



WAGE AND HOUR LESSONS FROM THE LITIGATION FRONTLINES

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California Wage and Hour Claims



- Wage and hour claims are among the top employment litigation matters.
- The dollar value of wage and hour class and PAGA actions has skyrocketed.
- The Top 10 California settlements in 2020 ranged from \$17.3M to \$2M.
 - **NINE of the Top TEN cases** were wage and hour cases.
 - **Totaling over \$58M for 9 cases.**
- These lawsuits are cash cows for plaintiffs' attorneys because attorney fees are relatively easier to get than in other litigation.
- Even if the employer's mistakes are minor, the employer may still be liable for penalties and attorneys' fees.

The Anatomy of a Wage and Hour Claim



- Employee consults attorney for a perceived unfairness
 - Placed on a performance improvement plan
 - Laid off
 - Terminated
 - Demoted
- Employee wants to sue for wrongful termination, discrimination or harassment.
- What happens?
 - Attorney encourages employee to become a representative in a **class action** or action under the **Private Attorneys General Act (PAGA)**
 - Why?
 - Wage and hour violations are easy to prove
 - Attorney recovers **1/3 of recovery for all employees** versus 1/3 of recovery for one employee

Typical Wage and Hour Claims

- Meal and rest period violations
- “Off the Clock” work
- Preliminary and post-liminary work
 - Donning safety gear
 - Bag checks
 - COVID screenings
 - Training
- Untimely pay periods
- Unpaid overtime
- Unpaid bonuses or commissions
- Unreimbursed business expenses
 - Cell phone
 - Mileage
 - PPE
 - Tools*
 - Internet
- Misclassification of independent contractors or exempt employees
- Unpaid vacation or PTO or paid sick leave
- Inaccurate wage statements
- Waiting time penalties



COVID Wage and Hour Litigation Trends

- Final Pay /WARN (terminations, layoffs, furloughs)
- Expense Reimbursement (remote work, testing)
- Unpaid Work Time (waiting for temperature checks)
- Misclassification of workers (AB 5, Proposition 22)
- Exemptions (is anyone an outside salesperson anymore?)

Wage and Hour Class Action Litigation

- 4 years statute of limitations
- Single class representative
- Recovers
 - Unpaid wages
 - Interest
 - Penalties
 - Attorney's Fees



The Painful Price of PAGA Penalties

- **Overtime**: \$100 for each aggrieved employee per pay period for the “initial violation” and \$200 for each aggrieved employee per pay period for each subsequent violation
- **Meal Period**: \$50 for each aggrieved employee per pay period for the “initial violation” and \$100 for each aggrieved employee per pay period for each subsequent violation
- **Rest Period**: \$50 for each aggrieved employee per pay period for the “initial violation” and \$100 for each aggrieved employee per pay period for each subsequent violation
- **Off The Clock Work**: \$100 for each aggrieved employee per pay period for the “initial violation” and \$200 for each aggrieved employee per pay period for each subsequent violation
- **Inaccurate Itemized Wage Statements**: \$100 for each aggrieved employee per pay period for the “initial violation” and \$200 for each aggrieved employee per pay period for each subsequent violation
- **AND THESE PENALTIES ARE STACKED!!**

PAGA Penalties Continued

- **Cumulatively**, the potential penalties would be **\$400 per employee** per pay period for the first violation and **\$800 per employee** per pay period for the subsequent violations.
 - **Example: 300 employees. \$400 x 300 x 1 (initial violation) PLUS \$800 x 300 x 25 (subsequent violations) = \$ 6,120,000**
- **Note:** Employers have successfully stricken the request for penalties for “subsequent” violations. That would reduce the penalties in this example to \$3,120,000.
- ****There is rarely any EPLI insurance coverage for these penalties.****



Tips for Limiting Wage and Hour Liability



- Conduct a thorough **wage and hour audit**.
- Pay for **actual work times** recorded. Do not round.
- Adopt a robust **meal and rest period compliance** program.
- Monitor and pay* for non-compliant meal and rest periods.
- Encourage employees to take meal periods early (e.g. at 4th hour).
- Require longer (35 – 60 mins) meal periods (cushion).
- Publish and enforce strict policy **“no working off the clock.”**

More Tips for Limiting Wage and Hour Liability



- Make time reporting easy (multiple clocks, computers, tablets or mobile timekeeping applications.
 - Note: 2802 – expense reimbursement issues.
- Pay for preliminary/postliminary activities.
 - E.g. Time spent donning safety gear.
- Include incentive pay (commissions/bonuses) in the “regular rate of pay” for overtime and meal/rest period premium pay.
- Provide an opportunity to correct/ supplement timekeeping records.
- Confirm exempt employees are properly classified as exempt.

Be Proactive In Dealing With PAGA

What To Do When You Get An Attorney Letter Addressed To The LWDA?

- Take it seriously.
- Consult with employment counsel immediately.
- Conduct a wage and hour audit.
 - Check for curable violations (e.g. wage statement)
 - You only have 33 days to “cure.”
 - Cure violations and inform the LWDA.
- Fix the ‘non-curable’ problems.
- The lawsuit will be filed in 65 days (or sooner).
- Consider release agreements.*
- Check for arbitration agreements.**
- Confirm exempt employees are properly classified as exempt.



What About Arbitration Agreements?

- **AB51** made it unlawful for California employers to require applicants and employees to sign an arbitration agreement
- The law included civil and criminal penalties for violations
- It was successfully challenged immediately as preempted by the Federal Arbitration Act
- **BUT**



Ninth Circuit Decision – *Chamber of Commerce v. Bonta*

- Labor Code Section 432.6 is not preempted by the FAA as it does not effect the enforceability of arbitration agreements
- Labor Code Section 432.6 only governs pre-agreement conduct which is outside of the purview of the FAA
- FAA preempts any civil or criminal sanctions
 - “§ 432.6 is not preempted by the FAA because it is solely concerned with pre-agreement employer behavior, but the accompanying enforcement mechanisms that sanction employers for violating § 432.6 necessarily include punishing employers for entering into an agreement to arbitrate” run afoul to the FAA.”



Now What?

- Further Appeal?
- Offer Voluntary Arbitration Agreements in the Interim
- What do you do for those that are in currently effect?
 - Applies to agreements after 1/1/20
 - What about PAGA waivers?
 - SCOTUS – *Viking River*



Unique PAGA Legal Issues

- Any employee can sue on behalf of other employees **even if** the employee personally did not experience a labor code violation.
 - *Huff v. Securitas Security Services USA, Inc.*
- An employer cannot secure a valid release of a PAGA claim. Only a court can approve a release of a PAGA claim.
 - *Kim v. Reins International California, Inc.*
 - ***But, what about a covenant not to sue?***
- Can employer challenge the manageability of a PAGA action?
 - **Yes** -- *Wesson v. Staples (2nd Appellate District)*
 - **No** -- *Estrada v. Royalty Carpet Mills (4th Appellate District)*



An Ounce of Prevention ...

A *dollar* spent on compliance and risk management is more powerful than money spent on litigating or settling a wage and hour class or PAGA representative action litigation.



Thank you!

Questions? Please don't hesitate to contact us!



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