

GOOD NEWS, BAD NEWS: APPEALS COURT CLARIFIES PENALTIES FOR VIOLATIONS OF WAGE ORDERS

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The California Court of Appeal, Fourth Appellate District, handed employers a mixed blessing in a recent case, holding that employees cannot make a Private Attorneys General Action (PAGA) claim based upon alleged violations of Industrial Wage Commission (IWC) Wage Orders. Rather, PAGA claims can only be based upon statutory rights.

The court also found that the “Penalty” provision found within IWC wage orders, permitting employees to seek penalties for violations of wage order provisions, was derived from the penalty provision found within Labor Code section 558 – and therefore, employees could not seek cumulative penalties from both provisions.

As an added bonus, the ruling holds that a court may reduce the amount of PAGA penalties awarded to an employee based upon discretionary factors other than the employer’s ability to pay. *Thurman v. Bayshore Transit Management, Inc.*

ON THE OTHER HAND ...

But it was not all good news for employers coming out of the *Thurman* decision. The Fourth Appellate District also clarified that employees could in fact seek penalties under Labor Code section 558 for alleged missed rest periods. Additionally, the court provided that employees, in certain circumstances, could seek the entire amount of alleged underpaid wages as penalties in a PAGA action. It is this last determination that could prove very troubling for employers as employees could now possibly seek double compensation for certain underpaid wages.

PAGA provides "any provision of *this code* [California Labor Code] that provides for a civil penalty ... for a violation of *this code*, may, as an alternative, be recovered through a civil action brought by an aggrieved employee...." (Emphasis added.) In *Thurman*, the employee tried to bring a PAGA claim for the alleged violation of California's rest period law. However, that law is not found in the California Labor Code, but rather in various regulatory IWC Wage Orders.

Accordingly, the *Thurman* court held that the employee's rest period PAGA claim was impermissible. Where a statutory Labor Code provision requires compliance with a regulatory IWC wage order provision – for example, Labor Code section 1198 prohibits longer work hours than those fixed by the applicable IWC wage order – an employee could *indirectly* seek penalties for that IWC wage order provision by making a PAGA claim *directly* asserting the Labor Code provision requiring compliance. However, an employee cannot *directly* assert an IWC wage order violation in a PAGA claim.

MORE GOOD NEWS

On a related issue, IWC wage orders include a "Penalties" provision which provides that, "*In addition to any other civil penalties provided by law, any employer or any other person acting on behalf of the employer who violates or causes to be violated, the provisions of this [IWC wage order], shall be subject to [a] civil penalty....*" (Emphasis added.) Based upon the introductory language of "*In addition to any other civil penalties provided by law,*" the plaintiff in *Thurman* sought penalties under this regulatory provision as well as penalties provided under Labor Code section 558.

However, as explained in the court's decision, the authority for the IWC wage order's "Penalties" provision is derived from Labor Code section 558. Indeed, the IWC itself provided in its "Statement as to the Basis" regarding its "Penalties" provision that, "[t]his section sets forth the provision of Labor Code § 558 which specifies penalties for initial and subsequent violations." In other words, seeking penalties under both the IWC wage order's "Penalties" provision and Labor Code section 558 would, in effect, be seeking penalties under Labor Code section 558 twice. As such, the *Thurman* court denied the IWC wage order penalties.

The *Thurman* decision also provides employers a victory by way of rejecting the plaintiff's contention that PAGA penalties may only be reduced if the employer cannot afford the maximum penalty amount. The Fourth Appellate District found that trial courts have the discretion to reduce the amount of a PAGA penalty if the maximum amount would be "unjust, arbitrary, oppressive and confiscatory."

In *Thurman*, the trial court reduced the PAGA penalty by 30% due to the employer's self-initiated compliance with the applicable law prior to the initiation of the lawsuit, and the employer's consistent compliance thereafter. Given these circumstances,

the *Thurman* court affirmed the trial court's finding that instituting the maximum penalty against the employer would have been unjust.

MORE BAD NEWS

Unfortunately for employers, the employee prevailed on two other significant points. First, the court found that an employee can seek penalties for alleged rest period violations under Labor Code section 558. Section 558 provides that "any employer or other person acting on behalf of an employer who violates, or causes to be violated, [Labor Code sections 500 through 558], or any provision regulating hours and days of work in any order of the [IWC] shall be subject to a civil penalty...." The employer in *Thurman* asserted that rest periods did not constitute "hours and days of work" because the IWC wage orders only include overtime and alternative work week provisions under the heading "Hours and Days of Work."

However, the court asserted that it was not bound by the IWC's use of that heading in rendering its own interpretation. Rather, citing the canon of interpretation that "statutes governing conditions of employment are to be construed broadly in favor of protecting employees," the *Thurman* court decided that rest period provisions – which require rest breaks based upon the number of hours worked by an employee – could be broadly construed as "regulating hours." Based upon this premise, the Fourth Appellate District determined that an employee could seek penalties under Labor Code section 558 for alleged rest break violations.

Finally, the court determined that the awards of unpaid wage amounts provided by Labor Code section 558 were considered "penalties" which could be recovered by an employee within a PAGA action. Again, PAGA allows employees to seek penalties set forth in the Labor Code. In turn, Labor Code section 558 provides that if an employer violates Labor Code sections 500 through 558, or any provision regulating hours and days of work in any IWC wage order, that employer is subject to the following penalties: 1) for "any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid *in addition to an amount sufficient to recover underpaid wages;*" and 2) for "each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid *in addition to an amount sufficient to recover underpaid wages.*" (Emphasis added.)

In *Thurman*, the employer argued that only the initial flat dollar amount was the actual penalty for which a PAGA claim could be made. The employer asserted that the "amount sufficient to recover underpaid wages" was not a penalty, but rather a restitution of wages not subject to a PAGA action. The Fourth Appellate District, citing dictum from a previous California Supreme Court case, disagreed. In *Reynolds v. Bement*, a 2005 case, the California Supreme Court determined that corporate

officers could not be held liable for unpaid overtime claims. In a footnote, the California Supreme Court then responded to a complaint by the Division of Labor Standards Enforcement (DLSE) that the ruling would pose an obstacle to recovering owed wages, advising that “pursuant to section 558, subdivision (a) any ‘person acting on behalf of an employer who violates or causes to be violated’ a statute or wage order relating to working hours is subject to a *civil penalty ... equal to the amount of any underpaid wages.*” (Emphasis added.)

Consistent with this advice, the *Thurman* court asserted that both the flat dollar amount and the underpaid wages amount was part of the penalty provided in Labor Code section 558 that could be recovered by an employee in a PAGA claim.

WHAT’S AHEAD

This final part of the *Thurman* decision may lead to further employment litigation and prove very troubling – and expensive – for employers. If the amount equal to the underpaid wages provided by Labor Code section 558 is considered a penalty rather than restitution of the underpaid wages, employees may seek to recover double what they are owed. For example, Labor Code section 510 requires premium wages for overtime work. If an employer fails to pay premium overtime wages to an employee due to accidental misclassification, pursuant to *Thurman*, that employee may attempt to seek the underpaid premium wage pursuant to Labor Code section 1194, plus demand that same amount again in the form of the penalty provided by Labor Code section 558. [\[1\]](#)

But employers might argue persuasively that, if this was the intent of the legislature, the language in Section 558 of the Labor Code would have been more explicit, such as where the Labor Code specifically awards “liquidated damages” in an amount equal to the wages unlawfully paid. Undoubtedly, despite strong opposition from employers, plaintiff attorneys in the near future may seek to pile on additional “penalty” damages for unpaid wages using Section 558 in addition to other remedies already available in the Labor Code’s more express language.

The critical lesson to be learned from appellate cases such as this is the old one that prevention costs less than the cure. Our advice: continue to be vigilant in complying with California’s wage-and-hour laws, including accurate timekeeping and meal-and-rest period compliance, and conduct frequent self audits to avoid liability from which all of these various penalties flow.

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[1] While employees typically need to pay the State of California 75% of any PAGA penalties received, the *Thurman* court determined that the employee was entitled to keep the entire “amount sufficient to recover underpaid wages” portion of the penalty.