Insights, News & Events

A BUMP IN THE ROAD FOR CALIFORNIA'S PIECE RATE EMPLOYERS

Court Denies Safe Harbor Postponement Request IMMEDIATE ACTION REQUIRED!

Insights
Jul 28, 2016

On Monday, July 25, 2016, the Fresno County Superior Court denied a request to postpone the deadline for qualified employers to notify the Department of Industrial Relations (DIR) of their election to participate in the affirmative defense, also known as the "safe harbor" provision, set forth in Labor Code §226.2. The request would have also extended the December 15, 2016 deadline to make back payments to current and former employees for rest and recovery periods and nonproductive time.

The decision is a blow to all California employers who pay workers on a piece-rate basis, and will require immediate action for all such employers by today's July 28, 2016 deadline (*Nisei Farmers League v. California Labor and Workforce Development Agency*).

Why Did The Court Deny The Application For A Preliminary Injunction?
Background information for those who are unfamiliar with the Nisei case is located here. In the case, an agricultural employer interest group filed a motion for a preliminary injunction, asking the court to block the rule from taking effect. A party who seeks a preliminary injunction must show that they are likely to prevail on one of their causes of action at trial. In the *Niesi* case, the plaintiff argued that Section 226.2 was void for vagueness and that it was an unconstitutional retroactive application of law.

The court dismissed both of plaintiff's arguments. First, the court stated that Section 226.2 does not impose any new

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obligations on employers that *Gonzalez v. Downtown LA Motors, LP* and *Bluford v. Safeway Stores, Inc.* did not already require (i.e., payment of applicable minimum wage for all unproductive time including rest periods), so the law governing the safe harbor back-wage payments would not have retroactive effect. Further, the court noted that the affirmative defense is optional, and the employer is free to either take advantage of it by making the back-wage payments or, in the alternative, argue that its employees are not entitled to any back pay under the law.

In sum, the court hinged its decision on its determination that plaintiff did not demonstrate that it could likely succeed on one of its causes of action at trial.

What's Next?
The preliminary injunction would have delayed both the deadline to sign up for the safe harbor provision and the December 15, 2016 deadline to make back payments to current and former employees, which qualified employers must do if they wish to use the affirmative defense. Since the preliminary injunction was denied, qualified employers must notify the DIR of their election to participate in the affirmative defense by **Thursday, July 28, 2016.** The deadline to make back payments is still December 15, 2016.

Note that the denial of this preliminary injunction does not mean the case is over; rather, it simply means that enforcement of the deadlines will not be blocked before the trial takes place. The plaintiffs will still proceed with the case and will try to obtain a permanent injunction to effectively overturn the law.

What Does The Ruling Mean For My Business?
Qualified employers who were waiting on the outcome of this hearing before they notified the DIR of their election to participate in the affirmative defense must act quickly: again, the new deadline is Thursday, July 28, 2016. This ruling will not have any effect on employers who have already notified the DIR of their election.

For interested parties who are keeping an eye on the *Nisei* litigation in hopes that the lawsuit may overturn Labor Code §226.2, the court's ruling is disappointing. It is safe to bet that plaintiff will not be able to prevail at trial on its arguments that the law is void for vagueness and unconstitutionally retroactive. Based on the court's initial evaluation in this most recent ruling, it has determined that

success on these issues is not likely. The case is not over, but this ruling represents a significant bump in the road to overturning this law.

The court made it a point to note that it has not made "any observations or rulings on the other causes of action contained in plaintiff's complaint." Again, the court only evaluated plaintiff's argument that the law is void for vagueness and is unconstitutionally retroactive, and plaintiff has other causes of action to present.

Still, the reasoning that the court applied to make the determination with respect to the causes of action that were briefed could also apply to other causes of action, and this ruling suggests that the court will not be easily convinced to overturn the law.

Those employers that were holding out on implementing new measures to comply with the law in hopes of the court overturning it need to adjust to the fact that the troubling status of piece rate law as a method of compensation is likely not going anywhere anytime soon. Thus, those employers should take steps to implement long-term solutions to ensure that they are complying with the law's requirements.

If you have any questions about this decision, or how it may affect your organization, please contact your Fisher Phillips attorney or one of the attorneys in any of our California offices:

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