

Have You Checked Your Paystubs Lately? How a Typo Can Cost You Millions

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ON THE FRONT LINES OF WORKPLACE LAWSM

Today's Agenda

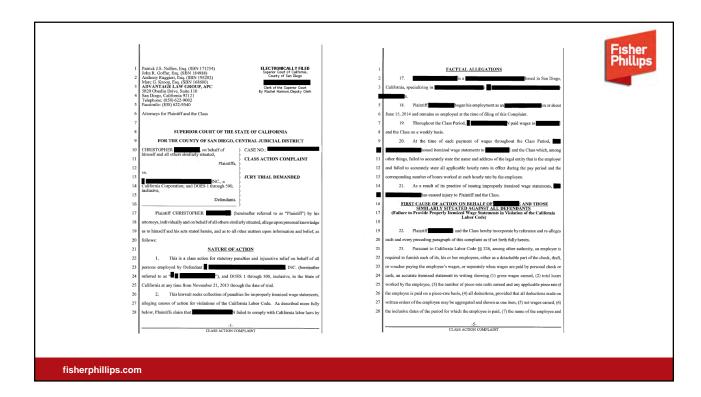


- What We Are Seeing & Why
- The Basics What is Required
- Violations Possible Claims
 - Labor Code Section 226(e)
 - PAGA
- Real Life Examples
- Prevention
 - Preventing Liability
 - Preventing Lawsuits
 - Arbitration & PAGA



THE CLAIM "DU JOUR"

What we are seeing



Wage Statements



 Q: How much will it cost you if you fail to comply?



• A: More than you think.

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Wage Statements



- · Remedy for inaccurate pay stubs:
 - Knowing and intentional violations: greater of all actual damages or \$50 for the initial pay period in which the violation occurs and \$100 per employee for each violation in a subsequent pay period
 - Not to exceed aggregate penalty of \$4,000
- Civil Penalties
 - PAGA
 - Can be assessed even for inadvertent violations
- Attorney's Fees
- Rest and Meal Break Violations: Rest, recovery and meal break violations can turn into pay stub violations

Recent Case Against Major Retailer



- One claim was that final paycheck for terminated employees did not accurately list dates of pay period.
- Second claim was that lump sum bonus listed as overtime did not break down how it was calculated.
- Court awarded \$102 million.
- Case being appealed.



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Why Are Such Simple Cases So Trendy?



- 1. Penalties add up quickly
- 2. Single claim clean / little work
- 3. Low risk of malpractice
- 4. Certifiable
- 5. No defense
- 6. Harm is a given
 IN SUM it's easy money

What's Required?





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The Basics – What's Required



Labor Code Section 226 - wage statements must contain:

- 1) Employer name and address.
- 2) Employee's name and last four digits of employee SSN or employee identification number.
- 3) Inclusive dates for the pay period.
- 4) Gross wages earned.
- 5) Applicable hourly rate (including OT) and hour worked at each rate.
- 6) Total hours worked.

The Basics – What's Required



Labor Code Section 226 - wage statements must contain:

- 7) Piece rate units and piece rate (for piece rate employees).
- 8) All deductions.
- 9) Net wages earned.
- 10)Paid sick leave (Labor Code Section 246) or as a separate writing.

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Violations – Two Possible Claims



Labor Code 226(e) Remedy:

- An employee who suffers injury from a knowing and intentional violation:
 - Greater of actual damages or \$50 for the initial pay period in which a violation occurs and \$100 per employee for each violation in a subsequent pay period.
 - Not to exceed aggregate penalty of \$4,000.
 - Plus costs and attorneys' fees.

Violations – Two Possible Claims



Labor Code 226(e) Remedy:

- Knowing and intentional:
 - Does not include an isolated and unintentional payroll error due to a clerical error or inadvertent mistake.
 - But courts have interpreted "knowing and intentional" to not necessarily mean you had the specific intent to violate the law.

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Violations – Two Possible Claims



Labor Code 226(e) Remedy:

- An employee "suffers injury" if
 - The employer does not provide a wage statement at all.
 - The employer fails to provide accurate and complete information and the employee cannot **promptly and easily** determine from the wage statement alone specified information from the paystub.

Violations – Two Possible Claims



Labor Code Private Attorney General Act (PAGA):

- \$100 per initial violation, \$200 per subsequent violation.
 - Labor Code 226.3 higher civil penalty? (\$250 per employee for initial violation, \$1,000 per employee for subsequent violations). Courts are split.
- PAGA does not require any showing of harm or "suffering injury" (a violation is a violation).
- PAGA does not require that a violation be "knowing or intentional."
- Recipe for disaster for minor and technical violations, even where there is no harm.

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Violations – Two Possible Claims



Labor Code Private Attorney General Act (PAGA):

- Lopez v. Friant & Associates (2017)
 - Furniture company issued paystubs without listing the last four digits of the employee's SSN.
 - No allegation that any employee was underpaid, their hours were shorted, or they were harmed in any way.
 - Court said a plaintiff seeking civil penalties under PAGA for paystub violations is not required to show any injury.
 - A violation is a violation is a violation.

Violations – Two Possible Claims



Labor Code Private Attorney General Act (PAGA):

- Raines v. Coastal Pacific Food Distributors (2018)
 - Wage statements listed the overtime hours worked and the total compensation, but did not divide those numbers and calculate the overtime rate of pay.
 - The employee did not suffer injury under 226 "Here, one can determine the hourly overtime rate 'from the wage statement alone.' It can be 'promptly and easily' determined by simple arithmetic. The mathematical operation required is division, which is taught in grade school."
 - However, a PAGA claim for a violation of Section 226 does not require proof of an injury or a knowing and intentional violation.

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Violations – Two Possible Claims

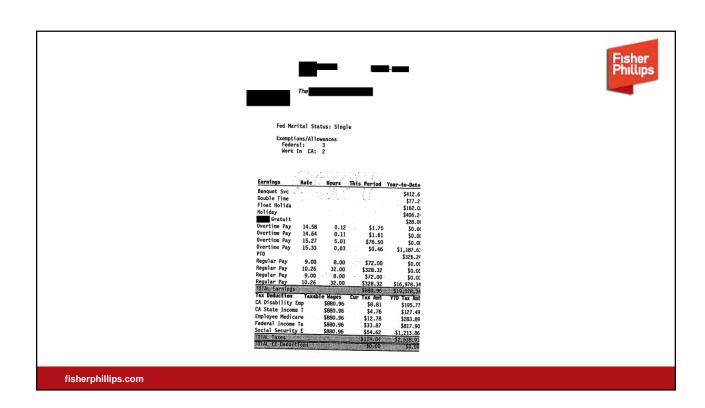


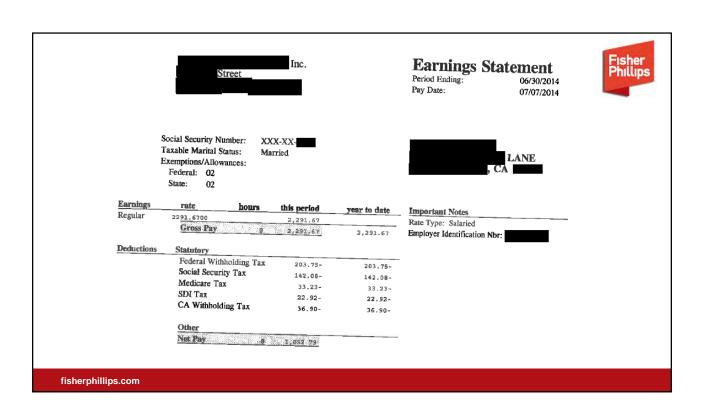
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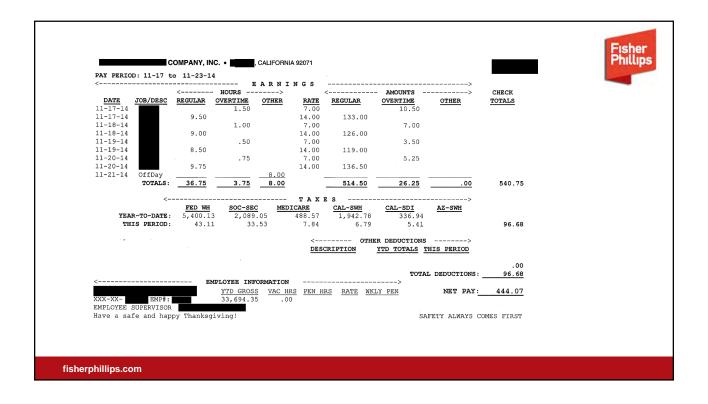
- Very limited "right to cure" for certain paystub claims:
 - Name and address of employer/inclusive dates of pay period.
 - Have to provide three (3) years of fully compliant paystubs.
 - Only have 33 days to do so.
 - If you "cure," can prevent PAGA claims for those narrow paystub claims.
- Big flaw does not prevent liability under Labor Code Section 226(e) for the same violations. Many employers reluctant to "cure" and raise a red flag and invite a class action lawsuit.



EXAMPLES OF CLAIMED VIOLATIONS







The Basics – Consequences





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What Does the Claim Look Like?



- Vera Willner v. Manpower, Inc. Hourly employee of operator of temporary-employment agency brings class action alleging wage statements are inaccurate because:
- 1) they failed to include "inclusive" dates of the period paid;
- 2) they failed to correctly display the name and address of the employer; and
- 3) they failed to display the hours properly because of the underlying claim.



Elements



Willner v. Manpower, Inc. -

"A claim for damages under Section 226(e) requires a showing of three elements:

- (1) a violation of Section 226(a);
- (2) that it is "knowing and intentional"; and
- (3) a "resulting injury."

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Element 1 - A Violation of 226(a)



Willner v. Manpower:

Address: Defense = address is on the check. Court says the statements do not contain the address. The section expressly requires that it be written on the actual paystub itself ... "Anything less fails to comply."

Inclusive dates: Defense = paystub lists all dates within the pay period. Court says no substantial compliance. It doesn't matter, it is a violation.

Element 2 – Knowing & Intentional



Labor Section 226 (e):

• "knowing and intentional failure" does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake.

Willner v. Manpower:

"knowing and intentional requires a showing that the defendant knew that facts existed that brought its actions or omissions within the provisions of section 226(a)." Willner is not required to demonstrate that Manpower knew that the conduct was unlawfu

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Element 3 – Resulting Injury



Labor Section 226 (e):

• "promptly and easily determine" means a reasonable person would be able to readily ascertain the information without reference to other documents or information.

Willner v. Manpower:

E.g. An employee cannot promptly determine the address from the wage statements alone and therefore, Willner suffered an injury.



PREVENTION

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Prevention – Overview



- Prevention of Liability
 - Auditing Paystubs
 - Arbitration Agreements
- Prevention of Lawsuit
 - Corrective action
 - Statute of Limitation
 - Happy employees
 - Severance

Step 1: Analysis of the Paystub CHEAT SHEET



- 1. Gross Wages
- 2. Total Hours worked unless exempt.
- 3. Piece rate units (if applicable)
- 4. All deductions
- 5. Net wages earned
- 6. Start and end of pay period
- 7. Name and last 4 digits of SSN (or employee #)
- 8. Name and address of the legal entity
- 9. All applicable hourly rates and the hours worked at that rate
- 10. Paid sick leave bank (7/1/2015)

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Step 1: Analysis of the Paystub



- DON'T automatically assume that the payroll company you hired is issuing your wage statements correctly.
 - You are the employer so liability for wage statement violations goes to you, not the payroll company.
 - Make sure who writes the contract provides accurate information regarding the company name, address, etc.
 - Written contracts with payroll companies often relieve them of liability, and may even require the employer to defend and indemnify the payroll company if it is named in the lawsuit.

Step 2: Arbitration Agreements



- Implementation of an arbitration agreement is one of the greatest tools to insulate a company from being subjected to a class action lawsuit.
- Background:
 - United States Supreme Court AT&T Mobility v. Concepcion, 563
 U.S. 321 (2011) upheld class action waivers.
 - Epic Systems (2018) mandatory class action waivers in arbitration agreements are enforceable and do not violate the National Labor Relations Act.
- But there are pros and cons, so this is not an automatic decision for every employer...consult with counsel.

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Arbitration Agreements



Iskanian v. CLS Transportation

- The California Supreme Court, however, also ruled an employee could not be required to waive his/her right to bring a representative PAGA claim on behalf of numerous employees.
 - United States Supreme Court has yet to take up this issue.

Why is Iskanian Important?



- Arbitration agreements can block an employee from bringing any and all class action claims, but *Iskanian* calls that into question regarding PAGA claims.
- It is unknown whether the United States Supreme Court will ever review the *Iskanian* rule and, if so, whether it will find that an employee can waive his/her right to PAGA.
- In the meantime ...

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The Mess



- Employers are left with a lot of questions and a mess that only benefits plaintiff's attorneys
- All cases now assert PAGA claims
 - What happens?
- Some cases only assert PAGA claims
- Cost Analysis
 - Defending arbitration (or several arbitrations) while a PAGA class claim is pending



Step 3: Lawsuit Prevention



- Corrective Action
 - Immediate change
 - No notice needed
 - May never know
- Short Statute of Limitation for PAGA Claims
 - The sooner the better
- Company Culture Happy employees
- Terminated Employees Severance Options





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