

***Lessons Learned from CA's Wage and Hour Litigation:
What Everyone (including Lawyers) Should Know***

by Allen K. Hutkin

1. Public Policy Supports the Aggressive Enforcement of California's Labor Laws

"California has long regarded the timely payment of employee wage claims as indispensable to the public welfare" (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 82.) and "not merely the interest of the employee to whom the wages are due." *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1147. "[W]ages are not ordinary debts ... [;] because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due." (*In re Trombley* (1948) 31 Cal.2d 801, 809; *accord, Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 837.) "[T]he failure to timely pay wages injures not only the employee, but the public at large" (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400.) ""Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to others, and, in many cases may make the wage-earner a charge upon the public."" (*Smith v. Superior Court, supra*, at p. 82, quoting *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 326.) In short, workers' rights are human rights. By combating wage theft and protecting workers from retaliation, earned wages are put into workers' pockets and it helps level the playing field for law-abiding employers so they can thrive and compete. A business that cannot or will not comply with California's labor laws is not a viable business.

2. PAGA Is a Critically Important Law for Protecting Employee Rights

The purpose of the Private Attorneys General Act (PAGA) [Lab. Code § 2698 et seq.] is to protect employees' rights by increasing enforcement of the Labor Code by "deputizing" citizens to act as private attorneys general and allowing them to pursue civil penalties on behalf of the state for Labor Code violations. This private enforcement mechanism helps address the reality that labor enforcement agencies cannot keep up with the number of Labor Code violations occurring in workplaces. It benefits current and future employees by exerting significant pressure on employers to comply with California's worker protection laws.

PAGA authorizes aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations. For example, if a PAGA claim is brought on an unpaid overtime case, employees receive \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each aggrieved employee per pay period for subsequent violations. (Lab. Code, § 2699(f)(2).)

PAGA does not impart illegality on wage and hour violations (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 579), but rather creates a quasi-class action and provides for attorneys' fees. A PAGA action is a *representative* action. It is similar to a *class* action but does not require proof of ascertainability, commonality, or other class action elements (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 975); certification, notices, and opt-outs are not required (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal. App.4th 489, 503); and attorney's fees and costs are mandatory for prevailing employees (but not employers) (Lab. Code, § 2699(g)(1)). PAGA requires that 75 percent of the civil penalties recovered be paid to the Labor and Workforce Development Agency, with the remaining 25 percent going to the employee. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157, 1195). In order to plead a PAGA cause of action, an employee must exhaust administrative remedies and follow the requirements specified in Labor Code §§ 2698 - 2699.5.

3. Termination or Layoff Often Disclose Wage and Hour Violations

Employees who are secure in their employment are unlikely to contact a lawyer concerning wage and hour issues. An employee who has been terminated, or in some cases laid off, often contacts a lawyer. Given the many hours an employee spends working and relationships developed, separating from a job takes an emotional toll. Employees who are fired are angry and many feel they've been wronged and want to sue. They call a lawyer because they feel they were wrongfully terminated, discriminated against or harassed. But viable discrimination, harassment, whistle blower, and wrongful termination cases are rare. In most cases, the employer had good cause to terminate the employee, state and federal law do not offer redress given the facts, or the economics of the case (e.g., the employee found a higher paying job) do not support bringing a claim.

A firm will screen many cases before finding a discrimination, harassment, whistle blower, or wrongful termination case worth taking. But many employers fail to comply with California's wage and hour laws. Often, during the intake process for a wrongful termination or harassment claim we discover the employee was not paid correctly and is owed unpaid wages and penalties. In short, most wage and hour litigation is the result of a termination or layoff.

4. Common Ways Employers Violate California Wage and Hour Laws

A. Misclassification of Employees leads to Wage and Hour Lawsuits

Employers frequently misclassify employees as independent contractors or as otherwise exempt. By doing so, the employer avoids paying the employee for overtime, or for missed meal or rest breaks. An additional reason employers misclassify employees as independent contractors is that the employees are responsible for paying their own benefits, withholding their own social security taxes, and providing their own supplies to complete the projects they are hired to work on.

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Employers are required to maintain records of the hours worked by all employees. (Section 7(a)(3) of the applicable IWC Order.) If the employer fails to do so, the burden of proof shifts to the employer to prove that the employee did not work the claimed overtime. (*Amaral v. Cintas Corp. No. 2* 163 Cal. App.4th 1157, 1189.)

i. Misclassified as an Exempt Manager, Professional or Administrative Employee

Employees can be an exempt executive (manager) (Section 1(A)(1) of the applicable IWC Order), an exempt administrator (Section 1(A)(2) of the applicable IWC Order), or professional (Section 1(A)(3) of the applicable IWC Order). The employer bears the burden of proving the exemption. (*Hodge v. Superior Court* (2006) 145 Cal. App.4th 278, 281.) The employee's job title is not dispositive. (*In re United Parcel Serv. Wage & Hour Cases* (2010) 190 Cal. App. 4th 1001, 1015.)

The most common claimed exemption is the executive (manager). To qualify, the executive or manager must meet *all* of the following requirements: (1) have duties and responsibilities of managing the enterprise, department, or subdivision; (2) customarily and regularly direct the work of two or more other employees; (3) have authority to hire/fire other employees or have recommendations regarding hiring/firing, advancement, and promotion of other employees that are given particular weight; (4) customarily and regularly exercise discretion and independent judgment; (5) spend most of the work time on management duties; (6) earn a monthly salary of at least twice the state minimum wage. (Section 1(A)(1) of the IWC Order.)

ii. Misclassified as an Independent Contractor

California law presumes a person providing labor or service for remuneration is an employee, rather than an independent contractor. To dispute that presumption, the employer must demonstrate the presumed employee is an independent contractor under the "ABC test." [Lab.C. § 2775(b)]. Lab. Code, § 2775 provides that "[a] person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

- (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- (B) The person performs work that is outside the usual course of the hiring entity's business.
- (c) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." [emphasis added].

There are a number of exceptions to this rule set forth in the Labor Code. For example, this rule does not apply to those performing work under a contract for professional services (marketing, human resources, sale of travel, graphic design, grant writing, fine art, tax advice, payment processing, photography, photojournalism, videography, photo editing, freelance journalism, publishing, licensed barber or salon services, teaching an artistic "master class," appraisals, forestry). Lab.C. § 2778.

Nor does Lab.C. § 2775 apply to licensed insurance agents, certain health care professionals, certain professionals licensed by the State of California (lawyers, architects, landscape architects, engineers, private investigators, and accountants), registered or licensed securities brokers-dealers or investment advisors, direct salespersons, manufactured housing salespersons, commercial fishers working on American vessels, certain newspaper distributors and carriers, international exchange program providers designated by the State Department, and competition judges. [Lab.C. § 2783]

If this three-part test does not apply then the determination of whether someone is an employee or an independent contractor is governed by the California Supreme Court's decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*).

Under *Borello*, the primary test of whether the worker is an employee or an independent contractor is whether the employer/principal has the right to control the manner and means by which the worker accomplishes the work. (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 343-46.) Other factors include (1) whether the worker is engaged in a distinct occupation or business; (2) whether the work is usually done under the principals direction or by a specialist without supervision; (3) the skill required; (4) whether the principal or worker supplies the instrumentalities, tools, and place of work; (5) the length of time for which the services are to be performed; (6) the method of payment: whether by time or by job; (7) whether the work is part of the principals regular business; and (8) whether the parties believe they are creating an employer-employee relationship. (*Espejo, supra*, at p. 343.)

An employee who has been mis-classified as an independent contractor is entitled to missed meal and rest break premium wages (Lab. Code § 226.7(b)), overtime pay (Lab. Code § 510(a)), interest (Lab. Code, § 218.6), PAGA penalties (\$50 for the first violation and \$100 for each subsequent violation, for each pay period in which a violation occurred per Section 20(A) of the applicable IWC Order), and reimbursement of expenses (Lab. Code § 2802(a)). If the mis-classification resulted in the employee not being paid at least minimum wage for any work, the employer owes the difference in the amount paid and minimum wage and that amount is doubled (Lab. Code §§ 1194, 1194.2) plus a \$100 PAGA penalty for each underpaid employee for the initial underpaid pay period, plus \$250 for each underpaid employee for each subsequent underpaid pay period. (Lab. Code § 1197.1(a).) If the employee is no longer with the company, they may also be entitled to waiting time penalties. (Lab. Code, § 203(a).) An employer who engages in a pattern or practice of misclassification is subject to a PAGA penalty ranging from \$10,000 to \$25,000 per violation. (Lab. Code, § 226.89(c).)

An employee who has been misclassified as exempt (e.g., executive/manager) is entitled to missed meal and rest break premium wages (Lab. Code § 226.7(b)), overtime pay (Lab. Code § 510(a)), interest (Lab. Code, § 218.6), penalties (\$50 for the first violation and \$100 for each subsequent violation, for each pay period in which a violation occurred per Section 20(A) of the applicable IWC Order). If the employee is no longer with the company, they may also be entitled to waiting time penalties. (Lab. Code, § 203(a).)

B. Meal Breaks Are Frequently Not Provided Correctly or at All

A non-exempt (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1018) employee who works more than 5 hours is entitled to an unpaid meal break (*Id.* at p. 1034) of at least 30 minutes (*Ibid.*), uninterrupted by any work (*Id.* at p.1035), and the employee must be free to leave the premises (*Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal. App. 4th 968, 975, disapproved on other grounds by *Tidewater Marine W., Inc. v. Bradshaw*(1996) 14 Cal.4th 557). The employer's obligation is limited to relieving employees of all duty and permitting a reasonable opportunity to take a break, without impeding or discouraging them from doing so. (*Brinker, supra*, at p. 1040.) An employer is not required to police meal breaks or ensure that no work is performed. (*Ibid.*) Employees who work no more than 6 hours may mutually agree with the employer to waive the meal break. (Lab. Code, § 512(a)).

Non-exempt employees who work more than 10 hours are entitled to a second meal break. (*Brinker, supra*, at p. 1036-37.) However, employees who work no more than 12 hours, and did not waive the first meal break, may mutually agree with the employer to waive the second meal break. (Lab. Code, § 512(a)).

Although most employees take the meal break around the middle of the shift that is not required. The only requirement is that first meal period be provided no later than the end of the fifth hour and the second break no later than the end of the tenth hour. (*Brinker, supra*, at p. 1041.)

Employers are required to maintain records of meal breaks. (Section 7(a)(3) of the applicable Industrial Welfare Commission (IWC) Order.) If an employer fails to do so, the employer has the burden of proving that the employee was actually provided with disputed meal breaks. (*Amaral, supra*, at p. 1189.) Time records showing non-compliant meal periods give rise to a rebuttable presumption of meal period violations. (*Donohue v. AMN Serv., LLC* (2021) 11 Cal.5th 58.

An employee who was not provided with a proper meal break is owed premium wages of an extra hour's pay at the regular rate (Lab. Code § 226.7(b)), plus interest (Lab. Code § 218.6), penalties (\$50 for the first violation and \$100 for each subsequent violation, for each pay period in which a violation occurred per Section 20(A) of the applicable IWC Order). PAGA (Lab. Code, § 2698 et seq.) penalties, if pled, may also apply (see Lab. Code § 2698 et seq.). An employee can only collect for one missed meal break per workday. (*United Parcel Serv. Inc. v. Superior Court* (2011) 196 Cal. App. 4th 57, Fn. 10.), but can collect for both a missed meal break and a missed rest break in the same workday. (*Id.* at p.70.)

C. Rest Breaks are Frequently Missed

A non-exempt (*Brinker, supra*, at p.1018) employee, who works at least 3½ hours is entitled to a paid 10 minute rest break for every 4 hours, or major fraction thereof, of work (*Id.* at p. 1028). An employer must relieve employees of all duties and employer control with no "on-call" responsibilities during these periods. *Augustus v. ABM Security Service, Inc.* (2016) 2 Cal.5th 257. Also, the employer must make a good faith effort to provide the rest break in the middle of the work period. (*Brinker, supra*, at p. 1031.) A bathroom break does not count as a rest break. (http://www.dir.ca.gov/dlse/FAQ_RestPeriods.htm, #8) .

Employees who are not provided with a rest break are owed premium wages of an extra hour's pay at their regular rate (Lab. Code, § 226.7(b)), plus interest (Lab. Code § 218.6), penalties (\$50 for the first violation and \$100 for each subsequent violation, for each pay period in which a violation occurred per Section 20(A) of the applicable IWC Order) and, if the employee is no longer with the company, waiting time penalties (Lab. Code § 203(a)). PAGA penalties, if pled, may also apply (See Lab. Code § 2698 et seq.). An employee can only collect for one missed rest break per workday (*United Parcel Serv., supra*, at p. 57, Fn. 10.), but can collect for both a missed meal break and rest break in the same workday. (*Id.* at p. 70.)

D. Unpaid Prep and Cleanup Time Are Often Examples of Working Off-the-clock

If an employee begins work before clocking in, or keeps working after clocking out, and the employer knows about it or should know about it, the employee is entitled to be paid for that work. (*Morillion v. Royal Packing Co.*(2000) 22 Cal.4th 575, 584-85.) An employee receiving less than the legal minimum wage for all work is entitled to recover the unpaid balance of the full amount of this minimum wage compensation plus an additional equal amount as liquidated damages. (Lab. Code §§ 1194(a) and 1194.2(a).) For example, if an employer pays an employee only \$11.00 an hour rather than a \$13.00 minimum wage for a period covering 80 work hours, the lost wages would be 2 times 80 hours, or \$160, per the pay period. The employee would be owed an additional \$160 per pay period in liquidated damages. Additionally, the employer is subject to a \$100 penalty for each underpaid employee for the initial underpaid pay period, plus \$250 for each underpaid employee for each subsequent underpaid pay period. (Lab. Code § 1197.1(a).) Additional PAGA penalties, if pled, may also apply (see Lab. Code, § 2698 et seq.).

If an employee works off the clock they are entitled to unpaid regular and overtime (Lab. Code § 510(a) wages, liquidated damages (Lab. Code § 1194.2, plus interest (Lab. Code § 218.6), penalties (\$50 for the first violation and \$100 for each subsequent violation, for each pay period in which a violation occurred per Section 20(A) of the applicable IWC Order) and, if the employee is no longer with the company, waiting time penalties (Lab. Code § 203(a)). PAGA penalties, if pled, may also apply (see Lab. Code § 2698 et seq.).

E. Late Pay or Bounced Payroll

When an employee is fired (Lab. Code, § 201(a)) or quits giving the employer at least 72 hours' notice (Lab. Code, § 202(a)), the employee must be paid everything owed at the time the employment terminates. If an employee quits without such notice, the employer has 72 hours to pay the employee all amounts owed. (Lab. Code, § 202(a)). Paying wages with a bad check is illegal. (Lab. Code § 203.1.)

Waiting time penalties are one day's wages for every day the payment is late (Lab. Code § 203(a)) or until paid with a valid check (Lab. Code, § 203.1), up to 30 days. PAGA penalties, if pled, may also apply (see Lab. Code § 2698 et seq.).

F. Employers Failure to Reimburse Expenses Has Increased During the Pandemic

An employer is required to reimburse its employees for all expenses necessarily incurred in the

discharge of the employee's duties. (Lab. Code, § 2802(a)). This requirement cannot be waived. (*Stuart v. Radio Shack Corp.*(N.D. Cal. 2009) 641 F. Supp.2d 901, 902.) Nor does the employee need to seek reimbursement; it is automatically required that the employer pay the expense with interest whenever the employer knows or has reason to know the employee has incurred a reimbursable expense (*Id.* at 902-04)(Lab. Code § 2802(b). Reimbursable costs may include things like use of an employee's car (*Gattuso v. Harte Hanks Shoppers, Inc.*(2007) 42 Cal.4th 554, 563-64), office equipment, and cell phone. (*Takacs v. A.G. Edwards and Sons, Inc.*(S.D. Cal. 2006) 444 F. Supp.2d 1100, 1124-25).

5. One Way Attorney Fees Should Promote Early Settlement

As noted above, California has long regarded the timely payment of employee wage claims as indispensable to the public welfare. To encourage attorneys to represent employees, California law provides that the prevailing employee is entitled to recover reasonable attorney's fees and costs *if it is requested in the complaint* under Lab. Code §§ 226 for defective pay stubs, 1194(a), and 2699(g)(1) for minimum wage or overtime violations, and 2802 for the employer's failure to pay for all necessary expenditures or losses incurred by the employee in direct consequence" of the employee performing their job. If a PAGA claim is made, a prevailing employee (but not an employer) is entitled to recover reasonable attorney fees and costs. (Lab. Code, § 2699(g)(1).)

Small verdicts can generate large attorney fee awards. *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 419, fee award of \$1,095,202 on \$30,300 verdict; *Vo v. Las Virgenes Municipal Water District* (2010) 79 Cal.App.4th 440, 442-43, upholding \$470,000 fee award on \$37,500 judgment; *Muniz v. United Parcel Service, Inc.* (9th Cir. 2013) 738 F.3d 214, upholding \$697,971 fee award on \$27,280 judgment; *Beaty v. BET Holdings, Inc.* (9th Cir. 2000) 222 F.3d 607, fee award of \$376,520 on \$30,000 judgment; *Gomez v. Gates* (C.D. Cal. 1992) 804 F. Supp. 69, fee award of \$378,175 on \$44,000 judgment; *Wilcox v. City of Reno* (9th Cir. 1994) 42 F.3d 550, 557, fee award of \$66,535 on only \$1 of damages.

Many employers, particularly small employers, are angry when they get sued for failing to comply with wage and hour laws. Employers often complain that employees should be grateful to the employer for giving them a job. They rarely acknowledge the employee's service to the business. In many cases, employers spend more money fighting and eventually settling wage violations than they would have spent had they acknowledged and paid for the violations at the outset. Notwithstanding the anger and emotion, it's important to give employers a realistic evaluation of the case if the employer has misclassified, failed to pay overtime, failed to give breaks, etc.