The Aggressive Push For Broad New Interpretations Of California's Wage And Hour Laws

Insights
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The past several years have been a difficult time for many California employers when it comes to wage and hour compliance. But if enterprising plaintiffs' attorneys have their way, times will get even worse in the coming years. By examining what we have experienced in the recent past along with current trends shaping the future of wage and hour law, you can be ready to handle the expected onslaught of new claims that could be heading your way.

Quick History Lesson
Some pinpoint January 1, 2000 as the beginning of the modern struggle for California employers, when the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999" (AB60) became effective after daily overtime requirements had been briefly relieved. This law, signed by the much-maligned Governor Gray Davis, did much more than restore daily overtime. It added a variety of restrictions upon employers, such as introducing strict requirements for alternative work schedules, makeup time requests, and modifying standards for meal periods. Ironically, the new law left both employers and employees upset about a lack of flexibility.

PAGA: The Dawn Of A New Day
If that wasn't enough, the legislature passed the Private Attorneys General Act of 2004 (PAGA). This law incentivizes employees to file private actions against their employers for Labor Code violations by giving the employee 25% of the penalties successfully recovered. More significantly, prevailing plaintiffs are reimbursed their costs and attorneys' fees in prosecuting the action.

It turned out not to matter that PAGA gave judges authority to reduce the penalty, as the passage of the new law quickly became a losing proposition for employers. The statute mandates that some penalty be awarded to "aggrieved" employees, and any such award includes reimbursement of the employees' litigation costs and attorneys' fees.

Although plaintiffs' attorneys were already entitled to reimbursement for fees in recovering unpaid wages and overtime, PAGA sent opportunistic attorneys scrambling for new claims to file, allowing them an opportunity to earn massive attorney fee awards for technical violations of the Labor Code. Employers often contend that violations are not knowing or willful (for example, incomplete information on pay stubs, employee seating issues, allegedly late or interrupted meal periods, etc.), but to no avail.

As plaintiffs' attorneys became familiar with the new laws and opportunities for large fee awards, the result was a flurry of legal decisions that changed the landscape of California wage and hour law for good. The appellate courts became flooded with wage and hour cases on appeal, with some decisions adding more fuel to the legislature's new protections. Here are three monumental cases of which you should be aware, and one area ripe for new and troubling case law.

"Wage Mining" For Hours Worked And Minimum Wage

It is well settled that California law requires employers to keep a record of all hours worked, including the time a shift or meal period begins and ends. This ensures that all hours worked are properly itemized and accurately compensated, with rounding permitted only in limited circumstances. Additionally, virtually all employers know that employees should be compensated at the applicable minimum wage for every hour worked. You might assume that accurately recording time and paying at least the minimum wage on average for total hours worked would be enough to satisfy your legal obligations – but you'd be wrong.

Some plaintiffs' attorneys have successfully attacked employment agreements for purportedly failing to compensate their clients for small segments of work time. This is true even when the total pay, divided by all hours worked, results in an average rate which vastly exceeds the applicable minimum wage and fully complies with federal regulations. All things being equal, this often means you are paying your employees more for doing less work. The practice of carving up the work day in this manner has been called "wage mining," or "timecard fracking."

One of the most significant appellate decisions giving birth to this practice was a 2005 Court of Appeals case where the court held that employers must pay for each and every hour worked, rejecting an employer's practice of paying hourly rates of pay for some work but zero pay for other work. The message sent by this decision was that every hour deemed to be unpaid, regardless of the contracted-for rate of pay, gives rise to a minimum wage violation, among other things. This case has led to additional litigation addressing the question of whether piece rates can legally compensate employees for unproductive time and rest periods.

Precision Counts With Pay Statements

Nowhere in the country are more lawsuits filed regarding pay statements than in California. In our state, employers must provide a detailed listing of specific information to non-exempt employees on each pay statement. This statement must include, among other things, an itemization of all hours worked, all applicable rates of pay, all piece rates and units paid, gross and net wages (including deductions showing how you get to the net rate of pay), and identifying information for the employer and employee.

Plaintiffs' attorneys have been quick, but not always successful, in harvesting pay statement claims by attempting to drum up new categories not expressly required by the law. For example, in the 2016 case of *Soto v. Motel 6 Operating, L.P.*, decided just a few months ago, the court rejected an opportunistic PAGA claim alleging that the value of accrued vacation should be reported on all wage statements except for the one accompanying the final paycheck. While this attempt was

statements except for the one accompanying the final paycheck. While this attempt was unsuccessful, it demonstrates that plaintiffs' attorneys will scrutinize your pay statements closely and creatively, so you should be vigilant to ensure they are accurate.

Finding The Pressure: Meal And Rest Periods

Following more than a decade of expensive litigation regarding meal and rest periods, the California Supreme Court clarified the law with the 2012 case of *Brinker Restaurant Corp. v. Superior Court*. The court confirmed that you are not required to police your employees or force them to stop working during their 30-minute meal periods (however, if your employees choose to continue to work while off duty, and you suffer and permit them to do so, you must pay them for the time). This decision clearly undercuts the position taken by plaintiffs' attorneys and the enforcement position sometimes taken by the California Labor Commissioner.

However, it did not change the fact that employees and employers could agree to an on-duty meal period if the nature of the work prevented workers from being relieved of duty. Because the Supreme Court said in *Brinker* that employees could choose to use their meal period time to continue working, often without the employer facing penalties, it raised an entirely new type of inquiry. It now appears that employees can either work off duty during a meal period, which supposedly has no legal consequence as long as employees are paid for such time, or work on duty while on a meal period, which is permitted only in narrowly defined circumstances.

Compared to on-duty meal periods, which are governed by clear regulatory requirements, employees choosing to work during an off-duty meal period create a zone of liability previously assumed by plaintiffs' attorneys, but which could now conceivably be borne by employers. Plaintiffs' attorneys will continue their attempt to establish liability by contending that employees working during a purportedly off-duty meal period, or taking a short or late meal period, have done so under employer pressure and against their will.

The expensive fact-intensive inquiry involved to resolve this question will continue to force employers into monetary settlements short of a trial. For this reason, many employers now prohibit their employees from working during a meal period altogether and also prohibit time punches for meal periods which are short or late.

Similarly, plaintiffs' attorneys continue to attack employers by alleging they have not provided 10-minute rest periods to their workers, which must be permitted for every four hours of work or "major fraction thereof" (and in the middle of the work period if possible). Because rest breaks are on the clock and need not be separately recorded, employers often have difficulty proving they were provided to workers, especially in fast-paced environments. You should consider having employees sign affirmations regarding their receipt of rest breaks to help support your defense of any such claim.

(Note: Shortly before publication of this newsletter, the California Supreme Court issued a significant ruling on this issue of rest breaks. The December 22, 2016 decision in *Augustus v. ABM Security Services* now requires you to provide your workers with duty-free rest breaks or face

Security Services now requires you to provide your workers with duty-free rest breaks or face potentially devastating financial consequences. Click here or visit fisherphillips.com/resources to read a summary of the decision and some immediate actions steps for you to take.)

The Next Battlefront: Sick Pay Laws

As most now know, California passed a detailed sick pay law (effective in July 2015) requiring employers to provide all employees with 24 hours or three days of sick pay, with detailed rules for calculating the rate of sick pay and a requirement that the available balance be reported on an employee's pay statement. Local authorities across the state have passed their own sick pay laws with standards higher than statewide requirements. Just as with litigation arising from California's laws governing vacation pay, these new local laws will almost certainly give rise to increased employment litigation, including costly class actions.

What Should Employers Do?

The best way to "win" a wage lawsuit is by preventing it from happening in the first place. You should seek assistance from employment counsel to stay on top of litigation trends and to conduct internal audits to assure compliance with the law. Unless the courts and the California legislature stem the tide of restrictive wage and hour laws, you must be on guard to avoid liability for violations of existing law, and anticipate developments that could lead to new kinds of claims. It is increasingly important for you to train your human resources personnel and managers on these issues, while maintaining up-to-date and legally compliant employee handbooks.

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