2022
Labor & Employment Law Update

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We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with **Barsamian & Moody at (559) 248-2360** or **Western Growers at (877) 942-4529** for individual responses to questions or concerns regarding any given situation.

AB 73 – Health Emergencies, Employment Safety, Agricultural Workers, Wildfire Smoke.

The year 2020 was one of the worst wildfire seasons on record in California, with farmworkers ranking high among some of the most vulnerable workers in terms of negative impacts from wildfire smoke.

AB 73, also known as the "Farmworker Wildfire Smoke Protection Act," is intended to protect agricultural workers from the hazards of wildfire smoke by allocating state resources to fund the creation of bilingual educational materials and stockpiles of protective masks.

The bill requires Cal/OSHA to review and update its existing "protection from wildfire smoke training" and post those updates on its website. The bill also requires employers to modify existing training methods to provide training in a language and manner readily understandable by its employees, considering ethnic and cultural backgrounds, education levels, and include the use of pictograms as necessary.

Signed into law September 27, 2021, the Act took immediate effect.

Best Practices

To comply with existing laws governing worker safety and health in wildfire regions, employers must have in place procedures/policies that allow it to act quickly in responding to changing conditions during any wildfire smoke emergency. Safety and health procedures/policies should include the following:

- A means of monitoring air quality in connection with the existing Air Quality Index (AQI).
- Procedures for anticipating which employees may be exposed to wildfire smoke.
- A means of modifying each shift in accordance with emergency AQI forecasts and current conditions.
- Procedures for implementing protective measures (e.g., distribution of Personal Protective Equipment (PPE) and worker evacuations).
- Processes and procedures (including training[1]) for communicating wildfire smoke hazards in a language and manner readily understandable by employees, including a system that encourages workers to report wildfire smoke hazards at the worksite without fear of retaliation.

[1] https://www.dir.ca.gov/title8/5141_1b.html

To comply with AB 73's updated training requirements employers should consider the following:

- Begin checking the California Department of Industrial Relations website (www.dir.ca.gov) webpage (Worker Safety and Health in Wildfire Regions) [2] for information on updated training materials.
- Assess current training methods and materials revising as necessary to make sure they are in a language and manner readily understood by all workers.

SB 572 – Labor Commissioner Liens on Real Property

SB 572 expands current Labor Commissioner authority to create, as an alternative to a judgment lien, a lien on real property to secure amounts due to the commissioner under any final citation, findings, or decision. Existing law allows the Labor Commissioner the same authority with regard to recovering amounts due under final orders in favor of an employee named in the order.

This expansion creates a direct means for the state to collect monies due from employers ordered to pay civil penalties for violations of state law, including the failure to pay minimum wage.

To avoid the imposition of a real property lien, employers who receive final citations, findings, or decisions for Labor Code violations, should seek immediate legal consultation.

SB 606 – Cal/OSHA Enterprise-Wide Violations

SB 606 creates an "enterprise-wide" rebuttable presumption for employers with multiple worksites who violate an occupational safety or health standard, order, special order, or regulation. The presumption applies if the employer has a written policy or procedure that violates Cal/OSHA provisions or there is a record evidencing a pattern or practice of the same violation committed by the employer involving more than one of its worksites.

If an employer cannot rebut the presumption, SB 606 authorizes Cal/OSHA to issue an enterprise-wide citation for egregious violations for each willful violation (as determined by Cal/OSHA) and count each employee impacted by the violation as a separate violation for purposes of the issuance of fines and penalties. In other words, the maximum penalty would be assessed per violation, per employee. A violation is deemed to be egregious if one or more of the following are true:

- An employer intentionally, through voluntary action or inaction, made no reasonable effort to eliminate the known violation.

[2] https://www.dir.ca.gov/dosh/worker-health-and-safety-in-wildfire-regions.html

- The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses.
- The violations resulted in persistently high rates of worker injuries or illnesses.
- The employer has an extensive history of prior violations of this section of the Labor Code.
- The employer has intentionally disregarded their health and safety responsibilities.
- The employer's conduct, taken as a whole, amounts to clear bad faith in the performance of their duties to provide occupational safety to their employees.
- The employer has committed enough violations to undermine the effectiveness of any safety and health program that might be in place.

The statutory amendments of SB 606 also authorize Cal/OSHA to investigate the employer's policies/practices or those of any related employer entity, to issue and enforce a subpoena for any failure to provide requested information. The ability to seek an injunction or temporary restraining order has also been authorized.

These amendments take effect on January 1, 2022.

Best Practices

When it comes to Cal/OSHA compliance, employers should keep the following responsibilities in mind:

- Know all of the safety and health standards which apply to your industry/operations.
- Ensure employees are aware of their rights and responsibilities.
- Inspect working conditions and assure conformity to applicable safety and health standards.
- Report accidents resulting in a fatality or serious injury or illness within 8 hours.
- Record certain work-related fatalities, injuries, or illnesses (if you have 10+ employees).
- Effectively train employees as required by specific regulations and communicate them in a language that they understand so that employees safely carry out duties and responsibilities.
- Ensure employees safely use and maintain tools and equipment.
- Warn employees of potential hazards.
- Provide employees (or their authorized agents) access to their medical and exposure records.
- Prevent discrimination against employees who exercise their rights under State or Federal law.
- Post required posters, summaries, citations, etc. in a prominent place.
- Comply with all applicable standards/safety orders.
- Establish, implement, and maintain an effective Injury & Illness Prevention Program.

Employers should also keep in mind the following as there is no penalty for exercising these rights which may assist in the reduction of potential liability and future litigation:

- Asking for and receiving proper identification from an inspector prior to a workplace inspection.
- Refusing to allow an inspector access without a warrant.
- Contesting a warrant.
- Limiting the scope of an inspection to what is contained in the warrant.
- Accompanying an inspector during the inspection.
- Having an opening and closing conference.
- Contesting a fine.

Employers may also want to consider utilizing the Cal/OSHA Consultation Service as a way to get into compliance prior to an inspection.[3]

SB 639 – Minimum Wages for Persons with Disabilities

The passing of SB 639 ends California's decades old use of exemptions that allow those with mental and/or physical disabilities to be paid at subminimum wages. In 1938, President Roosevelt signed into law the Fair Labor Standards Act (FLSA). Fearing that those with mental and/or physical disabilities would be disadvantaged by the new law, an additional section was added to the FLSA allowing employers to pay such workers a lower wage. California followed suit creating a similar exemption within its state Labor Code (Cal. Lab. Code Sections 1191 and 1191.5). State law permitted employers to pay wages at a rate below the applicable minimum wage to employees whose earning capacity is impaired by physical or mental disability when a special license authorizing the employment has been granted. The licenses required joint application of the employer and the employee.

SB 639 is the culmination of several subsequent Presidential and Gubernatorial legislative Acts that have pushed forward the rights of developmentally disabled workers to receive the same legal rights and responsibilities guaranteed all other persons by the United States and California Constitutions, regardless of the severity of their disabilities. The bill ends current exemptions and, after January 1, 2022, prohibits the issuance of any special licenses authorizing the payment of less than the minimum wage to any mentally and/or physically disabled workers.

Existing licenses will be phased-out and rendered inoperative as of January 1, 2025 (or sooner should a multiyear phaseout plan be released before that date).

[3] https://www.dir.ca.gov/dosh/consultation.html

SB 646 – Private Attorneys General Act; Janitorial Employee Exemption

An exception to the Private Attorneys General Act (PAGA) is created by SB 646 for janitorial employees under certain specified conditions. To be excepted from PAGA mandates a janitorial employee must be:

- Represented by a labor organization (union) that has represented janitors before January 1, 2021.
- Employed by a janitorial contractor registered with the Labor Commissioner as a property service employer in the year 2020 with respect to work performed under a valid collective bargaining agreement in effect any time before July 1, 2028. The collective bargaining agreement must expressly provide for the wages, hours of work, and working conditions of employees; provide premium wage rates for all overtime hours worked; and provide all of the following:
    1. Require the employer to pay all non-probationary workers working in certain worksites, defined in an applicable collective bargaining agreement, total hourly compensation, inclusive of wages, health insurance, pension, training, vacation, holiday, and fringe benefit funds, amounting to not less than 30 percent more than the state minimum wage rate.
    2. Prohibit all violations that would be redressable pursuant to California law, provide for a grievance and binding arbitration procedure to redress those violations, and allow the labor organization to pursue a grievance on behalf of all affected employees.
    3. Expressly waive the requirements of Labor Code Section 2699.8 in clear and unambiguous terms.
    4. Authorize an arbitrator to award any and all remedies otherwise available, providing that nothing in California law authorizes the award of penalties that would be payable to the state.

Janitorial employees may still bring an action under California's Labor Code if a court or administrative agency finds the labor organization has breached its duty to fairly represent its covered workers in relation to any Labor Workforce Development Agency claim.

AB 654 – COVID-19 Exposure Notification

In December 2020, California AB 685 was signed into law requiring non-healthcare employers who identified three or more cases of COVID-19 (i.e., an "outbreak") at a worksite within a 14-day period to report such information to their local health department within 48 hours. **AB 654** amends this requirement to allow an employer 48 hours *or one business day*, whichever is later, to notify its local health department of a COVID-19 outbreak. The new law also expands existing

exemptions to include community clinics, adult day health centers, community care facilities, and child day care facilities.

Association Advocacy at Work

Existing law under AB 685 requires the California Department of Public Health (CPDH) to make workplace industry information received from local public health departments available on its internet website in a manner that allows the public to track the number and frequency of COVID-19 outbreaks and the number of COVID-19 cases and outbreaks by industry reported by any workplace. **AB 654**, as initially drafted, included a requirement that this public listing include the name of each worksite impacted by a COVID-19 outbreak.

Western Growers assisted successfully in leading a coalition opposition to this requirement that resulted in this specific provision being amended out of the bill.

AB 654 takes effect immediately and is scheduled for revocation January 1, 2023.

Best Practices

Employers should remain complaint with existing notice and reporting mandates and continue to monitor CDPH updates for any relevant changes.

SB 657 – Distribution of Employment Information: Electronic Documents

State and federal law require employers to meet workplace posting obligations. What must be posted depends on many factors including the number of employees, nature, and location of the employer's business, annual dollar volume of business, whether the employer is a federal contractor, and in certain instances, the employer's industry. Posting requirements vary by statute which means not all employers will be subject to each posting requirement.

Employers subject to posting requirements must conspicuously place required notices in an area of the workplace frequented by employees throughout the workday. A decrease in the number of workers frequenting the workplace – along with a corresponding increase in the number of remote workers – has caused employers to question how best to comply with posting mandates in a virtual environment. California's newly signed SB 657 provides clarity and peace of mind.

The law allows, "in any instance in which an employer is required to physically post information, [to] also distribute that information to employees by email with the document or documents attached." It is important for employers to note that while SB 657 allows electronic distribution, it does not eliminate the employer's obligation to physically display required postings within its existing workspace.

Best Practices

At the beginning of the pandemic, to stay complaint with existing posting mandates, many employers moved required posting notices to an online environment (e.g., the company intranet) and notified employees where company posting could be viewed. For these employers, SB 657 imposes some additional burdens. Because SB 657 does not address notice via a company's intranet system, these employers should take the extra step – if they have not already – of sending the required postings to their employees via email with the document(s) attached. As an added precaution, this email notice could also serve as a reminder to employees that notices can also be viewed at the workplace and on the company's intranet system.

As far as the agricultural industry is concerned, if the employer does not have email addresses for its workers, maintaining posters and policies in a binder at the worksite and reminding employees that policies/postings are in the binder is a good method compliance. Additionally, notices can be included with paychecks or other documents provided to employees on paydays.

SB 807 – Enforcement of Civil Rights: Department of Fair Employment and Housing

This statutory amendment enacts several important changes impacting tolling and jurisdictional mandates of the Department of Fair Employment and Housing (DFEH) as well as employment record retention periods associated with complaints alleging workplace violations of California's Fair Employment and Housing Act (FEHA).

This bill makes several procedural changes to the way the DFEH enforces California's civil rights laws under the FEHA. These changes include: 1) modifying when and how the DFEH can appeal adverse superior court decisions regarding the scope of DFEH petitions to compel compliance with investigations of the department associated with violations of employment-related complaints; and 2) tolling the amount of time the DFEH has to file a civil action while dispute resolution efforts are pending.

SB 807 also extends current record retention requirements for employers to four years. As amended, Government Code Section 12946 will now require employers to retain personnel records for applicants and employees for four years from the date the records were created, or the date the employment action was taken. (**NOTE:** This is in addition to retention requirements that apply once a complaint has been filed.) The bill also extends the period in which an individual can file a civil action for violations of certain statutes, by tolling the filing period while the DFEH investigates and/or takes action on behalf of an individual complainant.

SB 807 also increases the time the DFEH has to complete its investigation and issue a right-to-sue notice for employment-related discrimination complaints treated by the DFEH as a class or group complaint to two years.

This bill becomes effective January 1, 2022.

Best Practices

The biggest takeaway from SB 807 is its newly expanded records retention mandate. Employers should immediately begin a review/audit of current record retention practices to include the expanded four-year retention requirement. Here are a few additional tips on improving an organization's recordkeeping practices:

- Create a checklist or other system as a means of assuring all necessary new hire employee-related paperwork is completed and timely filed for future reference (i.e., W-4 before the next payroll, I-9 within three business days [or better yet, on the very first day], etc.). Any system implemented should include tracking for expired documents, benefits eligibility, and overall completeness.

- A personnel file should be created for each newly hired employee. This file should include the application, reference checks, the W-4, and any general information (Note: Form I-9s should be kept in a separate file). This file will grow to include tracking of vacation requests and time taken, performance reviews, wage increase information, changes of address, etc. All documents relating to the employee should be kept in the personnel file except medical information and other confidential information.

- To ensure employee privacy, all employee-related files should be password protected and maintained on separate internal drives with limited accessibility. If the employer keeps hardcopy files, they should be kept in lockable free-standing file cabinets.

SB 87 – California Small Business COVID-19 Relief Grant Program

This bill, signed into law on February 23, 2021, established the California Small Business COVID-19 Relief Grant Program with California's Office of Small Business Advocate (CalOSB A). SB 87 is a bill providing for appropriations funding for small business grants in an effort to assist qualified small and underserved businesses impacted by COVID-19. The bill includes taxable year exclusions and requires the California Franchise Tax Board to adopt regulations necessary and appropriate to implement these taxable exclusions. Audit and recapture procedures are built into the bill to assure criteria oversight.

This bill took effect immediate upon signing.

AB 1003 – Wage Theft (Grand Theft)

Current law makes a violation of specified wage and gratuity provisions a misdemeanor and provides for civil penalties and remedies for the recovery of wages. AB 1003 elevates existing liability by making the intentional theft of wages or tips by employers punishable as grand theft, which can be charged as a felony.

An employer's intentional theft of wages or gratuities in an amount greater than $950 for one employee, or $2,350 for two or more employees, and in any 12 consecutive month period, is now

punishable as grand theft. This increases the existing penalty for grant theft and creates a new Penal Code Section (Cal. Pen. Code Section 487(m)). Criminal prosecutors will now have the discretion to decide whether to charge an employer with a misdemeanor (imprisonment in a county jail for up to 1 year) or felony (imprisonment in county jail for 16 months or 2 or 3 years), by a specified fine, or by a fine and imprisonment.

AB 1003 also includes the following:

- Defines "theft of wages" as the intentional deprivation of wages, gratuities (as defined by the Cal. Lab. Code), benefits or other compensation, by unlawful means, with the knowledge that the wages, gratuities, benefits, or other compensation is due to the employee under the law.
- Makes clear that the term "employee" includes independent contractors, and "employer" includes the hiring entity of an independent contractor.
- Authorizes wages, gratuities, benefits, or other compensation subject to the prosecution to be recoverable as restitution.
- Allows the employee or the Labor Commissioner the right to commence civil action seeking remedies as allowed under the Labor Code.

Best Practices

All employers – regardless of size – must be mindful of the impact of this new law and its severe penalties for engaging in intentional wage theft (i.e., not paying workers what they are owed by law).

Although it is yet unclear how this new criminal penalty will be interpreted or enforced, employers should take this opportunity to analyze and audit current compensation policies and practices. Increased training on internal policies and California law will also reinforce the seriousness of tight compliance. The expanded definition of the term "employee" to include independent contractors is another key reason to review current hiring, classification, and compensation policies. Most importantly, employers needing to take corrective measures after conducting an internal audit or review should contact legal counsel to ensure compliance with current laws.

The bill takes effect January 1, 2022.

SB 338 – Joint and Several Liability of Port Drayage Motor Carrier Customers

California's port drayage industry is a vital part of California's "goods movement economy" and employs an estimated 25,000 drivers moving fright between California's ports and distribution centers. Current law requires the state Department of Labor Standards Enforcement (DLSE) to post a public list of port drayage motor carriers that have unsatisfied court judgments, tax assessments, liens or any order, decision, or award that find the carrier has engaged in illegal conduct including the failure to pay wages owed and other labor violations.

The passage of SB 388 expands the usual set of circumstances under which port drayage contractors will be placed on the DLSE's enforcement list and expands joint liability to customers of that contractor. Carriers – or customers of the carrier – with prior offences and subsequent judgment, ruling, citation, orders, decisions, or awards finding a violation of a labor or employment law or regulation – even if the appeals period has not yet expired – will find their citation information publicly posted on the DLSE's webpage.

This expanded liability means customers of a listed port drayage carrier will also shoulder liability, including civil legal responsibility and civil liability, owed to the state for port drayage services obtained after the date the carrier appeared on the prior offender list. This could also extend potential responsibility and liability for employment tax assessments issued by the state and civil liability stemming from the carrier's failure to comply with applicable laws, rules and regulations.

Best Practices

Employers contracting with port drayage carriers should consider the following:

- Review the DLSE's public listings before entering into any port drayage contract(s).
- Port drayage contracts should be reviewed to include – to the extent possible – indemnification provisions protecting against losses stemming from current or prior carrier violations.
- After payment or settlement of any unsatisfied judgment, or successful appeal process associated with prior offences, subsequent judgments, rulings, citations, orders, decisions, or awards, employers should monitor the DLSE's public listing to assure removal.

SB 331 - Settlements and Non-disparagement Agreements

Recent legislative changes prohibit an employer from preventing the disclosure of factual information related to actions in the workplace associated with claim(s) (civil or administrative) that include allegations of sexual assault (e.g., sexual harassment, workplace harassment/discrimination based on sex, or retaliation).

SB 331 clarifies these existing prohibitions and expands them to include acts of workplace harassment or discrimination *not* based on sex. This new legislation makes it unlawful for an employer to require an employee to sign a non-disparagement agreement *or any other document* if it would have the *purpose or effect* of denying an employee the right to disclose information about such conduct. The prohibition also extends to any agreement related to an employee's separation from employment.

Employers utilizing non-disparagement or other contractual provisions that restrict an employee's ability to disclose information related to conditions in the workplace, in substantial form, must include the following language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

In addition, an employer offering a separation agreement must notify employees of the right to consult counsel regarding the agreement and must provide at least 5 business days to do so.

The statute does not prohibit the inclusion of a general release or waiver of claims in an employee separation agreement and does not preclude confidentiality with respect to the amount paid in a severance agreement. SB 331 remains inapplicable to settlements negotiated to resolve claims filed in court, before an administrative agency, in an alternative dispute resolution forum, or through an employer's internal complaint process.

Best Practices

It is important for employers to understand that the impacts of SB 331 go beyond non-disparagement agreements and will impact the terms under which they enter into severance or separation agreements that include a waiver of claims. Employers offering severance or separation agreements with liability waivers will need to review and revise these agreements to make clear they do not have the *purpose or effect* of denying an employee the right to disclose information about any unlawful conduct related to discrimination or harassment based on any protected classification.

Employers entering into separation or severance type agreements may still manage risk associated with an employee's separation from employment. This could include asking departing employees to specifically represent, warrant, and confirm that the employee has been properly paid for all hours worked, received all wages, salary, commissions, bonuses, and other compensation due, and/or has not made any claims or allegations to the Employer related to instances of workplace harassment or discrimination based on any protective classification. Any type of separation or non-disparagement agreement should also include specific language notifying the employee that they cannot sign the agreement if any of these representations are untrue and reminding them of their right to disclose information about unlawful acts in the workplace (i.e., to the employer, to state/federal agencies).

Employers should seek legal counsel before initiating or continuing the use of non-disparagement, severance, or separation agreements.

AB 1033 – California Family Rights Act

AB 1033 expands the California Family Rights Act to include leave to care for a parent-in-law within the existing definition of family care and medical leave. This amendment also modifies the existing Small Employer Family Leave Mediation Pilot program as follows:

- Requires the Department of Fair Employment and Housing (DFEH) to notify an employee who receives an immediate Right-to-Sue notice of the requirement to mediate prior to filing a civil action where either they or the employer have requested mediation. This notice by the DFEH must be in writing.
- Requires an employee who has filed an administrative complaint with the DFEH to contact the department and to indicate whether they are requesting mediation before filing a civil action.

- Allows an employer to stay any pending civil action or arbitration in favor of mediation if the employer did not receive notification of its right to mediate due to the employee's failure to contact the DFEH regarding mediation.
- Imposes various time restrictions on the DFEH once it makes the decision to pursue legal action on behalf of an employee.

Best Practices

Employers with five or more employees are subject to the California Family Rights Act. To remain compliant with these amendments, such employers should modify existing leave policies to include leave to care for a parent-in-law within the existing definition of family care and medical leave.

Agricultural Awareness in the Legislature

ACR60 – BeeWhere Month

Honoring the efforts of the California Association of Pest Control Advisors, the California Agricultural Commissioners and Sealers Association, and the Commissioners of Riverside, Butte and Shasta counties in forming the BeeWhere program, California's ACR60 proclaims the month of April of each year as "BeeWhere Month." The BeeWhere program is a comprehensive apiary registration and notification program offering beekeepers, pest control advisors, and pesticide applicators useful resources to help protect and sustain California's bee population.

ACR27 – Farm-to-Fork Corridor

Honoring the efforts of Butte, Sutter, Tehama, and Yuba counties in their efforts to provide fresh agricultural commodities and produce to generations of Californians and the greater United States, ACR27 authorizes the designation of a portion of State Route 99 as the "Farm-to-Fork Corridor." This designation also salutes the City of Sacramento, known as "America's Farm-to-Fork Capital."

SB 721 – California Farmworker Day

California's agricultural sector makes up 2% of our state's economy. As one of the top agricultural producing states in the nation, California produces over 400 different globally exported commodities (e.g., two thirds of all U.S. fruits and nuts and more than one-third of all U.S. vegetables). Farm workers are vital to California, contributing skilled labor necessary to feed Californians and those around the globe. SB 721 honors this tremendous contribution by declaring August 26th of each year as "California Farmworker Day."

AB 941 – Farmworker Assistance

This bill authorizes the appropriation of funds to establish grant programs to enable California counties to establish farmworker resource centers to provide farmworkers and their families

information and access to services related to such things as labor and employment rights, education, housing, immigration, and health and human services.

Association Advocacy at Work

AB 616 – Agricultural Labor Relations: Legal Representative Elections.

As discussed here,[4] Western Growers spearheaded a collaborative effort of agricultural organizations and allied industry partners in a concerted opposition effort that led to the successful defeat of AB 616. One of the most notable victories of the 2021-2022 legislative session, AB 616 would have denied farmworkers the most basic democratic protections in union elections and shifted election oversight powers to the UFW.

The defeat of AB 616 preserves the following democratic protections for all California farmworkers:

- Continued private ballot election oversight by the Agricultural Labor Relations Board.
- The rights of all farmworkers to receive election postcards.
- Independent oversight and verification of postcard submission and signature protocols.

[4] See www.wga.com/blog/Governor-Newsom-Vetoes-UFW-Sponsored-Card-Check-Bill

Litigation Update

2021 Cases

Hard Stop to Time Clock Rounding

Donohue v. AMN Services, LLC (2021) 11 Cal.5th 58

While working as a nurse recruiter for AMN, a healthcare services and staffing company, Donohue used AMN's computer-based timekeeping system which was used for all nonexempt employees. The timekeeping system rounded employee punch times – both punch in and punch out – to the nearest 10-minute increment. AMN would then convert the 10-minute increments into the nearest hundredth of a minute and use that number for calculating the employee wages for purposes of payroll. Employees were required to punch out and punch in for meal periods. When an employee failed to punch out for a meal period, or the punch out was late, the time keeping system would automatically flag it as being non-compliant and AMN would pay the meal period premium. The rounded time entries were used to determine if a meal period was timely and of proper length. In 2012, in an attempt to comply with *Brinker,* the timekeeping system implemented a drop-down menu that was activated when an employee logged a late meal period, logged a short meal period or failed to log a meal period. The activation of the drop-down menu was also based on the rounded time entries. The drop-down menu allowed the employee to select whether they had chosen to skip their meal period or if they were not provided the opportunity to take a timely 30-minute meal period. If the employee selected that they chose to skip or take a late or short meal period, they were not paid a meal period premium.

Donohue brought a class action alleging multiple wage and hour violations including failure to provide meal and rest periods. The parties filed cross-motions for summary judgment and the court granted AMN's motion for summary judgment and denied summary adjudication on the issues raised in Donohue's motion which argued that AMN denied employees their compliant meal periods, improperly rounded time records and failed to pay premium wages owed for noncompliant meal periods. Donohue appealed after judgment was entered in favor of AMN. The case was appealed to the California Supreme Court.

The California Supreme Court held that:

> "Employers cannot engage in the practice of rounding time punches—that is, adjusting the hours that an employee has actually worked to the nearest preset time increment—in the meal period context. The meal period provisions are

> designed to prevent even minor infringements on meal period requirements, and rounding is incompatible with that objective."

The Court also held that where the records show noncompliant meal periods, including lacking record of meal periods at all, there is a rebuttable presumption of meal period violations. The Court held that this rebuttable presumption applies at the class certification and summary judgment stage.

What This Means for Employers:

We know that employers do not use rounding policies to try to short employees paid time. Instead, employers use rounding policies because it makes calculating payroll easier and more reliable. Anyone that has ever tried to manually tally up a timesheet consisting of actual time punches knows how tedious that task can be. However, the Court does not care that using actual time punches will make calculating payroll more difficult (and expensive). Moving forward, employers must ensure that they are carefully recording the actual start and stop times of all shifts and 30-minute meal periods.

The Court's decision in *Donohue* is a continuation of a developing theme in California's wage and hour landscape. Courts are requiring increasingly strict adherence to California's onerous wage and hour laws. As technology advances and becomes more affordable, the Court will require increasing precision in timekeeping practices.

As a practical matter, the *Donohue* decision also requires employers that use manual (written) timesheets to train employees and crew bosses not to record the same start and stop times every day (i.e., a 6:00 a.m. start time each day, etc.). If your employees or crew bosses are recording the same start and stop times every day, this will give the appearance that a rounding policy is being applied. In other words, in addition to express rounding policies, *Donohue* also condemns apparent rounding policies where an employer either (A) should know that rounding is being applied, or (B) cannot convince a jury that rounding is not being applied. After *Donohue*, plaintiff's attorneys are going to argue that timesheets with the same entries recorded every day are evidence that a rounding policy is being applied. Employers will be extremely hard pressed to convince a judge or jury that a crew starts and stops at exactly the same time every single day.

Regular Rate of Pay for Meal, Rest and Recovery Premiums

Ferra v. Loews Hollywood Hotel, LLC (2021) 11 Cal.5th 858

Ferra worked as a bartender for Loews, where she was paid hourly wages and quarterly nondiscretionary incentive payments (i.e., nondiscretionary bonuses). When employees had a noncompliant meal period, they were paid the premium pay of one additional hour of pay

based on the employee's hourly rate. Ferra filed a class action lawsuit against Loews alleging that the failure to include the nondiscretionary incentive payments into the calculation of premium pay was illegal. Ferra alleged that because Labor Code section 226.7, subdivision (c) requires payment of the employees "regular rate of compensation" the failure to include the nondiscretionary incentive pay was a violation of Labor Code section 226.7.

The trial court dismissed the case without a trial, holding in favor of Loews that the "regular rate of compensation" is not the same as the "regular rate of pay" used for calculating overtime under section 510, subdivision (a). Ferra appealed the case up to the Supreme Court after the court of appeal affirmed the trial court's holding.

The Court looked at the legislative history to determine if the intent was to make the "regular rate of compensation" synonymous with the "regular rate of pay." The Court found that the IWC used the term "regular rate of pay" and "regular rate of compensation" interchangeably. Based on the legislative history, the Court held that premium pay for noncompliant meal, rest, or recovery periods must include hourly wages and other nondiscretionary payments for work performed by the employee. The Court further held that this interpretation applies retroactively.

What This Means for Employers:

This decision exemplifies how the court liberally construes the Labor Code in favor of employees. Employers should review and, if necessary, adjust, their methodology for calculating premium pay for missed meal and rest periods to ensure that premium pay includes any applicable nondiscretionary payments. Failure to do so may result in Labor Code violations.

Furthermore, the Court held that the decision is applied retroactively without overruling or disapproving of any previous decisions. Therefore, premium pay for meal and rest periods violations, as laid out in this opinion, would apply to any pending or potential claim arising under Labor Code section 226.7(c) or Business and Professions Code section 17200, et. seq. This means that employers may potentially be exposed to liability under this new ruling for improper payments stretching back as far as four years. As such, employers should audit their records to determine their liability exposure and, if necessary, remediate any premium pay for meal and rest period violations to avoid potential costly litigation.

Regular Rate of Pay May Include Per Diem Payments

Clarke v. AMN Services, LLC (9th Cir. 2021) 987 F.3d 848

Plaintiffs worked as traveling clinicians for AMN, a healthcare staffing company, where they were paid an hourly wage and a weekly per diem benefit. The per diem was designed by AMN to be a benefit to those employees who worked for AMN facilities more than 50 miles away

from their tax homes. Other clinicians who did not travel, meaning they worked within 50 miles of their tax homes, also received an equivalent of the per diem but as a function of their regular wages for both tax purposes and overtime wages.

Plaintiffs brought this class action alleging violations under the Fair Labor Standards Act ("FLSA") on behalf of the traveling clinicians alleging that the weekly per diem was improperly excluded from their regular rate of pay resulting in an underpayment of their overtime wages.

The FLSA requires overtime wages of "not less than one and one-half times the regular rate." (29 U.S.C. § 207(a)(1).) The FLSA excludes several categories of payments from the "regular rate" including travel expense. AMN argued that the per diem benefits were reimbursement for travel expenses and therefore were properly excluded. The court considered the fact that the per diem was presented as a part of the weekly pay when recruiting clinicians, and that the employees only were scheduled for three days a week and must complete all three shifts to be eligible for the full per diem, or receive a prorated per diem based on hours or shifts missed. The per diem benefit was presented as providing compensation for seven days' worth of travel expenses. Employees who worked more than three shifts per week did not receive a higher per diem that week, but the employees could "bank" the additional days worked and later use them to obtain the per diem on a week they worked less than the mandatory three shifts.

The district court found in favor of AMN on summary judgment and the plaintiffs appealed. The Court held that the per diem "functioned as compensation for work rather than as reimbursement for expenses incurred" and that the per diem should have been included in the regular rate of pay for overtime purposes. While this case was decided under the FLSA, the same analysis applies to the California Labor Code.

What This Means for Employers:

Reimbursing employees for business expenses is a common practice. This decision is troublesome for employers with reimbursement practices similar to AMN's where employees are paid a fixed amount without having to document or provide proof of expenses incurred. If such payments are deemed compensation instead of reimbursement, employers could face substantial liability. Employers should scrutinize their reimbursement policies and work with experienced employment counsel to ensure none of the issues addressed in this decision exist.

Court Clarifies Paystub Requirements for Employees Paid Two Hourly Rates During Same Pay Period

General Atomics v. Superior Court (2021) 64 Cal.App.5th 987

California Labor Code section 226 requires an employer to provide employees "an accurate itemized statement in writing" showing, among other things, "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly

rate by the employee." The central purpose of section 226 is to ensure that employers document the basis of employee compensation payments in order to assist employees in determining whether they have been paid properly.

In this case, an employee brought a class and PAGA representative action against her employer on the grounds that the employer failed to provide dual-rate employees—employees being paid two different hourly rates during the same pay period—with paystubs that identified the correct rate of pay for overtime wages because the paystubs showed "0.5 times the regular rate of pay rather than 1.5." The employer argued that it was following the DLSE's guidance and a careful reading of the California Labor Code.

In deciding this case, the court considered the following example, which is helpful to understanding the underlying issue:

In the same pay period, an employee worked 20 hours at $15 per hour (of which five hours were overtime hours) and 30 hours at $20 per hour (of which five hours were overtime hours). The employer and the employee both agreed that in such a pay period, the employee would be owed $990.00 in gross wages, which is calculated using the weighted average method (which is briefly described below). *However*, the parties disagreed as to the format of the paystub.

Weighted Average Method

While not directly at issue in this case, the court and the parties agreed that the "weighted average method" was the proper method of calculating the regular rate of pay for purposes of calculating overtime pay. The weighted average method is used where an employee is paid two or more rates during the same pay period. Under this method, the regular rate of pay is equal to the total compensation (before applying any overtime premium pay) divided by the total number of hours worked (including overtime hours). Once the regular rate of pay has been calculated, the overtime premium pay is equal to 0.5 times the regular rate of pay for all overtime hours and 1.0 times the regular rate of pay for all double time hours. The court noted that this is the method that the California Labor Commissioner has stated is applicable in this situation. The court also noted that this method mirrors the federal method.

Applying the weighted average method to the example above, the regular rate of pay is equal to $18.00 per hour:

Total compensation (less overtime premium pay) = $900

$900 = $300 (20 hours x $15 per hour) + $600 (30 hours x $20 per hour)

Total hours worked (including overtime hours) = 50 hours

Regular Rate of Pay = $18.00 per hour

$18.00 = $900 ÷ 50 hours

Overtime premium pay = $90

$90 = $18.00 per hour x 0.5 x 10 overtime hours

Note: “0.5” is used here because this method first compensates all hours worked at their respective straight-time rates, and then computes the additional overtime premium portion of the overtime hours as a factor of either 0.5 (overtime) or 1.0 (double time).

Total pay = $990

Again, both the employer and the employee agreed that this was the proper calculation of total pay for this pay period.

Paystub Formatting

With regard to paystub formatting, the employer argued that the DLSE’s sample piece-rate paystub, which applies the weighted average method, indicates that the paystub (in simplified form) should be formatted as follows:

Description	Hours	Rate	Gross Pay
Straight-time	20.00	$ 15.00	$ 300.00
Straight-time	30.00	$ 20.00	$ 600.00
Overtime	10.00	$ 9.00	$ 90.00
Total Hours Worked:	50.00	**Total Pay:**	$ 990.00

The employee argued that displaying the applicable overtime rate as $9.00 per hour, i.e., 0.5 times the regular rate of pay of $18 per hour, was confusing. The employee further argued that including the overtime hours in the total number of “straight-time” hours was confusing because it made it appear as though the employee was working 60.00 total hours (20 + 30 + 10).

Instead, the employee argued that the paystub was required by law to separately state the non-overtime and overtime hours and their corresponding rates. Thus, the employee argued the paystubs should appear as follows:

Description	Hours	Rate	Gross Pay
Straight-time	15.00	$ 15.00	$ 225.00
Overtime (1.5x)	5.00	$ 24.00	$ 120.00
Straight-time	25.00	$ 20.00	$ 500.00
Overtime (1.5x)	5.00	$ 29.00	$ 145.00
Total Hours Worked:	50.00	**Total Pay:**	$ 990.00

The court disagreed with the employee and found that displaying the paystubs in this way would make “it more difficult for an employee to calculate [their] contractual compensation.”

Instead, the court found that the employer's display was the correct formatting method for employees paid multiple rates during the same pay period.

What This Means for Employers:

This decision provides much needed clarity as to the formatting requirements for paystubs when using the weighted average method to calculate the regular rate of pay. It is important to note that the court did expressly leave open the possibility that "other formats may also be acceptable." Ultimately, the court ruled in favor of the employer because the employer was able to show that its paystubs conveyed the information required by section 226 in a way that enable employees "to readily determine whether their wages were correctly calculated," which has continuously been found to be the core purpose of section 226.

Wage Statements May Not Require Overtime Rate for Bonus Overtime Adjustment

Magadia v. Wal-Mart Associates, Inc. (9th Cir. 2021) 999 F.3d 668

Magadia worked for Walmart as a sales associate and led a class action and PAGA action alleging meal and rest break violations and wage statement violations. The Court of Appeal held that Magadia lacked Article III standing to bring a PAGA action for the alleged meal break violations because he did not suffer any injury.

Magadia's wage statement claim alleged that Walmart did not provide the required pay rate information and that the final paycheck failed to include the pay-period dates. Walmart pays employees every two weeks and issues wage statements at the time of pay. High-performing employees are voluntarily offered quarterly bonuses which are reported on the applicable wage statement as "Myshare Inct." When an employee receives a "Myshare" bonus, Walmart calculates the adjusted overtime pay for the hours worked during the applicable quarter and issues that lump sum overtime adjustment as "Overtime/Inct." on the wage statement with no corresponding hourly rate or hours worked.

The Court held that no wage statement violation occurred because Labor Code section 226, subdivision (a)(9) requires the "applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee" and there was no "hourly rate in effect during the pay period" nor were there hours worked during the pay period applicable to the bonus and overtime adjustments.

What This Means for Employers:

The *Magadia* ruling is a significant one with several key takeaways.

First, this case—like many others—serves as a reminder of the potential for high penalties under PAGA. PAGA allows an employee to pursue penalties on behalf of the employee and all other aggrieved employees and the penalties may be assessed for each California Labor Code

violation for each pay period. The court also has discretion to reduce such penalties if they would be unjust, arbitrary, oppressive, or confiscatory. As a result, hyper-technical claims can potentially lead to millions in liability, which was the case here at the district court level. Employers may want to audit employment practices and procedures regularly to avoid such penalties.

Second, the case has significant implications for the issue of standing under PAGA, particularly in federal court. Prior California appellate court cases had suggested an employee aggrieved by one or more California Labor Code violations could pursue PAGA claims based not only on those violations, but on other violations he or she had not suffered directly. The Magadia court held the opposite, finding that under Article III, Magadia lacked standing to pursue meal period claims he did not personally suffer. Although the Ninth Circuit remanded the meal period claim to state court for further proceedings, the ruling will have significant implications and may limit standing to pursue PAGA claims.

Third, the ruling provides important guidance limiting the scope of technical wage statement claims. It indicates that employers issuing overtime adjustment payments for bonuses earned over multiple pay periods need not display the hours or rate for such payments. This has been a hotly contested issue since the original district court ruling, and the Ninth Circuit's ruling is likely a welcome sight for employers facing similar technical allegations of wage statement violations. Unfortunately for California employers, it also demonstrates that proving compliance may require a long journey through the appellate process.

PAGA Representative Action May Proceed Even if Individual Claim is Time-Barred

Johnson v. Maxim Healthcare Services, Inc. (2021) 66 Cal.App.5th 924

Relying on *Kim v. Reins International California, Inc. (*2020) 9 Cal.4th 73, the Court held that an employee whose individual claim is time-barred may still maintain a representative action based on those claims. Johnson worked as an hourly, nonexempt employee for Maxim, a national healthcare staffing company. Johnson filed a lawsuit in 2019 under PAGA alleging the execution of a "Non-Solicitation, Non-Disclosure and Non-Competition Agreement" during her employment in 2016 violated Labor Code section 432.5. Johnson remained employed with Maxim at the time of her lawsuit.

Maxim demurred to the complaint and the trial court sustained the demurrer without leave to amend finding that Johnson's claim was time-barred. Johnson appealed the trial court's decision. On appeal the Court held that because Johnson had at one point personally suffered at least one Labor Code violation upon which the complaint was based the fact that her "individual claim may be time-barred does not nullify the alleged Labor Code violations nor strip Johnson of her standing to pursue PAGA remedies."

What This Means for Employers:

This decision is another reminder that employers should frequently review its company agreements, onboarding documents, and wage and hour policies to ensure they are California compliant. When an employer receives an employee's notice to the Labor & Workforce Development Agency, the employer should request assistance from counsel in order to consider all possible procedural and substantive PAGA defenses.

Disparate Impact Claims Based on a Subgroup

Mahler v. Judicial Council of California (2021) 67 Cal.App.5th 82

Plaintiffs were retired superior court judges who participated in the Temporary Assigned Judges Program (TAJP). The Chief Justice instituted a limit on the duration of service in the program with some exceptions. Plaintiffs brought this lawsuit alleging that the duration of service limit discriminates against older retired judges in violation of FEHA. The trial court sustained the demurrer on the complaint without leave to amend on the grounds that the claims were barred by legislative immunity. On appeal, the Court held that immunity does not foreclose declaratory relief.

Defendant had also demurred to the complaint on the grounds that the complaint failed to state a viable disparate impact age discrimination claim. Defendant raised this as an alternative ground for the Court to affirm the trial courts demurrer and therefore the Court considered this argument. Holding that while Plaintiffs' complaint at present was insufficient to state a cause of action, the Plaintiffs should have been granted leave to amend, thus the case was remanded for Plaintiffs to amend their complaint.

What This Means for Employers:

This case, although not determinative as to the Plaintiffs' claims, is important in that the Court held that a disparate impact age discrimination claim can be based on a subgroup of a protected class. Here, the Plaintiffs' claims that the duration of service limit has a disparate impact on older judges because they could no longer receive assignments unless they receive an exception to the limit. The fact is that this discriminatory policy only affects judges who are a subgroup of the FEHA protected class of persons 40 years of age and over. The case was remanded to allow Plaintiffs to amend their complaint and allege sufficient statistical evidence as appropriate to support the disparate impact on the subgroup of the protected class.

Arbitration Agreements are Still Enforceable

Chamber of Commerce of United States v. Bonta (9th Cir. 2021) 13 F.4th 766

In 2019, Governor Newsom signed AB 51 which made it unlawful for employers to require employees to execute arbitration agreements as a condition of employment and prohibited employer retaliation and discrimination for refusal to sign an arbitration agreement. AB 51 also provided for civil and criminal penalties for employers violating these prohibitions. A federal judge issued an injunction blocking the law from taking effect on January 1, 2020, as scheduled. The injunction was appealed to the Ninth Circuit Court of Appeals. In this case, the Ninth Circuit overturned the injunction in part.

The Court held that the Federal Arbitration Act (FAA) did not preempt AB 51 restrictions on arbitration agreements. The Court agreed, however, that the civil and criminal penalties associated with AB 51 stood as an obstacle to the purposes of the FAA and was therefore preempted by federal law.

What This Means for Employers:

Thus, arbitration agreements are still enforceable under federal and California law, but the agreement must be voluntary and mutually agreed to by the employer and employee. Employers should review their arbitration agreements to ensure that employees' execution of the agreement is not a condition of employment. Similarly, employers should ensure that their employee handbooks do not require arbitration as a condition of employment.

PAGA Litigation

In 2021, and in keeping with recent litigation trends, plaintiffs' attorneys continued to focus on bringing claims pursuant to the Private Attorneys General Act of 2004 ("PAGA"). Similarly, appellate courts decided a number of important cases that have contributed to the growing body of PAGA jurisprudence.

As a refresher, PAGA "deputizes" citizens as private attorneys general to enforce the California Labor Code. Specifically, PAGA authorizes "aggrieved employees" to act as private attorneys general and collect civil penalties for Labor Code violations where the State has been notified and does not itself take enforcement action. A PAGA lawsuit is "representative" in nature in that the plaintiff is suing on behalf of all affected employees. In this way, a PAGA representative action is similar to a class action, however, a PAGA action is not subject to the same procedural requirements as a class action because PAGA claims are technically enforcement actions between the State and the employer, with the underlying plaintiffs acting as proxies for the government. As a result, PAGA actions are easier for plaintiffs' attorneys to pursue in comparison to class actions.

The "default" civil penalty under PAGA varies depending on whether the violation is an "initial" violation or a "subsequent" violation. Generally, courts consider "subsequent" violations to be any violations that occur *after* an employer has notice of a violation. The default civil penalty for "initial" violations is $100 for each aggrieved employee per pay period. On the other hand, the penalty for subsequent violations is $200 for each aggrieved employee per pay period. Of the civil penalties recovered in PAGA representative actions, 75 percent goes to the State and the remaining 25 percent is distributed to the "aggrieved employees."

PAGA Claims and Arbitration

Herrera v. Doctors Medical Center of Modesto (2021) 67 Cal.App.5th 538

Defendant appealed an order denying its petition to compel arbitration of Labor Code claims pursued by former employees. Herrera brought this lawsuit alleging Labor Code violations under PAGA only. The Court interpreted the holding in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 to be "that PAGA representative claims for civil penalties are not subject to arbitration" under a pre-dispute arbitration agreement." (Citing *Esparza v KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1234.)

Williams v. RGIS, LLC (2021) 70 Cal.App.5th 445

The Court of Appeals following the California Supreme Court's holding in *Iskanian v. CLS Transportation Los Angeles, LLC*, held that individual employees cannot contractually waive their rights to bring a representative action under PAGA, and that the state law is not preempted by the Federal Arbitration Act.

Winns v. Postmates, Inc. (2021) 66 Cal.App.5th 803

Plaintiffs filed a putative class and representative action, alleging Labor Code violations. The trial court denied Postmates's petition to compel arbitration of Private Attorney General Act claims for civil penalties, citing the California Supreme Court's 2017 "Iskanian" holding that representative action waivers were unenforceable. The court of appeal affirmed, rejecting Postmates' arguments that Iskanian was abrogated by subsequent U.S. Supreme Court decisions. Iskanian expressly established that the Federal Arbitration Act does not preempt state law on the enforceability of PAGA waivers.

Rosales v. Uber (2021) 63 Cal.App.5th 937

The Court of Appeal affirmed the trial court's denial of Uber's motion to compel arbitration in an action brought by plaintiff, alleging a single cause of action for wage violations under the Private Attorneys General Act (PAGA), Lab. Code, 2698 et seq. Plaintiff was an Uber driver under a written agreement stating she was an independent contractor and all disputes would be resolved by arbitration under the Federal Arbitration Act (FAA), and the agreement delegated to the arbitrator decisions on the enforceability or validity of the arbitration provision.

The court concluded, as has every other California court presented with this or similar issues, that the threshold question of whether plaintiff is an employee or an independent contractor cannot be delegated to an arbitrator.

Contreras v. Superior Court (2021) 61 Cal.App.5th 461

In this PAGA suit, the trial court erred in ordering to arbitration the preliminary/gateway issue of whether the plaintiffs were employees of the defendant rather than independent contractors. The state is the real party in interest in a PAGA suit and cannot be forced to arbitrate any portion of its claim–including whether the individual plaintiff is an employee with standing to bring the claim–without the state's consent. The PAGA claim cannot be split into parts, some subject to arbitration, others not.

What This Means for Employers:

Employers should review their arbitration agreements in light of the courts' consistent resistance to the arbitrability of PAGA claims. Unless the PAGA statute is amended or courts hold otherwise, the only protection against PAGA claims may be the implementation of good policies and procedures and excellent attorneys.

PAGA Claims Must be Manageable

Wesson v. Staples the Office Superstore, LLC (2021) 68 Cal.App.5th 746

Wesson worked as a General Manager for Staples in California. Wesson brought a class and PAGA action alleging he and other general managers were misclassified as exempt employees and thus were denied overtime and other rights granted to non-exempt employees.

Wesson moved for class certification, but the Court denied his motion, holding that there was too much variation in how general managers performed their jobs and the level of non-managerial tasks performed. Following the Court's denial, Staples filed a motion to strike the PAGA claim on the grounds that it would be unmanageable at trial and would violate the company's due process rights under the same basis as the court's class denial. The Court requested the Plaintiff provide a trial plan which showed how the PAGA claim could be managed. In his trial plan, Plaintiff failed to address how the parties would litigate the defenses, including the exemption defense without performing an individual analysis for each employee. The parties estimated that each of the 346 employees would require six days of trial for examination.

The trial court held that the defenses could not be litigated though common proof but instead required an individual-by-individual determination and that the proposed trial plan did not address a manageable way to address this. Noting that the Plaintiff's trial plan which resulted

in a multi-year long trial of each individual employee was not manageable, the court granted Staples motion to strike the PAGA claim.

On appeal, the Court ruled that the trial court had inherent power to control the proceedings before it, which includes the authority to ensure manageability of claims at trial. The Court explained that manageability must account for the defendant's affirmative defenses, as they have a right to present evidence necessary to establish their defenses. The Court did not preclude the use of common proof in establishing defenses, but held that were individualized issues are incompatible with common proof, the court must consider and preserve the defendant's ability to present its defense. Where the parties' ability to present evidence raises an issue of manageability, the court has authority to dismiss unmanageable claims.

What This Means for Employers:

Prior to *Wesson*, there was no clear answer on whether trial courts could strike PAGA claims for being unmanageable. Now that the Court of Appeal has clarified that this is permissible, employers facing the possibility of similarly astronomical PAGA penalties may attempt to strike such claims as unmanageable where individual issues predominate, and potentially obviate entire PAGA actions, saving millions. Certainly, employers should consider this approach in all misclassification cases, which the *Wesson* court itself acknowledged are "highly fact dependent" in nature. However, in any instance in which the group of aggrieved employees have many differences, or the facts, for whatever reason, are individualized, employers should similarly move to strike PAGA claims as unmanageable.

Heightened PAGA Penalties Inapplicable

Gunther v. Alaska Airlines, Inc. (2021) 72 Cal.App.5th 334

In September 2017, Gunther sent a PAGA notice to her employer. The notice alleged that the employer, Alaska Airlines, Inc., violated Labor Code section 226 because the employer's paystubs failed to show the number of pieces earned, the corresponding piece-rate, and the number of hours worked. The following month, Gunther filed a PAGA representative action against her employer seeking PAGA penalties on behalf of herself and approximately 1,200 California-based flight attendants that worked for employer from October 2016.

While the default civil penalties generally apply to PAGA claims, Gunther sought the civil penalties set forth in Labor Code section 226.3, which states, in part:

> Any employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars ($250) per employee per violation in an initial citation and one thousand dollars ($1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the records required in subdivision (a) of Section 226.

Gunther argued that these "heightened" penalties should be applied because Alaska Airlines violated section 226, subdivision (a). After a three-day bench trial in April 2019, the trial court judge awarded plaintiffs over $25 million in PAGA penalties and $944,860 in attorney's fees. The employer appealed.

On appeal, Alaska Airlines argued that the "heightened" penalties set forth in Labor Code section 226.3 only applied where the employer fails to provide paystubs or fails to keep the required records. The appellate court agreed with the employer and held that the heightened civil penalties under section 226.3 only apply where the employer fails to provide paystubs or fails to maintain the records required by section 226. As such, the default civil penalties were applicable in this case.

What This Means for Employers:

This case is an important win for all California employers, but it is also a reminder of how unforgiving PAGA claims can be. After all, even though the employer was successful on appeal, the underlying PAGA penalties in this case are still expected to be well over $1 million. Further, the appellate court expressly affirmed the nearly $1 million in attorney's fees that the trial court awarded to the plaintiff. (Note: The plaintiff's attorney's fees are paid by the employer.)

At minimum, agricultural employers must ensure that they are providing all employees with paystubs and maintaining the corresponding records as required by Labor Code section 226. Given the prevalence of PAGA litigation, employers should strongly consider having experienced employment law counsel conduct an audit of their wage and hour practices, particularly as it concerns paying piece-rate wages and issuing paystubs for piece-rate workers.

Meal Period Claims May Require an Individualized Inquiry Making Class Certification Improper

Salazar v. See's Candies (2021) Cal. App. Unpub. LEXIS 2671

In an unpublished Court of Appeals case, the court determined that where the employer had communicated a lawful meal period policy, and many of the employees followed that policy by recording meal periods, and there was evidence that employees sometimes chose to waive their meal period, an individualized inquiry would be required to determine liability for failure to provide meal periods.

The Court denied class certification on the meal period issue because there was a lack of common evidence and thus individualized specific inquires would be required which would be timely and inefficient. In determining this, the Court considered the declarations submitted by See's from employees that showed employees sometimes chose to waive their meal period in order to finish their shift early. The Court also relied on evidence submitted by See's which

showed that it had a compliant meal period policy and that employees were well trained on that policy.

What This Means for Employers:

This unpublished decision provides a beacon of hope for California employers confronted with class action issues. Employers should work with their counsel to ensure that they have a legally compliant policy and attempt to comply with the policy, which may help defeat class certification one day.

A Stray, Potentially Discriminatory Comment Should be Considered by the Court at Summary Judgment

Jorgensen v. Loyola Marymount University (2021) 68 Cal. App. 5th 882

The Court of Appeal reversed summary judgment in an age discrimination action, finding that the court should have considered a stray comment reflecting an age-based discriminatory mindset. Plaintiff alleged she was fired because of her age. As evidence, in opposition to the employer's motion for summary judgment, the Plaintiff relied on a declaration from a former employee which stated that the decision-maker at issue had once commented, in the context of a hiring decision unrelated to Plaintiff, that she wanted to hire someone younger for another position not being sought by the Plaintiff.

The court held that a "stray remark" may have relevance because "one might infer the decision-maker could influence the top decision-maker on all issues including hiring and promotion."

What This Means for Employers:

This decision illustrates the dangers of making any comments related to an employee's age or other protected characteristic, even comments made by non-decision-makers. Additionally. California's stray remark precedent makes employer motions for summary judgment very difficult to win. A stray remark regarding an unrelated position can still impact a discrimination case, even if someone other than the final decision maker makes the remark.

Court of Appeal Rules in Favor of FLC and WG Member Growers in Waiting Time Penalties Case

On Thursday, August 12, 2021, the California Court of Appeal issued its opinion in *Jamie Zepeda Labor Contracting v. Department of Industrial Relations*, Division of Labor Standards Enforcement, a case which had the potential to upset longstanding pay practices in the

agricultural industry and expand the ability of the California Division of Labor Standards Enforcement (DLSE) to issue expensive citations to employers. Since 1985, the DLSE has been able to issue citations to employers for minimum wage violations. In 2014, the Legislature gave the DLSE new authority to recover "waiting time penalties" for minimum wage violations. Waiting time penalties are assessed when an employer fails to pay final wages upon discharge, such as when the employee is fired or quits, and can reach up to a maximum of 30 days of pay.

In the Zepeda case, the Court of Appeal was asked to decide whether the DLSE could issue a citation for waiting time penalties even when an employer pays its workers all minimum wages owed on the regular weekly payday. Because of its importance to members, and the wider agricultural industry, Western Growers, in conjunction with other agricultural industry advocacy groups, worked with Sheppard Mullin Richter and Hampton attorneys Babak Yousefzadeh and Brian Fong to file an amicus curiae, or "friend of the court" brief to help educate the Court of Appeal on the industry's perspective.

We are glad to report that the Court of Appeal decided that the DLSE could not issue minimum wage citations for waiting time penalties when an employer pays its workers all minimum wages owed on the regular weekly payday.

The Zepeda case started when the DLSE audited the pay practices of Coachella Valley farm labor contractor, Jaime Zepeda Labor Contracting, Inc. (JZLC), and the work JZLC did for growers Richard Bagdasarian, Inc. (RBI) and/or Anthony Vineyards, Inc. (AVI) during the 2014, 2015, and 2016 grape seasons. While JZLC's workers performed any number of agricultural tasks, for RBI and AVI during each grape season, such as tying, pruning, weeding, and harvesting, it treated employees as continuously employed throughout each grape season and paid them on the regular weekly payday. Yet, even though JZLC had longstanding employment relationships with its workers, the DLSE determined JZLC's workers were legally discharged from employment after completion of each agricultural task. In other words, the DLSE found that workers were discharged and owed final wages on the day they finished tying up, finished pruning, finished weeding, and finished harvest.

Even though JZLC paid its employees on the regular weekly payday, including all minimum wages, the DLSE issued four separate citations to JZLC, RBI, and AVI, totaling almost $350,000 and consisting predominantly of waiting time penalties. JZLC, RBI, and AVI asked the Superior Court to review the DLSE's decision and successfully persuaded the Superior Court that the DLSE could not issue the citations because JZLC had paid its workers all minimum wages owed on the regular weekly payday. The DLSE appealed, the case was argued on July 15, 2021 and the Court of Appeal's decision came down on August 12, 2021.

The Court of Appeal decided that because JZLC, RBI, and AVI had paid their workers all minimum wages owed on the regular payday, the DLSE did not have the authority to impose

waiting time penalties if all minimum wages were paid on the regular payday. The Court of Appeal did not decide whether the DLSE's argument that workers are discharged after completing "seasonal activities," and the DLSE will probably continue to push this approach in its enforcement activities. Members are encouraged to ensure workers are paid promptly, especially around the conclusion of seasonal activities. Members should expect the next iteration of DLSE audits will look at any reason to find minimum wages were not paid to impose waiting time penalties.

To be clear, the court did not say employers can avoid section 203 waiting time penalties if they pay all wages due by the next payday following a season ending. Rather the court said if an employer pays all wages owing on the next payday after a quit or a termination (as in due to a season ending), they are not subject to a failure to pay minimum wage penalty. If, however, the employer pays all wages due on the next payday after a quit or a termination (e.g., due to a season ending), the court in this case expressed no opinion on whether the employer is subject to section 203 waiting time penalties. This case does not change existing law on section 203 penalties, as the court expressly declined to address that issue.

U.S. Supreme Court Strikes Down Ag Union Access Rule

In a 6-3 decision, split along ideological lines, the Supreme Court Wednesday struck down as unconstitutional the California Agricultural Labor Relations Board regulation that permits union organizers to enter a farmer's property to solicit employees about supporting a union.

Writing for the majority, Chief Justice John Roberts said that when "the government physically acquires private property for a public use," the Fifth Amendment's takings clause "imposes a clear and categorical obligation to provide the owner with just compensation." The Court found that the access regulation clearly creates a right to invade the grower's property and therefore is a physical taking of property. Roberts reasoned that by giving union organizers "a right to physically enter and occupy the grower's land for three hours per day, 120 days per year," the access egulation takes away the owner's right to exclude others from the property – which is one of the most important rights of owning property.

The lawsuit was brought by Cedar Point Nursery, a northern California strawberry grower, and Fowler Packing Co., a Fresno-based grapes and citrus shipper, in federal court. The companies challenged access regulation, arguing that by giving the union organizers access to their property, the regulation created a legal right to use the property without their consent and without compensation, in violation of the Fifth Amendment of the Constitution. The lower courts sided with the state, but the two companies, represented by Pacific Legal Foundation, persuaded the Supreme Court to hear the case. Western Growers filed an amicus brief with the Supreme Court in support of the companies, which was joined by California Fresh Fruit

Association, Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties, and Ventura County Agricultural Association.

The court held that the access rule is a "per se" taking (i.e., one that involves a major intrusion of private property) for which just compensation must be paid to the property owner, as opposed to a mere "regulatory taking" which involve more minor restrictions on property, such as zoning ordinances.

California Supreme Court Cases to Watch in 2022

People Ex Rel. Garcia Brower v. Kolla's Inc.

Does Labor Code §1102.5(b), which protects an employee from retaliation for disclosing unlawful activity, apply when the information is already known to that person or agency?

Grande v. Eisenhower Medical Center

A temporary staffing company provided an assignment for Grande to work as a nurse at Eisenhower Medical Center. She claimed Eisenhower did not provide her with the required meal and rest periods, wages for hours worked, and overtime wages according to California labor law. Initially, she filed a class action against the staffing company on behalf of the its employees assigned to various positions at numerous locations. Her claims were based on her work on assignment at Eisenhower, and the staffing company settled with the class. A release of claims was executed by The Plaintiff. The trial court entered a judgment incorporating the settlement agreement. A year later, Grande filed a second class action lawsuit alleging the same labor law violations against Eisenhower, who was not listed in the prior class action.

The staffing company argued that she could not bring a separate lawsuit against Eisenhower based on claims settled in the prior class action. During a trial limited to questions of whether or not the Plaintiff could file the second class action, the trial court held that Eisenhower was not a released party under the settlement agreement, so the doctrine of *res judicata* did not apply since the hospital was not a party to the prior litigation or in privity with the staffing agency. The Court of Appeals agreed.

California employers should watch this case since the California Supreme Court's decision could affect staffing agencies, including farm labor contractors, and how they approach settlement of claims when their clients are not also named as defendants in the case. The issue could have a notable impact for California staffing agencies as duplicative litigation could mean they have to pay settlement costs twice due to indemnity clauses in contracts.

Naranjo v. Spectrum Security Services, Inc.

Whether a violation of Labor Code § 226.7 gives rise to claim under Labor Code §§ 203 and 226 when the employer does not include the premium wages in the employee's wage statements, but does include the wages earned for meal breaks.

Trial Court Cases to Watch in 2022

Haro, et. al. v. Walmart , Case No: 1-21-cv-00239.

Employees allege that they were required to report to their work location 30 minutes prior to the start of their shift to allow enough time to complete their screening and clock in on time. Once an employee passed the screening, they were issued their personal protective equipment, given a sticker indicating they passed the screening and were sent to clock in, often times at the other side of the facility. Wal-Mart claims they systematically added screening time pay to such time , including "adding extra time if there ever is a reason this additional time is not sufficient."

Class certification briefing expected to begin in March, with a hearing on class certification set for June 1, 2022.

Tirado v. Victoria's Secret Stores, LLC,, et. al. , Case No: 1-21-cv-00636

Employees claim that Victoria Secret knowingly and willfully required employees to perform work and/or remain on duty for the benefit of the defendant while off the clock.

Motion to Dismiss is currently pending.