims to bring a suit under B&P Section 17200, so long as each of them has a clear financial interest in the damages claimed.

Finally, Proposition 64 does not affect an individual's ability to sue under the UCL on behalf of others through the class action procedures discussed above. This fact, in conjunction with the California Supreme Court's decision in *Sav-On* (discussed above) leaves California's employers vulnerable to class action litigation.

**Retroactivity**

One unresolved question is whether the limitations of Proposition 64 apply to cases filed before November 3, 2004. While many commentators believe a lawsuit pending in Orange County, *Consumer Advocates v. DaimlerChrysler*, G029811, may result in the first published decision on this question, the case currently is at the trial level and the opportunity for appellate review is at least several months away.

In the meantime, the retroactivity issue is expected to be heavily litigated by both the plaintiffs' and defense bars and may ultimately need to be resolved by the California Supreme Court.

**Employers Should Still Ensure Legal Compliance**

While Proposition 64 certainly will assist employers by curbing the abuses of the UCL, it does not obviate employers' responsibilities to comply with workplace laws. Employers should conduct regular audits and ensure legal compliance by working with experienced employment law counsel.

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