APMA 2013: ON THE FRONT LINES OF WAGE AND HOUR

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New Legislation

Personnel Files (AB 2674)

- Labor Code section 1198.5 provides employees with certain rights regarding inspection of "personnel records."
- The Code excludes some records from the right of inspection:
  - Records relating to the investigation of a possible criminal offense;
  - Letters of reference;
  - Ratings, reports, or records that were obtained prior to the employee's employment, prepared by identifiable examination committee members, or obtained in connection with a promotional examination.
- Without the terms "personnel records" or "personnel file" ever being defined, there is considerable ambiguity about what documents should be keep in an employee's personnel file.
- Exclude medical information and I-9s from "personnel files," but realize that I-9s are probably covered.
- Be careful about offering "inspection" rather than copying records – the law now allows the employee's representative to inspect.
- The inspection or copies must take place within 30 days of a written request, and is extendable to a maximum of 35 days. $750 penalty.

Commission Sales (AB 1396/2675)

- Commission arrangement must be in writing
- When an employee is paid commissions, the employer must provide a written contract setting forth the method the commissions will be computed and paid.
- The written agreement must be signed by both the employer and employee.
- Commission wages are "compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof."
- Commissions do not include (1) short-term productivity bonuses, (2) temporary, variable incentive payment that increase, but do not decrease, payment under the written contract, and (3) bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed.

Salary Agreements (AB 2103)

- Revises Labor Code 515(d) to prohibit employers from paying a fixed salary designed to compensate for both regular and overtime hours.
- Overtime must be paid above any nonexempt employee's agreed upon salary.
- This law was in response to the court opinion in *Arechiga v. Dolores Press*.
- Does not apply to Agricultural Occupations under Wage Order 14. (Labor Code 554)
- But what if we guarantee hours, and not money?

Check Stubs (SB 1255)

- The new law provides that employees are deemed to have suffered injury for purposes of assessing penalties pursuant to Labor Code 226(a), if the employer fails to provide accurate and complete information.
- Furthermore, a violation occurs if the employee cannot easily determine from the wage statement alone the amount of the gross or net wages earned, the deductions the employer made from the gross wages to determine the net wages paid, the name and address of the employer or legal entity employing the employee, and the name and only the last 4 digits of the employee.

Check Stubs / Record Retention (AB 2674)

- Under Labor Code 226, employers must keep copies of employees' itemized pay statements for at least three years, at the site of employment or at a central location within the state of California.
- The new law, effective 1/1/13, clarifies that the term "copy" means either a duplicate of the statements provided to employees, or a computer generated record that shows all information required under Labor Code 226.
- As discussed above, the law sets a new deadline for employers to either provide a copy or permit the employee to inspect the personnel file within 30 days after the employer receives the request. The employer and employee may only agree to extend this time period out to 35 days.
- This requirement does not change the 21 day time period to produce or make available for inspection an employee's itemized wage statements under Labor Code 226(c).

Check Stubs (AB 1744)

- Temporary service employers to provide wage statements that list the rate of pay and total hours worked for each temporary assignment.
- A “temporary service employer” is defined as a company that contracts with customers to supply workers to perform services for the customer.
- This is effective 7/1/2013.
- The law requires temporary services employer to provide Wage Theft Notices required under 2810.5 and include additional information regarding the name, the physical address of the main office, the mailing address if different from the physical address of the main office, and the telephone number of the legal entity for whom the employee will perform work, and any other information the Labor Commissioner deems material and necessary. This requirement is effective on 1/1/2013.
- Not new to FLCs.

Pitfalls – Check Stubs

- Each employee must receive an itemized wage statement with the following information with each check:
  - All deductions
  - Inclusive dates of the pay period
  - Employee name and SSN (no more than the last 4 digits of the SSN)
  - Employer name, EIN and address
  - Hours worked and applicable rates of pay
  - Gross wages
  - Net wages
  - Applicable piece rate and number of pieces produced under each applicable piece rate
  - FLC's / Temp agencies – **NAME OF THE CUSTOMER / CLIENT / GROWER**

    PENALTY: $250 Per pay period per employee to the state; $50 for the first pay period; $100 for all other pay periods to each employee

Significant Court Decisions

Apply California Law in California

- **Out of State Employees Must Receive Pay under California Law**
  - In ***Sullivan v. Oracle Corp.***, the California Supreme Court held that California-based employers must pay non-resident employees working in California according to the California's overtime laws.
    - That means that a California employer who has employees travel to California to work must pay the employees according to California's wage and hour laws – not pursuant to the laws from the state that the employee is from. The Court emphasized California's strong public policies in place to protect the employees.
  - This holding was again recognized in ***See's Candy Shops, Inc. v. Superior Court***. The Court in See's Candy stated, "We agree with [the Plaintiff] that under Sullivan **a California employer generally must pay all employees, including nonresident employees working in California, state overtime wages unless the employee is exempt**." While the issue in See's Candy was whether an employer's time-keeping rounding policy complied with California law, the case is a good reminder that the analysis of which state's employment laws apply to employees is simply more than looking up where the employee live.
- Be careful if Arizona employees cross in to California.

Rounding Upheld – But Risk Exists

- ***See's Candy Shops, Inc. v. Superior Court*** addressed whether an employer's policy of rounding employee's time clock entries to the nearest tenth of an hour was legal.
- For example, if an employee clocked in at 7:58 a.m., the system rounds the time to 8:00 a.m., and if the employee clocked in at 8:02 a.m., the system rounds down the entry to 8:00 a.m.
- Plaintiffs argued that all rounding is unlawful in California.
- The court noted that even though California employers "have long engaged in employee time-rounding, there is no California statue or case law specifically authorizing or prohibiting this practice."
- The court agreed that time entry rounding is permissible under California law if the rounding policy is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.'
- Courts have found rounding valid even where there is a net loss to the employees, as long as the policy is applied neutrally. The statistical sample can be misleading.
- See's Candy was unusual in that the employer had a "grace period" policy that allowed people to punch in as much as a half hour early without pay until the start time.
- Rounding is legal – but risky. This practice is still targeted.

Expense Reimbursement

- Clothing retailer Wet Seal (***Morgan v. Wet Seal***) successfully defeated class certification on claims that it failed to reimburse uniform expenses and failed to compensate employees for expenses for using their personal vehicles to travel between store locations.
- Wet Seal presented its expense reimbursement and work attire policies, which on their face made very clear that employees were entitled to reimbursement for travel expenses and that employees were not required to purchase Wet Seal clothing but just expected to dress in the style of the store.
- Numerous employees testified that they understood they did not have to buy or wear Wet Seal clothing, and that they had been reimbursed for expenses.
- The court explained that Wet Seal's policies were facially lawful and thus could not supply the necessary "common policy" or "common method of proof" needed to support a determination of liability on a class wide basis.
- Certification was denied because liability would depend on individualized testimony of employees that, for example, their particular supervisor required them to purchase Wet Seal clothing and/or told them that they could not be reimbursed for travel expenses. In the circumstances, any trial of liability would require numerous individualized inquiries, making class certification unmanageable and inappropriate.
- But watch out – a couple of post Brinker denials of certification have been depublished.

Split Shifts and Reporting Time

- In ***Aleman v. AirTouch Cellular***, the court provided insight on the meaning of reporting time pay and split shift pay.

- California law provides that if an employee reports to work as scheduled and is not put to work or is furnished with less than half of the scheduled day's work, the employee shall be paid for half of the scheduled day's work, but in no event less than two hours nor more than four hours. In this case, the employees claimed that they were owed reporting time pay for having to attend store meetings.

- The store meetings were scheduled for less than two hours each, and, that they always lasted at least half the time scheduled. Nonetheless, the employees claimed that they were entitled to be paid for a minimum of two hours for every store meeting they had to attend, even if the meeting lasted only an hour.

- The court rejected this claim, holding that California's reporting time pay law does not require employers to pay employees for a minimum of two hours of work every time they report to work.

- The key is whether the employee is furnished with at least half of the scheduled day's work.

Split Shifts and Reporting Time (cont.)

- On certain occasions, the employees were required to attend a store meeting on the same day as a regular work shift. The store meeting and the sales shifts were not back to back, but were separated by a block of time, created a split shift.

- Under California law, when an employee works a split shift, he/she is entitled to one hour additional pay at the minimum wage in addition to the minimum wage required for that workday.

- AirTouch argued that no additional pay was owed because on every occasion the employees worked split shifts they were paid more than the sum of minimum wage for all hours worked plus an additional hour at minimum wage.

- The court agreed and rejected the employees' claim. The employees had argued that the Wage Order simply means that the employee must be paid an additional hour at his or her regular wage when a split shift is worked.

- Rejecting this argument, the court reasoned that the split shift provision refers not to "regular wages" but to "minimum wages" and that the provision is contained in the "Minimum Wage" section of the Wage Order, making it clear that the regulation is concerned solely with payment of minimum wage.

Split Shifts and Reporting Time (tidbits)

- The court also held that one employee's claims were barred by virtue of the fact that he had previously signed a general release of claims in favor of AirTouch.

- Relying on Labor Code section 206.5, the employee argued that the release could not bar claims for wages owed but unpaid. The court disagreed, holding that the release was valid and effective because 206.5 only bars a release of wages that are not in dispute. In this case, it was disputed whether the employee was owed reporting time pay and/or split shift pay.

- After prevailing on the merits of the case, AirTouch sought to recover its attorneys' fees. The court considered whether Labor Code section 218.5 permits a prevailing employer to recover its attorneys' fees incurred to successfully defend reporting time and split shift pay claims.

- In consideration of the California Supreme Court's recent ruling on this subject in ***Kirby v Immoos***, the court held that AirTouch could recover its fees on the reporting time pay claim but not the split shift pay claim. The split shift pay claim was a minimum wage claim and was thus governed by Labor Code section 1194, which has a one way fee shifting provision. However, the court held that the reporting time pay claim was not a minimum wage claim and thus fell under Labor Code section 218.5's two way fee shifting provision which allows the prevailing party (employee or employer) to recover its attorneys' fees.

Meal and Rest Periods (Brinker)

- Employers do not have to ensure employees take meal breaks.
- Employer is in compliance if it:
  - relieves its employees of all duty,
  - relinquishes control over their activities
  - permits them a reasonable opportunity to take an uninterrupted 30-minute break, and
  - does not impede or discourage them from doing so.
- Meal Periods must be authorized at or before the end of the fifth hour of work
- No “rolling” five hour period.
- Second meal period under Wage Order 14? Probably not, but be careful.
- Rest breaks: Figure out total rest **TIME** first. 10 minutes for every four hours, or major fraction thereof (anything over 2 hours).
- Determine when rest periods must occur (as near to the middle of the work period as practicable) but some flexibility.
- Does not necessarily have to occur before (or after) a meal break. Do what makes sense.

Meals & Breaks

- **Rest Breaks: Basic Requirements:**
  - Authorize and permit ten (10) net minutes of rest for each four hours (or major fraction thereof) worked. Anything over 2 hours is a major fraction of four hours.
  - If an employee works less than 3.5 hours, no rest period need be authorized.
  - Rest periods must be provided as near as is practicable to the middle of each work period.
  - Rest breaks may not be combined with or added on to meal breaks and may not be used to allow an employee to come in late or leave early, even if the employee requests it.
  - Rest breaks are paid time and are controlled by the employer, so employees may be required to remain on the premises.
- **Penalty for failure to provide:** One additional hour of pay at their regular rate for each day that an employer fails to authorize and permit a rest break.

Meals & Breaks (continued)

- **Meal Breaks: Basic requirement:**
  - Authorize and permit at least a thirty (30) minute duty free meal after no more than five (5) hours of work.
  - If six (6) hours will complete the day of work, then the meal period may be waived by the employee.
  - Meal periods may be unpaid if they are at least thirty (30) minutes long and if the employee is relieved of all duty and is free to leave the premises.
  - If employees must remain on the premises to eat, then the employer must provide a suitable place for them to eat. If employees are not free to leave during the meal period, it is an on-duty meal period.
  - The employer satisfies its obligation by ensuring that all employees are actually relieved of duty, are performing no work, and are free to leave the premises.
- **Meal periods must be recorded.** The record must have the time of day when each employee started and ended a meal period. **NO AUTO DEDUCTIONS!**

WHAT IS HAPPENING RIGHT NOW?

Changes at the DLSE

- Rules and legal interpretations are changing…without notice or public statement in writing.
  - No more dismissals of Berman claims at conference (except in the strongest cases).
  - Some DLSE employees report being instructed to "tip the playing field" in favor of employees.
  - Is the message from leadership, or just poorly communicated to agency employees?
- More combative field enforcement (BOFE)
  - Increased use of subpoenas
  - Broader information requests
  - More aggressive pursuit of large penalty awards
  - Reduced communication and cooperation
  - "It would compromise our investigation"
  - Is the self audit a thing of the past?
  - Overtime for field packing?

Payment of Wages - Penalty

- If wages are not paid timely on quit, termination, or layoff, daily wages continue for up to 30 days, unless the wages are paid sooner.
  - $8.00 x 10 hours x 30 days = $2400
- The employer does not find out usually until 30 days have passed.
- Remember, any time an employee is not given a specific date of return in the same pay period, DLSE will consider it a termination.
- Make sure they know how to reach you!

Payment of Wages - Penalty

- Historically, the DLSE required the employee to ask for payment if the employee did not show up and get the check on pay day.

- This is consistent with the law. The DLSE's own manual says: "Quitting employees must return to the office or agency of the employer in the county where the work was performed to recover wages after quitting except, of course, where the worker has given 72 hours notice or where the worker has requested payment by mail and provided an address." This is consistent with Labor Code 202 and 208.

- The only exception is when circumstances created by the employer which would prevent an employee from returning for the wages or which would make the return an exercise in futility. (O.L. 1986.09.15) Under those circumstances, the penalty wage provided by Section 203 may apply.

- We were informed by a Deputy Labor Commissioner that DLSE staff has been ordered by the Labor Commissioner to find waiting time penalties due when the employer has a means (like a phone number) to contact the employee and does not try to contact the employee to deliver payment.

Case Study #1: The Check Stub

- The employer, an FLC, contracts with a packing shed to harvest citrus. The ground on which the citrus grows was once farmed by a grower under UFW certification. The FLC contracts with the packinghouse, not the grower.

- Over the years, the scope of the certification has become uncertain as the land has become broken up under various entities. No one is really sure who is covered by the UFW contract. This FLC is not under the contract, because its contract is with the packinghouse, not the unionized grower.

- There is ongoing tension between FLC and UFW as UFW seeks access, which is not granted. At some point, the UFW complains to DLSE about a laundry list of alleged violations, including minimum wage for having two workers work under one name.

- Labor Commissioner Julie Su comes to Fresno and places deputies on "special assignment." The deputy who leads the investigation's father was once in business with the FLC, and the business ended badly – bad feelings for all involved.

- Deputies swoop into the fields and gather "evidence." DLSE believes there are multiple people working under one name because the foreman has a notebook that lists two names on the same line with numbers that appear to be production totals. At some point, DLSE interviews two employees. The UFW could not find any other witnesses to cooperate.

Case Study #1: The Check Stub

- DLSE requests records from the FLC. The FLC complies. DLSE issues a broad subpoena for virtually every piece of paper generated by the business for a year.

- FLC retains counsel. Counsel tries to negotiate with DLSE, who will not even give an extension for counsel to get familiar with the case.

- After great effort, FLC's counsel negotiates a narrowing of the subpoena, and the FLC produces the agreed documents, including all of its bank statements. DLSE refuses to discuss its concerns because to do so would "compromise the investigation."

- Several months pass. The employer is served with a citation - $33,000. 132 check stub violations during March 2012. DLSE refuses to discuss its findings with the employer. Refuses to provide the names of the 132 employees. Counsel reaches out to Labor Commissioner Su and BOFE Chief Cheng to no avail.

- FLC appeals citation, hearing is scheduled. On the date of the hearing, the prosecuting deputy announces that she is amending the citation to name the individual owner, not the corporation. Due to no notice, FLC's counsel objects, and the hearing officer delays the hearing. Time and money wasted.

Case Study #1: The Check Stub

- A new hearing date is set. DLSE denies bias from the deputy, refuses to communicate regarding the basis for the citation.

- FLC appears for the hearing ready to defend against anything. First witness is the UFW rep, who testifies that there were 70 workers on the crew working under 35 names, and claims the foreman's notebook is proof. He claims meal and rest period violations, among others.

- DLSE introduces a declaration with multiple levels of hearsay to support the UFW's allegations, none of which relate to the check stub violation that was cited.

- DLSE finally admits on the record that there was no evidence to support the UFW's claims, and none were cited. All crew sheets show 65-70 names on the crew.

- DLSE introduces two questionnaires from witness interviews. Employees stated they were always paid by check with a check stub except for two weeks in March 2012, when the foreman came by their houses and paid cash. Confirm that meals and rest are provided, and confirm no other violations.

- Crew sheets show that neither the foreman or the crew worked for the FLC during two weeks in March.

Case Study #1: What Happened?

- FLC wins the hearing. No violation, no fine. What went wrong?

- **RUSH TO JUDGMENT**. DLSE presumed that the FLC was in violation if they just looked hard enough. At the hearing, despite the lack of evidence, the deputy loudly proclaimed, "He's done it before and I know he'll do it again."

- **FAILURE TO COMMUNICATE**. If the DLSE had asked, the FLC would have explained what the notebook was. It was the foreman's shorthand production record. There were two names on one line because workers were sharing bins, and splitting the production between them. But each had their own payroll record, and each made minimum wage.

- **IGNORANCE OF THE INDUSTRY**. The most likely thing that happened was that the crew did not work for 2 weeks in March, and the foreman hustled up work for cash on the side. If DLSE had communicated with the employer early in the process, it might have gotten to the violator (paying an unlicensed FLC in cash) that was undercutting the legitimate and compliant FLC.

- **BIAS AND LACK OF OBJECTIVITY**. A deputy who, at minimum, created the appearance of bias undermined the integrity of the process. Acceptance of the UFW's claims at face value without recognition of the motive to fabricate was critical.

Independent Contractors (Penalties)

- **Willful misclassification** of an individual as an independent contractor.
  - "Avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor

- Civil Penalty of not less than five thousand dollars ($5,000) and not more than fifteen thousand dollars ($15,000) **for each violation**, in addition to any other penalties or fines permitted by law.

- Labor Commissioner aggressively pursuing these cases.

- They consider each individual who is misclassified to be a separate violation and penalize accordingly.

- What is "willful"?

Independent Contractors

- Right to Control the manner and means of performing work
  - The principal test of an employment relationship is whether the person to whom the service is rendered has the right to control the manner and means of accomplishing the desired result.
  - Control of work can be accomplished through a variety of means..
- Right to Discharge at will
  - Typically, a principal may only terminate a contract with an independent contractor before completion of the task if the work is not being done in a satisfactory manner pursuant to principles of contract law.
- Distinct Occupation or Business
  - There is a tendency to find an employment relationship when the worker does not furnish an independent business or professional service..
- Work Typically done by a Specialist
  - Independent contractors are often individuals who offer a specialized skill or service, such as attorneys, accountants, mechanics, janitors, and the like.

Independent Contractors

- Necessary Skill
  - The more skill required for the job, the more likely it is that the individual will be deemed an independent contractor.
- Supplying tools or equipment
  - If the employer supplies the tools and equipment for the work, then this factor will indicate that an employment relationship exists
- Duration of Relationship / Degree of Permanence
  - The more permanent the relationship between the worker and the company, the more likely it is that the worker will be considered an employee.
- Method of Payment
  - The method of payment is relevant because independent contractors are not typically paid by the hour or piece, rather they are paid for the entire job.

Independent Contractors

- Regular or Integral Part of the Business
  - There is a tendency to find that there is an employment relationship where the work being done is an integral part of the employer's regular business and the worker does not furnish an independent business or professional service.
- Intent of the Parties
  - An express agreement to be an independent contractor and waive the legal protections available to employees will not be controlling.
- Worker's investment or Employment of Helpers
  - If they hire their own staff (such as office staff to arrange appointments and scheduling), it may indicate that they are acting as independent business ventures.
- Opportunity for Profit or Loss
  - In order for this factor to weigh in favor of independent contractor status, the worker must have an opportunity for profit or loss depending upon their managerial or entrepreneurial skills

Case Study #2: Independent Contractors

- Business engages unskilled workers as independent contractors.
  - It is a high turnover position, and while the misclassification is consistent with industry practice, the misclassification is clear..
- High turnover position creates a large number of violations.
  - Potential issues include a range of statutory penalties (check stubs, willful misclassification etc.) and minimum wage violations.
- Employer cooperates, but citation issued.
  - Over $650,000 in penalties alone, before wages even discussed.
  - Over $1 million in potential liability if the wages issues and employee penalties (waiting time especially) imposed.
- Settled for $300,000, including all wages.
  - Extortion by the government
  - No realistic ability to deliver wages to the affected employees.
  - A self audit could have accomplished the same result
  - How much deterrence do you need?

Changes at the U.S. Department of Labor

- MSPA enforcement a priority – target FLCs.
- Joint liability for the grower increasingly important.
  - Threatened increased use of weapons – hot goods.
  - At least some use of these tools.
- Increased staffing and enforcement funding, decreased cooperation and outreach.
- Targeted areas.
  - Transportation
  - Minimum wage
  - Child Labor

Case Study #3: A Grower for All Seasons

- Grower grows cut flowers year round both outside and in greenhouses.
  - There is no seasonal cycle. Flowers are planted every day, and cut approximately 12 weeks later. Planting is staggered so workers plant, cut, and harvest every day. There are no seasonal layoffs, and the same jobs are done 52 weeks of the year.
- As the grower put it in a meeting with US DOL, "My business is to take away the seasons so people can have flowers year-round."
- DOL inspects. No wage issues, but concerned about MSPA disclosure and housing.
- Grower and counsel meet with DOL to discuss the fact that the business is not "seasonal" within the meaning of MSPA, so MSPA does not apply.
- DOL claims that "all agriculture" within the meaning of the FLSA is covered.
  - "You have to prove your innocence."
- DOL makes settlement offers, employer maintains innocence. DOL suggests that a no money settlement can be achieved.
- DOL schedules interviews – arrives an hour and a half late.

Case Study #3: A Grower for All Seasons

- Grower, his Congressional representative, California Farm Bureau representatives, county housing officials, and farmworker advocates meet with DOL representatives.
- All except DOL agree that the employer treats the workers well and that the housing is well maintained.
- All ask DOL to back off, requests fall on deaf ears.
- DOL yanks settlement offer off the table without explanation.
- Employer files for a hearing, threatens EAJA action.
- No hearing yet – silence. What happens next?
- Stay tuned…

WE CAN FIGHT BACK AND WIN

BUT IT STARTS WITH YOU