CALIFORNIA WAGE AND HOUR DEVELOPMENTS

THE LATEST (AND NOT SO GREATEST) CHANGES IMPACTING EMPLOYERS

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California Wage and Hour Developments: The Latest (and Not So Greatest) Changes Impacting Employers

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I. INTRODUCTION

With increasing frequency over the past two decades, California’s Legislature and courts continue to impose new employment laws and interpretations, often as part of an expanding of employee rights and defining employer obligations. The past year has continued that pattern related to a core segment of California’s wage and hour laws, including the scope of the Private Attorneys General Act (PAGA), and refining employer wage statement requirements.

II. RECENT LEGISLATIVE UPDATES

A. Labor Code § 1197.5 Amendment (Assembly Bill (AB) 2282)

The California Fair Pay Act recognizes that an employer may justify pay differentials based on a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex, race, or ethnicity. California Labor Code section 1197.5 elaborates on what qualifies as a “bona fide factor” other than sex, race, or ethnicity. A bona fide factor “shall apply only if the employer demonstrates that the factor is not based on or derived from a [sex-, race-, or ethnicity-based] differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity.” Each factor must be applied “reasonably.”

AB 2282 clarifies that an employer may consider a current employee’s existing salary when making a compensation decision. The amendment states: “Prior salary shall not justify any disparity in compensation. Nothing in this section shall be interpreted to mean that an employer may not make a compensation decision based on a current employee’s existing salary.” However, the amended law makes an important qualification. The employee’s existing salary may be considered, “so long as any wage differential resulting from that compensation decision is justified by one or more of the factors in this subdivision.”

B. Labor Code § 1182.12 and § 515.5 – California Minimum Wage Increase

In 2016, California approved a progressive increase to the minimum wage that would grow over a five-year period. The third minimum wage increase became effective January 1, 2019. Employers with 26 or more employees are required to pay their employees $12.00 per hour; employers with fewer than 26 employees are required to pay $11.00 per hour.

Additionally, California employers must comply with 25 city and county minimum wage ordinances. In nearly all of these jurisdictions, the minimum wage will increase for 2019. In 13 cities, the minimum wage increased on January 1, 2019, and in the remaining jurisdictions, the minimum wage rate will increase in July of 2019. All of the 2019 local minimum wages are higher than the California state minimum wage.

1 These written materials were prepared prior to February 1, 2019 with assistance from Alexandra Aurisch of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Effective January 1, 2019, California’s minimum annual salary for exempt employees of large businesses increased to $49,920 from $45,760 and the minimum salary for exempt small business employees increased to $45,760 from $43,680. Additionally, under Labor Code section 515.5, for computer software employees, the minimum hourly rate of pay exemption increased from $43.58 to $45.41 (annually from $90,790.07 to $94,603.25).

III. ADMINISTRATIVE GUIDANCE

A. DOL Reissues Opinion Letter Eliminating the 80/20 Rule

On November 8, 2018, the Department of Labor (DOL) gave hospitality employers good news when it retracted its “80/20 rule,” which prevented employers from taking the tip credit when tipped employees spent more than 20 percent of their working time on non-tipped work.

The Fair Labor Standards Act (FLSA) allows employers to pay their tipped employees not less than $2.13 per hour in cash wages and take a tip credit equal to the difference between the cash wages paid and the federal minimum wage. If a tipped employee also held a different, non-tipped occupation for the same employer, the employee holds “dual jobs” and must be paid the cash minimum wage in the non-tipped occupation. The DOL also recognized that there were tipped occupations that required non-tip-generating duties. In those situations, the DOL applied the 80/20 rule, where these related side duties could not exceed 20 percent of the employee’s time in order for the employer to utilize the tip credit. Many employers found the rule unworkable since it requires constant monitoring of the duties of tipped employees.

The opinion letter gives employers clearer guidance on what is related side work and states that employers are no longer required to track the time spent on side work as long as such work is “performed contemporaneously with the duties involving direct service to customers or for a reasonable time immediately before or after performing such direct-service duties.” Employers can look to Occupational Information Network (O*NET) lists or Title 29 of the Code of Federal Regulations, section 531.56(e) for what is considered directly related to tip-producing duties. Maintaining the “dual jobs” distinction, the opinion letter states that employers “may not take a tip credit for time spent performing any tasks not contained in the O*NET task list” unless the tasks are de minimis as defined by the DOL regulations in 29 CFR 785.47.

IV. CALIFORNIA CASE LAW UPDATE


Many California employers round employees’ clock-in and clock-out times to the closest quarter hour, tenth of an hour, or five-minute interval. This practice is commonly referred to as “rounding.” On June 25, 2018, California’s Second District Court of Appeal upheld an employer’s rounding system, reaffirming the Ninth Circuit Court of Appeals’ 2016 ruling on the subject and expanding the criteria used to evaluate whether a rounding policy is neutral in practice, and thus lawful.

In this case, AHMC Healthcare rounded employees’ clock-in and clock-out times to the closest quarter hour. For example, if an employee clocks in at 6:53 a.m. or 7:07 a.m., he or she is paid as if he or she clocked in at 7:00 a.m. A statistical study of two AHMC Healthcare locations revealed that the employer’s rounding practices resulted in the addition of 1,378 hours of compensable time over the course of 4 years at its San Gabriel location, and the addition of
3,875 hours of compensable time over the course of 4 years at its Anaheim location. The study also found that, due to the rounding policy, certain employees were paid less than they would have been paid if AHMC Healthcare calculated wages based on employees’ exact clock-in and clock-out times.

Two affected employees, Emilio Letona and Jacquelyn Abeyta, lost an average of .86 of a minute per shift and 1.85 minutes per shift, respectively, due to the rounding policy. They sued AHMC Healthcare on behalf of themselves and other similarly situated employees, arguing that “a rounding policy that resulted in any loss to any employee, no matter how minimal, violates California employment law.”

California’s Second District Court of Appeal found that AHMC Healthcare’s rounding practices were in compliance with California law, as they were neutral on their face as well as in practice. The employer’s rounding system was facially neutral because all time punches were rounded systematically to the nearest quarter-hour without an eye towards whether the employer or employee benefitted from the rounding. It was also neutral in practice, as evidenced by the statistical study’s results, which found that although certain employees were undercompensated, the employer overcompensated employees as a whole. The court concluded that the evidence established that the rounding system “did not systematically undercompensate employees over time.”

The court recounted the Ninth Circuit Court of Appeals’ determination in Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership that a “rounding policy is not meant to ‘ensure that no employee ever lost a single cent over a pay period.’” There is no requirement that “every employee gain or break even over every pay period or set of pay periods analyzed; fluctuations from pay period to pay period are to be expected under a neutral system.” Instead, a policy’s neutrality is based on its effect on an entire group of employees over a period of time. Notably, a plaintiff cannot engage in “strategic pleading” by “limiting his proposed class to only those employees who happen to come out behind during the class period.” The court also found that “[t]he fact that a bare majority at one hospital lost minor sums during a discrete period did not create an issue of fact as to the validity of the system.” In this case, 52.1 percent of employees at the Anaheim location lost compensation due to the rounding policy. This percentage was not large enough to demonstrate a lack of neutrality.

At the end of its decision, the court left open the possibility that courts could look at multiple data points when determining whether a company’s rounding practices are neutral in practice. As an example, it stated that “a system that in practice overcompensates lower paid employees at the expense of higher paid employees could unfairly benefit the employer.”

AHMC Healthcare reaffirms the validity of neutral rounding policies and provides a reasonable, common-sense approach to evaluating whether the policy is also neutral in practice. However, the case also highlights that there is an inherent risk with rounding policies, which is that employees, even “bare majorities” of employees, may lose minor sums of time worked over a discrete period of time. Plaintiffs’ lawyers and their experts can seize on these discrete records with the aim of certifying class actions with claims of unpaid time. Employers may want to consider conducting regular audits to ensure that their rounding practices do not systemically undercompensate employees, and instead have an impact that is neutral or results in the overcompensation of employees as a whole.
B.  Alvarado v. Dart Container Corp. of California, 4 Cal. 5th 542 (2018)

This case specifically dealt with how an employee’s overtime pay rate should be calculated when the employee earned a flat sum bonus during a single pay period. Defendant employed plaintiff Alvarado as a warehouse associate and gave him an “attendance bonus” if he worked on a weekend day as scheduled. To calculate the overtime pay rate, the employer divided the employee’s total base compensation, including the attendance bonus, by the total hours (both non-overtime and overtime hours) worked during the pay period—a method of calculating overtime on a flat sum bonus consistent with federal regulation. The Division of Labor Standards Enforcement’s (DLSE) published manual, on the other hand, advises that flat sum bonuses be divided by the regular hours of work, not including overtime hours. The plaintiff sued his employer alleging Labor Code violations and unfair business practices based on the employer’s use of the federal method of calculating overtime for flat sum bonuses.

The trial court disagreed with the DLSE manual and granted defendant’s motion for summary judgment, concluding that the DLSE policy was void for failure to comply with the Administrative Procedure Act (APA). Given that no valid California law or regulation explained how to factor a flat sum bonus into an employee’s regular rate of pay for calculating overtime compensation, the employer was justified in relying on the federal regulation. The Court of Appeal affirmed, adopting the trial court’s reasoning.

The California Supreme Court reversed and held that the divisor for flat sum bonus amounts should be the number of non-overtime hours actually worked. Guided by state policy that discourages employers from imposing overtime work, and favors the protection of the employee’s interests, the court analyzed several factors for its conclusion: (1) the flat sum bonus was given even if no overtime hours were worked, and thus only non-overtime hours should be considered in determining the bonuses per-hour value; (2) the term “regular rate of pay” as used in the wage orders refers to regular-time or non-overtime hours, which supports the notion that only non-overtime hours should be used as the divisor; and (3) the bonus is not to reward the employee for each hour of work and does not increase in proportion to the number of hours worked. The court further concluded that the divisor should be hours actually worked instead of hours available in a pay period (e.g., 40 in a workweek) because using available hours would dilute the rate of pay for part-time employees, and there is no discernible basis to do so. The court agreed with the trial court that the DLSE policy was void and did not warrant deference, but still considered the interpretive guidance because the policy was based on the DLSE’s expertise and special competence. Finally, the court held that the new calculation methodology should apply retroactively.


In Canales, the defendant employer paid non-exempt employees a monthly, quarterly, and/or annual bonus. The employees earned the bonus throughout the month, quarter, and/or year. When paying the bonus, the defendant recalculated and paid overtime owed on the bonus, and issued wage statements with the bonus listing the incremental additional overtime paid to the employee for overtime hours worked during the bonus period. However, no hourly rates or hours worked were identified on the bonus wage statements. Additionally, when an employee was terminated, the defendant would issue a cashier’s check immediately for all wages earned, with the corresponding wage statement mailed the following day.

Plaintiffs sued alleging the bonus wage statements violated Labor Code section 226(a)(9) because they did not list “all applicable hourly rates in effect during the pay period and
the corresponding number of hours worked at each hourly rate by the employee," and the wage statements mailed the day after termination were not provided “semimonthly or at the time of each payment of wages.” Defendant argued that the bonus wage statements reflected additional overtime pay that was owed for work performed in previous pay periods, and thus there were no corresponding hourly rates or hours worked during the current pay period, and that mailing final wage statements met Labor Code section 226’s semimonthly requirement.

In affirming the trial court, the Court of Appeal held that the bonus wage statements did not have to list all applicable hourly rates and corresponding hours worked when the bonus was paid as a supplement to previously paid hours. The court concluded that the overtime on the bonus represented additional wages that were earned as overtime pay based on nondiscretionary bonuses being spread over the hours worked during the bonus period. Moreover, the overtime hours were worked in previous pay periods for which employees had already received their standard overtime pay. The itemized wage statement issued by an employer need only provide the applicable hourly rates and the corresponding number of hours worked “in effect during the pay period.” In other words, the employer need only identify on the wage statement the hourly rate in effect during the pay period for which the employee was currently being paid, and the corresponding hours worked. As for the final bonus wage statements to terminated employees, for purposes of section 226, if an employer furnishes an employee’s wage statement before or by the semimonthly deadline, the employer is in compliance. The Court of Appeal interpreted “semimonthly or at the time of each payment of wages” as representing the outermost deadlines by which an employer is required to furnish the wage statement. Since the defendant mailed the wage statement to certain discharged employees paid in-store by the same day as or the next day after termination, the defendant was in compliance with section 226 because the employee was “furnished” with the wage statement semimonthly.


Carrington brought a suit against her former employer under PAGA (Labor Code § 2698, et seq.), alleging a failure to provide meal breaks or pay meal period premiums in violation of Labor Code sections 226.7 and 512. The trial court found liability and imposed penalties of $150,000, 75 percent of which were payable to the Labor and Workforce Development Agency (LWDA) and 25 percent to Carrington and the employees she represented. Starbucks appealed, arguing that Carrington failed to prove she was an aggrieved employee and failed to prove a representative claim.

The Court of Appeal rejected all three of Starbucks’ arguments, namely that (1) Carrington never experienced the “specific violation” she alleged; (2) Starbucks provided Carrington the required breaks; and (3) the alleged violations were not actionable because they were de minimis. The court found that a policy that did not provide for premium payments when employees were not scheduled to work more than five hours, but ultimately worked “slightly more” than five hours, was not legally compliant with meal period requirements. The court also determined that Carrington’s time records established that on two occasions, she worked more than five hours without taking a meal break without receiving a premium payment. Although she did not remember the details of those shifts, she testified that “she accurately recorded her work time while employed at Starbucks; she was required to obtain approval from her supervisor prior to beginning her meal break; she never refused to begin a meal break when instructed to do so; and once instructed to start a meal break, she would “immediately” punch out to start the break.” The court held that this was “substantial evidence” that Carrington did not receive meal breaks.
The court discussed that the trial court took into account Starbucks’s good faith attempts to comply with the law by imposing only a $5 penalty per violation instead of the $50 maximum.

E. **Certified Tire & Service Centers Wage & Hour Cases, 28 Cal. App. 5th 1 (2018)**

The issue presented was whether the employer’s compensation model, which guaranteed automotive technicians a specific hourly wage above the minimum wage for all hours worked during each pay period, but also gave them the possibility of earning a higher hourly wage (for all hours worked during each pay period) based on productivity, violated the applicable minimum wage and rest period requirements. Affirming the lower court, the Court of Appeal held that the model did not violate minimum wage law because the plaintiffs had not demonstrated that the model, which provided technicians with a higher hourly rate for work billed to clients as “labor,” failed to compensate employees when performing other tasks that did not generate labor “production dollars.”

The court distinguished the case from other cases because the model was not an “activity-based compensation system” but instead, an hourly-rate system in which technicians are paid at a single hourly rate for all hours worked during a pay period. Other cases involved either (1) an hourly compensation system including off-the-clock work; (2) a piece-rate system; or (3) a commission-based system. Here, the employer applied an hourly based system that compensated technicians for all time worked. Technicians earned wages for every single work activity, including waiting for customers and performing tasks without associate billed labor costs. Although the hourly rate varied by pay period because the employees could increase their guaranteed minimum hourly rate based on the generation of production dollars, the technicians were always paid on an hourly basis for all hours worked at a rate above minimum wage regardless of their productivity, and regardless of the type of activity. The court held, “[C]ontrary to plaintiffs’ contention, because technicians are paid at an hourly rate that is above minimum wage for each hour on the clock, this case does not involve averaging of an employee’s hourly rate to show compliance with minimum wage requirements.”


In *Diaz*, several employees sued their employer—a restaurant operating in a business improvement district near LAX—on behalf of a class of current and former employees for failure to pay the “living wage” required by municipal ordinance, treble damages pursuant to the municipal ordinance, waiting time penalties, and prejudgment interest. Shortly after the case was filed, the employer calculated the underpayment of wages and issued checks to all affected current and former employees. The parties then filed cross-motions for summary adjudication regarding the plaintiffs’ penalty and prejudgment interest claims. The employer claimed that the living wage ordinance was unconstitutionally vague, and thus it had no liability for any damages beyond the underpayment of wages. The trial court rejected these arguments, finding that the living wage ordinance sufficiently advised employers of its requirements, and that the employer’s failure to pay wages was “willful” within the meaning of Labor Code section 203. The employer was not liable for treble damages because it did not “deliberately violate the ordinance.”

Based on these rulings, the parties stipulated to the amount of prejudgment interest and waiting time penalties. The only remaining trial issue was whether the trial court could waive the waiting time penalties for equitable reasons. The trial court concluded that waiting time penalties could not be waived. The employer appealed, contending that the trial court erred in finding that
(1) its failure to pay employees was “willful” within the meaning of Labor Code section 203, and (2) the court lacked discretion to waive waiting time penalties.

The Court of Appeal for the Second District unanimously affirmed the lower court on both issues. Reviewing the lower court’s finding of willfulness de novo, the court found that the employer’s inability to locate the applicable living wage ordinance did not preclude a finding of willfulness because ignorance of the law is no excuse, and that the employer suspected that it was underpaying its employees. Moreover, the living wage ordinance was not unconstitutionally vague given that a reasonable person of ordinary intelligence could determine what was prohibited or required, including how to ascertain when a living wage increase was required. Because the employer’s vagueness challenge was unreasonable, it did not amount to a good faith dispute that would preclude a finding of willfulness with respect to waiting time penalties.

Finally, and most significantly, the court held that trial courts do not have the discretion to reduce or waive waiting time penalties, reasoning that the plain language of the statute was unambiguous and that an exception based on equitable concerns would run contrary to the statutory language. Moreover, allowing such an exception would undermine the purpose of the Labor Code section 203, which is to ensure prompt payment of wages upon discharge.


An in-home caregiver alleged, among other claims, that the employer failed to pay overtime wages under the Domestic Worker Bill of Rights (DWBR) (Labor Code §§ 1450 et seq.). The DWBR requires that domestic work employees receive overtime wages for all hours worked more than 9 hours per day or 45 hours per week.

To determine the issue of whether plaintiff was an employee, the trial court had applied the test set forth in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 and held that Plaintiff was an independent contractor, not an employee. The Court of Appeal concluded that the trial court had erred in exclusively applying this so-called “common law” test and held that the determination must be made by considering the language of the DWBR itself, which contains two alternative definitions of employment: “(1) when the hiring entity exercises control over the wages, hours, or working conditions of a domestic worker, or (2) when a common law employment relationship has been formed.” Under the appropriate analysis, the court held that a question of fact existed as to whether Plaintiff was an employee. Control over working conditions was not at issue, and the court found that the employer did not exercise control over working hours because the caregiver could reject any assignment, but the placement agency, not the caregiver, negotiated the caregiver’s rates with the client and thereby exercised control over the caregiver’s wages.

H. Dynamex Operations West v. Superior Court, 4 Cal. 5th 903 (2018)

In a landmark decision, the Supreme Court of California adopted a new test to determine whether a worker performing services for a company is an employee or an independent contractor under California’s wage orders. The new three-factor test, known as the ABC test, will determine whether a company “employs” a worker under the wage orders, which address certain requirements for minimum wage, overtime, and meal and rest periods, among others. The ABC test, which has long existed in other parts of the country in different forms, has not previously been used in California.
Under the ABC test adopted by the court, which is based upon Massachusetts’s version of the test, a worker is properly considered an independent contractor only if the company hiring the worker establishes all of the following: (A) the worker is free from the control and direction of the hiring company “in connection with the performance of the work, both under the contract for the performance of the work and in fact”; (B) “the worker performs work that is outside the usual course of the hiring company’s business”; and (C) the worker is “customarily engaged in an independently established trade, occupation, or business of the same nature” as the work performed for the hiring entity. The company’s “failure to prove any one of these three prerequisites will be sufficient in itself to establish that the worker is an included employee, rather than an excluded independent contractor, for purposes of the wage order,” the court stated.

In adopting the new standard, the court abandoned the Borello test—a multifactor test based primarily upon a company’s “right to control” the worker—in certain circumstances. In particular, the court stated that the new ABC test applies to determine whether there is an employment relationship under the wage orders. In a footnote, the court refused to address whether the Borello test was still the applicable standard for various obligations under the California Labor Code, including the obligation to reimburse employees and to provide them with workers’ compensation benefits. The decision does not address or change the applicable laws regarding the tax treatment of workers.

The court also addressed its own decision in Martinez, which involved a controversy over the definition of “employ” and “employer” in a case brought by seasonal workers. The Martinez court had ruled, in 2010, that “the applicable wage order sets forth three alternative definitions of employment for purposes of the wage order: ‘(a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship.’” While the Dynamex defendant argued that the “suffer or permit to work” standard only applies to the joint-employment issue presented in Martinez, the California Supreme Court concluded that this standard also “properly applies to the question whether a worker should be considered an employee or, instead, an independent contractor.”

The court argued in favor of a broad interpretation of the wage order’s definition of “suffer or permit to work” in order to “provide the wage order’s protection to, all workers who would ordinarily be viewed as working in the hiring business.” At the same time, the court ruled that the suffer or permit to work definition should not encompass “individual workers, like independent plumbers or electricians, who have traditionally been viewed as genuine independent contractors who are working only in their own independent business.”

“[I]t is appropriate, and most consistent with the history and purpose of the suffer or permit to work standard in California’s wage orders,” the court concluded “to interpret that standard as: (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order’s coverage; and (2) requiring the hiring entity, in order to meet this burden, to establish each of the three factors embodied in the ABC test.” The court also held that under the suffer or permit to work standard, the class certification order at issue in Dynamex should be upheld.

The decision establishes that the ABC test (which previously was not used by any court or enforcement agency in California, including the DLSE) now applies to claims brought under the applicable wage orders. Because the various wage orders include provisions related to minimum wage payments, overtime compensation, and meal and rest requirements (among
others), the ABC test will apply to those claims in many cases.

Under the ABC test, either the independent contractor satisfies all three criteria and is properly classified or the independent contractor does not meet one or more of the criteria and is misclassified. Companies that engage independent contractors to perform services should evaluate whether they can satisfy this new test. While the California Supreme Court sought to provide “greater clarity and consistency” by adopting the ABC test, in the short run the Dynamex decision will cause considerable uncertainty and upheaval. Although the California Supreme Court complained that the Borello test “invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis,” there are 30 years of California court decisions interpreting and applying that test. In contrast, because the ABC test is new to California, it is unclear exactly how it will be applied. There will also be further litigation or rulings to clarify whether the Dynamex decision only applies prospectively, as well as under what circumstances the Borello standard still applies.


In *Furry*, the Court of Appeal held that the trial court had erroneously completely denied the employee relief on an overtime claim, holding that “imprecise evidence by an employee can provide a sufficient basis for damages when the employer fails to keep accurate records of the employee’s work hours.”

The court held that the employee’s performance of overtime was established through the testimony of the employee and his coworkers: “Once an employee shows that he performed work for which he was not paid, the fact of damage is certain; the only uncertainty is the amount of damage.” To prove the amount of hours of uncompensated work, imprecise evidence by the employee was permissible. The detail provided by the employee’s testimony was sufficient to shift the burden to the employer. “Furry’s estimates were based on his recollection of his workload over the years, the duties and tasks he performed in connection with specific events, and the specific tasks that went into creating the artwork and promotional materials used by East Bay Express at the events...” The court emphasized that Furry testified to spending approximate but specific amounts of time on specific projects, and evidence of the work on those projects was introduced at trial. Ultimately, “[t]hat Furry had to draw his time estimates from memory was no basis to completely deny him relief.”

However, the court held that Furry was not entitled to premium or regular pay for missed meal breaks since “he failed to demonstrate that [the employer] knew or reasonably should have known he was working through authorized meal breaks.” Although Furry argued that his testimony about missed meal periods on specific weekdays was supported by the testimony of two of his coworkers, he did not show or argue how that knowledge was imputed to the employer, and provided no further evidence of the employer’s knowledge.


This case presents the question of whether a plaintiff who brings a representative action under PAGA (Labor Code § 2698, et seq.) may seek penalties not only for the Labor Code violation that affected him or her, but also for different violations that affected other employees.

Plaintiff sued for untimely payment of wages during employment and upon termination. The trial court ordered the case to proceed in phases. Following the first trial phase, defendant moved for summary judgment, which the trial court granted, on the issue that plaintiff was not a
temporary services employee as defined by Labor Code section 201.3(b)(1), which requires such employees be paid on a weekly basis, and as a result could not show he was affected by a violation of that section. Further, the trial court decided plaintiff had no standing to pursue PAGA penalties on behalf of others who were affected by that violation.

Plaintiff moved for a new trial, which the court granted, finding that so long as plaintiff could prove he was affected by at least one Labor Code violation, he could pursue penalties on behalf of other employees for additional violations he did not personally suffer. Since plaintiff’s complaint alleged another violation of the Labor Code separate from the one he had not suffered, he was not precluded from also seeking penalties for the weekly pay requirement violations.

Defendant appealed. The Court of Appeal affirmed, holding that an employee affected by at least one Labor Code violation may pursue penalties on behalf of the state for unrelated violations committed by the same employer. The court thus interpreted PAGA’s provisions to mean that any Labor Code penalties recoverable by state authorities may be recovered in a PAGA action by a person who was employed by the alleged violator and affected by at least one of the violations alleged in the complaint. In reaching that conclusion, the Court of Appeal engaged in statutory interpretation of PAGA, finding that a plain reading of the “one or more” language in PAGA’s definition of an “aggrieved employee” supported such an interpretation. The court ignored PAGA’s legislative history, which dictates an employee is limited to pursuing penalties for the type of violation he or she has suffered, because the legislative history contradicted the language the Legislature decided to include in the actual statute. The court further determined that the legislative history is also clear that the goal of PAGA is to achieve maximum compliance with state labor laws, and thus it would make little sense to limit a PAGA plaintiff from seeking penalties for all the violations an employer committed.

Additionally, the Court of Appeal reasoned its holding on a PAGA claim’s nature as a *qui tam* proceeding that does not need to conform to traditional standing requirements. While PAGA does not permit the general public from bringing an action, an employee not being injured by a particular statutory violation is not a bar to pursuing penalties for that violation, so long as the employee suffered at least one of the alleged violations. The Court of Appeal likewise rejected defendant’s interpretation of PAGA standing as being akin to requirements for class certification, which does not apply to PAGA actions. As the state and not the plaintiff is the real party in interest, the Court of Appeal determined it does not flow logically to limit a plaintiff’s ability to stand in the place of the government to collect penalties for all labor violations. Lastly, the Court of Appeal rejected defendant’s arguments that such an interpretation of PAGA’s standing requirement would lead to absurd consequences, such as double-counting of penalties and sharing in proceeds for violations that a plaintiff did not suffer, noting its reading supports PAGA’s overall goal of encouraging labor compliance, that courts have discretion to reduce PAGA penalties, and that the Legislature could further amend the statute.


Before bringing a PAGA claim, a plaintiff must comply with administrative procedures outlined in Labor Code section 2699.3, requiring notice to the Labor and Workforce Development Agency (LWDA) and the employer of the specific provisions of the Labor Code alleged to have been violated, including the facts and theories to support the alleged violation.

In *Khan*, the plaintiff initially filed suit alleging violations of Labor Code sections 201-203 for receiving his final wage paycheck 11 days after his termination. After the lawsuit was
pending, plaintiff then provided defendant and the LWDA with notice of the intent to pursue PAGA penalties for the late final paycheck, as well as formatting deficiencies in violation of Labor Code section 226(a) for failing to include the pay period begin date. However, plaintiff’s notice did not reference any other current or former employee besides plaintiff himself. Upon receiving notice from the LWDA that it did not intend to investigate plaintiff’s allegations, plaintiff filed a First Amended Complaint with a PAGA claim. The trial court granted defendant’s motion for summary judgment on the basis that plaintiff’s notice was insufficient.

In affirming the trial court’s order, the Court of Appeal reasoned that because the plaintiff referred only to himself, the LWDA was not given proper opportunity to determine whether investigation was warranted, and further the notice failed to provide defendant with an adequate opportunity to respond because only an individual violation was alleged. Because plaintiff failed to give fair notice of the individuals involved in the representative action, he failed to comply with PAGA’s mandatory administrative requirement.


In *Maldonado*, a plastic bag manufacturer implemented an alternative workweek schedule (AWS) that required its employees to work 12-hour days in which the first 10 hours were compensated at their regular, straight-time rate, and the last 2 hours were compensated at their overtime rate. Several employees filed a class action complaint for unpaid overtime, interest, waiting time penalties, and for providing inaccurate wage statements on the basis that the employer improperly adopted the AWS. Under the applicable wage order, an employer seeking to implement an AWS must follow specific procedures, including conducting a vote secret ballot after written disclosure and discussion of the effects of the proposed AWS. The AWS may be implemented only if two-thirds of the employees vote in favor of the AWS. Employers must then wait 30 days to implement a successful vote and report the vote to the state Division of Labor Statistics and Research. The employer implemented the AWS four separate times during the limitations period.

After granting class certification, the trial court found that the employer failed to follow the proper procedures each time it implanted the AWS, resulting in two hours of unpaid overtime per employee per shift (hours eight through ten of the 12-hour shift). The employer, however, argued that the employees were due only 1.5 hours of overtime because they were paid for 30-minute lunch periods during which no work was performed. The trial court found that the meal periods were not duty free because employees were required to monitor their machines during their meal period. Thus, the employees were owed two hours, not 1.5 hours, of overtime pay. Further, the court found that Epsilon did not act in good faith to establish the AWS (entitling plaintiffs to waiting time penalties), and that employees were entitled to penalties for incorrect wage statements.

The Court of Appeal held that the employer was liable for overtime because an AWS was never properly established. Because an exemption from the overtime laws is considered an affirmative defense, the employer had the burden to demonstrate that the AWS had been properly adopted. Although the employer presented some evidence of compliance, it was insufficient to meet the employer’s burden.

The court, however, reversed and remanded with respect to the amount of overtime wages owed. In concluding that the employees were entitled to two hours of overtime, rather than 1.5 hours, the trial court erred by requiring the employer to demonstrate compliance with Labor Code section 512, which governs the provision of meal periods. Labor Code section 512
was not at issue, however, because the trial court had denied certification of that cause of action. Rather than placing the burden on the employer to show that it had provided lawful meal periods, the trial court should have applied the standard applicable to an overtime claim. In other words, it was the employees’ burden to affirmatively establish that they had worked 12 hours rather than 11.5 hours. The court directed the trial court to recalculate the unpaid wages, waiting time penalties, and prejudgment interest owed based on 1.75 hours of unpaid overtime per shift, which was measure of damages advanced by the employer. In addition, the employees’ expert analysis was flawed because it improperly included unpaid time due to the employer’s time-clock rounding practice, and did not follow established statistical methodology.

With respect to waiting time penalties, the court found that the evidence did not support a finding of a good faith dispute. A subjective belief that the AWS had been properly adopted was insufficient to establish a good faith dispute. Moreover, the court rejected the employer’s claim that it substantially complied with applicable AWS requirements because there was evidence of multiple deficiencies. Finally, the court reversed the award of penalties for incorrect wage statements, reasoning that the employees were not injured within the meaning of Labor Code section 226 because the wage statement accurately reflected the pay they actually received, and that the proper remedy for the AWS violations was unpaid overtime and interest, not penalties for inaccurate wage statements.


The U.S. Court of Appeals for the Ninth Circuit in Mendoza v. Fonseca McElroy Grinding Co., Inc., et al., No. 17-15221 (January 15, 2019), requested that the California Supreme Court decide the following question:

Is operating engineers’ offsite “mobilization work”—including the transportation to and from a public works site of roadwork grinding equipment—performed “in the execution of [a] contract for public work,” Cal. Lab. Code § 1772, such that it entitles workers to “not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed” pursuant to section 1771 of the California Labor Code?

Presuming that the California Supreme Court grants the request for certification as to this question, its answer will likely have a substantial impact on California’s prevailing wage laws.

California’s prevailing wage statute requires that all workers employed on “public works” projects be paid at least the “prevailing rate.” The prevailing wage in California is typically tied to the union wage scale in the particular trade. California law defines a “public work” to mean any (1) “construction, alteration, demolition, installation, or repair work”; (2) “done under contract”; and (3) “paid for in whole or in part out of public funds” and requires that prevailing wages be paid to any worker performing work “in the execution of the contract.” In the underlying decision, Mendoza v. Fonseca McElroy Grinding Co., Inc., 2016 WL 6947552 (N.D. Cal. Nov. 28, 2016), the U.S. District Court for the Northern District of California found that the plaintiff workers were not entitled to the payment of prevailing wages for off-site mobilization work, including loading, maintaining, and transporting milling machines from the contractor’s yard to the jobsite and back. Crucially, the contractor paid its workers for travel time, but at a lower rate than the applicable prevailing wage rate. In reaching its determination that such work did not constitute the type of work for which prevailing wages are required, the court found that the off-
site mobilization work was not “an integrated aspect of the flow process of construction” or “integral to the performance of that general contract”; thus, the court concluded that the off-site mobilization work was not “in the execution of a public works contract.” Notably, the court agreed with the contractor’s argument that to require the payment of prevailing wages for off-site mobilization work would be “to justify application of the prevailing wage law to the transportation of many things needed for a public works construction job.”

Following the district court’s decision, the plaintiffs appealed to the Ninth Circuit, asking it to determine whether the plaintiffs were employed in the “execution of” a public works contract when they performed off-site mobilization work. In its Order Certifying Question to the California Supreme Court, the Ninth Circuit noted that California courts had not previously addressed the applicability of California’s prevailing wage laws to off-site mobilization work. The Ninth Circuit did, however, reference two California Court of Appeal cases—Williams v. SnSands Corporation, 156 Cal.App.4th 742 (2007) and Sheet Metal Workers’ International Association, Local 104 v. Duncan, 229 Cal.App.4th 192 (2014)—whose decisions might provide guidance.

In Williams, the Court of Appeal addressed whether a material subcontractor’s truck drivers who hauled materials from a public works site were exempt from the prevailing wage requirements. The court utilized three factors to consider in reaching a determination: (1) “whether the transport was required to carry out a term of the public works contract”; (2) “whether the work was performed on the project site or another site integrally connected to the project site”; and (3) “whether work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract.” 156 Cal. App. 4th at 752. The Williams court applied these factors and concluded that the truck drivers were not entitled to the payment of prevailing wages. Id. at 754-55.

In Sheet Metal Workers, the Court of Appeal decided whether the prevailing wage laws apply to an employee of a subcontractor “who fabricates materials for a public works project at a permanent, offsite manufacturing facility that is not exclusively dedicated to the project.” 229 Cal. App. 4th at 196. In that case, the Court of Appeal held that “[w]ork performed at a permanent, offsite, and non-exclusive manufacturing facility” did not require the payment of prevailing wages. Id.

Looking at both the Williams and Sheet Metal Workers decisions, the Ninth Circuit noted that application of the three Williams factors suggested that the plaintiffs were not entitled to the payment of prevailing wages for off-site mobilization work. The Ninth Circuit acknowledged, however, that the Department of Industrial Relations’ (DIR) Public Works Manual states that “[t]ravel time related to a public works project constitutes ‘hours worked’ on the project, which is payable at not less than the prevailing rate based on the worker’s classification.” It also reviewed a DIR coverage determination, In re Kern Asphalt Paving & Sealing Co., Inc., No. 04-0117-PWH (March 28, 2008), in which the director of the DIR concluded that workers who first reported to a contractor’s shop and then were transported in company vehicles to a public works construction site must be paid for that travel time at the prevailing wage rate. The Ninth Circuit opined that “the reasoning and conclusion of Kern Asphalt are instructive, if not binding, even though the courts bear the ultimate responsibility for interpreting the statutory language of the prevailing wage law.” (Slip Op. at 17.)

Ultimately, the Ninth Circuit found that because no California court had specifically addressed the issue of whether off-site mobilization work was subject to California’s prevailing wage requirements, and “[g]iven the potential scope of this decision,” certification to the California Supreme Court was appropriate. (Slip Op. at 18.)
It is expected that the California Supreme Court will grant the request for certification. As the Ninth Circuit highlighted, the issue presented has the potential to significantly expand prevailing wage coverage to apply to non-construction, non-jobsite work based simply upon its tie to a public works project. However, the Ninth Circuit over-relied on the travel time provisions set forth in the DIR’s Public Works Manual as well as the non-precedential Kern Asphalt coverage determination. Indeed, the DIR’s Public Works Manual specifically states that its “text, standing alone, is . . . not binding . . . on the courts when reviewing DIR proceedings under the prevailing wage laws.” Public Works Manual § 1.1. Similarly, as to the Ninth Circuit’s reliance on the Kern Asphalt coverage determination, courts have routinely held that no “deference” is to be extended to the director of the DIR’s interpretation of prevailing wage laws. State Building and Construction Trades Council of California v. Duncan, 162 Cal.App.4th 289, 294 (2008). Further, the Kern Asphalt determination is distinguishable from Mendoza in that the contractor in Kern Asphalt did not pay for travel time at all; thus, the director decided that the applicable rate was the prevailing wage rate. By contrast, the contractor in Mendoza did pay its workers for the off-site mobilization work.

The Ninth Circuit’s order and the California Supreme Court’s decision on this issue have the potential to expand the application of prevailing wage laws to the transportation of many items, such as materials, tools, and personnel, needed to support public works construction jobs.


In Mora, the plaintiff filed a putative class action alleging violation of Labor Code section 226(a), along with a PAGA claim, based upon payments his former employer made to a union vacation trust fund authorized by the Labor Management Relations Act of 1947 (LMRA). The trial court held that payments to the union vacation trust fund were not “wages” within the meaning of Labor Code section 226(a) and, in any event, plaintiff’s claims were preempted by the LMRA.

The Court of Appeal affirmed. Plaintiff did not allege he exercised any control over the funds, which were immediately deducted and transferred to the employer-financed union vacation trust fund. Neither did plaintiff allege he could opt to alter or decline to make the contribution. Further, although plaintiff had some expectation of benefits from the trust fund, he did not allege an entitlement to receive the entirety of the union vacation payments back from the trust fund. Finally, although defendant’s obligation to make the payments arose from plaintiff’s labor, plaintiff did not allege or present authority defendant owed the payments to him, rather than to the trust fund. The collective bargaining agreement (CBA) authorizes the trust fund to bring an action to collect any delinquent employer contributions, not plaintiff. Accordingly, the union vacation trust fund payments did not fall under Labor Code section 226(a)’s ambit.

O.   Newton v. Parker Drilling Mgmt. Servs., Ltd., 881 F.3d 1078 (9th Cir. 2018)

This case examined whether workers employed on drilling platforms fixed on the Outer Continental Shelf (OCS) can bring California state wage and hour claims. The plaintiff, who regularly worked 12 hours per day for a period of 14 days, sued for various wage and hour violations under California law. The employer argued that the FLSA is a comprehensive statutory and regulatory scheme that leaves no voids or gaps for state law to fill, so state laws do not apply on the OCS, while the employee argued that California laws apply because the laws are not inconsistent with the FLSA under the Act’s savings clause. The trial court agreed
with the defendant, holding that the FLSA is a comprehensive statutory scheme that is exclusive of California laws.

The Ninth Circuit reversed, holding that “applicable” and “not inconsistent” state laws can become surrogate federal law under the Outer Continental Shelf Lands Act (OCSLA), even if applicable federal law exists. The OCSLA allows laws of the adjacent state to apply to drilling platforms fixed to the seabed of the OCS if state law is “applicable and not inconsistent with...Federal laws.” The Supreme Court’s OCSLA cases only addressed situations where no federal laws were applicable, so the Ninth Circuit was not bound by precedent. The court analyzed the origins of the OCSLA and its legislative history to hold that the “applicable” term does not require that state law fill a void by federal laws. The court held that the principle for determining whether state laws are inconsistent with federal law is by looking at Congress’s objective in enacting the federal statutes at issue, and since the FLSA explicitly allows for more protective standards for minimum wage and maximum hours, California’s minimum wage and maximum hours laws are not inconsistent with the FLSA. The court remanded for the district court to determine if California’s meal period, final pay, and pay stub laws are “not inconsistent” with existing federal law.


In an effort to codify the notable Gonzalez v. Downtown LA Motors, LP (2013) 215 Cal. App. 4th 36 and Bluford v. Safeway Inc. (2013) 216 Cal. App. 4th 864 decisions related to piece-rate compensation, the Legislature enacted Labor Code Section 226.2 subdivision (a)(1), which states that piece-rate employees “shall be compensated for rest and recovery periods and other nonproductive time separate from any piece-rate compensation.” The term “other nonproductive time” is defined as “time under the employer’s control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis.” Further, subdivision (a) specifies that the separate compensation for rest and recovery time must be at an hourly rate that is no less than the applicable minimum wage, and in some instances must be greater than minimum wage, depending on a statutory formula, and the separate compensation for employees’ other nonproductive time must be no less than the applicable minimum wage.

The employers argued that their piece-rate wage systems were designed to cover all work performed throughout the work day, including rest breaks, and they complied with minimum wage requirements by, at the end of each pay period, “dividing the hours worked by the payment made and making any additional payment necessary to ‘true up’ the total compensation to reach at least minimum wage.” This practice was “understood by employers to be in accordance with established law, was the settled practice in the industry, and was consistent with defendants’ own publications providing guidance to employers.”

As a result, among other things, the employers argued that (1) the term “other nonproductive time” was unconstitutionally vague because the statute did not define what activities constituted such nonproductive time, and (2) the statute should only apply retroactively. The appellate court rejected both arguments. With respect to the vagueness argument, the court held that “a statute will be deemed void for vagueness if it either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to what is required.” Some ambiguity was not sufficient for a finding of vagueness; “the statutory definition of the term ‘other nonproductive time’ as ‘time under the employer’s control, exclusive of rest and recovery periods, that is not
directly related to the activity being compensated on a piece-rate basis’ (§ 226.2) provides an adequately discernable standard that possesses a reasonable degree of specificity."


The *Raines* court held that a PAGA claim for civil penalties based on an employer’s failure to provide or maintain accurate wage statements does not require a showing of injury. Plaintiff sued a former employer, seeking, among other claims, individual Labor Code and representative PAGA penalties for defendant’s alleged failure to provide and maintain accurate wage statements as required by Labor Code section 226(a). The wage statements at issue included both the number of overtime hours worked by the employee and the employee’s total overtime pay, but failed to include the overtime hourly rate of pay.

The trial court granted summary adjudication in favor of defendant, finding that the hourly overtime rate could readily be determined from the wage statement by using simple math. There was thus no injury, and without an injury, plaintiff’s individual and PAGA claims premised on violations of Labor Code sections 226(e) and 226(a), respectively, both failed.

The Court of Appeal determined that plaintiff failed to establish the injury required for the recovery of statutory penalties on her individual section 226(a) claim. As the trial court found, an employee’s hourly overtime rate could be promptly and easily determined from the information on the wage statement by using simple arithmetic. That a pencil and paper or a calculator might be required to perform the calculation did not render it unreasonably complex. The trial court erred, however, in finding that the lack of injury also barred plaintiff’s PAGA claim. PAGA is concerned with collecting civil penalties for the violation of section 226(a), not the damages or statutory penalties provided for in section 226(e). The requirements for a section 226(e) claim thus do not apply to a PAGA claim for a violation of section 226(a). The absence of injury does not mean the absence of a violation. Civil penalties are specifically provided for any failure to provide or maintain the wage statements required under section 226(a), without reference to injury. The court accordingly reversed the trial court judgment as to plaintiff’s PAGA claim.


This case arose from a dispute over roughly $300 in unpaid wages. In a prior appeal, the employer challenged the trial court’s award of $31,365 in attorneys’ fees to plaintiff. The appellate court affirmed and stated that the parties must bear their own costs of appeal. Defendant thereafter claimed that “costs” included attorneys’ fees on appeal. Plaintiff disagreed, seeking $114,840 in appellate attorneys’ fees (including a lodestar of $57,420 due to issue complexity). The trial court awarded the lodestar. The court then not only denied Defendant’s motion to reconsider or clarify the ruling, but also awarded Plaintiff’s Counsel an additional $9,020 in fees he incurred in opposing the motion. The Court of Appeal affirmed, thereby highlighting the potential for significant financial impact to an employer in appealing a small Labor Commissioner award.

S. **Troester v. Starbucks Corp., 5th Cal. 5th 829 (2018)**

Breaking with federal law’s version of the *de minimis* rule as stated in *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 692, and *Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057, 1063 the California Supreme Court held that an employer must compensate hourly employees for off-the-clock work that amounts to even four to ten minutes each day. The court based its conclusion on two determinations: (1) that California’s wage and hour statutes or
regulations had not adopted the *de minimis* doctrine found in the FLSA; and (2) that the relevant California wage order and statutes “do not permit application of the *de minimis* rule on [these] facts...where the employer required the employee to work “off the clock” several minutes per shift. The court left open the issue of “whether there are circumstances where compensable time is so minute or irregular that it is unreasonable to expect the time to be recorded.”

V. CASES TO WATCH

A. *Busker v. Wabtec Corp.*, 903 F.3d 881 / S251135

Request presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. The question presented is: Does work installing electrical equipment on locomotives and rail cars (i.e., the “on-board work” for Metrolink’s [Positive Train Control (PTC)] project) fall within the definition of “public works” under California Labor Code section 1720, subdivision (a)(1), either (a) as constituting “construction” or “installation” under the statute or (b) as being integral to other work performed for the PTC project on the wayside (i.e., the “field installation work”)?

B. *Frlekin v. Apple, Inc.*, 870 F.3d 867 (9th Cir. 2017) / S243805

Request presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. The question presented is: Is time spent on the employer’s premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience by employees compensable as “hours worked” within the meaning of California Industrial Welfare Commission Wage Order No. 7?

C. *Goonewardene v. ADP, LLC*, S238941 / 5 Cal.App.5th 154

Petition for review after the Court of Appeal reversed the dismissal of a civil action. This case presents the following issue: Does the aggrieved employee in a lawsuit based on unpaid overtime have viable claims against the outside vendor that performed payroll services under a contract with the employer?


Petition for review after the Court of Appeal affirmed judgment in a civil action. This case presents the following issue: Does an employee bringing an action under PAGA (Labor Code § 1698, et seq.) lose standing to pursue representative claims as an “aggrieved employee” by dismissing his or her individual claims against the employer?


Petition for review after the Court of Appeal granted a petition for peremptory writ of mandate. This case presents the following issue: Does a representative action under PAGA (Labor Code § 2698, et seq.) seeking recovery of individualized lost wages as civil penalties under Labor Code section 558 fall within the preemptive scope of the Federal Arbitration Act (9 U.S.C. § 1 et seq.)?

Petition for review after the Court of Appeal reversed an order denying a motion to compel arbitration in a civil action. The court limited review to the following issue: Is plaintiffs’ statutory wage claim under Labor Code section 201 subject to mandatory arbitration pursuant to section 301 of the LMRA because it requires the interpretation of a CBA?

G. Oman v. Delta Air Lines, Inc., 889 F.3d 1075 (9th Cir. 2018) / S248726

Request presented in a matter pending in the United States Court of Appeals for the Ninth Circuit on the following issues. The case is not yet fully briefed.

1. Do California Labor Code sections 204 and 226 apply to wage payments and wage statements provided by an out-of-state employer to an employee who, in the relevant pay period, works in California only episodically and for less than a day at a time?

2. Does California minimum wage law apply to all work performed in California for an out-of-state employer by an employee who works in California only episodically and for less than a day at a time? See Cal. Labor Code §§ 1182.12, 1194; 8 C.C.R. § 11090(4).

3. Does the Armenta/Gonzalez bar on averaging wages apply to a pay formula that generally awards credit for all hours on duty, but which, in certain situations resulting in higher pay, does not award credit for all hours on duty? See Gonzalez v. Downtown LA Motors, LP, 215 Cal.App.4th 36, 155 Cal.Rptr.3d 18, 20 (2013); Armenta v. Osmose, Inc., 135 Cal.App.4th 314, 37 Cal.Rptr.3d 460, 468 (2005).


Petition for review after the Court of Appeal reversed an order denying a petition to compel arbitration in a civil action. This case presents the following issues: (1) Was the arbitration remedy at issue in this case sufficiently “affordable and accessible” within the meaning of Sonic-Calabasas A, Inc. v. Moreno (2013) 57 Cal.4th 1109 to require the company’s employees to forego the right to an administrative Berman hearing on wage claims? (2) Did the employer waive its right to bypass the Berman hearing by waiting until the morning of that hearing, serving a demand for arbitration, and refusing to participate in the hearing?

I. Stewart v. San Luis Ambulance, Inc., 878 F.3d 883 (9th Cir. 2017) / S246255

Request under California Rules of Court, rule 8.548, that this court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. The case is not yet fully briefed. It presents the following issues:

1. Under the California Labor Code and applicable regulations, is an employer of ambulance attendants working 24-hour shifts required to relieve attendants of all duties during rest breaks, including the duty to be available to respond to an emergency call if one arises during a rest period?
2. Under the California Labor Code and applicable regulations, may an employer of ambulance attendants working 24-hour shifts require attendants to be available to respond to emergency calls during their meal periods without a written agreement that contains an on-duty meal period revocation clause? If such a clause is required, will a general at-will employment clause satisfy this requirement?

3. Do violations of meal period regulations, which require payment of a “premium wage” for each improper meal period, give rise to claims under sections 203 and 226 of the California Labor Code where the employer does not include the premium wage in the employee’s pay or pay statements during the course of the violations?

J. Voris v. Lampert, S241812

Petition for review after the Court of Appeal affirmed in part and reversed in part the judgment in a civil action. This case presents the following issue: Is conversion of earned but unpaid wages a valid cause of action?

K. Ward v. United Airlines, Inc., 889 F.3d 1068 (9th Cir. 2018) / S248702

Request under California Rules of Court, rule 8.548, that this court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. The case is not yet fully briefed. It presents the following issues:

1. Wage Order 9 exempts from its wage statement requirements an employee who has entered into a CBA in accordance with the Railway Labor Act (RLA). See 8 C.C.R. § 11090(1)(E). Does the RLA exemption in Wage Order 9 bar a wage statement claim brought under California Labor Code section 226 by an employee who is covered by a CBA?

2. Does California Labor Code section 226 apply to wage statements provided by an out-of-state employer to an employee who resides in California, receives pay in California, and pays California income tax on her wages, but who does not work principally in California or any other state?
California Wage and Hour Developments: The Latest (and Not So Greatest) Changes Impacting Employers

Patricia A. Matias (Orange County) • Evan R. Moses (Los Angeles)  
Sean N. Pon – Aderans America Holdings, Inc. | Bosley, Inc.  
Robert R. Roginson (Los Angeles)

Wage and Hour Developments

• Independent Contractors  
• New “De Minimis” Test  
• Calculating Bonuses  
• Vacation Plans  
• Expense Reimbursements  
• Reporting Time Pay  
• Pay Records  
• PAGA Developments
New Rules for Classifying Independent Contractors

A: How much control and direction does the company exert, or has the right to exert over how the work is done?

B: Does the worker perform work that is outside the usual course of the hiring entity’s business?

C: Is the worker “customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity”?

California’s New De Minimis Test and “Hours Worked”

IF IT’S THE SMALL THINGS THAT COUNT,

WHY DO PEOPLE SAY “DON’T SWEAT THE SMALL STUFF?”
New Rule for “Flat Sum” Bonuses

Alvarado v. Dart Container Corp. of California

Alvarado: Flat-Sum Bonuses

- A bonus that does not increase in amount for increased production or for each hour of work
- Examples:
  - Retention bonus
  - Attendance bonus
  - Safety bonus
  - Project completion bonus
  - Referral bonus
  - On-call stipend
  - Education bonus
**Alvarado: Flat-Sum Bonuses**

**Federal Law**

\[
\frac{100}{50 \text{ total hours}} = 2.00 \text{ regular rate adjustment}
\]

\[
2.00 \times 0.5 \times 10 \text{ OT hours} = 10.00 \text{ OT adjustment}
\]

**Formula under Alvarado**

\[
\frac{100}{40 \text{ total hours}} = 2.50 \text{ regular rate adjustment}
\]

\[
2.50 \times 1.5 \times 10 \text{ OT hours} = 37.50 \text{ OT adjustment}
\]

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**PAGA Developments**

- New PAGA exception for certain CBAs
- *Huff v. Securitas*
- *Khan v. Dunn-Edwards*
- *Raines v. Coastal Pac. Food*
Other Developments

- Rules for unlimited vacation plans
- FMCSA preemption of CA meal/rest rules
- DOL Opinion Letter regarding 80/20 rule
- Increase in IRS mileage reimbursement rates
- Right to receive copies of pay records
- Labor Code 1197.5 amendment to CA Fair Pay Act
- Minimum wage increases
California Wage and Hour Developments: The Latest (and Not So Greatest) Changes Impacting Employers

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