

Sacramento Breakfast Briefing

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

Presented by:
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Today's Agenda

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- 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

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THE CLAIM "DU JOUR"

What we are seeing

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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
Clerk of the Superior Court
By: Rachel Harmon, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO, CENTRAL JUDICIAL DISTRICT

CHRISTOPHER [REDACTED] on behalf of } CASE NO. [REDACTED]
10 himself and all others similarly situated, }
11 } **CLASS ACTION COMPLAINT**
12 } Plaintiff, }
13 vs. } **JURY TRIAL DEMANDED**
14 } [REDACTED] INC, a }
15 California Corporation, and DOES 1 through 500, }
16 } inclusive, }
17 } Defendant, }

18 Plaintiff CHRISTOPHER [REDACTED] (hereinafter referred to as "Plaintiff") by his
19 attorneys, individually and on behalf of all others similarly situated, allege upon personal knowledge
20 as to himself and his acts stated herein, and as to all other matters upon information and belief, as
21 follows:

NATURE OF ACTION

22 1. This is a class action for statutory penalties and injunctive relief on behalf of all
23 persons employed by Defendant [REDACTED] INC. (hereinafter
24 referred to as "[REDACTED]"), and DOES 1 through 500, inclusive, in the State of
25 California at any time from November 21, 2013 through the date of trial.

26 2. This lawsuit seeks collection of penalties for improperly itemized wage statements,
27 alleging causes of action for violations of the California Labor Code. As described more fully
28 below, Plaintiffs claim that [REDACTED] failed to comply with California labor laws by

- 1 -
CLASS ACTION COMPLAINT

FACTUAL ALLEGATIONS

17. [REDACTED] is a [REDACTED] based in San Diego,
3 California, specializing in [REDACTED] and [REDACTED]
4 [REDACTED].

18. Plaintiff [REDACTED] began his employment as an [REDACTED] on or about
6 June 15, 2014 and remains so employed at the time of filing of this Complaint.

19. Throughout the Class Period, [REDACTED] paid wages to [REDACTED]
8 and the Class on a weekly basis.

20. At the time of each payment of wages throughout the Class Period, [REDACTED]
9 [REDACTED] issued itemized wage statements to [REDACTED] and the Class which, among
10 other things, failed to accurately state the name and address of the legal entity that is the employer
11 and failed to accurately state all applicable hourly rates in effect during the pay period and the
12 corresponding number of hours worked at each hourly rate by the employee.

21. As a result of its practice of issuing improperly itemized wage statements, [REDACTED]
13 [REDACTED] has caused injury to Plaintiff and the Class.

**FIRST CAUSE OF ACTION ON BEHALF OF [REDACTED] AND THOSE
SIMILARLY SITUATED AGAINST ALL DEFENDANTS
(Failure to Provide Properly Itemized Wage Statements in Violation of the California
Labor Code)**

22. Plaintiff [REDACTED] and the Class hereby incorporate by reference and re-alleges
20 each and every preceding paragraph of this complaint as if set forth fully herein.

23. Pursuant to California Labor Code §§ 226, among other authority, an employer is
22 required to furnish each of its, his or her employees, either as a detachable part of the check, draft,
23 or voucher paying the employee's wages, or separately when wages are paid by personal check or
24 cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours
25 worked by the employee, (3) the number of piece-rate units earned and any applicable piece rate if
26 the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on
27 written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6)
28 the inclusive dates of the period for which the employee is paid, (7) the name of the employee and

- 2 -
CLASS ACTION COMPLAINT

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Wage Statements

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



- **A:** More than you think.

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Wage Statements

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- 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

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Recent Case Against Major Retailer

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- 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?

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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

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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.

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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.

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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.

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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.

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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



Labor Code Private Attorney General Act (PAGA):

- 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.

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EXAMPLES OF CLAIMED VIOLATIONS

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The [REDACTED]
[REDACTED]

Fed Marital Status: Single

Exemptions/Allowances
Federal: 3
Work In CA: 2


Earnings	Rate	Hours	This Period	Year-to-Date
Banquet Svc				\$412.6
Double Time				\$77.2
Float Holid				\$162.0
Holiday				\$406.2
Gratuit				\$28.0
Overtime Pay	14.58	0.12	\$1.75	\$0.0
Overtime Pay	14.64	0.11	\$1.61	\$0.0
Overtime Pay	15.27	5.01	\$76.50	\$0.0
Overtime Pay	15.33	0.03	\$0.46	\$1,187.6
PTD				\$326.2
Regular Pay	9.00	8.00	\$72.00	\$0.0
Regular Pay	10.26	32.00	\$328.32	\$0.0
Regular Pay	9.00	8.00	\$72.00	\$0.0
Regular Pay	10.26	32.00	\$328.32	\$16,978.34
TOTAL Earnings			\$880.96	\$19,976.34
Tax Deduction	Taxable Mages		Cur Tax Amt	YTD Tax Amt
CA Disability Emp	\$880.96		\$8.81	\$195.77
CA State Income T	\$880.96		\$4.76	\$127.49
Employee Medicare	\$880.96		\$12.78	\$283.89
Federal Income Ta	\$880.96		\$33.87	\$617.90
Social Security E	\$880.96		\$54.62	\$1,213.86
TOTAL Taxes			\$114.84	\$2,638.91
TOTAL EE Deductions			\$0.00	\$0.00

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██████████ Inc.
Street ██████████

Earnings Statement

Period Ending: 06/30/2014
Pay Date: 07/07/2014



Social Security Number: XXX-XX-██████
Taxable Marital Status: Married
Exemptions/Allowances: ██████████
Federal: 02
State: 02

██████████ LANE
██████████, CA ██████████


Earnings	rate	hours	this period	year to date	Important Notes
Regular	2291.6700		2,291.67		Rate Type: Salaried Employer Identification Nbr: ██████████
Gross Pay			\$ 2,291.67	2,291.67	

Deductions	Statutory	this period	year to date
	Federal Withholding Tax	203.75-	203.75-
	Social Security Tax	142.08-	142.08-
	Medicare Tax	33.23-	33.23-
	SDI Tax	22.92-	22.92-
	CA Withholding Tax	36.90-	36.90-
	Other		
	Net Pay	\$ 1,852.79	

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██████████ COMPANY, INC. • ██████████, CALIFORNIA 92071

PAY PERIOD: 11-17 to 11-23-14



E A R N I N G S									
DATE	JOB/DESC	HOURS			RATE	AMOUNTS			CHECK TOTALS
		REGULAR	OVERTIME	OTHER		REGULAR	OVERTIME	OTHER	
11-17-14			1.50		7.00				
11-17-14		9.50			14.00	133.00			
11-18-14			1.00		7.00		7.00		
11-18-14		9.00			14.00	126.00			
11-19-14			.50		7.00		3.50		
11-19-14		8.50			14.00	119.00			
11-20-14			.75		7.00		5.25		
11-20-14		9.75			14.00	136.50			
11-21-14	OffDay			8.00					
TOTALS:		36.75	3.75	8.00		514.50	26.25	.00	540.75

T A X E S						
	FED WH	SOC-SEC	MEDICARE	CAL-SWH	CAL-SDI	AZ-SWH
YEAR-TO-DATE:	5,400.13	2,089.05	488.57	1,942.78	336.94	
THIS PERIOD:	43.11	33.53	7.84	6.79	5.41	

OTHER DEDUCTIONS		
DESCRIPTION	YTD TOTALS	THIS PERIOD
		.00
		96.68

EMPLOYEE INFORMATION					
	YTD GROSS	VAC HRS	PEN HRS	RATE	WKLY PEN
██████████ EMP#:	33,694.35	.00			
EMPLOYEE SUPERVISOR					

Have a safe and happy Thanksgiving!

TOTAL DEDUCTIONS: .00

NET PAY: **444.07**

SAFETY ALWAYS COMES FIRST

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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.



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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.

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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.

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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

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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.*

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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.

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Why is *Iskanian* Important?

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- 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

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- 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



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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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The Fisher Phillips logo, consisting of the words "Fisher" and "Phillips" stacked vertically in white text on a red, ribbon-like background.

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Final Questions

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Thank You

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