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In California, Uncertain Times May Require Creative Solutions for Resolving Wage-and-Hour Claims

By John K. Skousen

This article provides a general overview of California law relating to wage-and-hour claims and then offers a host of innovative solutions for employers to consider, whether employers are resolving disputes through litigation or settlement – or if they are contemplating proactive actions to prevent disputes arising in the first place.

In California, wage-and-hour claims are more common than claims of wrongful termination and harassment. Fortunately, employers have had a variety of forums in which to resolve wage-and-hour claims. Because litigation can be costly, parties always need to consider settling disputes using various alternative dispute resolution ("ADR") channels. One way or the other, employers should actively seek creative solutions to address and resolve these claims.

LAY OF THE LAND: WELCOME TO CALIFORNIA

Employing workers in the Golden State carries with it a set of particularly unique challenges, and wage-and-hour compliance tops the list. California has the largest state wage-and-hour state enforcement agency in the country, called the Division of Labor Standards Enforcement ("DLSE"). It is operated by the Labor Commissioner, and it purports to provide a streamlined way to resolve wage-and-hour claims.

John K. Skousen is a partner in the Dallas and Irvine offices of Fisher Phillips. His practice is concentrated on wage-and-hour law and employment litigation. Mr. Skousen may be contacted at jskousen@fisherphillips.com.

In addition, the state legislature has been active over the years enacting statutes under the California Labor Code that impact how and when parties can litigate wage-and-hour claims.

Further, the California Industrial Welfare Commission also has promulgated Wage Orders covering industries and/or occupations that operate as regulations that have the force of law. Both the courts and the DLSE are charged with applying the law to facts.

Ambiguities in the language of statutes and regulations, however, have created rather than resolved many issues both at the agency level and in civil court. Although the courts attempt to provide clarification, they often add to the difficulties faced by employers trying to comply with the law:

- For example, in 2021's *Ferra v. Loews Hollywood* case, the California Supreme Court reversed an appellate court's decision for misreading the statutory intent regarding "regular rate" for meal-period premium calculation.

- And in 2019's, *Nisei Farmers League v. LWDA*, an appellate court upheld the text of Labor Code Section 226.2, leaving to the courts to figure out the application of the law to particular facts and circumstances. In other words, the mere fact that the language of a statute may be imprecise will not necessarily rise to the level of a constitutional infirmity in the eyes of California judges.

For sure, the outcomes of pending cases are uncertain, including the issue soon to be addressed by the U.S. Supreme Court. In *Viking River Cruises, Inc. v. Moriana*, the U.S. Supreme Court will decide whether the California Private Attorneys General Act ("PAGA") is preempted, in whole or in part, by the Federal Arbitration Act ("FAA"), which outcome may determine whether PAGA penalty actions can be altogether waived by employees in valid arbitration agreements or forced into arbitration for adjudication with other wage claims.

In addition, the path for resolving wage claims filed by employees with the DLSE remains potentially complicated, in part because the procedures provide certain advantages to employees seeking that forum.[1]

Although employees should decide early on whether to initiate claims with the Labor Commissioner or the courts, they face the added wrinkle that an arbitration agreement may altogether divest jurisdiction of DLSE over wage claims. For example, in 2019's *OTO, LLC v. Kho* case, the state Supreme Court held that a litigation-like arbitration procedure "may be an acceptable substitute" for the DLSE hearing even though the arbitration agreement in the particular case was held invalid.

Attorney's Fees – The Long and Winding One-Way Road

In California, because of reimbursable attorney's fees, wage-and-hour claims are attractive to trial lawyers and expensive to litigate. Generally, California's one-way road to recovery of attorney's fees tips the balance in favor of employees. With a few exceptions, only the employee who prevails on a wage-and-hour claim will be entitled to recover attorney's fees.[2] Similarly, employees prevailing on claims for reimbursement of expenses incurred during employment are entitled to reimbursement for their attorney's fees, both at the DLSE agency level and in civil court.[3]

The cards are stacked against employers, unfortunately.

Although a successful employer that prevails on an employee's appeal of a DLSE decision may recover its attorney's fees in some situations,[4] the legislature and courts have created disadvantages for an employer seeking such appeals.[5] Indeed, court decisions have obliterated the prevailing party aspect of Section 98.2 by incorporating other Labor Code statutes providing for one-way relief on minimum wage and overtime claims.[6]

Thus, although the DLSE offers an expedited path to hearing DLSE wage claims, employers defending DLSE claims can face an uphill battle, even though the DLSE's policies purport to provide a fair and impartial forum for hearing claims.

An employer's disadvantages are not limited to DLSE appeals. For example, an employer that prevails against an employee in civil court on certain actions "for non-payment of wages," arising under Labor Code Section 218.5, may recover its attorney's fees, but that particular claim must have been made by the employee in bad faith.[7]

It is not all on the side of the employee, however. To get around this impediment, attorneys simply file PAGA actions alleging violations of the meal and rest period laws, which actions provide for reimbursement of attorney's fees to prevailing plaintiffs.[8]

Finally, employees who lose in court get nothing and get no fees reimbursed, at all. Nor are successful DLSE wage claimants entitled to an award of attorney's fees by the DLSE at the agency level. That's sometimes, but not always, enough to stop a plaintiff attorney, or an individual at the DLSE, from proceeding on one or more tenuous wage claims. But as long as there is an avenue for potential attorney's fees, an employee may persist on a weak claim with encouragement from legal counsel.

Class Actions Barred by Arbitration Agreements

After two U.S. Supreme Court cases, many employers have successfully used arbitration agreements to stop class actions in favor of individual arbitrations.[9] Employers thus may successfully enforce valid class action waivers in arbitration agreements, thereby preventing class litigation on

aggregated wage claims with attorney's fees related to such actions. And, recent cases demonstrate that many class actions are simply uncertifiable due to the preponderance of individual questions.[10] This creates certain advantages for employers.

The Private Attorneys General Act

But so far, plaintiff attorneys have not been prevented from recovering attorney's fees on a special kind of collective action, the Private Attorneys General Act of 2004 ("PAGA"), which permits employees to sue for penalties owed to "aggrieved employees" as proxies for the state and collect 25 percent of the penalties due for PAGA violations, with no requirement in state court to satisfy the prerequisites for class certification. An employee suing under PAGA who successfully prevails under PAGA is entitled to an award of the employee's reasonable attorney's fees and costs, even if those claims include violations of California's meal and rest period laws arising under Section 226.7(b) of the Labor Code, mitigating the impact of *Kirby*.[11]

Thus, attorneys often are encouraged to bring PAGA claims, even if tenuous, but risk remains.

Although this may soon change, PAGA claims for now cannot be compelled to arbitration according to the California Supreme Court.[12] However, courts can limit PAGA claims where the PAGA claims cannot be fairly and efficiently tried, which should cause plaintiff attorneys to pause before piling on unmanageable claims.[13] And, courts can reduce a PAGA penalty based on the facts and circumstances of a case if a penalty would be "unjust, arbitrary and oppressive, or confiscatory."[14] Importantly, reduced penalties may mean reduced attorney's fee awards as well.[15] Courts also have inherent authority to strike a PAGA claim altogether for unmanageability, which would mean no fees at all for a stricken claim.[16] Manageability issues and the possibility of significantly reduced penalties if the PAGA moves forward therefore continues to be a risk for plaintiff lawyers in every PAGA case that is filed and litigated.

Viking River Cruises *and the PAGA Preemption Question*

This discussion regarding the impact of PAGA actions assumes such actions remain viable. But, the outlook for plaintiff attorneys using PAGA to recover attorney's fees may not be good.

First, on December 15, 2021, the U.S. Supreme Court granted certiorari in *Viking River Cruises, Inc. v. Moriana*, which requires the U.S. Supreme Court to determine whether the FAA preempts state law and requires the courts to enforce bilateral arbitration agreements that expressly bar representative claims, including under PAGA. Indeed, two U.S. Supreme Court

cases suggest that the FAA preempts state law and requires enforcement of bilateral arbitration agreements.[17]

Central to the outcome of this controversy may be the determination regarding who holds the right to pursue PAGA actions. It may well turn out that state agencies such as the DLSE may continue to have a right to investigate violations and impose civil penalties, while individual employees, at the same time, may waive in arbitration agreements their rights to proceed with PAGA claims individually as proxies of the state. Unless the Supreme Court holds that preemption can extinguish the state right, this could create a potentially uncertain finality to PAGA cases settled by employers.

Second, a recent voter referendum effort called "The Fair Pay and Employer Accountability Act of 2022" would have permitted California voters to altogether strike the PAGA statutes and instead give these actions back to the state – the Labor Commissioner's office – where they belong. And, attorney's fees would have been barred. All penalties for violations, which are doubled in cases of "willful" misconduct, would have gone to aggrieved employees. However, although it appears a significant number of signatures were gathered on the ballot initiative (over 600,000), due to timing issues it has been shelved for now but may succeed in getting on the ballot for 2024. Assuming the initiative is needed after the Supreme Court rules in *Viking River Cruises*, this delay may prove helpful, among other things, in educating the public regarding the ballot initiative.

In summary, in California, the battlefield of litigating and resolving wage-and-hour claims continues to change and give rise to uncertainty. Regardless of the outcome of pending appeals and legislation, employers will need to be creative in resolving wage claims, individually or collectively, which may require flexibility and compromise.

FINDING CREATIVE WAYS TO ADDRESS AND RESOLVE WAGE CLAIMS, INDIVIDUALLY AND COLLECTIVELY

Despite swirling legal trends and the existence of pending cases that always threaten to upend the current order, employers should continue to pay attention to the tension of whether to resolve claims individually or collectively, whether dealing with class actions, PAGA actions, or hybrid actions. In each case, employers still may have good legal defenses that could persuade attorneys to work toward early resolution.

Creative Litigation Strategies

There are a variety of creative litigation strategies that can work well in resolving wage claims, with the goal of addressing pros and cons of

various litigation forums, minimizing the expense of litigation, and to use resources efficiently. Among those strategies:

1. Determine the stakeholders in wage-and-hour litigation as soon as possible, including plaintiffs, defendants, and insurance carriers potentially responsible for coverage with interests in the outcome. On the defense side, this may include tendering letters to the stakeholders as soon as practicable.

2. Prepare dispositive motions attacking causes of action, venue, forum itself, or the scope of claims asserted therein (including collective versus individual claims).

3. Determine whether to seek or oppose collective versus individual adjudication of claims. The DLSE may only aggregate claims for hearing purposes only, with each claim adjudicated separately in the end after common evidence is heard.

4. Develop a plan of investigation, including a discovery plan, tailored to addressing the merits of claims in the most efficient manner. This could include identifying internally the persons most knowledgeable of facts relevant to claims and retaining necessary consultants or experts in complex cases at the appropriate times.

5. Consider approaches tailored specifically to defending claims made by employees at the DLSE. This includes whether to proceed to litigate through appeals, timely challenge citation proceedings, or whether to invoke arbitration early (if there is an arbitration agreement) if that strategy would be better suited for defending the claims.

6. If there is no pre-dispute arbitration agreement, or if some claims cannot be forced to arbitration, determine whether you could benefit from stipulating with opposing counsel to adjudicate (and possibly settle) all claims in arbitration rather than other available forums.

7. Consider that a variety of other stipulations may be available. These could include stipulations for dismissal of claims, a stipulation for a bench trial (if jury trial available), stipulation as to timelines permitted by the court, and stipulations regarding facts or fact development if beneficial to the overall defense strategy.

Creative Settlement Strategies

Settlement is often the dispositional path that works best, but before proceeding down this road, it's critical to obtain advice from legal counsel. The path to mediation generally should not distract an employer from aggressively pursuing legal defenses and developing factual evidence, however. This is because there will generally be litigation deadlines established by the forum and opportunities to eliminate or weaken claims and even eliminate parties in the litigation, where appropriate. Such actions, including filing strong motions that are scheduled to be heard, could change the playing cards in favor of the employer and create tensions for plaintiffs to reduce their demands for settlement. Among the issues to consider for settlement:

1. By doing their homework, employers will best be prepared to consider the viability of settlement, either individually or collectively. In the alternative, there may be instances where employers will get the best "bang for the buck" by not settling at all but proceeding to defend wage claims. In this manner, you may avail yourself of the benefit of res judicata, not achieved by settlement, but by litigation on the merits.

2. Assuming there are sufficient numbers of claims, settling such claims collectively is frequently (but not always) the most economical dispositional path in a settlement. This is true regardless of whether *Viking River Cruises* results in a holding that PAGA actions are preempted by the FAA, waived altogether by employees, or forced to arbitration in an arbitration agreement.

3. A settlement may be partial – disposing of only some claims – or a complete resolution of all wage-and-hour claims. Of course, employers ideally will desire a complete resolution of claims in most cases, if possible. In the end, where there are multiple claims pending in different actions, the employer generally will seek to resolve both the merits of underlying wage claims and related penalties through an artfully crafted global settlement. Of course, this is only true as long as all of the impacted parties can participate or be bound by the settlement agreement.

4. Although employers generally cannot settle directly with employees after a class has been certified, employers may consider whether to attempt settlement of claims individually if able to do so. In the end, however, this may not dispose of all claims.[18]

5. Drafting a settlement agreement should involve assistance from legal counsel. An employer's chief interest typically would be to achieve a settlement that has finality as to any competing claims covering the same liability period. Recent decisions could impact the ability of employers to more effectively settle and release PAGA claims based on the language in the initial LWDA notice letter. This may operate to prevent the state from pursuing PAGA penalties arising from those claims even if the claims were not specifically listed in the LWDA notice.

6. Consider the impact of pending government audits, not addressed in detail in this article. Employer policies for responding to state and federal agency audits may provide opportunities to resolve claims with agencies. This could include making payments of back wages, which may include an opportunity to obtain releases from employees regarding federal claims arising under the Fair Labor Standards Act ("FLSA"). This may impact the overall mix of pending claims and their resolution.

7. Seek legal counsel regarding the timing and selection of mediators, which may be critical in achieving the best settlement possible under certain circumstances. This could include taking advantage of the timing on pending motions or appeals, the outcome of which may change or adversely impact the parties' respective positions.

Creative Strategies for Compensation Agreements and HR Documents

The development of effective personnel and human resource policies may be the best deterrent in defending – and perhaps even preventing – many wage-and-hour claims. Of course, the best strategy of all is prevention, nailing down all wage-and-hour compliance issues and fortifying with employer's operations by implementing sound compliant policies.

1. Creating strong policies and practices begins at the top and should trickle down to routine HR protocols. This includes training and self-audits, and then eliminating all questionable practices that create potential liability.

2. But again, making things right may include obtaining releases should any back-wage payments be necessary, which should be done with assistance of legal counsel.

3. Similarly, an employer with complicated pay systems should develop effective compensation agreements, with assistance of legal counsel. These agreements may be a powerful defense against minimum wage claims.

4. Also high on the list would be addressing the quality of an employer's timekeeping policies and practices. This includes programs for investigating employee time records showing late, skipped, or short meal periods. You could utilize procedures along these lines to effectively refute claims that your policies or practices prevented an employee from taking a compliant meal period. In such cases, the employee claiming meal premiums would not be entitled to a one-hour premium despite the time-card deviation.

CONCLUSION

In summary, keeping current is not optional but mandatory. Employers should keep abreast of legal developments to adapt your HR policies and management practices in a creative manner. By crafting action plans to investigate, resolve, and prevent wage-and-hour claims in the first place, as well as taking effective action to address and resolve claims early when they come to light, employers put themselves in the best position.

The strength of defenses generally will impact the speed of resolution, but it requires retention of astute and vigilant legal counsel without delay to investigate wage-and-hour claims early. Litigation should be conducted while keeping the settlement option open, but employers should prepare well early on so that claims can be defended, if necessary.

NOTES

1. *See Sampson v. Parking Service 2000 Com, Inc.*, 117 Cal.App.4th 212 (2004).

2. *See, e.g.,* Labor Code § 1194 (minimum wage and overtime claims).

3. *See* Labor Code § 2802.

4. Labor Code § 98.2.

5. *See, e.g.,* Labor Code § 98.2(b) (cost shifting favors employees rather than employers because an employer is "successful" only if an appealing employee collects nothing on the appeal). *See also Palagin v. Paniagua Construction, Inc.*, 222 Cal.App.4th 124, 137 (2013) (addressing purpose of Section 98.2(b)).

6. *See, e.g., Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1426 (upholding one-way nature of attorney's fee reimbursement when comparing Labor Code Section 218.5

and 1194); *Eicher v. Advanced Business Integrators, Inc*. (2007) 151 Cal.App.4th 1363 (2007) (allowing successfully appealing employee from DLSE decision to recover attorney's fees).

7. Labor Code § 218.5(a).

8. *Kirby v. Immoos Fire Protection, Inc*., 53 Cal.4th 1244, 1248 (2012) (addressing Labor Code § 226.7(b)).

9. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 612 (2018).

10. *See, e.g., Cirrincione v. American Scissor Lift, Inc*., 73 Cal.App.5th 619 (2022) (holding that alleging the existence of a uniform policy or practice – or unlawful lack of a policy – is not sufficient to establish predominance of common questions required for class certification).

11. *See* Labor Code § 2699 (g)(1).

12. *See Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014).

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

14. Labor Code § 2699 (e)(2).

15. *See, e.g., Bernstein v. Virgin America, Inc*., 990 F.3d 1157, 1173 (9th Circuit) (court recognizes lower penalties would require trial court to reassess attorney's fee award).

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

17. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 612 (2018).

18. *See, e.g.,* the 2019 case of *Chindarah v. Pick Up Stix*.