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In an effort to minimize waste, the cases covered in this year’s Labor Seminar will not be included in these written materials. All cases will be sent with the digital materials by email following the seminars. If you wish to review any particular case in detail, please contact your Hanson Bridgett Labor & Employment attorney. Thank you.
<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>8:30 am – 8:50 am</td>
<td>Registration, Breakfast and Networking</td>
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<tr>
<td>8:50 am – 9:00 am</td>
<td>Introduction and Welcome Remarks</td>
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<td>New Employment Laws</td>
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<td>What’s New? How to Use and Manage Technology in the Workplace</td>
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<tr>
<td>10:05 am – 10:15 am</td>
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<td>Sexual Harassment in the #MeToo Era</td>
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<td>Hardships Just Got Easier and Other Employee Benefit Trends</td>
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<td>Managing From a Distance: The Challenges of Managing a Distributed Workforce</td>
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<tr>
<td>11:35 am – 12:20 pm</td>
<td>Lunch</td>
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<td>Discrimination &amp; Retaliation Case Developments</td>
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<td>Labor Mobilization and Traditional Labor Law Updates</td>
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<td>California Independent Contractor Classification</td>
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<td></td>
<td>Minimize Your Risk: 2018 Wage &amp; Hour Developments and How to Prevent Claims</td>
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Wage & Hour
Employer Must Pay for Requested Copies Of Pay Statements (SB 1252)

SB 1252 provides that employees have the "right to receive" a copy of their wage statements upon request. Employers may not require employees to make or pay for copies of their payroll records themselves. (See Lab. Code § 226.)

This section does not apply to public employers.

Minimum Wage Increases in 2019

<table>
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<tr>
<th>Effective Date</th>
<th>Employers with 26 or more employees</th>
<th>Employers with 25 or fewer employees</th>
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<td>$10.00 (no change)</td>
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<td>January 1, 2018</td>
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<td>January 1, 2019</td>
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<td>January 1, 2020</td>
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<td>January 1, 2021</td>
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<td>January 1, 2022</td>
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<tr>
<td>January 1, 2023</td>
<td>$15.00</td>
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Workplace Accommodation & Paid Family Leave

Expanded Obligations for Lactation Accommodation (AB 1976)

Employers must provide a space other than a bathroom and "in close proximity to the employee's work area," to express breast milk. AB 1976 authorizes a temporary lactation location if certain conditions are met, including that the temporary lactation location be used only for lactation purposes, and provides a narrow hardship exemption. (See Lab. Code § 1031.)

Note: an agricultural employer shall be deemed compliant if it provides a private, enclosed, and shaded space, including but not limited to, an air-conditioned cab of a truck or tractor.
Expanded State-Paid Family Leave Benefits for Military Families (SB 1123)

Beginning January 1, 2021, eligible employees are entitled to state-paid family leave benefits for time off to attend to a "qualifying exigency" related to the covered active duty of the employee's spouse, domestic partner, parent, or child in the armed forces. (See Unemp. Ins. Code §§ 3301, 3302.1, 3302.2, 3303, 3303.1, 3307.)

This is an appropriation bill, paid for by worker contributions to the Unemployment Compensation Disability Fund.

Human Trafficking Training
Human Trafficking Training for Operators of Mass Transit (AB 2034)

• Existing law requires specified businesses and establishments to post a Department of Justice-approved notice containing information relating to slavery and human trafficking. (See Civil Code § 52.6.)

Human Trafficking Training for Mass Transit, cont.

• By the end of 2020, specified business and establishments operating mass transit (intercity passenger rail systems, light rail systems, and bus stations) must provide at least 20 minutes of training to their employees regarding:
  – (1) The definition of human trafficking
  – (2) Myths and misconceptions about human trafficking.
  – (3) Signs that may indicate that human trafficking is occurring.
  – (4) Guidance on identifying individuals who are most at risk.
  – (6) Protocols for reporting human trafficking when on the job.
Human Trafficking Training for Hotel and Motel Employers (SB 970)

• By the end of 2019, hotel or motel employers must also provide at least 20 minutes of human trafficking awareness training and education to new and existing employees who are likely to come into contact with victims of human trafficking.
  – Such employees include employees who work in a reception area, perform housekeeping duties, help customers in moving their possessions, or drive customers.
  – After 2019, this training must be provided once every two years. (See Gov't Code § 12950.3.)

Training must include:
• (1) The definition of human trafficking and commercial exploitation of children.
• (2) Guidance on how to identify individuals who are most at risk for human trafficking.
• (3) The difference between labor and sex trafficking specific to the hotel sector.
• (4) Guidance on the role of hospitality employees in reporting and responding to this issue.
• (5) The contact information of appropriate agencies.
New Laws Impacting Construction Industry

PAGA Exemption for Certain Unionized Construction Industry Employees (AB 1654)

The Private Attorneys General Act (PAGA) will not apply to construction industry employees covered by a collective bargaining agreement which:

1. provides for a regular hourly pay rate of at least 30% more than the minimum wage and a premium wage for overtime hours worked;
2. expressly waives PAGA requirements;
3. prohibits certain Labor Code violations;
4. contains a grievance and binding arbitration procedure to redress alleged Labor Code violations; and
5. authorizes the arbitrator to award remedies available under the Labor Code. (See Lab. Code § 2699.6.)
Joint Liability for Construction Contractors and Subcontractors (AB 1565)

This bill made effective as of September 19, 2018.

- Repealed Labor Code 218.7’s provision that relieved direct contractors for liability for anything other than unpaid wages and fringe or other benefit payments or contributions, including interest.
- For contracts entered into after January 1, 2019, in order to withhold disputed payments, the direct contractor must identify, in its contract with the subcontractor, the specific documents or information that the direct contractor will require from the subcontractor.
- Subcontractors also may include the same requirements in their contracts with lower-tiered subcontractors and may withhold as disputed all sums owed, as specified.

Clarification on Salary History Ban (AB 2282)
Pre-Existing Law (Labor Code 432.3)

• Effective 2018, public and private employers are prohibited from requesting or relying on the salary history of an “applicant” as a factor in determining salary.
• Employers are required to provide to an applicant the “pay scale” for a position “upon reasonable request.”

New Definitions Added

• “Applicant” means an individual who is seeking employment and is not currently employed with that employer in any capacity.
• “Reasonable request” means a request made after an applicant has completed an initial interview.
• “Pay scale” means a salary or hourly wage range.
Clarifications

• Confirmed: Employer may ask an applicant about his or her “salary expectation” for the position.
• Confirmed: Employers can consider current employee’s existing salary as a factor to justify a wage differential as long as it is based on:
  – A seniority system;
  – A merit system;
  – A system that measures quality or quantity of production; or
  – A bona fide factor other than sex, race or ethnicity (e.g., education, training, or experience), consistent with a business necessity.

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The Future of Work

- “Roads?
- Where we’re going,
- we don’t need roads.”

– Dr. Emmett Brown (“Doc”) in Back to the Future

Where We Were - The Work Place Then
Where We Are - The Work Place Now

- Robots check in guests at Henn-na Hotel in Nagasaki.

Collaborative Robots - Cobots

- Helping employees do their jobs; performing some tasks and allowing them to do others.
- Labor union “Employees Switzerland” has had its first non-human member since December 1, 2018.
- By granting membership to a collaborative robot, unionists want to draw attention to unresolved issues in Industry 4.0.

Collaborative Robots - Cobots

Where We Are

Robot Sales Are Increasing, Including Cobots

HANSON BRIDGERTT LABOR & EMPLOYMENT SEMINAR
What are some of the issues facing employers as they automate and use AI?

Immediate impact probably a bit overstated, but you don’t want to be running to catch the train . . .

• Lay offs of employees
• Reassignment of employees
• Retraining of employees
• Collective bargaining issues for unionized employers
• Accommodation Issues – is use of a robot a reasonable accommodation?
• Can robots limit workers compensation claims?

AI – “1984” is Here

• Humanyze sells smart ID badges that can track employees around the office and reveal how well they interact with others.
• Contains blue tooth, microphones, infrared, motion sensors.
AI – “1984” is Here

• “He took his scribbling pad on his knee and pushed back his chair so as to get as far away from the telescreen as possible. To keep your face expressionless was not difficult, and even your breathing could be controlled, with an effort: but you could not control the beating of your heart, and the telescreen was quite delicate enough to pick it up.”
  – 1984 by George Orwell

Occupational Robotics Organizational Profile

Superior Performance
– Robot workers are simply better than people at precise and repetitive tasks
– With perfect memories, internet connectivity, and high-powered processors for data analysis, robots can also provide informational support beyond human capabilities.
  • Keep perfect record of project progress
  • Provide real-time scheduling and decision support
  • Have perfect recall
– Can complete dangerous tasks
  • Venturing into dangerous environments
  • Completing hazardous activities
Occupational Robotics
Organizational Profile

Managerial Cognitive Capabilities
• – Remind a team of deadlines, procedures, and progress

Operational Cost Reduction
• – Human employees cost money—30 to 40% more than salary in benefits
• – Costs barely $8 an hour to use a robot for spot welding in the auto industry, compared to $25 for a worker—and the cost savings gap is only going to widen.

Are You Ready?

"I'm sorry Dave, I'm afraid I can't do that"
CULTURAL CHANGES
#MeToo and #TimesUp

Sexual harassment cases have dominated headlines from 2016 to 2018 resulting in the #MeToo movement.

The #TimesUp movement has also sought to address ongoing gender disparities in equal pay, most publicly, between Hollywood actors and actresses.

Legal Claims

Legal Claims asserted and Laws implicated:

- **Tort Claims:**
  - Sexual harassment
  - Sexual assault
  - Wrongful termination

- **Federal Laws:**
  - Title VII
  - Title IX
  - Equal Pay Act

- **State Laws:**
  - Fair Employment and Housing Act
  - Fair Pay Act, Wage Equality Act
  - San Francisco “Pay Parity” law
Legal Claims

• Attorneys across the country agree that the volume of demand letters has increased since the Weinstein scandal.

• But on March 13, 2018, the EEOC reported that it has not seen a surge in sexual harassment claims between 2017 and 2018.

• And the percentage of EEOC sexual harassment claims settling at the EEOC claim stage is actually decreasing
  – Number of charges investigated by the EEOC remained the same between 2007-2017, but settlements at lowest in a decade: 9.4% in 2017, down from 11.4% in 2016.

NEW LAWS
New Laws – California

• SB826 – All *publicly traded* companies whose main executive office is in California will be required to have at least one woman director by the end of 2019. By 2022, boards with 6+ directors will be required to have at least three women.

• SB1343 – Mandatory anti-harassment training for supervisors now required for employers with just 5+ employees. Non-supervisory employees must also receive at least 1 hour of anti-harassment training every 2 years.

• AB1619 – Extends the statute of limitations for a civil sexual assault claim up to 10 years after the alleged assault or three years after the victim discovered the injury, whichever is later.

New Laws – California

• AB2770 – Modifies legal standard for defamation for both employees and employers.
  – Harassment victims not liable for defamation if making a statement to the DFEH or other administrative agency, as long as the statement is based on credible evidence and made without malice
  – Employers not liable for defamation when responding to reference requests from other employers by stating that an employee is not eligible for rehire based on employee’s prior acts of sexual harassment.

• SB224 – Expands existing liability for sexual harassment in non-employment relationships where the harasser holds them self out as being able to help the plaintiff establish a business, service, or professional relationship.
New Laws – California

• SB1300 – Significant amendments to the California Fair Employment and Housing Act (FEHA)
  – Single incident of harassing conduct sufficient to create a triable issue of fact if the conduct interfered with work performance or created an intimidating, hostile, or offensive work environment.
  – Adds additional personal liability if a harasser engaged in retaliatory behavior against anyone complaining of harassment or against any participant in an investigation or proceeding.
  – Makes it unlawful for an employer to require an individual to sign a release or nondisparagement agreement that denies the right to disclose information about unlawful acts in exchange for a raise, bonus, or continued employment.
  – 998 offers may not be used to shift the recovery of fees and costs to a prevailing defendant unless the court finds the action was frivolous.

New Laws – California

• SB820 – Prohibition on nondisclosure provisions in settlement agreements involving sexual assault, sexual harassment, or discrimination based on sex.

• AB3109 – Voids provisions in settlements that would prevent someone from testifying about alleged criminal conduct or alleged sexual harassment in an administrative, legislative, or judicial proceeding.
New Laws – Federal

• The Tax Cuts and Jobs Act was signed into law by President Trump on December 22, 2017, and took effect on January 1, 2018.

• The Act eliminates the ability of companies to deduct from their taxable income any “settlement or payment related to sexual harassment or sexual abuse” (including attorneys’ fees) if the settlement is subject to a nondisclosure agreement.

• The Act does not address whether a severance agreement for a departing employee falls within the scope of the new law.

PRE-CLAIM BEST PRACTICES
Pre-claim Best Practices

• Improve training
• Improve communication from management – top-down communication as often as possible that emphasizes:
  – a commitment to safe and respectful workplace
  – a willingness to take appropriate action no matter who is involved
  – no tolerance for retaliation
• Improve use of reporting channels
  – Make visible, provide alternatives, allow anonymous reporting
  – Consider implementing a third-party hotline

Pre-claim Best Practices

• Revamp policies
  – Clear investigation and resolution procedures that hold everyone accountable
  – Make clear who can bring complaints (e.g., including bystanders)
  – Give actual examples of inappropriate conduct
  – Consider implementing a separate workplace dating policy
• Conduct impartial, thorough, and timely investigations
• Male leadership “informal” reinforcement of policies and training
Informal Reinforcement of Policies

- Male “Backlash” to #MeToo Complaints and Issues
  - #NotAllMen
  - “Can I compliment a woman?”
  - “Can I ask a colleague out without getting in trouble?”
  - “Can I still joke around and have fun at work?”
  - “I’m just going to stop mentoring women. I can’t risk it.”
  - “When I travel for business, I’m going to keep my distance.”
  - “When I go out with the guys, we’ll just not invite the women.”

Voluntary Ending of Forced Arbitration?

- Dec. 2017 – Microsoft becomes first company to eliminate forced arbitration for sexual harassment claims
  - Microsoft’s Chief Legal Officer announces that the change is prompted specifically by the #MeToo movement
- 2018 – Google, Facebook, Uber, Lyft end forced arbitration
INVESTIGATIONS

Investigations in the #MeToo Context

- Common mistakes in investigation of #MeToo-like complaints
  - Arbitrary temporal parameters
  - “Relevant” information defined too narrowly
  - “Relevant” witnesses defined too narrowly
  - Ignoring former employees
  - Ignoring social media
A Note On Social Media

**Usage Stats as of 2016**

- **Tumblr** hosts over 280.4 million blogs and more than 8.5 billion posts in total.
- **Instagram** has 500 million active users, 95 million photos posted per day, and 4.2 billion daily likes.
- **Twitter** has 310 million monthly active users, 500 million Tweets sent per day.
- **Facebook** has 1.59 billion users.
- **LinkedIn** has 450 million registered users.
- **Pinterest** has 176 million users, of which 100 million are active users.
- **YouTube** has over 1 billion users, with 6 billion hours of video watched per month, 100 hours of video uploaded per minute.
- **Google+** has over 1 billion enabled accounts and more than 359 million monthly active users.

**Business Use of Social Media**

- Recruiting
- Employment candidate screenings
- Employee monitoring
- Litigation

- 84% of business recruit via social media
- 34% of employees use social media at work to take a mental break
- Over 3 million companies have created LinkedIn accounts, but only 17% of US small businesses use LinkedIn
- Only 20 Fortune 500 companies actually engage with their customers on Facebook, while 83% have a Twitter presence.

- 31% track employee use of social media; 43% block access on company computers and handheld devices.
- Top 3 groups in an organization to use social media: marketing 67%, HR 44% and PR 38%.
Social Media in Investigations

• Labor Code Section 980 – Employers are prohibited from requesting an employee or applicant:
  – Disclose a username or password for purpose of accessing personal social media
  – Access personal social media in the presence of the employer
  – Divulge any personal social media
• Retaliation against an employee for refusal to provide social media information is prohibited.
• Exception: Employers can request social media information reasonably believed to be relevant to an allegation of employee misconduct or violation of laws/regulations.
Training

Does it actually work??

June 2016 EEOC Select Task Force on the Study of Harassment in the Workplace – failed to find any evidence that the past 30 years of corporate training has had any effect on preventing harassment

Training

• Consider live training rather than online/computer-based
  – …and pick the right trainer!
  – Top-down reinforcement by executives at training
• Focus on the gray area
• Try to avoid legalese
• More storytelling
• Make training interactive
• Reinforce the actions that constitute “notice”
• Emphasize that the workplace is not the place for normative debate on #MeToo type of issues
• Include training on related issues, not simply satisfying the legal requirements of AB1825
  – Implicit/unconscious bias
  – Microaggressions
Training

- Microaggressions
  - Interrupting
  - “Mansplaining”
  - Being called nicknames in front of clients
  - Being referred to as one of “the Girls”
  - Assigning “administrative” duties
  - “When are you getting married/starting a family?”
  - “Are you going to breast feed?”
  - Gender-based compliments and critiques

LITIGATION ISSUES
Statutes of Limitation

- DFEH complaint must be filed within one year of the last alleged unlawful action (Govt. Code § 12960).
- Continuing violations doctrine - provided at least one of the acts occurred within the statutory period, the employer may be liable for an entire course of conduct, including acts predating the statutory period.
  - Similarity in the types of unlawful conduct
  - Reasonable frequency in conduct
  - Justification for not bringing charges sooner

“Unwelcome Conduct” in Hostile Work Environment Claims

- Increased social awareness of inappropriate conduct
- “Unwelcome” is not the same as “intentional”
- Conduct of a sexual nature can be presumed to be unwelcome and unwanted
- When is “consensual” not “consensual”?
  - Remember the power dynamic
“Me Too” Evidence

• Evidence showing the employer discriminated against similarly situated individuals other than plaintiff may be admissible to show a pattern or practice of discrimination against persons in plaintiff's protected class.

• Limitations
  – Same decision-maker
  – Same protected class
  – Normal hearsay rules

• But note… dissimilarities between the facts of a plaintiff’s and other employees' “me too" stories go to weight, not admissibility, of evidence.

#MeToo… Part 2?
#MeToo… Part 2?

“Diversity is being invited to the party; inclusion is being asked to dance.”

-Verna Meyers, Author and Activist

#MeToo… Part 2?

• Microaggression issues the same as for gender…
  – “You speak so well”
  – “No, where are you really from?”
  – “You don’t act like a ___ person”
  – “You people”
  – “Oops sorry, wrong person”
  – “I’m not racist, my friend/significant other is ___”
  – “I don’t see color” or “I don’t care if you’re black, white, green, etc.”
  – Touching hair without consent
  – Policing presence
• …but Company demographics may be worse
  – Tokenism
Employee Benefits Update

• Retirement Plan Updates
  – New Hardship Distribution Rules
  – Litigation Update
• Health Plan Updates
  – Current Status of the Affordable Care Act
  – New Trends in Employer-Provided Healthcare

Hardship Distributions

• Proposed regulations issued implementing changes effective January 1, 2019; plan amendment not required – yet
• Mandatory changes
  – 6 month prohibition on elective contributions eliminated
  – New standard to determine whether participant has other sources available to meet financial need
• Optional changes
  – Participants not required to take plan loan in advance of hardship distribution
  – Expand sources for hardships (QNECs and earnings)
• Broader list of “safe harbor” hardship events
Retirement Plans – Litigation Update

• 403(b) Plan litigation
  – High investment manager fees
  – High plan administration fees
  – Too many investment options

• Defined benefit plan litigation
  – Large corporate defined benefit plans targeted with class action lawsuits
  – Plaintiffs claim use of outdated actuarial assumptions result in participants who choose an optional form of benefit do not receive the actuarial equivalent of the plan’s default benefit

ACA Status

• Texas court decision declaring the ACA individual mandate unconstitutional and that the rest of the law cannot stand
• Notwithstanding the ruling, the ACA is in full force and effect with respect to employers – including the employer’s shared responsibility penalty

• The IRS has extended the deadline for furnishing Form 1095-C to employees from January 31 to March 4
• The IRS has not extended the deadline for filing Form 1095-C/1094-C with the IRS
Employer-Provided Healthcare: Trends

- Health Reimbursement Arrangements (HRAs)
- Telemedicine
- Direct contracting
- Value-based healthcare
- On-site clinics
- Emphasis on behavioral health benefits
- Increased use of technology to support healthcare choices

- **Public Agency Employers** - Wednesday, Feb. 13, 2019 [Register »]

- **Private Sector Employers** - Thursday, Feb. 14, 2019 [Register »]

- Questions? Please contact Amanda Proen at aproen@hansonbridgett.com
Trend Toward A More Distributed Workforce

- Over 40% of employees work in different locations from their coworkers at least some of the time
- Over 70% of projects are completed with at least one team member working from a different location
- Over 50% of managers say their companies are embracing the distributed workforce
- Over 75% of US workers prefer to do important tasks in places other than their normal office environment
- Over 80% of workers pledge more loyalty to their employers when allowed to work remotely
- Over 90% of remote workers plan to work remotely the remainder of their careers
Benefits of A Distributed Workforce

- Engagement
- Productivity
- Talent Recruitment
- Loyalty
- Reduces real estate costs

Potential Legal Issues

- Expense Reimbursement
- Pay for Travel Time
- Monitoring Hours Worked
  - Overtime
  - Meal / Rest breaks
- Health & Safety
  - Ergonomics
  - Accommodations
- Security / Data Breaches
EEOC Turns Up The Heat

- EEOC’s FY 2018 Statistics
- EEOC received over 554,000 calls and email and handled over 200,000 inquiries concerning potential discrimination claims
  - Launch of Public Portal resulted in 30% increase in inquiries and 40,000+ interviews
- Increased intake on discrimination and harassment claims
- EEOC website states that it “secured $505 million for victims of discrimination” including:
  - $354 million through mediation, conciliation, and settlements;
  - $53.5 million through litigation; and
  - $98.6 million for federal employees and applicants in hearings and appeals
EEOC's Flurry of Year End Lawsuits

- EEOC brought 87 new enforcement actions in September, the last month of its 2018 fiscal year
- Top four industries sued by EEOC in September 2018 (by number of lawsuits filed):
  - Health care and social assistance (18)
  - Retail trade (15)
  - Accommodation and food services (12)
  - Construction (7)
- Harassment topped the list, followed by disability discrimination

Disability Discrimination

- A stated EEOC enforcement priority is to steer employers away from policies that discriminate against workers with disabilities by not considering leave, or additional leave, as a potential job accommodation
  - The EEOC also faults inflexible "maximum leave" rules or requiring employees to show that they're 100-percent healed before returning to work
- Of the 36 end-of-year disability discrimination lawsuits the EEOC filed, at least 15 were brought on behalf of a worker or workers who allegedly faced discrimination when attempting to take disability-related leave or when returning to the job after a period of approved leave
- At least four of the disability bias filings include allegations of unlawful requests for workers' medication information or other prohibited medical inquiries or examinations
Employer Obligations Regarding Post-Offer Medical Examinations

_EEOC v. BNSF Ry. Co., Case No. 16-35457 (9th Cir. Aug. 29, 2018)_

- Ninth Circuit held that an employer violates the Americans With Disabilities Act of 1990 ("ADA") by demanding that a job applicant with a perceived disability pay the cost of medical testing prior to being deemed eligible for employment.
- Employer may not request a medical test at the applicants' cost only from persons with perceived or actual disabilities or impairments. In this situation, the employer is imposing an additional financial burden on a person with a disability because of that person's disability.

Increase in Pregnancy Discrimination Claims

- Accommodations for workers’ pregnancy-related disabilities
  - Federal court cases filed by pregnant workers alleging hazardous working conditions shows filings are on the rise and have almost doubled since 2015
  - XPO Logistics: Nearly 100 members of House of Representatives called for a congressional investigation following reports that XPO worked pregnant women to the point of miscarriage
  - Walmart and Target also face lawsuits for failing to accommodate pregnancy workers. Allegations include forcing pregnancy workers to lift heavy boxes, work with toxic chemicals in photo departments, and stand at cash registers without bathroom breaks
Pay Equity Trends


- Class-action lawsuit filed in Oregon federal court, claiming that Nike violated the Equal Pay Act by engaging in systemic gender pay discrimination and ignoring sexual harassment.
  - The former employees said that women who work for the company are paid less for doing the same work as their male colleagues, receive smaller bonuses, and are less likely to get promoted.
- Requests an order requiring Nike “to develop and institute reliable, validated, and job-related standards for evaluating performance, determining pay, and making promotion decisions.” Also requests a court-appointed monitor to make sure Nike complies with the plan, and an order requiring Nike to offer back jobs to the women who left because of the alleged discrimination.
**Rizo v. Yovino (9th Cir. 16-15372 4/9/18)**

- The court, in an en banc opinion, held that prior salary alone or in combination with other factors cannot justify a wage differential between male and female employees.
- Instead, salary differentials are limited to legitimate, job-related factors such as a prospective employee’s experience, educational background, ability, or prior job performance.
- The Court clarified that the “Equal Pay Act ‘creates a type of strict liability’ for employers who pay men and women different wages for the same work: once a plaintiff demonstrates a wage disparity, she is not required to prove discriminatory intent.”
- Decision is in line with California’s Fair Pay Act

**Difficulty in Certifying a Class**

  - Complaint alleged both violations of the EPA, as well as discrimination in promotions and pay in violation of FEHA
- LA Superior Court denied the plaintiffs’ motion to certify classes of all female and all African American non-exempt employees of Anthem Blue Cross California and related entities.
- Trial court concluded that neither of Plaintiffs’ experts had appropriately grouped together similarly situated individuals across the entire putative classes.
  - Plaintiffs’ experts grouped individuals by EEO job group, which assigned Anthem’s greatly varied jobs into only 10 categories, with over 80% of individuals falling into just one EEO job group (office and clerical).
- Court also faulted Plaintiffs’ second expert because (1) he only measured tenure by time at the company, rather than time in a position; and (2) he included outlier physician advisors earning over $180,000 in his model
- Court would have to conduct highly individualized assessments of each member of the putative class to determine liability, and Plaintiffs’ statistical models did nothing to cure the problem
California Pay Equity Task Force published guidance and approved resources for employer compliance with the state's equal pay laws, including:

- Guidance for employers on starting compensation
- Step-by-step wage rate evaluation template
- How to promote pay equity culture
- Infrastructure data tool
- Tips for compliance with Fair Pay Act

**Task Force’s Guidance for Employers on Starting Compensation**

- Includes a number of factors employers may consider in developing a compensation philosophy to ensure employees are paid in a fair and nondiscriminatory manner, such as rewarding employees for job performance and their contribution to the company, as well as gearing compensation toward employee-retention and motivation, market competitiveness, budget, and profitability.
- Also includes a number of recommendations for how employers may communicate with prospective employees without asking for prior salary information.
Task Force’s Step-by-Step Wage Rate Evaluation Template for Employers

- Determine whether employees are performing substantially similar work
- Compare the wage rate for employees performing substantially similar work
- Affirmative Defense: Identify Factors that Account for any Differences in Wage Rate
  - Seniority
  - Merit
  - Incentive/Production
  - Other Bona Fide Factors (education, experience, ability, geography, particular assignment)
- Taking Steps to Decrease Differences in Wage Rates

How to Promote a Culture of Pay Equity

- Increase diversity of applicant pool
- Remove bias from hiring process
- Train supervisors or managers
- Encourage employee communication
- Job classifications and descriptions
- New hire evaluations
- Consider removing negotiation from hiring process/lockstep salary bands
- Review/adjust incumbent pay
- Compensation reviews
- Increase diversity at senior levels and in compensation department
- Limit pay decisions
- Promote wage transparency/standardize compensation
- Design Fair performance evaluations
- Offer training and other accommodations
- Improve workplace flexibility/change subtle drivers of discrimination
- Design fair incentive compensation plans
- Offer paid parental/family leave for both women and men
- Parental leave policies
- Create a culture of equity
Task Force’s Infrastructure Data Tool

- This document can be found in Tab 3 of your materials.

Task Force’s Tips for Compliance with Fair Pay Act

- Ensure that you have access to reliable compensation information.
- Review Job Descriptions.
- Educate Managers.
- Document Compensation
- Systematize Compensation Factors.
- Consider Conducting an Audit.
- Do not retaliate
NLRB Board Composition

- The NLRB currently only has four of its five positions filled.
  - John F. Ring, Chairman
  - William J. Emanuel
  - Marvin E. Kaplan
  - Lauren McFerran

- Lauren McFerran is the last remaining Obama appointee on the Board.
Notable NLRB Moves In 2018

• Proposed New Rule To Overturn The *Browning-Ferris* Test
  – The NLRB's 2015 *Browning-Ferris* decision (362 NLRB No. 186) allowed a joint employer finding even where a company has only "indirect control" over another company's workers.

  – *Hy-Brand Industrial Contractors, Ltd.* (365 NLRB No. 156) overturned *Browning-Ferris* in 2017, but the decision was vacated just two months later due to conflict of interest concerns regarding Board Member William Emanuel's participation in the decision.

  – Under its September 2018 proposal, the Board will only find a business jointly employs another company's workers if it controls the "essential terms and conditions" of their employment, such as hiring, firing, discipline and supervision. This control must be "direct and immediate" rather than "limited and routine."

Notable NLRB Moves In 2018

• Possible "Purple Communications" Rollback
  – In *Purple Communications*, an Obama-appointed NLRB majority said that workers who use their employer’s email systems for work reasons should generally also be able to use them for union business too.

  – In August 2018, the Board put out a call for comment on rescinding or revising the Purple Communications rule, and invited briefs on whether to "adhere to, modify or overrule Purple Communications."

  – In September, the Ninth Circuit granted the NLRB’s request to stay oral arguments for the case (Case No. 17-71062) until the NLRB decides whether to keep or revoke the Purple Communications rules.
Notable Supreme Court Decisions Of 2018

- Mandatory agency fees for public sector employees ruled unconstitutional in Janus v. AFSCME, No. 16-1466.
  - The U.S. Supreme Court ruled in a 5-4 decision that the First Amendment prohibits public employees from being compelled to pay what are known as “agency fees” when they choose not to join their union.
  - Under the 1977 Abood standard, unions could charge non-members a fee for union expenditures for activities “germane” to the union’s collective bargaining activities (but not the union’s political and ideological efforts).
  - The Janus Court found that requiring payments to unions that negotiate with public agencies impermissibly compels workers to “subsidize the speech of . . . private speakers.”

Few Changes Post-Janus In California

- Governor Jerry Brown signed into law SB 866 the same day Janus was decided. SB 866 provides that:
  - Deductions for union dues may be requested by employee organizations and bona fide associations from salaries and wages of their members and public employers shall honor those requests.
  - Employee organizations must now certify to the public employer in writing that the employee organization has and will maintain an authorization, signed by the individual from whose salary or wages the deduction is to be made.
  - Any changes to, or revocation of, an employee’s individual authorization must be directed to the employee organization and not to the employer.
Surge In Employee Mobilization In 2018

• **Google Walkout, November 2018**
  – Google employees around the world staged walkouts to protest Management’s “blind eye” to sexual harassment and discrimination.
  – Protests took place in Google’s Mountain View, CA Headquarters, Singapore, Tokyo, Zurich, Delhi, Mumbai, Berlin.

Mobilization Among “Prospective” Employees Too

• **Kirkland & Ellis Boycott, November 2018**
  – Harvard Law students successfully launched the #DumpKirkland campaign to pressure the firm to drop its use of mandatory arbitration for employees.
  
  – “Don’t interview with Kirkland & Ellis until they promise to stop making any of their employees—no associate, paralegal, custodian, or contractor—sign these coercive contracts.”
  
  – Other firms such as Munger, Tolles & Olson, Orrick, and Skadden soon agreed to remove their mandatory arbitration clauses as well.
Employer Advice For A More Organized Workforce

• Remember, the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity is protected under Section 7 of the National Labor Relations Act (NLRA).
  – Employees may discuss wages, hours, and “other terms and conditions of employment” with their co-workers.
  – Employees may also take action with one or more co-workers to improve their working conditions by raising work-related complaints directly with their employer (or with a government agency).

• Be mindful to not interfere with, or retaliate against, employees engaged in collective action.
California Independent Contractor Classification (The ABC Test)

_Dynamex Operations West, Inc._

v.

_Superior Court_

_4 Cal.5th 905 (2018)_

_Dynamex Key Facts_

- *Dynamex* is a national courier and delivery service
- Drivers provide their own vehicles, pay expenses, taxes and provide workers compensation insurance
- Payment is by flat fee or percentage
- Drivers set schedules, and routes but must deliver daily
- Drivers can hire others and work for other companies
- Drivers set schedules
- Drivers set routes – but same day delivery required
- Termination without cause
CASE BACKGROUND

- Class action lawsuit
- Trial court certifies a class
- Issue on class certification
- What legal standard applies under the applicable wage order to determine employee or independent contractor status

**Borello**

**Legal Standard**

- *S.G. Borello & Sons v. Dept. of Industrial Relations* (1989), 48 Cal.3d 341
- *Borello* determines employment status for workers compensation
- Common Law “control” test and secondary factors
- Statutory purpose analysis
- *Borello* has been seen as overall articulation of employee/IC determination
**Martinez Joint Employer Legal Standard**

- *Martinez v. Combs (2010), 49 Cal. 35*
  - Joint employer case
  - Interprets terms “employ” and “employer” under the California Wage Order
  - Three alternative definitions for employment
    a) To exercise control over wages, hours or working conditions or control wages, hours, working conditions, or
    b) To “Suffer or Permit” work, or
    c) To “Engage” thereby creating common law employment relationship (*Borello*)

**FIRST MAIN HOLDING “Suffer or Permit”**

- *Dynamex* argues *Borello* standard should be applied to wage orders
- Court holds “Suffer or Permit” standard applies to all wage orders
- “Suffer or Permit” goes beyond application only to joint employment
SECOND MAIN HOLDING-THE ABC TEXT
The Adoption of the ABC Test

• “The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions:
(a) That the worker is free from the control and direction of the hirer in connection with performance of the work, both under the contract for the performance of the work and in fact; and
(b) That the worker performs work that is outside the usual course of the hiring entity’s business; and
(c) That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.”

ABC TEST
Prong B

• Rejects the economic reality test
• Requires proof the independent contractor “would not reasonably have been viewed as working in the hiring business
• Uses plumbers and electricians as examples of independent contractors
• The burden of proof squarely rests on the hiring entity to prove IC status
QUESTIONS

• The ABC test applies to wage orders but apparently not workers compensation, unemployment
• Arguably does not apply to unemployment compensation, workers compensation or Labor Code § 2802
• Curry v. Equilon Enterprises, 23 Cal.App.5TH 389 (May 2018)
  – Joint employment case
  – Court applies ABC test
Brief Overview – Part One

• Labor Agencies Top Targeted Areas

• Some good news for employers about rounding:
  - Donohue v. AMN Servs, LLC
  - AHMC Healthcare, Inc. v. Superior Court

• Wage Statement Issues

• Questions on the Horizon for the Cal. Supreme Court

• Don’t Forget Alvarado v. Dart!

What Are The Labor Agencies Targeting?

• CA Labor Commissioner press release (01/09/19)
  – Labor Commissioner seized $1.7M in employer’s assets to pay 56 employees
  – Citations totaled more than $2.1M in alleged unpaid wages, liquidated damages & civil penalties for claimed violations of:
    • Minimum wage
    • Overtime pay
    • Meal break/rest break
  – Payments owed to the 56 employees range from $2,603 to $150,523, with an average of $37,246 awarded to each worker
By Contrast…

• U.S. Dep’t of Labor press release (01/11/19)
  – U.S. Dep’t of Labor recovers $49,269 for 21 employees
    • Overtime pay violations

• Why the exorbitant cost of doing business in California?
  – Complex set of wage and hour rules under state law Labor Code
  – Severe penalty structure
  – Private Attorneys General Act (PAGA) allows employees to pursue steep penalties on behalf of themselves and others

Some Good News for Employers: Rounding Policy Is Permitted

Timekeeping Practices

• Employee should record exact start and stop times

• But employer is allowed to “round off” employee’s starting and stopping times to the nearest 5 minutes or nearest one-tenth or one-quarter of an hour only if the practice averages out over a period of time

• Must not result in failure to compensate employee for all time actually worked

• What does this mean?
  – Court of Appeal issued two decisions in 2018 to clarify that rounding is permitted under state and federal law
Some Good News for Employers: Rounding Policy Is Permitted

*Donohue v. AMN Servs, LLC.*, 29 Cal.App.5th 1068 (11/21/18), modified (12/28/18)

- Employer’s policy rounded to nearest one-tenth of an hour; policy upheld
- Rounding policy must be fair and neutral on its face and in its application
- What is a “fair and neutral” policy?
  - If “‘on average, [it] favors neither overpayment nor underpayment’ ”
  - Cannot have a policy if it “encompasses only rounding down”
- Court is to look at how often the application of the rounding policy results in rounding up and rounding down
  - Note: Defense expert analyzed more than 500,000 time punches and found that practice of rounding to nearest 10-minute increment resulted overall in “a net surplus of 1,929 work hours” in paid time for employees

Some Good News for Employers: Rounding Policy Is Permitted

*AHMC Healthcare, Inc. v. Superior Court*, 24 Cal.App.5th 1014 (06/25/18)

- Employer’s policy rounded to nearest quarter of an hour; policy upheld
- Rounding system must round all time punches without regard to whether the employer or the employee will benefit from the policy
  - If employees clocked in between 6:53 and 7:07, they were paid as if they had clocked in at 7:00
  - If employees clocked in between 7:23 and 7:37, they were paid as if they had clocked in at 7:30
- Defense expert analyzed all shifts over 4-year period
- Employer’s practice resulted overall in employees having gained compensable time (overcompensation), so policy upheld even though some employees lost time over a certain period of time
Final Pay for Quitting Employees

• Labor Code §202:
  – “If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.”

• Employee submitted resignation by e-mail on a Friday evening
  – When does the 72-hour period start? Matter of first impression.
• Held: 72-hour period did not begin as soon as employee sent e-mail
  – Court punted on issue of whether time period was triggered on Saturday, when bookkeeper read the e-mail, or on Monday (next business day) because check was timely in either case

Wage Statement Obligations: Discharged Employees

• Labor Code §226:
  – “An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee…”

• No violation by not providing wage statement at time of termination

• Permissible to mail wage statement to discharged employees by the same day or the next day after termination because employee was “furnished” with the wage statement semimonthly
  – Note: Discharged employees were given final paycheck on day of termination
Derivative Wage Statement Claims?


- Plaintiff brought claim for overtime pay based on improperly adopted AWS

- Plaintiff also sought penalties for alleged “inaccurate wage statements” based on theory that wage statement was inaccurate because pay was inaccurate (because overtime pay allegedly was owed)

- Court of Appeal rejected claim for wage statement penalties because paystub accurately reflected compensation that actually was received.
  - **Note:** CA state trial courts so far have been reluctant to dismiss derivative wage statement claims on the pleadings because *Maldonado* was a post-trial appeal, but this issue likely will gain more traction.

Minimizing Risk of Wage Statement Claims: Refresher on Requirements

**Labor Code §226(a):**

(1) Gross wages earned

(2) Total hours worked by the employee

(3) Number of piece-rate units earned and applicable piece rate if employee is paid on piece-rate basis

(4) All deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item

(5) Net wages earned

(6) Inclusive dates of the period for which the employee is paid

(7) Name of employee and only the last four digits of his or her social security number or an employee identification number other than a social security number

(8) Name and address of the legal entity that is the employer, and

(9) Applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee and, beginning July 1, 2013, if the employer is a temporary services employer as defined in Section 201.3, the rate of pay and the total hours worked for each temporary services assignment.
What’s Coming Down The Pike on Labor Code Issues

_Oman v. Delta Airlines, 889 F.3d 1075 (9th Cir. 2018)_
Certified the following 3 questions of state law to CA Supreme Court:

• (1) Do California Labor Code §§ 204 and 226 apply to wage payments and wage statements provided by an out-of-state employer to an employee who, in the relevant pay period, works in California only episodically and for less than a day at a time?

• (2) Does California minimum wage law apply to all work performed in California for an out-of-state employer by an employee who works in California only episodically and for less than a day at a time?

• (3) Does California’s bar on averaging all hours worked in any work week to compute an employer’s minimum wage obligation apply to employer’s pay formula that generally award credit for all hours on duty, but which, in certain situations resulting in higher pay, do not award credit for all hours on duty?

Reminder!

- And for those who missed our July Labor Seminar Update:

  - _Alvarado v. Dart Container Corp. of California_ (April 25, 2018): Cal. Sup. Court decided how to calculate the regular rate when an employee receives a flat sum bonus –

    - the employer must divide the total amount of compensation by the number of regular hours worked – excluding overtime hours.
Overview – Part II

1. What’s New With PAGA?

   – *Huff v. Securitas Security Services USA, Inc.* – holds one wage statement violation is good enough to represent any violation.

   – *Carrington Starbucks Corporation (December 19, 2018)* - holds meal period policies *and practices* must demonstrate compliance with California law – don’t let *Brinker’s* “opportunity” language lull you into lax practices.

Agenda

2. FLSA Update:

   - De Minimis Test – Just about gone in California after *Troester v. Starbucks Corporation* – what does this mean for employers?


   - DOL Opinions Are Back – a good starting place for answers to compliance questions.
3. **Class Action Waivers** – The Saga Continues.

   - United States Supreme Court rules mandatory class action waivers in arbitration agreements are valid. Where do we go from here?

4. **Gerard, et al. v. Orange Coast Memorial Medical Center** (December 10, 2018) – The Saga is Over.

   - After a ten year battle, the California Supreme Court rules voluntary meal period waivers are permissible for healthcare employees who work long shifts, even if they work more than 12 hours.
1. **PAGA: Huff v. Securitas Security Services USA, Inc.**

- A plaintiff who brings a representative action under the Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698, et seq.) may seek penalties not only for the Labor Code violation that affected him or her, but also for different violations that affected other employees.
- PAGA allows an “aggrieved employee” — a person affected by at least one Labor Code violation committed by an employer — to pursue penalties for all the Labor Code violations committed by that employer.

1. **PAGA: Carrington v. Starbucks**

- A barista who worked at Starbucks for less than five months successfully brought a representative action under the Private Attorney General Act (“PAGA”).
- Plaintiff sought nearly $70 million in total penalties arguing she did not get compliant meal periods.
- Starbucks had a scheduling system that did not schedule a meal break for a partner scheduled to work exactly five hours or less in a workday. If that partner did work over five hours, the "slightly more" policy applied and the decision to pay a premium is ultimately left to the store manager’s discretion.
Carrington v. Starbucks Corporation

• What did the court say?
  – Confirmed class action requirements don’t apply to PAGA.
  – Found substantial evidence of failure to pay premium pay essentially proven by one management witness, an expert and the plaintiff.
  – Good Faith Compliance helps - The court, recognizing Starbucks had made “good faith efforts” to comply with the law, lowered the $50.00 penalty per violation to $5.00 for a totally recovery of $150,000 (approximately 30,000 violations).

Carrington v. Starbucks Corporation

• What did the court say? (cont’d)
• No possible de minimis defense - Starbucks argued that any time worked by employees beyond their scheduled five hour shift was de minimis and should be disregarded. The court disagreed - because the employees’ work time was not administratively impossible or impractical to record.
• Plaintiff suffered two meal period violations.
• Lessons? Strict compliance with meal break requirements.
PAGA For Employers

- *California Business & Industrial Alliance v. Xavier Becerra* (December 2018) Orange County Superior Court: CBIA brings action seeking a declaration that PAGA is unconstitutional – “transferring the state's power to private attorneys who operate for their own personal gain.”
- Complaint lists plaintiffs lawyer groups and the amount of PAGA letters they submitted to the LWDA.
- Stay tuned . . .

2. The Fall of the FLSA De Minimis Test

- What is the FLSA De Minimis Rule?
  
  - “In recording working time under the FLSA, infrequent and insignificant periods of time beyond the scheduled working hours, which cannot as a practical matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such periods of time are de minimis (insignificant). This rule applies only where there are uncertain and indefinite periods of time involved, a few seconds or minutes in duration, and where the failure to count such time is justified by industrial realities. As noted below, an employer may not arbitrarily fail to count any part, however small, of working time that can be practically ascertained.” See [https://webapps.dol.gov/elaws/whd/flsa/hoursworked/screeene29.asp](https://webapps.dol.gov/elaws/whd/flsa/hoursworked/screeene29.asp)
The Fall of the De Minimis Test

*Troester v. Starbucks*: What did the Court Say?

“We hold that the relevant California statutes and wage order have not incorporated the de minimis doctrine found in the FLSA.”

We further conclude that although California has a de minimis rule that is a background principle of state law, the rule is not applicable to the regularly reoccurring activities that are principally at issue here. The relevant statutes and wage order do not allow employers to require employees to routinely work for minutes off the clock without compensation.
The Fall of the De Minimis Test

*Troester v. Starbucks*: What did the Court Say?

We leave open whether there are wage claims involving employee activities that are so irregular or brief in duration that employers may not be reasonably required to compensate employees for the time spent on them."

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No Narrow Construction of “Exempt”

Some good news:

No Narrow Construction of “Exempt”

• **Encino Motorcars, LLC v. Navarro (cont’d)**
  • (5-4 decision): Reversed the Ninth Circuit on a salesperson exemption -
    – “The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. 845 F. 3d, at 935–936. **We reject this principle as a useful guidepost for interpreting the FLSA.**” (slip op., at 9)

• **Encino Motorcars, LLC v. Navarro (cont’d)**
  – “the FLSA has over two dozen exemptions in §213(b) alone, including the one at issue here. Those exemptions are as much a part of the FLSA’s purpose as the overtime-pay requirement. See id., at ___ (slip op., at 9) (“Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage”). **We thus have no license to give the exemption anything but a fair reading.**”

...
DOL OPINION LETTERS

• In 2018, the DOL issued nearly 30 Opinion letters on wage and hour issues. Here are a few examples:
  - Compensability of travel time
  - Salary deductions for full-day absences based on hours missed and section 13(a)(1) salary basis
  - Compensability of frequent rest breaks required by a serious health condition
  - Minimum wage and overtime compliance for employees with varying average hourly rates

See https://www.dol.gov/whd/opinion/guidance.htm

3. Arbitration – To Do Or Not To Do?

• Epic Systems Corp. v. Lewis, 584 U.S. ___ (2018). A win for employers, yes, but sophisticated complex departments in state courts and federal courts familiar with class actions probably have a much better handle on some of the complex expert issues that arise than arbitrators.

• Is this your best forum? And, if so, with or without a class action waiver, how to educate the arbitrator?

• And, remember – you cannot require an employee to arbitrate PAGA actions.
Arbitration – To Do Or Not To Do?

Are you prepared for thousands of single arbitrations?

*Turner et. al v. Chipotle Mexican Grill* – FLSA collective action claiming that closing shift workers had to work after the time keeping system automatically timed them out.

- On August 3, 2018, the federal court dismissed from the collective action approximately 2,800 plaintiffs because they were subject to a mandatory arbitration agreement that barred them from pursuing their wage claims in court.
- On November 30, 2018, the court denied Chipotle’s request for a stay.

4. Gerard: Waiving Second Meal Period

- Case began in 2008 and involves the Wage Orders v. the Labor Code with a final win for employers.
  - Labor Code section 512(a)) states in relevant part: “An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.”
4. Gerard: Waiving Second Meal Period

- **Section 11 of Wage Order No. 5** of the Industrial Welfare Commission (IWC) permits, with respect to health care employees: "Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods."

- Relying upon the Wage Order, employer/hospital policy allowed health care employees who worked shifts longer than 10 hours caring for patients to voluntarily waive one of their two meal periods, even if their shifts lasted more than 12 hours.

4. Gerard: Waiving Second Meal Period

- Plaintiffs claimed that the IWC order permitting them to waive second meal periods for shifts greater than 12 hours violated the Labor Code and that the employer hospital owed them back wages and penalties for unlawfully permitting them to waive the second meal period.
4. Gerard: Waiving Second Meal Period

- Court holds: **IWC order does not violate the Labor Code.**

- In its holding, the court does interpret the regulatory language favorably toward employers and waivers of meal periods.

- **Strange bedfellows** – the Service Employees International Union Local 121RN supported the employer/hospital's position
I want to perform a gender pay equity analysis
California law requires that employers pay women and men doing substantially similar work the same wage rate. To comply, businesses may want to evaluate the jobs their employees do and compare wages by gender:

- Collect the right data
- Identify employees doing substantially similar work [LINK TO STEP BY STEP]
- Compare wage rates for employees of the opposite sex
- Determine reasons for any differences in pay
- Remedy any disparity that cannot be justified based on a seniority or merit system, a system that measures earnings by quality or quality of production, or another bona-fide factor that is job related and necessary for the business such as education, training, experience, or the geographical location of the employee and cost of living in that area.

Collect the right data
Beginning a pay equity analysis means having the right information to analyze. Generally, this means collecting information about employees, jobs, business/company practices, market data, and salaries, though the size of your business may impact what you collect and what makes sense to collect.

For employers of all sizes, retaining information to perform a pay audit will help you to:
- Establish and/or change existing management practices
- Ensure that sufficient data for a pay equity analysis are captured and stored in an accurate manner with appropriate retention schedules
- Analyze and take action on pay equity data.

The chart below summarizes infrastructure and data that would be useful in conducting a pay equity analysis. These may not always apply based on industry or employee population. There may be other data points that may be relevant that may not be listed here. While not explicitly required by law, this data may facilitate compliance with the law.

<table>
<thead>
<tr>
<th>Function</th>
<th>Description</th>
<th>Pay Equity Data</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Human Resources Management System</strong></td>
<td>o Time in Company o Time in Position o Pay Rate History (including Starting Salary) o Gender o Race/Ethnicity o Employee Job History, Management Level History, Location History, Compensation History o Geographic Salary Ranges reflecting external experience o Team Size (total team size and direct)</td>
<td>Basic Desirable</td>
</tr>
<tr>
<td>Payroll</td>
<td>o Payroll Data o Earnings o Hours Worked</td>
<td>✓</td>
</tr>
<tr>
<td>Time and Attendance</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Talent Management</td>
<td>o Talent assessment data o Accomplishments; Performance against o Goals/Objectives o Long-Term Career Potential (High Potential or Key Role); Training &amp; Development Positions; o Employee Profiles (internal/external employment history, experience, institutional o Competency assessment o Succession planning o Scope of Role - Budget P&amp;L Responsibility, Complexity of channels, geographies</td>
<td>✓</td>
</tr>
<tr>
<td>Recruiting / Talent Attraction</td>
<td>o Job Profiles/Descriptions o Candidate Resumes</td>
<td>✓</td>
</tr>
<tr>
<td>External Market Data</td>
<td>o Salary Survey analysis o Salary Surveys with benchmark jobs</td>
<td>✓</td>
</tr>
<tr>
<td>Company Practices**</td>
<td>o Definition / Statement of Compensation Strategy (Pay for Performance; Pay for o Definition of Recruiting Practices (Prior Salary; Blind Resume; Documentation of compensation)</td>
<td>✓</td>
</tr>
<tr>
<td>Internal Job Structure Data</td>
<td>o Job Functions / Job Families o Career leveling matrix indicated breadth and</td>
<td>✓</td>
</tr>
</tbody>
</table>

Notes:

A While the definitions of “small” and “large” employers vary depending on the context, the pay equity data are categorized as basic and aspirational to illustrate the desired data elements to establish equitable pay practices and to be able to conduct pay equity audits.

SB 1067 expanded Labor Code Section 1197.5 to cover race and ethnicity. Include Non-Reported vs. Opt-
New FEHC National Origin Discrimination Regulations

The California Fair Employment and Housing Council (FEHC) issued new regulations under California’s Fair Employment and Housing Act (FEHA) addressing national origin discrimination. Effective July 1, 2018, the regulations provide a broad definition of "national origin" and apply to applicants and employees, regardless of documentation status. The regulations impact employment practices such as English-only policies, English proficiency requirements, and height and weight requirements. The regulations also clarify that an applicant’s or employee’s immigration status is irrelevant during the liability phase of any proceeding brought to enforce FEHA.

Expansive Definition Of "National Origin" And "National Origin Group"

The new regulations define "national origin" to include the individual’s or ancestors’ actual or perceived:

1. physical, cultural, or linguistic characteristics associated with a national origin group;
2. marriage to or association with persons of a national origin group;
3. tribal affiliation;
4. membership in or association with an organization identified with or seeking to promote the interests of a national origin group;
5. attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of a national origin group; and
6. name that is associated with a national origin group.

"National origin group" is defined to include ethnic groups, geographic places of origin, and countries that are not presently in existence.

Prohibitions On Language Restriction Policies

The new regulations also address language restriction policies, including English-only policies. Language restriction policies are presumptively unlawful unless: (1) the restriction is justified by business necessity; (2) the restriction is narrowly tailored; and (3)
the employer has effectively notified its employees of the circumstances and time when the language restriction is required to be observed and of the consequence for violating the language restriction.

“Business necessity” is narrowly defined to mean an overriding legitimate business purpose, such that: (a) the language restriction is necessary to the safe and efficient operation of the business; (b) the language restriction effectively fulfills the business purpose it is supposed to serve; and (c) there is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact. A language restriction is not justified if it simply promotes business convenience or is due to customer or co-worker preference.

The regulations further clarify that **English-only rules are never lawful during non-work time** (breaks, lunch, etc.).

**Discrimination Based On Accent And English Proficiency Requirements**

The new regulations also clarify that discrimination based on an applicant’s or employee’s accent is unlawful unless the employer proves that the individual’s accent interferes materially with the applicant’s or employee’s ability to perform the job in question.

Further, discrimination based on an applicant’s or employee’s English proficiency also is unlawful unless the English proficiency requirement at issue is justified by business necessity (i.e., the level of proficiency required by the employer is necessary to effectively fulfill the job duties of the position.) The regulations specify that employers may request information regarding an applicant or employee's ability to speak, read, write, or understand any language, if justified by business necessity.

**Height And Weight Requirements May Be Discriminatory**

The new regulations recognize that height and/or weight requirements may have the effect of creating an unlawful disparate impact based on national origin. If adverse impact is established, the requirements are unlawful, unless the employer can demonstrate that they are job related and justified by business necessity. Even if job related and justified by business necessity, however, such a requirement is still unlawful if the applicant or employee can establish a less discriminatory alternative that achieves the purpose of the requirement.

**Anti-Retaliation Provisions**

The new regulations clarify that retaliation includes: (1) threatening to contact or contacting immigration authorities or a law enforcement agency about the immigration status of the employee, former employee, applicant, or a family member (defined expansively to include spouse, domestic partner, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, great-grandparent, grandchild, or great-grandchild, by blood, adoption, marriage, or domestic partnership) of the employee, former employee, or applicant; or (2) taking adverse action against an employee because the employee updates or attempts to update personal information based on a change of name, social security number, or government-issued employment documents.

**Employer Takeaway**

California employers should review their policies and practices to avoid claims of discrimination based on national origin. Specifically, employers should review any English-only policies and height or weight
requirements to ensure they comply with the new regulations. Also, employers should update application and recruiting documents and processes to protect against excluding potential applicants based on national origin. Further, employers should train managers and supervisors so that they understand the prohibitions against national origin discrimination and harassment.

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California Supreme Court Rejects The Federal 'De Minimis' Doctrine, Ruling Instead That Employers Must Compensate For 'Minutes' Of Off-the-Clock Work

by Gilbert J. Tsai

Yesterday, the California Supreme Court issued an important decision for employers that rejects the application of the federal *de minimis* defense to unpaid wage claims arising under California law. In *Troester v. Starbucks*, Case No. S234969 (July 26, 2018), the Supreme Court held that California law prohibits requiring employees to "routinely work for minutes off the clock without compensation." However, the Court left open the possibility of applying the rule to certain employee activities that are so "irregular or brief in duration" that it would be unreasonable to require employers to track and compensate employees for such time.

This alert provides employers with the key points from this long-awaited opinion as well as guidance for maintaining compliant timekeeping policies and procedures.

**Background of the De Minimis Rule**

Federal and state wage laws generally require employers to record and pay wages for all hours worked by non-exempt employees. Under the federal Fair Labor Standards Act, however, employers are relieved from this requirement for "insubstantial or insignificant" periods of "off-the-clock" time spent on otherwise compensable tasks. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). The factors for determining whether such time is "*de minimis*" include: (1) the practical administrative difficulty of recording the additional time; (2) the total amount of compensable time; and (3) the regularity of the additional work. *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984). Under some circumstances this rule permits employers to require as much as 10 minutes of uncompensated work per day. While the *de minimis* doctrine is a well-established defense under federal law, the California Supreme Court had not previously addressed whether the doctrine applied to California Labor Code claims for unpaid wages.

**Troester v. Starbucks**

Douglas Troester was a Starbucks shift supervisor who routinely performed "store closing" activities after clocking out, including transmitting sales data to headquarters, activating the store alarm, locking the door, walking co-workers to their cars, and...
occasionally waiting with them for their rides. These daily closing tasks ranged from 4-10 minutes of uncompensated time, and were all required under Starbucks’ policy. He sued Starbucks in a class action for unpaid wages for that time, along with related penalties.

In the lower courts, Starbucks successfully argued that the federal *de minimis* rule applies under California law, and as a result, Starbucks could legally require employees to perform the required tasks without compensation. The Supreme Court disagreed that the *de minimis* rule could be applied on these particular facts, where the work was routinely required. However, the Court expressly left open the question of whether a "*de minimis* principle may ever apply to wage and hour claims given the wide range of scenarios in which this issue arises."

**Employer Takeaways**

- California wage law does not incorporate the broad *de minimis* defense found under the Fair Labor Standards Act. This means that employers may not require employees to routinely work off-the-clock without compensation, even for a few minutes a day. However, the *de minimis* doctrine may still apply when employee activities are "so irregular or brief in duration" that it would be unreasonable to require employers to compensate for them.
- Employers should:
  - Review handbooks, job descriptions, and other policies and procedures to ensure that non-exempt employees are not being required to perform duties after clocking out.
  - Review timekeeping and payroll systems to ensure that non-exempt employees are being compensated for all regularly occurring tasks.
  - If any regularly occurring tasks are not being compensated, consider solutions which would permit tracking such time, such as restructuring the work, customizing existing time tracking systems, or developing new ones (e.g., by utilizing smartphones, tablets, or other devices).
  - Consider options for reasonably estimating time spent on off-the-clock tasks—e.g., through surveys or time studies—in order to fairly compensate employees for that time.

Importantly, this decision specifically endorses the use of fair and neutral "rounding" policies. As we wrote about previously, in *AHMC Healthcare, Inc. v. Superior Court (Letona)*, Case No. B285655 (June 25, 2018), the Court of Appeal recently re-affirmed the use of payroll systems that automatically round employee time up or down (e.g., to the nearest 5 minutes or quarter hour) so long as the system "is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." The *Troester* Court expressly confirmed that when properly implemented, such policies constitute a practical and legal solution for capturing (through reasonable estimation) all work time.

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California Legislature Clarifies Salary History Ban And Equal Pay Statute

On July 18, 2018, Governor Brown signed into law AB 2282, which amends the California Labor Code to clarify aspects of California's salary history and equal pay statutes.

**Labor Code Section 432.3**

As we previously reported, effective January 1, 2018, Labor Code section 432.2 prohibits both public and private employers from asking job applicants for "salary history information." The new amendments specify that an employer may ask an applicant about his or her salary expectation for the position being applied for.

The salary history statute also requires employers to provide applicants, upon reasonable request, with a pay scale for the relevant position. The amendments now define "pay scale," "reasonable request," and "applicant" for purposes of this law.

"Pay Scale" means a salary or hourly wage range.

"Reasonable Request" means a request made after an applicant has completed an initial interview with the employer.

"Applicant" or "Applicant for Employment" means an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position.

**Labor Code Section 1197.5**

Under this statute, employers may not discriminate on the basis of sex, race, or ethnicity, with respect to employee compensation for substantially similar work, except under limited circumstances.

The new amendments clarify that an employer may make a compensation decision based upon an employee’s current salary, as long as any wage differential resulting from that compensation decision is justified by one or more of the following factors: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; and (4) a bona fide factor other than race or ethnicity, such as education, training, or experience.
If you have any questions about how your hiring or pay practices may be impacted by these amendments, please contact your Hanson Bridgett attorney.

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Employer Obligations Regarding Post-Offer Medical Examinations

by Emily Leahy & Lisa M. Pooley

In *EEOC v. BNSF Ry. Co.*, Case No. 16-35457 (9th Cir. Aug. 29, 2018), the Ninth Circuit held that an employer violates the Americans With Disabilities Act of 1990 ("ADA") by demanding that a job applicant with a perceived disability pay the cost of medical testing prior to being deemed eligible for employment. The employer offered an applicant a job as a Senior Patrol Officer on the condition that he satisfactorily complete a medical review. During the medical review, the applicant disclosed a prior back injury. The applicant's own doctor and chiropractor, as well as the doctor hired by the employer to conduct the exam, all determined that he had no current limitations due to his back. The employer nonetheless demanded that the applicant undergo and submit the results of an MRI of his back, at his own expense. When the applicant did not obtain an MRI, the employer revoked the job offer. The Equal Employment Opportunity Commission ("EEOC") then sued the employer for violations of the ADA.

The Ninth Circuit recognized that, under the ADA, medical inquiries may occur at three different stages: (1) pre-job offer; (2) post-job offer, but before employment commences; and (3) at any later point. The Court noted that unlike the other two stages, post-job offer/pre-employment medical examinations need not be limited solely to the individual's "ability to perform job-related functions," nor must they be "job-related or consistent with business necessity." Notwithstanding the broader permissible scope, however, the Court held that these examinations cannot violate the ADA's disability prohibitions.

The Ninth Circuit found that the EEOC demonstrated all three elements of a disability discrimination claim under the ADA: (1) that the applicant had a "disability" because the employer perceived him to have a back impairment; (2) that the applicant was qualified for the job; and (3) that the employer impermissibly conditioned the applicant's job offer on the applicant procuring an MRI at his own expense based on its assumption that the applicant had a back impairment.

According to the Court, under the ADA, an employer may not request a medical test at the applicants' cost only from persons with perceived or actual disabilities or impairments. In this situation, the employer is imposing an additional financial burden on a person with a disability because of that person's disability.
"Allowing employers to place the burden on people with perceived impairments to pay for follow-up tests would subvert the goal of the ADA to ensure that those with disabilities have 'equality of opportunity,' [citation] and would force people with disabilities to face costly barriers to employment."

The Court's holding applies regardless of the cost of the medical test at issue and regardless of the employee's ability to pay.

Employer Takeaway

In the post-job offer/pre-employment stage, it is permissible to require follow-up medical exams for applicants with disabilities or impairments. But an employer may not require a prospective employee to pay the cost of the testing, no matter how necessary the testing may be.

Employers should be aware of the ADA's rules governing medical exams at the various stages of hiring and employment. If you have any questions, please contact your Hanson Bridgett attorney.

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New California Employment Laws For 2019

Governor Brown signed into law a number of bills, which significantly impact employers. Unless otherwise indicated, each new law takes effect January 1, 2019. For an in-depth analysis of how each law might affect your organization, contact one of Hanson Bridgett's experienced labor and employment lawyers.

Harassment & Discrimination

Sexual Harassment Prevention Training for Non-Supervisory Employees (SB 1343): By the end of 2019, employers with 5 or more employees (including seasonal and temporary employees) must provide sexual harassment prevention training to all nonsupervisory employees. Thus, in addition to the 2 hours of training required for supervisory employees, non-supervisory employees must receive at least 1 hour of training. SB 1343 also requires the DFEH to develop online training courses that employers can use to satisfy these requirements. (See Gov't Code §§ 12950 and 12950.1.)

Sexual Harassment Omnibus Bill (SB 1300): SB 1300 significantly amended the Fair Employment and Housing Act (FEHA), especially as it relates to sexual harassment. Recognizing that the purpose of FEHA is "to provide all Californians with an equal opportunity to succeed in the workplace," the Legislature made several declarations regarding the application of harassment laws:

(1) Actionable harassment need only make it more difficult to do the job. Harassment creates a hostile environment when it "disrupt[s] the victim's emotional tranquility in the workplace, affect[s] the victim's ability to perform the job as usual, or otherwise interfere[s] with and undermine[s] the victim's personal sense of well-being."

(2) A single incident of harassment is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment.

(3) The existence of a hostile work environment is based on the totality of circumstances and a single discriminatory remark
may be relevant evidence of discrimination.

(4) The legal standard for harassment should not vary by type of workplace. “[C]ourts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties.”

(5) Harassment cases are rarely appropriate for summary judgment.

In addition to these legislative declarations, SB 1300 also makes substantive amendments:

(a) Employers may not require employees to sign, in exchange for a raise or bonus, or as a condition of employment: (1) a release of FEHA claims or (2) documents prohibiting disclosure of unlawful acts in the workplace, including non-disparagement agreements. This provision does not apply to negotiated settlement agreements.

(b) Prevailing defendants will not be awarded attorney’s fees and costs in FEHA litigation, unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so.

(c) Employers may (but are not required to) provide "bystander intervention training" to employees, which includes information and practical guidance on how to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors. (See Gov’t Code §§ 12940, 12965, 12923, 12950.2, and 12964.5.)

Restrictions on Confidential Sexual Harassment Settlement Agreements (SB 820): Settlement agreements may not include provisions that prevent disclosure of factual information related to a claim of sexual assault, sexual harassment, sex discrimination, or retaliation, which is filed in a civil or administrative action. The agreement may preclude disclosure of the amount paid in settlement. SB 820 also allows claimants' identities, and facts that could reveal their identities, to be protected if the claimant requests anonymity, except if a government agency or public official is a party to the settlement agreement. (See Code of Civ. Proc. § 1001.)

Ban on Waivers of Right to Testify About Alleged Sexual Harassment or Criminal Conduct (AB 3109): Any contract or settlement agreement provision that waives a party’s right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment is unenforceable. (See Civ. Code §1670.11.)

Expanded Liability for Sexual Harassment in Business, Service or Professional Relationships (SB 224): “Investors, elected officials, lobbyists, directors and producers” have been added to the list of persons who may be held personally liable for sexual harassment in “business, service or professional” relationships. (See Civ. Code § 51.9; Gov’t Code §§ 12930, 12948.)

Wage & Hour

Employer Must Pay for Requested Copies Of Pay Statements (SB 1252): SB 1252 provides that employees have the "right to receive" a copy of their wage statements upon request. Employers may not require employees to make or pay for copies of their payroll records themselves. (See Lab. Code § 226.)
**Workplace Accommodation & Paid Family Leave**

**Expanded Obligations for Lactation Accommodation** (AB 1976): Employers must provide a space other than a bathroom and "in close proximity to the employee's work area," to express breast milk. AB 1976 authorizes a temporary lactation location if certain conditions are met and provides a narrow hardship exemption. (See Lab. Code § 1031.)

**Expanded State-Paid Family Leave Benefits for Military Families** (SB 1123): Beginning January 1, 2021, eligible employees are entitled to state-paid family leave benefits for time off to attend to a "qualifying exigency" related to the covered active duty of the employee's spouse, domestic partner, parent, or child in the armed forces. (See Unemp. Ins. Code §§ 3301, 3302.1, 3302.2, 3303, 3303.1, 3307.)

**Human Trafficking Training**

**Human Trafficking Training for Operators of Mass Transit** (AB 2034): By the end of 2020, businesses and establishments that operate in mass transportation, specifically including intercity passenger rail systems, light rail systems, and bus stations, must provide at least 20 minutes of training to their employees regarding how to recognize the signs of, and report, human trafficking. (See Civ. Code § 52.6.)

**Human Trafficking Training for Hotel and Motel Employers** (SB 970): By the end of 2019, hotel or motel employers must provide at least 20 minutes of human trafficking awareness training and education to new and existing employees who are likely to come into contact with victims of human trafficking. Examples of such employees include employees who work in a reception area, perform housekeeping duties, help customers in moving their possessions, or drive customers. After 2019, this training must be provided once every two years. (See Gov't Code § 12950.3.)

**Corporate Board of Directors**

**Women on Corporate Boards** (SB 826): Each publicly held corporation whose principal executive offices are located in California must have at least one female director on its board by the end of 2019. If no board seat opens up on an all-male board before that date, a corporation must increase its authorized number of directors by one and must fill that seat with a woman. This bill also imposes minimum board seats that must be filled by women, proportional to the number of board seats, by the end of 2021. (See Corp. Code §§ 301.3 and 2115.5.)

**New Laws Impacting Construction Industry**

**PAGA Exemption for Certain Unionized Construction Industry Employees** (AB 1654): The Private Attorneys General Act (PAGA) will not apply to construction industry employees covered by a collective bargaining agreement, if the agreement: (1) provides for a regular hourly pay rate of not less than 30% more than the minimum wage and a premium wage for overtime hours worked; (2) expressly waives PAGA requirements; (3) prohibits certain Labor Code violations; (4) contains a grievance and binding arbitration procedure to redress alleged Labor Code violations; and (5) authorizes the arbitrator to award remedies available under the Labor Code. (See Lab. Code § 2699.6.)

**Joint Liability for Construction Contractors and Subcontractors** (AB 1565): This bill, signed as urgency legislation and effective September 19, 2018, repealed Labor Code 218.7's provision that relieved...
direct contractors for liability for anything other than unpaid wages and fringe or other benefit payments or contributions, including interest owed. Additionally, for contracts entered into on or after January 1, 2019, in order to withhold disputed payments, the direct contractor must identify, in its contract with the subcontractor, the specific documents or information that the direct contractor will require the subcontractor to provide. Subcontractors also may include the same requirements in their contracts with lower-tiered subcontractors and may withhold as disputed all sums owed, as specified. (See Lab. Code § 218.7.)

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Reminder: Minimum Wage Increases Effective January 1, 2019

New State Minimum Wage

Effective January 1, 2019, the State minimum wage increases to $12.00 per hour for employers with 26 or more employees, and $11.50 per hour for employers with 25 or fewer employees.

New Local Minimum Wages

Additionally, several California cities and counties have passed their own minimum wage ordinances with a more aggressive schedule of minimum wage increases.

Effective January 1, 2019, local minimum wage increases include the following:

**Locality : Minimum Wage Eff. 1/1/19**
Belmont: $13.50
Cupertino: $15.00
El Cerrito: $15.00
Los Altos: $15.00
Mountain View: $15.65
Palo Alto: $15.00
Richmond: $15.65
San Diego: $15.00
San Jose: $15.00
San Mateo: Employers: $15.00, 501(c)(3) Nonprofits: $13.50
Santa Clara: $15.00
Sunnyvale: $15.65

Recently Enacted Local Minimum Wages

As a reminder, other California cities and counties increased their local minimum wages in 2018. As of October 1, 2018, the minimum wage in Berkeley increased to $15.00 per hour.

On July 1, 2018, the minimum wage also increased for the following cities and counties:
Locality: Minimum Wage Eff. 7/1/18

Emeryville: Large businesses (56 or more employees): $15.69; Small businesses (55 or more employees): $15.00

City and County of Los Angeles: 26 or more employees: $13.25; 25 or fewer employees/non-profit corporations: $12.00

Malibu: 26 or more employees: $13.25; 25 or fewer employees: $12.00

Milpitas: $13.50

Pasadena: 26 or more employees: $13.25; 25 or fewer employees: $12.00

San Francisco: $15.00

San Leandro: $13.00

Santa Monica: 26 or more employees: $13.25; 25 or fewer employees: $12.00

Employers with employees working in any of these cities – even if only on a temporary basis – should review their wage structure and implement any necessary changes for compliance purposes, including recordkeeping and notice requirements. If you have any questions, please contact your Hanson Bridgett attorney.

For a summary of other new employment laws taking effect on January 1, 2019, see our prior Labor & Employment Alert.

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The Affordable Care Act ("ACA") is alive and well, despite renewed legal challenges and the elimination of the "individual mandate" beginning next year. While the Tax Cuts and Jobs Act reduced the tax penalty for individuals who don’t have health coverage to $0, effective for 2019, employers continue to be subject to penalties for failing to comply with certain ACA rules. Earlier this year, the IRS began enforcing penalties against employers who fail to meet the “employer shared responsibility” requirements of the ACA. Here are three things about the ACA that employers need to focus on now to avoid significant financial liabilities.

1. The IRS Is Currently Assessing Employer Penalties Using “226-J” Letters

In 2017, the IRS began assessing “employer shared responsibility payments” ("ESRP") or tax penalties, against large employers who don’t offer qualifying health coverage to at least 95% of their full-time employees. The initial assessment comes in the form of a “226-J” letter, which explains that the employer may be liable for an ESRP, based on information obtained by the IRS from Forms 1095-C filed by the employer and tax returns filed by the employer’s employees. The employer will have only 30 days to respond using the provided IRS Form 14764, and must complete and return IRS Form 14765 to challenge any part of the assessment.

We recommend that employers share this Alert and a copy of the IRS 226-J form letter that is included as a link in this Alert with staff who are likely to be the first to receive communications from the IRS. Time to reply is short and you need to be notified immediately if you receive an IRS 226-J form letter. You may want to consider contacting your legal counsel as soon as the first IRS notice is received.

Depending on the employer’s response to the initial assessment, the IRS will send the employer one of four types of “227” acknowledgment letters. If the employer disputes the penalty assessment, the IRS could accept the additional information provided by the employer and reduce the penalty to $0 (a 227-K letter). However, if the IRS rejects any part of the employer’s response, the employer will receive either a 227-L letter, with a...
reduced penalty amount, or a 227-M letter, to notify the employer that the amount of the initial assessment hasn’t changed. Either letter will explain steps the employer must take to continue disputing the assessment, including applicable deadlines. These steps include requesting a telephone conference or meeting with an IRS supervisor, or requesting a hearing with the IRS Office of Appeals.

2. ACA Reporting Requirements Still Apply

The IRS uses Forms 1095-C to determine whether to assess ESRP penalties on the employer. Large employers must file Forms 1095-C with the IRS and send them to full-time employees each year to document their compliance with the ACA requirement to offer qualified, affordable coverage to at least 95% of full-time employees and their dependent children. Generally, the forms are due to employees by January 31, and to the IRS by March 31, each year, to report compliance for the prior year. In years past, the IRS has extended the deadline for providing the forms to employees, but not the deadline for filing with the IRS.

We understand that a number of the ACA employer penalties being assessed now are based on reporting errors. We recommend that you continue to carefully monitor your ACA filings and reports to avoid complex responses and tight deadlines based on erroneous reporting. You should contact legal counsel if you have reporting questions.

Penalties of up to $520 per form can apply if an employer both fails to file with the IRS and to send the forms to employees, and can be doubled if the IRS determines that the employer intentionally disregarded the filing requirement. These penalties can apply if an employer fails to file, files late, or if the forms are timely filed, but are incorrect or incomplete. In addition to the reporting-related penalties, inaccurate information on Forms 1095-C can lead to erroneous ESRP assessments that the employer will then need to refute, using the IRS forms and procedures described above. Employers should continue tracking offers of coverage made for each month of 2018, to prepare for compliance with the Form 1095-C reporting requirement early next year.

3. The “Cadillac Tax” Is Still Looming

The ACA includes a provision to impose an annual excise tax on high-cost health coverage, the so-called “Cadillac tax”, that was initially scheduled to apply beginning this year. Implementation of the Cadillac tax has been repeatedly delayed, and the federal budget bill passed in January delayed it again through December 31, 2021. Despite the repeated delays, the Cadillac tax has not been repealed and is currently scheduled to apply to health coverage offered on or after January 1, 2022.

We recommend that employers who are negotiating collective bargaining agreements this year that include terms for health benefits extending beyond 2021 consider the potential effect of the Cadillac tax on the cost of health benefits in the event the tax takes effect as currently scheduled.

STAY ALERT: While uncertainty continues to surround the ACA, we recommend that employers remain aware of continuing compliance requirements to avoid the potentially significant penalties that remain in effect under the ACA. We will continue to follow developments in this area and provide updates on new developments as they occur. Please contact us if you have questions or concerns.

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Lessons for Defined Contribution Plan Fiduciaries from Current Litigation

by Judith W. Boyette & Elizabeth J. Masson

This month, courts have been active in several of the fiduciary breach cases involving 403(b) retirement plans at private universities, including USC, Brown, New York University, the University of Pennsylvania, Duke and Northwestern. We have been closely monitoring these and other lawsuits against fiduciaries of defined contribution plans, and the lessons to be gleaned for avoiding liability.

In the last two years, over 100 lawsuits were filed against fiduciaries of 401(k) plans, primarily involving selection of investment options and other plan service providers. Similar lawsuits are targeting plans sponsored by private sector universities and tax-exempt organizations, such as hospitals and senior care facilities, with claims against plans sponsored by governmental entities conceivably to follow. We recommend that all defined contribution plan fiduciaries review the types of claims described below and schedule a review of your processes for selection of investment options and other service providers, to limit liability exposure.

403(b) Plan Litigation

Since 2016, over 20 lawsuits have been filed against private universities by the same law firm, each alleging that the fiduciaries in charge of the university’s 403(b) retirement plans breached their duties to the plans—the same types of claims that have been made against 401(k) plan fiduciaries. A 403(b) plan is a tax-favored retirement plan that provides annuity contracts, and also permits participants to elect investments in mutual funds through custodial accounts. Only governmental educational organizations and tax-exempt non-profits, including entities such as private universities and hospitals, may sponsor a 403(b) plan.

The various lawsuits are based on alleged violations of the Employee Retirement Income Security Act of 1974 (“ERISA”), which applies to private 403(b) plans, but not to 403(b) plans sponsored by state-run colleges and universities. However, many of the fiduciary duties imposed by state law on sponsors and administrators of governmental plans are virtually identical to the ERISA standards. This means that all defined contribution plan fiduciaries should carefully review their processes in light of the claims underlying these new lawsuits.
The current cases allege that fiduciaries of the universities’ 403(b) plans breached their duties of prudence and loyalty under ERISA in their selection of investment options and other service providers. Many of these claims are identical, including that plans incurred losses from:

- Paying excessive fees for plan administration services
- Offering too many investment options for participants to choose from
- Using more than one recordkeeper, resulting in excessive recordkeeping fees
- Offering investment options that charged asset-based fees and used revenue sharing
- Paying fees for retail-class investment options, rather than for institutional-class options
- Retaining under-performing investments in the fund line-up, and
- Failing to engage in a competitive bidding process for plan administrative services.

The lawsuits claim that individuals who served as fiduciaries of the plans are personally liable for losses to the plans resulting from the alleged breaches.

**Recent Court Activity**

Last week, the Ninth Circuit ruled that claims against fiduciaries of USC’s retirement plans are not covered by arbitration agreements signed by individual employees, finding that the claims were brought on behalf of the retirement plans, not employees. And earlier this month, a federal judge dismissed some but not all of the claims brought against fiduciaries of Brown University’s retirement plans. Both of these rulings will allow the lawsuits to go forward.

The court in the Brown University case dismissed claims involving the number of investment options offered under the University’s 403(b) plans, and asset-based fee and revenue sharing arrangements. However, the court declined to dismiss several other claims, including that:

- Fiduciaries acted imprudently by using more than one recordkeeper and by failing to engage in a competitive bidding process for administrative services for the plans;
- The plans paid significantly too much for recordkeeping services compared to market rates; and
- Fiduciaries caused the plans to incur excessive investment management fees and losses by retaining expensive funds with inferior historical performance.

A similar case against the University of Pennsylvania was dismissed entirely last year, and is currently being appealed in the Third Circuit. The American Council on Education and seven other higher education associations have filed a “friend of the court” brief in the Penn case, urging the court to consider the historical and structural differences between 403(b) plans sponsored by educational organizations and corporate 401(k) plans, and apply ERISA fiduciary standards in recognition of those differences.

The case against Northwestern was dismissed earlier this year, while the case against New York University went to trial in April, after some claims were dismissed last year. The case against Duke has also been permitted to go forward as a class action, although the judge rejected the plaintiffs’ request for a jury trial. The case against the University of Chicago was settled earlier this year for $6.5 million.

**Fiduciaries Should Review Relevant Processes and Watch for Updates**

We will continue to monitor these cases and provide updates on final rulings. While public school system and governmental university plan fiduciaries are not subject to ERISA, similar fiduciary duty rules often apply under state law. While we are not aware of any similar cases against fiduciaries of governmental 403
(b) or other defined contributions plans to date, plaintiffs’ attorneys may be looking at opportunities in that area.

We encourage defined contribution plan fiduciaries to undertake a review of your procedures for selecting investment options and other service providers to limit exposure to liability in this area of increased focus by plaintiffs’ counsel. Please feel free to contact us if you have questions regarding your particular situation.

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The Internal Revenue Service has released a Private Letter Ruling ("PLR") allowing a plan sponsor to make contributions to employees’ 401(k) accounts if the employees are repaying student loans. This is exciting news for employers sponsoring 401(k) plans who hope to attract and retain employees as student loan debt rises to unprecedented levels.

The PLR confirmed that some student loan repayment programs linked to 401(k) employer contributions are acceptable. The approved student loan repayment program allows the employer to make non-elective contributions to an employee’s 401(k) account in lieu of the matching contributions the employer would have otherwise made had the employee contributed the amount of the loan payment to his or her 401(k) account. To be eligible for a nonelective employer contribution, employees repaying student loans must pay at least 2% of eligible compensation towards student loan debt. The employer will make a "matching" nonelective contribution of up to 5% of eligible compensation to the employee’s 401(k) account.

Should an employee elect to participate in the student loan repayment program but fail to pay at least 2% of eligible compensation towards his or her student loan and instead defer money to his or her 401(k) account, the program provides that the employer will make a "true-up" contribution to the employee’s 401(k) account. This true-up contribution is equivalent to the amount the employee would have received as an employer matching contribution.

Several other features of the student loan repayment program described in the PLR are important to note. The program is entirely voluntary, meaning that employees must elect to enroll and may opt out of enrollment on a prospective basis. The employer’s nonelective contributions are subject to all eligibility, vesting, and distributions rules as well as contribution limits, although such contributions are not treated as matching contributions for testing under Internal Revenue Code section 401(m). The IRS also specifically stated that this student loan repayment program does not violate the "contingent benefit" prohibitions found in Code section 401(k)(4)(A) because the employer’s nonelective contributions are not conditioned on the employee making elective contributions under a cash or deferred
payment arrangement.

Although Private Letter Rulings respond to the request of specific taxpayers and may not be relied upon generally, they are good indicators of the IRS’s viewpoint and what fact patterns it considers acceptable.

Plan sponsors with questions about student loan repayment programs are encouraged to contact Alison Wright or the Hanson Bridgett Employee Benefits Group.

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The SEC Increases Enhanced Disclosure Threshold Under Rule 701 and Considers Broader Changes

by Alison E. Wright & Natalie N. Wilson

Following the enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act, the Securities and Exchange Commission (SEC) has adopted an amendment to Rule 701(e) increasing the threshold amount of securities that can be sold during a 12-month period from $5 million to $10 million. Securities sold in excess of the threshold trigger enhanced disclosure obligations for the issuer. Additionally, the SEC has issued a concept release requesting public comments on the modernization of Rule 701 and Form S-8.

The Exemption Under Rule 701

Rule 701 provides an exemption from the registration requirements of the Securities Act of 1933, allowing private, non-reporting companies to issue equity to employees, directors, consultants and advisors for compensatory purposes, subject to certain requirements. The exemption under Rule 701 recognizes that equity compensation plays an important role in recruiting and retaining talent, as well as aligning company and employee goals and success. However, the exemption is subject to certain limits to ensure the protection of employees as investors.

The exemption is available to companies so long as the amount of securities sold in any 12-month period in reliance on Rule 701 does not exceed the greater of $1 million, 15% of the company’s assets, or 15% of outstanding securities of the class being sold.

Enhanced Disclosure Requirements and Increased Threshold

Regardless of the number of securities sold in reliance on Rule 701, companies must provide all eligible recipients with a copy of the written compensation plan or contract covering the offering. Prior to the adoption of the amendment, if a company issued more than $5 million in securities in any 12-month period in reliance on Rule 701, enhanced disclosure requirements applied. The amendment increases the threshold for enhanced disclosure to $10 million dollars, and future increases will be made to adjust for inflation every 5 years, rounding to the nearest $1,000,000.

The enhanced disclosure requirements require companies to provide additional materials to eligible recipients, such as
financial statements for the two most recent fiscal years (prepared in accordance with GAAP) and risk factors. Preparing and distributing such materials can be burdensome and costly for private companies, and as a result, companies carefully limit and monitor their offerings under Rule 701.

While the threshold amount for enhanced disclosure has increased, companies should also be mindful that the disclosure requirements themselves remain unchanged.

Potential for Further Changes

Concurrently with the adoption of the amendment to Rule 701(e), the SEC issued a concept release requesting public comment on other aspects of Rule 701 and Form S-8.

Overall, the concept release seeks comment on how to streamline the rules related to compensatory issuances of equity in response to an evolving "gig economy" and changing company-worker relationships. More specifically, the concept release asks whether eligibility should be extended to other types of employment relationships under Rule 701, whether disclosure content and timing under Rule 701(e) should be further revised, and whether offerings on Form S-8 should be further streamlined.

Hanson Bridgett's Employee Benefits and Corporate Group will be monitoring any further developments related to the concept release.

Recommended Actions

The increased enhanced disclosure threshold of $10 million, which applies to current offerings, should provide private, non-reporting companies with greater opportunities and flexibility to utilize equity based compensation for service providers. In addition, companies have an opportunity to provide comments to the SEC on the concept release. Companies should take this opportunity to review their plans with respect to equity compensation, as well as their compliance with applicable disclosure requirements.

Companies with questions regarding Rule 701 or the concept release are encouraged to contact the Hanson Bridgett Employee Benefits Group or Corporate Group.

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As we reported in our [May 31, 2018 Alert](#), the California Legislature has been considering legislation to prevent joint powers authority (JPA) member agencies from contracting out of liability for the JPA’s pension obligations.

Despite significant Assembly amendments we reported in May, AB 1912 still faced stiff opposition from a coalition of public agencies and public agency associations over retroactivity of its apportionment scheme and prospective joint several liability for members of future CalPERS-contracting JPAs.

But AB 1912’s sponsor, Assemblyman Freddie Rodriguez (D-Pomona), reached a compromise with opposition groups to secure the bill’s passage by both houses (the Senate on August 30 and the Assembly on August 31) after a series of Senate amendments (June 20 and July 3, August 17 and August 24).

Together, those amendments:

- Replace joint and several liability of a JPA’s member agencies for its pension obligations (including prospectively for new CalPERS-contracting agencies) with a more equitable apportionment scheme. Under the final bill, JPA member agencies must still mutually agree to apportion 100% of that liability among themselves (may include a former JPA member). If they cannot agree, the retirement system board must apportion that liability among them proportionately based on their respective (1) shares of the JPA’s services, or (2) populations.

- Make that JPA pension liability apportionment scheme contingent upon the JPA’s notice of termination, dissolution or cessation of operations. Under the final bill, the requirement that JPA member agencies mutually agree to apportion 100% of the JPA’s pension liabilities among themselves isn’t triggered until right before the JPA’s governing body decides to dissolve or cease operations or, in the case of a CalPERS-contracting JPA, the JPA files a notice of termination with CalPERS.

- Clarify that the JPA pension liability apportionment requirement doesn’t apply to a JPA that dissolved before January 1, 2019. But under the final bill, that requirement still applies retroactively to JPA agreements in existence on or
before January 1, 2019, as well as prospectively to new JPA agreements on or after that date with CalPERS or another California public retirement system.

• Prohibit a JPA from voluntarily terminating its CalPERS contract or dissolving or ceasing operations until its member agencies have mutually agreed to apportion 100% of its pension liabilities among themselves, and it has furnished a copy of that agreement to the retirement system board.

• Give a JPA 60 days after a CalPERS notice of an involuntary termination to file an agreement with CalPERS, signed by all of its member agencies, that apportions 100% of its pension liabilities among those agencies. Otherwise, CalPERS will decide how to apportion those liabilities.

• Give a JPA member agency 30 days to appeal the retirement system board’s pension liability allocation. In that case, the appeal will be referred to, and decided by, an arbitrator, who must decide the apportionment within 60 days of referral, and whose decision will be final and binding. Arbitration costs will be shared equally by the JPA member agencies identified in the arbitration decision.

• Require CalPERS to, consistent with its fiduciary duties, consider and exhaust all options and take all necessary actions, including whether to bring a civil action against a terminating JPA’s member agencies to compel payment of its retirement obligations.

Members of JPAs that participate in a retirement system should consider reviewing their JPA agreements now to determine how, in light of the recent amendments, this legislation could affect the allocation of pension liabilities under those agreements once it becomes law. For questions about this legislation or the recent amendments to it, please contact the Hanson Bridgett Employee Benefits Group.

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Buy Me Some Peanuts and Crackerjacks?

IRS Provides Guidance on Tax Deductions for Business Meals Provided with Entertainment

On October 3, 2018, the IRS issued guidance for employers on how to claim tax deductions for business meals this year. Under the Tax Cuts and Jobs Act, ("TCJA") business expenses for "entertainment" are no longer deductible, effective for 2018. However, the TCJA did not modify the separate 50% deduction for expenses for business meals, which left employers wondering how to distinguish a business meal from entertainment.

In Notice 2018-76, the IRS confirmed that business meals remain 50% deductible, if certain conditions are met. The IRS also clarified that expenses for food and beverages may be deductible even if provided along with entertainment, such as a ball game, if meal expenses are billed or paid separately from entertainment expenses. The Notice explains which meal expenses are deductible and how employers will need to substantiate that the conditions for taking the deduction are met.

Employers are entitled to tax deductions for certain expenses that are "ordinary and necessary" in conducting business. Before the TCJA, that included up to 50% of expenses for entertainment that was directly related to the employer's business activities or was associated with such activities, so long as business was discussed immediately before or after the entertainment. A separate rule applies to business expenses for food and beverages, which generally are deductible only if: 1) the expense is not "lavish" or "extravagant" under the circumstances, and 2) an employee of the taxpayer is present when the food or beverage is furnished.

As used in the tax rules, the term “entertainment” includes activities objectively considered to be amusement or recreation, such as entertaining at night clubs, cocktail lounges, theaters, country clubs, golf and athletic clubs, sporting events, and on hunting, fishing, or vacation trips. It can also include activities that meet an individual's "personal, living, or family needs" such as providing food and beverages, a hotel suite, or an automobile to a customer or client. Based on this definition it was unclear whether the TCJA's elimination of the deduction for entertainment expenses would swallow the deduction for food and beverages provided to an employer's client or customer.

The Notice confirms that expenses for business meals are still...
deducible, up to 50%, if:

- The expense is an ordinary and necessary expense paid or incurred during the taxable year in carrying on any trade or business;
- The expense is not lavish or extravagant under the circumstances;
- The taxpayer, or an employee of the taxpayer, is present at the furnishing of the food or beverages;
- The food and beverages are provided to a current or potential business customer, client, consultant, or similar business contact; and
- In the case of food and beverages provided during or at an entertainment activity, the food and beverages are purchased separately from the entertainment, or the cost of the food and beverages is stated separately from the cost of the entertainment on one or more bills, invoices, or receipts.

The Notice also warns that employers cannot circumvent the disallowance for entertainment expenses by inflating the amount paid or charged for food and beverages provided with entertainment.

Three examples in the Notice describe how the IRS will view expenses for business meals provided in connection with an activity that is considered entertainment:

- In the first example, the employer buys tickets to take a client to a baseball game. While at the ball game, the employer buys the client a hot dog and drinks. The tickets are an entertainment expense, which is not deductible. However, the cost of the hot dog and drinks, which were purchased separately from the game tickets, is not an entertainment expense and so 50% of those expenses are deductible.
- In the second example, the employer buys tickets to take a client to a basketball game in a suite, where they have access to food and beverages. The cost of the game tickets, as stated on the invoice, includes the food and beverages. Because the expenses for food and beverages are not purchased or billed separately from the entertainment expenses, the employer cannot deduct any of the cost of the food and beverages provided at the game.
- The facts in the third example are the same as in the second example, except that the invoice for the basketball game tickets separately states the cost of the food and beverages. In that case, the employer can deduct 50% of the food and beverage costs because those expenses are stated separately on the invoice for the game tickets, and therefore, are not entertainment expenses.

Employers should review their expense documentation procedures in light of these examples to ensure that business meal deductions can be properly substantiated.

The Notice announced that the IRS intends to publish regulations to provide guidance on the business expense deduction rules, and that taxpayers may rely on the guidance in the Notice in the meantime.

If you have questions or concerns, please contact the Hanson Bridgett Employee Benefits Group or Tax Group.

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Under the Affordable Care Act ("ACA"), large employers (generally those with 50 or more full-time employees or full-time equivalents) must report annually to the IRS information about the health coverage offered to their full-time employees during the prior year using IRS Form 1095-C. The IRS uses the forms to assess whether an employer "shared responsibility" penalty applies. Employers also must provide copies of the forms to their full-time employees.

In Notice 2018-94, the IRS extended the deadline for providing Forms 1095-C to employees to report coverage provided in 2018, although the notice did not extend the deadline for filing the forms with the IRS. Generally, employers must furnish copies of Forms 1095-C to full-time employees by January 31, for offers of coverage made in the prior year. The IRS extended the 2019 deadline for providing Forms 1095-C to employees from January 31, 2019 to March 4, 2019.

The annual IRS filing deadline for Forms 1095-C, and transmittal Form 1094-C, is February 28, or March 31, if filing electronically. Notice 2018-94 did not extend the deadline for filing these forms with the IRS, meaning 2018 forms must be filed by February 28, 2019, or April 1, 2019, if filing electronically. However, as in previous years, employers may submit IRS Form 8809 on or before the due date to obtain an automatic 30-day extension, and may request an additional 30-day extension if hardship conditions apply. Instructions for Forms 1094-C and 1095-C may be found online.

Notice 2018-94 also extended the transitional penalty relief for certain failures to comply with the reporting requirements. Generally, an employer that fails to file, or files incomplete or incorrect Forms 1095-C, may be subject to a penalty of up to $260 per form, capped at an annual maximum of $3,218,500, or higher amounts if the IRS determines that the failure was due to the employer’s intentional disregard of the filing requirement. Similar penalties apply for a failure to provide complete and correct copies of the forms to employees. In previous years, the IRS provided penalty relief for employers that could show they made a good-faith effort to comply with the reporting requirements. Notice 2018-94 extends this penalty relief for the 2019 filing year. As in previous years, no relief will be granted for
employers that fail to timely file the forms or provide copies to full-time employees.

While the Tax Cuts and Jobs Act (Public Law 115-97) effectively repealed the ACA’s individual mandate, effective January 1, 2019, the law did not affect the employer requirements of the ACA. This means that large employers continue to face penalties if they fail to offer qualified, affordable coverage to full-time employees and their dependent children, or fail to timely provide Forms 1095-C to employees and file the forms with the IRS.

If you have any questions regarding the reporting requirements under the ACA, please contact a member of the Hanson Bridgett Employee Benefits Group.

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The IRS recently issued proposed regulations to implement changes to the rules for hardship distributions from 401(k) plans made by the Bipartisan Budget Act of 2018 ("BBA") that will take effect on January 1, 2019. The proposed changes will make hardship distributions more widely available and will ease administration of hardship distributions for plan sponsors. While employers may implement some of these changes retroactively to apply as of January 1, 2018, plans need not be amended this year for any of the changes. This alert explains the mandatory and optional plan changes, and optional effective dates for each change.

Implementation of BBA Changes

Generally, 401(k) plans can provide for hardship distributions to active employee participants, if necessary to satisfy an immediate and heavy financial need. However, plans currently are required to impose restrictions and conditions that can make hardship distributions difficult for participants to obtain and administratively complex. The proposed changes will relax some of those restrictions.

The proposed regulations contain both mandatory and optional changes to the hardship distribution rules.

Mandatory Changes

- Plans can no longer prohibit participants from making elective contributions to the plan, or other plans maintained by the employer, for six months following the hardship distribution. This rule must apply for hardship distributions made on or after January 1, 2020, but can be applied earlier.
- Plans must use a new standard to determine whether the participant has other sources available to meet the financial need, described in detail below. The new general standard must be used for distributions made on or after January 1, 2020, but can be applied earlier.

Optional Changes

- Plans may eliminate the requirement that participants take all available loans from the plan, or other plans maintained by
the employer, before requesting a hardship distribution,

- Plans may make funds attributable to earnings, qualified nonelective employer contributions (QNECs) and qualified matching contributions (QMACs) available for a hardship distribution; and
- Plans may impose additional conditions to demonstrate that a distribution is necessary to satisfy an immediate and heavy financial need, as long as that condition is not a suspension of elective deferrals.

**Broader List of “Safe Harbor” Events**

Under current “safe harbor” rules, a plan may provide that a hardship is deemed to exist, if the distribution is for one of several enumerated reasons. The proposed regulations would make three changes to the safe harbor rules:

- In addition to a spouse or dependent child, a participant’s “primary beneficiary under the plan” is an individual for whom qualifying medical, educational, and funeral expenses may be incurred;
- a hardship distribution is available for expenses and losses (including loss of income) incurred by a participant due to a federally declared disaster, if the participant’s principal residence or principal place of employment was located within the disaster area; and
- a hardship distribution can be made for expenses incurred to repair damage to the participant’s principal residence that would qualify for the casualty deduction under section 165 of the Internal Revenue Code (“Code”), even if the loss was not attributable to a federally declared disaster.

This last provision corrects an inadvertent change made by the Tax Cuts and Jobs Act (“TCJA”), which revised Code section 165 to limit the casualty deductions to losses resulting from federally declared disasters, effective for tax years between 2018 and 2025. This meant that hardship distributions to pay for damage to a participant’s home would be limited to situations where the damage resulted from a federally declared disaster, effective as of January 1, 2018. Under the proposed regulations, plans can be amended to include this corrective provision as of January 1, 2018, so that any hardship distribution made after that date would not be affected by the TCJA change to Code section 165.

**Elimination of “Facts and Circumstances” Test for Alternative Relief Sources**

Under the current rules, a plan sponsor must determine whether a hardship may be relieved from other sources that are reasonably available using a “facts and circumstances” test. The proposed regulations would replace that test with a general standard, under which:

- The participant must have obtained all available distributions from the employer’s plans other than loans,
- the distribution may not exceed the amount of the employee’s need, and
- the participant must represent in writing (including via electronic writing) that he or she has insufficient cash or other liquid assets to satisfy the financial need. The plan sponsor may rely on the participant’s representation, absent actual knowledge to the contrary.

**Timing of Plan Amendments and Optional Effective Dates**

All plan revisions related to the proposed regulations will be treated as “integrally related” to the required change to the six-month suspension rule, so there will be only one plan amendment deadline for all plan changes, even those that are optional. Based on the proposed regulations, and required adoption deadlines set forth in IRS guidance, this means that plan amendments for both governmental and non-governmental plans to implement the changes will not be required until 2021, at the earliest.
Prior to adopting an amendment, plan sponsors may apply the following effective dates for the new rules:

- **Six-month suspension rule**: This rule can be lifted as of the first day of the first plan year starting after December 31, 2018. Calendar year plans may lift the suspension for hardship distributions taken in the second half of the 2018 plan year as of January 1, 2019 (or the plan may continue to provide that contributions will be suspended for the originally scheduled six months).
- **TCJA casualty loss deduction correction**: The revision to the safe harbor casualty loss deduction (eliminating the requirement that the damage resulted from a federally declared disaster) may be applied to distributions made on or after January 1, 2018.
- **New safe harbor for federally declared disasters**: The new safe harbor for expenses and income lost due to a federally declared disaster may be applied to losses resulting from disasters that occurred on or after January 1, 2018.
- **Elimination of requirement to take plan loans**: This may be applied as of the first plan year beginning after December 31, 2018.
- **Inclusion of earnings, QNECs, and QMACs in amounts available for a hardship**: This may be applied as of the first plan year beginning after December 31, 2018.

Hanson Bridgett’s employee benefits practice group will monitor the rule-making process, and will notify clients when the regulations become final.

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SHERI MINARSKY
Appellant

v.

SUSQUEHANNA COUNTY;
THOMAS YADLOSKY, JR.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(District Court No.: 3-14-cv-02021)
District Judge: Honorable Robert D. Mariani

Argued April 18, 2018

Before: GREENAWAY, JR., RENDELL, and FUENTES,
Circuit Judges
(Opinion Filed: July 3, 2081)

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RENDELL, Circuit Judge:

Thomas Yadlosky, the former Director of Susquehanna County’s Department of Veterans Affairs, made unwanted sexual advances toward his part-time secretary, Sheri Minarsky, for years. She never reported this conduct and explained in her deposition the reasons she did not do so. Although Yadlosky was warned twice to stop his inappropriate behavior, it was to no avail. The County ultimately terminated Yadlosky when the persistent nature of his behavior toward Minarsky came to light.

Minarsky seeks to hold Yadlosky, her supervisor, liable for sexual harassment, and her former employer, Susquehanna County, vicariously liable for said harassment. At issue in this case are the two elements of the Faragher-Ellerth affirmative defense that Susquehanna County has raised.¹ In granting summary judgment in favor of the

¹ To successfully invoke the Faragher-Ellerth affirmative defense, an employer must show that (i) it “exercised reasonable care to avoid harassment and to eliminate it when it might occur,” and that (ii) the plaintiff “failed to act with like reasonable care to take advantage of the employer’s safeguards and otherwise prevent harm that could have been avoided.” Faragher v. City of Boca Raton, 524 U.S. 775, 805 (1998).
County, the District Court held that the elements of this defense had been proven as a matter of law. We conclude that given the facts of this case, the availability of the defense regarding both the first element, whether the County took reasonable care to detect and eliminate the harassment, as well as the second element, whether Minarsky acted reasonably in not availing herself of the County’s anti-harassment safeguards, should be decided by a jury. Accordingly, we will vacate the judgment of the District Court and remand for further proceedings.  

II. Factual Background  

On appeal from the grant of summary judgment in favor of Defendant Susquehanna County, we view the facts in the light most favorable to Plaintiff Minarsky. Nevertheless, the facts are largely undisputed.  

A. Yadlosky’s Alleged Harassment  

Minarsky served as a part-time secretary at the Susquehanna County Department of Veterans Affairs, working Mondays, Wednesdays, and Fridays. On Fridays, Minarsky worked for Defendant Yadlosky. They worked together in an area separate from other County employees.  

2 Minarsky also challenges the District Court’s dismissal of her remaining state law claim of assault against Yadlosky for lack of supplemental jurisdiction, but that issue is moot in light of our decision.  

3 Yadlosky was a full-time employee, but worked out of different offices on the other days.
Minarsky alleges that soon after she started working at the Department in September of 2009, Yadlosky began to sexually harass her. Yadlosky would attempt to kiss her on the lips before he left each Friday, and would approach her from behind and embrace her, “pull[ing] [her] against him.” A. 98. When Minarsky was at her computer or the printer, Yadlosky would purportedly massage her shoulders or touch her face. She testified that these advances were unwanted, and happened frequently—nearly every week. As they worked together, alone, others were seldom present to observe Yadlosky’s conduct, other than during the holiday season each year, when Yadlosky asked Minarsky and other female employees to kiss him under mistletoe.⁴

Yadlosky engaged in other non-physical conduct that Minarsky found disturbing. For example, he often questioned Minarsky about her whereabouts during her lunch hour and with whom she was eating. He called her at home on her days off under the pretense of a work-related query but proceeded to ask personal questions. Yadlosky allegedly became hostile if she avoided answering these calls. He sent sexually explicit messages from his work email to Minarsky’s work email, to which Minarsky did not respond. He also behaved unpredictably, as on one occasion when he insisted that Minarsky take two full days off, unpaid, to drive her daughter to her cancer treatment, but soon after, he chastised her for seeking time off—even though it fell on days they did not work together.

⁴ Another instance noted in the record of an employee observing Yadlosky’s behavior toward Minarsky is the incident involving Connie Orangasick. See infra pp. 6–7.
Minarsky alleges that the harassment intensified as time passed. When the harassment first began, she mildly and jokingly told him to stop. He did not. She claims that Yadlosky knew that her young daughter was ill and thus knew Minarsky depended on her employment to pay medical bills. She states that she feared speaking up to him in any context, let alone to protest his harassment, because he would react and sometimes become “nasty.” A. 142.

B. Prior Reprimands

Yadlosky reported to Sylvia Beamer, the Chief County Clerk, who reported to the Susquehanna County Commissioners. On two separate occasions, Beamer became aware of Yadlosky’s inappropriate behavior toward other women, and reprimanded him. County Commissioner Maryann Warren was aware of one of these incidents. First, in 2009, Beamer observed Yadlosky embrace a female employee. Beamer verbally admonished Yadlosky and told him that such behavior was inappropriate. Second, Commissioner Warren observed Yadlosky act inappropriately with the County’s Director of Elections in late 2011 or early 2012. Warren notified Beamer that she saw Yadlosky hug the Director and kiss her on the cheek. Beamer verbally reprimanded Yadlosky once again and told him he could face termination if his inappropriate behavior continued. After both incidents, there was no further action or follow-up, nor was any notation or report placed in Yadlosky’s personnel file.

Minarsky became aware of the first reprimand, but not the second. In Minarsky’s deposition, she recounted a time when another employee, Connie Orangasick, saw Yadlosky
approaching Minarsky from behind and hugging her. Orangasick walked by, noticed the situation, and said to Yadlosky, “I thought you said yesterday you’re not supposed to do that anymore.” A. 99. A few minutes later, he responded that he could do whatever he wanted “[o]ver here,” referring to the building where he and Minarsky were largely separated from other employees. A. 100. When Minarsky followed up with Orangasick, she learned that Beamer had warned Yadlosky about his inappropriate behavior. After being warned, he then allegedly came back to his office and joked about the incident to Orangasick.

Minarsky also learned that other women had similar encounters with Yadlosky. In addition to the mistletoe episodes, Minarsky spoke to another secretary, Rachel Carrico, who mentioned that she had problems with Yadlosky’s hugging, as well. Also, once when Beamer was in the Veterans Affairs office, Minarsky observed Yadlosky as he was attempting to embrace Beamer, but she stopped him and said, “Get away from me.” A. 111.

C. The County’s Anti-Harassment Policy

On her first day of work, Minarsky read and signed Susquehanna County’s General Harassment Policy. It states that harassment based upon “sex, age, race, religion, national origin, ethnicity, disability, sexual preference and any other protected classification” is prohibited. A. 166; A. 205–06. According to the policy, an employee could report any harassment to their supervisor; if the supervisor is the source of the harassment, the employee could report this to the Chief County Clerk or a County Commissioner.
During the four years Minarsky avers that she was harassed by Yadlosky, she did not report this harassment to either Beamer, the Chief County Clerk, or any of the County Commissioners. Minarsky alleges that she feared elevating the claims to County administrators, because Yadlosky repeatedly warned her not to trust the County Commissioners or Beamer. She claims that he would often tell her to look busy or else they would terminate her position. These warnings, Minarsky contends, along with the fact that Yadlosky had been reprimanded unsuccessfully for his inappropriate advances toward others, prevented her from reporting Yadlosky.

D. Yadlosky’s Termination

In her deposition, Minarsky recounted that she finally revealed the harassment and its emotional toll on her health to her physician in April of 2013. The doctor discussed the situation with Minarsky and emphasized the need to bring an end to the conduct. She encouraged Minarsky to compose an email to Yadlosky, so she would have some documentation.

Minarsky testified that she agonized over this, but finally sent Yadlosky an email on July 10, 2013, prompted by the incident in which Yadlosky allegedly reacted negatively when Minarsky asked to take time off for her daughter’s treatment. She wrote, “I want to just let you know how uncomfortable I am when you hug, touch and kiss me. I don’t think this is appropriate at work, and would like you to stop doing it. I don’t want to go to Sylvia [Beamer]. I would rather resolve this ourselves.” A. 170. Yadlosky responded,
First and more importantly, I never meant to make you feel uncomfortable nor would I ever want to offend you in any way and I will STOP IMMEDIATELY. Secondly, almost from the first day you started (3 years and 9 months) I have been affectionate to you, among other people I was close to (only in a friendly manner, no other way intended), why have you never said anything to me before. Third, and to me most important, I thought we had a very good working relationship where we could approach one another on any matters. It disturbs me that you would put this out on an e-mail and not talk to me about this. Apparently I was wrong on thinking that. If you wanted to do this in writing, for proof, you could have typed this out and I would have signed it and you could have kept it.

A. 170. He confronted Minarsky about the email on July 12; she claims that he seemed mostly concerned that his reputation might be tarnished if someone else read her email.

Around the same time, Minarsky confided in her friend and co-worker, Rachel Carrico, about Yadlosky’s harassment. When Carrico mentioned what was happening between Yadlosky and Minarsky to another employee, Carrico’s supervisor overheard the conversation and reported Yadlosky’s conduct to Beamer. At first, Minarsky objected, for fear of losing her job. But Beamer had already been notified, and she interviewed Minarsky about her allegations within a few days. Beamer informed the County Commissioners, who agreed that Yadlosky should be
terminated. The next day, Beamer interviewed Yadlosky. When he admitted to the allegations, Yadlosky was immediately placed on paid administrative leave, and then terminated. The County then hired a Human Resources Director to oversee personnel issues.

Minarsky quit several years later, and she alleges she was uncomfortable in her role after Yadlosky was fired, because her workload increased, and because of inquiries from her new supervisor asking about what had transpired with Yadlosky and who else she had caused to be fired.

II. Procedural History

Plaintiff Minarsky filed a Complaint, Amended Complaint, and a Second Amended Complaint with five causes of action against Susquehanna County and two against Yadlosky. The counts against the County were: gender discrimination, sexual harassment through a hostile work environment, and quid pro quo sexual harassment, all under Title VII of the Civil Rights Act; gender discrimination under the Pennsylvania Human Relations Act (PHRA); and negligent hiring and retention under Pennsylvania state law. The counts against Yadlosky, all under state law, were: gender discrimination under the PHRA (later withdrawn), intentional infliction of emotion distress (IIED), and assault.

The District Court granted Yadlosky’s Motion to Dismiss the IIED claim but denied the County’s Motion for Judgment on the Pleadings. After discovery, the County moved for summary judgment. The District Court adopted the Magistrate Judge’s Report and Recommendation and granted the County’s Motion for Summary Judgment, while
dismissing the remaining count of assault against Yadlosky—the lone remaining state law claim—for lack of supplemental jurisdiction.

On appeal, Minarsky claims that the District Court erred in finding that the County had satisfied both elements of the Faragher-Ellerth affirmative defense as to the claim of sexual harassment through a hostile work environment and erred in dismissing the state law claim for lack of supplemental jurisdiction.

III. Standard of Review

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. This Court has jurisdiction over final orders of the District Court pursuant to 28 U.S.C. § 1291.

We exercise plenary review over the grant or denial of summary judgment and apply the same standard the district court should have applied. Giles v. Kearney, 571 F.3d 318, 322 (3d Cir. 2009). Summary judgment is appropriate when, drawing all reasonable inferences in favor of the nonmoving party, “the movant shows that there is no genuine dispute as to any material fact,” and thus the movant “is entitled to judgment as a matter of law.” Thomas v. Cumberland Cty., 749 F.3d 217, 222 (3d Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). We deny summary judgment if there is enough evidence for a jury to reasonably find for the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).
IV. Hostile Work Environment Claim

On appeal, Minarsky does not contest the District Court’s grant of summary judgment on the claims for gender discrimination and quid pro quo sexual harassment in violation of Title VII and the PHRA. Thus, we focus our analysis on the claim of sexual harassment based on a hostile work environment. To establish a Title VII hostile work environment claim against one’s employer, a plaintiff employee must prove:

1) the employee suffered intentional discrimination because of his/her sex, 2) the discrimination was severe or pervasive, 3) the discrimination detrimentally affected the plaintiff, 4) the discrimination would detrimentally affect a reasonable person in like circumstances, and 5) the existence of respondeat superior liability.

Mandel v. M & Q Packaging Corp., 706 F.3d 157, 167 (3d Cir. 2013) (internal citations omitted). Defendant Susquehanna County only contests the fifth prong, vicarious liability, which frames our analysis on appeal.

A. The Faragher-Ellerth Affirmative Defense

In the companion cases of Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), the U.S. Supreme Court established standards for when an employee who was harassed in the workplace by a supervisor may impute liability to the employer. In doing so, the Court acknowledged
the sensitive nature of workplace harassment: “a supervisor’s power and authority invests his or her harassing conduct with a particular threatening character.” *Ellerth*, 524 U.S. at 763.

If the harassment resulted in a “tangible employment action” against the employee, then the employer is strictly liable. *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323, 328 (3d Cir. 2015) (quoting *Pa. State Police v. Suders*, 542 U.S. 129, 143 (2004)). The Supreme Court has described a tangible employment action as “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Ellerth*, 524 U.S. at 761.5

However, if the harassed employee suffered no tangible employment action, as in the present scenario,6 the employer can avoid liability by asserting the *Faragher-

5 To prove a claim for gender discrimination under Title VII or the PHRA and quid pro quo sexual harassment under Title VII, a plaintiff must show that she suffered an adverse employment action, or “an action by an employer that is serious and tangible enough to alter an employee’s compensation, terms, conditions, or privileges of employment.” *Jones*, 796 F.3d at 326 (quoting *Storey v. Burns Int’l Sec. Servs.*, 390 F.3d 760, 764 (3d Cir. 2004)). “Regardless of whether [tangible employment action] means precisely the same thing as ‘adverse employment action,’ we think it clear that neither phrase applies” in this case. *Id.* at 328.

6 Minarsky did not proffer evidence that she was reassigned, discharged, or demoted.
Ellerth affirmative defense. The employer must show “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.

The cornerstone of this analysis is reasonableness: the reasonableness of the employer’s preventative and corrective measures, and the reasonableness of the employee’s efforts (or lack thereof) to report misconduct and avoid further harm. Thus, the existence of a functioning anti-harassment policy could prove the employer’s exercise of reasonable care so as to satisfy the first element of the affirmative defense. Faragher, 524 U.S. at 807.

To prove the second element of the affirmative defense, that the plaintiff unreasonably failed to avail herself of the employer’s “preventive or corrective opportunities,” the Supreme Court has held that “proof that an employee failed to [exercise] reasonable care to avoid harm . . . will normally suffice to satisfy the employer’s burden under the second element of the defense.” Id. at 807–08; Ellerth, 524 U.S. at 765.

B. District Court Rulings

The Magistrate Judge recommended that the District Court grant summary judgment on all counts. He determined that the County acted reasonably: first, for maintaining an anti-harassment policy, with which Minarsky was familiar,
and second, for reprimanding Yadlosky for his inappropriate conduct two times in the past and for promptly terminating Yadlosky once his misconduct toward Minarsky came to light.

The Judge also found Minarsky’s silence—her failure to report the harassment—unreasonable. “The County’s reasonable policies and responses,” the Magistrate Judge wrote, “are set in stark contrast to the plaintiff’s refusal or unwillingness to avail herself of the County’s anti-harassment policy to bring Yadlosky’s conduct to the attention of County officials.” Minarsky v. Susquehanna Cty., 2017 WL 4475978, at *6 (M.D. Pa. May 22, 2017). The Magistrate Judge dismissed Minarsky’s alleged apprehension of the Chief Clerk and County Commissioners as unreasonable, because her mistrust of them came “from the very employee Minarsky claims was harassing her,” and was not sufficient to excuse her failure to report. Id. He cited to caselaw for the principle that a prolonged failure to report misconduct, when a policy existed to report the conduct, is unreasonable as a matter of law, under the facts of those cases.\(^7\)

The Magistrate Judge acknowledged that a failure to avail oneself of a sexual harassment policy, in fear of retaliation, may be reasonable when grounded in fact, which

\(^7\) E.g., Newsome v. Admin. Office of the Courts of the State of N.J., 51 F. App’x 76, 80 (3d Cir. 2002) (non-precedential) (a two-year delay in reporting harassment was unreasonable); Gawley v. Ind. Univ., 276 F.3d 301, 312 (7th Cir. 2001) (seven-month delay unreasonable); Cacciola v. Work N Gear, 23 F. Supp. 3d 518, 531–32 (E.D. Pa. 2014) (nine-month delay unreasonable).
he distinguished from what he found to be Minarsky’s unfounded concerns. He contrasted Minarsky’s situation with the plaintiff’s in Still v. Cummins Power System, who observed fellow employees suffer retaliation for having followed the anti-harassment policy, and was thus justified in not reporting. 2009 WL 57021, at *13 (E.D. Pa. Jan. 8, 2009).

Minarsky lodged objections to the Magistrate Judge’s Report and Recommendation, but the District Court rejected Minarsky’s objections and adopted the Report and Recommendation in its entirety. The Court found that the County satisfied the Faragher-Ellerth defense: although the County was unaware of Yadlosky’s misconduct toward Minarsky, it warned him after each prior incident and fired him as soon as Beamer and the Commissioners were made aware of the allegations, all while Minarsky did not avail herself of the County’s sexual harassment policy because she feared the consequences of reporting. The District Court concluded, “no reasonable jury could find that Plaintiff acted reasonably in failing to avail herself of the protections of the sexual harassment policy.” Minarsky v. Susquehanna Cty., 2017 WL 4475981, at *1 (M.D. Pa. June 28, 2017).

C. Analysis

1. Element One

The first element of the Faragher-Ellerth affirmative defense concerns whether the County “exercised reasonable care to prevent and correct promptly any sexually harassing behavior.” Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765. We acknowledge that the County maintained a written anti-harassment policy, which Minarsky was asked to read
and sign on her first day. The policy prohibited harassment in the workplace, directed employees to report any harassment to a supervisor, and provided that an employee “may” report to the Chief Clerk or a County Commissioner if the supervisor was the source of harassment. A. 166–67.

The District Court determined that the County had reasonable policies and responses so as to satisfy the first prong of Faragher-Ellerth as a matter of law. We disagree. While Yadlosky was reprimanded twice and ultimately fired, we cannot agree that the County’s responses were so clearly sufficient as to warrant the District Court’s conclusion as a matter of law. Yadlosky’s conduct toward Minarsky was not unique; Minarsky’s deposition testimony revealed a pattern of unwanted advances toward multiple women other than herself. See, e.g., A. 102–03.

In addition to the mistletoe incidents and his advances toward Rachel Carrico and Connie Orangasick, Yadlosky had also made inappropriate physical advances to two of the women in authority, Chief Clerk Beamer and Commissioner Warren. Minarsky testified that when she later attended the hearing to determine Yadlosky’s eligibility for unemployment benefits, she was shocked to learn of the extent to which Beamer knew of Yadlosky’s pattern of inappropriate physical contact: apart from the two times Beamer reprimanded Yadlosky for hugging other employees, Yadlosky tried to hug Beamer, too. In her deposition, Commissioner Warren also

8 In her deposition, Beamer testified, “Once I believe he was going to [hug me]. It was in my office and he started to come around my desk and I just said don’t go there. That was early on.” A. 192:10–12.
testified that Yadlosky attempted to hug her, put his arm around her, or kiss her on the cheek approximately ten times. 9 Although as a Commissioner, Warren was in a position to discipline Yadlosky for his behavior, and although she raised his misconduct to County Commissioner Hall, neither Warren nor Hall reprimanded Yadlosky. 10 Thus, County officials were faced with indicators that Yadlosky’s behavior formed a pattern of conduct, as opposed to mere stray incidents, yet they seemingly turned a blind eye toward Yadlosky’s harassment.

Was the policy in place effective? Knowing of his behavior, and knowing that Minarsky worked alone with Yadlosky every Friday, should someone have ensured that she was not being victimized? Was his termination not so much a reflection of the policy’s effectiveness, but rather, did it evidence the County’s exasperation, much like the straw that broke the camel’s back? We do not answer these questions, but conclude that there exists enough of a dispute of material fact, and thus a jury should judge all of the facts as to whether the County “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at

9 Warren: “He would kind of giggle like a girl, come around the table and lean over and . . . hug me and tried to kiss me on the cheek. . . . I backed the chair up, told him to get away, [asked him what he was] doing and to stop being a jerk.” A. 260:16–18, 21–22.

10 In her deposition, Warren stated that she needed another Commissioner to sign off if she were to take any action against Yadlosky.
765, and thereby determine whether the County satisfied the first element of Faragher-Ellerth.

2. Element Two

The second element, regarding the reasonableness of Minarsky’s failure to report Yadlosky’s behavior, presents a similarly troubling set of facts. On the one hand, she remained silent and did nothing to avoid further harm. On the other hand, her silence might be viewed as objectively reasonable in light of the persuasive facts Minarsky has set forth.

We are sensitive to the Supreme Court’s emphasis that the second Faragher-Ellerth element is tied to the objective of Title VII, to avoid harm, rather than provide redress. Faragher, 524 U.S. at 806–07 (“[N]o award against a liable employer should reward a plaintiff for what her own efforts could have avoided.”). We also acknowledge that our case precedent has routinely found the passage of time coupled with the failure to take advantage of the employer’s anti-harassment policy to be unreasonable, as did the District Court here. E.g., Jones, 796 F.3d at 329.11

Nevertheless, we cannot ignore Minarsky’s testimony as to why she did not report Yadlosky’s conduct, and we

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11 In Jones, the plaintiff’s ten-year delay in reporting her alleged harassment was just one factor we credited in concluding that the defendant satisfied Faragher-Ellerth.
believe that a jury could find that she did not act unreasonably under the circumstances.\textsuperscript{12}

\textsuperscript{12} This appeal comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims. It has come to light, years later, that people in positions of power and celebrity have exploited their authority to make unwanted sexual advances. In many such instances, the harasser wielded control over the harassed individual’s employment or work environment. In nearly all of the instances, the victims asserted a plausible fear of serious adverse consequences had they spoken up at the time that the conduct occurred. While the policy underlying \textit{Faragher-Ellerth} places the onus on the harassed employee to report her harasser, and would fault her for not calling out this conduct so as to prevent it, a jury could conclude that the employee’s non-reporting was understandable, perhaps even reasonable. That is, there may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it in this way. Instead, they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment.

Recent news articles report that studies have shown that not only is sex-based harassment in the workplace pervasive, but also the failure to report is widespread. Nearly one-third of American women have experienced unwanted sexual advances from male coworkers, and nearly a quarter of American women have experienced such advances from men who had influence over the conditions of their employment, according to an ABC News/Washington Post poll from October of 2017. Most all of the women who experienced
Although we have often found that a plaintiff’s outright failure to report persistent sexual harassment is unreasonable as a matter of law, particularly when the opportunity to make such complaints exists, we write to clarify that a mere failure to report one’s harassment is not per se unreasonable. Moreover, the passage of time is just one factor in the analysis. Workplace sexual harassment is highly harassment report that the male harassers faced no consequences. ABC News/Washington Post, Unwanted Sexual Advances: Not Just a Hollywood Story (Oct. 17, 2017), http://www.langerresearch.com/wp-content/uploads/1192a1SexualHarassment.pdf.

Additionally, three out of four women who have been harassed fail to report it. A 2016 Equal Employment Opportunity Commission (EEOC) Select Task Force study found that approximately 75 percent of those who experienced harassment never reported it or filed a complaint, but instead would “avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior.” EEOC Select Task Force, Harassment in the Workplace, at v (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf. Those employees who faced harassing behavior did not report this experience “because they fear[ed] disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.” Id.; see also Stefanie Johnson, et al., Why We Fail to Report Sexual Harassment, Harvard Business Review (Oct. 4, 2016), http://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment (women do not report harassment because of retaliation fears, the bystander effect, and male-dominated work environments).
circumstance-specific, and thus the reasonableness of a plaintiff’s actions is a paradigmatic question for the jury, in certain cases. If a plaintiff’s genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second Faragher-Ellerth element as a matter of law. Instead, the court should leave the issue for the jury to determine at trial.

Here, Minarsky asserts several countervailing forces that prevented her from reporting Yadlosky’s conduct to Beamer or a County Commissioner: her fear of Yadlosky’s hostility on a day-to-day basis and retaliation by having her fired; her worry of being terminated by the Chief Clerk; and the futility of reporting, since others knew of his conduct, yet it continued. All of these factors were aggravated by the pressing financial situation she faced with her daughter’s cancer treatment.

First, the particular nature of Minarsky’s working relationship with Yadlosky complicated the situation. They worked alone one day each week, away from others, and on other days he continued to monitor her, ostensibly utilizing his control over her work environment to harass her. Appellees argue that the superior-subordinate dynamic is unremarkable, because all Faragher-Ellerth cases involve a power imbalance wherein the harasser controls the working conditions of the harassed. We disagree that this is irrelevant; the degree of control and specific power dynamic can offer context to the plaintiff’s subjectively held fear of speaking up, for instance, if the supervisor “took advantage of the power vested in them . . . to facilitate their abuse” or harassment.
Second, when Minarsky attempted to assert herself in the workplace, she alleges that Yadlosky became “nasty,” which deepened her fear of defending herself or disclosing Yadlosky’s misconduct. For example, if she tried to request personal days off or ignored his phone calls on days she was not working, he became ill-tempered. She said,

He was just unpredictable with his temperament. I had to watch what I said to him. I had to watch how I acted around him. It seemed if he didn’t get what he wanted, I seemed to get treated more miserably. The day would be harder if I spoke up about anything he said or [did] in the office. I had to just watch what I did.

A. 153:15–20; see also A. 158:6 (“[H]e had a temper.”). Moreover, when asked why she was unable to vocally protest Yadlosky’s attempts to kiss her, Minarsky stated that she needed her job to pay her daughter’s medical bills, and worried that she might lose her job or otherwise be retaliated against if she voiced her distress.\(^\text{13}\) When Yadlosky would approach Minarsky because “he thought he should kiss [her] on the lips before he left” each Friday, A. 97:21–22, Minarsky stated in her deposition, “I did not know how to respond. It happened so quickly. I was under probation so I

\(^{13}\) Minarsky did, however, refuse to walk into his office if there was mistletoe hanging, and admits that this was the only time she specifically voiced her discomfort.
was concerned that . . . if I did not, what was going to happen [to my job].” 14 A. 98:10–12. Although she avers that she meekly protested, she states, “I know I didn’t dare speak up to him.” A. 99:10–11.

We distinguish this situation from one in which the employee’s fear of retaliation is generalized and unsupported by evidence. Several courts have held that a generalized fear of retaliation is insufficient to explain a long delay in reporting sexual harassment. See, e.g., Pinkerton v. Colo. Dep’t of Transp., 563 F.3d 1052, 1063 (10th Cir. 2009) (citing cases from the Fifth, Sixth, Eighth, and Eleventh Circuit Courts of Appeals where a generalized fear of retaliation did not excuse a two-to-four month delay in reporting harassment). 15 The First Circuit Court of Appeals has held that a fear of retaliation that is substantiated by evidence in the record may excuse a failure to report, and the jury should decide the credibility of the witness expressing this fear. See Burns v. Johnson, 829 F.3d 1, 19 (1st Cir. 2016) (finding “evidence in the record that Burns feared retaliation, which is bolstered by the fact that others expressed fear of

14 When Minarsky first began working at the County, her employment was probationary for the first six months.

retaliation for mere participation in the . . . investigation into [the harassment, along with] evidence that Burns had earlier reported her concerns, including to her direct supervisor”).

Here, Minarsky identifies instances where asserting herself rendered her working conditions even more hostile, and she was led to believe that she should not protest her supervisor’s conduct. Presented with these facts, a reasonable jury could find that Minarsky’s fear of aggravating her work environment was sufficiently specific, rather than simply a generalized, unsubstantiated fear.\footnote{16 The trial judge can instruct the jury that a plaintiff’s fears must be specific, not generalized, in order to defeat the Faragher-Ellerth defense.}

Third, although Minarsky’s fear of retaliation was subjective, we disagree with the District Court’s view that it was clearly unfounded. Yadlosky discouraged her from using the anti-harassment policy by underscoring that she could not trust the Commissioners or the Chief Clerk—those to whom she would report the harassment. He warned her that they might “get rid” of Minarsky and her job, which she alleged “made it very hard for [her] to think of going to them.” A. 101:20–21, 24–25. The District Court discounted this because it was Yadlosky himself who made these comments. But the fact that he was the harasser does not mean that Minarsky should have disbelieved his comments about people in authority whom he knew better than she did, and does not render her fear unfounded. Minarsky was merely a part-time employee. Yadlosky was the Director of Veterans Affairs for the County. We do not think that her failure to avail herself of
this avenue was necessarily unreasonable, and a jury could find the same.

Fourth, Minarsky discovered that the County had known of Yadlosky’s behavior and merely slapped him on the wrist, without more—bolstering Minarsky’s claim that she feared the County would ignore any report she made. “[H]e had been warned and it went nowhere,” she observed. A. 142:21. She proffered evidence that Yadlosky openly disregarded his behavioral warnings in front of Minarsky and continued to emphasize distrust with the County officials. She said,

[The warning] didn’t phase him at all and he’s telling me not to trust the Chief Clerk, the Commissioners; they would get rid of me; they would get rid of my job. I didn’t know how to perceive that. Was this going to mean my job if I speak up? *It didn’t help the first time with the first person speaking up.*

A. 142:22–143:1 (emphasis added). A jury could find that Minarsky reasonably believed that availing herself of the anti-harassment policy would be futile, if not detrimental. See, e.g., *Harvill v. Westward Commc’ns, LLC*, 433 F.3d 428, 437 (5th Cir. 2005) (a harassed employee “is not obligated to go through the wasted motion of reporting the harassment” if the employee reasonably believes that subsequent complaints would be futile).

Fifth, a reasonable jury could consider the pernicious nature of the harassment compounded with its frequency and duration to contextualize Minarsky’s actions. Minarsky
endured over three-and-a-half years of being kissed on the lips, touched, and embraced by her boss, without her consent, all while he sent her explicit emails and monitored her whereabouts. She witnessed him hugging others and asking female employees to kiss him under mistletoe. Minarsky seemingly agonized over her situation. She only revealed her harassment to her husband years later, because she knew he would have urged her to quit even though her family desperately needed the money. When Minarsky eventually did share her situation with her husband, she expressed that if she quit, she then feared Yadlosky would harass her replacement. Even then, it was only after Minarsky’s medical doctor emphasized that Minarsky was being treated inappropriately, and encouraged her to confront Yadlosky to hopefully bring an end to the harassment and its physical and emotional toll, did Minarsky finally do so.

Rather than view this merely as Minarsky’s idle delay in reporting, a jury could consider the aggravating effect of prolonged, agonizing harassment as a way to credit Minarsky’s fear of worsening her situation.

Appellees argue that Minarsky’s behavior was unreasonable, given her knowledge of the County’s anti-harassment policy and her failure to use the policy, by pointing to the line in Minarsky’s email to Yadlosky, “I don’t want to go to Sylvia. I would rather resolve this ourselves.” A. 170. While Appellees characterize this as evidence

17 Minarsky: “I relayed to him that I was concerned about, if I quit, Tom [will do] this to the next person. . . . How do I quit, knowing that [Yadlosky is] going to continue this? How do I get him to understand that it’s wrong?” A. 157:20–21, 22–24.
Minarsky deliberately refrained from using the policy’s protections, Minarsky averred in her deposition that it was her way of informing Yadlosky that she would resort to the harassment policy if his conduct did not change. Whether this evidence negates the reasonableness of Minarsky’s non-reporting is for the jury, not us, to decide.

In sum, Minarsky has produced several pieces of evidence of her fear that sounding the alarm on her harasser would aggravate her work environment or result in her termination. A jury could consider this evidence and find her reaction to be objectively reasonable. We therefore cannot uphold the District Court’s conclusion that Minarsky’s behavior was unreasonable as a matter of law.

Thus, we will vacate the District Court’s Order granting summary judgment in favor of the County and remand for further proceedings consistent with this opinion.

V. Supplemental Jurisdiction

Minarsky appeals the District Court’s ruling not to exercise supplemental jurisdiction over her sole state-law claim of assault against Yadlosky. Because we vacate the dismissal of the hostile work environment claim under Title VII of the Civil Rights Act, on remand, the District Court will have a federal claim once again. The Court can therefore choose to exercise supplemental jurisdiction over the state-law claim, and thus we vacate the dismissal of the assault

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18 “That was my way of saying I hadn’t gone to the Chief Clerk but, if I need to, I will.” A. 115:22–23.

VI. Conclusion

For the foregoing reasons, the judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.
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ALLIANCE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

Case No.: 

CALIFORNIA BUSINESS & INDUSTRIAL
ALLIANCE, an association representing
California-based employers,

Plaintiff,

v.

XAVIER BECERRA, in his official capacity
as the Attorney General of the State of
California,

Defendant.

COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF

Firm: 47427817v2
COMPLAINT
SYNOPSIS

Are California business owners who inadvertently make a payroll error equivalent to the worst perpetrators of hate crimes? That’s the twisted logic that, more than a decade ago, led the state legislature to pass a harmful law called the Private Attorneys General Act (PAGA).

PAGA was conceived as a means to help employees right workplace wrongs without further burdening the state bureaucracy. Trial attorneys quickly discovered that they could use the law for their own benefit; today, thousands of PAGA complaints are filed annually against large and small businesses, nonprofit charities, and even labor unions.

PAGA, as written and practiced, is unconstitutional. With this complaint, we’re asking the state to enforce its own laws--rather than transferring the state’s power to private attorneys who operate for their own personal gain.

Plaintiff CALIFORNIA BUSINESS AND INDUSTRIAL ALLIANCE (hereafter “CABIA” or “Plaintiff”) alleges as follows:

INTRODUCTION

1. The California Supreme Court has held that “the continued operation of an established, lawful business is subject to heightened protections.” County of Santa Clara v. Superior Court, 50 Cal. 4th 35, 53 (2010) (“Santa Clara”).

2. Notwithstanding, in 2004, the California Legislature passed the Labor Code Private Attorneys General Act (“PAGA”), which “deputized” each and every California employee (and his or her private contingency-fee attorneys) to sue their employers on behalf of the State. In so doing, the California Legislature vested in millions of private individuals the scale-tipping power of the State-litigant status.

3. As pleaded in greater detail below, the current construction of PAGA by California courts (which have their own constitutional infirmities) gives rise to the following unconstitutional framework: valid and binding arbitration agreements are rendered unenforceable; private contingency-fee attorneys are permitted to litigate on behalf of the State without oversight or coordination with any State official; private attorneys are allowed to negotiate settlements that enrich themselves at the expense of everyone but themselves; due
process protections embodied in class action procedural rules do not apply; trial courts are
divested of discretion to manage certain discovery issues; “fishing expeditions” are expressly
authorized, allowing discovery into claims and theories about which a litigant has no personal
knowledge; limited liability structures and/or a person’s relationship to an employer is
meaningless for the purposes of imposing liability for PAGA penalties.

4. The above, plus the complete lack of oversight by the legislative, executive, and
judicial branches of the California State government, has allowed PAGA to become a tool of
extortion and abuse by the Plaintiffs’ Bar, who exploit the special standing of their PAGA
plaintiff clients to avoid arbitration, threaten business-crushing lawsuits, and extract billions of
dollars in settlements, their one-third of which comes right off the top.

5. Each day that PAGA continues to empower greedy and unscrupulous plaintiffs’
attorneys to shake down California employers, the fundamental right of employers to the
“continued operation of an established, lawful business” is imperiled. Santa Clara, 50 Cal. 4th
at 53.

6. COMES NOW CABIA to challenge the constitutionality of PAGA not only as
written, but also as applied to its members and other California employers.

THE PARTIES

7. Plaintiff is an association that was incorporated in Washington, D.C., which
principally represents the interests of small and mid-sized businesses in California, a number of
which have been sued under PAGA.

8. Many of Plaintiff’s members have suffered damages as a result of the existence
of PAGA, in the form of legal fees to defend against PAGA actions, settlement payments to
resolve PAGA lawsuits, or judgments or orders to pay PAGA penalties from California courts.

9. CABIA was formed for the general purpose of promoting the interests of small
and mid-sized business through a mix of public education, lobbying, and grassroots organizing,
and the specific purpose of accomplishing the repeal or reform of PAGA.

10. CABIA is willing and capable to represent the interests of its members in this
lawsuit, whose individual participation is not required in order for this Court to evaluate and to
adjudicate the constitutional challenges asserted against PAGA herein.

11. Defendant Attorney General Xavier Becerra is sued in this action in his official capacity as a representative of the State of California charged with the enforcement of PAGA.

JURISDICTION AND VENUE

12. This Court has original jurisdiction in this matter under Article VI, Section 10, of the California Constitution. This Court also has jurisdiction under California Code of Civil Procedure Sections 410.10, 525, 526, 526a, 1060, 1062, and 1085.

13. Venue in this Court is proper under California Code of Civil Procedure Sections 393, 395, and 401. Some or all of Plaintiff’s members reside, do business, and/or have suffered an injury in this county.


15. Injunctive relief is authorized by California Code of Civil Procedure Sections 525, 526, and 526a.

STATEMENT OF FACTS

I. THE STATUTORY AND CONSTITUTIONAL FRAMEWORK

A. Federal and State Prohibitions on Excessive Fines and Unusual Punishment

16. The Eighth Amendment to the U.S. Constitution provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const., amend. VIII.

17. The United States Supreme Court has held that the Excessive Fines Clause applies to the states. See Hall v. Florida, 134 S. Ct. 1986, 1992 (2014).

18. The Excessive Fines Clause, as interpreted by the United States Supreme Court, “limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’? R.L. Austin v. United States, 509 U.S. 602, 609–10 (1993) (“Austin”).

19. “The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.” Id. at 610.
20. “The touchstone of the constitutional inquiry under the Excessive Fines Clause is
the principle of proportionality: the amount of the forfeiture must bear some relationship to the
gravity of the offense that it is designed to punish.” United States v. Bajakajian, 524 US 321,

21. The California Supreme Court, as well as the U.S. Court of Appeals for the
Ninth Circuit, have held that these prohibitions apply with equal force to the California State
(“R.J. Reynolds”) (“[T]he Due Process Clause of the Fourteenth Amendment to the Federal
Constitution . . . makes the Eighth Amendment’s prohibition against excessive fines and cruel
and unusual punishments applicable to the States.”); accord Wright v. Riveland, 219 F.3d 905,
916 (9th Cir. 2000) (analyzing whether state fine was excessive under the Eighth Amendment).

22. Moreover, the California Constitution contains similar protections to those
embodied in the Eighth Amendment. Article I, Section 17, prohibits “cruel or unusual
punishment” and “excessive fines”; article I, Section 7, prohibits the taking of property “without
due process of law.” R.J. Reynolds, 37 Cal. 4th at 728.

B. Due Process

23. The Fifth Amendment to the U.S. Constitution provides, in relevant part, that:
“No person shall . . . be deprived of life, liberty, or property, without due process of law;
nor shall private property be taken for public use, without just compensation.”
U.S. Const., amend. V.

24. Likewise, the Due Process Clause of the 14th Amendment to the United States
Constitution provides that “[n]o state shall . . . deprive any person of life, liberty, or property,
without due process of law . . . .” Id., amend. XIV.

25. The California Constitution also separately prohibits a person from being
“deprived of life, liberty, or property without due process of law[.]” Cal. Const. art. I, Section
7.

26. This due process guarantee has been interpreted to have both procedural and
substantive components, the latter which protects fundamental rights that are so “implicit in the
concept of ordered liberty” that “neither liberty nor justice would exist if they were sacrificed.”


C. Separation of Powers

27. Pursuant to the California Constitution, the legislative power of the State is vested in the California Legislature, save the reserved powers of initiative and referendum. See Cal. Const. art. IV, Section 1. The supreme executive power of the State is vested in the Governor. See Id., art. V, Section 1. And “[t]he judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record.” Id., art. VI, Section 1. The California Constitution expressly provides for the separation of these government powers. Id., art. III, Section 3 (hereafter, “Separation of Powers Doctrine”). The California Supreme Court has articulated the “classic understanding of the separation of powers doctrine—that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality.” Lockyer v. City and County of San Francisco, 33 Cal. 4th 1055, 1068 (2004).

28. Under the Separation of Powers Doctrine, the Legislature cannot exercise any core judicial functions. See Pryor v. Downey, 40 Cal. 388, 403 (1875) (“The Legislature of California cannot exercise any judicial function, and no person in this State can be deprived of life, liberty or property without due process of law.”). And the California Supreme Court will hold unconstitutional legislation that violates the Separation of Powers Doctrine. See In re Application of Lavine, 2 Cal. 2d 324, 328 (1935); Merco Constr. Eng’rs, Inc. v. Mun. Court, 21 Cal. 3d 724, 731 (1984).

29. The California Supreme Court has set forth “the basic test for assessing whether
the Legislature has overstepped its oversight authority: "[T]he legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions." Conway v. State Bar, 47 Cal. 3d 1107, 1128 (1989). And “[w]here a statute creates a special liability upon the part of employers and grants power to an agency of government to determine when liability exists and to render a judgment in favor of the employee against the employer, the power exercised constitutes basic judicial power within the meaning of the Constitution." Laisne v. Cal. State Bd. of Optometry, 19 Cal. 2d 831, 864 (1942).

D. Equal Protection

30. The 14th Amendment to the United States Constitution provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws . . . .” U.S. Const., amend. XIV.

31. Similarly, the California Constitution guarantees all persons “equal protection of the laws[.]” Cal. Const. art. I, Section 7.

E. The California Labor Code

32. The California Labor Code, California Code of Regulations, and the Industrial Welfare Commission Orders (collectively, the “California Labor Laws”) govern the rights and obligations of employers, employees, and other “persons,” as that term is defined in Labor Code Section 18, with respect to employment and/or the provision of labor by and between parties in the State of California. The California Labor Laws are composed of myriad rules, standards, and obligations, which touch nearly every aspect of the employment relationship, including, but not limited to, working hours, payment of minimum wages and overtime, the provision of meal and rest breaks, the temperature of workplace bathrooms, what information that must appear on a paystub, the place of payment of wages, the timing of payment during employment, the timing of payment after employment, mandatory paid sick leave, State-approved workplace posters, the nature of gratuities, use of credit reports, what records must be kept and for how long, and a multitude of other matters.

33. Many of the California Labor Laws are unclear, cumbersome, counterintuitive,
impossible to follow, or all of the foregoing.

34. For example, to comply with California law with respect to meal periods, employers must navigate and harmonize a combination of Labor Code Sections, California Code of Regulations provisions, Industrial Welfare Commission Orders, and California judicial opinions. More specifically, Labor Code Section 512(a) sets forth a portion of most employers’ obligations with respect to meal periods:

- An employer shall not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer shall not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

Additional obligations (and exceptions to the rule) are set forth in the Industrial Welfare Commission orders, many of which contain the following or similar language:

- (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an “on duty” meal period and counted as time worked. An “on duty” meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement
shall state that the employee may, in writing, revoke the agreement at any
time.

See, e.g., I.W.C. Wage Order 4-2001, Section 11, (A)-(B) ("Wage Order 4"). As pleaded in
further detail below, attempting to comply with just the timing rules of a meal period is difficult
enough. But even a dozen years after the codification of an employer’s meal period obligation
in Labor Code Section 512, there was still ambiguity over what it meant to “provide” meal
periods under California law. This ambiguity, which for many California employers carried the
prospect of business-crushing lawsuits, was not settled law until the California Supreme Court
“explained” the obligation in 2012:

The employer satisfies this obligation if it relieves its employees of all duty,
relinquishes control over their activities and permits them a reasonable
opportunity to take an uninterrupted 30-minute break, and does not impede
or discourage them from doing so . . .

Bona fide relief from duty and relinquishing of control satisfies the
employer’s obligations . . .


35. The penalty for not complying with the meal period rules is set forth in the Labor
Code Section 226.7, which provides in relevant part:

If an employer fails to provide an employee a meal or rest or recovery period
in accordance with an . . . order of the Industrial Welfare Commission . . .
the employer shall pay at the employee’s regular rate of compensation for
each workday that the meal or recovery period is not provided.

36. As demonstrated by the hundreds of meal period class and/or representative
actions filed each year, there is no policy, practice, or combination thereof that can achieve full
and irrefutable compliance with California meal period rules.

a. This is so because full compliance would require that an employer have perfect
foresight regarding how long each shift for each employee would last, which is
impracticable.
b. It would also require that an employer be able to read the minds of all its non-
exempt employees, specifically whether they felt as if they had a “reasonable
opportunity” to take a meal period, which is preposterous.

c. It would also require that an employer anticipate and prevent every possible
circumstance, event, or contingency that might lead to an interrupted meal break,
which is hopeless.

37. And even if an employer could accomplish all of the foregoing, it would be still
impossible to create, to preserve, and to present sufficient evidence of its compliance with the
rules to dissuade self-interest employees (current or former) and their attorneys from filing suit.

38. California rest period rules, which share many of the characteristics that make
meal period compliance unattainable, are virtually impossible to comply in the wake of the
California Supreme Court’s decision in Augustus v. ABM Security Services, Inc., 2 Cal. 5th 257
(2016) (“Augustus”). In Augustus, the Supreme Court inferred that employers’ responsibilities
were “the same for meal and rest periods[,]” even though the language in Wage Order 4 that
expressly requires employees to be “relieved of all duty” during meal periods has no corollary
in the rules relating to rest periods. Id. at 265. Applying that rule to the facts of the case, the
Court went onto hold that merely requiring an employee to carry a communication device, even
if never used, was tantamount to an “on-duty” rest period and thus violated the employer’s
obligation under the Labor Code. Id. at 273. As highlighted by the dissent in Augustus, this was
a “marked departure from the approach we have taken in prior cases concerning whether on-call
time counts as work, and in sharp contrast to the DLSE’s views about what constitutes a duty-
free break,” and there was “no reason to believe that the bare requirement to carry a radio,
phone, or pager necessarily prevents employees from taking brief walks, making phone calls, or
otherwise using their rest breaks for their own purposes, and certainly there is no evidence in
this record to that effect.” Id. at 276. What Augustus means for employers is that virtually every
employee in California who carries a cell phone or pager can allege a cognizable claim for non-
compliant rest breaks. And, again, there is no policy, practice, or combination thereof that can
achieve full and irrefutable compliance with the rules as written and applied by the courts.
39. As another example, Labor Code Section 201(a) provides that “[i]f an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.” Pursuant to Labor Code Section 203(a), “[i]f an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201 . . . the wages of the employee shall continue as a penalty . . . until paid or until an action therefore is commenced; but the wages shall not continue for more than 30 days” (“Section 203”). Though the plain language of Section 203 suggests that it punishes volitional and/or intentional conduct of employers (i.e., “willfully fails to pay”), that turns out not to be the case. Rather, this is how the Department of Industrial Relations (“DIR”) defines the concept of “willful” within the meaning of Section 203:

Assessment of the waiting time penalty does not require that the employer intended the action or anything blameworthy, but rather that the employer knows what he is doing, that the action occurred and is within the employer’s control, and that the employer fails to perform a required act.

See Department of Industrial Relations, Waiting time penalty, available at <https://www.dir.ca.gov/dlse/faq_waitingtimepenalty.htm> (last accessed Nov. 21, 2018). And this standard has been reinforced by California Courts of Appeal:

In civil cases the word “willful” as ordinarily used in courts of law, does not necessarily imply anything blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.


Thus, under California law, the assessment of waiting time penalties has nothing to do with innocence or guilt. In this State, mens rea is all but irrelevant; and the well-meaning and blameless employer can be punished exactly the same as the ill-intended and guilty employer.
And the penalty is the same regardless of whether the employer failed to pay the separating employee one cent, one dollar, one hundred dollars, or one million dollars because the penalty is based on the average daily pay. In the vast majority of circumstances, the amount of underpayment is minuscule, and more often than not the product of a mistake, which means the penalty assessed exceeds any harm suffered by the separating employee. Below is a chart detailing the maximum waiting time penalties that can be assessed against an employer who fails to pay a separating employee one dollar, or a million dollars—again, it makes no difference in California:

<table>
<thead>
<tr>
<th>Hourly Rate</th>
<th>Average Hours Worked</th>
<th>Max Waiting Time Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>$11.00 per hour</td>
<td>8</td>
<td>$2,640</td>
</tr>
<tr>
<td>$13.50 per hour</td>
<td>8</td>
<td>$3,240</td>
</tr>
<tr>
<td>$15.00 per hour</td>
<td>8</td>
<td>$3,600</td>
</tr>
<tr>
<td>$25.00 per hour</td>
<td>8</td>
<td>$6,000</td>
</tr>
<tr>
<td>$35.00 per hour</td>
<td>8</td>
<td>$8,400</td>
</tr>
<tr>
<td>$45.00 per hour</td>
<td>8</td>
<td>$10,800</td>
</tr>
</tbody>
</table>

40. A common allegation made in support of a claim for Section 203 penalties is that employees were not paid for work they did not record in the timekeeping system (i.e., “off-the-clock” work). In California, an employer is liable for such “unpaid” wages (and derivative 203 Penalties) if an employee can show that the employer “knew or should have known off-the-clock work was occurring.” *Brinker*, 53 Cal. 4th at 1051. And the difficulty of combating such claims has greatly increased in the wake of the Supreme Court’s decision in *Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 848 (2018), which all but eliminated the “de minimis” defense, and, at a minimum, made almost all claims of off-the-clock work cognizable under California law.

41. California wage statement laws present their own unique challenges for employers. Labor Code Section 226(a) requires employers to furnish paystubs that contain up to nine different pieces of information. These required items of information are: gross wages
earned by the employee, total hours worked by the employee, all applicable hourly rates during
the pay period, all deductions taken from the employee’s wages, the net wages the employee
earned, the pay period that the wage statement reflects, including the start and end date, the
employee’s name and ID number (which can be the last four digits of the Social Security
number (SSN)), the name and address of the legal employer, and if the employee earns a piece
rate, then the number of piece-rate units earned and the applicable piece rate.

42. In order to prevail on a Labor Code 226(a) claim, an employee must be able to
show that (1) a violation of the statutory provision setting forth criteria for wage statements,
(2) the violation was knowing and intentional, and (3) the employee suffered an injury as a
result of the violation. See Cleveland v. Groceryworks.com, LLC, 200 F. Supp. 3d 924, 957
(N.D. Cal. 2016). Though not a “strict liability” statute, the Labor Code deems an employee to
suffer injury if the employee cannot readily ascertain certain information from the wage
statement (e.g., the amount of gross or net wages), even if the employee suffers no financial
injury as a result of the error.

43. As a result, Labor Code Section 226(a) has spawned countless lawsuits alleging
hyper-technical violations that have required employers to incur significant legal expenses in
their defense as well as large settlements and damage awards in numerous cases. The absurd
theories put forward by the Plaintiffs’ Bar in pursuit of wage statement penalties include:
neglecting to total all the hours worked, even though the wage statement lists all the various
types of hours individually; accidentally showing net wages as “zero” where an employee gets
direct deposit; leaving off either the start or end date of the pay period; not showing the number
of hours worked at each applicable rate; recording an incomplete employer name (e.g., “Acme”
instead of “Acme, Inc.”); recording an incomplete employer address; failing to provide an
employee ID number, or reporting a full nine-digit SSN instead of a four-digit SSN.

44. The penalty for violating the wage statement rules are “the greater of all actual
damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one
hundred dollars ($100) per employee for each violation in a subsequent pay period, not to
exceed an aggregate penalty of four thousand dollars ($4,000),” and reasonable attorneys’ fees.

45. The Labor Code also contains numerous one-way fee-shifting provisions in favor of employees who sue to enforce its provisions. See, e.g., Cal. Lab. Code 1194(a).

46. In sum, the California Labor Laws contain a daunting and confusing web of obligations for employers, robust and generous remedies for employees, and a framework that encourages enforcement through private litigant access to the courts.

F. The Labor Code Private Attorneys General Act

1. History of the Law

47. In the early 2000’s, the California State Assembly and Employment Committee held hearings about the effectiveness and efficiency of the enforcement of wage and hour laws by the State Department of Industrial Relations (“DIR”). SB 796, Analysis of S. R. Comm., at 3 (May 21, 2003). The Senate Rules Committee reported the Legislature appropriated over $42 million dollars to the State Labor Commission for the enforcement of over 300 laws, and that the DIR’s authorized staffed numbered over 460, which made it the largest State labor law enforcement organization in the country. Id. Notwithstanding, the California Legislature put forward SB 796 (hereafter “PAGA Bill”) to “augment the LWDA’s civil enforcement efforts by allowing employees to sue employees for civil penalties.” Id. at 4. The Legislative Digest of the PAGA Bill described it as follows:

Under existing law, the Labor and Workforce Development Agency and its departments, divisions, commissions, boards, agencies, or employees may assess and collect penalties for violations of the Labor Code. . . .

This bill would allow aggrieved employees to bring civil actions to recover these penalties, if the agency or its departments, divisions, commissions, boards, agencies, or employees do not do so. The penalties collected in these actions would be distributed 50% to the General Fund, 25% to the agency for education, to be available for expenditure upon appropriation by the Legislature, and 25% to the aggrieved employee, except that if the person does not employ one or more persons, the penalties would be distributed
50% to the General Fund and 50% to the agency. In addition, the aggrieved employee would be authorized to recover attorney's fees and costs and, in some cases, penalties. For any violation of the code for which no civil penalty is otherwise established, the bill would establish a civil penalty, but no penalty is established for any failure to act by the Labor and Workplace Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees.

48. The report of the Assembly Committee on Judiciary ("Judiciary Committee") cited the following justifications for the PAGA Bill:

[M]any Labor Code provisions are unenforced because they are punishable only as criminal misdemeanors, with no civil penalty or other sanction attached. Since district attorneys tend to direct their resources to violent crimes and other public priorities, supporters argue, Labor Code violations rarely result in criminal investigations and prosecutions.

SB 796, Assembly Comm. On Jud. Analysis, at 3-4 (June 26, 2003). The foregoing was reiterated by another Assembly Committee as the "Purpose" of the PAGA Bill. See SB 796, Assembly Comm. On Appropriations, at 1 (Aug. 20, 2003). Notably, the Judiciary Committee conceded that "[g]enerally, civil penalties are recoverable only by prosecutors, not by private litigants, and the moneys are paid directly to the government." SB 796, Assembly Comm. On Jud. Analysis, at 5 (June 26, 2003). Seeking to justify this departure from legal norms, the Judiciary Committee then went onto say that "recovery of civil penalties by private litigants does have precedent in law." Id. at 5. The "precedent" the Assembly Comments cited in support of this deviation from the norm was that "the Unruh Civil Rights Act allows the victim of a hate crime to bring an action for a civil penalty of $25,000 against the perpetrator of the crime." Id.

The relevant portion of the Unruh Civil Rights Act to which the Legislature was referring provides, in relevant part:

If a person or persons . . . interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or
enjoyment by any individual or individuals of rights secured by the Constitution or
laws of the United States, or of the rights secured by the Constitution or laws of this
state, the Attorney General . . . may bring a civil action for injunctive and other
appropriate equitable relief in the name of the people of the State of California . . .

49. The PAGA Bill was supported exclusively by labor union and applicant attorney
special interest groups, including, but not limited to, The California Labor Federation, AFL-CIO
(co-source), the California Rural Legal Assistance Foundation (co-source), California
Applicants Attorneys Association, California Teamsters, and Hotel Employees, Restaurant
Employees International Union. SB 796, S. Floor Analysis, at 5 (May 21, 2003). Those in
opposition included, but were not limited to, the California Chamber of Commerce, the Civil
Justice Association of California, and the Orange County Business Council. Id. Opponents
raised salient and prescient objections to the PAGA Bill, namely:

a. That "[a]llowing such 'bounty hunter' provisions will increase costs to
businesses of all sizes, and add thousands of new cases to California's already
over-burdened civil court system." SB 796, Assembly Comm. On Lab. & Emp.,
at 7 (July 9, 2003).

b. That "a private enforcement statute in the hands of unscrupulous lawyers is a
recipe for disaster." Id.

c. And that "there is no requirement for the employee to exhaust the administrative
procedure or even file with the Labor Commissioner . . . ." SB 796, Analysis of
S. Comm. on Lab. & Indus. Relations, at 6 (Apr. 9, 2003).

50. In response to these concerns, and more, the Assembly Committee on Labor
Employment proffered the following:

The sponsors are mindful of the recent, well-publicized allegations of
private plaintiffs [sic] abuse of the UCL, and have attempted to craft a
private right of action that will not be subject to such abuse, pointing to
amendments taken in the Senate to clarify the bill's intended scope. First,
Unlike the UCL, this bill would not open up private actions to persons who suffered no harm from the alleged wrongful act. Instead, private suits for Labor Code violations could only be brought by an "aggrieved employee"—an employee of the alleged violator against whom the alleged violation was committed.

... Second, a private action under this bill would be brought by the employee "on behalf of himself or herself and other current or former employees"—that is, fellow employees also harmed by the alleged violation - instead of "on behalf of the general public," as private suits are brought under the UCL.

... Third, the proposed civil penalties are relatively low.

51. On September 11, 2003, the PAGA Bill was passed by the State Assembly by a margin of just one vote above the bare minimum for passage a regular bill, 42. The following day, September 12, 2003, the State Senate passed the PAGA Bill by the bare minimum number of votes necessary for a regular bill, 21. The PAGA Bill was approved by Governor Gray Davis on October 12, 2003, just five days after the California electorate voted to recall him from office on October 7, 2003. As a result, the first iteration of the PAGA took effect on January 1, 2004.

52. Less than two months after PAGA took effect, on February 20, 2004, SB 1809 was introduced, which according to the Senate Rules Committee Digest was intended to "significantly amend[] 'The Labor Code Private Attorneys General Act of 2004' [citation] by enacting specified procedural and administrative requirements that must be met prior to bringing a private action to recover civil penalties for Labor Code violations." SB 1809, Analysis of Sen. R. Comm., at 1-2 (July 28, 2004).

53. SB 1809 became law in July 2004, but because of its status as an emergency measure, it had retroactive application dating back to January 1, 2004. The PAGA Bill, SB
1809, as well as a series of amendments to PAGA in 2016 provide the modern framework for the unconstitutional delegation of State authority that plagues most California employers, including Plaintiff’s members, today.

2. **The California Legislature Recently Exempted Just One Industry Group from PAGA - Construction**

54. On September 19, 2018, Governor Jerry Brown signed AB 1654 (“AB 1654”), adding Section 2699.6 to the California Labor Code (“Section 2699.6”). The effect of Section 2699.6 is to exempt employees in the construction industry who are subject to a collective bargaining agreement (with certain other components) from the entirety of PAGA. One of the other components, ironically, is the existence of a “binding arbitration procedure.” *See* Cal. Lab. Code 2699.6(a).

55. The justifications put forward by the proponents of the bill include:

   a. “[AB 1654] is needed to protect construction industry employer from frivolous lawsuits brought under PAGA.” AB 1654, Analysis of S. J. Comm., at 7 (June 18, 2018).

   b. “While well intended to protect aggrieved employees, [PAGA] is a complex legal process that has led to the unintended consequence of significant legal abuse. The threat of extended litigation on behalf of an entire class of workers provides enormous pressure on employers to settle claims regardless of the validity of those claims . . . .” AB 1654, Analysis of S. Comm. on Indus. Rel., at 4 (June 18, 2018).

   c. “Attorneys representing workers sue employers for Labor Code violations by limiting their complaints to those arising under PAGA. These ‘stand-alone PAGA suits’ allow those attorneys to represent all employees potentially affected by the alleged Labor Code violations and to conduct wide-ranging discovery allowed when prosecuting civil claims in court.” *Id.*
d. “PAGA was a well-intended law that gives workers the power to fight unscrupulous employers directly through the court system when the Labor Commissioner lacks the resources to enforce but it has, in many cases, become another form of litigation abuse by unscrupulous lawyers.” AB 1654, Analysis of S. Rules Comm., at 4 (Aug. 24, 2018).

e. “PAGA, in effect, encourages class action type lawsuits over minor employment issues because once a PAGA lawsuit has been filed, the employee (or class) plaintiff is suing on behalf of the state and the issues involved are no longer subject to arbitration.” AB 1654, Analysis of Assembly Comm. On Lab. & Emp., at 2 (Aug. 24, 2018).

56. On information and belief, the justifications asserted by the proponents of AB 1654 are equally applicable to Plaintiff’s members and California employers generally. More specifically, Plaintiff’s members, and California employers generally, are similarly subject to “frivolous lawsuits,” “legal abuse,” “enormous pressure ... to settle claims regardless of the validity of those claims,” “wide ranging discovery,” “unscrupulous [plaintiffs’] lawyers,” and “lawsuits over minor employment issues.”

57. On information and belief, there is no rational basis for the Legislature exempting the construction industry alone from the unfair, unconstitutional, and business-crushing impacted of PAGA.

3. The Basic PAGA Framework

58. PAGA “deputizes” each and every current and former “aggrieved employee” in California to sue to recover civil penalties on behalf of the State. Cal. Lab. Code §2699(a). To prevail, the aggrieved employee need only show that a violation occurred, not that he or she was actually harmed by the violation. See Cal. Lab. Code § 2699(a); see also Raines v. Coastal Pac. Food Distrib., Inc., 23 Cal. App. 5th 667 (2018) (“the trial court incorrectly found an employee must suffer an injury in order to bring a PAGA claim”) (“Raines”); Lopez v. Friant & Assoc., 15 Cal. App. 5th 773, 778 (2017). The statutory timeframe for filing a PAGA claim is one year.

59. PAGA has three categories of violations, each with its own penalty and
administrative exhaustion scheme, as pleaded in further detail below:

(a) **Category One: Violations of Labor Code Provisions**

Specifically Listed in Labor Code Section 2699.5

60. This first category includes violations of those Labor Code sections identified in Section 2699.5. There are over 150 different violations listed, including Section 203 (waiting time penalties), Section 226.7 (meal and rest break premiums), Section 1198 (which includes any “conditions prohibited by the wage order”), and certain violations of Section 226 (wage statement penalties). Before commencing a Category One claim, an employee must satisfy certain notice requirements. A PAGA lawsuit can be dismissed outright if the notice is deficient, but this rarely occurs due to low standard for sufficiency applied by California courts. The employee is required to give written notice describing the “specific provisions . . . alleged to have been violated, including the facts and theories to support the alleged violation” to the LWDA via its website (along with a $75 filing fee) and on the employer via certified mail. If the LWDA declines to investigate, or otherwise fails to respond to the employee, within 65 days of the postmark date of the notice, then the employee can proceed to file a civil lawsuit seeking PAGA penalties.

(b) **Category Two: Health and Safety Violations (Labor Code Sections 6300 et seq.)**

61. The second category is for health and safety violations predicated on any section of Labor Code sections 6300 et seq. (other than those listed in Section 2699.5). In addition to sending notice to LWDA and employer, an employee bringing a health and safety-based PAGA claim must also send notice to the Division of Occupational Safety and Health, which is then required to investigate the claim. If the Division issues a citation, the employee is precluded from commencing a civil action under PAGA. In the alternative, if the Division does not issue a citation then the aggrieved employee may appeal to the Superior Court for an order directing the Division to issue a citation.

(c) **Category Three: All Other Labor Code Violations**

62. The third category is for Labor Code violations other than those covered by the
first two categories. Some common violations include wage statements that fail to provide inclusive dates of a pay period or the legal employer’s name and address, as required by Labor Code Section 226.

63. The notice requirement is the same as Category One claims but an employer can “cure” the violation within 33 days of the PAGA notice. An employer sends notice to LWDA and the employee describing the actions taken to cure the violation. The employee can respond to the LWDA, as to why those actions did not actually cure the violation, and the LWDA has 17 days to review the actions taken and make a determination on whether the employer did, in fact, cure the violations.

64. There are limitations on the number of times an employer can avail itself of the cure provision. If the LWDA determines that the employer did not cure the violations, or otherwise fails to provide a timely response, then the employee can proceed with the civil lawsuit. But even if the LWDA determines the violations have been cured then an employee can appeal the agency’s determination by filing an action with the Superior Court.

(d) The PAGA Penalty Framework

65. Where the Labor Code does not specifically provide for a civil penalty, PAGA creates one. These “default penalties” are assessed against employers in the amount of $100 per employee per pay period for an initial Labor Code violation, and $200 per employee per pay period for each subsequent violation. See Cal. Lab. Code § 2699(f)(2). These penalties can be collected for each employee for each pay period the employee worked within the statutory period (one year). Civil penalties recovered under the PAGA statute (i.e., California Labor Code Section 2698 et seq.) do not include unpaid wages or individualized damages, and damages are split between the California government and the aggrieved employees. See, e.g., Thurman v. Bayshore Transp. Mgmt. Inc., 203 Cal. App. 4th 1112 (2012). The split is 75% to the State and 25% to aggrieved employees. Cal. Lab. Code § 2699(i). PAGA also provides for an award of the employee’s attorney fees and costs incurred in litigation. See Cal. Lab. Code § 2699(g). Because only a fraction of PAGA cases are litigated through verdict, however, counsel for PAGA plaintiffs are almost always compensated by court-approval of their lofty contingency.
fees (e.g., one third), based on the gross recovery and/or settlement amount.

66. PAGA has also been interpreted by some California courts and agencies to allow employees to recover unpaid wages, liquidated damages, waiting time penalties, as well as civil penalties provided for under other statutes that, historically, could only be enforced by the State—e.g., California Labor Code Sections 558, 1197.1.

67. Where a civil penalty is already enumerated for a Labor Code violation, California Courts have held that the enumerated penalty (which is normally much higher) displaces the default penalty. See, e.g., Raines, 23 Cal. App. 5th at 680 (holding that civil penalty for wage statement set forth in 226.3 in the amount of $250 per employee per initial violation and $1000 per employee for each subsequent violation applied over penalty set forth in 2699(f)(2)).

(e) The Limited Court and Agency Involvement In Settlement, Court Orders, and Judgments

68. Court approval is required by statute for settlement of PAGA claims. See Cal. Lab. Code § 2699(l). However, judicial oversight in PAGA claims is strikingly different from the oversight for class actions. In PAGA actions, the Court is not required to exercise anywhere near the same level of scrutiny required in a class action. Arias v Superior Court, 46 Cal. 4th 969 (2009) (holding that PAGA actions are not subject to class action requirements).

69. For example, PAGA approval requires none of the various findings required by Rule 23 of the Federal Rules of Civil Procedure, Civil Procedure Section 382, and/or corresponding case law.

70. Indeed, the language of the statute suggests an extremely limited inquiry. The PAGA statute does not even require the Court to review the entire settlement, but only “any penalties sought as a part of a proposed settlement agreement[,]” See Cal. Lab. Code § 2699(l). Any proposed settlement must be provided to LWDA at the same time that it is submitted to the court. Similarly, judgments and orders regarding PAGA penalties must be provided to LWDA. In neither case, however, is the LWDA required to take any action or even review the proposed settlement agreement, judgments, or orders.
4. **PAGA’s Lack of Judicial and/or Administrative Oversight**

71. As outlined above, the State exercises virtually no control over any aspect of PAGA litigation. Rather, the sole manner in which the government plays any role in controlling a PAGA case is through the pre-filing notice requirements imposed by California Labor Code Section 2699.3. But that notice provision merely requires the potential PAGA litigant to mail a notice to the LWDA and the Employer of the intention to bring PAGA claims, to provide a bare-bones description of the facts and Labor Code sections the employee intends to sue under, and then to wait until the LWDA either decides to investigate (which occurs less than 1% of the time) or does nothing, which is almost always the case.

72. On information and belief, the LWDA does not receive, loses, and/or fails to review the vast majority of notices addressed to its attention by aggrieved employees and/or their attorneys. Indeed, the LWDA website all but admits as much:

The PAGA statute does not require parties to prove affirmatively that documents were received by LWDA. The statute only requires proof that items were mailed or submitted in the required manner.


73. If the LWDA declines to investigate the alleged violations or fails to respond within the time allotted under PAGA, which, again is the outcome 99% of the time, that single, pre-litigation event constitutes the only connection the government will ever have to the PAGA action filed thereafter, other than the LWDA’s potential receipt of settlement agreements, judicial verdicts and/or order, and its share of recovered penalties.

74. Indeed, PAGA does not provide for any means by which the government can later intervene to ensure neutrality or that the public’s interests are being met.

75. To that end, PAGA provides no means by which the government can monitor the litigation or later step in to oversee negotiations or ensure that the government’s interests are adequately represented and/or compensated in settlement agreements or litigation (except in the
limited circumstances of certain health and safety violations for which the Division of Occupational Safety and Health is entitled to “comment” on the proposed settlement, and the court must give those comments “appropriate weight”).

Consequently, subject only to the limited oversight by the trial court of a final settlement agreement (Cal. Lab. Code § 2699(l)), the “aggrieved employee” and his or her private attorney prosecuting a PAGA action alone decide whether to settle PAGA claims that the LWDA declines to pursue itself, and on what terms. Such “aggrieved employees” and, more precisely, their private attorneys who stand to recover significant attorneys’ fees enjoy carte blanche authority to prosecute the PAGA action, guided only by their personal needs and interests. The government has no say in whether or how a PAGA action will be brought, the facts or theories on which the claim will be based, what discovery will be conducted, what motions will be filed and how defense motions will be opposed, whether the case will be settled, or the terms of any settlement.

5. **PAGA Plaintiffs’ Proxy Role Vests Them With Unconstitutional Power In the Courts**

On June 23, 2014, the California Supreme Court issued its decision in Iskanian v. CLS Transportation Los Angeles, LLC, holding that an express class action waiver in an employment arbitration agreement is unenforceable with respect to PAGA claims under California law. *Id.* at 59 Cal. 4th 348, 391 (“Iskanian”). The California Supreme Court reasoned that an arbitration agreement precluding representative PAGA claims is invalid as a matter of California public policy and that that public policy to enforce wage-and-hour laws on behalf of the State is not preempted by the FAA (since the dispute was not between two contracting private parties, but between the State and an employer). *Id.* at 388-89.

The Court also clarified an important open-ended question about who receives the PAGA civil penalties that are recovered through the action. Specifically, the California Supreme Court made clear that the penalties are distributed to all aggrieved employees (unlike a typical *qui tam* action where the bounty hunter keeps all of the money that does not go to the State), unequivocally stating that “a portion of the penalty goes not only to the citizen bringing
the suit but to all employees affected by the Labor Code violation.” Id. at 382.

79. Lastly, the California Supreme Court found that PAGA does not violate constitutional separation of powers on the basis that a PAGA action is a type of *qui tam* action—because it conforms to three traditional criteria: (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty. Id. at 382. To the Court, there was only one distinction between PAGA and the classic *qui tam* action, “that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation.” Id. But this, the Court reasoned, does not change the fact that the “government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit.” Id.

80. As alleged in further detail below, however, the private contingency-fee attorneys who file and pursue PAGA claims make no effort to further the interests of the State in litigation, and actively work against the interests of the State in private mediations. In practice, private contingency-fee attorneys exploit the holding of *Iskanian* to persuade employers with binding arbitration agreements (with class action waivers) to participate in private mediation. Once at mediation, PAGA penalties rarely receive any serious consideration. Rather, the parties usually arrive at a sum that will resolve the underlying statutory claims on a class-wide basis and the private contingency-fee attorney usually suggests a very small allocation of that total to PAGA – so as to maximize his or her fees.

81. On June 29, 2009, the Supreme Court of California issued its decision in *Arias v. Superior Court*, holding that representative PAGA claims are not subject to California’s class-action requirements because PAGA’s purpose is as a law enforcement action on behalf of the State. 46 Cal. 4th 969 (2009). More specifically, the Court reasoned:

When a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party. [Citation]. Accordingly, with respect to the recovery
of civil penalties, nonparty employees as well as the government are bound
by the judgment in an action brought under the act, and therefore
defendants’ due process concerns are to that extent unfounded.

Id. at 986.

82. On July 13, 2017, the California Supreme Court issued its decision in Williams v. Superior Court, holding that an employee need not provide any proof of his or her allegations before being presumptively entitled to State-wide contact information in discovery. 3 Cal. 3d 531 (2017) (“Williams”). Specifically, the Court reasoned:

PAGA’s standing provision similarly contains no evidence of a legislative intent to impose a heightened preliminary proof requirement. Suit may be brought by any “aggrieved employee” [citation]; in turn, an “aggrieved employee” is defined as “any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed” [citation]. If the Legislature intended to demand more than mere allegations as a condition to the filing of suit or preliminary discovery, it could have specified as much. That it did not implies no such heightened requirement was intended.

Id. at 546. The Williams Court also blessed the PAGA plaintiffs’ ability to embark on fishing expeditions:

The Legislature was aware that establishing a broad right to discovery might permit parties lacking any valid cause of action to engage in “fishing expedition[s],” to a defendant’s inevitable annoyance. [citation]. It granted such a right anyway, comfortable in the conclusion that “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”

Id. at 551.

allows an employee who suffers just one Labor Code violation to seek PAGA penalties for any and all other violations committed by that employer against any other employee. In so holding, the Court of Appeal disregarded legislative history that demonstrated the California Legislature's intent to limit a PAGA plaintiff's ability to pursue penalties only for the same type of Labor Code violations he or she is alleged to have suffered. Id. at 755-56. Among the bases for this holding was the court's determination that: "Given the goal of achieving maximum compliance with State labor laws, it would make little sense to prevent a PAGA plaintiff (who is simply a proxy for State enforcement authorities) from seeking penalties for all the violations an employer committed." Id. at 757. The practical impact of the Huff decision is that an employee who alleges to have been aggrieved in one isolated way by an employer is vested with the power of the State to audit a business for all potential violations.

84. On September 29, 2018, the California Court of Appeal issued its decision in Attempa v. Pedrazzani, which held that any person who is in fact responsible for overtime and/or minimum wage violations may be held personally liable for civil penalties, and that these penalties can be recovered through PAGA, regardless of whether the person was the employer or whether the employer is a limited liability entity. 27 Cal. App. 5th 809 (2018). The Court of Appeal reasoned:

[T]he Legislature has decided that both the employer and any "other person" who causes a violation of the overtime pay or minimum wage laws are subject to specified civil penalties. [citation]. Neither of these statutes mentions the business structure of the employer, the benefits or protections of the corporate form, or any potential reason or basis for disregarding the corporate form. To the contrary, as we explain, the business structure of the employer is irrelevant; if there is evidence and a finding that a party other than the employer "violates, or causes to be violated" the overtime laws (§ 558(a)) or "pays or causes to be paid to any employee" less than minimum wage (§ 1197.1(a)), then that party is liable for certain civil penalties regardless of the identity or business structure of the employer.
6. **Contrary to the Conclusion of the California Supreme Court in Iskanian, PAGA is Unconstitutional On Its Face.**

85. In *Iskanian*, the California Supreme Court incorrectly labeled a “PAGA representative action . . . a type of *qui tam* action,” and found that a PAGA action could not be waived because the State—and not the named plaintiff—is the real party in interest. The analogy is incorrect. A *qui tam* action differs significantly from a PAGA action.

86. Unlike *qui tam* actions arising under the False Claims Act, the State of California plays almost no role in a PAGA action. Under PAGA, the LWDA has a limited opportunity to investigate or intervene in an aggrieved employee’s claims. In most cases, LWDA has 65 days to determine whether to investigate and, if it does investigate, 120 additional days to complete the investigation and determine whether to issue a citation. On information and belief, LWDA rarely investigates such claims. A March 25, 2016 report from the Legislative Analyst’s Office ("March 2016 Report") stated:

The LWDA ... has been able to devote only minimal staff and resources—specifically, one position at DLSE beginning in 2014—to perform a high-level review of PAGA notices and determine which claims to investigate. **In 2014, less than half of PAGA notices were reviewed, and LWDA estimates that less than 1 percent of PAGA notices have been reviewed or investigated since PAGA was implemented.** When a PAGA notice is investigated, LWDA reports that it has difficulty completing the investigation within the timeframes outlined in PAGA. When an investigation is not completed, or not completed on time, the PAGA claim is automatically authorized to proceed.”


The March 2016 Report also noted that:

[T]he intent of PAGA is that LWDA have the opportunity to review PAGA notices and at least in some cases conduct its own investigation prior to the PAGA claim.
proceeding. Given the minimal resources currently devoted to the review and investigation of PAGA notices, we do not believe LWDA is currently able to fulfill the role intended for it in the PAGA legislation.”

Id.

87. In contrast to the lack of State governmental involvement in PAGA actions, the State maintains substantial control in *qui tam* actions. The Attorney General has 60 days in which to intervene and proceed with an action, and may seek numerous extensions of time in which to do so. Cal. Gov’t Code §§ 12652(c)(4)-(5). While the State is investigating a claim, which is first filed under seal, the *qui tam* plaintiff cannot serve the complaint, litigate, or negotiate a settlement. *See* Cal. Gov’t Code § 12652. If the State declines to intervene, it can intervene at a later time and assume substantial control over the litigation. *See* Cal. Gov’t Code §§ 12652(f), (i). Moreover, the standards for filing bringing a claim under the False Claims Act, and the information provided to the State, are materially greater than what is required under PAGA. Until July 2016, PAGA only required that minimal notice be provided to the LWDA. An aggrieved employee was not required to provide a copy of a proposed complaint, settlement agreement, or even report whether the matter has settled. In fact, the March 25, 2016 report from the Legislative Analyst’s Office recommended changes to PAGA to require “more detail in the initial PAGA notice and that a copy of the PAGA complaint and any settlement be provided to LWDA,” and stated that doing so would be “a reasonable extension of LWDA’s oversight of the PAGA process[.]” *Id.*

a. In contrast, the False Claims Act requires a complaint be filed, under seal, with a copy served on the Attorney General. Furthermore, the *qui tam* Plaintiff is required to furnish to the Attorney General a written disclosure of “substantially all material evidence and information the person possesses.” Cal. Gov’t Code § 12652(c)(3).

b. Actions arising under the False Claims Act can also only be dismissed with approval from a court and the State Attorney General, “taking into account the best interests of the parties involved and the public purpose of the statute.” Cal. Gov’t Code § 12652(c)(1). No claim arising under the False Claim Act may be released by a
private person, except as part of a court-approved settlement. *Id.* (emphasis added).

88. PAGA contains no comparable judicial oversight. On information and belief, settlements of Labor Code claims enforced under PAGA frequently involve very little or no allocation of PAGA penalties. There is no judicial oversight unless PAGA penalties are allocated. On information and belief, PAGA claims are used to wrestle greater settlements from private claims and produce very little for the State, despite the fact that PAGA requires that the LWDA receive 75 percent of any civil penalties collected. The above referenced March 2016 Report stated:

[N]ot all settlements include civil penalties. In fact, LWDA reports that in 2014-15 it received just under 600 payments for PAGA claims that resulted in civil penalties. This number is low relative to the amount of PAGA notices LWDA receives each year (roughly 10 percent of notices received in 2014), implying that the final disposition of a large portion of PAGA claims, and likely many settlements, do not involve civil penalties.

*Id.* The March 2016 Report also states that the amount of PAGA notices filed with the LWDA in 2014 exceeded 6,300 and the amount of PAGA penalties deposited in the Labor and Workforce Development Fund in 2014 was $8,400,000. *Id.* On information and belief, the issue identified in the 2016 Legislative Analyst’s Office report—a large portion of PAGA claims settling without allocating civil penalties—continues to this day.

7. **PAGA is Unconstitutional As-Applied.**

89. In *Iskanian*, our Supreme Court declared that PAGA did not violate the Separation of Powers Doctrine. 59 Cal. 4th at 391. The Court decided the question over the over the objection of the party Iskanian, who argued that “this issue was not raised in CLS’s answer to the petition for review and is not properly before [the Court].” *Id.* at 389. The Court grounded its authority to address the unraised issue in a California Rule of Court which provides, in relevant part, that the Supreme Court may “decide an issue that is neither raised nor fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it.” *Id.* (citing Cal. R. Ct.)
The Court expressly invoked the "reasonable opportunity to brief the issue" portion of the rule, which, at a minimum, is a tacit admission that the Court had an incomplete record before it, at least for the purposes of determining whether PAGA is unconstitutional as applied to CLS in that case.

The following allegations, made on information and belief, will allow this court to develop a sufficient factual record for this Court, the Court of Appeal, our Supreme Court, and/or the United States Supreme Court to determine whether PAGA is unconstitutional as applied to Plaintiff's members and other California employers.

(a) **PAGA's Penalty Scheme Is Unconstitutional As Applied.**

90. As alleged, *supra*, where the Labor Code does not provide for a civil penalty, PAGA exacts a penalty of $100 per employee, per pay period, for initial violations, and $200 per employee, per pay period, for subsequent violations. And though still an open question in the law, the weight of authority suggests that PAGA penalties may be "stacked" or "aggregated" for multiple PAGA violations in the same pay period. *See, e.g., Schiller v. David's Bridal, Inc.,* 2010 U.S. Dist. LEXIS 81128, *at* 18 (E.D. Cal. July 14, 2010) ("Plaintiff cites no authority establishing that PAGA penalties could not be awarded for every cause of action under which they are alleged."); "the Court concludes that Defendant may aggregate all alleged PAGA penalties asserted as to each cause of action for purposes of establishing the amount in controversy."); *see also Pulera v. F & B, Inc.,* 2008 U.S. Dist. LEXIS 72659, at *2-3 (E.D. Cal. Aug. 19, 2008) (aggregating 25% of all PAGA penalties alleged when making amount in controversy determination); *Smith v. Brinker Intern, Inc.,* 2010 U.S. Dist. LEXIS 54110, (N.D. Cal. May 5, 2010).

91. Under this framework, the allegation by a single employee that an employer has unknowingly underpaid him or her by just a few dollars could provide the basis for millions of dollars in PAGA penalties, even for a small employer, and regardless of the employer's innocent intent or mistake. What follows is an example of how such an allegation (which on information and belief are similar to the allegations that have been pleaded against Plaintiff's members) could lead to such an absurd and unconstitutional result.
92. Employee alleges (without any proof) that for the past year, he has worked 2 minutes of “off-the-clock” overtime each pay period attending to miscellaneous tasks related to opening or closing Employer’s place of business—without ever telling Employer—and that Employer has not paid him for this time. Under the Starbucks decision, discussed supra, the employee has a cognizable claim of failure to pay minimum wages and overtime. Employer has 30 employees and weekly pay periods. Employee’s hourly rate of pay is $11.00 per hour, which means the approximate amount of unpaid minimum wages is: $19.07 (2 minutes x 52 pay periods = 104 minutes; 104 minutes / 60 minutes = 1.73 hours; 1.73 hours x $11.00 = $19.07), and the approximate amount of unpaid overtime wages are: $9.54 ($19.07 x 0.5 = $ 9.54). So the total approximate amount of wages Employer failed to pay Employee, unknowingly, is $28.61.

93. Below is a breakdown of the maximum penalties that Employee could threaten against the Employer under PAGA.

<table>
<thead>
<tr>
<th>Type of Violation</th>
<th>Statute</th>
<th>Penalties Per Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-Payment of Minimum Wages</td>
<td>1197.1</td>
<td>• Unpaid Wages: $19.07</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Penalties: $12,850</td>
</tr>
<tr>
<td>Non-Payment of Overtime</td>
<td>558</td>
<td>• Unpaid Wages: $9.54</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Penalties: $5150</td>
</tr>
<tr>
<td>Failure to Provide Accurate Wage Statements</td>
<td>226.3</td>
<td>• Penalties: $51,250</td>
</tr>
<tr>
<td>Failure to Maintain Accurate Payroll Records</td>
<td>1174.5</td>
<td>• Penalties: $500</td>
</tr>
<tr>
<td>Total Exposure For Employee</td>
<td>N/A</td>
<td>$69,508.61</td>
</tr>
<tr>
<td>Workforce Exposure (for 30 employee business)</td>
<td>N/A</td>
<td>$2,085,258.30</td>
</tr>
</tbody>
</table>

94. Through PAGA, Employee has authority to seek a maximum of $69,508.61 civil penalties and personal damages for the alleged failure of Employer to pay Employee: $28.61, which is 2,430 times the alleged actual damages. And Employee is further empowered to threaten Employer (through extrapolation) with over $2 million dollars in penalties and damages for its 30-person workforce. This does not even account for penalties that could be

95. Plaintiff is aware that PAGA provides the trial court the discretion to “award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code § 2699(e)(2) (“Section (e)(2)”). Indeed, state and federal courts alike have relied almost exclusively on this provision in holding that PAGA is constitutional.

96. However, the California Court of Appeal has made clear that PAGA penalties “are mandatory, not discretionary” and that the considerations in Section (e)(2) may only be exercised to reduce penalties, not for “exercising discretion in general with regard to the amount of penalties, because the amount is fixed by statute.” Amaral v. Cintas Corp. No. 2, 163 Cal. App. 4th 1157, 1213 (2008). In the context of our example, this means that the amount of civil penalties and damages to which Employee is entitled under PAGA is set at $69,508.61, which (by extrapolation) means that Employee can threaten this small 30-person Employer with a lawsuit with exposure that exceeds $2,000,000. And only if Employer is willing and able to incur the costs and expenses necessary to litigate Employee’s PAGA case through verdict—which could cost hundreds of thousands of dollars—does the Court have any discretion to reduce the mandatory 2,430 multiple of the alleged actual damages provided for under PAGA.

97. Thus, under PAGA, employers must endure years of cost-prohibitive litigation, under the constant threat of bankrupting liability, and proceed all the way to trial on the hope that a judge just might exercise an undefined “discretion” to reduce the mandatory penalties provided for under the statute. Such a framework is not a fair, reasonable, appropriate, or constitutional state of affairs, and its inequitable results “shock the conscience.”

(b) PAGA’s Lack of Government Oversight Is Unconstitutional As-Applied.

98. On information and belief, CABIA alleges that the Plaintiffs’ Bar—specifically
those that focus on wage/hour actions—have exploited the Legislature’s unfettered delegation
of power through PAGA to enrich themselves at the expense of the State of California, the
“aggrieved employees” they purported to represent, and the ethical standards for attorney
conduct.

99. On information and belief, the Plaintiffs’ Bar routinely exploits the fact that the
Supreme Court has ruled that PAGA claims are non-arbitrable to avoid the effect of arbitration
agreements, particularly those with class action waivers.

100. More specifically, and on information and belief, the typical tactic employed by
the Plaintiffs’ Bar is to file a class action lawsuit and add non-arbitrable PAGA claims, not to
vindicate the interest of the State, or to fulfill the express purpose of PAGA of enhancing
employer compliance with California Labor Laws, but rather to coerce employers to agree to
early-stage mediation.

101. During the vast majority of these mediations, the Plaintiffs’ Bar engages in
practices made possible by PAGA which, as applied to Plaintiff’s members and other California
employers, are unconstitutional under State and federal law, including, but not limited to:

   a. Not requiring the “aggrieved employee” to attend the mediation;

   b. Not consulting with the “aggrieved employee” or the State before agreeing to a
      settlement of PAGA claims;

   c. After using PAGA to avoid arbitration (and the effect of a class waiver),
      attempting to settle for the value of Labor Code violations and allocate only a
      very small portion of the settlement to PAGA, thereby minimizing the share of
      the recovery that goes to the State;

   d. Threatening to pursue the life savings, homes, college tuition funds, and other
      personal property as a means to intimidate and coerce those connected with an
      employer-business to pay large settlements, very little of which is normally
      allocated to PAGA in the end.

102. PAGA litigation also lacks any appreciable oversight and/or coordination with
the legislative, executive, and/or judicial branches of government, which results in the
unconstitutional application of PAGA to Plaintiff’s members and California employers
generally, including, but not limited to:

a. Not requiring the LWDA to review any number or percentage of PAGA notices;
b. Not requiring the LWDA to investigate any number of PAGA notices;
c. Not monitoring or auditing the Plaintiffs’ Bar’s use of PAGA (e.g., the number
   of notices filed by firms);
d. Not requiring a representative of LWDA to be present at mediations, court
   hearings, or trials involving PAGA claims;
e. Not requiring the LWDA to review settlement agreements, court orders, or court
   judgments that are based on or relate to PAGA claims;
f. Permitting the LWDA to understaff the LWDA’s PAGA unit, lose PAGA
   notices, and maintain inadequate records of PAGA notices, fees collected,
   lawsuits, settlements, judgment, and orders;
g. Failing to establish and enforce ethical guidelines for attorneys who are
   representing the State’s proxies, the aggrieved employees; and
h. Failing to vet or screen the attorneys who are representing the State’s proxies, the
   aggrieved employees.

103. The Legislature’s unfettered grant of authority to the Plaintiffs’ Bar to exercise
State power through PAGA, without any oversight or coordination, has resulted in an
oppressive regime of opportunism that threatens “the continued operation of an established,
lawful business” in this State, which the Supreme Court has held is subject to heightened
protections. See County of Santa Clara, supra, 50 Cal. 4th at 53. This unconstitutional grant of
State power has been aggressively exploited by dozens of law firms. According to State records,
which are incomplete, well over 100 firms have sent 50 or more PAGA Notices to the LWDA
since it the law was enacted, and the 30 most aggressive PAGA plaintiffs’ firms (by number of
PAGA Notices) appear in the chart below:

<table>
<thead>
<tr>
<th>No.</th>
<th>Law Firm</th>
<th>PAGA Notices</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Law Offices of Ramin R. Younessi</td>
<td>753</td>
</tr>
<tr>
<td>2</td>
<td>Kingsley &amp; Kingsley</td>
<td>599</td>
</tr>
</tbody>
</table>
104. The Legislature’s unfettered grant of authority to the Plaintiffs’ Bar to exercise State power through PAGA, without any oversight or coordination, has resulted in the Plaintiffs’ Bar targeting charities, non-profits, and other employers who provide valuable and charitable services to California residents, including, but not limited to children’s hospitals, AIDS centers, senior living centers, ambulance companies, sustainable energy companies, foster homes, and more; a non-exhaustive list of such employers who have been targeted by the Plaintiffs’ Bar via the Legislature’s unfettered and unconstitutional delegation of State power through PAGA include:
<table>
<thead>
<tr>
<th>Employer Name</th>
<th>Law Firm</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paramount Meadows Nursing Center LP; Paramount Meadows Nursing Center LLC</td>
<td>Aegis Law Firm</td>
</tr>
<tr>
<td>KinderCare Education LLC; KinderCare Learning Centers LLC</td>
<td>Baltodano &amp; Baltodano LLP</td>
</tr>
<tr>
<td>Sober Living By The Sea, Inc.</td>
<td>Bibiyan Law Group, P.C.</td>
</tr>
<tr>
<td>Carriage Funeral Holdings, Inc.</td>
<td>Blumenthal Nordrehaug Bhowmik De Blouw LLP</td>
</tr>
<tr>
<td>Kaiser Foundation Hospitals</td>
<td>Blumenthal Nordrehaug Bhowmik De Blouw LLP</td>
</tr>
<tr>
<td>Navajo Express, Inc.</td>
<td>Blumenthal Nordrehaug Bhowmik De Blouw LLP</td>
</tr>
<tr>
<td>Pride Transport Inc.</td>
<td>Blumenthal Nordrehaug Bhowmik De Blouw LLP</td>
</tr>
<tr>
<td>AIDS Healthcare Foundation</td>
<td>Blumenthal Nordrehaug Bhowmik De Blouw LLP</td>
</tr>
<tr>
<td>El Camino Hospital</td>
<td>Blumenthal Nordrehaug Bhowmik De Blouw LLP</td>
</tr>
<tr>
<td>Methodist Hospital of Sacramento</td>
<td>Bohm Law Group, Inc.</td>
</tr>
<tr>
<td>United Ambulance Services, Inc.</td>
<td>Bohm Law Group, Inc.</td>
</tr>
<tr>
<td>Providence Saint John’s Health Center</td>
<td>Bradley Grombacher LLP</td>
</tr>
<tr>
<td>Center for Elders’ Independence</td>
<td>Bradley Grombacher LLP</td>
</tr>
<tr>
<td>Victor Valley Union High School District</td>
<td>California School Employees Association</td>
</tr>
<tr>
<td>Lifecare Solutions, Inc.</td>
<td>Capstone Law APC</td>
</tr>
<tr>
<td>Healing Care Hospice, Inc./Shahrouz Golshani</td>
<td>Chesler McCaffrey LLP</td>
</tr>
<tr>
<td>Valley Presbyterian Hospital</td>
<td>Cohelan Khoury &amp; Singer</td>
</tr>
<tr>
<td>Max Laufer, Inc. d/b/a MaxCare Ambulance</td>
<td>Cohelan Khoury &amp; Singer</td>
</tr>
<tr>
<td>BHC Sierra Vista Hospital, Inc.</td>
<td>Crosner Legal P.C.</td>
</tr>
<tr>
<td>Mental Health America of Los Angeles</td>
<td>Diana Gevorkian Law Firm</td>
</tr>
<tr>
<td>Earthbound Farm, LLC</td>
<td>Diversity Law Group</td>
</tr>
<tr>
<td>Planned Parenthood Mar Monte, Inc.</td>
<td>Diversity Law Group</td>
</tr>
<tr>
<td>Adventist Health/Reedley Community Hospital</td>
<td>Diversity Law Group</td>
</tr>
<tr>
<td>The Salvation Army</td>
<td>Diversity Law Group</td>
</tr>
<tr>
<td>Samaritan LLC</td>
<td>Diversity Law Group</td>
</tr>
<tr>
<td>Regional Medical Center of San Jose</td>
<td>Diversity Law Group</td>
</tr>
<tr>
<td>Grand Terrace Health Care, Inc.</td>
<td>Diversity Law Group</td>
</tr>
<tr>
<td>Employer</td>
<td>Representation</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-----------------------------------------------------</td>
</tr>
<tr>
<td>Carmichael Care, Inc.</td>
<td>Diversity Law Group</td>
</tr>
<tr>
<td>Watsonville Community Hospital</td>
<td>Diversity Law Group</td>
</tr>
<tr>
<td>San Jose Foothill Family Community</td>
<td>Diversity Law Group</td>
</tr>
<tr>
<td>Mama Petrillo’s-Temple City, Incorporated</td>
<td>Employee Justice Legal Group, LLP</td>
</tr>
<tr>
<td>Fresno Community Hospital And Medical Center</td>
<td>Employee Law Group</td>
</tr>
<tr>
<td>Westlake Wellbeing Properties LLC</td>
<td>Ferguson Case Orr Paterson LLP</td>
</tr>
<tr>
<td>John Muir Health &amp; John Muir Behavioral Health</td>
<td>Gaines &amp; Gaines</td>
</tr>
<tr>
<td>Front Porch Communities and Services</td>
<td>Gaines &amp; Gaines</td>
</tr>
<tr>
<td>Encore Education Corporation</td>
<td>Gaines &amp; Gaines</td>
</tr>
<tr>
<td>The Endoscopy Center of Santa Maria, Inc.</td>
<td>Gaines &amp; Gaines</td>
</tr>
<tr>
<td>Sutter Central Valley Hospitals</td>
<td>Gaines &amp; Gaines</td>
</tr>
<tr>
<td>Valley Children’s Medical Group</td>
<td>Gaines &amp; Gaines</td>
</tr>
<tr>
<td>Silver Crown Home Care, LLC</td>
<td>Gaines &amp; Gaines</td>
</tr>
<tr>
<td>Childrens Hospital Los Angeles Medical Group, Inc.</td>
<td>Gartenberg Gelfand Hayton LLP</td>
</tr>
<tr>
<td>Youth Policy Institute Charter Schools, Monsignor Oscar Romero Charter School...</td>
<td>Genie Harrison Law Firm</td>
</tr>
<tr>
<td>Life Alert Emergency Response, Inc.</td>
<td>Geragos &amp; Geragos, APC</td>
</tr>
<tr>
<td>Rehabilitation Center of Santa Monica Holding Company GP, LLC</td>
<td>Graham Hollis APC</td>
</tr>
<tr>
<td>First Alarm</td>
<td>Graham Hollis APC</td>
</tr>
<tr>
<td>Progressus Therapy, LLC &amp; other employers</td>
<td>Gurme Mason &amp; Forestiere</td>
</tr>
<tr>
<td>Soquel Union Elementary School District</td>
<td>Habbu &amp; Park</td>
</tr>
<tr>
<td>California Friends Home dba Quaker Gardens</td>
<td>Haines Law Group</td>
</tr>
<tr>
<td>Evergreen Hospice Care, Inc.</td>
<td>Haines Law Group</td>
</tr>
<tr>
<td>Life Care Centers of America, Inc.</td>
<td>Haines Law Group</td>
</tr>
<tr>
<td>Big League Dreams USC, LLC</td>
<td>Haines Law Group</td>
</tr>
<tr>
<td>Chhatrala Hospitality Group, LLC dba Howard Johnson Hotel Circle</td>
<td>Hasbini Law Firm</td>
</tr>
<tr>
<td>Central Coast Community Health Care, Inc.; Central Coast VNA, VNA Community Serv</td>
<td>Humphrey &amp; Rist, LLP</td>
</tr>
<tr>
<td>California Rehabilitation Institute, LLC (and other Defendant in the notice)</td>
<td>J.B. Twomey Law</td>
</tr>
<tr>
<td>San Diego Humane Society and S.P.C.A.</td>
<td>Jackson Law, APC</td>
</tr>
<tr>
<td>Seasons Hospice &amp; Palliative Care of California-San Bernardino, LLC</td>
<td>Jafari Law Group</td>
</tr>
<tr>
<td>Eureka Rehabilitation &amp; Wellness Center, LP.</td>
<td>Janssen Malloy LLP</td>
</tr>
<tr>
<td>EFR Environmental Services, Inc.</td>
<td>JUSTICE LAW CORPORATION</td>
</tr>
<tr>
<td>Central Coast Home Health, Inc.</td>
<td>JUSTICE LAW CORPORATION</td>
</tr>
<tr>
<td>Universal Hospital Services, Inc.</td>
<td>JUSTICE LAW CORPORATION</td>
</tr>
<tr>
<td>Covanta Long Beach Renewable Energy Corp.</td>
<td>Kokozian Law Firm, APC</td>
</tr>
<tr>
<td>Central City Community Health Center</td>
<td>Kokozian Law Firm, APC</td>
</tr>
<tr>
<td>CHLB, LLC dba College Medical Center</td>
<td>Kokozian Law Firm, APC</td>
</tr>
<tr>
<td>St. John’s Well Child and Family Center, Inc.</td>
<td>Lavi &amp; Ebrahimian LLP</td>
</tr>
<tr>
<td>City of Hope National Medical Center</td>
<td>Lavi &amp; Ebrahimian LLP</td>
</tr>
<tr>
<td>North Hills Healthcare &amp; Wellness Centre, LP</td>
<td>Lavi &amp; Ebrahimian LLP</td>
</tr>
<tr>
<td>Assisatalife Family Assisted Care, LLC; Assisatalife Family Assisted Care et al.</td>
<td>Law Office of Alfredo Nava Jr.</td>
</tr>
<tr>
<td>Greater Los Angeles Agency on Deafness, Inc.</td>
<td>Law Office of Alfredo Nava Jr.</td>
</tr>
<tr>
<td>Family Housing and Adult Resources, Inc.</td>
<td>Law Office of Allan A. Villanueva</td>
</tr>
<tr>
<td>Brookdale Senior Living, Inc., and others-see PAGA Notice</td>
<td>Law Offices of C. Joe Sayas, Jr.</td>
</tr>
<tr>
<td>CHA Hollywood Medical Center, L.P.; CHA Health Systems, Inc.</td>
<td>Law Offices of C. Joe Sayas, Jr.</td>
</tr>
<tr>
<td>National Student Aid Care/CSADVO, LLC</td>
<td>Law Offices of Carlin &amp; Buchsbaum</td>
</tr>
<tr>
<td>New Life Treatment Center</td>
<td>Law Offices of Carlin &amp; Buchsbaum</td>
</tr>
<tr>
<td>J&amp;L Day Care Centers, J&amp;L Day Cares, VOICE</td>
<td>Law Offices of Carlin &amp; Buchsbaum</td>
</tr>
<tr>
<td>Redwood Memorial Hospital of Fortuna</td>
<td>Law Offices of Choi &amp; Associates</td>
</tr>
<tr>
<td>Silverado Senior Living Management, Inc.</td>
<td>Law Offices of Choi &amp; Associates</td>
</tr>
<tr>
<td>Regional Medical Center of San Jose</td>
<td>Law Offices of Kevin T. Barnes</td>
</tr>
<tr>
<td>Antelope Valley Hospital Foundation</td>
<td>Law Offices of Kevin T. Barnes</td>
</tr>
<tr>
<td>Social Vocational Services, Inc.</td>
<td>Law Offices of Kirk D. Hanson</td>
</tr>
<tr>
<td>Ambuserve, Inc; Shoreline Ambulance, LLC; Shoreline Ambulance Company, LLC; M. Harris</td>
<td>Law Offices of Morris Nazarian</td>
</tr>
<tr>
<td>We Are Family Center</td>
<td>Law Offices of Ramin R. Younessi</td>
</tr>
<tr>
<td>Dr. Sandhu Animal Hospital, Inc.</td>
<td>Law Offices of Stephen Glick</td>
</tr>
<tr>
<td>BHC Sierra Vista Hospital (Sierra Vista Hospital); UHS of Delaware; UHS SUB III</td>
<td>Law Offices of Traci M. Hinden</td>
</tr>
<tr>
<td>Greenfield Care Center of Fullerton, LLC</td>
<td>Law Offices of Zorik Mooradian</td>
</tr>
<tr>
<td>Mercy Services Corp; Mercy Housing, Inc.; Mercy Housing Management Group, Inc.</td>
<td>Lawyers for Justice</td>
</tr>
<tr>
<td>St. John’s Well Child and Family Center, Inc.</td>
<td>Lawyers for Justice</td>
</tr>
<tr>
<td>Always There Homecare</td>
<td>Lidman Law APC</td>
</tr>
<tr>
<td>Covenant Care California dba Covenant Care La Jolla LLC</td>
<td>Light &amp; Miller, LLP</td>
</tr>
<tr>
<td>Senior Lifestyle Holding Company, LLC dba Sunflower Gardens</td>
<td>Mahoney Law Group</td>
</tr>
<tr>
<td>Edgewater Skilled Nursing Center</td>
<td>Mahoney Law Group</td>
</tr>
<tr>
<td>California Rehabilitation Institute, LLC</td>
<td>Matern Law Group</td>
</tr>
<tr>
<td>South Pasadena Care Center, LLC</td>
<td>Matern Law Group</td>
</tr>
<tr>
<td>Valley Oak Residential Treatment Program Inc</td>
<td>Mayall Hurley P.C.</td>
</tr>
<tr>
<td>Brookdale Senior Living, Inc.</td>
<td>Mayall Hurley P.C.</td>
</tr>
<tr>
<td>Gage Medical Clinic, Inc.</td>
<td>Messrelian Law Inc.</td>
</tr>
</tbody>
</table>
On information and belief, the above employers, and those like them, are the types of entities that the State of California would not be interested in prosecuting or driving into bankruptcy through PAGA litigation. At a minimum, these entities are deserving of a balanced and neutral approach (the type of approach required by a State attorney, not a private attorney) to ensure a “just” result for the public.

The Legislature’s unfettered and unconstitutional delegation of State power to the Plaintiffs’ Bar, without any oversight or coordination, has allowed the Plaintiffs’ Bar to enrich themselves at the expense of the State and the alleged aggrieved for whom they are supposed to advocate.

For example, in Vicerol v. Mistras Group, Inc., case number 15-cv-02198-EMC, a federal judge of the Northern District approved a $6,000,000 settlement, of which only $20,000 was allocated to the PAGA claim, even though it was valued at $12,900,000. The plaintiffs’ attorneys were awarded $2,000,000 in fees (double the lodestar estimate) and
$46,000 in costs.

108. In Price v. Uber Technologies Inc., case number BC55451, a Los Angeles Superior Court judge approved a $7,750,000 settlement, even though the estimated liability was over $1,000,000,000. The plaintiffs’ attorneys were awarded $2,325,000, whereas the average Uber Driver was awarded just over one dollar ($1.08).

109. In John Doe v. Google Inc., case number CGC-16-556034, a San Francisco Superior Court judge approved a $1,000,000 settlement, of which the attorneys were awarded $330,000 (which tripled their hourly rate), and each aggrieved employee received just fifteen and one-half dollars ($15.50).

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Violation of California Separation of Powers Doctrine)

110. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

111. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

112. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff’s members and other California employers.

113. The California Constitution provides for the separation of the legislative, executive, and judicial powers of the State government. Under the classic understanding of the Separation of Powers Doctrine, the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality. Among the limitations imposed by the Separation of Powers Doctrine is that the Legislature can neither exercise any core judicial function nor place restrictions on the Judiciary that materially impair or defeat the exercise of the Judiciary’s functions. Similarly, the Legislature cannot exercise any core executive functions, and correlatively, the Executive may not abdicate the exercise of its function.

114. As pleaded more fully above, the Private Attorneys General Act violates the
California Separation of Powers Doctrine, on its face and/or as practiced because, inter alia: 
PAGA does not provide the judiciary sufficient oversight of the judicial functions it has 
unconstitutionally delegated to private citizens and their counsel; PAGA vests private citizens in 
their proxy role with the same unique and powerful status as would be enjoyed by the Executive 
without requiring any coordination or oversight by the Executive to ensure such persons are 
acting on behalf of the interests of the State and commonsense principles of equity and justice; 
and PAGA vests private citizens with the power to initiate, steer, litigate, and resolve lawsuits 
on behalf of the executive without providing meaningful coordination or oversight by the 
Executive to ensure such persons are acting on behalf of the interests of the State and 
commonsense principles of equity and justice.

115. This Court has the power to issue declaratory relief under Code of Civil 
Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate 
regarding the proper interpretation of the California Constitutional provision and the legality of 
the Private Attorneys General Act thereunder, and regarding the respective rights and 
obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and 
proper at this time and under these circumstances in order to determine whether Defendant may 
continue to enforce the provisions of the Private Attorneys General Act.

116. This Court has the power to issue injunctive relief under Code of Civil Procedure 
Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and 
temporary injunction to compel Defendant, and those public officers and employees acting by 
and through their authority, to immediately set aside any and all actions taken to continue to 
implement or enforce the provisions of the Private Attorneys General Act, pending the hearing 
on the merits of Plaintiff’s claims to avoid irreparable harm to Plaintiff and its members.

117. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this 
Court’s injunction, Defendants will continue to implement and enforce the provisions of the 
Private Attorneys General Act in violation of Section 3, of Article 3 of the California 
Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and 
Fourteenth Amendment to the United States Constitution. No amount of monetary damages or
other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

SECOND CAUSE OF ACTION

(Violation of the United States Constitution’s Fourteenth Amendment
Procedural Due Process Protections)

118. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

119. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

120. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff’s members and other California employers.

121. The Due Process Clause of the Fourteenth Amendment prohibits the states from depriving any person of life, liberty, or process, without due process of law. This due process guarantee has both procedural and substantive components.

122. As pleaded more fully above, the Private Attorneys General Act violates the Fourteenth Amendment’s procedural due process guarantee, on its face and/or as practiced, in part, because? PAGA imposes and/or results in the imposition of criminal or quasi-criminal liability without the protections of the grand jury and indictment process; PAGA imposes or results in the imposition of criminal or quasi-criminal liability without requiring the heightened burden of proof required such as “beyond or reasonable doubt” or “clear and convincing evidence”; PAGA imposes and/or results in the imposition of criminal or quasi-criminal liability without requiring proof of a sufficiently culpable mens rea; PAGA imposes or results in the criminal or quasi-criminal liability in the absence of a neutral prosecutor; and PAGA provides for the taking of property in the absence of a fair, neutral, decision maker.

123. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the United States Constitutional protections and the
legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

124. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff’s claims to avoid irreparable harm to Plaintiff and its members.

125. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court’s injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

THIRD CAUSE OF ACTION

(Violation of the United States Constitution’s Fourteenth Amendment
Substantive Due Process Protections)

126. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

127. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

128. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff’s members and other California employers.

129. The Due Process Clause of the Fourteenth Amendment prohibits the states from
depriving any person of life, liberty, or process, without due process of law. This due process
guarantee has both procedural and substantive components.

130. As pleaded more fully above, the Private Attorneys General Act violates the
Fourteenth Amendment's substantive due process guarantee, on its face and/or as practiced, in
part, because PAGA imposes or results in penalties, fines, and/or extorted settlement sums
disconnected from, and/or grossly disproportionate to, any harm or wrongdoing committed, to
the extent that it "shocks the conscience."

131. This Court has the power to issue declaratory relief under Code of Civil
Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate
regarding the proper interpretation of the United States Constitutional protections and the
legality of the Private Attorneys General Act thereunder, and regarding the respective rights and
obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and
proper at this time and under these circumstances in order to determine whether Defendant may
continue to enforce the provisions of the Private Attorneys General Act.

132. This Court has the power to issue injunctive relief under Code of Civil Procedure
Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and
temporary injunction to compel Defendant, and those public officers and employees acting by
and through their authority, to immediately set aside any and all actions taken to continue to
implement or enforce the provisions of the Private Attorneys General Act, pending the hearing
on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

133. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this
Court's injunction, Defendants will continue to implement and enforce the provisions of the
Private Attorneys General Act in violation of Section 3, of Article 3 of the California
Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and
Fourteenth Amendment to the United States Constitution. No amount of monetary damages or
other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable
harm that it, its members, and California employers generally, would suffer from the violations
of law described herein.
FOURTH CAUSE OF ACTION

(Violation of California Constitutional Procedural Due Process Protections)

134. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

135. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

136. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff’s members and other California employers.

137. The California Constitution prohibits the State government from depriving any person of life, liberty, or process, without due process of law. This due process guarantee has both procedural and substantive components.

138. As pleaded more fully above, the Private Attorneys General Act violates the procedural due process guarantee of the California Constitution, on its face and/or as practiced, in part, because PAGA imposes and/or results in the imposition of criminal or quasi-criminal liability without the protections of the grand jury and indictment process; PAGA imposes or results in the imposition of criminal or quasi-criminal liability without requiring the heightened burden of proof required such as “beyond or reasonable doubt” or “clear and convincing evidence”; PAGA imposes and/or results in the imposition of criminal or quasi-criminal liability without requiring proof of a sufficiently culpable mens rea; PAGA imposes or results in the criminal or quasi-criminal liability in the absence of a neutral prosecutor; and PAGA provides for the taking of property in the absence of a fair, neutral, decision maker.

139. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the California Constitutional protections and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.
140. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff’s claims to avoid irreparable harm to Plaintiff and its members.

141. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court’s injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

**FIFTH CAUSE OF ACTION**

(Violation of California Constitutional Substantive Due Process Protections)

142. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

143. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

144. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff’s members and other California employers.

145. The California Constitution prohibits the State government from depriving any person of life, liberty, or process, without due process of law. This due process guarantee has both procedural and substantive components.

146. As pleaded more fully above, the Private Attorneys General Act violates the substantive due process guarantee of the California Constitution, on its face and/or as practiced, in part, because PAGA imposes or results in penalties, fines, and/or extorted settlement sums
disconnected from, and/or grossly disproportionate to, any harm or wrongdoing committed, to
the extent that it “shocks the conscience.”

147. This Court has the power to issue declaratory relief under Code of Civil
Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate
regarding the proper interpretation of the California Constitutional protections and the legality
of the Private Attorneys General Act thereunder, and regarding the respective rights and
obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and
proper at this time and under these circumstances in order to determine whether Defendant may
continue to enforce the provisions of the Private Attorneys General Act.

148. This Court has the power to issue injunctive relief under Code of Civil Procedure
Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and
temporary injunction to compel Defendant, and those public officers and employees acting by
and through their authority, to immediately set aside any and all actions taken to continue to
implement or enforce the provisions of the Private Attorneys General Act, pending the hearing
on the merits of Plaintiff’s claims to avoid irreparable harm to Plaintiff and its members.

149. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this
Court’s injunction, Defendants will continue to implement and enforce the provisions of the
Private Attorneys General Act in violation of Section 3, of Article 3 of the California
Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and
Fourteenth Amendment to the United States Constitution. No amount of monetary damages or
other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable
harm that it, its members, and California employers generally, would suffer from the violations
of law described herein.

SIXTH CAUSE OF ACTION

(Violation of the United States Constitution’s Eighth Amendment
Excessive Fines and Unusual Punishment Protections)

150. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this
Complaint as though each were set forth herein in full.
151. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

152. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff’s members and other California employers.

153. The Eighth Amendment to the United States Constitution prohibits the federal government from extracting payments, fines, or penalties that are not proportional and/or that do not bear some relationship to the gravity of the offense a law is designed to punish. These protections apply to the government of the State of California.

154. As pleaded more fully above, the Private Attorneys General Act violates the Eighth Amendment prohibition on excessive fines and unusual punishment because the PAGA penalty framework is not proportional and/or does not bear any conceivable relationship to the gravity of the offenses that PAGA is designed to punish.

155. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the United States Constitutional protections provision and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

156. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff’s claims to avoid irreparable harm to Plaintiff and its members.

157. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court’s injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California
Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

SEVENTH CAUSE OF ACTION

(Violation of California Constitution’s Excessive Fines and Unusual Punishment Protections)

158. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

159. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

160. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff’s members and other California employers.

161. The California Constitution prohibits the State government from extracting payments, fines, or penalties that are not proportional and/or that do not bear some relationship to the gravity of the offense a law is designed to punish.

162. As pleaded more fully above, the Private Attorneys General Act violates the this California Constitutional prohibition on excessive fines and unusual punishment because the PAGA penalty framework is not proportional and/or does not bear any conceivable relationship to the gravity of the offenses that PAGA is designed to punish.

163. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the California Constitutional protections and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

164. This Court has the power to issue injunctive relief under Code of Civil Procedure
Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff’s claims to avoid irreparable harm to Plaintiff and its members.

165. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court’s injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

EIGHTH CAUSE OF ACTION
(Violation of the United States Constitution’s Fourteenth Amendment Equal Protection of the Laws Guarantee)

166. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

167. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

168. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff’s members and other California employers.

169. The Fourteenth Amendment to the United States Constitution prohibits the federal government from denying any person equal protection of the laws. These protections apply to the government of the State of California.

170. As pleaded more fully above, the Private Attorneys General Act violates the Fourteenth Amendment guarantee of equal protection because the California Legislature recently, and without any rational basis, exempted the construction industry from the impact of
PAGA via the passage of AB 1654, now codified in California Labor Code Section 2699.6. In so doing, the California Legislature has unconstitutionally denied Plaintiff's members, and California employers not subject to the exemption, the equal protection of California law.  

171. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the United States Constitutional protections provision and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.  

172. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.  

173. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.  

**NINTH CAUSE OF ACTION**  
(Violation of California Constitution's Equal Protection Clause)  

174. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.
175. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

176. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff’s members and other California employers.

177. The California Constitution prohibits the State government from denying any person equal protection of the laws.

178. As pleaded more fully above, the Private Attorneys General Act violates the California Constitution’s guarantee of equal protection because the California Legislature recently, and without any rational basis, exempted the construction industry from the impact of PAGA via the passage of AB 1654, now codified in California Labor Code Section 2699.6. In so doing, the California Legislature has unconstitutionally denied Plaintiff’s members, and California employers not subject to the exemption, the equal protection of California law.

179. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the California Constitutional protections and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

180. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff’s claims to avoid irreparable harm to Plaintiff and its members.

181. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court’s injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution.
Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

**PRAYER FOR RELIEF**

1. On the First through Ninth Causes of Action, a temporary restraining order and preliminary and permanent injunctions enjoining Defendant from implementing or enforcing the Private Attorneys General Act, or any of its unconstitutional provisions.

2. On the First through Ninth Causes of Action, that this Court issue its judgment declaring that the Private Attorneys General Act is, in whole or in part, unconstitutional and unenforceable because it violates Section 3, Article III, and/or Section 17, Article I, of the California Constitution, and/or the Eighth and/or Fourteenth Amendment of the United States Constitution.

3. On the First through Ninth Causes of Action, that this Court enter orders reforming the Private Attorneys General Act to the extent mandated by constitutional concerns and permitted by law.

4. On each and every Cause of Action, that this Court grant Plaintiff its costs, including out-of-pocket expenses and reasonable attorneys’ fees; and

5. On each and every Cause of Action, that this Court grant such other, different or further, relief as this Court may deem just and proper.

DATED: November 27, 2018

EPSTEIN, BECKER & GREEN, P.C.

By:

Richard J. Frey
Robert H. Pepple
David M. Prager
Paul DeCamp

Attorneys for Plaintiff
California Business & Industrial Alliance
This case presents the question of whether a plaintiff who brings a representative action under the Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698, et seq.) may seek penalties not only for the Labor Code violation that affected him or her, but also for different violations that affected other employees. The trial court granted plaintiff Forrest Huff a new trial, reasoning that Huff’s failure to prove he was personally affected by one of the multiple Labor Code violations alleged in his complaint did not preclude his action under PAGA. As we will explain, we conclude that PAGA allows an “aggrieved employee” —a person affected by at least one Labor Code violation committed by an employer—to pursue penalties for all the Labor Code violations committed by that employer. We will therefore affirm the order granting a new trial.

I. BACKGROUND

Huff worked as a security guard for defendant Securitas Security Services USA, Inc. (Securitas). Securitas provides businesses with on-site security. It hires employees to work as security guards, and then contracts with its clients to provide guards for a particular location. Securitas occasionally places guards in temporary assignments, but it
more typically provides clients with long term placements. (A standard contract duration, though terminable on 30 days’ notice, is three years.)

Huff was employed by Securitas for about a year, during which time he worked at three different client sites. After he was removed from an assignment at the request of the client, Huff resigned his employment. Two months later, he sued Securitas for Labor Code violations. The operative second amended complaint contains a representative cause of action under PAGA, seeking penalties for Labor Code violations committed against Huff and other employees. According to the complaint, the basis for the PAGA claim is that Securitas is subject to penalties for violations of “numerous Labor Code provisions.” The Labor Code provisions alleged to have been violated include sections 201 [requiring immediate payment of wages upon termination of employment]; 201.3, subdivision (b) [requiring temporary services employers to pay wages weekly]; 202 [requiring payment of wages within 72 hours of resignation]; and 204 [failure to pay all wages due for work performed in a pay period] (unspecified statutory references are to the Labor Code).

Because of the representative nature of the action, the case was designated complex and the court ordered that the trial would proceed in phases. The parties agreed the first phase of the trial would involve a sample of 20 Securitas employees (10 selected by Huff and 10 by Securitas), and would determine only certain disputed issues as to those employees. Among the issues the parties agreed to have determined in the first phase were whether the sample employees had been paid on a weekly basis as required by Labor Code section 201.3, subdivision (b)(1); whether they were assigned to work for a client for over 90 days (and were therefore exempt from the weekly pay requirement under the exemption provided for by section 201.3, subdivision (b)(6)); and the amount of any penalties to be imposed against Securitas.

The first phase was tried to the court. After Huff presented his case, Securitas moved for judgment under Code of Civil Procedure section 631.8. The trial court granted
the motion, finding that the evidence established Huff was not a temporary services employee as defined by section 201.3, subdivision (b)(1), and as a result could not show he was affected by a violation of that section. The court further decided that Huff had no standing to pursue penalties under PAGA on behalf of others who were affected by that violation. Judgment was entered in favor of Securitas.

Huff moved for a new trial under Code of Civil Procedure section 657, and the trial court granted that motion. The court found that it made an error in law when it entered judgment in favor of Securitas based on Huff’s inability to prove a violation of the section 201.3, subdivision (b)(1) weekly pay requirement. Under PAGA an “aggrieved employee” can pursue penalties for Labor Code violations on behalf of other current and former employees, and the statute defines an aggrieved employee as someone who suffered “one or more of the alleged violations” of the Labor Code for which penalties are sought. Relying on that statutory definition, the court concluded that so long as Huff could prove he was affected by at least one Labor Code violation, he could pursue penalties on behalf of other employees for additional violations. Since Huff’s complaint alleged that another violation of the Labor Code (separate from the weekly pay requirement) affected him personally, the court decided that the failure to establish a violation of the weekly pay requirement did not preclude his entire PAGA cause of action. Securitas appeals from the order granting Huff a new trial.

II. DISCUSSION

A. THE PRIVATE ATTORNEYS GENERAL MODEL OF LABOR LAW ENFORCEMENT

California law closely regulates the working conditions of employees and the payment of their wages. (See, e.g., §§ 201 [requiring immediate payment of all wages due upon discharge of an employee]; 202 [requiring payment of wages within 72 hours of an employee’s resignation]; 201.3 [requiring weekly payment of wages for temporary employees]; 204 [requiring semi-monthly payment of wages during regular employment].) Those labor laws are enforceable in several ways: An employee can file
suit to recover wages owed and any statutory damages provided for by the Labor Code (see, e.g., § 203). An employee can file an administrative complaint with the Labor Commissioner, who is authorized to investigate complaints and order employers to pay wages owed (§ 98). Violations of certain provisions are punishable by a monetary penalty, which the Labor Commissioner can recover in an administrative proceeding or in court (§§ 210, 225.5); and some violations may be prosecuted as criminal offenses (§§ 215, 216, 218).

Despite those statutes and remedies, the Legislature found state labor laws were not being effectively enforced. (Iskanian v. CLS Transportation Los Angeles, LLC (2014) 59 Cal.4th 348, 379 (Iskanian).) Declining funding and staffing levels had left state agencies unable to produce widespread compliance. (Arias v. Superior Court (2009) 46 Cal.4th 969, 980–981.) The solution the Legislature devised is the statute at issue in this case. PAGA was enacted in 2003 to allow private parties to sue for the civil penalties previously only recoverable by a state agency. (Iskanian, supra, 59 Cal.4th at p. 379.) As the California Supreme Court recognized in Iskanian, PAGA created a type of qui tam action, authorizing a private party to bring an action to recover a penalty on behalf of the government and receive part of the recovery as compensation. (Id. at p. 382). When an employee brings a representative action under PAGA, he or she does so “as the proxy or agent of the state's labor law enforcement agencies, not other employees.” (Esparza v. KS Industries, L.P. (2017) 13 Cal.App.5th 1228, 1241.)

“The purpose of the PAGA is not to recover damages or restitution, but to create a means of ‘deputizing’ citizens as private attorneys general to enforce the Labor Code. [Citation.]” (Brown v. Ralphs Grocery Co. (2011) 197 Cal.App.4th 489, 501.) The relief provided by the statute is designed to benefit the general public, not the party bringing the action. (Ibid.) Since PAGA is fundamentally a law enforcement action, a plaintiff must first allow the appropriate state authorities to investigate the alleged Labor Code violations, by providing the Labor and Workforce Development Agency with written
notice of the violations. (Montano v. Wet Seal Retail, Inc. (2015) 7 Cal.App.5th 1248, 1256, citing § 2699, subd. (a).) Only if the agency elects not to pursue the violations may an employee file a PAGA action. (§ 2699.3, subd. (a)(2).) The penalties that can be recovered in the action are those that can be recovered by state enforcement agencies under the Labor Code; they are separate from the statutory damages that can be recovered by an employee pursuing an individual claim for a Labor Code violation. (Iskanian, supra, 59 Cal.4th 348, 381.) Penalties recovered by a plaintiff in a PAGA case are paid mostly to the state. (See § 2699, subd. (i) [75 percent distributed to the Labor and Workforce Development Agency, and the remaining 25 percent to aggrieved employees].)

**B. An Employee Affected By at Least One Labor Code Violation May Pursue Penalties on Behalf of the State for Unrelated Violations By the Same Employer**

Securitas contends the trial court erred in concluding that so long as Huff was affected by at least one Labor Code violation, he can sue under PAGA to recover penalties for any alleged violation by Securitas, even those that did not affect him. Securitas does not dispute that PAGA authorizes a plaintiff to recover penalties for Labor Code violations suffered by other employees. But it argues the statute allows for that only when the violations against the other employees involve the same provision of the Labor Code as the violation suffered by the plaintiff. Resolving the issue raised by Securitas requires us to interpret PAGA, a pure question of law to which we apply a de novo standard of review. (Haniff v. Superior Court (2017) 9 Cal.App.5th 191, 198.)

When we interpret a statute our primary task is to ascertain the Legislature’s intent and effectuate the purpose of the law. We look first to the words of the statute itself as the most direct indicator of what the Legislature intended. (Hsu v. Abbara (1995) 9 Cal.4th 863, 871.) PAGA provides in section 2699, subdivision (a) that “any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and
Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.” The statute then specifically defines “aggrieved employee” in section 2699, subdivision (c): “‘aggrieved employee’ means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.”

As the trial court did, we interpret those provisions to mean that any Labor Code penalties recoverable by state authorities may be recovered in a PAGA action by a person who was employed by the alleged violator and affected by at least one of the violations alleged in the complaint. Indeed, we cannot readily derive any meaning other than that from the plain statutory language, and Securitas does not offer a reasonable alternative for what those provisions mean when read together.

Instead, Securitas relies heavily on legislative history, which it views as revealing the Legislature’s intent to allow a PAGA plaintiff to pursue penalties only for the same type of Labor Code violation alleged as to him or her. Securitas points to a statement attributed to the sponsors of the PAGA bill that “unlike the UCL [Unfair Competition Law; Bus. & Prof. Code § 17200, et seq.] this bill would not open private actions up to persons who suffered no harm from the alleged wrongful act … private suits for Labor Code violations could be brought only by an ‘aggrieved employee’—an employee of the alleged violator against whom the alleged violation was committed.” (Assem. Com. on

1 Both parties have asked us to take judicial notice of documents reflecting the legislative history for S.B. 796, the bill that enacted PAGA in 2003; and S.B. 940, a bill that amended PAGA in 2008. We grant those requests. Huff also requested that we judicially notice documents reflecting the legislative history for A.B. 281, a bill proposed in 2017 that would amend PAGA. That request relates to documents not relevant to the determination of the issues in this appeal, and is therefore denied.
Securitas cites other statements from the legislative history indicating employees would be permitted to act in the capacity of a private attorney general to recover penalties for a Labor Code violation “solely because they have been aggrieved by that violation.” (Sen Comm. on Labor and Industrial Relations, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) April 9, 2003, p. 3.; see also, Sen. Com. on Judiciary, Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) June 26, 2003, p. 6 [“… this bill would not permit private actions by persons who suffered no harm from the alleged wrongful act.”].)

It is an established principle that where statutory language is unambiguous, a court is precluded from considering legislative history. (See, e.g., People v. Robles (2000) 23 Cal.4th 1106, 1112 [“If the language contains no ambiguity, we presume the Legislature meant what it said, and the plain meaning of the statute governs. [] If, however, the statutory language is susceptible of more than one reasonable construction, we can look to legislative history in aid of ascertaining legislative intent.”].) But as Securitas points out, the plain meaning rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose. (Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735.) Courts have therefore considered legislative history even in cases where the text of a statute is clear; but only to confirm the interpretation already apparent from the plain language, not to advance an alternative meaning. (See, e.g., Miller v. Bank of America, NT & SA (2009) 46 Cal.4th 630, 642 [examination of legislative history to support conclusion regarding proper interpretation]; Haniff v. Superior Court, supra, 9 Cal.App.5th at p. 202 [legislative history may provide additional authority confirming the court’s interpretation of a statute].)

Even assuming it is appropriate to consider legislative history here, that would not change our conclusion because none of the purported expressions of intent relied on by Securitas made its way into the statute. The proposition that PAGA allows an employee
to pursue penalties only for the type of violation he or she has suffered is directly at odds with the provision that an action may be brought by an employee against whom “one or more” of the alleged violations was committed. Legislative history, even when appropriately considered, cannot be used to contradict language that the Legislature decided to include in the statute. (An Independent Home Support Service, Inc. v. Superior Court (2006) 145 Cal.App.4th 1418, 1437.) Had the Legislature intended to limit the recovery of a PAGA plaintiff suing in a representative capacity to only the penalties for employees affected by the same Labor Code violation as the plaintiff, it would have said so in the statute. Indeed, the Legislature did make such a distinction in section 2699, subdivision (h), which prohibits an employee from bringing a PAGA claim when state authorities have already taken action against an employer for the same violation: “No action may be brought under this section by an aggrieved employee if the agency or any of its departments, divisions, commissions, boards, agencies, or employees, on the same facts and theories, cites a person within the timeframes set forth in Section 2699.3 for a violation of the same section or sections of the Labor Code under which the aggrieved employee is attempting to recover a civil penalty on behalf of himself or herself … .” We find it significant that the Legislature did not use similar limiting language regarding what violations can be pursued by an aggrieved employee when, as in this case, state authorities do not take enforcement action.

Securitas makes much of the fact that a previous version of the bill stated aggrieved employees could recover penalties “on behalf of themselves or other current and former employees,” and the language was changed to the conjunctive in the enacted version—allowing aggrieved employees to bring an action “on behalf of himself or herself and other current or former employees.” (§ 2699, subd. (a) (italics added).) But the effect of that change is simply to require that a PAGA claim be representative. That is, an employee seeking to recover Labor Code penalties that would otherwise be recoverable only by state authorities cannot do so in a purely individual capacity; the
employee must bring the action on behalf of himself or herself and others. (Reyes v. Macy’s, Inc. (2011) 202 Cal.App.4th 1119, 1123–1124 [“‘[T]he PAGA statute does not enable a single aggrieved employee to litigate his or her claims, but requires an aggrieved employee “on behalf of herself or himself and other current or former employees” to enforce violations of the Labor Code by their employers.’ [Citation.]’”) The use of conjunctive phrasing to preclude an employee from using PAGA to litigate as an individual has no bearing on whether a PAGA plaintiff may pursue penalties for all the Labor Code violations committed by an employer.

We also observe that PAGA’s legislative history as a whole actually undermines Securitas’ position. The Legislature clearly stated that its intention in enacting PAGA was to solve the problem of inadequate state enforcement resources by deputizing private citizens to pursue violators. (Arias v. Superior Court (2009) 46 Cal.4th 969, 980–981.) Given the goal of achieving maximum compliance with state labor laws, it would make little sense to prevent a PAGA plaintiff (who is simply a proxy for state enforcement authorities) from seeking penalties for all the violations an employer committed.

Securitas’ argument that in order to have standing to pursue statutory violations, a plaintiff must be aggrieved by those particular violations would have more traction if a PAGA claim were not a qui tam proceeding. As observed by the California Supreme Court in Iskanian (citing the Federal False Claims Act as an example), traditional standing requirements do not necessarily apply to qui tam actions since the plaintiff is acting on behalf of the government: “The qui tam plaintiff under the federal False Claims Act has standing in federal court under article III of the United States Constitution, even though the plaintiff has suffered no injury in fact, because that statute ‘can reasonably be regarded as effecting a partial assignment of the Government’s damages claim. [Citation.]’” (Iskanian, supra, 59 Cal.4th at p. 382.) So in this context, not being injured by a particular statutory violation presents no bar to a plaintiff pursuing penalties for that violation. Although a PAGA suit differs from a pure qui tam action
(such as under the Federal False Claims Act) in that PAGA’s standing requirement prevents the general public from bringing an action, the even more stringent standing requirement urged by Securitas is not found in the statute. For PAGA standing a plaintiff need only have been employed by the violator and affected by “one or more” of the alleged violations. (§ 2699, subds. (a), (c).) That requirement strikes a reasonable balance, requiring a plaintiff to have some connection to the employer’s unlawful practices, while also advancing the state’s interest in vigorous enforcement.

Securitas’ interpretation of PAGA standing—that a plaintiff must have personally experienced the same violations pursued in the action—is similar to the requirements for class certification. (See Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1021 [requirements for maintaining a class action include predominant questions of law and fact among the class, and a plaintiff with claims that are typical of the class].) But a representative action under PAGA is not a class action. (Franco v. Arakelian Enterprises, Inc. (2015) 234 Cal.App.4th 947, 962.) It is a law enforcement action where the plaintiff acts on behalf of the state, not on behalf of other employees. (Ibid.) The idea that a plaintiff must be aggrieved of all the violations alleged in a PAGA case does not flow logically from the fact that a plaintiff is standing in for government authorities to collect penalties paid (in large part) to the state. The plaintiff is not even the real party in interest in the action—the government is. (Iskanian, supra, 59 Cal.4th at p. 382.) In that sense, it would be arbitrary to limit the plaintiff’s pursuit of penalties to only those Labor Code violations that affected him or her personally.

In Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal.4th 993, 999 (Amalgamated Transit), the California Supreme Court held that a union had no standing to bring a PAGA claim because it had never been employed by the alleged violator and therefore was not an “aggrieved employee.” (Id. at p. 1003.) That case interpreted a part of the “aggrieved employee” definition not at issue here—no one disputes Huff was employed by Securitas—but the Supreme Court’s description of
PAGA is consistent with our construction: “The Labor Code Private Attorneys General Act of 2004 permits an ‘aggrieved employee’—that is, an employee against whom a violation of a provision of the Labor Code was committed [citation]—to bring an action ‘on behalf of himself or herself and other current or former employees’ to recover civil penalties for violations of other provisions of the Labor Code. [Citation.]” (Amalgamated Transit, supra, at p. 1003.) The construction urged by Securitas is contrary to the view expressed by the Supreme Court that the statute allows an employee against whom a Labor Code violation was committed to recover penalties “for violations of other provisions of the Labor Code.” (Ibid.)

We also note, as did the trial court, that PAGA has been interpreted in two federal district court cases as allowing an employee who has suffered a Labor Code violation to pursue penalties for all the violations committed by the employer. (Jeske v. Maxim Healthcare Servs., Inc. (E.D. Cal. 2012) 2012 U.S. Dist. LEXIS 2963, at p. 37 [Plaintiff “need not have suffered all PAGA violations for which she seeks to pursue civil penalties.”]; Holak v. K Mart Corp. (E.D. Cal. 2015) 2015 U.S. Dist. LEXIS 65439, at pp. 12–13 [“By the plain language of the statute, an aggrieved employee need only suffer one of the Labor Code violations alleged against his or her employer to be able to bring a PAGA claim on behalf of himself or herself and current or former employees who suffered any Labor Code violation at the hands of the employer. Plaintiff need not have actually suffered all of the Labor Code violations that she alleges to have taken place for purposes of seeking PAGA penalties.”].) Of course, those decisions are not binding on this court, and Securitas correctly points out that the standing issue was not necessary to the resolution of either case, so the observations regarding standing requirements are
dicta. Nonetheless, we find it persuasive that two federal courts have construed the statute the same way we do here.\textsuperscript{2}

Securitas argues that the “operative provision” of PAGA is section 2699, subdivision (a). Securitas attempts to avoid the implications of section 2699, subdivision (c), which defines “aggrieved employee,” by characterizing it as merely a definition that “was never intended to overwhelm all other provisions of the PAGA.” But in construing a statute, we will not focus on one provision while ignoring another, as Securitas would have us do. “Fundamental rules of statutory interpretation require that a statute be read as a whole, and that the parts of a statute be read together and harmonized, when possible, in order to give effect to the intent of the Legislature.” (\textit{County of Orange v. Flourney} (1974) 42 Cal.App.3d 908, 914.) We must accord significance to every word, phrase, and sentence in discerning the legislative purpose. (\textit{People v. Valencia} (2017) 3 Cal.5th 347, 357.) Our interpretation of the statute harmonizes section 2699, subdivision (a) with the definition of “aggrieved employees” in section 2699, subdivision (c) and is therefore preferable to Securitas’ proposed interpretation, which focuses on the former in isolation. Securitas further asserts that the definition of “aggrieved employee” in section 2699, subdivision (c) cannot be harmonized with other provisions of the statute, specifically, subdivisions (f) and (i) of that section.

Section 2699, subdivision (f) creates a civil penalty for any Labor Code violation for which a penalty is not provided elsewhere in the law. The penalties under section 2699, subdivision (f) are “one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.” Securitas posits that using the

\footnote{Securitas has asked us to take judicial notice of a decision regarding PAGA from the Alameda County Superior Court, and urges us to adopt the reasoning in that decision. The rules of court do not permit citation to Superior Court decisions as authority (Cal. Rules of Court, rule 8.1115(a)), and the decision is not otherwise relevant here. We therefore deny the request for judicial notice.}
definition of aggrieved employees in section 2699, subdivision (c) to calculate those penalties would allow over-counting in some cases to include weeks worked by employees affected by just one of the Labor Code violations alleged in the complaint, even if it is not the one giving rise to the penalties imposed by section 2699, subdivision (f). To the contrary, it is entirely possible to harmonize the two provisions. The method of calculation under section 2699, subdivision (f) imposes penalties based on the total number of employees that have been affected by an employer’s Labor Code violations. Though Securitas calls that “over-counting,” it is not impermissible for the Legislature to impose penalties measured in that way. Even if the method of calculation provided for by section 2699, subdivision (f) is something of a blunt instrument, it is not our role to rewrite the statute. (People v. Garcia (1999) 21 Cal.4th 1, 14.) Separation of powers principles require us to interpret the law as written, “and leave for the People and the Legislature the task of revising it as they deem wise.” (Id. at p. 15.) We also note that PAGA gives a court broad discretion to “award a lesser amount than the maximum civil penalty amount … if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” (§ 2699, subd. (e)(2).) So the statute incorporates a remedy if the penalty calculation is unfair or arbitrary as applied to a particular employer.

Section 2699, subdivision (i) provides for the distribution of the monetary penalties recovered in a PAGA action: 75 percent to the state Labor and Workforce Development Agency, and 25 percent to the aggrieved employees. Securitas maintains that applying the statutory definition of “aggrieved employee” to that provision cannot be correct because that would allow a plaintiff to share in penalties imposed for violations he or she never suffered. But Securitas again ignores the distinction between an individual lawsuit and the *qui tam* action authorized by PAGA. As previously discussed, a PAGA plaintiff does not pursue an individual claim but rather is deputized to bring a suit to collect penalties on behalf of the government. If all penalties were paid to the state, an
individual would have little incentive to pursue a PAGA action. Since the Legislature sought to give individual employees an incentive to enforce labor laws in place of understaffed state agencies, it provided for some of the penalties to be paid to the plaintiff employees. Applying the statutory definition of “aggrieved employee” to the part of the statute governing distribution of the penalties yields a result consistent with the overall purpose of the legislation.

Securitas asserts that allowing PAGA plaintiffs to recover penalties for violations that did not affect them would grant them powers beyond those of the Labor Commissioner. But it cites no authority for the proposition that the Labor Commissioner is precluded from seeking penalties for all Labor Code violations an employer has committed. An action brought by the Labor Commissioner to recover penalties “shall be brought in the name of the people of the State of California and the Labor Commissioner.” (§ 210, subd. (b).) The state’s interest in such an action is to enforce its laws, not to recover damages on behalf of a particular individual. The Labor Commissioner therefore has the authority to seek penalties for all known violations committed by an employer—just as a PAGA plaintiff has that authority when standing in the shoes of the Labor Commissioner.

Securitas relies on Starbucks Corp. v. Superior Court (2008) 168 Cal.App.4th 1436, 1451 (Starbucks), which found that the plaintiffs could not bring an action for violation of a law prohibiting employers from inquiring about marijuana-related convictions on job applications because they had not suffered any injury from the inquiry—they had no such convictions to disclose. The court held that a plaintiff could not sue for a statutory penalty unless he or she was within the class of persons the statute was designed to protect. Starbucks is distinguishable for two reasons. First, it involved individual claims brought on behalf of other individuals, not a qui tam claim brought on

3 The statute does not further explain the method to be used for dividing the 25 percent of the total penalties among the aggrieved employees. (See § 2699, subd. (i).)
behalf of the government. The traditional standing analysis undertaken by the court in
Starbucks does not apply in a *qui tam* action. And second, PAGA states that an action
may be brought by an employee “against whom one or more of the alleged violations was
committed,” a clear expression that the Legislature intended that a PAGA plaintiff be
affected by at least one, but not necessarily all, of the violations alleged in the action.
The Starbucks court, by contrast, found no such expression of legislative intent in the
statute at issue in that case, and relied on that silence to conclude that only those injured
by a particular violation of the statute could bring suit. (*Id.* at p. 1451.)

Securitas asserts that applying the statutory definition of “aggrieved employee” as
we do here leads to absurd consequences. It worries that the penalties collectable by
PAGA plaintiffs will be “bounded solely by [their] pleading imagination.” But a PAGA
plaintiff does not collect penalties merely by alleging a Labor Code violation in the
complaint. The plaintiff still must prove at trial that a violation in fact occurred.
Procedural mechanisms such as summary adjudication remain available to weed out
meritless claims before trial. (Code of Civ. Proc. §437c, subd. (f)(1).) Perhaps Securitas’
concern is more about plaintiffs who bring PAGA claims solely as a fishing expedition to
attempt to uncover other violations committed by the employer. Though that concern is
better directed to the Legislature, we note that the trial courts are also equipped to
manage cases in a way that avoids unreasonable consumption of time or resources.
Where appropriate, cases brought under PAGA can be designated complex under the
Rules of Court (as in this case), with rules designed to manage the expenditure of
resources. (See, e.g., Cal. Rules of Court, rule 3.750(c) [providing for an initial case
management conference in cases designated complex, the principal objects of which are
“to expose at an early date the essential issues in the litigation and to avoid unnecessary
and burdensome discovery procedures in the course of preparing for trial of those
issues.”].)
The other consequences Securitas characterizes as absurd are that plaintiffs will be incentivized to pursue penalties for Labor Code violations that affected other employees, and will be able to collect a portion of the penalties imposed for those violations. Far from absurd, those consequences are precisely what the Legislature intended when it enacted PAGA as a way to encourage private parties to pursue Labor Code violations, relieving pressure on overburdened state agencies and achieving maximum compliance with labor laws. The trial court correctly found that so long as Huff was affected by at least one of the Labor Code violations alleged in the complaint, he can recover penalties for all the violations he proves.

C. THE REMAINING LABOR CODE VIOLATIONS ALLEGED BY HUFF ARE SUFFICIENT TO SUPPORT THE PAGA CAUSE OF ACTION

When the court granted the defense motion for judgment after Huff presented his case at the first phase of trial, it found that Huff had failed to prove a violation of the section 201.3 weekly pay requirement because his assignments exceeded 90 days and he was therefore not a temporary employee. In its later order granting a new trial (from which Securitas now appeals), the court determined that regardless of whether Huff proved a violation of the weekly pay requirement, he could maintain a PAGA action because he alleged another Labor Code violation that did affect him: the failure to timely pay employees after they quit or were removed from a site, in violation of sections 201 and 202.

Securitas contends that even if PAGA permits a plaintiff to seek penalties for Labor Code violations that did not affect him or her, Huff still cannot proceed because the untimely payment of wages on termination is a new theory raised after trial. We agree that had Huff not alleged that claim as part of the lawsuit, he could not be granted a new trial to litigate it. But as noted by the trial court in its order granting a new trial, the second amended complaint states: “When a security officer quits or is removed from a site, Securitas typically does not immediately pay the officer. Instead, it waits until the
officer’s next scheduled payday. This could be as much as 20 days, generally no less than 7 days, and averages at least 13 days. [¶] Securitas’ actions violate the rights of Securitas’ security officer employees to have their final wages paid on a timely basis as mandated by law. This is a violation of California Labor Code §§ 201, 202 ….” The claim that Securitas failed to promptly pay wages on termination was not raised for the first time after trial, but was specifically alleged in the operative complaint.

Securitas also contends that Huff’s claim for failure to pay wages on termination cannot support his PAGA cause of action because the claim is without legal merit. It argues that Huff’s removal from an assignment does not constitute a termination of his employment as a matter of law and therefore it was not required to issue him a final paycheck at the time of removal. But the trial court never ruled on the merits of the claim for prompt payment of final wages, and as a reviewing court, we cannot do so in the first instance. (Code Civ. Proc. § 906.) The trial was divided into phases. The first phase determined only certain issues, and the issue of whether Securitas violated section 201 or 202 by not timely paying wages on termination was not among them. The trial court accordingly made no findings regarding the merits of Huff’s claim for violation of sections 201 and 202, so there is nothing for us to review. Securitas similarly asserts that Huff’s claim for failure to pay wages on termination fails because he did not notify the Labor and Workforce Development Agency of the facts and circumstances relating to that violation. Again, that issue has not yet been decided by the trial court and is therefore not ripe for review.

A court has discretion to order separate trials of issues and determine the order in which those issues are to be decided. (Royal Surplus Lines Ins. Co. v. Ranger Ins. Co. (2002) 100 Cal.App.4th 193, 205.) The trial court properly rejected Securitas’ argument that Huff waived his claim for failure to pay wages on termination, finding that the claim was not waived because it was not among the issues to be tried at the first phase of the trial and the second phase of the trial was to “include any remaining issues that have not
yet been determined.” We would reverse a decision regarding the management of a case for trial and the order in which issues are to be tried only for a manifest abuse of discretion. (Downey Savings & Loan Ass’n v. Ohio Casualty Ins. Co. (1987) 189 Cal.App.3d 1072, 1086.) Securitas argues that the pretrial scheduling orders contemplated only a trial of the claim for violation of the section 201.3 weekly pay requirement, and that the trial was divided into phases merely to allow that issue to be tried as to the chosen 20 employees first and any remaining employees in a later phase. But the trial court disagreed, and, interpreting its own orders, found the language broad enough to allow for the trial of the failure to pay on termination claim at a later phase of the proceedings. We find no abuse of discretion in that decision.

Securitas also contends that Huff forfeited the argument that other alleged violations could support the PAGA cause of action by not raising it in opposition to the defense motion for judgment during trial. But Huff did make the argument when he moved for a new trial, and the court properly considered it at that time in deciding to grant the motion. Securitas cites no authority for the proposition that the court was prohibited from correcting a legal error it made in its previous decision. As long as the trial court still has jurisdiction over a case, it has inherent authority to correct a prior ruling. (LeFrancois v. Goel (2005) 35 Cal.4th 1094, 1108 [procedural rules limit a party’s ability to bring a motion for reconsideration but do not prevent a court from correcting a prior erroneous order, no matter how the error came to its attention].)

Securitas’ arguments regarding Huff’s purported failure to preserve certain claims are rooted in the idea that it did not have adequate notice of the claims and therefore could not properly defend against them. But this is not a case where a plaintiff was granted relief at trial on claims about which the defendant was previously unaware. The court’s ruling here is simply that plaintiff should be allowed to pursue certain claims at a later phase of trial—at which point Securitas will have the opportunity to defend against them. The only prejudice identified by Securitas is that it did not conduct discovery
regarding the prompt payment on termination claims because it believed those claims were no longer at issue. But nothing prevents Securitas from conducting that discovery before the new trial. *(Fairmont Ins. Co. v. Superior Court (2000) 22 Cal.4th 245, 247.)*

**D. HUFF’S CROSS-APPEAL IS MOOT**

Huff filed a protective cross-appeal from the order granting Securitas’ motion for judgment and the resulting judgment in Securitas’ favor. The trial court’s order granting a new trial vacated the order and judgment from which Huff cross-appeals. Since we affirm the order granting a new trial, Huff’s cross-appeal is moot.

**E. HUFF’S MOTION TO INTERPRET SECTION 201.3 IS DENIED**

Recognizing that affirmance of the order granting a new trial means that we will not reach the issues he raises in his cross-appeal, Huff filed a motion requesting that we interpret section 201.3, subdivision (b)(6). He asks that we provide direction to the trial court on how to apply these statutory exemptions for the temporary employee weekly pay requirement on retrial in order to avoid additional proceedings there and in this court. But the order granting a new trial does not limit retrial to a particular issue. *(Barmas, Inc. v. Superior Court (2001) 92 Cal.App.4th 372, 376 [court may either grant a new trial on all issues, or limit retrial to certain issues if that would not make the trial unfair].) As a result, all issues now remain to be tried, and on retrial (as Huff’s counsel acknowledged at oral argument) the trial court will not be bound by the previous ruling on the issue. We therefore deny Huff’s request that we interpret section 201.3, subdivision (b)(6) because that would constitute an advisory opinion, which is prohibited under established principles of appellate review. *(Hunt v. Superior Court (1999) 21 Cal.4th 984, 998.)*

**III. DISPOSITION**

The order granting a new trial is affirmed. Huff shall be awarded costs on appeal. The cross-appeal is moot and dismissed. No costs are awarded as to the cross-appeal.
WE CONCUR:

Grover, J.

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Premo, Acting P. J.

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Mihara, J.

H042852 – Huff v Securitas Security Services USA, Inc.
| Trial Court:               | Santa Clara County Superior Court  
|                           | Superior Court No. 1-10-CV-172614 |
| Trial Judge:              | Hon. Peter H. Kirwin               |
| Counsel for Plaintiff/Respondent | Michael Millen                   |
| Forrest Huff              |                                    |
| Counsel for Defendant/Appellant | James E. Hart                    |
| Securitas Security Services USA, Inc. | John Kevin Lilly               |
|                           | Littler Mendelson                  |
|                           | Sherry Beth Shavit                 |
|                           | Tharpe & Howell, LLP               |

24 Cal.App.5th 1014
Court of Appeal, Second District, Division 4, California.

AHMC HEALTHCARE, INC. et al., Petitioners, v. The SUPERIOR COURT of Los Angeles County, Respondent; Emilio Letona et al., Real Parties in Interest.

B285655
Filed 6/25/2018

Synopsis
Background: Employees brought action against employer for failure to pay wages and for penalties under Private Attorneys General Act (PAGA). The Superior Court, Los Angeles County, No. BC629297, Elihu M. Berle, J., denied cross motions for summary judgment. Employer filed petition for writ of mandate.

[ Holding: ] The Court of Appeal, Manella, J., held that employer’s policy of rounding employee hours did not violate federal labor regulation.

Petition granted.

West Headnotes (3)

[1] Parties
Consideration of merits

Trial courts should decide whether a class is proper and, if so, order class notice before ruling on the substantive merits of the action in order to prevent one-way intervention which occurs when potential plaintiffs elect to stay in a class after favorable merits rulings but opt out after unfavorable ones.

Cases that cite this headnote

[2] Courts
Decisions of United States Courts as Authority in State Courts

In determining employee wage claims, State courts may look to federal authorities for guidance in interpreting state labor provisions.

Cases that cite this headnote

[3] Labor and Employment
Working Time

Employer’s policy of rounding employee hours up or down to the nearest quarter hour was neutral on its face and without an eye toward whether employer or employee benefited from the rounding, and thus rounding did not violate federal labor regulation governing rounding of employee hours, although slight majority at one location lost time due to rounding, where, overall, employees were compensated for more hours than they worked, and slight majority who lost time lost only minor sum of wages during discrete period. 29 C.F.R. § 785.48.


I Cases that cite this headnote

**805 ORIGINAL PROCEEDINGS in mandate. Elihu M. Berle, Judge. Petition granted. (Los Angeles County Super. Ct. No. BC629297)

Attorneys and Law Firms
Ballard Rosenberg Golper & Savitt, Jeffrey P. Fuchsman, Glendale, and Zareh A. Jaltorossian for Petitioners.

Law Offices of Kevin T. Barnes, Kevin T. Barnes and
**FACTUAL AND PROCEDURAL BACKGROUND**

Real parties Emilio Letona and Jacquelyn Abeyta, acting on behalf of themselves and others similarly situated, brought suit against petitioners for failure to pay wages, failure to provide meal periods, failure to provide rest periods, failure to furnish timely and accurate wage statements, failure to pay wages to discharged employees, and unfair business practices. The operative complaint also sought penalties under the Private Attorneys General Act (Lab. Code, § 2698 et seq.).

**806** Real party Letona was employed by San Gabriel as a part-time respiratory care technician from 2009 to 2016. Real party Abeyta was employed by Anaheim as an R.N. from November 2015 to August 2016. Both real parties were employed in hourly positions, requiring them to clock in and out, which they did by swiping their ID badges at the beginning and end of their shifts. Real parties’ primary contention was that petitioners’ method of calculating employee hours violated the Labor Code because the system rounded employees’ hours up or down to the nearest quarter hour prior to calculating wages and issuing paychecks, rather than using the employees’ exact check-in and check-out times. Both sides moved for summary adjudication to establish whether petitioners’ method of calculation passed muster under California law.

The parties stipulated to the following facts. Petitioners have a policy that rounds employees’ time clock swipes up or down to the nearest quarter hour. For example, if an employee clocks in between 6:53 and 7:07, he or she is paid as if he or she had clocked in at 7:00; if an employee clocks in from 7:23 to 7:37, he or she is paid as if he or she had clocked in at 7:30. In addition, meal breaks that last between 23 and 37 minutes are rounded to 30 minutes.

The time records for San Gabriel and Anaheim for the period August 2, 2012 through June 30, 2016 were examined by Deborah K. Foster, Ph. D., an economic and statistics expert. During this period, employee shifts totaled 527,472 at San Gabriel, and 766,573 at Anaheim. Dr. Foster examined the data over the four-year period from three perspectives: (1) the percentage of employees who gained by having minutes added to their time, compared to the percentage who lost by having minutes deducted; (2) the percentage of employee shifts in which time was rounded up, compared to the percentage in which time was rounded down; and (3) whether the employees as a whole benefitted by being paid for minutes or hours they did not work, or the petitioners benefitted by paying for fewer minutes or hours than actually worked. The parties stipulated to the accuracy of her findings, discussed below.

At San Gabriel, petitioners’ rounding procedure added time (9,476 hours) to the pay of 49.3% of the workforce (709 employees) and left 1.2 percent of the workforce unaffected; 49.5 percent of the workforce (713 employees) lost time (a total of 8,097 hours). On a day-by-day analysis, the procedure added time to 45.2 percent of the employee shifts, averaging 4.96 minutes per day; it reduced time from 43.3 percent of employee shifts, averaging 4.82 minutes per employee shift; it had no effect on 11.6 percent of employee shifts. Overall, the number of minutes added to employee time by the rounding policy exceeded the number of minutes
subtracted, adding 1,378 hours to the employees’ total compensable time.

At Anaheim, the rounding procedure added time (17,464 hours) to the pay of 47.1 percent of the workforce (861 employees), and had no effect on 0.8 percent of the workforce (14 employees); 52.1 percent of the workforce (953 employees) lost time (a total of 13,588 hours). On a day-by-day analysis, the procedure added time to 46.6 percent of the employee shifts examined, reduced time from 42.3 percent of the employee shifts examined, and had no effect on 11 percent. Overall, the rounding policy added 3,875 hours to the employees’ total compensable time.

*1019 The parties also stipulated to the net effect of rounding on the two named plaintiffs: over the nearly four-year period examined, Letona lost 3.7 hours, an average of .86 of a minute per shift, for a total dollar loss of $118.41. Abeyta, who worked at San Gabriel for only nine months during the examined period, lost 1.6 hours, an average of 1.85 minutes per shift, for a total dollar loss of $63.70.

Based on these facts, petitioners contended the rounding procedure was lawful, as it was facially neutral, applied fairly, and provided a net benefit to employees considered as a whole. As proof of its tilt toward employees, petitioners pointed to the stipulated facts that at both facilities, the majority of employee shifts either had time added or were unaffected, and the number of minutes added to employee time from rounding up exceeded the number of minutes subtracted from rounding down. The result was a net loss to petitioners and net gain for their employees, who were paid for 1,378 additional hours at San Gabriel and 3,875 additional hours at Anaheim. Moreover, with respect to the employees who lost time, the total amount was small per employee, particularly when calculated on a daily basis. For example, Letona’s loss of 3.7 hours, worked out to less than a minute per shift. Abeyta’s loss of 1.6 hours worked out to less than two minutes per shift. Petitioners contended this negligible amount of lost time was not compensable, under a de minimis theory.

Real parties opposed petitioners’ motion, and asked the court to grant summary adjudication in their favor on the rounding issue. They contended that an employer’s rounding practice is unlawful if it systematically undercompensates employees, and that such systematic undercompensation occurs whenever “the average employee suffers a loss of income due to rounding.” According to real parties, petitioners’ rounding procedure was unlawful because it resulted in undercompensation for a slight majority of petitioners’ employees. Real parties further maintained that a rounding policy that resulted in any loss to any employee, no matter how minimal, violates California employment law.

*1020 The trial court denied both petitioners’ and real parties’ motions for summary adjudication. At the hearing, the court explained that an employer may be permitted to use a rounding procedure “as long as [it] does not consistently result in a failure to pay employees per time worked,” and that “a rounding policy is lawful if it is fair and neutral on its face and it’s used in such a manner that would not result over a period of time in failure to compensate employees properly for all the time that they have worked.” The court further explained that determining whether a rounding policy is slanted against employees “is a factual issue and not a legal one,” and that “the analysis turns on whether the policy is used in such a manner that will not result over a period of time in failure to compensate employees properly for all the time that they’ve actually worked.” The court cited Shiferaw v. Sunrise Senior Living Mgmt., Inc. (C.D.Cal., Mar. 21, 2016, CV-13-02171-JAK (PLAx), 2016 WL 6571270, 2016 U.S. Dist. LEXIS 187548 (Shiferaw ) for the proposition that “a plaintiff may establish [that] the employer’s facially-neutral policy is unlawful using either a net effect approach or an employee percentage approach.” The court expressed concern that an employer could manipulate the system by “consistently overcompensat[ing]” low wage earners and “consistently undercompensat[ing]” high wage earners in order to “serve [the] company’s whims at the expense of the employees.” The court concluded that the evidence that 49.5 percent of the employees at San Gabriel and 52.1 percent of the employees at Anaheim had their hours reduced supported a finding that the rounding policy “consistently favored the employer.” Thus, the court concluded, the evidence “raise[d] triable issues as to whether the rounding policies systematically under-compensate employees.”

Petitioners filed a petition for writ of mandate, seeking reversal of the order denying their motion for summary adjudication. On February 8, 2018, this court issued an alternative writ of mandate, instructing the trial court either to vacate the order insofar as it denied petitioners’ motion and make a new and different order granting the motion or, in the alternative, to show cause why a peremptory writ of mandate should not issue. The trial court did not vacate its original order.
DISCUSSION

Section 785.48 of title 29 of the Code of Federal Regulations (section 785.48), promulgated many decades ago, allows employers to compute employee worktime by rounding “to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour,” provided that the rounding system adopted by the employer “is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.” (29 C.F.R. § 785.48(b).) Federal district courts interpreting the provision have almost universally concluded that a rounding system is valid if it “average[s] out sufficiently,” rejecting claims that minor discrepancies in individual employee’s wage calculations establish that the employee is entitled to assert a claim for underpayment of wages. (East v. Bullock’s Inc. (D. Ariz. 1998) 34 F.Supp.2d 1176, 1184 [employee presented evidence of 24 occasions of time reductions of less than 15 minutes]; accord, Alonzo v. Maximus, Inc. (C.D. Cal. 2011) 832 F.Supp.2d 1122, 1126-1127 [“An employer’s rounding practices comply with § 785.48(b) if the employer applies a consistent rounding policy that, on average, favors neither overpayment nor underpayment. ... An employer’s rounding practices violate § 785.48(b) if they systematically undercompensate employees”]; Mendez v. H.J. Heinz Co., L.P. (C.D. Cal., Nov. 13, 2012, No. CV-12-5652-GHK (DTBx) ), 2012 WL 12888526, p. *2, 2012 U.S. Dist. LEXIS 170785, p. *6 [“Rounding policies may be permissible if they, ‘on average, favor neither overpayment nor underpayment’ of wages”]; Eddings v. Health Net, Inc. (C.D. Cal., Mar. 23, 2012, Case No. CV-10-1744-JST (RZx) ), 2012 WL 994617, p. *3, 2012 U.S. Dist. LEXIS 51158, p. *11 [Eddings] “An employer’s rounding practices comply with § 785.48(b) if the employer applies a consistent rounding policy that, on average, favors neither overpayment nor underpayment”].)

In Corbin v. Time Warner Entm’t-Advance/Newhouse Pship. (9th Cir. 2016) 821 F.3d 1069 (Corbin ), the first federal appellate court to interpret the regulation “join[ed] the consensus of district courts that have analyzed this issue ....” (Id. at p. 1079.) The plaintiff there had lost $15.02 in total compensation over a one-year period, and contended that “if an employee loses any compensation due to the operation of a company’s rounding policy, that policy should be found to violate the federal rounding regulation.” (Id. at pp. 1076-1077.) “In other words, ... unless every employee gains or breaks even over every pay period or set of pay periods analyzed, an employer’s rounding policy violate[s] the federal rounding regulation ...” (Id. at p. 1077, italics omitted.) The Ninth Circuit rejected that contention for multiple reasons. First, the court observed, the plaintiff’s interpretation “read into the federal rounding regulation an ‘individual employee’ requirement that does not exist. The regulation instead explicitly notes that it applies to ‘employees’ and contemplates wages for the time ‘they’ actually work.” (Ibid., quoting 29 C.F.R. § 785.48(b).) “If the rounding policy was meant to be applied individually to each employee to ensure that no employee ever lost a single cent over a pay period, the regulation would have said as much.” (Corbin, supra, at p. 1077,.)

The court further found that interpreting the regulation to require the rounding to work out neutrally for every employee “would undercut the purpose” and “gut the effectiveness” of the typical rounding policy. (Corbin, supra, 821 F.3d at p. 1077.) “Employers use rounding policies to calculate wages efficiently; sometimes, in any given pay period, employees come out ahead and sometimes they come out behind, but the policy is meant to average out in the long-term. If an employer’s rounding practice does not permit both upward and downward rounding, then the system is not neutral ....” (Ibid.) The plaintiff’s interpretation “would require employers to engage in the very mathematical calculation that the federal rounding regulation serves to avoid,” requiring employers to “‘un-round’ every employee’s time stamps for every pay period to verify that the rounding policy had benefitted every employee.” (Ibid.) “The proper interpretation of the federal rounding regulation cannot be one that renders it entirely useless.” (Ibid.)

Finally, the court expressed concern that the plaintiff’s interpretation of the regulation would “reward[ ] strategic pleading, permitting plaintiffs to selectively edit their relevant employment windows to include only pay periods in which they may have come out behind while chopping off pay periods in which they may have come out ahead.” (Corbin, supra, 821 F.3d at p. 1077.) The court did not believe that “the legality of an employer’s rounding policy” should “turn[ ] on the vagaries of clever pleading.” (Id. at p. 1078.)

Applying its reasoning to the facts presented, the Corbin court found that the rounding policy at issue “pass[ed] muster.” The policy was “facially neutral,” the court observed, as the employer “round[s] all employee time punches to the nearest quarter-hour without an eye towards whether the employer or the employee is benefitting from the rounding.” (Corbin, supra, 821 F.3d at pp. 1078-1079.) Moreover, the plaintiff’s own compensation records demonstrated that the rounding policy was “neutral in application”: “sometimes [he] gained minutes and compensation, and sometimes [he] lost minutes and compensation.” Although the plaintiff
was able to show an aggregate loss of $15.02, “[the] numbers ... fluctuated from pay period to pay period, and ... a few more pay periods of employment may have tilted the total timecompensation tally in the other direction ....” (Id. at p. 1079.)

**812** Focusing on the evidence that “the majority” of See’s Candy employees were overcompensated under the system at issue in See’s I, real parties contend that the case stands for the proposition that a rounding policy is unlawful where a bare majority of employees lose compensation.11 We do not read the holding in See’s I to create such rule. Because the expert analysis established that the class as a whole gained time and compensation and that the majority of See’s Candy’s employees gained time and compensation, the court had no basis to resolve whether either factor was decisive. However, two recent federal district courts have considered the issue and, relying on Corbin and See’s I, concluded that the fact that a slight majority of employees lost time over a defined period was not sufficient to invalidate an otherwise neutral rounding practice. (Utne v. Home Depot U.S.A., Inc. (N.D. Cal., Dec. 4, 2017, Case No. 16-cv-01854-RS), 2017 WL 5991863, 2017 U.S. Dist. LEXIS 199184 (Utne); Boone v. PrimeFlight Aviation Services, Inc. (E.D.N.Y., Feb. 20, 2018, No. 15-CV-6077 (JMA) (ARL) ), 2018 WL 1189338, 2018 U.S. Dist. LEXIS 28000 (Boone ).)

*812* Focusing on the evidence that “the majority” of See’s Candy employees were overcompensated under the system at issue in See’s I, real parties contend that the case stands for the proposition that a rounding policy is unlawful where a bare majority of employees lose compensation. We do not read the holding in See’s I to create such rule. Because the expert analysis established that the class as a whole gained time and compensation and that the majority of See’s Candy’s employees gained time and compensation, the court had no basis to resolve whether either factor was decisive. However, two recent federal district courts have considered the issue and, relying on Corbin and See’s I, concluded that the fact that a slight majority of employees lost time over a defined period was not sufficient to invalidate an otherwise neutral rounding practice. (Utne v. Home Depot U.S.A., Inc. (N.D. Cal., Dec. 4, 2017, Case No. 16-cv-01854-RS), 2017 WL 5991863, 2017 U.S. Dist. LEXIS 199184 (Utne); Boone v. PrimeFlight Aviation Services, Inc. (E.D.N.Y., Feb. 20, 2018, No. 15-CV-6077 (JMA) (ARL) ), 2018 WL 1189338, 2018 U.S. Dist. LEXIS 28000 (Boone ).)

The court held that “a rounding-over-time policy” does not systematically undercompensate employees if it is “neutral, both facially and as applied,” because “its net effect is to permit employers to efficiently calculate hours worked without imposing any burden on employees. [Citation.]” (See’s I, supra, 210 Cal.App.4th at p. 903, 148 Cal.Rptr.3d 690.) Having found that an employer is entitled to use rounding if the system is “fair and neutral” on its face and in practice (id. at pp. 903, 907, 148 Cal.Rptr.3d 690), the court went on to consider whether a reasonable trier of fact could find that See’s Candy’s policy was consistent with section 785.48 under the evidence presented. Because the defense expert’s analysis established that the rounding resulted in a total gain of thousands of hours for the employee class members as a whole, that most of the class member were fully compensated for every minute of their time, and that “the majority was paid for more time than their actual working time,” the court found that See’s Candy had met its burden to show a triable issue of fact regarding whether its nearest-tenth rounding policy was proper under California law.10 (Id. at p. 908, 148 Cal.Rptr.3d 690.)

*1025* In Utne, the timekeeping system was programmed to round either up or down to the nearest quarter of an hour for purposes of calculating employee compensation. (Utne, supra, 2017 WL 5991863 at p. *2, 2017 U.S. Dist. LEXIS 199184 at p. *5.) The employer’s expert performed an analysis of a representative sample of the potential class over a five-year period and found that: 51.3 percent of shifts had minutes added rather than subtracted; in more than half of all analyzed pay periods, employees were credited with extra minutes; the average potential class member was paid for an additional 11.3 minutes; and overall, the employer paid for an additional 339,331 minutes (5,656 hours) when compared to the actual minutes employees worked. (Id. at p. *2–3, 2017 U.S. Dist. LEXIS 199184 at p. *7.) However, the plaintiff had lost time—an average of 36 seconds per shift—and of the 13,387 employees analyzed, 53 percent were negatively impacted by the rounding, an average of 141.7 minutes per employee over the five-year period. (Id. at p. *3, 2017 U.S. Dist. LEXIS 199184 at p. *9.) The court nonetheless granted summary judgment in favor of the employer: “The rounding policy rounds both up and down, and is thus facially neutral. There is no evidence that the rounding policy is applied differently to [the plaintiff] or to any of the proposed class members. [The employer’s] expert calculations are sufficient to establish that the practice does not systematically undercompensate employees over time.” (Id. at p. *3, 2017 U.S. Dist. LEXIS 199184 at p. *11, italics omitted.) The court observed that the figures were “consistent with [the employer’s] contention that rounding contemplates the
**813** respect to individual employees, shifting the time window even slightly could flip the figures.” (Id. at p. *3, 2017 U.S. Dist. LEXIS 199184 at pp. *11-12.)

**Boone** also involved a quarter-hour rounding system. As in **Uime**, expert evaluation of employee compensation during the relevant period resulted in evidence that a majority (58.5%) of all time entries were either neutral or rounded in favor of the employee and that the employer suffered a loss overall, but that the majority of employees (55.8%), including the *1026 plaintiff, suffered minor losses in compensated time. (Boone, supra, 2018 WL 1189338 at pp. *2-3, 8-9, 2018 U.S. Dist. LEXIS 28000 at pp. *6-7, 26.) Relying on the Ninth Circuit’s conclusion in **Corbin** that “the rounding policy is not meant to ‘ensure that no employee ever lost a single cent over a pay period.’” (Boone, supra, at p. *9, 2018 U.S. Dist. LEXIS 28000 at p. *27, quoting Corbin, supra, 821 F.3d at p. 1077), the court granted summary judgment in favor of the employer, finding that the plaintiff “failed to raise a genuine issue of material fact on whether [the employer’s] timekeeping system did not ‘result over a period of time, in failure to compensate the employees properly for all the time they have actually worked.’” (Boone, supra, at p. *9, 2018 U.S. Dist. LEXIS 28000 at p. *28, quoting 29 C.F.R. § 785.48(b).) The court explained: “[A]n analysis of the putative class as a whole demonstrates that the rounding policy was neutral. It is undisputed that (1) 58.5% of all time entries resulted in either neutral rounding or rounding in favor of the employee; (2) the 138 putative class members gained compensation or broke even on approximately 54.5% of their shifts; and (3) 42% of the putative class members gained compensation from rounding over the entire length of the class period analyzed. Further, ... Plaintiff does not refute that [when employees lost time,] the 138 putative class members lost on average 15.67 seconds per shift. Although the data analyzed here ... did not average out to 0, Defendant’s expert calculations are sufficient to establish that the practice does not systematically undercompensate employees over time.” (Id. at p. *9, 2018 U.S. Dist. LEXIS 28000 at pp. *27-28, italics omitted.)

Real parties contend that two federal cases—**Eddings**, supra, 2012 WL 994617, 2012 U.S. Dist. LEXIS 51158 and **Shiferaw**, supra, 2016 WL 6571270, 2016 U.S. Dist. LEXIS 187548—support the position that section 785.48 is violated where the majority of the employees suffer a minor loss in compensation. In **Eddings**, one of **814** the two systems challenged in the complaint required the employees to round their own time up or down, rather than input their time and leave it to an impartial system to round up or down according to a fixed formula. The employer claimed to have communicated to the employees that time was always to be rounded in their favor, but some employees submitted declarations stating they were told to round down. Accordingly, the court found the existence of a genuine issue of material fact “both as to the facial neutrality of the [system] and to the effects of its application .... ” (Eddings, supra, at p. *4, 2012 U.S. Dist. LEXIS 51158 at pp. *15-16.) Because the policy “could have been interpreted differently by different associates,” and it was “at best ambiguous as to whether employees are ever allowed to round up,” the fact that the majority of employees gained time was not determinative. (Id. at p. *4, 2012 U.S. Dist. LEXIS 51158 at pp. *15-16.)

In **Shiferaw**, which involved a system that automatically rounded time to the nearest quarter hour, the court stated that “two pragmatic approaches” could be used “to gather data” in determining whether a rounding system, neutral in its face, was neutral in application: “(1) compare all rounded punches with the actual punch times to determine the overall net effect—in *1027* hours, minutes, and/or seconds—of the rounding; and (2) compare the percentage of employees for whom the rounding resulted in a net loss of time—those who were undercompensated—with the percentage of employees for whom the rounding resulted in overcompensation.” (Shiferaw, supra, 2016 WL 6571270 at p. *28, 2016 U.S. Dist. LEXIS 187548 at pp. *6, 81.) The plaintiffs’ expert provided data establishing that the rounding policy resulted in net undercompensation of the employees in the amount of 1,783 hours and that the majority of employees (53.3%) lost time due to rounding. (Id. at p. *——, 2016 U.S. Dist. LEXIS 187548 at p. 83.) Contrary to real parties’ assertion that “the ... court concluded [the] ... expert created a triable issue of fact under either the net effect or percentage methodology,” the court considered both assumptions in finding “[the] evidence ... sufficient to show the existence of a genuine dispute as to whether [the employer’s] challenged rounding policy results in a ‘failure to compensate the employees properly for all the time they have actually worked.’” (Id. at p. *——, 2016 U.S. Dist. LEXIS 187548 at p. 85, italics omitted.) As the plaintiffs introduced evidence that both the net effect and percentage effect analysis supported their claims, the court had no cause to consider whether a difference in either datapoint would have led to a different result. Moreover, **Shiferaw** was decided before the Ninth Circuit issued its decision in **Corbin**. To the extent it conflicts with that decision, it is no longer good law.
The rounding system is neutral on its face. It “rounds all employee time punches to the nearest quarter-hour without an eye towards whether the employer or the employee is benefitting from the rounding.” (Corbin, supra, 821 F.3d at pp. 1078-1079.) It also proved neutral in practice. At San Gabriel, a minority of employees lost time, the remainder either gained time or broke even, and overall it caused the employer to overcompense employees for 1,378 hours not worked. At Anaheim, although a slight majority of employees (52.1 percent) lost time, overall, employees were compensated for 3,875 more hours than they worked. Because petitioners presented undisputed evidence that the rounding system was neutral on its face, and that employees as a whole were significantly overcompensated, the evidence established that petitioners’ rounding system did not systematically undercompensate **815 employees over time. The fact that a bare majority at one hospital lost minor sums during a discrete period did not create an issue of fact as to the validity of the system. We agree with the court in Corbin that the regulation does not require that every employee gain or break even over every pay period or set of pay periods analyzed; fluctuations from pay period to pay period are to be expected under a neutral system. (See also Utne, supra, 2017 WL 5991863 at p. *3, 2017 U.S. Dist. LEXIS 199184 at p. *12 [“[R]ounding contemplates the possibility that in any given time period some employees will have net overcompensation and some will have net undercompensation”]; Boone, supra, 2018 WL 1189338 at pp. *9, 2018 U.S. Dist. LEXIS 28000 at pp. *27-28 [rounding policy was neutral as applied where majority of time entries resulted in *1028 rounding in favor of employees, class members broke even or gained compensation on their shifts, and bare majority of class members lost time, but only an average of 15.67 seconds per shift].) We further agree with the court in See’s I and See’s II that a system is fair and neutral and does not systematically undercompensate employees where it results in a net surplus of compensated hours and a net economic benefit to employees viewed as a whole.

Nothing in our analysis precludes a trial court from looking at multiple datapoints to determine whether the rounding system at issue is neutral as applied. Such analysis could uncover bias in the system that unfairly singles out certain employees. For example, as the trial court discussed, a system that in practice overcompensates lower paid employees at the expense of higher paid employees could unfairly benefit the employer. However, real parties presented no evidence of a bias in the system or that the policy was applied differently to different employees. Dr. Foster analyzed the data on an overall basis, a per shift basis and a per employee basis. Her analysis established that overall, at both hospitals, the rounding policy benefitted employees and caused petitioners to overcompensate them. Her per shift analysis established that for the majority of shifts, the employees at both facilities gained compensable time. Moreover, at San Gabriel, the majority of employees gained time and compensation or broke even during the approximately four years of the study. The sole discrepancy was at Anaheim where a slight majority (52.1%) lost an average of 2.33 minutes per employee shift. But where the system is neutral on its face and overcompensates employees overall by a significant amount to the detriment of the employer, the plaintiff must do more to establish systematic undercompensation than show that a bare majority of employees lost minor amounts of time over a particular period. Because the petitioners’ employees benefited overall from the rounding policy, the fact that a bare majority lost a minimal amount of time was not sufficient to create a triable issue of a fact. Petitioners’ motion for summary adjudication should have been granted.13

DISPOSITION

The petition is granted. Let a peremptory writ of mandate issue directing respondent superior court to set aside that portion of its order of September 26, 2017 denying petitioners’ motion for summary **816 adjudication of issues, *1029 and issue a new order granting such motion. Petitioners are awarded their costs on appeal.

We concur:

EPSTEIN, P. J.
WILLHITE, J.

All Citations


1 The original plaintiff was Ernesto Fajardo, an R.N. employed by AHMC Garfield Medical Center, L.P. However, as it was determined that Fajardo’s hours and wages had been increased as a result of the rounding procedures, he was substituted out for Letona and Abeyta. AHMC Garfield Medical Center L.P., AHMC Monterey Park Hospital, L.P., AHMC Greater El Monte Community Hospital, L.P. and AHMC Whittier Hospital Medical Center, L.P. were named as defendants in the original complaint, but dismissed when the complaint was amended. Real parties acknowledged that the evidence did not show that employees at these medical facilities were undercompensated by the rounding system.

2 The trial court has not yet decided whether to certify the proposed class. It is well settled that “trial courts ... should decide whether a class is proper and, if so, order class notice before ruling on the substantive merits of the action” in order to prevent “‘one-way intervention’” which occurs when potential plaintiffs “elect to stay in a class after favorable merits rulings but opt out after unfavorable ones.” (Fireside Bank v. Superior Court (2007) 40 Cal.4th 1069, 1074, 56 Cal.Rptr.3d 861, 155 P.3d 268.) The parties entered into a stipulation waiving this rule. In the stipulation, the parties asked the court to proceed under Code of Civil Procedure section 437c, subdivision (t), which permits the parties to stipulate to adjudication of “a legal issue or a claim for damages other than punitive damages that does not completely dispose of a cause of action, affirmative defense, or issue of duty ....”

3 For those employees whose time was reduced, the average net reduction was 2.04 minutes per employee shift.

4 For those employees whose time was reduced, the average net reduction was 2.33 minutes per employee shift.

5 The parties stipulated that the two medical facilities should be considered separately. Nonetheless, petitioners combined the figures for certain purposes, and sometimes referred to the combined figures in their argument. Although real parties asked the court to disregard the combined figures, they too referred to them in their argument. To clarify the record, we note that according to the parties, combining the San Gabriel and Anaheim figures leads to the following results: for the 1,294,045 total employee shifts at the two facilities; 26,938 hours were added to the time of 1,568 employees (48% of the combined total number of employees); 21,685 hours were taken from 1,666 employees (51% of the combined total number of employees); there was no effect on 31 employees (0.9% of the combined total number of employees). The effect of the rounding procedure on San Gabriel and Anaheim employees combined was a net increase of 5,254 in compensated hours.

6 As we have seen, the majority of employees at San Gabriel did not lose any compensation as the result of rounding. Real parties used the combined numbers to support the argument that the majority of employees at petitioners’ facilities suffered a loss.

7 Section 785.48 is part of section 785, title 29 of the Code of Federal Regulations, the regulations that define “what constitutes working time” for purposes of determining whether employees are receiving the minimum wage or are entitled to overtime. (29 C.F.R., § 785.1.)


9 Real parties do not dispute that section 785.48 is applicable to claims made under state law. We note that California’s Division of Labor Standards Enforcement (DLSE) adopted the federal regulation in its Enforcement Policies and Interpretations Manual (DLSE Manual or Manual): “The Division utilizes the practice of the U.S. Department of Labor of ‘rounding’ employee’s hours to the nearest five minute, one-tenth or quarter hour for purposes of calculating the number of hours worked pursuant to certain restrictions.” (DLSE Manual (Revised, June 2002 Update), ¶ 47.1, “Rounding.”) The court in See’s I agreed with the DLSE and the federal courts in concluding that section 785.48 and the policies underlying it “apply equally to the employee-protective policies embodied in California labor law.” (See’s I, supra, 210 Cal.App.4th at p. 903, 148 Cal.Rptr.3d 690.) The court observed that “the rounding practice has long been
adopted by employers throughout the country." (Ibid.) To construe the requirements of California’s wage laws in a manner inconsistent with federal law, “would preclude [California] employers from adopting and maintaining rounding practices that are available to employers throughout the rest of the United States.” (Ibid., quoting East v. Bullock’s Inc., supra, 34 F.Supp.2d at p. 1184.)

In See’s I, the appellate court reviewed the trial court’s order granting the plaintiff’s motion for summary adjudication. In a subsequent decision, Silva v. See’s Candy Shops, Inc. (2016) 7 Cal.App.5th 235, 212 Cal.Rptr.3d 514 (See’s II), the appellate court affirmed a grant of summary judgment in favor of See’s Candy on essentially the same facts: “(1) the aggregate impact of rounding actual time punches produced a net surplus of 2,749 employee work hours in time paid and thus resulted in a net economic benefit to the employees as a group; (2) 67 percent of the employees had either no impact or a net gain under the rounding policy; (3) the rounding policy did not negatively impact employee overtime compensation: it was ‘virtually a wash’—neither the employees nor See’s [Candy] benefited from this rounding practice; and (4) there was no meaningful impact on [the plaintiff’s] hours paid under the rounding practice; she obtained an aggregate surplus of 1.85 hours.” (Id. at pp. 242, 250, 212 Cal.Rptr.3d 514.) The court concluded that “See’s Candy met its burden to show the rounding policy is fair and neutral on its face and is used in a manner that over a relevant time period will compensate the employees for all the time they have actually worked.” (Id. at p. 252, 212 Cal.Rptr.3d 514.)

As real parties acknowledge, the majority of employees at San Gabriel either had time added to their shifts and received compensation for time they did not work, or broke even. A slight majority (52.1 percent) of Anaheim employees had time (an average of 2.33 minutes) subtracted. Only by combining the data for the two facilities can real parties assert that the majority of employees suffered a loss.

The Utne court rejected the plaintiff’s request to certify as a class those employees who lost time as “expressly foreclosed by Corbin, which explained that the federal rounding regulation was not meant to apply individually to each employee.” (Utne, supra, 2017 WL 5991863 at p. *4, 2017 U.S. Dist. LEXIS 199184 at p. *14, citing Corbin, supra, 821 F.3d at p. 1077.) “Provided [the] rounding policy does not systematically undercompensate employees over time, [the plaintiff] cannot defeat summary judgment on his rounding claims by limiting his proposed class to only those employees who happen to come out behind during the class period. As the Ninth Circuit explained in Corbin, the federal regulation did not intend to reward strategic pleading where a plaintiff includes only pay periods during which he or she came out behind a few minutes.” (Id. at p. *4, 2017 U.S. Dist. LEXIS 199184 at p. *15.) The court also rejected the plaintiff’s contention that See’s I “goes too far under California law and does not reflect how the California Supreme Court would treat rounding”: “Because California law does not address rounding one way or another, courts must ask whether the federal rule is consistent with California wage and hour law. The California Court of Appeal [in See’s I] carefully studied the issue and answered that question in the affirmative. [Citation.]” (Utne, supra, at p. *4, 2017 U.S. Dist. LEXIS 199184 at pp. *13-14.)

Because we conclude petitioners’ rounding system complies with section 785.48, we do not consider whether the de minimus rule, which permits “insubstantial or insignificant periods of time beyond the scheduled working hours to be disregarded” (29 C.F.R. § 785.47)—applies in California. That issue is currently before the Supreme Court in Troester v. Starbucks Corp., rev. granted Aug. 17, 2016, S234969.
Court of Appeal, Fourth District, Division 1, California.

Kennedy DONOHUE, Plaintiff and Appellant, v. AMN SERVICES, LLC, Defendant and Respondent.

D071865
Filed 11/21/2018
As Modified 12/28/2018

Synopsis
Background: Former employee, who was nurse recruiter, filed wage and hour class and representative action against employer, which was healthcare staffing company, alleging failure to provide meal and rest periods, failure to pay overtime and minimum wage, improper wage statements, and other claims. The Superior Court, San Diego County, No. 37-2014-00012605-CU-OE-CTL, Joel M. Pressman, J., granted summary judgment in favor of employer, entered judgment in favor of employer, and subsequently denied former employee’s ex parte application for order striking filing of judgment so that trial court could hear her pending motion for reconsideration. Former employee appealed.

Holdings: The Court of Appeal, Irion, J., held that:

[1] Court of Appeal lacked jurisdiction to consider postjudgment order denying ex parte application;

[2] employer established that its time-rounding policy was fair and neutral, in compliance with law;

[3] employer was not liable for meal period violations;

[4] former employee was not entitled to recover civil penalties under Private Attorneys General Act (PAGA); and

[5] trial court’s exclusion of former employee’s summary judgment declaration testimony did not prejudice employee, and thus did not require reversal.

West Headnotes (41)

[1] Appeal and Error
Record in General

When a case comes before the Court of Appeal after the trial court granted a motion for summary judgment, the Court of Appeal takes the facts from the record that was before the trial court when it ruled on that motion.

Cases that cite this headnote

[2] Appeal and Error
Burden of showing correctness or error
Appeal and Error
Judgment in General

Because the trial court’s judgment is presumed correct, the appellant has the burden of establishing reversible error.

Cases that cite this headnote

Motion or Other Application

In both summary judgment and summary adjudication proceedings, the pleadings—i.e., the complaint and the answer—determine the scope of the relevant issues. Cal. Civ. Proc. Code § 437c(a, f).

Cases that cite this headnote

De novo review
Supreme Court reviews de novo the trial court’s order granting or denying summary judgment or summary adjudication. Cal. Civ. Proc. Code § 437c(a, f).

Cases that cite this headnote

Appeal and Error

Review using standard applied below

As a practical matter, when reviewing a trial court’s order granting or denying summary judgment or summary adjudication, the Court of Appeal assumes the role of a trial court and applies the same rules and standards which govern the trial court’s determination of the motion in the first instance. Cal. Civ. Proc. Code § 437c(a, f).

Cases that cite this headnote

Labor and Employment

Purpose and construction in general

Labor and Employment

Construction and operation

Purpose of the California statutes governing the employment relationship is the protection of employees, and for that reason, the Court of Appeal liberally construes the Labor Code and wage orders to favor the protection of the employees.

Cases that cite this headnote

Judgment

Presumptions and burden of proof

In attempting to achieve the goal of persuasion that one or more elements of the cause of action at issue cannot be established or that there is a complete defense to the cause of action, the defendant moving for summary judgment has the initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if the defendant meets this burden, then the burden of production shifts to the plaintiff to establish the existence of a triable issue of material fact. Cal. Civ. Proc. Code § 437c(p)(2).

Cases that cite this headnote

Judgment

Presumptions and burden of proof

In attempting to achieve the goal of persuasion that there is no defense to a cause of action after proving each element of the cause of action entitling the plaintiff to judgment, the plaintiff moving for summary adjudication has the initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if the plaintiff meets this burden, then the burden of production shifts to the defendant to establish the existence of a triable issue of material fact. Cal. Civ. Proc. Code § 437c(p)(1).

Cases that cite this headnote

Appeal and Error

Summary judgment

Former employee forfeited appellate review over claim that trial court erred in granting employer summary adjudication as to former

Cases that cite this headnote
employee’s claim for unfair business practices in violation of unfair competition law, where former employee failed to raise that issue in her appellate briefs. Cal. Bus. & Prof. Code § 17200; Cal. R. Ct. 8.204(a)(1)(B).

Cases that cite this headnote


Effect of delay or failure to take proceedings

Court of Appeal lacked jurisdiction to consider trial court’s postjudgment minute order denying former employee’s ex parte application to strike entry of judgment to allow trial court to hear her motion for reconsideration of trial court’s grant of summary judgment in favor of employer, though postjudgment order denying a motion to strike was final and appealable and former employee asserted that civil procedure statute governing review of denial of motions for reconsideration provided for review; in her written notice of appeal, former employee appealed only from judgment, but she did not appeal from postjudgment order, and civil procedure statute was inapplicable under the circumstances, especially given that postjudgment order did not deny former employee’s then-pending motion for reconsideration. Cal. Civ. Proc. Code §§ 904.1(a)(2), 906, 1008.

Cases that cite this headnote

[13] **Appeal and Error**

Opening or Vacating Judgment or Order

An order denying a nonstatutory motion to vacate, as oppose to strike, a judgment, is not appealable. Cal. Civ. Proc. Code § 904.1(a)(2).

Cases that cite this headnote

[14] **Appeal and Error**

On motion or summary proceeding

An order granting summary judgment is not appealable.

Cases that cite this headnote

[15] **Evidence**

Conflict with other evidence

Labor and Employment

Working time

Employer, which was healthcare staffing company, established that its time-rounding policy for nurse recruiters, in which it paid those employees based on rounded time employee clocked in or out to nearest ten-minute increment up or down, was fair and neutral on its face and used in such a manner that it did not result, over a period of time, in failure to compensate employees properly for all the time they actually worked, in former employee’s wage and hour action, though former employee’s expert statistics professor found policy resulted in uncompensated time due to short or delayed lunches; employer presented expert testimony from labor economist who determined that rounding policy resulted in net surplus of work hours paid to recruiters, and statistics expert did not offset uncompensated work time from overcompensated time. 29 C.F.R. § 785.48(b).
An employer is entitled to use a rounding policy for timekeeping if the rounding policy is fair and neutral on its face and it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked. 29 C.F.R. § 785.48(b).

Employer, which was healthcare staffing company, was not liable for meal period violations in wage and hour class action, though former employee, who was nurse recruiter, asserted that employer’s time-rounding policy, rounding actual time clocked in or out to nearest ten-minute increment up or down, resulted in shortened and delayed meal periods, and that meal breaks were short due to downward pressure from employer; rounding policy was fair and neutral, when rounded times resulted in noncompliant meal period, recruiter had to select options in time system that compliant meal break was offered but recruiter declined or chose shorter/later break, or that recruiter was not provided compliant period, for which employer automatically paid statutory penalty, and former employee failed to inform employer of any potential violation through that system. Cal. Lab. Code §§ 226.7(c), 512(a); Cal. Code Regs., tit. 8, § 11040(11).

Class certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious; in determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of class certification are met.

Resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided, with the court
assuming for purposes of the certification motion that any claims have merit.

Concurring opinions are not binding precedent.

Cases that cite this headnote

[22] Parties
- Evidence; pleadings and supplementary material

Parties
- Identification of class; subclasses

Parties
- Employees

During the class certification process in a wage and hour class action raising meal period violations, the court is concerned with issues of commonality and whether the class is ascertainable, and in that context, an employer’s time records may establish a rebuttable presumption that shortened or delay meal periods reflect a meal period violation. Cal. Lab. Code §§ 226.7(c), 512(a); Cal. Code Regs., tit. 8, § 11040(11).

Cases that cite this headnote

[23] Judgment
- Labor and employment

On summary judgment in a putative class action raising meal break violations, the court looks to the evidence the employer submits in support of its initial burden; and where an employer meets this initial burden, the employer has rebutted any applicable presumption, and the burden shifts to the employee to establish a triable issue of material fact. Cal. Civ. Proc. Code § 437c(c); Cal. Lab. Code §§ 226.7(c), 512(a); Cal. Code Regs., tit. 8, § 11040(11).

Cases that cite this headnote

[24] Courts
- As evidence of the law

Burden of proof of damages shifts to the employer in the wage and hour context only where an employer’s compensation records are so incomplete or inaccurate that an employee cannot prove his or her damages or the employer has failed to keep records required by statute.

Cases that cite this headnote

[25] Labor and Employment
- Evidence

Under the test for determining whether an employer’s time-rounding policy is fair and neutral, as required by law, the court is to look at how often the application of the rounding policy results in rounding up and rounding down, not the number of times penalties are assessed or avoided as a result of rounding up and down. 29 C.F.R. § 785.48(b).

Cases that cite this headnote

[26] Labor and Employment
- Working Time

Summary judgment declaration testimony by former employee, who was nurse recruiter, that she was routinely discouraged from taking meal breaks was insufficient to create triable issue of fact as to whether employer healthcare staffing company engaged in meal period violations, so as to preclude summary judgment in favor of employer in wage and hour class action, since declaration was inconsistent with certified statement submitted with each timesheet that she
was provided with opportunity to take all meal breaks to which she was entitled, or, if not, that she had reported on timesheet that she was not provided with opportunity to take all such meal breaks. Cal. Civ. Proc. Code § 437c(c); Cal. Lab. Code §§ 226.7(c), 512(a); Cal. Code Regs., tit. 8, § 11040(11).

Cases that cite this headnote

Appeal and Error
Judgment

Former employee, who was nurse recruiter, forfeited appellate review over claim that trial court erred in granting summary judgment in favor of employer, which was healthcare staffing company, on former employee’s claim that wage statements failed to provide accurate hourly rates, total hours worked, or inclusive dates of period, in violation of wage and hour law, where former employee failed to raise that issue in opposition to employer’s motion for summary judgment in trial court. Cal. Lab. Code § 226(a).

Cases that cite this headnote

Appeal and Error
Summary judgment

Former employee, who was nurse recruiter, failed to adequately brief her claim that trial court erred in granting summary judgment in favor of employer on her claim that her wage statements failed to provide accurate and complete information because 20 minutes of work time was sometimes represented as .34 and sometimes represented as .33, and thus former employee forfeited appellate consideration of that issue, where former employee failed to present argument, evidence, or authority, as to how or why a recruiter was unable to promptly and easily determine from wage statement alone the actual time worked, as required before employee could be deemed to suffer injury. Cal. Lab. Code § 226(a), (e)(1)(B); Cal. R. Ct. 8.204(a)(1)(B).

Cases that cite this headnote

Judgment
Labor and employment

Former employee’s deposition testimony and declaration testimony that she was routinely discouraged from taking rest breaks, and was called back to her desk on several occasions when attempting to take rest break, failed to raise triable issue of fact as to whether employer, which was healthcare staffing company, engaged in rest period violations through noncompliant company policy, denial of compliant rest period, or nonpayment of premium for denial of rest period, so as to preclude summary judgment in favor of employer in wage and hour class action, in light of employee’s testimony that no one ever told her that she could not take rest break. Cal. Lab. Code § 226.7(d); Cal. Code. Regs. tit. 8, §
Trial court’s consideration of portion of former employee’s deposition testimony did not require trial court to consider all of former employee’s deposition testimony under rule of completeness, in deciding employer’s motion for summary judgment as to former employee’s claim for rest period violations; trial court was not required to consider deposition testimony sua sponte, and there was no indication that trial court did not consider any evidence that former employee properly cited. Cal. Evid. Code § 356.

Cases that cite this headnote

Under Private Attorneys General Act (PAGA), the aggrieved employee acts as the proxy or agent of state labor law enforcement agencies, representing the same legal right and interest as those agencies, in a proceeding that is designed to protect the public, not to benefit private parties. Cal. Lab. Code § 2698 et seq.

Cases that cite this headnote

Former employee, who was nurse recruiter, was not entitled to recover civil penalties under Private Attorneys General Act (PAGA) in wage and hour class action employer, which was healthcare staffing company, in absence of evidence that she suffered harm as result of employer’s violation of Labor Code relating to meal breaks, wage statements, and rest periods or that her PAGA claims were not derivative of her individual claims. Cal. Lab. Code §§ 226(a), 226.7(b), 512(a), 2699 (a), (c), (g)(1).

Cases that cite this headnote

Generally, the Court of Appeal reviews for an abuse of discretion the trial court’s ruling on the exclusion of evidence in summary judgment proceedings.

Cases that cite this headnote


Cases that cite this headnote

A miscarriage of justice may be found on appeal only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the

Former employee failed to explain how she was prejudiced by exclusion of any particular exhibit attached to her attorney’s declaration, and thus she was not entitled to reversal of grant of summary judgment in favor of employer in wage and hour class action based on alleged erroneous exclusion of that evidence. Cal. Const. art. 6, § 13; Cal. Civ. Proc. Code § 475.

Appeal and Error

Rulings as to evidence


Case law

Appeal and Error

Same or Similar Evidence Otherwise Admitted; Cumulative Evidence

Any error in trial court’s exclusion of former employee’s summary judgment declaration testimony, that she did not certify that she received all meal and rest breaks by clicking box when submitting timecard to that effect, and that she was routinely discouraged from taking such breaks and was called back to her desk while attempting to take those breaks, did not prejudice former employee, and thus did not require reversal of summary judgment in favor of former employer on her claims for meal and rest period violations, in light of former employee’s acknowledgement that such testimony was cumulative and her failure to suggest how that testimony supported specific triable issue of fact. Cal. Const. art. 6, § 13; Cal. Civ. Proc. Code § 475; Cal. Lab. Code §§ 226(a), 226.7(b), 512(a).

Case law

*117 APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed. (Super. Ct. No. 37-2014-00012605-CU-06-CTL)

Attorneys and Law Firms


DLA Piper, Mary Dollarhide, San Diego, and Betsey Boutelle for Defendant and Respondent.

Opinion

IRION, J.

In this wage and hour class and representative action, the trial court granted a motion for summary judgment brought by defendant AMN Services, LLC (AMN), and denied motions for summary adjudication of one cause of action and one affirmative defense brought by plaintiff Kennedy Donohue, individually and on behalf of five certified plaintiff classes she represents (together Plaintiffs). In her appeal from the judgment, Donohue challenges the grant of AMN’s motion for summary judgment and the denial of her motion for summary adjudication of one of the causes of action. On appeal, Donohue also challenges what she characterizes as the trial court’s “failure” to hear a proper motion for reconsideration of the summary judgment and summary
adjudication rulings. As we explain, we lack jurisdiction to review the postjudgment order that resulted in the court’s decision not to hear Donohue’s motion for reconsideration, and in our de novo review of the summary judgment and summary adjudication rulings, we conclude that Donohue did not meet her burden of establishing reversible error. Accordingly, we affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion.” (Wilson v. 21st Century Ins. Co. (2007) 42 Cal.4th 713, 716-717, 68 Cal.Rptr.3d 746, 171 P.3d 1082.) We consider all the evidence in the moving and opposing papers, liberally construing and reasonably deducing inferences from Donohue’s evidence, resolving any doubts in the evidence in Donohue’s favor. (Id. at p. 717, 68 Cal.Rptr.3d 746, 171 P.3d 1082; Code Civ. Proc., § 437c, subd. (c).) For the most part, the relevant facts are not in dispute.

A. The Parties

AMN, a healthcare services and staffing company, recruits nurses for temporary contract assignments. AMN employed Donohue as a nurse recruiter in its San Diego office between September 2012 and February 2014. Donohue earned a base hourly rate plus commissions, bonuses, and other forms of nondiscretionary performance-based pay.

B. AMN’s Timekeeping System & Policies

During the time AMN employed Donohue, AMN used a computer-based timekeeping system known as “Team Time” for all nonexempt employees, which included nurse recruiters. Recruiters like Donohue used Team Time at their desktop computers by clicking on an icon to open the program each day, after which they usually made four entries: Recruiters would “punch in” for the day, “punch out” when they returned from their meal break, and punch out at the end of the day.

Team Time rounded recruiters’ punch times—both punch in and punch out—to the nearest 10-minute increment. To establish the proper hourly compensation, AMN would convert each 10-minute increment to a decimal (to the nearest hundredth of a minute), total the number of hours (to the nearest hundredth of a minute), and multiply the total hours by the recruiter’s hourly rate.

If a recruiter believed that a recorded punch time was inaccurate—e.g., the recruiter may have worked while not clocked in or forgotten to punch in or out—AMN’s written policy allowed the recruiter to contact his or her manager, who would then notify the recruiter that his or her computer timecard had been unlocked and opened for correction by the recruiter.

Recruiters did not have predetermined times during which they were required to take meal or rest breaks, but AMN had a written policy by which recruiters were: “provided meal breaks and authorized and permitted rest breaks in accordance with California law;”; “expected to take meal breaks as provided and rest breaks as authorized and permitted in accordance with this policy”; and “required to accurately record their meal breaks on their time cards and to report to the Company if they are not provided with a meal break or authorized and permitted a rest break or do not otherwise take a meal break.” More specifically, this written policy provided: “[Recruiters] who work more than five hours per day are provided an uninterrupted 30 minute meal period no later than the end of the [recruiter]’s fifth hour of work. If a [recruiter] works more than five but no more than six (6) hours in a workday, the meal period may be waived by mutual consent of the Company and [the recruiter].”

Whenever there was noncompliance with the meal period requirements—e.g., if the recruiter did not punch out to take a meal period before the end of the fifth hour of work, or if the meal period was less than 30 minutes—AMN had a policy in place to ensure what it considered an appropriate remedy. During the first few weeks of Donohue’s employment in September 2012, for any noncompliant meal period, Team Time assumed a Labor Code violation, and the recruiter automatically received the full statutory meal period penalty payment. At all relevant times after mid-September 2012, if a recruiter’s meal period was missed, shortened, or delayed, Team Time automatically provided a drop-down menu that required the recruiter’s response. If the recruiter indicated that he or she chose not to take a timely 30-minute meal period, then AMN did not pay a meal
period penalty; however, if the recruiter indicated that he or she was not provided the opportunity to take a timely 30-minute meal period, then AMN paid the recruiter the full statutory meal period penalty.\(^1\) We note that *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 139 Cal.Rptr.3d 315, 273 P.3d 513 (*Brinker*) became final in May 2012 and that AMN changed its policy to provide the drop-down menu in September 2012. We infer that AMN effected the change in an effort to comply with the holding in *Brinker*, where the Supreme Court concluded that, although “an employer’s obligation is to relieve its employee of all duty” during a meal period, “the employer need not ensure that no work is done”; rather, “the employee [is] thereafter at liberty to use the meal period for whatever purpose he or she desires.” (Id. at p. 1017, 139 Cal.Rptr.3d 315, 273 P.3d 513.)

AMN’s written policy directed recruiters to “accurately record their meal breaks every day” as follows: “[Recruiters] should ‘clock out’ on their timesheet at the start of their meal period and ‘clock in’ when they return to work. Meal breaks are unpaid. [Recruiters] who are not provided a meal period as defined above will receive payment for hours worked and an additional hour’s pay. [Recruiters] who waive a meal period as permitted by this policy, or who otherwise do not take a meal period which was provided as defined above, are *120* paid for hours worked. [Recruiters] who do not take a full and timely meal period for any reason must report this on their timesheets and must also report if they were provided or not provided, as defined in this policy, with the meal period. [Recruiters] who report that they were provided a timely and full meal break but did not take it, took a shorter break or a later break are representing that he/she did so voluntarily.”

In addition to hourly compensation, AMN also paid nurse recruiters like Donohue “different types of non-discretionary commissions, performance bonuses, and other incentive pay.” These bonuses, which may be earned monthly or quarterly, are often due and calculable only after the pay period during which the work was performed; and in the event additional overtime must be paid on such amounts, it is calculated by a complex formula. These bonus-related overtime adjustments—which are not tied to the recruiter’s hourly wage but rather are “the mathematical equivalent of calculating the bonus into the [recruiter’s] regular rate of pay”—are denoted as “Flsa Ot” on the recruiter’s wage statement.\(^2\)

C. The Litigation

Donohue filed the underlying wage and hour action in April 2014. The operative second amended complaint (complaint), filed on behalf of Donohue individually and a class of similarly situated AMN employees and former employees, contains allegations in support of the following seven causes of action: (1) failure to provide meal and rest periods in violation of sections 226.7 and 1197.1; (2) failure to pay overtime and minimum wage in violation of sections 510 and 1197.1; (3) improper wage statements in violation of section 226; (4) unreimbursed business expenses in violation of section 2802; (5) waiting time penalties in violation of sections 201-203; (6) unfair business practices in violation of Business and Professions Code section 17200; and (7) civil penalties authorized by the Labor Code Private Attorneys General Act of 2004 (PAGA), section 2698 et seq.

In October 2015, the trial court certified five classes of nonexempt AMN employees with the title of “Recruiter”: (1) the overtime class; (2) the meal period class; (3) the rest period policy class; (4) the itemized wage statement class; and (5) the ex-employee class (of former AMN employees who are entitled to relief based on violations proven to the four prior classes of current AMN employees). The court denied class certification to Donohue’s claims related to unreimbursed business expenses, which were based on an employee’s use of a personal cell phone for AMN business.

Almost a year later, in September 2016, the parties filed cross-motions: AMN sought summary judgment, or in the alternative, summary adjudication of eight individual issues (which, if granted as to each issue, would result in summary judgment);\(^3\) and Donohue sought summary adjudication of two issues. AMN and Donohue filed numerous pleadings in support of their respective motions; AMN and Donohue filed numerous pleadings in opposition \(^{121}\) to their adversary’s motion; AMN and Donohue filed replies to their adversary’s oppositions; AMN and Donohue filed objections to specified evidence submitted by their adversary; and AMN and Donohue responded to the evidentiary objections of their adversary. Following oral argument, the court took the matter under submission, ultimately granting AMN’s motion for summary judgment and denying Donohue’s motion for summary adjudication. More specifically, the court sustained certain evidentiary objections, overruled other evidentiary objections, granted summary adjudication of all eight issues in AMN’s motion—thereby resulting in the grant of summary judgment—and denied summary adjudication of the two issues raised in Donohue’s motion.
In December 2016, Donohue filed a motion for reconsideration of the order granting AMN’s motion for summary judgment and denying Donohue’s motion for summary adjudication.

Two days later, on December 14, 2016, the trial court filed its judgment in favor of AMN and against Donohue, based on the grant of AMN’s motion for summary judgment and the denial of Donohue’s motion for summary adjudication.

In January 2017, Donohue filed an ex parte application for an order striking the filing of the judgment (so that the court could hear her pending motion for reconsideration of the order granting AMN’s motion for summary judgment and denying Donohue’s motion for summary adjudication) and allowing her to file a supplemental brief in support of her motion for reconsideration. The court denied the application and “vacated” Donohue’s pending motion for reconsideration.

Donohue timely appealed from the judgment in February 2017.

II. STANDARDS OF APPELLATE REVIEW

Because the trial court’s judgment is presumed correct, Donohue (as the appellant) has the burden of establishing reversible error. (Denham v. Superior Court (1970) 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 468 P.2d 193 (Denham); Demara v. The Raymond Corp. (2017) 13 Cal.App.5th 545, 552, 221 Cal.Rptr.3d 102 (Demara) [appeal from defense summary judgment].)

A. Summary Proceedings Under Code of Civil Procedure Section 437c.

In both summary judgment and summary adjudication proceedings, with exceptions inapplicable here, the pleadings—i.e., the complaint and the answer—determine the scope of the relevant issues. (Port Medical Wellness, Inc. v. Connecticut General Life Ins. Co. (2018) 24 Cal.App.5th 153, 169, 233 Cal.Rptr.3d 830.)

A defendant’s motion for summary judgment asks the court to determine, as a matter of law, that the entire action has no merit. (Code Civ. Proc., § 437c, subd. (a).)

A cause of action “has no merit” if one or more of the elements of the cause of action cannot be established or an affirmative defense to the cause of action can be established. (Code Civ. Proc., § 437c, subd. (o).) As applicable here, a defendant’s motion for summary adjudication may ask the court to determine, as a matter of law, that one or more causes of action or one or more claims for damages have no merit. (Code Civ. Proc., § 437c, subd. (f)(1).)

A plaintiff’s motion for summary judgment asks the court to determine, as a matter of law, that the defendant has no defense to the action. (Code Civ. Proc., § 437c, subd. (a).) A successful motion for summary judgment terminates the action without a trial. (Ibid.) As applicable here, a plaintiff’s motion for summary adjudication asks the court to determine, as a matter of §122 law, that there are no affirmative defenses to one or more causes of action or to one or more claims for damages. (Code Civ. Proc., § 437c, subd. (f)(1).)

To be successful, a summary adjudication motion must completely dispose of the entire cause of action, defense, damages claim, or duty to which the motion is directed. (Code Civ. Proc., § 437c, subd. (f)(1).) A successful motion for summary adjudication eliminates the need to prove or disprove a particular claim, leaving the remainder of the case to go to trial—after which one judgment is entered covering the issues decided in the motion and the trial. (Code Civ. Proc., § 437c, subds. (k), (n).) A summary adjudication motion “proceed[s] in all procedural respects as a motion for summary judgment.” (Code Civ. Proc., § 437c, subd. (f)(2).)

We review de novo the trial court’s order granting or denying summary judgment or summary adjudication. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 860, 107 Cal.Rptr.2d 841, 24 P.3d 493 (Aguilar) [summary judgment]; Jacks v. City of Santa Barbara (2017) 3 Cal.5th 248, 273, 219 Cal.Rptr.3d 859, 397 P.3d 210 [summary adjudication].) As a practical matter, “we assume the role of a trial court and apply the same rules and standards” which govern the trial court’s determination of the motion in the first instance. (Demara, supra, 13 Cal.App.5th at p. 552, 221 Cal.Rptr.3d 102.)

B. Standards Applicable to the Grant of AMN’s Motion for Summary Judgment

A moving defendant has the ultimate burden of persuasion that one or more elements of the cause of
action at issue “cannot be established” or that “there is a complete defense to the cause of action.” (Code Civ. Proc., § 437c, subd. (p)(2); Aguilar, supra, 25 Cal.4th at pp. 849, 850, 853-854, 107 Cal.Rptr.2d 841, 24 P.3d 493.) In attempting to achieve this goal, the defendant has the initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. (Aguilar, at pp. 850-851, 107 Cal.Rptr.2d 841, 24 P.3d 493.) If the defendant meets this burden, then the burden of production shifts to the plaintiff to establish the existence of a triable issue of material fact. (Ibid.)

Applying these concepts in our de novo review of the grant of summary judgment here, therefore, we first must determine whether AMN’s initial showing establishes an entitlement to judgment in AMN’s favor. (Aguilar, supra, 25 Cal.4th at pp. 850-851, 107 Cal.Rptr.2d 841, 24 P.3d 493; Demara, supra, 13 Cal.App.5th at p. 552, 221 Cal.Rptr.3d 102.) If so, we then determine whether Donohue’s responsive showing establishes a triable issue of material fact. (Aguilar, at pp. 850-851, 107 Cal.Rptr.2d 841, 24 P.3d 493; Demara, at p. 552, 221 Cal.Rptr.3d 102.)

C. Standards Applicable to the Denial of Donohue’s Motion for Summary Adjudication

A moving plaintiff has the ultimate burden of persuasion that “there is no defense to a cause of action,” but only after that plaintiff first “has proved each element of the cause of action entitling the party to judgment.” (Code Civ. Proc., § 437c, subd. (p)(1); Aguilar, supra, 25 Cal.4th at pp. 849, 850, 107 Cal.Rptr.2d 841, 24 P.3d 493.) In attempting to achieve this goal, the plaintiff has the initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. (Aguilar, at pp. 850-851, 107 Cal.Rptr.2d 841, 24 P.3d 493.) If the plaintiff meets this burden, then the burden of production shifts to the defendant *123 to establish the existence of a triable issue of material fact. (Ibid.)

Applying these concepts in our de novo review of the denial of summary adjudication here, therefore, we first must determine whether Donohue’s initial showing establishes an entitlement to judgment in her favor on the particular cause of action or defense. (Aguilar, supra, 25 Cal.4th at pp. 850-851, 107 Cal.Rptr.2d 841, 24 P.3d 493.) If so, we then determine whether AMN’s responsive showing establishes a triable issue of material fact either as to an element of Donohue’s cause of action or as to an applicable affirmative defense of AMN. (Aguilar, at pp. 850-851, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

III. DISCUSSION

We begin with the recognition, understanding, and appreciation that the purpose of the California statutes governing the employment relationship is “the protection of employees”; and, for that reason, we “liberally construe the Labor Code and wage orders to favor the protection of the employees.” (Troester, supra, 5 Cal.5th at p. 839, 235 Cal.Rptr.3d 820, 421 P.3d 1114; accord, Prachasaisoradej v. Ralphs Grocery Co., Inc. (2007) 42 Cal.4th 217, 227, 64 Cal.Rptr.3d 407, 165 P.3d 133 [because statutes governing the employer/employee relationship are “remedial in nature,” they must be liberally construed “with an eye to promoting the worker protections they were intended to provide”].)

AMN’s motion for summary judgment, or in the alternative, summary adjudication, is comprised of motions for summary adjudication of the following eight issues:

• AMN Issue No. 1—“AMN is entitled to summary adjudication on Plaintiffs’ certified overtime claim because AMN’s methods of calculating and paying overtime compensation are lawful.”

• AMN Issue No. 2—“AMN is entitled to summary adjudication on Plaintiffs’ certified meal period claim because there is no evidence of a uniform policy or practice to deny meal periods, and because Plaintiffs’ theory that the rounding practice resulted in meal period violations is not pled in the operative Complaint.”

• AMN Issue No. 3—“AMN is entitled to summary adjudication on Plaintiffs’ certified rest period claim because there is no evidence of a uniform policy or practice to deny rest periods.”

• AMN Issue No. 4—“AMN is entitled to summary adjudication on Plaintiffs’ certified claims for wage statement violations because the format of AMN’s wage statements is lawful, and because Plaintiffs’ wage-statement claims are otherwise derivative of their other claims under the California Labor Code, which also fail.”

• AMN Issue No. 5—“AMN is entitled to summary adjudication on Plaintiffs’ certified claim for waiting
time penalties because it is derivative of Plaintiffs’ other claims under the California Labor Code, which also fail.”

*124 • AMN Issue No. 6—“AMN is entitled to summary adjudication of Plaintiffs’ claim for violations of Business and Professions Code section 17200 because Plaintiffs have identified no ‘unlawful, unfair, or fraudulent’ conduct that could support this claim as a matter of law.”1

• AMN Issue No. 7—“AMN is entitled to summary adjudication on Plaintiff Donohue’s claim for penalties under [PAGA, section ]2698 et seq., because this claim is derivative of Plaintiffs’ other claims under the California Labor Code, which also fail, and because Donohue has failed to exhaust her administrative remedies.”

• AMN Issue No. 8—“AMN is entitled to summary adjudication on Plaintiff Donohue’s individual claim for unreimbursed business expenses because she cannot meet her burden to show that she actually incurred such expenses.”12

In support of its alternative motion, AMN argued that, if each of the eight issues is summarily adjudicated in its favor, then there is no triable issue of material fact in the complaint, and AMN is entitled to summary judgment as a matter of law.

In her motion, Donohue sought summary adjudication of the following two issues:

• Donohue Issue No. 1—“[AMN] possessed a standard time system in place for all members of the certified class which improperly alters the recorded meal periods. This policy violates California law in multiple ways....”

• Donohue Issue No. 2—“[AMN’s] 40th Affirmative Defense regarding ‘Make Up Time,’ pursuant to [section ]513, cannot be established as a matter of law ....”13

On appeal, Donohue contends that, if the trial court had not erroneously denied summary adjudication of Donohue Issue No. 1, she and the meal period class would be entitled to $802,077.07 in meal period penalties—presumably based on the first cause of action for failure to provide meal and rest periods.

Donohue does not present her arguments on appeal in a format by which we might review each motion for summary adjudication or each cause of action in the complaint. As a result, we are required to discuss each of Donohue’s issues as Donohue presents them in her opening brief in *125 the context of the parties’ motions in the trial court and the trial court’s rulings. As we explain, because Donohue did not meet her burden of establishing reversible error on appeal, we affirm the judgment.

First, however, we explain why this court lacks jurisdiction to consider the trial court’s January 2017 postjudgment order denying Donohue’s ex parte application.

A. The Court Lacks Jurisdiction to Consider the January 2017 Postjudgment Order

In this appeal, the parties briefed issues related to the postjudgment minute order denying Donohue’s ex parte application to strike entry of the judgment (to allow the court to hear Donohue’s motion for reconsideration) and to allow Donohue to file a supplemental brief in support of her motion for reconsideration. The briefing did not include a mention of jurisdiction to review this order, and we requested and received supplemental briefing.

[As a postjudgment order that denies a motion to “strike” the entry of a document or to file a supplemental brief, the January 2017 minute order was final and appealable. (Code Civ. Proc., § 904.1, subd. (a)(2).) However, in her written notice, Donohue appealed only from the “judgment ... entered on December 14, 2016.” She did not appeal from the postjudgment order, and “if an order is appealable, [an] appeal must be taken or the right to appellate review is forfeited.” (In re Baycol Cases I & II (2011) 51 Cal.4th 751, 761, fn. 8, 122 Cal.Rptr.3d 153, 248 P.3d 681; accord Pfeifer v. John Crane, Inc. (2013) 220 Cal.App.4th 1270, 1315-1316, 164 Cal.Rptr.3d 112 [“ ‘[i]f a judgment or order is appealable, an aggrieved party must file a timely appeal or forever lose the opportunity to obtain appellate review” ’ ”].) This is a jurisdictional principle; an appellate court lacks the power to review an appealable order if a timely appeal is not taken.” (Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc. (1997) 15 Cal.4th 51, 56, 61 Cal.Rptr.2d 166, 931 P.2d 344; see Code Civ. Proc., § 906.)

Alternatively, to the extent the January 2017 postjudgment order can be considered a denial of a nonstatutory motion to vacate (as oppose to strike) the judgment, such an order is not appealable. (Scognamillo v. Herrick (2003) 106 Cal.App.4th 1139, 1146, 131 Cal.Rptr.2d 393 [to hold otherwise would authorize two appeals from the same decision; any assertions of error in the judgment can be reviewed on appeal from the
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judgment itself[14]); \textit{Forman v. Knapp Press} (1985) 173 Cal.App.3d 200, 203, 218 Cal.Rptr. 815 [nonstatutory motion to vacate a summary judgment is “akin to a motion for new trial,” the denial of which is not appealable].)

Donohue argues that she was not required to separately appeal from the postjudgment order. Despite the express language of the written order (denying the application to strike entry of the judgment and to allow supplemental briefing on her then-pending motion for reconsideration of the order granting summary judgment), Donohue tells us that the order “actually denied the pending motion for reconsideration without a hearing.” (Original italics *126 and bolding.) She then suggests that, even though she did not appeal from the postjudgment order, \textit{Code of Civil Procedure section 1008} allows for appellate review, because, under subdivision (g), although an order denying a motion for reconsideration is generally not appealable, “if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order.” There are at least two independent problems with Donohue’s position.

First, the present appeal is from the judgment, not from the order granting AMN’s motion for summary judgment; nor could it be, since an order granting summary judgment is not appealable (\textit{Dang v. Maruichi American Corp.} (2016) 3 Cal.App.5th 604, 608, fn. 1, 207 Cal.Rptr.3d 658). Thus, subdivision (g) of \textit{Code of Civil Procedure section 1008} is inapplicable.

Moreover, contrary to Donohue’s presentation in her supplement brief, the order denying Donohue’s ex parte application did not deny her then-pending motion for reconsideration; the order denied Donohue’s request to file an additional brief in support of the then-pending motion for reconsideration and then “vacate[d]” the motion and the hearing on the motion. The record is consistent: (1) In her application, Donohue requested an order “Striking the Court’s entry of judgment as premature” and “Allowing [Donohue] to file a brief supplement to her [pending] Motion for Reconsideration”; (2) in support of the application, Donohue’s attorney testified that the relief being sought in the application was “an order striking the entry of judgment as premature and seeking permission to file a supplement to the motion for reconsideration”; and, (3) in its written order denying Donohue’s request, the court described the proceeding as Donohue’s “application for an order striking judgment and allow[ing Donohue] to supplement [her] motion for reconsideration.”

For the foregoing reasons, we lack jurisdiction to consider the January 2017 postjudgment order and express no opinion on the merits of the ruling(s) in the order.

B. The Trial Court Did Not Err in Ruling That, for Purposes of the Cross-Motions, AMN’s Rounding Policy Complies with California Law

At least three of the parties’ motions for summary adjudication required the trial court to determine whether AMN’s timekeeping system for recruiter employees— in particular, AMN’s rounding policy—complied with California law. Thus, we analyze this issue first and, as we explain, conclude that, based on the record in this appeal, the rounding policy is compliant.

In California, the rule is that an employer is entitled to use a rounding policy “if the rounding policy is fair and neutral on its face and it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.” (\textit{See’s Candy Shops, Inc. v. Superior Court} (2012) 210 Cal.App.4th 889, 907, 148 Cal.Rptr.3d 690 (\textit{See’s Candy I}), quoting 29 C.F.R. § 785.48(b) (2012) and citing Division of *127 Labor Standards Enforcement (DLSE) Enforcement Policies and Interpretations Manual (2002 rev.) §§ 47.1, 47.2 (DLSE Manual).)

Under this standard, an employer’s rounding policy is “fair and neutral” if “on average, [it] favors neither overpayment nor underpayment”; but such a policy is unacceptable if it “systematically undercompensate[s] employees” because it “encompasses only rounding down.” (\textit{See’s Candy I, supra}, 210 Cal.App.4th at pp. 901-902, 907, 148 Cal.Rptr.3d 690.) In \textit{See’s Candy I}, we reasoned that if an employer’s rounding policy “is neutral, both facially and as applied, the practice is proper under California law because its net effect is to permit employers to efficiently calculate hours worked without imposing any burden on employees.” (\textit{Id.} at p. 903, 148 Cal.Rptr.3d 690.) Federal and state appellate courts have applied this standard to California employers consistently since \textit{See’s Candy I, supra}, 210 Cal.App.4th 889, 148 Cal.Rptr.3d 690, in 2012. (E.g., \textit{AHMC Healthcare, Inc. v. Superior Court} (2018) 24 Cal.App.5th 1014, 1023-1024, 234 Cal.Rptr.3d 804 (\textit{AHMC Healthcare}) [rounding to nearest quarter hour]; \textit{Silva v. See’s Candy Shops, Inc.} (2016) 7 Cal.App.5th 235, 249, 212 Cal.Rptr.3d 514 (\textit{See’s Candy II}) [rounding to nearest 10th of an hour]; Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership (9th Cir.)
2016) 821 F.3d 1069, 1076 (Corbin) [rounding to nearest quarter hour].) Indeed, earlier this year, in *Troester, supra*, 5 Cal.5th 829, our Supreme Court approvingly cited the *See’s Candy I* rule and analysis set forth above (*Troester*, at pp. 846-847, 235 Cal.Rptr.3d 820, 421 P.3d 1114)—although the court did not apply *See’s Candy I*, because the issue in *Troester* was whether “the de minimis doctrine found in the FLSA,” not the *See’s Candy I* rounding standard, applied to the facts in that case (*Troester*, at p. 848, 235 Cal.Rptr.3d 820, 421 P.3d 1114).

*128* In the present case, in support of its motion and in opposition to Donohue’s motion, AMN submitted evidence in the form of expert testimony from a labor economist who analyzed AMN’s recruiter employees’ time records from April 23, 2010, through April 26, 2015 (rounding period). He explained that, under AMN’s time entry system, the records contain two entries for each employee “punch”—(1) the actual time that the employee clocked in or out, and (2) the nearest 10-minute increment up or down. (See fn. 1, ante.) AMN paid its employees on the basis of the rounded, not actual, times clocking in and out.

With regard to Donohue and the nurse recruiters, AMN’s expert analyzed the time records during the rounding period logged by 311 recruiters—time records that reflected more than 500,000 work-hours. Based on his detailed analysis, the expert testified that AMN’s practice of rounding punch times to the nearest 10-minute increment resulted overall in “a net surplus of 1,929 work hours in paid time for the Nurse Recruiter class as a whole.” *(Italics added.)*

As to the ultimate issues, the expert opined: “The ten-minute rounding rule is thus neutral; in the long run, neither the employer nor the employee benefits from this policy. [¶] ... [¶] ... AMN’s practice of rounding employee punch times to the nearest ten-minute increment did not result in any failure, over time, to properly compensate the Nurse Recruiters as a class for all time they actually worked.” *(Italics added.)* By this evidence and the related evidence and argument that it paid all wages due based on its calculation of the hours its recruiters worked, on this record AMN met its initial burden of establishing that AMN’s rounding policy is lawful.

In an effort to meet her responsive burden, Donohue relied on the expert testimony of a statistics professor. *(1)* In her response to AMN’s separate statement, Donohue disputed AMN’s evidence set forth above as follows: “[Donohue’s] expert ... found that the Team Time system resulted in AMN failing to pay its employees for 2,631.583 hours of actual time worked. This amounted to $47,959.30 in unpaid compensation owed to the class.” However, as the trial court correctly ruled, this evidence from Donohue did not establish the existence of a triable issue of fact as to whether AMN’s rounding policy was lawful, because Donohue’s expert only considered the recruiters’ uncompensated time as a result of “‘Short Lunches’” and “‘Delayed Lunches.’” *(Italics added.)* Because he did not consider evidence that Plaintiffs may have gained (and, in fact, did gain) compensable work time by the rounding policy, he necessarily did not offset the amounts of uncompensated time by amounts of time for which Plaintiffs were compensated but not working. *(2) Accordingly, Donohue did not meet her responsive burden of establishing a triable issue of material fact under the applicable legal standard for determining whether AMN’s rounding policy complied with California law. *(See Aguilar, supra, 25 Cal.4th at pp. 850-851, 107 Cal.Rptr.2d 841, 24 P.3d 493.)*

On this record, therefore, for purposes of AMN’s motion, AMN established that AMN’s rounding policy during the rounding period was—in the language of *See’s Candy I, supra*, 210 Cal.App.4th at page 907, 148 Cal.Rptr.3d 690—“fair and neutral on its face and ... ‘used in such a manner that it [did] not result, over a period of time, in failure to compensate the [ Recruiter] employees properly for all the time they have actually worked.’” *(Italics added.)* We apply this conclusion, as appropriate, to various arguments Donohue raises in her appeal.

C. The Trial Court Did Not Err in Deciding Issues Related to the Meal Period Claims

In general, California law requires that an employee who works a shift of more than five hours at one time must be allowed “a meal period of not less than 30 minutes.” *(§ 512, subd. (a); tit. 8, § 11040, subd. 11(A).)* If an employer fails to provide an employee with such a meal period, then the employer must pay the employee one additional hour of pay for each workday that the meal period is not provided. *(§ 226.7, subd. (c); tit. 8, § 11040, subd. 11(B).)*

1. The Trial Court Did Not Err in Granting AMN’s Motion for Summary Adjudication AMN Issue No. 2

*(19) The trial court granted AMN’s motion for summary adjudication of AMN Issue No. 2, which was directed to
Donohue’s meal period claim on two independent grounds: (1) There was no evidence of a uniform policy or practice to deny meal periods; and (2) Donohue did not plead in the complaint that the rounding practice resulted in meal period violations.

*130 Donohue contends that “time record evidence can establish meal period violations,” citing and quoting from Safeway, Inc. v. Superior Court (2015) 238 Cal.App.4th 1138, 1159-1160, 190 Cal.Rptr.3d 131 (Safeway), and Lubin v. The Wackenhut Corp. (2016) 5 Cal.App.5th 926, 951, 210 Cal.Rptr.3d 215 (Lubin). Based on those authorities, Donohue then argues that, because she provided evidence of “over 45,000 shortened and delayed meal periods” directly from recruiters’ time records (some capitalization and bolding omitted), the trial court erred in granting AMN’s motion directed to Donohue’s meal period claim. More specifically, Donohue relies on the evidence from her expert who testified that, based on the actual times the recruiters punched out and in, their meal periods during the rounding period, there were 40,110 “‘short’ meal periods” (i.e., less than 30 minutes) and 6,651 “‘delayed’ meal periods” (i.e., not offered until after the end of the fifth hour). According to Donohue, any time records that establish a meal period violation “‘immediately’” entitle the recruiter to a premium wage penalty payment. (Bolding omitted.)

As we explained at part III.B. and footnote 22, ante, however, because Donohue’s expert based his testimony on the actual times the recruiters punched out and in for their meal period, he neither considered nor accounted for an application of AMN’s rounding policy to the actual meal period punches. Thus, in response to AMN’s evidence that AMN’s rounding policy was fair and neutral on its face and used in such a manner that, over time, recruiters were compensated properly for the time they worked, Donohue’s evidence did not raise the existence of a triable issue of material fact as to the effect of the rounding policy on the recruiters’ actual punches when taking and returning from meal periods.

Instead, Donohue argues that a rounding policy should never be applied to meal period time punches, because application of such a policy “is contrary to the plain language of the Labor Code [and a wage order.]” (Bolding and some initial capitalization omitted.) Quoting from section 512 and title 8, section 11040, subdivision 11, Donohue argues that, because the express terms of both the statute and regulation “require that employees be provided ‘with a meal period of not less than 30 minutes,’ any meal period of less than 30 actual minutes is a per se violation of law. (Italics added.) As a result of each such violation in the present case, Donohue’s argument continues, AMN owes each affected recruiter compensation for both the time worked during the 30-minute break period and the related penalty. We reject Donohue’s suggestion that the court blindly apply section 512, subdivision (a), and title 8, section 11040, subdivision 11(A), without consideration of rounding—a wage and hour procedure that has been accepted in California since at least 2012 (See’s Candy I, supra, 210 Cal.App.4th at p. 907, 148 Cal.Rptr.3d 690) and cited approvingly by our Supreme Court as recently as earlier this year (Troester, supra, 5 Cal.5th at pp. 846-847, 235 Cal.Rptr.3d 820, 421 P.3d 1114).

Initially, Donohue’s reliance on Safeway, supra, 238 Cal.App.4th 1138, 190 Cal.Rptr.3d 131, and Lubin, supra, 5 Cal.App.5th 926, 210 Cal.Rptr.3d 215, is misplaced. In each of those cases, the appellate court was reviewing a ruling on class certification, not on the merits of the plaintiff class’s claims. ( *131 Safeway, supra, 238 Cal.App.4th at p. 1144, 190 Cal.Rptr.3d 131; Lubin, supra, 5 Cal.App.5th at p. 931, 210 Cal.Rptr.3d 215.) Likewise, ABM Industries Overtime Cases (2017) 19 Cal.App.5th 277, 227 Cal.Rptr.3d 445 (ABM), quoted by Donohue in her reply brief, was an appeal following class certification procedures. (Id. at pp. 283-284, 227 Cal.Rptr.3d 445.) This distinction is significant. As Brinker explains: “The certification question is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’ ’ ... ‘In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [class certification] are met.’ ” [21] Resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided ..., with the court assuming for purposes of the certification motion that any claims have merit.” (Brinker, supra, 53 Cal.4th at p. 1023, 139 Cal.Rptr.3d 315, 273 P.3d 513, citations omitted.) During the class certification process, the court is concerned with issues of commonality and whether the class is ascertainable; and in that context, an employer’s time records may establish a rebuttable presumption that shortened or delay meal periods reflect a section 226.7 violation. (See Safeway, at pp. 1159-1160, 190 Cal.Rptr.3d 131; Lubin, at p. 951, 210 Cal.Rptr.3d 215.)

The standard is different on summary judgment. We look to the evidence the employer submits in support of its initial burden; and where an employer meets this initial burden, the employer has rebutted any applicable presumption, and the burden shifts to the employee to establish a triable issue of material fact.\(^25\) (See See’s Candy II, supra, 7 Cal.App.5th at p. 254, 212 Cal.Rptr.3d 40,)
514; see generally Aguilar, supra, 25 Cal.4th at pp. 850-851, 107 Cal.Rptr.2d 841, 24 P.3d 493.) Indeed, in the present case, when the trial court certified the plaintiff class in 2015, the court explained that it was considering merely issues, including presumptions, related to the “ascertainability and a well-defined community of interest” of the proposed class; only later, if called on to decide the merits of the claims, would the court consider “whether the uniform policies in place were, in fact, unlawful.”

Further, Donohue’s position that AMN’s rounding policy may never be applied to *132 meal period time punches is insupportable on the present record.

Whenever a recruiter’s rounded punch times resulted in a noncompliant meal period time (i.e., either a meal period of less than 30 minutes or no opportunity for a meal period before the beginning of the sixth hour of work), a drop-down menu appeared on the recruiter’s computer screen beneath the punch times for the date in question.26 Before the recruiter could electronically submit the time, the recruiter was required to select one of the following options: (1) the recruiter was provided the opportunity to take a compliant meal period (i.e., a 30-minute break before the end of the fifth hour of work), “but chose not to”; (2) the recruiter was provided the opportunity to take a compliant meal period, “but chose to take a shorter/later break”; or (3) the recruiter was not provided an opportunity to take a compliant meal period. If a recruiter checked the third option, AMN automatically paid the recruiter the required section 226.7, subdivision (c) penalty. Based on this procedure, Donohue suggests that, because the drop-down menu only appeared after application of AMN’s rounding policy, the policy masked or covered up meal period violations.

However, there is no basis on which to deny application of AMN’s California-compliant rounding policy to a recruiter’s meal period.

First, contrary to the premise to Donohue’s argument—namely, that any noncompliant meal period entitles an employee to a penalty (and perhaps additional wages)—by providing the employee the above-described three choices in the drop-down menu, AMN’s policy at issue complied with Brinker, supra, 53 Cal.4th at page 1017, 139 Cal.Rptr.3d 315, 273 P.3d 513 (Although “an employer’s obligation is to relieve its employee of all duty” during a meal period, “the employer need not ensure that no work is done”; rather, “the employee [is] thereafter at liberty to use the meal period for whatever purpose he or she desires.”).

More to the point, in the present appeal, we are tasked with determining whether AMN’s rounding policy “is neutral, both facially and as applied.” (See’s Candy I, supra, 210 Cal.App.4th at p. 903, 148 Cal.Rptr.3d 690; accord, AHMC Healthcare, supra, 24 Cal.App.5th at pp. 1023-1024, 234 Cal.Rptr.3d 804; See’s Candy II, supra, 7 Cal.App.5th at p. 249, 212 Cal.Rptr.3d 514; Corbin, supra, 821 F.3d at p. 1076; see also Troester, supra, 5 Cal.5th at pp. 846-847, 235 Cal.Rptr.3d 820, 421 P.3d 1114) This standard contains no limitation to suggest it does not apply (or should not be applied) to meal periods.28 Neither Donohue’s briefs nor our independent research has disclosed any such limitation, and the policy that we considered, applied, and resulted in our decision in See’s Candy I, supra, 210 Cal.App.4th at page 903, 148 Cal.Rptr.3d 690—namely, “recognition that time-rounding is a practical method for calculating worktime and can *133 be a neutral calculation tool for providing full payment to employees”—applies to the timekeeping of meal periods as well as to timekeeping of the beginning of an employee’s shift as in See’s Candy I.

Donohue contends that a rounding policy should never be applied to meal periods because to do so “would quickly eviscerate employee[s’] statutory right to full 30 minute meal periods,” especially in the context of rounding to the nearest quarter hour.29 However, Donohue’s hypothetical is insufficient to rebut—i.e., to raise a triable issue of fact regarding—the evidence AMN submitted in support of its motion. This evidence indicates that, over time, AMN did not fail to properly compensate the recruiters, as a class, for all the time they worked based on the rounding policy in effect.29 As such, Donohue did not establish that Plaintiffs were entitled either to additional wages or penalties.

[26]Donohue next complains that AMN’s rounding policy is not “neutral” because the rounded time never results in the issuance of a meal period penalty when the actual time does not reflect a violation (i.e., when the recruiter receives a 30-minute meal period before the sixth hour of work). Donohue misconstrues the concept of neutrality in this context. The same argument could be made about shift hours—i.e., rounded time will never result in the issuance of a penalty when the actual time does not reflect a violation—but the neutrality of a rounding policy does not depend on the frequency of penalties. Under the See’s Candy I test, the court is to look at how often the application of the rounding policy results in rounding up and rounding down, not the number of times penalties are assessed or avoided as a result of rounding up and down. (See’s Candy I, supra, 210 Cal.App.4th at p. 902, 148 Cal.Rptr.3d 690 [a rounding policy that “encompasses only rounding down” is unacceptable].)
2. The Trial Court Did Not Err in Denying Donohue’s Motion for Summary Adjudication of Donohue Issue No. 1

The trial court denied Donohue’s motion for summary adjudication of Donohue Issue No. 1, which was directed to Donohue’s meal period claim as follows: “[AMN] possessed a standard time system in place for all members of the certified class which improperly alters the recorded meal periods. This policy violates California law in multiple ways. . .”

On appeal, after discussing AMN’s motion for summary adjudication of the meal period claims, Donohue argues that “[b]ased on the same factual record . . . it was also error for the trial court to deny [her] motion for adjudication of the meal period issue.” (Italics added.) More specifically, Donohue argues that AMN did not rebut her evidence of meal period violations. We disagree.

We, too, base our decision on the same factual record set forth above. As we just explained at parts III.B. and III.C.1., ante, AMN’s showing established both that AMN’s rounding policy complied with California law and that AMN’s rounding policy applied to recruiters’ meal period time punches. Accordingly, even if we assume that Donohue met her initial burden of showing that Plaintiffs experienced shortened or delayed meal periods (which we do not decide), AMN met its responsive burden by establishing that, upon applying AMN’s rounding policy, AMN has a complete defense to Donohue’s claim of meal period violations contained in the first cause of action in the complaint. Contrary to Donohue’s proposed issue to be summarily adjudicated, the evidence establishes that AMN’s timekeeping system neither “improperly alter[ed] the recorded meal periods” nor violated California law.

For these reasons, the trial court did not err in denying Donohue’s motion for summary adjudication of Donohue Issue No. 1 related to alleged meal period violations. Accordingly, we affirm the trial court’s ruling as to Donohue Issue No. 1.

D. The Trial Court Did Not Err in Summarily Adjudicating Donohue’s Wage Statement Claim in Favor of AMN

Section 226, subdivision (a) requires that employers like AMN provide “an accurate itemized statement in writing showing . . . *135 (2) total hours worked by the employee, . . . and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. . .” Where an “employee suffer[s] injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a)[,]” section 226, subdivision (e)(1) provides for an award of damages to the employee. As applicable to the present case, a recruiter-employee will be deemed to suffer injury “if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of
subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone ... [\*] ... [t]he amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) ... and (9) of subdivision (a).” (§ 226, subd. (e)(2)(B)(i), italics added.)

In the complaint, Donohue asserted a cause of action under section 226, alleging that AMN provided wage statements that failed to state all hours Plaintiffs worked (in violation of subd. (a)(2) ) and failed to identify all applicable regular and overtime rates of pay (in violation of subd. (a)(9) ). In particular, Donohue alleged that these three failures in AMN’s wage statements occurred “at the designation for ‘Flsa Ot’”—where AMN did not provide amounts for either the hourly rate or the number of hours.

[28] [29] On appeal, Donohue argues first that, with regard to the line item for “Flsa Ot” payments, the AMN wage statements do not provide accurate hourly rates, total hours worked, or inclusive dates of the pay period. However, Donohue forfeited appellate consideration of the arguments related to these wage statement issues, because she failed to raise them in her opposition to AMN’s motion in the trial court. (Cable Connection, Inc. v. DIRECTV, Inc. (2008) 44 Cal.4th 1334, 1350, fn. 12, 82 Cal.Rptr.3d 229, 190 P.3d 586 (“ ‘A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.’ ”) An appellate court “generally will not consider an argument ‘raised in an appeal from a grant of summary judgment ... if it was not raised below ....’ ” (Noe v. Superior Court (2015) 237 Cal.App.4th 316, 335, 187 Cal.Rptr.3d 836; accord, North Coast Business Park v. Nielsen Construction Co. (1993) 17 Cal.App.4th 22, 28-29, 21 Cal.Rptr.2d 104 (permitting a change of theory on appeal from the grant of a defense summary judgment would be “manifestly unjust to the opposing parties, unfair to the trial court, and contrary to judicial economy”)).

[30] Donohue next contends that triable issues of fact exist as to whether recruiters could “ ‘promptly and easily determine’ ” their actual hours worked from *136 the wage statements alone, as required by subdivisions (a)(2) and (e)(2)(B) of section 226. (Italics omitted.) In this context, “ ‘promptly and easily determine’ means a reasonable person would be able to readily ascertain the information without reference to other documents or information.’ ” (§ 226, subd. (e)(2)(C).) Based on this standard, Donohue argues that AMN “ ‘alters’ its employees’ work times prior to payment, but does not explain to its employee that it is doing so.” In support of this statement, Donohue cites AMN’s response to Donohue’s separate statement and a copy of Donohue’s wage statement from a pay period in 2013. However, because a separate statement is “mere assertion” and “not itself evidence of anything” (Stockinger v. Feather River Community College (2003) 111 Cal.App.4th 1014, 1024, 4 Cal.Rptr.3d 385 (Stockinger), disapproved on another ground in Regents of University of California v. Superior Court (2018) 4 Cal.5th 607, 634, fn. 7, 230 Cal.Rptr.3d 415, 413 P.3d 656), the separate statement cannot raise a triable issue of material fact. Likewise, a wage statement without more does not raise a triable issue of material fact.

[31] Even if we were to consider the evidence cited in the separate statement on which Donohue relies, the result is no different. Donohue’s separate statement citation references the following material facts which AMN does not dispute: “In its Wage Statements, AMN sometimes represents 20 minutes of work-time as ‘.34’”; “In its Wage Statements, AMN sometimes represents 20 minutes of work-time as ‘.33’”; “In its Wage Statements, AMN never provides its nonexempt employees with any sort of written explanation which states that both .33 and .34 can mean 20 minutes of work-time”; “20 minutes is exactly one-third of 60 minutes”; and “.33 is not exactly one-third of 100.” (Bolding and underscoring omitted.) Even if we assume that, by these statements, AMN failed to provide accurate and complete information as required by section 226, subdivision (a), Donohue forfeited appellate consideration of the issue, because she did not present argument, evidence, or authority as to how or why a recruiter is unable to “promptly and easily determine from the wage statement alone” the actual time worked—which is the required showing before an employee can be “deemed to suffer injury” according to subdivision (e)(1)(B) of section 226.9 (Cal. Rules of Court, rule 8.204(a)(1)(B) [each point in a brief must be supported “by argument and, if possible, by citation to authority”]; see Pizarro v. Reynoso (2017) 10 Cal.App.5th 172, 181, 215 Cal.Rptr.3d 701 [failure to present coherent argument forfeits appellate review].)

In her reply brief on appeal, Donohue suggests that, because AMN converted the hours and minutes to hours and decimal hours, she or other recruiters generally were unable to promptly and easily determine the actual time worked.10 We reject such a suggestion. First, Donohue forfeited appellate consideration of the argument, because she raised it for the first time in her reply brief on appeal. ( *137 Varjabedian v. City of Madera (1977) 20 Cal.3d 285, 295, fn. 11, 142 Cal.Rptr. 429, 572 P.2d 43 [“Obvious reasons of fairness militate against
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consideration of an issue raised initially in the reply brief of an appellant.”]; Padron v. Watchtower Bible and Tract Society of New York, Inc. (2017) 16 Cal.App.5th 1246, 1267, 225 Cal.Rptr.3d 81 [“Any new substantive arguments raised by [an appellant] in its reply brief are deemed forfeited.”].) In any event, even if we were to consider Donohue’s tardy presentation, Donohue did not include evidence or authority for the suggestion that, by the use of decimal hours rather than minutes, AMN did not provide a wage statement from which the amount of time worked can be, in the language of section 226, subdivision (e)(1)(B), “promptly and easily determined.”

Accordingly, we affirm the trial court’s ruling as to AMN Issue No. 4.

E. The Trial Court Did Not Err in Summarily Adjudicating Donohue’s Overtime Claim in Favor of AMN

Section 510, subdivision (a) requires employers like AMN to pay employees like Plaintiffs “one and one-half times the regular rate of pay” for “[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek.”

As part of the second cause of action in the complaint, Donohue alleged that AMN failed to pay required overtime wages in violation of section 510, subdivision (a). More specifically, Donohue alleged the following two types of overtime payment violations: (1) “‘time shaving,’ ” which included both the rounding of time when recruiters punched in and out, and the conversion of time that was recorded in minutes to decimal hours for purposes of multiplying the amount of time by the overtime hourly rate; and (2) failure to include “‘Referral Bonus[es],’ ” “‘monthly commissions,’ ” and “‘RAMP pay’” in calculating commissions and nondiscretionary bonuses when determining a recruiter’s “regular rate of pay, which results in an improper rate of overtime pay.

*138 However, on appeal, Donohue does not mention these two alleged overtime violations. Instead, she argues only that the trial court erred in adjudicating her overtime claim based on what she characterizes as AMN’s “makeup time” defense. Thus, Donohue did not meet her burden of establishing a triable issue of material fact in response to AMN’s initial showing. (Aguilar, supra, 25 Cal.4th at p. 850-851, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

We are aware that, in granting AMN’s motion for summary adjudication directed to the overtime claim, the trial court included as an alternative ruling that Donohue was required to, but did not, plead that AMN’s makeup time policy resulted in overtime violations. However, the court’s principal ruling was on another ground—namely that, because AMN’s application of its rounding policy complied with California law, “AMN’s methods of calculating and paying overtime compensation are lawful”; yet Donohue does not argue on appeal that the court erred in so ruling on summary adjudication. Stated differently, even if we assume that the trial court erred in denying Donohue’s motion as to the makeup time defense, any such error would be harmless (see discussion of prejudice at pt. III.H., post): Because AMN was entitled to summary adjudication on its motion directed to the overtime claim on grounds unrelated to the issue of makeup time, the result on the overtime claim is unaffected by the court’s ruling, even if erroneous, that Donohue did not plead that AMN’s makeup time policy resulted in overtime violations.

Accordingly, we affirm the trial court’s ruling as to AMN Issue No. 1—without expressing an opinion as to the effect of AMN’s makeup policy on Donohue’s overtime claim.

F. The Trial Court Did Not Err in Summarily Adjudicating Donohue’s Rest Period Claim in Favor of AMN

[32] A rest period mandated by state law, which includes Industrial Welfare Commission wage orders, “shall be counted as hours worked, for which there shall be no deduction from wages.” (§ 226.7, subd. (d).) In general, California employers are required to provide rest periods of a specified minimum duration—e.g., 10 minutes of paid rest for every four hours worked; and for shifts of less than four hours, a 10-minute rest period after three and a half hours. (Tit. 8, §§ 11010-11150, subd. (12)(A) & § 11160, subd. (11)(A).) An employer is precluded from requiring an *139 employee to work during a rest period, and an employer that fails to provide such a required rest period “shall pay” each affected employee one hour’s pay for each workday the employee was not provided the appropriate rest period. (§ 226.7, subds. (b), (c); tit. 8, §§ 11010-11150, subd. (12)(B) & § 11160, subd. (11)(D).) In the present action, Donohue alleges that, by failing to have a compliant rest period policy, AMN violated section 226.7, subdivision (b), and title 8, section 11040, subdivision (12), which entitled Plaintiffs to recover damages.
In its motion, AMN sought to summarily adjudicate the rest period claim “because there is no evidence of a uniform policy or practice to deny rest periods.” Donohue argues that the trial court improperly granted the motion by relying “on a generalization that Ms. Donohue took ‘some’ rest breaks, ... improperly ignor[ing] all of her testimony in which she said she was often denied other rest breaks.” Donohue characterized the pertinent allegations in the complaint to be “that AMN did not provide all legally-compliant rest periods due,” expressly asserting that “[t]he testimony in the record confirmed [her] allegations to be true.” By this argument, Donohue necessarily acknowledges that AMN met its initial burden, suggesting only that she met her responsive burden of establishing the existence of a triable issue of material fact.

In response to AMN’s showing that its written policy complies with California law (which Donohue does not challenge on appeal), Donohue refers us to one page of her declaration and eight pages of her deposition transcript and argues that “(1) she and others were frequently denied rest breaks altogether when work got too busy, and (2) that [AMN] would often interrupt her (call her back to work) before her rest period was finished.” The problem with Donohue’s argument is that the evidence on which she relies does not establish either a general noncompliant company policy or the denial of any specific required rest period(s).

In her declaration, Donohue testified that she “was routinely discouraged from taking meal and rest breaks” and even called back to her desk “on several occasions” when attempting to take a rest break. However, neither of these events establishes either a noncompliant company policy or the denial of a compliant rest period (or, in the event of a noncompliant rest period, nonpayment of the required premium).

At her deposition Donohue expressly testified that AMN allowed recruiters to take rest breaks, commenting only that taking such breaks “was highly frowned upon” and “it was not a commonality to take rest periods at all.” Significantly, Donohue could not remember what she was told or what was communicated to her to cause her to believe that taking rest breaks was uncommon or disapproved. Although Donohue later identified a “recruitment manager” in “upper division” who told her “just conversationally” that she should make telephone calls instead of taking breaks, Donohue confirmed that the manager never stated that taking a rest period was “frowned upon” or otherwise precluded. All of that said, Donohue testified unequivocally that no one—and repeated later that she could not remember any manager or supervisor who—even told her that she could not take a rest break.

For these reasons, the evidence on which Donohue relies is insufficient to establish the existence of a triable issue of material fact in response to AMN’s initial showing that, in the terms of the issue to be summarily adjudicated, “there is no evidence of a uniform policy or practice to deny rest periods.” Accordingly, we affirm the trial court’s ruling as to AMN Issue No. 3.

G. The Trial Court Did Not Err in Summarily Adjudicating Donohue’s PAGA Claim in Favor of AMN

Section 2699, subdivisions (a) and (g)(1), which are part of PAGA (§ 2698 et seq.), allow an aggrieved employee to recover civil penalties for certain violations of the Labor Code.41 (Arias v. Superior Court (2009) 46 Cal.4th 969, 980, 95 Cal.Rptr.3d 588, 209 P.3d 923.) Under PAGA, an “‘aggrieved employee’” is defined as an employee “against whom one or more of the alleged [Labor Code] violations was committed.” (§ 2699, subd. (c).)

41 “Before the PAGA was enacted, an employee could recover damages, reinstatement, and other appropriate relief but could not collect civil penalties. The Labor and Workforce Development Agency ... collected them. The PAGA changed that.” (Villacres v. ABM Industries Inc. (2010) 189 Cal.App.4th 562, 578, 117 Cal.Rptr.3d 398; accord, Thurman v. Bayshore Transit Management, Inc. (2012) 203 Cal.App.4th 1112, 1126, 138 Cal.Rptr.3d 130 [“Section 2699, subdivision (a) ... permits aggrieved employees to recover civil penalties that previously could be collected only by the agency’ ”].) “In PAGA, the Legislature created an enforcement mechanism for aggrieved employees to file representative actions to recover penalties in cases in which there is no private cause of action as an alternative to enforcement by the Labor Commissioner.” (Rape v. Auto-Chlor System of Washington, Inc. (2013) 220 Cal.App.4th 635, 650, 163 Cal.Rptr.3d 392, superseded in part on another issue by statute.) Under PAGA, “the aggrieved employee acts as the proxy or agent of state labor law enforcement agencies, representing the same legal right and interest as those agencies, in a proceeding that is designed to protect the public, not to benefit private parties.” (Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal.4th 993, 1003, 95 Cal.Rptr.3d 605, 209 P.3d 937.)
[35] In the seventh cause of action of the complaint, Donohue pleaded that she *141 complied with PAGA’s administrative prefiling requirements (see § 2699.3, subd. (a)) and alleged that, under PAGA, she was an aggrieved employee asserting a claim against AMN based on violations of specified Labor Code sections and Industrial Welfare Commission wage orders dealing with: straight time; overtime; meal periods; rest periods; wage statements; and amount of compensation owed upon termination of employment (based on proof of the other alleged violations). The trial court granted AMN’s motion for summary adjudication of Donohue’s PAGA cause of action, because—in the language of the issue to be summarily adjudicated—each of the PAGA claims “is derivative of [Donohue’s] other claims under the California Labor Code, which also fail[].” The trial court did not err.

On appeal, Donohue argues otherwise, contending that, unlike a class action plaintiff who must show a common policy or practice that results in Labor Code (or related) violations, a PAGA plaintiff need only prove the existence of a violation. In support, Donohue relies on a language from *Williams v. Superior Court* (2017) 3 Cal.5th 531, 220 Cal.Rptr.3d 472, 398 P.3d 69 (*Williams*) that, in a PAGA action, “recovery on behalf of the state and aggrieved employees may be had for each violation, whether pursuant to a uniform policy or not.” *Williams*, at p. 559, 220 Cal.Rptr.3d 472, 398 P.3d 69.) Even if we accept Donohue’s authority, *42 Donohue did not establish that she suffered harm as a result of AMN’s violation of the Labor Code.

Stated differently, Donohue did not establish that she was an aggrieved employee—a prerequisite to asserting a PAGA claim (§ 2699, subds. (a), (g)(1))—because she did not establish that “one or more of the alleged [Labor Code] violations was committed” against her (§ 2699, subd. (c)). The parties and the trial court discussed this issue in terms of analyzing whether Donohue’s PAGA claims were “derivative” of her substantive claims for Labor Code violations.

In its separate statement in support of its motion to summarily adjudicate Issue No. 7, AMN proffered the following undisputed material fact: “All claims for PAGA penalties that [Donohue] has brought in this lawsuit are derivative of her other causes of action for violations of the Labor Code.” As supporting evidence, AMN relied on copies of Donohue’s administrative prefiling letters and certain allegations in her complaint in which Donohue expressly contended that her PAGA claims were *entirely* derivative of her substantive claims under the Labor Code. Significantly, in her response to AMN’s separate statement, Donohue did not dispute that her claims for PAGA penalties were derivative of her substantive claims for Labor Code violations. *43 Consistently, in her memorandum of points and authorities in opposition to AMN’s motion in the trial court, Donohue again specifically acknowledged that her PAGA claims were derivative of her substantive Labor Code claims. Indeed, instead of presenting any independent argument related to the PAGA cause of action, Donohue merely asked the court to “Please see the above arguments”—thereby confirming that her PAGA claims were, in fact, derivative of her other Labor Code claims.

Donohue suggests that the holding in *Lopez v. Friant & Associates, LLC* (2017) 15 Cal.App.5th 773, 224 Cal.Rptr.3d 1 (*Lopez*) saves her PAGA claim (§ 2699) for wage statement violations (§ 226, subd. (a)). *44 More specifically, she argues that, under *Lopez*, the trial court here erred in ruling that, because AMN was entitled to judgment as a matter of law on her individual (class) claims under section 226, AMN was also entitled to judgment as a matter of law on her representative (PAGA) claim under section 2699. *45 However, all *Lopez* held was that a plaintiff who asserts a *representative* claim for *civil penalties* under PAGA (§ 2699) based on violations of section 226, subdivision (a), need not prove an *individual* claim for *statutory damages* under the Labor Code (§ 226, subd. (e)) based on the same violations of section 226, subdivision (a). *Lopez*, at pp. 784-786, 224 Cal.Rptr.3d 1.) Although a representative PAGA claim for penalties (§ 2699) and an individual claim for damages (§ 226, subd. (e)) both require proof of a violation of the requirements for itemized wage statements under section 226, subdivision (a), the *representative* claim requires only proof that the employer’s wage statement violated section 226, subdivision (a), whereas the *individual* claim requires proof that the plaintiff suffered an “‘injury’ resulting from a ‘knowing and intentional’ violation of section 226[, subdivision](a).” *Lopez*, at pp. 784, 784-786, 224 Cal.Rptr.3d 1.)

In *Lopez*, the defendant employer sought summary judgment on the *representative* (PAGA) claim for penalties (§ 2699) based on evidence and argument that the plaintiff employee could not establish an *individual* claim for damages (§ 226, subd. (e)) based on the same alleged section 226, subdivision (a) wage statement violations. *Lopez*, supra, 15 Cal.App.5th at pp. 776-777, 224 Cal.Rptr.3d 1.) In reaching its conclusion otherwise, the *143 Lopez* court stated only that a PAGA *representative* claim for penalties based on a violation of subdivision (a) of section 226 is not derivative of an *individual* claim for damages based on a violation of

subdivision (e) of section 226 because the individual claim requires proof of a knowing and intentional violation of subdivision (a), whereas the representative claim does not. (Lopez, at p. 786.) In contrast, here, because Donohue’s individual (class) claims failed on grounds other than the lack of proof of a knowing and intentional violation of section 226, subdivision (a)—namely, on the basis that Donohue did not meet her burden of establishing an issue of material fact as to the existence of a section 226, subdivision (a) violation (see pt. III.D., ante)—Lopez is not controlling.46

In conclusion, based on the record and our rulings on her individual (class) Labor Code claims, ante, Donohue did not meet her burden of establishing trial court error in granting summary adjudication in favor of AMN on Donohue’s representative (PAGA) cause of action. Stated differently, in the language from her opening brief on appeal, Donohue did not meet her burden of establishing an issue of material fact as to whether she “individually experienced” any particular Labor Code violation. (See Huff, supra, 23 Cal.App.5th at p. 753, 233 Cal.Rptr.3d 502 [PAGA plaintiff must be “affected by at least one Labor Code violation”].) In response to AMN’s showing—which included Donohue not disputing the proffered material fact that her representative (PAGA) claims were derivative of her individual (class) Labor Code claims49—Donohue did not establish either that she suffered a Labor Code violation or that her PAGA claims were not derivative of her individual (class) claims.

Accordingly, we affirm the trial court’s ruling as to AMN Issue No. 7.

H. The Trial Court Did Not Abuse its Discretion in Sustaining AMN’s Evidentiary Objections to Certain of Donohue’s Evidence

In ruling on the cross-motions, the trial court sustained AMN’s evidentiary objections to the declarations of Donohue and Clint S. Engleson, one of Donohue’s attorneys. Donohue contends on appeal that these rulings are erroneous and, on that basis, she is entitled to a reversal of the judgment. We disagree.

*144 436 Generally, we review for an abuse of discretion of the trial court’s ruling on the exclusion of evidence in summary judgment proceedings. (Park v. First American Title Co. (2011) 201 Cal.App.4th 1418, 1427, 136 Cal.Rptr.3d 684.) A trial court abuses its discretion only when, in its exercise, the ruling is arbitrary or the trial court “exceeds the bounds of reason, all of the circumstances before it being considered.” (Denham, supra, 2 Cal.3d at p. 566, 86 Cal.Rptr. 65, 468 P.2d 193.) That said, in Reid v. Google, Inc. (2010) 50 Cal.4th 512, 113 Cal.Rptr.3d 327, 235 P.3d 988, our Supreme Court expressly left open the question of whether such evidentiary rulings are reviewed under a de novo or an abuse of discretion standard. (Id. at p. 535, 113 Cal.Rptr.3d 327, 235 P.3d 988.) The parties disagree as to which standard we are to apply.

Under either standard, however, an appellant who seeks a reversal based on the erroneous exclusion of evidence in summary judgment proceedings must establish how the error resulted in a “miscarriage of justice,” often referred to as prejudice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; Pool v. City of Oakland (1986) 42 Cal.3d 1051, 1069, 232 Cal.Rptr. 528, 728 P.2d 1163.) For purposes of this analysis, a “miscarriage of justice” may be found on appeal “only when the court, ‘after an examination of the entire cause, including the evidence,’ is of the ‘opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’” (Pool, at p. 1069, 232 Cal.Rptr. 528, 728 P.2d 1163; accord, San Diego Gas & Electric Co. v. Schmidt (2014) 228 Cal.App.4th 1280, 1301-1302, 175 Cal.Rptr.3d 858.) In this context, “reasonably probable” means “more than an abstract possibility.” (College Hospital Inc. v. Superior Court (1994) 8 Cal.4th 704, 715, 34 Cal.Rptr.2d 898, 882 P.2d 894.) Prejudice is not presumed (Code Civ. Proc., § 475), and the appellant bears the burden of establishing both error and a miscarriage of justice. (Denham, supra, 2 Cal.3d at p. 566, 86 Cal.Rptr. 65, 468 P.2d 193.) Without deciding which standard of review applies, we assume that the challenged evidence should have been admitted.48 As we explain, however, because Donohue did not meet her burden of establishing prejudice, any error in excluding the evidence is harmless.

1. Donohue’s Testimony

In support of her opposition to AMN’s motion directed to meal periods and rest periods, Donohue testified as follows:

*145 “I understand AMN is arguing that I somehow ‘certified’ that I received all meal and rest breaks while working for the company by clicking a box to that effect when submitting my timecard. This is not the case. To confirm, I could not submit my timecard—and
Donohue v. AMN Services, LLC, 29 Cal.App.5th 1068 (2018)

thus get paid—without clicking this box. Because I had no choice but to click this box, my doing so does not ‘certify’ the fact that I received meal and rest breaks. As I have testified multiple times, I was routinely discouraged from taking meal and rest breaks while I worked for AMN and was in fact called back to my desk—over the intercom—on several occasions when attempting to take meal and rest breaks.”

AMN objected to this testimony on numerous grounds. The trial court excluded the testimony without stating the basis of its ruling.

[40] On appeal, Donohue contends that this testimony is “relevant,” “based on personal knowledge,” and “simply expand[s] on and clarif[ies] what she had meant by her prior deposition testimony.” She then argues that the exclusion of this testimony “was highly prejudicial, as it created a multitude of triable issues of fact with regard to the meal and rest period claims.” However, by acknowledging that this testimony is cumulative and by failing to suggest how this testimony supports a specific triable issue of material fact, Donohue has not met her burden of establishing prejudice.

Accordingly, Donohue is not entitled to relief based on the trial court’s exclusion of Donohue’s declaration testimony.

I. Donohue Did Not Retain Her Individual Claims
In her final argument, without a record reference, Donohue contends that, because “AMN’s notice of summary judgment motion only seeks to adjudicate the certified class action claims, ... it was error for the trial court to adjudicate Ms. Donohue’s individual claims for meal break, rest break, unpaid compensation and wage statement violations.” (Original italics and bolding) We emphasize “without a record reference,” because the record discloses that AMN gave notice of and moved for “summary judgment or, in the alternative, summary adjudication, in its favor and against the certified class and named plaintiff Kennedy Donohue in her individual capacity, on Plaintiffs’ Second Amended Complaint, and as to each cause of action therein.” (Italics added.)

*146 Accordingly, Donohue’s argument that AMN’s motion did not seek to adjudicate her individual claims is frivolous, and we reject it.

2. Engleson’s Testimony
In support of her opposition to AMN’s motion, Donohue submitted the declaration from one of her attorneys, Engleson. In his declaration, Engleson provided substantive testimony, as well as foundational/authentication testimony related to 16 exhibits. AMN objected to the declaration and to certain of the exhibits on various grounds, and the trial court sustained AMN’s evidentiary objections on the basis that most of the declaration was “an improper attorney declaration.” The court did not rule on the objections to any of the exhibits.

[44] On appeal, Donohue does not challenge the ruling that Engleson’s declaration was an improper attorney declaration. She challenges only that portion of the court’s ruling that sustained AMN’s objections to the 16 exhibits. However, Donohue does not attempt to explain (let alone succeed in explaining) how she was prejudiced by the exclusion of any particular exhibit.

IV. DISPOSITION
The judgment is affirmed. AMN is entitled to its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

WE CONCUR:

HALLER, Acting P. J.

O’ROURKE, J.

All Citations

Footnotes
For example, all punch times between 7:55 a.m. and 8:04 a.m. would record as 8:00 a.m., and all punch times between 8:05 a.m. and 8:14 a.m. would record as 8:10 a.m.

For example, 20 minutes would be .333 hours, which would convert to .33 hours; and 40 minutes would be .666 hours, which would convert to .67 hours. At times, we refer to this format as “decimal hours.”

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes ....” (Lab. Code, § 512, subd. (a).) (Further undesignated statutory references are to the Labor Code.)

In general, California employers are required to provide rest periods of a specified minimum duration—e.g., 10 minutes of paid rest for every four hours worked; and for shifts of less than four hours, a 10-minute rest period after three and a half hours. (Cal. Code Regs., tit. 8, §§ 11010-11150, subd. (12)(A) & § 11160, subd. (11)(A).) (Further undesignated regulation references (tit. 8) are to the California Code of Regulations.)

“An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation ....” (§ 226.7, subd. (b).)

During Donohue’s first two weeks of employment by AMN, her time entries triggered one such meal period violation, and AMN paid Donohue the appropriate penalty.

After mid-September 2012, once Team Time required the recruiter to complete the drop-down menu for any noncompliant meal period, on 31 occasions, Donohue selected the option stating that she had been provided the opportunity, but chose not, to take a nonworking 30-minute meal period before the end of the fifth hour of work. Donohue never selected the option stating that AMN did not provide a compliant meal period.

The details of these incentives are contained in formal publications from AMN, copies of which were included as exhibits in support of AMN’s summary judgment motion.

At times, AMN refers to the bonus-related retroactive overtime adjustment as a “true-up.”

In an amended notice and motion filed a month later, AMN sought essentially the same relief, relying exclusively on the supporting documentation filed in support of the September 2016 motion.

The Industrial Welfare Commission is the state agency “empowered to promulgate wage orders, which are legislative regulations specifying minimum requirements with respect to wages, hours, and working conditions.” (Augustus v. ABM Security Services, Inc. (2016) 2 Cal.5th 257, 281, fn. 5, 211 Cal.Rptr.3d 634, 385 P.3d 823.) The wage orders that the commission adopts “are to be accorded the same dignity as statutes’ … [and] take precedence over the common law to the extent they conflict.” (Troester v. Starbucks Corp. (2018) 5 Cal.5th 829, 839, 235 Cal.Rptr.3d 820, 421 P.3d 1114 (Troester).)

Donohue does not mention this issue in her appellate briefs. Thus, she has forfeited appellate review of the ruling granting the motion. (Atempa v. Pedrazzani (2018) 27 Cal.App.5th 809, 830, 238 Cal.Rptr.3d 465 (Atempa) [citing Cal. Rules of Court, rule 8.204(a)(1)(B)]; Cahill v. San Diego Gas & Electric Co. (2011) 194 Cal.App.4th 939, 956, 124 Cal.Rptr.3d 78 (Cahill) [when appellant fails to provide “reasoned argument and citations to authority, we treat the point as waived” “”.]) Accordingly, we affirm the trial court’s ruling as to AMN Issue No. 5.

Donohue does not mention this issue in her appellate briefs. Thus, she has forfeited appellate review of the ruling granting the motion. (Atempa, supra, 27 Cal.App.5th at p. 830, 238 Cal.Rptr.3d 465; Cahill, supra, 194 Cal.App.4th at p. 956, 124 Cal.Rptr.3d 78.) Accordingly, we affirm the trial court’s ruling as to AMN Issue No. 6.

On appeal, Donohue affirmatively states that she is not challenging the court’s ruling granting AMN’s motion as to this issue (unreimbursed business expenses). Accordingly, we affirm the trial court’s ruling as to AMN Issue No. 8.

On appeal, Donohue raises no argument as to the denial of the motion as to Donohue Issue No. 2. Thus, she has forfeited appellate review of this ruling. (Atempa, supra, 27 Cal.App.5th at p. 830, 238 Cal.Rptr.3d 465; Cahill, supra, 194 Cal.App.4th at p. 956, 124 Cal.Rptr.3d 78.) Accordingly, we affirm the trial court’s ruling as to Donohue Issue No. 2, although we do mention it further at part III.E., post.

At the outside, the time to appeal from the January 2017 postjudgment order was 180 days after entry of the order.
Indeed, at part III.G., post, based on Donohue’s argument in support of her appeal from the judgment, we will consider the principal argument Donohue presented in her motion for reconsideration.

These motions include: AMN Issue No. 1; AMN Issue No. 2; and Donohue Issue No. 1. (See pts. III.D., III.B.1. & III.B.2., respectively, post.)

The United States Department of Labor adopted a regulation (29 C.F.R. § 785.48) under the federal Fair Labor Standards Act (FLSA; 29 U.S.C. § 201 et seq.) which permits employers to use time-rounding policies in certain circumstances. (See’s Candy I, supra, 210 Cal.App.4th at p. 901, 148 Cal.Rptr.3d 690.) In full, 29 Code of Federal Regulations section 785.48(b) is entitled “‘Rounding’ practices” and provides: “It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees’ starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.” (Italics added.)

The DLSE is the California state agency charged with enforcing wage and hour laws. (See’s Candy I, supra, 210 Cal.App.4th at p. 902, 148 Cal.Rptr.3d 690.) Statements in the DLSE Manual are not binding on the courts, but merely persuasive. (Id. at pp. 902-903, 148 Cal.Rptr.3d 690.) The DLSE has adopted the federal standard set forth at 29 C.F.R. section 785.48(b), quoted at footnote 17, ante: “The [DLSE] utilizes the practice of the U.S. Department of Labor of ‘rounding’ employee’s hours to the nearest five minutes, one-tenth or quarter hour for purposes of calculating the number of hours worked pursuant to certain restrictions.” (DLSE Manual, supra, § 47.1, quoted in See’s Candy I, supra, 210 Cal.App.4th at p. 902, 148 Cal.Rptr.3d 690.) Further relying on this federal standard, See’s Candy I also quoted as follows from section 47.2 of the DLSE Manual: “There has been [a] practice in industry for many years to follow this practice, recording the employees’ starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted by DLSE, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.” (See’s Candy I, at p. 902, 148 Cal.Rptr.3d 690, italics added.)

With regard to Donohue personally, during the rounding period, AMN’s practice of rounding punch times to the nearest 10-minute increment resulted in a net surplus of 9.82 hours—which is an overpayment of approximately $151.03 based on Donohue’s hourly wage.

Actually, Donohue submitted the expert’s declaration in support of her motion for summary adjudication with no mention of the declaration in her brief in her opposition to AMN’s motion. Donohue did cite to the declaration in her response to AMN’s separate statement, which the trial court considered in ruling on AMN’s motion; and AMN responded to this evidence in its appellate brief on this issue. Therefore, we consider this evidence on appeal as well. We begin by noting that, in her opening brief on appeal, Donohue does not once mention AMN’s expert—or even the fact that AMN presented expert testimony—let alone discuss the expert evidence or attempt to apply it to the procedural (summary judgment law) or substantive (wage and hour law) issues in the appeal.

At oral argument, counsel for Donohue stated more than once that the trial court erred by not considering Donohue’s expert’s testimony. The record does not support counsel’s statement. The court considered and rejected the expert’s opinions as to the neutrality of AMN’s rounding policy, expressly explaining its reasoning in its order granting AMN’s motion.

For example, assume that the deadline for offering a recruiter a timely meal period is 1:00 p.m. (i.e., before the end of the fifth hour of work), but that the recruiter is not offered the meal period until 1:04 p.m. Under AMN’s rounding policy, the meal period is timely because the actual punch of 1:04 p.m. is considered 1:00 p.m. Donohue’s expert’s testimony is that, in this example, AMN’s rounding policy results in at least one violation (i.e., no meal break before the end of the fifth hour of work) and potentially second violation (i.e., if the recruiter punches back in at any time between 1:25 p.m. and 1:33 p.m., since such a punch is considered 1:30 p.m., yet the actual time of the meal period is less than 30 minutes). However, in forming his opinions, Donohue’s expert failed to consider the situation where 1:00 p.m. is the deadline for a timely meal period, where the recruiter takes a meal period break at 12:55 p.m. (which is considered 1:00 p.m.) or punches back in at 1:34 p.m. (which is considered 1:30 p.m.). In both of these hypotheticals, the recruiter received credit for work and payment of wages for time during which the recruiter was on a meal period break.
To the extent Donohue attempted to prove, as part of her motion, that AMN’s rounding policy violated California law, Donohue’s showing (described in the text, ante) was insufficient to meet her initial burden; i.e., the burden never shifted to AMN to establish the existence of a triable issue of material fact under Aguilar, supra, 25 Cal.4th at pages 850-851, 107 Cal.Rptr.2d 841, 24 P.3d 493.

Actually, Donohue cited subdivision 10 of title 8, section 11040. We assume that she meant subdivision 11.

Donohue correctly notes that the rebuttable presumption analysis applied in Safeway, Lubin, and ABM was based on Justice Werdegar’s concurrence in Brinker, supra, 53 Cal.4th at page 1053, 139 Cal.Rptr.3d 315, 273 P.3d 513 ("If an employer’s records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided."). (Safeway, supra, 238 Cal.App.4th at pp. 1159-1160, 190 Cal.Rptr.3d 131; Lubin, supra, 5 Cal.App.5th at p. 951, 210 Cal.Rptr.3d 215.) However, we reject Donohue’s suggestion to apply this standard here. First, as we explained in the text, ante, presumptions in summary judgment proceedings are different than presumptions that might arise in class certification proceedings. Moreover, although Justice Liu joined Justice Werdegar’s rebuttable presumption proposal, the majority of justices did not (Brinker, at p. 1055, 139 Cal.Rptr.3d 315, 273 P.3d 513 [conc. opn. of Werdegar, J.]); and “concurring opinions are not binding precedent” (In re Marriage of Dade (1991) 230 Cal.App.3d 621, 629, 281 Cal.Rptr. 609). Contrary to Donohue’s suggestion, we do not read ABM as stating that Justice Werdegar’s rebuttable presumption applies to a plaintiff’s substantive proof of damages. As ABM explained, the burden of proof shifts to the employer in the wage and hour context only where "an employer’s compensation records are so incomplete or inaccurate that an employee cannot prove his or her damages" or "the employer has failed to keep records required by statute." (ABM, supra, 19 Cal.App.5th at p. 311, 227 Cal.Rptr.3d 445.) Those facts are not present in this case.

Actually, AMN’s policy (of requiring the recruiter to select from a drop-down menu any time the rounded time indicated a noncompliant meal period) began a few weeks after Donohue began working at AMN.

Donohue argues that “rounding always negatively impacted employees’ meal periods.” We disagree. The neutrality of AMN’s rounding policy is demonstrated by the following illustration: If the recruiter punched out at 12:55 p.m. and punched back in at 1:34 p.m., the recruiter would have had a 39 minute meal period—which complies with both section 512, subdivision (a) and title 8, section 1104, subdivision 11(A)—and also would have been paid for nine minutes of this time, since rounding would show a punch out at 1:00 p.m. and a punch back in at 1:30 p.m.

This case does not involve rounding to the nearest quarter of an hour.

In her opening brief on appeal, Donohue relies on evidence from her expert regarding the effect of the application of AMN’s rounding policy to meal periods. According to Donohue, this evidence “caused class members to not be paid for a total of 2,631.583 hours recorded on their time records as a result of ‘short’ and ‘delayed’ meal periods.” First, this evidence does not support Donohue’s theory that any recruiter’s right to a statutory meal period was let alone offset these amounts by, evidence that recruiters

As we explain at part III.H., post, even though the trial court excluded this testimony, we have considered it in our de novo review on appeal.

According to testimony from AMN’s supervisor of corporate payroll of AMN’s parent company: Recruiters like Donohue were eligible to receive “different types of non-discretionary commissions, performance bonuses, and other incentive pay” in addition to their hourly compensation; these bonuses, which may be earned monthly or quarterly, are often “due and calculable only after the pay period during which the work was performed”; in the event additional overtime must be paid on such amounts, it is not tied to the recruiter’s hourly wage, but rather is calculated by a complex formula which is “the mathematical equivalent of calculating the bonus into the [recruiter’s] regular rate of pay”; and “[t]hese bonus-related overtime adjustments are denoted as ‘Flsa Ot’ on a [recruiter’s] wage statement” and may denote a payment that comprises multiple adjustments for multiple bonuses being paid during the same pay period. (Italics added.)
Donohue v. AMN Services, LLC, 29 Cal.App.5th 1068 (2018)

Donohue does not tell us which of these statements—or how any of these statements—raises a triable issue of material fact.

In the trial court, Donohue submitted two declarations, one in opposition to AMN’s motion and one in support of her motion. She did not mention any confusion or inability to determine the time worked based on the information contained on her wage statement; nor did she present any evidence of any other recruiter who was confused or unable to determine the time worked.

For example, actual time of 1 hour and 30 minutes is converted to 1.5 hours, and actual time of 1 hour and 40 minutes is converted to 1.67 hours.

In her reply brief on appeal, Donohue refers us to two pages of a separate statement (with five separately numbered paragraphs), a copy of one of Donohue’s wage statements, and one page of the deposition transcript of a witness, C.B. The separate statement is neither evidence nor argument. ([Stockinger, supra. 111 Cal.App.4th at p. 1024, 4 Cal.Rptr.3d 385.] Although the copy of the wage statement contains a decimal hour, Donohue failed to present evidence or argument that she or any of Plaintiffs could not promptly and easily determine the amount of time worked. At her deposition, C.B. testified that, in order to determine how many minutes .83 of an hour is, she would have to refer to a chart, although she guessed that it was 50 minutes. However, Donohue has not explained or provided evidence as to who C.B. is, and because Donohue did not cite this evidence until her reply brief on appeal, we decline to consider it. In any event, Donohue does not explain, or attempt to explain, how or why she or any recruiter was not able to promptly or easily determine the amount of time worked when it was expressed in decimal hours (.83 of an hour) rather than minutes (50 minutes). Given that only basic skills in arithmetic are required to convert minutes to decimal hours and decimal hours to minutes, we will not infer a triable issue of material fact without evidence that any recruiter was delayed or had difficulty in determining the amount of time worked.

The second cause of action also contains a claim for failure to pay minimum wage in violation of section 1197, but on appeal Donohue does not mention, let alone raise an argument, related to the minimum wage claim or section 1197.

Donohue does not tell us, either in the complaint or her appellate briefing, what she considers referral bonuses, monthly commissions, or RAMP pay.

Without deciding whether the makeup time argument is part of Donohue’s claim or AMN’s defense (which the parties dispute), it is based on section 513, which provides in part: “If an employer approves a written request of an employee to make up work time that is or would be lost as a result of a personal obligation of the employee, the hours of that makeup time work, if performed in the same workweek in which the work time was lost, may not be counted towards the total number of hours worked in a day for purposes of the overtime requirements specified in Section 510 .... An employee shall provide a signed written request for each occasion that the employee makes a request to make up work time pursuant to this section. ...” (Italics added.) Donohue assures us on appeal that AMN’s allegedly improper designation of makeup time is not part of her claim for overtime. She explains that her overtime claim is based solely on the “allegation ... that overtime was not paid in some instances where over 8 hours in a day were worked by employees.” AMN therefore properly directed its motion to the allegations in the complaint, where Donohue alleged improper overtime payments based on time-shaving (rounding of time and use of decimal hours) and failure to include certain commissions or bonuses in the calculation of regular time, and therefore, overtime—none of which involved the application of makeup time.

Citing Evidence Code section 356, Donohue argues on appeal that, because the court considered a portion of Donohue’s deposition testimony, “[t]he rule of completeness requires all of Ms. Donohue’s testimony on the subject of rest periods be considered.” We disagree. Evidence Code section 356 provides in part: “Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party[.]” (Italics added.) The trial court was not required to consider deposition testimony sua sponte, and there is no indication that the trial court did not consider any evidence that Donohue properly cited.

As we explain at part III.H., post, even though the trial court excluded this testimony, we have considered it in our de novo review on appeal.

“Notwithstanding any other provision of law, any provision of the Labor Code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency ... for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.” ([§ 2699, subd. (a).]) “[A]n aggrieved employee may recover the civil penalty described in subdivision (f), which deals with civil penalties,] in
a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed.” (§ 2699, subd. (g)(1).)

The procedural posture in Williams makes the case inapplicable to the present appeal. Williams was a discovery dispute, where the principal issue was whether the PAGA plaintiff had to show that he had been subject to Labor Code violations prior to obtaining discovery from the defendant employer regarding contact information for other California employees. (Williams, supra, 3 Cal.5th at pp. 538, 559, 220 Cal.Rptr.3d 472, 398 P.3d 69.) The court concluded that the identity of the employer’s other California employees were discoverable without first requiring that the PAGA plaintiff establish that he had been subject to Labor Code violations. (Williams, at p. 558, 220 Cal.Rptr.3d 472, 398 P.3d 69 [“the merits of one’s case has never been a threshold requirement for discovery”].) As applicable to the present appeal—and as we discuss in the text, post—in dictum the court explained that, in order to recover on the merits as opposed to merely obtaining discovery, a PAGA plaintiff must establish standing, which requires a showing the PAGA plaintiff “suffered harm” as a result of the employer’s violation of the Labor Code. (Williams, at p. 559, 220 Cal.Rptr.3d 472, 398 P.3d 69, citing § 2699.)

Actually, Donohue did not include any response to AMN’s proposed undisputed material fact. AMN noted this nonresponse in its reply to Donohue’s opposition, contending that, because “[Donohue] has provided no response to this fact[,] ... it therefore remains undisputed.” Donohue did not argue otherwise at the hearing (or seek leave to amend her prior response), and she does not contend otherwise on appeal.

Because this is the argument that Donohue attempted to raise in her motion for reconsideration, which the trial court struck after entry of judgment, Donohue has not been prejudiced by the trial court’s failure to rule on the motion.

In the individual (class) cause of action for damages under section 226, subdivision (e), Donohue alleged that AMN failed to include in employees’ wage statements “all hours worked” in violation of subdivision (a)(2) and failed to identify “all applicable regular and overtime rates of pay” in violation of subdivision (a)(9).

In the representative (PAGA) cause of action under section 2699 for penalties based on section 226 violations, Donohue alleged that AMN failed to include in employees’ wage statements “the accurate total number of overtime hours worked” in violation of subdivision (a)(2), the “accurate net or gross wages, including overtime wages, earned” in violation of subdivision (a)(1), and “the name and address of the legal entity that is the employer in violation” of subdivision (a)(8).

At oral argument, counsel for Donohue presented argument based on Huff v. Securities Security Services USA, Inc. (2018) 23 Cal.App.5th 745, 233 Cal.Rptr.3d 502 (Huff)—a case that was decided many months after the filing of her reply brief. We disapprove of counsel presenting this authority without sufficient time for AMN to respond—despite six months and three rounds of supplemental briefing after the filing of Huff and before oral argument. However, since the case does not help Donohue, we will consider it without requesting supplemental briefing from AMN. In Huff, the appellate court held that an employee who is affected by at least one Labor Code violation may pursue PAGA penalties for unrelated Labor Code violations by the same employer. (Huff, at pp. 753-754, 233 Cal.Rptr.3d 502.)

Here, as we concluded in the text, ante, Donohue has not established the right to recover for any Labor Code violation; thus, even under Huff, she may not pursue PAGA penalties for any Labor Code violation(s).

As we explained at footnote 45, ante: In the individual (class) claim for damages under section 226, subdivision (e), Donohue alleged violations of subdivisions (a)(2) and (a)(9) of section 226; whereas in the representative (PAGA) claim for penalties under section 2699, Donohue alleged violations subdivisions (a)(1), (a)(2), and (a)(8) of section 226—which includes two alleged violations that were not part of the individual (class) claim. Donohue does not suggest that the PAGA claim was not derivative of the class claims because the two sets of claims alleged different violations of section 226, subdivision (a).

“No judgment shall be set aside ... in any cause, on the ground of ... the improper ... rejection of evidence ..., unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Cal. Const., art. VI, § 13, italics added.)

“No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown.” (Code Civ. Proc., § 475, italics added.)
Indeed, in our discussions of both the meal period and rest period issues at parts III.C.1. & III.F., respectively, ante, we considered applicable portions of Donohue’s declaration testimony that the trial court excluded.

Court of Appeal, Second District, Division 5, California.


B276127

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Synopsis

Background: Former and current employees brought class action against employer for wage statement violations. The Superior Court, Los Angeles County, No. BC502826, John Shepard Wiley, Jr., J., granted summary judgment in employer’s favor. Employees appealed.

[Holdings:] The Court of Appeal, Kim, J., sitting by assignment, held that employer did not violate statute governing wage statements by furnishing wage statement to discharged employees by mail the day after discharge.

Affirmed.

West Headnotes (15)

[1] Judgment
Presumptions and burden of proof

From commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law; this is because of the general principle that a party who seeks a court’s action in his favor bears the burden of persuasion thereon. Cal. Civ. Proc. Code § 437c.

Cases that cite this headnote

Existence or non-existence of fact issue

There is a triable issue of material fact for summary judgment purposes if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. Cal. Civ. Proc. Code § 437c.

Cases that cite this headnote

Presumptions and burden of proof

The party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. Cal. Civ. Proc. Code § 437c.

Cases that cite this headnote

Weight and sufficiency

A prima facie showing for summary judgment purposes is one that is sufficient to support the position of the party in question. Cal. Civ. Proc. Code § 437c.

Cases that cite this headnote


De novo review


Cases that cite this headnote

Appeal and Error

Summary judgment

The trial court’s stated reasons for granting summary judgment are not binding because the Court of Appeal reviews its ruling not its rationale. Cal. Civ. Proc. Code § 437c.

Cases that cite this headnote

Judgment

Motion or Other Application

A summary judgment motion is directed to the issues framed by the pleadings; these are the only issues a motion for summary judgment must address. Cal. Civ. Proc. Code § 437c.

Cases that cite this headnote

Statutes

Language and intent, will, purpose, or policy

Context

In construing statute, the Court of Appeal construes the words in question in context, keeping in mind the statute’s nature and obvious purposes.

Cases that cite this headnote

Statutes

Construing together; harmony

In construing statute, the Court of Appeal must harmonize the statute’s various parts by considering it in the context of the statutory framework as a whole.

Cases that cite this headnote

Statutes

Purpose and intent; determination thereof

Plain language; plain, ordinary, common, or literal meaning

Plain, literal, or clear meaning; ambiguity

If statutory language is unambiguous, then its plain meaning controls; if, however, the language supports more than one reasonable construction, then the Court of Appeal may look
to extrinsic aids, including the ostensible objects to be achieved and the legislative history.

Cases that cite this headnote

[13] **Labor and Employment**

Employer did not violate statute governing wage statements by furnishing wage statement to discharged employees by mail the day after discharge, although employer provided discharged employees with last wages on day of discharge, and thus employer was not liable in non-exempt employees’ wage statement claim. Cal. Lab. Code § 226(a).

Cases that cite this headnote

[14] **Appeal and Error**

Non-exempt employees failed to preserve for appellate review their argument that use of cashier’s check was not equivalent of paying cash for purposes of statute governing wage statements, where employees raised argument for first time in appellate reply brief. Cal. Lab. Code § 226; Cal. Com. Code § 3310.

Cases that cite this headnote


When an agency sets forth an interpretive policy in a void underground regulation, the deference that the agency’s interpretation of the statute would normally enjoy is absent, but in its place the agency has its power to persuade.


**817** APPEAL from a judgment of the Superior Court of Los Angeles County, John Shepard Wiley, Jr., Judge. Affirmed. (Los Angeles County Super. Ct. No. BC502826)

**Attorneys and Law Firms**

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**818** I. INTRODUCTION

Plaintiffs Fabio Canales and Andy Cortes, on behalf of themselves and class members, appeal from a summary judgment. Plaintiffs were former or current non-exempt employees of defendant Wells Fargo Bank, N.A. Plaintiffs alleged that their wage statements failed to include information required under Labor Code section 226, subdivision (a)(9). Specifically, plaintiffs argued that a line on the wage statement, “OverTimePay-Override,” should, but did not, include hourly rates and hours worked. Plaintiffs also alleged defendant violated section 226 by failing to provide a wage statement concurrently with the terminated employees’ final wages paid in-store. Plaintiffs moved for summary adjudication on the section 226 cause of action.

Defendant in its summary judgment motion argued that OverTimePay-Override reflected additional overtime pay that was owed for work performed on a previous pay period, but could not be calculated because it was based on a nondiscretionary bonus not yet earned. Under subdivision (a)(9), defendant contended
OverTimePay-Override did not have corresponding hourly rates or hours worked for the current pay period. As to plaintiffs’ second theory, defendant asserted it complied with the statute by furnishing the wage statement by mail. The trial court found in favor of defendant and against plaintiffs.

Plaintiffs contend the trial court erred by denying their summary adjudication motion and by granting defendant’s motion. We affirm.

II. BACKGROUND

A. Factual Background
Plaintiffs are current or former non-exempt California employees of defendant. Defendant would in some instances issue a paycheck and wage statement *1266 that contained nondiscretionary incentive compensation† (the bonus) to employees who worked during the period covered by the incentive compensation. These bonus periods would be monthly, quarterly, or annually. For employees who worked overtime during those bonus periods, the wage statements contained a line item called “OverTimePay-Override,” formerly called “OT-Flat.” OverTimePay-Override listed incremental additional overtime paid to the employee for overtime hours worked during the bonus period under the “Earnings” column.‡ For the OverTimePay-Override **819 line on the wage statements, no hourly rates or hours worked was identified.

In certain situations, defendant issued final wages to employees at the time of their termination through “in-store payments” made by cashier’s check. Defendant’s payroll department would then create the wage statement either the same day or the next day and mail it to the terminated employee by United States mail.§ During their employment, employees had online access to their itemized wage statements. Employees lost such online access the day after termination.

B. First Amended Complaint
Plaintiffs filed their first amended complaint, the operative pleading, on June 20, 2013. Plaintiffs sued on behalf of themselves and a class composed of (1) current or former non-exempt California employees of defendant who received OverTimePay-Override from March 13, 2012 to present and (2) all former California employees of defendant who were terminated from March 13, 2012 to present and were paid their final wages through the “in-store payment” procedure. In their first cause of action, plaintiffs alleged defendant *1267 violated section 226 by failing to identify the hourly rates and the hours worked that corresponded to OverTimePay-Override. Plaintiffs also alleged defendant violated section 226 by failing to provide terminated employees with wage statements immediately upon termination. Plaintiffs alleged a second cause of action pursuant to the Private Attorneys General Act (§ 2698 et seq.) (PAGA) for violation of section 226.†

C. Summary Adjudication/Judgment Motions
On December 15, 2015, plaintiffs moved for summary adjudication.§ Much like the **820 allegations in their amended complaint, plaintiffs argued that defendant violated section 226, subdivision (a)(9) by failing to specify the hourly rates and number of hours worked for the OverTimePay-Override adjustment on the itemized wage statements. Plaintiffs also argued defendant violated section 226 by failing to provide to terminated employees an itemized wage statement concurrently with their final wages that were paid in-store by cashier’s check. Defendant filed its own summary judgment motion on December 15, 2015. Defendant asserted it did not violate section 226, subdivision (a)(9) because OverTimePay-Override represented an increase in overtime pay, based on a periodic bonus, for overtime hours worked in previous pay periods. Defendant argued there were no “applicable hourly rates in effect during the pay period” that corresponded to OverTimePay-Override and thus defendant did not have to provide such information on the wage statement. As to plaintiffs’ second theory, defendant contended it furnished the itemized statement as *1268 required under section 226 by mailing it to the terminated employee’s last known address either the same day or the next day. Finally, defendant argued plaintiffs’ PAGA cause of action failed because it was wholly derivative of a violation based on section 226 and because plaintiffs failed to exhaust administrative remedies. Plaintiffs do not dispute their PAGA cause of action is derivative of the section 226 claims.

On May 26, 2016, the trial court issued its order granting
defendant’s motion and denying that of plaintiffs. As to defendant’s first argument, the trial court agreed that section 226, subdivision (a)(9) did not apply to OverTimePay-Override because there was no applicable hourly rate for the pay period reflected in the wage statement. For defendant’s second argument, the trial court found that defendant complied with the “furnish” requirement under section 226 by mailing the wage statement.

III. DISCUSSION

A. Standard of Review

We review an order granting summary judgment de novo. (Coral Construction, Inc. v. City and County of San Francisco (2010) 50 Cal.4th 315, 336, 113 Cal.Rptr.3d 279, 235 P.3d 947.) The trial court’s stated reasons for granting summary judgment are not binding because we review its ruling not its rationale. (Ibid.) In addition, a summary judgment motion is directed to the issues framed by the pleadings. (Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238, 1252, 32 Cal.Rptr.2d 223, 876 P.2d 1022.) These are the only *1269 issues a motion for summary judgment must address. (Conroy v. Regents of University of California (2009) 45 Cal.4th 1244, 1250, 91 Cal.Rptr.3d 532, 203 P.3d 1127.)

B.-C.

D. No Violation for not Providing an Itemized Statement at Time of Termination

Defendant argues it is in compliance with section 226, subdivision (a) because it “furnished” the wage statement to the discharged employee by United States mail. As noted, section 226, subdivision (a) provided, “[e]very employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee’s wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing....” It is undisputed defendant provided some discharged employees with their
As our Supreme Court noted at the time of discharge are due and payable pursuant to the Labor Code, Gov. Code, § 226, subd. (a), “[i]f an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.” 208 “[e]very employee who is discharged shall be paid at the place of discharge.” “Furnish” means to “provide with what is needed,” or to “supply” or “give.” (Merriam-Webster’s Collegiate Dict. (10th ed. 1993) p. 474, col. 1.) Section 226 provides that an employer must furnish the wage statement as either “a detachable part of the check, draft, or voucher paying the employee’s wages,” or separately when the wages are paid by personal check or cash. Other than that one provision, section 226 describes no other specific means by which an employer is to furnish the itemized statement to an employee. Thus, mailing the wage statement is a viable means to “furnish.” Defendant **822 could also furnish the wage statement separately because paying discharged employees by cashier’s check was the equivalent of paying them by cash. However, the Legislature also provided for when an employer was to furnish the wage statement to the employee: “semimonthly or at the time of each payment of wages.”

We first find that for purposes of the Labor Code, “at the time of each payment of wages” for discharged employees means “immediately.” As noted, a discharged employee’s unpaid earned wages are due and payable “immediately.” (§ 201, subd. (a).) When construing section 226 in relation to the Labor Code, the most logical construction of “at the time of each payment of wages” in section 226 for discharged employees is whenever the discharged employee receives his or her unpaid earned wages, which is “immediately.” Because defendant in some instances did not provide wage statements immediately to discharged employees, but rather mailed the statement to the employee’s last known address the same day or the next day, defendant did not furnish the wage statement to these discharged employees “at the time of each payment of wages.”

However, by the plain meaning of the statute, defendant also had the option of furnishing the wage statement semimonthly. (§ 226, subd. (a).) Additionally, nothing in section 226 suggests that an employer cannot furnish the wage statement prior to the semimonthly date. For example, suppose an employer furnishes wage statements on the first and the fifteenth of each month. The employer discharges an employee on the second of the month. Per the statute’s plain language, if an employer pays the final wages by personal check or cash, it has the option of furnishing the discharged employee with the wage statement on the fifteenth. We find it illogical to conclude an employer violates section 226 by furnishing a wage statement before the semimonthly date has been reached. If the employer furnishes the wage statement to the discharged employee on the fifth of the month, the employer has complied with the requirement that it furnish the wage statement to the employee “semimonthly” because the employee would have ostensibly been furnished with the wage statement by the semimonthly date.

For purposes of section 226, if an employer furnishes an employee’s wage statement before or by the semimonthly deadline, the employer is in compliance. Thus, we interpret “semimonthly or at the time of each payment of wages” as representing the outermost deadlines by which an employer is required to furnish the wage statement. Since defendant mailed the wage statement to certain discharged employees paid in-store by the same day as or the next day after termination, defendant was in compliance with section 226 because the employee was “furnished” with the wage statement semimonthly. Defendant has met its initial burden of production. (Code Civ. Proc., § 437c, subd. (p)(2).)

**823 Plaintiffs contend the wage statement must be furnished immediately for a discharged employee. Plaintiffs cite the DLSE Policies and Interpretations Manual (DLSE Manual), section 14.1.1, which provides, “[A] California employer must furnish a statement showing the following information to each employee at the time of payment of wages (or at least semimonthly, whichever occurs first),” and section 14.1.2, which provides, “[S]ection 226 ... sets out the employer’s responsibilities in connection with the wage statement which must accompany the check or cash payment to the employee.”

**151 Plaintiffs have not met their burden. (Code Civ. Proc., § 437c, subd. (p)(2).) There is no evidence in the record that the DLSE adopted this interpretation in accordance with the Administrative Procedure Act (Gov. Code, § 11340 et seq.). Thus, it is the equivalent of a void underground regulation. (Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557, 576-577, 59 Cal.Rptr.2d 186, 927 P.2d 296.) As our Supreme Court held, “when an agency like the DLSE sets forth an interpretive policy in a void underground regulation, the deference that the agency’s interpretation would normally enjoy is absent, but in its place the agency has its power to persuade.” (Alvarado, supra, 4 Cal.5th 542, 559, 229 Cal.Rptr.3d 347, 411 P.3d 528.)

The DLSE’s interpretation is not persuasive. The term “whichever occurs first” is not in section 226. The plain meaning of the statute indicates *1272 the Legislature
specifically intended a choice for employers as to when to furnish the wage statement. There is also no requirement in section 226 that the wage statement “must accompany” the personal check or cash payment to the employee. As noted, the wage statement must be a detachable part of the check, draft, or voucher, unless payment is by personal check or cash; in such instance the wage statement may be furnished separately. (§ 226, subd. (a).) Accordingly, we decline to follow the DLSE’s interpretation.

Plaintiffs cite several cases that purportedly determined that section 226, subdivision (a) requires employers to furnish a wage statement to each employee “at the time wages are paid.” (See Zavala v. Scott Brothers Dairy, Inc. (2006) 143 Cal.App.4th 585, 591, 49 Cal.Rptr.3d 503 (Zavala); Reinhardt v. Gemini Motor Transport (E.D.Cal. 2012) 879 F.Supp.2d 1138, 1141 (Reinhardt); In re Bimbo Bakeries USA FLSA Actions (N.D.Cal. Oct. 24, 2008, No. C 05-00829 JW) 2008 WL 10850153, at *7, 2008 U.S. Dist. Lexis 125068, at *23 (Bimbo Bakeries).) Such statements were dicta as the cases concerned issues unrelated to the one here. (Zavala, supra, 143 Cal.App.4th at pp. 592-593, 49 Cal.Rptr.3d 503 [whether collective bargaining agreement required arbitration of Labor Code claims]; Reinhardt, supra, 879 F.Supp.2d at pp. 1141-1142 [whether plaintiffs sufficiently alleged Labor Code violations were “‘knowing and intentional’” for recovery under § 226, subd. (e)]; Bimbo Bakeries, supra, 2008 WL 10850153, at *7, 2008 U.S. Dist. Lexis 125068, at *24 [whether defendant’s violation was “knowing and intentional” for summary judgment purposes].) They are thus unpersuasive.

Defendant should prevail on this theory. Because there are no triable issues of material fact and defendant is entitled to judgment as a matter of law, summary judgment was properly granted in its favor.

IV. DISPOSITION

The judgment is affirmed. Defendant Wells Fargo Bank, N.A. is entitled to recover its costs on appeal from plaintiffs Fabio Canales and Andy Cortes.

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

All Citations


Footnotes

* Pursuant to California rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts III(B) and III(C).

** Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 Further statutory references are to the Labor Code unless otherwise indicated.

2 All facts are considered undisputed for purposes of summary judgment.

3 Teresa Swanson, defendant’s person most knowledgeable, stated that a nondiscretionary bonus was “given to a team member, based on some sort of preset work definition, goal, something that they have to meet. And then they earn that bonus.” It appears this bonus was a production or piecework bonus.

4 To calculate the amount to be entered on the OverTimePay-Override line: (1) take the bonus earned during the bonus period, whether it be by year, quarter, or month; (2) divide the bonus by the total number of hours worked during the bonus period; (3) multiply the resulting number by 0.5; (4) multiply the resulting number by the total number of overtime hours worked during the bonus period.

Our Supreme Court in a recent decision concerning flat sum bonuses under California law decided that the proper method for calculating the rate of overtime pay when an employee receives both an hourly wage and a flat sum bonus is to divide the bonus by the number of nonovertime hours actually worked during the bonus period. (Alvarado v. Dart
Plaintiffs asserted in their opening brief, without citation to the record, that they never received their wage statements. We will disregard such assertions as meritless. (Susag v. City of Lake Forest (2002) 94 Cal.App.4th 1401, 1416, 115 Cal.Rptr.2d 269.)

At the time of the alleged offenses, section 226, subdivision (a)(9) provided in pertinent part: “(a) Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee’s wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing ... (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee....” (Stats. 2012, ch. 844, § 1.7.) Subdivision (a)(9) was added by the Legislature in 2000. (Stats. 2000, ch. 876, § 6.) Section 226, subdivision (a) was amended by the Legislature in 2016 to read in pertinent part: “An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee’s wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing....” (Stats. 2016, ch. 77, § 1, eff. Jan 1, 2017.) Subdivision (a)(2) was also amended, and subdivision (j) was added. (Ibid.) The 2016 amendment does not substantively affect our opinion.

A third plaintiff, Luciano Gonzales, was initially part of this action. However, Gonzales was not named as a class representative in plaintiffs’ motion for class certification and is not an appellant. The class was certified on March 20, 2015.

Though plaintiffs categorized their motion as one for summary judgment or in the alternative, summary adjudication, plaintiffs sought only summary adjudication as to their first cause of action for violation of section 226.

*** See footnote *, ante.

As argued by defendant, a cashier’s check was the equivalent of paying by cash. (See Gray1 CPB, LLC v. SCC Acquisitions, Inc. (2015) 233 Cal.App.4th 882, 893-894, 896, 182 Cal.Rptr.3d 654 [citing U. Com. Code, § 3310, cashier’s check taken for obligation has same effect as cash].) Plaintiffs argue for the first time in their reply brief that a cashier’s check is not the equivalent of a personal check or cash for purposes of section 226. This issue was not raised in the opening brief nor before the trial court and is therefore waived and forfeited. (Tellez v. Rich Voss Trucking, Inc. (2015) 240 Cal.App.4th 1052, 1066, 193 Cal.Rptr.3d 403; SCI California Funeral Services, Inc. v. Five Bridges Foundation (2012) 203 Cal.App.4th 549, 573, fn. 18, 137 Cal.Rptr.3d 693; Greenwich S.F., LLC v. Wong (2010) 190 Cal.App.4th 739, 767, 118 Cal.Rptr.3d 531.)
236 Cal.Rptr.3d 626, 2018 Wage & Hour Cas.2d (BNA) 274,332...

25 Cal.App.5th 883
Court of Appeal, First District, Division 4, California.

Taryn NISHIKI, Plaintiff and Respondent,

v.

DANKO MEREDITH, APC, Defendant and
Appellant.

A147733
Filed 8/1/2018

Synopsis
Background: Former employer appealed Labor Commissioner’s award of waiting time penalties to former employee for delay in receiving unpaid vacation time. The Superior Court, San Mateo County, No. CIV-533665, Joseph E. Bergeron, J., affirmed and awarded former employee attorney’s fees, and former employer appealed.

Holdings: The Court of Appeal, Schulman, Superior Court Judge sitting by assignment, held that:

[1] as a matter of first impression, 72-hour period to pay did not begin to run when former employee submitted her resignation by e-mail on Friday evening;

[2] employer’s initial error in omitting word “eighty” from spelled-out amount of $2,880.31 in check to former employee for unpaid vacation time was not willful;

[3] employer’s delay in issuing former employee a corrected check entitled former employee to waiting time penalties;

[4] award of attorney’s fees to former employee was not subject to reduction for time attorney spent on unsuccessful claims;

[5] contingency risk supported application of 1.5 multiplier to lodestar amount; and

[6] evidence supported award of $500 hourly rate for attorney.

Reversed and remanded with directions in part; otherwise affirmed.

West Headnotes (41)

[1] Labor and Employment
/payment on termination of employment

Former employer’s 72-hour period to pay unused vacation time to former employee prior to imposition of waiting time penalties did not begin to run when former employee submitted her resignation by e-mail on Friday evening, but rather could not begin to run until former employer read e-mail. Cal. Lab. Code § 202(a).

Cases that cite this headnote

[2] Statutes
/presumptions, inferences, and burden of proof

In interpreting a statute, court presumes that legislative provisions were not intended to produce unreasonable results and adopts a common sense construction over one leading to mischief or absurdity.

Cases that cite this headnote

[3] Labor and Employment
/payment of wages

Intent of statute imposing waiting time penalties for failure to promptly pay a former employee’s wages is to provide an employer a reasonable time to pay an employee who quits without notice. Cal. Lab. Code § 202(a).

Cases that cite this headnote

[4] Labor and Employment
/payment on termination of employment

Cases that cite this headnote
Payment of wages

The purpose of waiting time penalties statute is to compel the prompt payment of earned wages. Cal. Lab. Code § 203.

Cases that cite this headnote

Labor and Employment
Penalties

Statute imposing waiting time penalties for failure to promptly pay wages to a former employee is to be given a reasonable but strict construction. Cal. Lab. Code § 203.

Cases that cite this headnote

Labor and Employment
Payment of wages

Design of statute imposing waiting time penalties for failure to promptly pay wages to a former employee is to protect the employee and to promote the welfare of the community. Cal. Lab. Code § 203.

Cases that cite this headnote

Labor and Employment
Penalties

Statute imposing waiting time penalties for failure to promptly pay a former employee’s wages contemplates that the penalty shall be enforced against an employer who is at fault; it must be shown that he owes the debt and refuses to pay it. Cal. Lab. Code § 203.

Cases that cite this headnote

Labor and Employment
Penalties

A former employer is not denied any legal defense to the validity of a claim for waiting time penalties for the failure to promptly pay wages due to a former employee. Cal. Lab. Code § 203.

Cases that cite this headnote

Labor and Employment
Penalties

To be at fault within the meaning of the waiting time penalties statute, the employer’s refusal to timely pay wages owed to a former employee need not be based on a deliberate evil purpose to defraud the employee of wages which the employer knows to be due. Cal. Lab. Code § 203.

Cases that cite this headnote

Appeal and Error
Wages, hours, and working conditions

Court of Appeal reviews for substantial evidence a finding that a former employer’s failure to timely pay wages due to a former
employee was willful. Cal. Lab. Code § 203.

Cases that cite this headnote

[12] Labor and Employment
Penalties

Former employer’s initial error in omitting word “eighty” from spelled-out amount of $2,880.31 in final check to former employee for unused vacation time was not willful, and thus did not support award of waiting time penalties against former employer; correct amount was entered in numerals on the check, and there was no basis to conclude that check’s omission of word “eighty” was anything other than an inadvertent clerical error. Cal. Lab. Code § 203.

Cases that cite this headnote

[13] Labor and Employment
Penalties

Former employer’s delay in issuing corrected final check to former employee for unused vacation time entitled former employee to waiting time penalties; due to clerical error, initial check was worth $80 less than former employee was owed, but rather that correcting the clerical error immediately when notified of it, either by stopping payment on the original check and issuing a new check for the full amount or by sending an additional check for $80, former employer waited until it received the initial check to issue a new, back-dated check. Cal. Lab. Code § 203.

Cases that cite this headnote

[14] Labor and Employment
Amount of penalties

Waiting time penalties for former employer’s delay in issuing corrected final check to former employee for unused vacation time equaled former employee’s daily wage of $250, rather than $80 amount initial final check underpaid former employee, for each of nine days between time former employer had notice of error in initial check and time former employer sent corrected check. Cal. Lab. Code § 203.

Cases that cite this headnote

[15] Labor and Employment
Administrative powers and proceedings

Labor Code statute providing for attorney’s fees for an appeal from a Labor Commissioner’s wage claim decision is not a prevailing party fee provision; instead it is a one-way fee-shifting scheme that penalizes an unsuccessful party who appeals the Commissioner’s decision. Cal. Lab. Code § 98.2(c).

Cases that cite this headnote

[16] Labor and Employment
Administrative powers and proceedings

Purpose of fee-shifting statute in appeals from Labor Commissioner wage claim decisions is to act as a disincentive to appeal the commissioner’s decision and to discourage unmeritorious appeals of wage claims, thereby reducing the costs and delays of prolonged disputes, by imposing the full costs of litigation on the unsuccessful appellant. Cal. Lab. Code § 98.2(c).

Cases that cite this headnote

[17] Labor and Employment
Administrative powers and proceedings

If an employee fails to pay wages in the amount,
time, or manner required by contract or statute, the employee may seek administrative relief by filing a wage claim with the commissioner or, in the alternative, may seek judicial relief by filing an ordinary civil action for breach of contract and/or for the wages prescribed by statute. Cal. Lab. Code § 98.

Cases that cite this headnote

[18] Labor and Employment
  ➸ Administrative powers and proceedings

The Labor Commissioner considering a wage claim may hold a hearing (known as a “Berman hearing”), which is designed to provide a speedy, informal, and affordable method of resolving wage claims, and to avoid recourse to costly and time-consuming judicial proceedings in all but the most complex of wage claims. Cal. Lab. Code § 98.

Cases that cite this headnote

[19] Labor and Employment
  ➸ Administrative powers and proceedings

After the Labor Commissioner issues a ruling on a wage claim, the parties may seek review by filing an appeal to the superior court, which hears the appeal de novo, granting no weight to the commissioner’s decision. Cal. Lab. Code § 98.2(a).

Cases that cite this headnote

[20] Appeal and Error
  ➸ Attorney Fees
  ➸ Appeal and Error
  ➸ Authorization, eligibility, and entitlement in general; prevailing party

On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion; the trial court’s decision will only be disturbed when there is no substantial evidence to support the trial court’s findings or when there has been a miscarriage of justice.

Cases that cite this headnote

[21] Appeal and Error
  ➸ Attorney Fees
  ➸ Appeal and Error
  ➸ Costs, fees, and sanctions

If the trial court has made no findings regarding an award of attorney’s fees, under the abuse of discretion standard the reviewing court will infer all findings necessary to support the judgment and then examine the record to see if the findings are based on substantial evidence.

Cases that cite this headnote

[22] Appeal and Error
  ➸ Authorization, eligibility, and entitlement in general; prevailing party

De novo review of a trial court order awarding attorney’s fees is warranted where the determination of whether the criteria for an award of attorney fees and costs have been satisfied amounts to statutory construction and a question of law.

Cases that cite this headnote

[23] Costs
  ➸ Items and amount; hours; rate

The general principle is that where a statute allows attorney fees for a prevailing party, a court may reduce attorney fees where a claimant achieves only limited success, and may deny attorney fees for time spent litigating unsuccessful claims.
Award of attorney’s fees to former employee, who prevailed only on waiting time penalties claim, was not subject to reduction for time attorney spent on unsuccessful claims; former employee was successful under the attorney’s fee statute, as she received an amount greater than zero, and it was former employer, rather than former employee, that chose to appeal de novo after suffering only a relatively modest loss before the commissioner, which caused former employee to have to retry the case. Cal. Lab. Code § 98.2.

A wage claimant who achieves only minimal success should be considered successful for purposes of an award of attorney fees. Cal. Lab. Code § 98.2(c).

Labor Code statute shifting attorney’s fees for an unsuccessful appeal of a wage order is designed to penalize appealing employers and employees who turn to the courts after rejecting what, in retrospect, was a reasonable commissioner’s award. Cal. Lab. Code § 98.2.
Contingency risk supported application of 1.5 multiplier to lodestar amount of attorney’s fees in former employee’s action against former employer regarding waiting time penalties after receiving final paycheck for unused vacation time; counsel represented former employee on a contingent basis in former employer’s de novo appeal, and legal representation was of high quality. Cal. Lab. Code § 98.2.

Cases that cite this headnote

[31] Costs
Items and amount; hours; rate

After calculating the “lodestar,” or total attorney hours expended multiplied by a reasonable hourly rate, the court awarding attorney’s fees may adjust the lodestar amount to take account of unique circumstances in the case.

Cases that cite this headnote

[32] Costs
Items and amount; hours; rate

Some factors the court may consider in adjusting the lodestar amount of attorney’s fees include: (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, and (4) the contingent nature of the fee award.

Cases that cite this headnote

[33] Costs
Items and amount; hours; rate

The purpose of adjustment to the lodestar amount of attorney’s fees is to fix a fee at the fair market value for the particular action; in effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services.

Cases that cite this headnote

[34] Costs
Items and amount; hours; rate

The contingency risk factor for adjusting the lodestar amount of attorney’s fees compensates the lawyer not only for the legal services he renders but for the loan of those services; the implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.

Cases that cite this headnote

[35] Costs
Items and amount; hours; rate

For purposes of adjusting the lodestar amount of attorney’s fees, a lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of those functions; if he is paid no more, competent counsel will be reluctant to accept fee award cases.

Cases that cite this headnote

[36] Costs
Items and amount; hours; rate

In determining hourly rates, the court considering an award of attorney’s fees must look to the prevailing market rates in the relevant community; the rates of comparable
attorneys in the forum district are usually used.

Cases that cite this headnote

Costs

Items and amount; hours; rate

In making its calculation of a proper hourly rate, the court awarding attorney’s fees should consider the experience, skill, and reputation of the attorney requesting fees.

Cases that cite this headnote

Costs

Evidence as to items

The court awarding attorney’s fees may rely on its own knowledge and familiarity with the legal market in setting a reasonable hourly rate.

Cases that cite this headnote

Appeal and Error

Items and amount; hours and rates

Costs

Evidence as to items

The experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will be not disturbed unless the appellate court is convinced that it is clearly wrong.

Cases that cite this headnote

Labor and Employment

Administrative powers and proceedings

Former employee was entitled to attorney fees she incurred in connection with former employer’s appeal of trial court’s award of waiting time penalties, even though award was reduced. Cal. Lab. Code § 98.2.


Cases that cite this headnote

Labor and Employment

Administrative powers and proceedings

Evidence supported award of $500 hourly rate for attorney who represented former employee in action seeking waiting time penalties for failure to timely pay unpaid vacation time, where counsel had nearly two decades of experience, court commented that case involved “Two good lawyers going at it,” and there was evidence of market rate in the area and of fee awards in various decisions. Cal. Lab. Code § 98.2.

Cases that cite this headnote

**630** San Mateo County Superior Court, No. CIV-533665, Joseph E. Bergeron, Judge. (San Mateo County Super. Ct. No. CIV533665)

Attorneys and Law Firms

Law Offices of David Lyon and David E. Lyon, Emeryville, for Plaintiff and Respondent.

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Opinion

Schulman, J.
*887 When an employee resigns without notice, California law requires the employer to pay all wages within 72 hours. (Lab. Code § 202, subd. (a).) If the employer willfully fails to do so, the employee’s wages continue as a penalty from that date **631 date until the wages are paid, for up to 30 days. (§ 203.) This case considers an award of these “waiting time” penalties, as well as an award of attorney fees to the employee for the employer’s unsuccessful appeal. (§ 98.2.)

*888 Taryn Nishiki, a former employee of defendant Danko Meredith P.C., filed a complaint with the California Labor Commissioner (the commissioner) seeking vacation wages, rest period premiums, and waiting time penalties. She prevailed on her claim for waiting time penalties, and was awarded $4,250. Defendant appealed the award to the superior court, which affirmed the commissioner’s award, and awarded Nishiki $86,160 in attorney fees. On appeal, defendant contends the waiting time penalties are unwarranted and the attorney fee award was excessive. We shall reduce the waiting time penalties and otherwise affirm the judgment.

I. BACKGROUND

The pertinent facts are largely undisputed. Nishiki worked for defendant, a law firm, as office manager and paralegal. She resigned by sending an email to defendant’s two partners, Danko and Meredith, at 6:38 p.m. on Friday, November 14, 2014. In the email, she noted that her unused vacation time “needs to be paid within 72 hours of my notice of resignation.” She sent a copy of the email to Sharman Blood, defendant’s bookkeeper, and Blood sent an email about Nishiki’s resignation to both partners at 9:08 a.m. on Saturday, November 15.

At the time Nishiki resigned, she was owed $2,880.31 for her unused vacation time. Defendant mailed her a handwritten check on Tuesday, November 18. The check, signed by Meredith, had an inconsistency: the amount in numerals in the dollar amount box was “2,880.31,” the correct amount; however, the amount as spelled out was “Two thousand eight hundred and 31/100,” or $80 less than the correct amount.

On Wednesday, November 26, at 9:46 a.m., Nishiki sent an email to Meredith telling her she had been unable to deposit the check because of the inconsistency between the numerical and written amounts, and asserting she was therefore entitled to waiting time penalties. Just after midnight on Thursday, November 27—Thanksgiving Day—Meredith responded in an email, “No check has been refused or returned so we are unable to confirm it was not honored upon presentation to the bank.” Nishiki responded that she had taken the check to the bank, but that the bank could not accept it because of the discrepancy. On Monday, December 1, Meredith sent an email in response: “Notwithstanding what your bank told you, the check you were sent is negotiable. If you would like to return the check to the office, we will issue you a new one. If you wish to keep the check, we’ll issue a second check for $80. We can mail the check or you can pick it up at the office. Let me know what you want to do.” Nishiki replied that the bank was not able to accept a check with two different amounts on it, and said she was out of state but had mailed the check to defendant. Defendant mailed a corrected check for $2,880.31 to Nishiki on Friday, December 5, 2014.

Nishiki filed a complaint with the commissioner. She sought (1) unpaid vacation wages of $366.88; (2) rest period premiums of $23,718.75; and (3) waiting time penalties for the delay in receiving the $2,880.31 check, in the amount of $7,500, calculated as 30 days at the rate of $250 per day.

The hearing officer rejected Nishiki’s first two claims for relief. He found Nishiki had been paid for all of her accrued vacation time and that she had not been denied rest periods. As to her waiting time claim—that is, for the time between her resignation and when she received the corrected check—the hearing officer found she was entitled to the penalties for the time between November 18, 2014 and December 5, 2014, and thus awarded her $4,250, or her $250 average daily wage times 17 days.

Defendant appealed the award to the superior court. (§ 98.2.) After a trial de novo, the court found Nishiki was entitled to 17 days of waiting time penalties, and was awarded $4,250. She prevailed on her claim for waiting time penalties and otherwise affirm the judgment.
A. Waiting Time Penalties

Defendant contends Nishiki is not entitled to waiting time penalties. Section 202, subdivision (a) provides in pertinent part: “If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.” Section 203, subdivision (a) establishes the waiting time penalties: “If an employer willfully fails to pay, without abatement or reduction, in accordance with Section[ ] ... 202 ..., any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.”

[1] [2] Defendant’s first contention is that the 72-hour period for paying wages did not begin to run at 6:38 p.m.—that is, after the close of *890 business—on Friday, November 14, 2014, but rather at the beginning of business hours on Monday, November 17. The parties have not cited any authority considering whether the 72 hours begins to run immediately if the manner in which the employee resigns does not ensure that the employer would actually receive the notice until business opens on a later day, and our own research has disclosed none. In considering this issue, however, we are guided by the rule that in interpreting a statute, “[w]e presume that ... legislative provisions were intended to produce unreasonable results and adopt a common sense construction over one leading to mischief or absurdity.” (In re Samano (1995) 31 Cal.App.4th 984, 989, 37 Cal.Rptr.2d 491.)

[3] The construction of section 202 Nishiki urges, under which the time begins to run as soon as she submits her resignation, regardless of whether her employer actually receives the notice of resignation, falls afool of this rule. There is no evidence her employers were working or reading their business email after business hours on Friday, November 14, and thus no basis to conclude they actually received her resignation on that date. If Nishiki’s position is correct, her accrued wages were due on Monday, May 18—the first business day after her after-hours email. The result would be that, rather than having 72 hours to calculate and pay Nishiki’s wages, defendant might have only the length of a **633 single work day. This result contravenes the statute’s clear intent to provide an employer a reasonable time to pay an employee who quits without notice.6 We conclude, therefore, that the 72 hours did not begin to run when Nishiki sent her email. We need not decide whether it commenced on Saturday, November 15, by which time defendant’s bookkeeper had read her resignation email, or at the start of business on Monday, November 17. Based on either of these dates, the November 18, 2014 check was timely.

As we have discussed, however, the amount stated in numerals on the check was correct, but the amount as written out in words was eighty dollars less than the amount owed to Nishiki. Defendant contends the evidence shows that the discrepancy in the check was not willful for purposes of section 203, and therefore argues waiting time penalties are unwarranted.

*891 [4] [5] [6] [7] [8] [9] [10]—The purpose of section 203 is to compel the prompt payment of earned wages; the section is to be given a reasonable but strict construction. [Citation.] ... [The] statute should have reasonable construction. Its design is to protect the employee and to promote the welfare of the community .... But it is to be observed that the most formidable objection to the statute derives its principal force from the supposed hardships of a hypothetical case wherein the employer is without fault or the employee is guilty of culpable conduct. The statute ... contemplates that the penalty shall be enforced against an employer who is at fault. It must be shown that he owes the debt and refuses to pay it. He is not denied any legal defense to the validity of the claim.’ [¶] However, to be at fault within the meaning of the statute, the employer’s refusal to pay need not be based on a deliberate evil purpose to defraud [employees] of wages which the employer knows to be due. As used in section 203, ‘willful’ merely means that the employer intentionally failed or refused to perform an act which was required to be done.” (Barnhill v. Robert Saunders & Co. (1981) 125 Cal.App.3d 1, 7, 177 Cal.Rptr. 803.) Similarly, in Davis v. Morris (1940) 37 Cal.App.2d 269, 274, 99 P.2d 345 (Davis ), the court explained, “ ‘In civil cases the word “willful” as ordinarily used in courts of law, does not necessarily imply anything blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: “That the person knows what he is doing, intends to do what he is doing, and is a free agent.” ’ ”

[11] Applying this principle, the Court of Appeal in Gonzalez v. Downtown LA Motors, LP (2013) 215 Cal.App.4th 36, 55, 155 Cal.Rptr.3d 18 (Gonzalez ), concluded an employer’s actions were properly found willful where it did not follow its policy of supplementing its employee’s pay when compensation for piece-rate
work fell below the minimum wage floor. In *Davis*, the appellate court concluded there was evidence to support the trial court’s determination **634** that the defendants did not act in good faith in claiming that wages were not due, and hence that the defendants willfully failed to pay the wages. (*Davis, supra, 37 Cal.App.2d at p. 274, 99 P.2d 345.*) We review a finding of willfulness under section 203 for substantial evidence. (*Gonzalez, supra, 215 Cal.App.4th at p. 54, 155 Cal.Rptr.3d 18.*)

[12]Nothing in the record supports a conclusion that defendant knew or intended to do what it was doing when someone wrote two different amounts on the check. * The attachment to the check shows the gross amount of vacation pay due to Nishiki was $4,500, and it reflected deductions for state *892* and federal taxes totaling $1,619.69. The remaining amount was $2,880.31, and this was the amount entered in numerals on the check. There is no basis to conclude the omission of the word “eighty” in the spelled-out amount was anything other than an inadvertent clerical error. In the circumstances, we conclude the initial error may not properly be treated as “willful” for purposes of an award of waiting time penalties under section 203. (See *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 84, 120 Cal.Rptr.3d 363 [“Like inadvertence, clerical error denotes behavior that is accidental, not deliberate”]; *Cleveland v. Groceryworks.com, LLC* (N.D. Cal. 2016) 200 F.Supp.3d 924, 959–960 [Where an employer’s failure to pay wages to an employee when those wages are due is a result of a “mistake,” it is not willful].)

[13]We must next consider the effect of the delay in sending Nishiki a corrected check. Nishiki told Meredith by email on the morning of Wednesday, November 26, 2014, that she had been unable to deposit the check because of the discrepancy. Meredith sent an email on Monday, December 1, telling Nishiki the check was negotiable, and offering either to issue a second check for $80 or to send a new check for the correct amount if Nishiki returned the original check.

**635** California law provides that, “If an instrument contains contradictory terms, typewritten terms prevail over printed terms, handwritten terms prevail over both, and words prevail over numbers.” (Cal. U. Com. Code, § 3114, italics added.) The check, therefore, was worth eighty dollars less than the amount defendant calculated Nishiki was owed. Rather that correcting the clerical error immediately when notified of it, either by stopping payment on the original check and issuing a new check for the full amount or by sending an additional check for $80, defendant waited until Friday, December 5—apparently after receiving the original check—to issue a new check, back-dated to *893* November 18. In doing so, defendant violated its statutory obligation to pay wages promptly. We conclude Nishiki was entitled to waiting time penalties for the period between November 26, when defendant had notice of the error, and December 5, when it sent the corrected check, for a total of nine days.*

[14]Defendant contends that, if waiting time penalties are proper, the proper measure is $80 per day, that is, the amount of the underpayment, rather than the amount of Nishiki’s daily wage. We disagree. Section 203 provides that if an employer willfully fails to pay the wages of an employee who is discharged or who quits, “the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid.” This provision has been interpreted to mean the penalty is an amount “equal to the employee’s daily wages for each day ... that the wages are unpaid.” (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377, 36 Cal.Rptr.3d 31; accord *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493, 80 Cal.Rptr.2d 175 [“A proper reading of section 203 mandates a penalty equivalent to the employee’s daily wages for each day he or she remained unpaid up to a total of 30 days.”].) There appears to be no dispute that Nishiki’s daily wage was $250. The proper waiting time penalty for nine days was therefore $2,250.

### B. Attorney Fees

Defendant also challenges the trial court’s award of attorney fees. Nishiki requested fees for 121.2 hours, at a rate of $500 per hour, multiplied by 1.5, for a total requested award of $90,900. This request included all hours her counsel had spent on the court case. The court granted the motion and awarded fees of $86,160. *

[15,16]Section 98.2, subdivision (c) provides: “If the party seeking review by filing an appeal to the superior court is unsuccessful in the appeal, the court shall determine the costs and reasonable attorney’s fees incurred by the other *894* parties to the appeal, and assess that amount as a cost upon the party filing the appeal. *An **636* employee is successful if the court awards an amount greater than zero.*” (§ 98.2, subd. (c), italics added.) This statute “is not a prevailing party fee provision, instead it is a one-way fee-shifting scheme that penalizes an unsuccessful party who appeals the commissioner’s decision.” (*Arias v. Kardoulis* (2012) 207 Cal.App.4th 1429, 1435, 144 Cal.Rptr.3d 599 (*Arias*).) Its purpose is to “act[ ] as a...
disincentive to appeal the commissioner’s decision” (id. at p. 1438, 144 Cal.Rptr.3d 599) and to “‘discourag[e] unmeritorious appeals of wage claims, thereby reducing the costs and delays of prolonged disputes, by imposing the full costs of litigation on the unsuccessful appellant.’” (Post v. Palo/Huklar & Associates (2000) 23 Cal.4th 942, 946, 98 Cal.Rptr.2d 671, 4 P.3d 928.) The commissioner may hold a hearing (known as a “Berman hearing”), which is “‘designed to provide a speedy, informal, and affordable method of resolving wage claims,’” and to “‘avoid recourse to costly and time-consuming judicial proceedings in all but the most complex of wage claims.’” (Id. at pp. 946–947, 98 Cal.Rptr.2d 671, 4 P.3d 928.) After the commissioner issues a ruling, the parties may seek review by filing an appeal to the superior court, which hears the appeal de novo, granting no weight to the commissioner’s decision. (Id. at pp. 947–948, 98 Cal.Rptr.2d 671, 4 P.3d 928; § 98, subd. (a).)

The issue in Arias, supra, 207 Cal.App.4th 1429, 144 Cal.Rptr.3d 599, was whether a party who obtained a dismissal of an appeal from the commissioner’s decision on jurisdictional grounds was entitled to attorney fees. The court noted that in other statutory contexts, such as contractual attorney fees (Civ. Code, § 1717), a prevailing party had been awarded attorney fees after obtaining a dismissal on procedural grounds. (Arias, supra, 207 Cal.App.4th at pp. 1437–1438, 144 Cal.Rptr.3d 599.) The court continued, “But adopting the interpretation of conventional, prevailing party cases would ignore the statutory context and misapprehend the legislative purpose in enacting the attorney fees provision in section 98.2, subdivision (c)—that is, the purpose of providing a disincentive to appeal the commissioner’s decision. (Id. at p. 1438, 144 Cal.Rptr.3d 599.) Noting that the dismissal of the appeal was not the equivalent of a determination that the *employee was entitled to “zero,” the court concluded, “In light of the statutory language, the legislative purpose of the one-way fee-shifting provision, and the amendment to favor employees, we hold that section 98.2, subdivision (c) does not become operative against an employee unless the employee has a new trial in the superior court on the wage claim,” and that the trial court had erred in assessing fees and costs against the employee. ( **637 Id. at pp. 1438–1439, 144 Cal.Rptr.3d 599.)”

“On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion.” (Conservatorship of Whiteley (2010) 50 Cal.4th 1206, 1213, 117 Cal.Rptr.3d 342, 241 P.3d 840.) However, “[d]e novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.” (Conservatorship of Whiteley, supra, 50 Cal.4th at p. 1213, 117 Cal.Rptr.3d 342, 241 P.3d 840.)

With these principles in mind, we consider first defendant’s contention that the trial court erred in awarding Nishiki all of her attorney fees, rather than reducing them to account for the fact that she did not prevail on two of her claims. Defendant relies on the general principle that where a statute allows attorney fees for a prevailing party, a court may reduce attorney fees where a claimant achieves only limited success, and may deny attorney fees for time spent litigating unsuccessful claims. (See Chavez v. City of Los Angeles (2010) 47 Cal.4th 970, 989–990, 104 Cal.Rptr.3d 710, 224 P.3d 41 (Chavez); *896 Harman v. City and County of San Francisco (2006) 136 Cal.App.4th 1279, 1311–1312, 39 Cal.Rptr.3d 589 (Harman); Mann v. Quality Old Time Service, Inc. (2006) 139 Cal.App.4th 328, 342–344, 42 Cal.Rptr.3d 607 (Mann); Hensley v. Eckerhart (1983) 461 U.S. 424, 440, 103 S.Ct. 1933, 76 L.Ed.2d 40 (Hensley).)

Defendant’s reliance on this principle is unavailing. The authorities on which it relies were “conventional, prevailing party” cases (Arias, supra, 207 Cal.App.4th at p. 1438, 144 Cal.Rptr.3d 599), considering statutes that
authorized an award of attorney fees to the prevailing party. ([Chavez, supra, 47 Cal.4th at pp. 982, 984, 104 Cal.Rptr.3d 710, 224 P.3d 41] [Code Civ. Proc., § 1033, subd. (a), Gov. Code, § 12965, subd. (b)]; [Harman, supra, 136 Cal.App.4th at pp. 1306–1307, 39 Cal.Rptr.3d 589 [42 U.S.C. § 1988]; Mann, supra, 139 Cal.App.4th at p. 344, 42 Cal.Rptr.3d 607 [Code Civ. Proc., § 425.16, subd. (c)]; [Hensley, supra, 461 U.S. at p. 440, 103 S.Ct. 1933 [42 U.S.C. § 1988].]) **638 They did not implicate the legislative intent in enacting section 98.2—a one-way provision allowing attorney fees only against a party who appeals an administrative award, in order to discourage such trial court actions. Moreover, the statute explicitly provides that “[a]n employee is successful if the court awards an amount greater than zero.” (§ 98.2, subd. (c).) The Legislature thus made clear that a claimant who achieves only minimal success should be considered successful for purposes of an award of attorney fees. (See [Lolley v. Campbell, supra, 28 Cal.4th at p. 376, 121 Cal.Rptr.2d 571, 48 P.3d 1128 (“Our construction of section 98.2, subdivision (c) serves the legislative purpose of discouraging unmeritorious appeals of wage claims, thereby reducing the costs and delays of prolonged disputes, by imposing the full costs of litigation on the unsuccessful appellant.”)].)

[26] Moreover, it warrants emphasis that it was defendant, not Nishiki, that chose to appeal and seek a trial de novo after suffering only a relatively modest loss before the commissioner, having defeated two other claims for which Nishiki sought considerably higher damages. If Nishiki consequently was required to incur substantial attorney fees to retry the entire case, including issues on which she did not prevail before the commissioner, defendant has only itself to blame. (See [Arneson v. Royal Pacific Funding Corp., supra, 239 Cal.App.4th at p. 1279, fn. 5, 191 Cal.Rptr.3d 687] “[s]ection 98.2 is designed to penalize appealing employers and employees who turn to the courts after rejecting what, in retrospect, was a reasonable commissioner’s award.’”]; [Stratton v. Beck, supra, 9 Cal.App.5th at p. 497, 215 Cal.Rptr.3d 150 [affirming $31,265 fee award, rejecting contention it was “grossly disproportionate to the ‘disputed wage claim in this case [of] $303.50’”]; [Eicher v. Advanced Business Integrators, Inc. (2007) 151 Cal.App.4th 1363, 1382, 61 Cal.Rptr.3d 114] “[In many cases, an employee’s attorney’s fees in a trial de novo will exceed his or her wage recovery.”].) Under the circumstances before us, the trial court did not act improperly in declining to reduce the fee award to reflect the issues on which Nishiki was unsuccessful. To the extent that *897 defendant’s specific challenges to the attorney fee award rest on Nishiki’s limited success, we reject them.**

[27] [28] We also reject defendant’s other challenges to the fee award. We bear in mind that, “[w]ith respect to the amount of fees awarded, there is no question our review must be highly deferential to the views of the trial court.” [Citation.] As our high court has repeatedly stated, ‘ ‘[t]he “experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong’”—meaning that it abused its discretion.’ ” [Citations.] ([Children’s Hospital & Medical Center v. Bontà (2002) 97 Cal.App.4th 740, 777, 118 Cal.Rptr.2d 629.])

[29] Defendant contends the billing statements are “suspect” because some of them must reflect work done in connection with the administrative hearing, for which attorney fees are not available. ([Samspson v. Parking Service 2000 Com., Inc. (2004) 117 Cal.App.4th 212, 228–230, 11 Cal.Rptr.3d 595.] This is simply speculation, **639 and it is not borne out by the billing statements submitted in support of the attorney fee motion, which show only time spent after the commissioner’s decision had been issued.

[30] [31] [32] [33] [34] [35] We are likewise unpersuaded that the trial court abused its discretion by applying a 1.5 multiplier. After calculating the “lodestar,” or total attorney hours expended multiplied by a reasonable hourly rate, the court may “adjust the lodestar amount to take account of unique circumstances in the case.” [Citations.] Some factors the court may consider in adjusting the lodestar include: ‘(1) the novelty and difficulty of the questions involved, (2) the skill displayed by the attorneys, [and] (4) the contingent nature of the fee award.’ [Citation.] ‘The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services.’ [Citation.]” ([Amaral, supra, 163 Cal.App.4th at p. 1216, 78 Cal.Rptr.3d 572.]) Of these factors, one of the most common fee enhancers is for contingency risk. ([Graham v. DaimlerChrysler Corp. (2004) 34 Cal.4th 553, 579, 21 Cal.Rptr.3d 331, 101 P.3d 140.] This factor “ ‘compensates the lawyer not only for the legal services he renders but for the loan of those services. The *898 implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.”’ [Citation.]
“A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of those functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.” [Citation.]

(Id. at p. 580, 21 Cal.Rptr.3d 331, 101 P.3d 140; see also Center for Biological Diversity v. County of San Bernardino (2010) 185 Cal.App.4th 866, 900, 111 Cal.Rptr.3d 374 [upholding 1.5 multiplier that was based primarily on contingent risk]; Bernardi v. County of Monterey (2008) 167 Cal.App.4th 1379, 1399, 84 Cal.Rptr.3d 754 [upholding “modest” 1.25 multiplier for contingent risk and delay in obtaining payment, as well as unique issues].) Here, Nishiki’s counsel represented her on a contingent basis in the appeal, and the trial court noted the high quality of the legal representation on both sides. We see no abuse of discretion in applying a 1.5 multiplier to the award.

Finally, we reject defendant’s challenge to the hourly rate of $500. “In determining hourly rates, the court must look to the ‘prevailing market rates in the relevant community.’ [Citation.] The rates of comparable attorneys in the forum district are usually used. [Citation.] In making its calculation, the court should also consider the experience, skill, and reputation of the attorney requesting fees. [Citation.] The court may rely on its own knowledge and familiarity with the legal market in setting a reasonable hourly rate. [Citation.]” (640 Heritage Pacific Financial, LLC v. Monroy (2013) 215 Cal.App.4th 972, 1009, 156 Cal.Rptr.3d 26.) “The courts repeatedly have stated that the trial court is in the best position to value the services rendered by the attorneys in his or her courtroom [citation], and this includes the determination of the hourly rate that will be used in the lodestar calculus.” (569 East County Boulevard LLC v. Backcountry Against the Dump, Inc. (2016) 6 Cal.App.5th 426, 437, 212 Cal.Rptr.3d 304; see also PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084, 1096, 95 Cal.Rptr.2d 198, 997 P.2d 511 (“The value of legal services performed in a case is a matter in which the trial court enjoys expert testimony.”).) “The ‘experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will be not disturbed unless the appellate court is convinced that it is clearly wrong.” [Citation.]

In support of Nishiki’s request for attorney fee, her counsel submitted a declaration stating he had a bachelor’s degree from Stanford University and a J.D. degree from the University of Chicago Law School; that he had been practicing law in San Francisco since 1987; and that he had worked as an associate at two law firms, Jackson, Tufts, Cole & Black and Keker & Van Nest. Nishiki also submitted evidence that Danko had brought a previous lawsuit against a former employer seeking wages owed (the O’Reilly litigation), in which he sought and was awarded attorney fees. The 2012 declaration of Danko’s attorney in the O’Reilly litigation, James M. Wagstaffe, indicated that his then-current hourly rate of $650 was below the market rate in San Francisco; that another partner at his firm, a 1995 law school graduate, had a current hourly rate of $525, which was below the local market rate; and that an attorney who had been practicing law since 2008 had a regular hourly rate of $300, which was below the market rate; and that the hourly rate of another associate was $400. In her memorandum of points and authorities in support of the motion for attorney fees, Nishiki also pointed to attorney fee awards found in various legal decisions. (See, e.g., Prison Legal News v. Schwarzenegger (9th Cir. 2010) 608 F.3d 446, 455 [hourly rates between $325 for associates and $875 per hour for attorneys involved in federal civil litigation in Northern District of California].) Defendant contends this evidence is insufficient to support the $500 hourly rate awarded by the trial court.

We are not persuaded that the trial court’s award was “‘clearly wrong.’” (Ketchum v. Moses, supra, 24 Cal.4th at p. 1132, 104 Cal.Rptr.2d 377, 17 P.3d 735.) Defendant contends the hourly rates charged by Danko’s counsel in the O’Reilly litigation do not support the award because there is no showing that litigation and the present case involve similar types of legal work. However, they both involved claims for wages under the Labor Code. In any case, Nishiki’s counsel had nearly two decades of experience. The judge who made the award presided over the trial and commented that it involved “[t]wo good lawyers going at it hammer and tong.” As we have noted, a trial court has its own expertise in the value of legal services performed in a case (PLCM Group, Inc. v. Drexler, supra, 22 Cal.4th at 1096, 95 Cal.Rptr.2d 198, 997 P.2d 511; 569 East County Boulevard LLC v. Backcountry Against the Dump, Inc., supra, 6 Cal.App.5th at p. 437, 212 Cal.Rptr.3d 304) and it may rely on its own familiarity with the local legal market in setting the hourly rate (641 Heritage Pacific Financial, LLC v. Monroy, supra, 215 Cal.App.4th at p. 1009, 156 Cal.Rptr.3d 26.) Defendant has not shown the trial court abused its discretion in setting the hourly rate. (See Stratton v. Beck, supra, 9 Cal.App.5th at p. 496, 215 Cal.Rptr.3d 150 [no abuse of discretion in setting hourly rate of $450, which was supported by substantial experience].)
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[41]Nishiki argues she is also entitled to the attorney fees she incurred in this appeal. We agree. (Eicher v. Advanced Business Integrators, Inc., supra, 151 Cal.App.4th at p. 1384, 61 Cal.Rptr.3d 114, citing *900 Morcos v. Board of Retirement (1990) 51 Cal.3d 924, 927, 275 Cal.Rptr. 187, 800 P.2d 543 [attorney fees authorized by statute include fees on appeal].)

III. DISPOSITION

The judgment is reversed with directions. On remand, the trial court shall enter a new judgment reducing the waiting time penalty from $4,250 to $2,250. In all other respects, the judgment is affirmed. On remand, the trial court shall award attorney fees for the appeal in an amount to be determined by the trial court. Nishiki shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

We concur:
Streeter, Acting P.J.
Reardon, J.

All Citations

Footnotes

¹ Judge of the Superior Court of California, City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

All undesignated statutory references are to the Labor Code.

2 For ease of reference, we shall refer to Danko Meredith, P.C. as “defendant,” and shall refer to the two partners, Michael Danko and Kristine Meredith as “Danko” and “Meredith,” respectively.

3 Indeed, as defendant points out, under Nishiki’s construction, if an employee resigned after hours on a Friday before a three-day holiday weekend, the employer would be unable to comply with the 72-hour deadline.

4 That intent is implicit in section 202, and is made explicit in another section, which provides that an employer who lays off employees engaged in oil drilling shall be deemed to have made immediate payment of earned and unpaid wages “if the wages of such employees are paid within such reasonable time as may be necessary for computation or payment thereof; provided, however, that such reasonable time shall not exceed 24 hours after discharge excluding Saturdays, Sundays, and holidays ....” (§ 201.7, italics added).

5 A good faith dispute about whether any wages are due precludes imposition of waiting time penalties. (Cal. Code Regs., tit. 8, § 13520; Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1201, 78 Cal.Rptr.3d 572 (Amaral ).) No such dispute was involved here.

6 At the court trial of this matter, the parties presented testimony on the issue of whether Nishiki was deprived of rest breaks. At the end of the day, the court asked the parties when they could return to try “the second issue,” i.e., the issue of waiting time penalties. Because Nishiki had family obligations elsewhere, the court suggested the parties stipulate to the pertinent facts. Defense counsel indicated he would like to present testimony on “the intent in sending the check,” and the court replied, “It’s not like it’s a general intent crime. And that is you don’t have to intend to cause injury. You just failed to do something that you should have. Intent is not there.” The court then gave the parties the opportunity to submit additional briefing on the issue. Its written ruling stated simply, “The Court finds for Plaintiff on the issue of Waiting Time Penalty. Plaintiff is entitled to 17 days waiting time penalties.”

7 We find some support for this conclusion in another provision of the Labor Code. Section 203.1 provides that an employer who pays wages (including wages due under section 202) by a check that is refused payment because drawn on a nonexistent bank account or an account with insufficient funds may be liable for a penalty of up to 30 days’ wages and fringe benefits, so long as the check was presented within 30 days after receipt. (§ 203.1.) However, “this
penalty shall not apply if the employer can establish to the satisfaction of the Labor Commissioner or an appropriate court of law that the violation of this section was unintentional." (Ibid.) By enacting this statute, the Legislature intended employers "to be spared the payment of penalty wages in instances of innocent and excusable error." (People v. Hampton (1965) 236 Cal.App.2d 795, 803, 46 Cal.Rptr. 338.)

Defendant suggests Nishiki "intentionally and manipulatively caused" the delay because she notified defendants of the problem with the check the day before Thanksgiving, "thus effectively preventing the problem from being corrected until five days later on December 1," and that she should be equitably estopped from profiting from this "wrongdoing." (See Battuello v. Battuello (1998) 64 Cal.App.4th 842, 847–848, 75 Cal.Rptr.2d 548 ["no man will be permitted to profit from his own wrongdoing in a court of justice"]). There is nothing but speculation to suggest Nishiki was acting in bad faith when she informed defendants of the discrepancy the day before Thanksgiving, and there is no basis to apply the doctrine of equitable estoppel.

At the hearing on the attorney fee motion, the court stated it would award fees of "[$]60,600 times 1.5." The written order reflects an award of $57,440, with a multiplier of 1.5, for a total of $86,160. Despite the minor deduction, there seems to be no dispute that the court awarded fees for all hours counsel spent.

The amendment referred to was the addition of the following sentence to section 98.2, subdivision (c): "An employee is successful if the court awards an amount greater than zero." (Stats. 2003, ch. 93, § 2 (c), p. 791; see Sonic-Calabasas A., Inc. v. Moreno (2011) 51 Cal.4th 659, 673, fn. 2, 121 Cal.Rptr.3d 58, 247 P.3d 130, cert. granted, judg. vacated and cause remanded (2011) 565 U.S. 973, 132 S.Ct. 496, 181 L.Ed.2d 343; Sonic-Calabasas A., Inc. v Moreno (2013) 57 Cal.4th 1109, 1161, 163 Cal.Rptr.3d 269, 311 P.3d 184.) This amendment superseded our Supreme Court's holding in Smith v. Rae-Venter Law Group (2002) 29 Cal.4th 345, 370, 127 Cal.Rptr.2d 516, 58 P.3d 367, which held that "whether an employer or employee elects a trial de novo after the commissioner issues a decision and award, that party is 'unsuccessful in the appeal,' and thereby liable for the other party's fees and costs, unless the resulting trial court judgment is more favorable to the appealing party than was the administrative award from which the appeal was taken." Under the new provision, "an employee was still successful in the appeal even if the employee ended up with a reduced award—as long as it was not zero." (Arneson v. Royal Pacific Funding Corp. (2015) 239 Cal.App.4th 1275, 1279, 191 Cal.Rptr.3d 687.)

These challenges include the contentions that the fee award is exorbitant because the "sole successful claim was extraordinarily simple," that it is not possible to distinguish in counsel's billing statements time spent on the successful and unsuccessful claims, and that the award bears no reasonable relation to Nishiki's degree of success.

The declaration of Nishiki's counsel stated, "I agreed to represent Plaintiff Taryn Nishiki on a contingency basis for her appeal of this matter." Defendant argues that, since defendant rather than Nishiki appealed the commissioner's decision, the declaration does not show that counsel represented her in defendant's appeal of the decision. We reject this flyspecking argument.
Synopsis

**Background:** Employees brought wage and hour class action against employer. Following bench trial, the Superior Court, Los Angeles County, No. BC460298, Mel Red Recana, J., entered judgment in employees’ favor and subsequently awarded attorney fees. Employer appealed.

**Holdings:** The Court of Appeal, Rubin, J., held that:

1. Substantial evidence supported ruling that employer was liable for adoption of alternative workweek schedule (AWS);
2. Employees had burden of proof on their claim for overtime wages for half hour paid meal breaks;
3. Sufficient evidence supported finding that employer lacked good faith dispute under AWS;
4. Substantial evidence supported award of waiting time damages;
5. As matter of first impression, employees were not entitled to penalties for inaccurate wage statements; and
6. Trial court, on remand, was required to reduce employees’ award of attorney fees.

Affirmed in part, reversed in part, and remanded.

West Headnotes (14)

1. **Labor and Employment**
   - **Work week**

   Substantial evidence supported trial court ruling that employer was liable for adoption of alternative workweek schedule (AWS) in which employees worked 12-hour shifts and for which they were paid regular time for the first 10 hours and overtime for the last two hours, where employer failed to present any evidence regarding requisite vote to adopt AWS. Cal. Lab. Code § 510.

2. **Labor and Employment**
   - **Exemptions**

   Assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore, employer bears burden of proving the employee’s exemption.

3. **Labor and Employment**
   - **Working time**
   - **Labor and Employment**
   - **Working time**

   Employees had burden of proof on their claim for overtime wages for half hour paid meal breaks in wage and hour class action regarding alternative workweek schedule (AWS), and thus employees could not recover additional overtime premium, where employees made no effort to affirmatively establish amount of time they worked over and above 11.5 hours employer conceded. Cal. Lab. Code §§ 203, 512.
As a general rule, employees have the burden of proving that they performed work for which they were not compensated.

Employees need not prove that they performed work for which they were not compensated with perfect exactitude when the employer’s time records are inaccurate or inadequate.

The regulation providing that a good faith dispute that any wages are due will preclude imposition of waiting time penalties against the employer imposes an objective standard. Cal. Lab. Code § 203(a); Cal. Code Regs. tit. 8, § 13520.

For purposes of disputing that any wages are due, the issue of good faith is an issue of fact reviewed for substantial evidence. Cal. Lab. Code § 203(a); Cal. Code Regs. tit. 8, § 13520.
notice of the AWS and meetings discussing it, and employees were not given opportunity to freely exercise their vote. Cal. Lab. Code § 203(a); Cal. Code Regs. tit. 8, § 13520.

Cases that cite this headnote

Substantial evidence supported trial court’s award of waiting time damages in wage and hour class action regarding alternative workweek schedule (AWS), although employees subsequently fired expert who provided damages calculations, which were admitted with no objections. Cal. Lab. Code § 203.

Cases that cite this headnote

Employees were not entitled to penalties for inaccurate wage statements in wage and hour class action regarding alternative workweek schedule (AWS), although AWS was improperly adopted and led to employer’s failure to pay overtime at appropriate rate, where statements were accurate in that they correctly reflected hours worked and pay received, and employees failed to establish injury flowing from inaccuracies beyond improper adoption of AWS. Cal. Lab. Code § 226.

Cases that cite this headnote

Statutory purpose of the Labor Code provision governing wage statements is to document the paid wages to ensure the employee is fully informed regarding the calculation of those wages. Cal. Lab. Code § 226.

Cases that cite this headnote

Trial court, on remand, was required to reduce employees’ award of attorney fees in wage and hour class action regarding alternative workweek schedule (AWS), where employees’ award for overtime wages, waiting time penalties, and wage statement penalties were reduced in whole or in part on appeal. Cal. Lab. Code § 203; Cal. R. Ct. 3.1702(b)(1).


Cases that cite this headnote

APPEAL from a judgment of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Affirmed in part, reversed in part and remanded with direction. (Super. Ct. No. BC460298)

Attorneys and Law Firms

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Opinion

RUBIN, J.

Plaintiff employees were successful in a wage and hour class action against defendant and appellant Epsilon Plastics. Specifically, at four different times, Epsilon
employees worked on a 12-hour/day schedule, under which they were paid for 10 hours at the regular rate of pay and 2 hours of overtime. This Alternative Workweek Schedule (AWS) would have been permissible if it had been adopted in accordance with the rules set forth in the applicable wage order. However, the trial court concluded, after a bench trial, that the AWS had not been properly adopted. The court further concluded that Epsilon’s failure to pay overtime for the ninth and tenth hours of work, in reliance on the improperly adopted AWS, was not in good faith. As a result of the improperly adopted AWS, plaintiffs obtained judgment for unpaid overtime, interest, waiting time penalties (Lab. Code, § 203), inaccurate wage statement penalties (Lab. Code, § 226), and attorney’s fees.¹

Epsilon appeals, arguing: (1) the evidence does not support the trial court’s conclusion that the AWS was improperly adopted in one of the four periods; (2) the evidence does not support the full award of damages for unpaid overtime; (3) the evidence does not support the trial court’s conclusion of lack of good faith for two of the four periods, undermining the award of waiting time penalties; (4) the evidence does not support the award of waiting time penalties for certain former employees; (5) the wage statement penalties must be reversed because plaintiffs suffered no injury; (6) the attorney’s fee award was untimely sought; and (7) the attorney’s fee award incorporated a multiplier that was not supported by the evidence. We agree with Epsilon only in two respects: the evidence does not support the full award of damages for unpaid overtime; and the wage statement penalties must be reversed. We therefore affirm in part, reverse in part, and remand for recalculation of damages, and reconsideration of the attorney’s fee award.

FACTUAL AND PROCEDURAL BACKGROUND

Because of the complexity of the issues and the variety of mathematical calculations for different time periods, we spend considerable time reciting the facts and procedural history through and including the court’s final statement of decision.

1. The Plant and the Plaintiffs
Epsilon manufactures plastic bags. The manufacture requires the operation of one or more lines of machines which are designed to operate 24 hours per day. Whenever the machines are shut down, it takes up to six hours to restart them. This process creates a lot of wasted plastic, and excessive wear and tear on the machines. For this reason, Epsilon strongly preferred to run its plant 24 hours a day, seven days a week.

Plaintiffs are production employees who operate the machines. Plaintiffs are largely Spanish-speaking, and many are uneducated.

2. The Two Schedules Used by Epsilon
As a general rule, overtime pay is required for each hour in excess of 8 hours in one day, or 40 hours in one week. (§ 510, subd. (a).) Epsilon could have run the plant full time with four shifts of employees working 8-hour shifts, with minimal overtime.² But Epsilon did not run the plant in that fashion.

A. The 10/2 AWS
Instead, Epsilon’s employees each worked 12-hour shifts—four shifts in one week and three in the next.³ If no AWS had been adopted, Epsilon could operate its plant in this manner, but would be required to pay its employees overtime for each hour in excess of 8 hours each day. In other words, the employees would be paid regular time for the first 8 hours of each 12-hour shift, and overtime for the last 4 hours. However, Epsilon used an AWS, under which the employees were paid regular time for the first 10 hours, and overtime for the last 2 (the 10/2 AWS). In weeks that an employee worked 48 hours (4 shifts), the employee would receive 40 hours of regular pay and 8 hours of overtime; in weeks that the employee worked 36 hours (3 shifts), the employee would receive 30 hours of regular pay and 6 hours of overtime.

Under the 10/2 AWS, Epsilon also agreed to give its employees a half-hour paid meal break. As a result, the employees were paid for the full 12 hours of each shift, even though they only worked 11.5 hours. A dispute regarding overtime pay for these meal breaks would ultimately become the main damages issue at trial.
B. The Ten Day/Eight-Hour Schedule

At times, Epsilon did not have enough orders to justify operating the plant 24 hours a day, 7 days a week. However, it was keenly aware of the problems caused by continually starting and stopping its machines. Therefore, when it could not operate the plant full time, it adopted a schedule of 24 hours a day for 10 days straight, then closed down for 4 days, before restarting for another 10 days, and so forth. Epsilon put its employees into three 8-hour shifts, and had each shift work for 8 hours, for 10 days straight. Epsilon paid no overtime, because it structured its workweek such that employees were working the last five days of one week and the first five days of the next, thereby never exceeding 40 hours in one week.

It can come as no surprise that Epsilon’s employees vastly preferred the 10/2 AWS to the Ten Day/Eight-Hour schedule. On the 10/2 AWS, they worked fewer days and received greater pay (both for additional hours worked and for overtime). In contrast, the Ten Day/Eight-Hour schedule required them to commute to work more often, and work ten days in a row, for less money. However, although Epsilon’s employees testified that they preferred the 10/2 AWS to the Ten Day/Eight-Hour schedule, several of them also testified that, had they been offered the option of a 12-hour schedule with 4 hours of overtime, they would have preferred that. It does not appear that were ever given this option, nor were they given the option of running the plant full time with 8-hour schedules and minimal overtime.

3. The Governing Authority for Adoption of an AWS

Before we address the circumstances in which Epsilon adopted the AWS each of the four times it did so, we provide an overview of the legal requirements for an AWS.

Overtime compensation is required to be paid for any work in excess of eight hours in one workday unless an exception applies. One such exception is an “alternative workweek schedule adopted pursuant to Section 511.” (§ 510, subd. (a)(1).) Section 511 in turn, provides that an employee may adopt an AWS only if it receives approval in a secret ballot election by at least two-thirds of the affected employees. Specific requirements for the adoption of an AWS are then set forth in the applicable wage orders. For the manufacturing industry, we are concerned with Industrial Welfare Commission wage order 1-2001. (Cal. Code Regs., tit. 8, § 11010.) This wage order permits an AWS which has up to 10 hours of work per day at regular pay with up to 2 additional hours to be paid at the overtime rate. (Cal. Code Regs., tit. 8, § 11010, subd. 3(B)(1); see Mitchell v. Yoplait (2004) 122 Cal.App.4th 8, 12, 19 Cal.Rptr.3d 267.)

The wage order provides detailed requirements for the adoption of such an AWS:

- it shall begin with a proposal “in the form of a written agreement proposed by the employer” (Cal. Code Regs., tit. 8, § 11010, subd. 3(C)(1));

*1315 - in “order to be valid, the proposed alternative workweek schedule must be adopted in a secret ballot election, before the performance of work, by at least a two-thirds (2/3) vote of the affected employees in the work unit. The election shall be held during regular working hours at the employees’ work site” (id. at subd. 3(C)(2));

- prior to the vote, the employer “shall have made a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees’ wages, hours, and benefits. Such a disclosure shall include meeting(s), duly noticed, held at least 14 days prior to voting, for the specific purpose of discussing the effects of the alternative workweek schedule” (id. at subd. 3(C)(3));

- the results of the election shall be reported by the employer to the Division of Labor Statistics and Research within 30 days (id. at subd. 3(C)(6));

- employees affected by the AWS “may not be required to work those new hours for at least 30 days after the announcement of the final results of the election” (id. at subd. 3(C)(7)); and

- the employer “shall not intimidate or coerce employees to vote either in support of or in opposition to a proposed alternative workweek” (id. at subd. 3(C)(8)).

4. The Four Challenged Periods in Which Epsilon Used the 10/2 AWS

The present lawsuit encompasses four periods in which Epsilon used the 10/2 AWS. The trial court found that Epsilon’s adoption of the 10/2 AWS was faulty, and not in good faith, each time. As Epsilon does not challenge these findings with respect to the later two times, we focus the bulk of our discussion on the first two periods.

Although the first challenged period began in April 2007, Epsilon did not actually adopt the 10/2 AWS at that time. Instead, April 2007 was simply as far back as the statute of limitations allowed plaintiffs to reach. The 10/2 AWS in effect in 2007 had been in operation when Epsilon acquired the plant in 2002. Epsilon’s predecessor was Apple Plastics; Epsilon purchased Apple’s assets when the latter filed for bankruptcy. The issue then, turned not on whether Epsilon had properly adopted the 10/2 AWS, but whether Apple had.*

The evidence at trial regarding Apple’s adoption of the 10/2 AWS was minimal. There was certainly evidence that the 10/2 AWS was in effect at Apple. Several workers remembered it, and one testified to having voted at Apple to keep the schedule, but there was no testimony as to a vote at Apple initially adopting the 10/2 AWS. Indeed, Epsilon’s controller, Jim Gifford—who had worked in the same position for Apple since 1993—testified that although he recalls Apple employees voting on the AWS, he was unable to identify a time when the employees voted on it before they actually worked on that schedule.

Instead, Epsilon relied on two documents found by Gifford. The first is a May 1, 1995 memo, found in an Apple file, directed to “Production Employees.” It states, “We have been on the 12 hour workday schedule. Would like to know if you would like to continue working 12 hour shifts. We would like to have your opinion on this matter. Please read following information regarding the 12 hour work day schedule. Indicate on the bottom half of this memo if you are in favor or not in favor of the 12 hour work schedule.” There follows a description of the 10/2 AWS, and a tear-off at the bottom of the memo on which the employee can vote. It states, “Special Note: The 12 Hour Work Day Schedule has been implemented since May 1993 and needs to be reviewed on an annual basis and evaluated to ensure that the program is working properly.”

The second is a December 15, 1999 letter, on Apple letterhead, addressed to the Industrial Welfare Commission, requesting “an exemption to continue with the current alternative work schedule that is currently in place.” After explaining the 10/2 AWS, it states, “We have had this schedule since 1993 and have surveyed employees on May 1995 and May 1996 as to whether they would like to continue with the 12 hours shift as described above. More than 2/3 of the employees voted to continue with the 12 hours work schedule.” The letter closes with, “Again, I would like to respectfully request the exemption to continue with our alternate work schedule. Respectfully, I await your reply on this matter.” There was no evidence whether this letter was actually sent to, or received by, the Commission.

*1316 The trial court would ultimately conclude that there was no evidence the 10/2 AWS was properly adopted for this initial period. Specifically, there was no evidence of a written disclosure, a meeting, voting, a 30-day waiting period, or a report to the state within 30 days.

At one point during this period, in January 2008, Epsilon conducted a revote to confirm its employees’ agreement to the 10/2 AWS. Exhibits indicate that it was a secret ballot, preceded by a written memo, circulated to employees in Spanish, explaining the 10/2 AWS. An employee who recalls the vote does not remember any meeting prior to the vote. Additionally, the exhibits demonstrate that a supervisor took part in the vote (he voted yes), even though he was salaried and therefore not part of the work group subject to the 10/2 AWS.

The 10/2 AWS continued until October 2008. At that time, the recession reduced the plant’s orders, and Epsilon was unable to keep operating 24 hours per day, 7 days a week. Instead, the plant switched to the Ten-Day/Eight-Hour schedule described earlier. The return to this schedule does not implicate AWS regulations.


In October 2009, orders picked up, and the plant was able to return to the full 24/7 schedule. Controller Gifford delegated to Human Resources administrator Marisol Mendoza the task of conducting the vote to return to the 10/2 AWS. Mendoza was given an order that “we had to move back to the 12-hour shift.” It was her understanding that Epsilon had no choice; it had to move to the 12-hour shift in order to fulfill its orders.*

Mendoza was untrained on the AWS adoption procedure. She conducted her own research, by reviewing how a previous Human Resources administrator had handled it, and searching the Department of Labor’s website for direction. She is certain that she had access to counsel if she needed it, but chose not to contact the lawyers, explaining, “I just went by what the—I think it was the Department of Labor asked for. It was pretty simple. Just...
follow those guidelines, and you know everything was done in good faith.”

Mendoza prepared a memorandum, dated October 6, 2009, stating, “Due to our customer demands our plant will be moving from an (8) eight hour shift to a (12) twelve hour shift. This will be ongoing for approximately (1) one month or more should we get more orders in. To get an [sic] employee input we are conducting this election. Below please indicate if you agree with the *1318 (12) twelve hour shift schedule or if you disagree with it.” The memo explained the terms of the 10/2 AWS, although it did not specifically state that, without adoption of the 10/2 AWS, overtime pay on a 12-hour shift would begin after the first 8 hours.

After preparing the memorandum, Mendoza had meetings with each shift of employees on October 6, 2009. During the meetings, she explained that Epsilon “will be going to the 12-hour schedule” and that employees would be paid 10 hours at regular time and 2 hours overtime. The employees voted on the 10/2 AWS at the meetings.

The employees’ vote was in favor of the 10/2 AWS. Several employees testified that they were told that, although they were asked to vote, they were told to vote yes “because it was going to happen anyway.” Indeed, one employee testified that he was told by the plant manager that if he did not agree with the AWS, he could leave at any time, as there were a lot of people outside who wanted work. Additionally, the salaried supervisor who should not have voted in October 2008 voted again in October 2009.

The 10/2 AWS went into effect on October 12, 2009, six days after the vote. On October 16, 2009, Mendoza wrote a letter **468 to the Division of Labor Statistics and Research, in order to comply with the AWS requirements and inform the Division of what Epsilon “was trying to do.” The letter explained that the employees voted unanimously on October 6, 2009 to adopt the 10/2 AWS, and that the schedule went into effect on October 12, 2009.

This adoption of the 10/2 AWS was short-lived. The plant returned to the Ten-Day/Eight-Hour schedule in late November or early December 2009. Again, this schedule does not implicate AWS rules.

The plant briefly returned to the 10/2 AWS for two weeks in October 2010 with no vote whatsoever. Mendoza conceded that she did nothing to implement the 10/2 AWS during this period. She testified, however, that she thought Epsilon was “okay in doing it” because the employees preferred the 10/2 AWS to the Ten-Day/Eight-Hour schedule.


Mendoza did conduct a vote related to Epsilon’s final adoption of the 10/2 AWS in May 2011. However, as her May 31, 2011 letter to the Division *1319 indicates, the 10/2 AWS took effect on May 23, 2011, but the employees did not vote on it until May 31, 2011.7

When asked at trial whether a vote after the AWS was implemented complied with the rules for an AWS, Mendoza testified, “At that time, since this was already something implemented in the past, um, some things may have changed, um, because the process was, you know, similar, the same, and I could have mentioned it, like I said last time on my safety meetings, which are conducted monthly. And because it’s so—it was, like, kind of, like, a popular schedule and a lot of people wanted it, we kind of went that way.”

5. The Complaint

On April 26, 2011, plaintiffs Olvin Maldonado and Manuel Cobian Hernandez, individually and on behalf of the class of hourly employees of Epsilon, brought suit against Epsilon for violation of wage and hour laws and violation of the unfair competition law (Bus. & Prof. Code, § 17200).8 The complaint alleged numerous wage and hour violations, not all of which plaintiffs pursued at trial. The unfair competition law cause of action was based on the same alleged wage and hour violations.

6. Class Certification

In December 2012, plaintiffs moved to certify a class with respect to a more limited set of claims: (1) failure to pay overtime for hours 9 and 10 under the 10/2 AWS each time it was implemented; (2) failure to pay overtime for
work more than 40 hours in a week (and failure to give one day of rest in seven) under the Ten-Day/Eight-Hour schedule; (3) denial of meal and rest breaks; (4) failure to provide accurate pay stubs, as the pay stubs did not reflect the overtime rate for all overtime hours actually worked; and (5) waiting time penalties for those former employees who were not paid all earned wages.

**469** On September 30, 2013, the trial court granted the motion in part and denied it in part. The court granted certification with respect to the claims for overtime, inaccurate wage statements, waiting penalties, and related unlawful business practices. The court denied certification as to the claims for failure to provide meal and rest breaks. The court explained that certification of these *1320 latter claims was denied because those claims required individualized fact-specific inquiries, such that individual issues predominated over common ones.*

7. Summary Adjudication of Ten-Day/Eight-Hour Schedule Claims
Epsilon next moved for, and obtained, summary adjudication of plaintiffs’ claim that they were owed overtime for the Ten-Day/Eight-Hour Schedule. The court concluded that the schedule was legal, and that no additional overtime was owed. Plaintiffs do not challenge this ruling on appeal.

8. Court Trial–Phase One
The matter proceeded with a bifurcated trial, with the parties trying the equitable claim under the unfair competition law to the trial court first. The sole issue at this phase of the trial was whether Epsilon owed plaintiffs overtime for hours 9 and 10 when the 10/2 AWS was in effect or if, to the contrary, the payment of overtime for those hours was excused by the proper adoption of an AWS. The court was specifically troubled by the fact that, throughout the entirety of the period, Epsilon “failed to inform the Employees that by agreeing to the [10/2 AWS], they were waiving overtime pay for hours nine and ten of the 12-hour shift that they would otherwise be entitled to.” The court also noted specific problems with the adoption in each of the four periods. In the first period, there was no written disclosure, no meeting, no voting, no 30-day waiting period, and no report to the state within 30 days. In the second period, the meeting was the same day as the vote, not 14 days before; and the AWS was implemented 6 days, not 30 days later. For the third period, there was no vote at all or any other attempt to comply with the procedures. For the fourth period, the AWS had been implemented before the vote.

As the 10/2 AWS was never properly adopted, the court concluded the failure to pay overtime for hours 9 and 10 was not excused, and Epsilon *1321 violated both the Labor Code and the unfair competition law. The case would therefore proceed to the second phase, where the parties would litigate the amount of unpaid overtime, as well as liability and damages for the waiting time and inaccurate wage statement claims.

9. Court Trial–Phase Two Testimony
The phase two trial was broadly concerned with three issues: (1) the calculation of damages owed for the failure to pay overtime for hours 9 and 10 under the 10/2 AWS; (2) whether Epsilon had a good faith **470 defense to the failure to pay overtime, which would excuse it from waiting time penalties; and (3) whether Epsilon was also liable, and in what amount, for inaccurate wage statements.** We discuss the evidence on each issue.

A. Damages for Uncompensated Overtime
As we have explained, under the 10/2 AWS, employees were paid regular time for 10 hours and overtime for 2 hours; this time included 1/2 hour for a meal break even though, as a general rule, an off-duty meal break need not be paid. (Cal. Code Regs., tit. 8, § 11010, subd. 11(C).) Plaintiffs and Epsilon each presented expert testimony as to the amount of unpaid overtime owed to the class; the difference between them was simply how to handle the paid meal break which had been part of the 10/2 AWS.

Specifically, Epsilon took the position that, since its
employees did not work during their lunch breaks, they actually did not work full 12-hour shifts, but only worked 11.5 hours. As they had already received 2 hours of overtime for each shift, their damages should be calculated as 1.5 hours of unpaid overtime per shift only. Notably, Epsilon did not seek to offset the half-hour it had paid for lunch against the damages owed. It simply had its expert, Robert Plante, make calculations on the basis that there should be no overtime calculated on the paid half-hour meal break. Under Epsilon’s calculation, once damages were awarded, each employee’s compensation for a 12-hour shift would be: 8 hours of regular pay, plus 3.5 hours of overtime, plus a .5 hour regular pay bonus for lunch.

Plaintiffs had hired two experts. Their first expert, Jim Skorheim, performed his calculations, but was then fired by plaintiffs, who sued him for fraud and extortion in connection with his billing. Their second expert, forensic accountant Henry John Kahrs, actually testified at trial. When Kahrs realized the only difference between Skorheim’s initial calculations and *1322 Plante’s calculations was whether overtime was due for the half-hour meal break, Kahrs went into the punch clock data to determine the actual hours the employees had worked, and tried to figure out if they had, in fact, been paid for a 30-minute break.

Kahrs originally pulled “30 or 31 random punch cards and calculated what the time in, the time out, the total number of hours they worked.” In that initial sample, which was actually 32 individual time cards, he concluded that only two employees were paid for the meal break, and the remainder were not. In addition, he concluded that, of the employees who were not paid for their meal break, 21 were underpaid by at least a minute, while nine others were overpaid (but not by the full 30 minutes which would constitute payment for the meal break). He did a second random sample of 19 and reached a similar conclusion. Kahrs extrapolated from this data, offsetting the overpayments against the underpayments, and concluding that, on average, each class member was underpaid by about 60 cents per shift. Plaintiffs did not seek to recover this amount; however, they relied on this testimony to bolster their conclusion that the employees were not paid for their meal breaks.

Epsilon pointed out three general problems with Kahrs’s random sampling. First, plaintiffs questioned whether a sample as small as Kahrs’s could have any statistical **471 significance. Kahrs’s sample consisted of no more than 51 line items of data, out of a total of 56,000 time sheet line items. This is less than one-tenth of 1 percent of the data. Kahrs testified that this tiny sample was nonetheless statistically significant, stating, “If you go through and you calculate a confidence interval, even if you ran a million pieces in your sample, if you took 35 random items, your confidence level of being correct would be roughly above 95 percent. That’s why randomness is so important. *[6] The object isn’t to go through and test hundreds and hundreds of thousands. The object is to take a small sample and take a look at it and see if it’s representative.” Kahrs was not himself a statistician, but testified that there was a statistician on his staff. Kahrs testified that he told someone in his office to randomly choose the records to constitute the sample with the statistician, saying, “Do it however is the most random and gives us a 95-percent confidence interval.”

Second, it appears that several of the samples Kahrs selected were actually from 8-hour shifts, for which Epsilon had never agreed to pay for the meal break. Of his initial sample of 32, 10 of entries were from 8-hour shifts, and thus should be excluded from his data. Our review of his second sample of 19 shows another 10 entries were from 8-hour shifts. Kahrs conceded this would “drag down the average.”

*1323 Third, some of the samples he selected were from employees who were not members of the class. Only production line employees were part of the class; maintenance employees were not. Yet, of the 51 line items in his random sample, 26 came from maintenance employees. Faced with the suggestion that the majority of his data did not come from class members, Kahrs nonetheless believed that this would not call into question the accuracy of his analysis. He testified that the randomness of his sample established its accuracy. Eventually, he conceded that “In hindsight, I may choose a different sample and take a look at this,” but he did not believe it was problematic to include non-class member data in his sample.

There appears to be another problem with Kahrs’s analysis of his line items of data. By calculating what he believed to be a number of minutes over- or under-paid for an entire day, Kahrs went beyond the issue of whether the employees were paid for their meal breaks and instead offset paid meal break time against unpaid time-clock rounding time. This was problematic, as there was no class certified on the issue of improper time-clock rounding, and the only issue on which Kahrs should have been testifying was whether the meal breaks had actually been taken.

To counter Kahrs’s conclusion that employees on the 10/2 AWS were not paid for their meal break, Epsilon presented various time sheet line items establishing that at
least some of the employees were paid for some meal breaks. Kahrs responded that Epsilon’s data was cherry-picked, not random, and stood by his conclusion that although some of the employees were, in fact, paid for meal breaks, “these people on the whole were not paid for their lunch.” Kahrs also testified that he had his staff just randomly pick pages in the time card data, and the results confirmed that the employees were not paid for meal breaks.

At one point, Kahrs testified that if the class is not awarded the extra half-hour of overtime in dispute, the employees will be underpaid, but if the half-hour is awarded, they will be overpaid. This led defense counsel to ask, “Wouldn’t the happy medium be maybe to split it in half, your damages number and Mr. Plante’s number, and meeting in the middle on this issue?” **472 Kahrs responded, “Well, I suggested that at least 15 times during the course of this to plaintiffs’ counsel, who tried to get them to stipulate to that so that I wouldn’t have to come here. Yeah. That would have been brilliant.”

B. Good Faith Defense

Section 203 provides that employees must be paid their wages upon discharge or quitting. If the wages are not paid in accordance with law, the **1324 employee’s wages “shall continue as a penalty” for up to 30 days. However, a “good faith dispute” will preclude the imposition of these waiting time penalties.

Once the court found overtime was owed under the 10/2 AWS, Epsilon would also be liable for waiting time penalties to its former employees, unless it could establish there was a good faith dispute. Epsilon therefore introduced testimony at the second phase of the trial on this point.

Specifically, human resources administrator Mendoza testified that she had intended to comply with all AWS implementation requirements. She said, “I tried to do the best that I can based on the research; so yes. I was trying to comply with the law.” She continued, “Everything was done in good faith, and I was trying to follow and comply with the law.” Plant manager Tamayo Covarrubias testified he believed all iterations of the 10/2 AWS were valid, regardless of the failures to comply with the provisions set forth in the wage order, because all the employees preferred the 10/2 AWS. Controller Gifford testified that when Epsilon took over from Apple, it believed the 10/2 AWS had been properly implemented, although he conceded that, on behalf of Epsilon, he did nothing to confirm that fact beyond looking in the file and seeing the two documents on which he had relied in phase one of the trial.

C. Wage Statements

Plaintiffs also sought damages for inaccurate wage statements. The evidence introduced at trial on this point, however, was virtually nonexistent. A handful of wage statements for one employee were introduced into evidence, reflecting that he was paid under the 10/2 AWS. There was no testimony by any of the class members as to damages arising from the wage statements.

10. Final Statement of Decision

After additional briefing, the court issued a statement of decision, supporting an award of over $900,000 in favor of the plaintiff class. The court’s statement of decision explained its ruling on the issues in controversy as follows:

A. Amount of Overtime Damages

Plaintiffs were entitled to a total of 4 hours of overtime for each 12-hour shift. As they had already received overtime for two of those hours, and **1325 regular time for the other two, damages would be calculated as the overtime premium (difference between regular wage and overtime wage) for two hours. Notably, there would be no reduction for the meal period. The court reached this conclusion on the basis that most punches for meal breaks were for less than 30 minutes, and sometimes the employees did not punch out at all for a break. Moreover, the meal breaks were **473 not duty free, as the employees were required to continue to monitor their machines. The court was persuaded by Kahrs’s analysis that if 30 minutes of overtime premium were to be deducted, the employees would be underpaid, due to both time-clock rounding and the fact that employees rarely received a full 30-minute break. The court completely adopted Kahrs’s analysis, specifically noting that Kahrs “utilized random samplings that provided a 95% confidence interval,” and that “even if one were to remove the 8-hour shifts and the non-class members, still only one employee received a lunch of at least 30 minutes...
According to the punch details. Further, when confronted with this, Kahrs confirmed that it did not change the conclusion."

While the court declined to deduct 30 minutes from the overtime award, it noted that this was "not to be confused with Labor Code meal break violations which were not at issue during this trial for the Class, only for the individual Plaintiffs." Nonetheless, the court went on to conclude that Epsilon "failed to show that it uniformly gave the Employees a paid 30-minute, duty free lunch for each 12-hour shift worked to entitle it to reduce the overtime damages." Here, the court itemized evidence supporting this conclusion, including that there was no schedule to guarantee breaks; managers often summoned employees back to their machines when they were on break; employees could not leave the premises for breaks during the night shift; and there were not enough employees to provide coverage for the breaks.

**474** 12. Notice of Judgment
On August 10, 2016, plaintiffs served Epsilon a file-stamped copy of the judgment, giving notice that it had been entered.

13. Attorney's Fees
On October 11, 2016, plaintiffs sought their attorney's fees under section 218.5. Plaintiffs sought fees in a lodestar amount, enhanced by a multiplier of 1.7.

Epsilon opposed the motion on the basis that it was untimely, because the clerk allegedly served a file-endorsed copy of the judgment when it was entered on July 26, 2016. Epsilon also challenged the lodestar in some respects; and the multiplier.

Plaintiffs responded that the clerk's mailing was not sufficient to start the clock running for a motion for attorney's fees, and that the motion was timely when measured from plaintiffs’ August 10, 2016 notice of judgment.

The court agreed with plaintiffs, finding the motion to be timely. It awarded fees in the amount of $888,811.50, based on a somewhat reduced lodestar, and a multiplier of 1.5.
14. Appeal
Epsilon filed timely notices of appeal from both the judgment and the award of attorney’s fees. We have consolidated the two appeals for argument and resolution in a single opinion.

DISCUSSION
The several arguments on appeal are affected by various burdens of proof and our standard of review. We discuss each under the applicable argument.

1. Challenges to the Overtime Damages Based on Improper Adoption of the AWS
Plaintiffs were awarded damages for unpaid overtime due to the improper adoption of the 10/2 AWS in four separate periods. Defendant challenges both the finding of liability with respect to one of the four periods and the calculation of damages.

A. Substantial Evidence Supports the Finding of Liability

With respect to the first period the 10/2 AWS was in effect—the period based on Apple’s earlier adoption of its 10/2 AWS—Epsilon argues that the AWS was properly adopted as a matter of law, based on undisputed evidence. Epsilon argues, “The AWS that was in place during this time period was first implemented in the early 1990s by Apple, and no evidence was presented that Apple failed to follow necessary procedures to implement this AWS.” However, it was not plaintiffs’ burden to establish that Apple failed to follow the procedures; it was Epsilon’s burden to establish that it did.

We begin with the premise that section 510, subdivision (a) provides that any work in excess of 8 hours in one day shall be compensated at the overtime rate of time and a half. This does not apply, however, to an employee working pursuant to a properly adopted AWS. (§ 510, subd. (a)(1).)

B. Overtime Damages Were Miscalculated

As the 10/2 AWS was not properly adopted (in any of the four periods at issue), the trial court awarded overtime to the plaintiff class. The sole dispute at the second trial, regarding the damage calculation, was whether to award plaintiffs 1.5 hours of overtime premium for each shift or 2 hours of overtime premium for each shift. Epsilon conceded that the plaintiffs were entitled to 1.5 hours. The issue was simply whether they were entitled to the additional half-hour for the time which Epsilon allocated to the paid meal break.

**475 Thus, Epsilon had the burden to establish the 10/2 AWS was properly adopted. Specifically, as to the first period, Epsilon had the burden to establish that Apple had properly adopted its AWS. Epsilon’s evidence on this point was limited to documentary evidence indicating that the 10/2 AWS was adopted in 1993 and confirmed by votes in 1995 and 1999. But while the two documents indicate the 10/2 AWS was implemented in 1993, neither document states that there was a pre-adoption vote, by secret ballot or otherwise. Controller Gifford, the only Epsilon witness who testified to working at Apple in 1993, conceded that he could not testify to a vote happening prior to the Apple employees working on the 10/2 AWS.

This does not establish as a matter of law that the 10/2 AWS was properly adopted. Instead, there was an absence of evidence that it was. Subsequent attempts (by Apple and Epsilon) to reaffirm the employees’ commitment to the 10/2 AWS after it had been adopted do not meet the requirements of a pre-adoption vote, preceded by written notice and meetings.

Epsilon failed to meet its burden, and the trial court did not err in finding there was insufficient evidence that the 10/2 AWS was properly adopted. Our analysis would be the same whether we employed a de novo review based on uncontested facts (as suggested by Epsilon) or substantial evidence to the extent there were conflicting facts or conflicting inferences to be drawn from undisputed facts (as argued by plaintiffs).

**1327 Therefore the employer bears the burden of proving the employee’s exemption. [Citations.]” (Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785, 794-795, 85 Cal.Rptr.2d 844, 978 P.2d 2.)

**478 [T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee’s exemption. [Citations.]” (Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785, 794-795, 85 Cal.Rptr.2d 844, 978 P.2d 2.)
were seeking an award of damages; they had the burden of proof. (Evid. Code, § 500.) As a general rule, employees have the burden of proving that they performed work for which they were not compensated. (Hernandez v. Mendoza (1988) 199 Cal.App.3d 721, 727, 245 Cal.Rptr. 3d.) To be sure, employees need not prove this time with perfect exactitude when the employer’s time records are inaccurate or inadequate. (Ibid.) But that is not this case, and plaintiffs do not argue that it is. Indeed, plaintiffs’ evidence on this point was based on Kahrs’s testimony, which was, in turn, based on Epsilon’s detailed punch card records.

Instead, plaintiffs take the position that Epsilon bore the burden of proof because it was seeking a “reduction” in overtime damages for the meal break. *1329 Specifically, they argue that “in order for Epsilon to get this lunch reduction, Epsilon needed to prove that: 1) it gave the Employees with the ‘opportunity’ to take a 30-minute duty-free lunch; and 2) the lunch lasted a full 30 minutes; and 3) the lunch occurred before the fifth hour of work; and 4) the Employees were relieved of all duties, including leaving the facility at will; and 5) [Epsilon] did not discourage the Employees from taking the 30-minute lunch.”

Plaintiffs here rely on section 512, the Labor Code provision governing meal breaks. But plaintiffs overlook the fact that **476 this was not a cause of action under the Labor Code for the failure to provide statutorily-mandated meal breaks. Plaintiffs had alleged such a cause of action and the court had denied class certification on it. Instead, this was merely an element of damages for unpaid overtime. In short, the question was whether, under the 10/2 AWS, the employees worked 11.5 or 12 hours. The burden of proof that this additional half-hour was worked was squarely on plaintiffs.13

The misallocation of the burden of proof on this element drove plaintiffs, their expert Kahrs, and the trial court, to focus on the wrong issue. Plaintiffs believed they had defeated Epsilon’s defense merely by establishing that not every employee took the full 30-minute meal break at every shift. But plaintiffs instead needed to establish that every class member worked for the entirety of the break during every shift, so that 30 minutes (or some specified lesser amount) could be added onto the overtime calculation. Perhaps this could have been established by a statistical analysis of the time card punch data. (Compare Duran v. U.S. Bank National Assn. (2014) 59 Cal.4th 1, 40, 172 Cal.Rptr.3d 371, 325 P.3d 916 [discussing the use of statistical sampling to prove damages in overtime cases] (Duran).) But because plaintiffs believed the burden of proof was on Epsilon, plaintiffs made no effort to affirmatively establish the amount of time that plaintiffs worked over and above the 11.5 hours defendant conceded (as the trial court had already found an invalid AWS).

This failure of proof is sufficient to undermine that portion of the trial court’s award granting plaintiffs the additional half hour of overtime damages. However, we believe it necessary to briefly address three failings in the theory pursued by plaintiffs and supported by Kahrs’s testimony.

First, Kahrs, as we have discussed, sought to determine whether the employees were paid for their meal breaks. He did so not by simply checking **430 whether the time cards reflected 30-minute meal breaks were taken. Instead, he added up the total amount of minutes the time cards reflected were worked. Finding that employees clocked in earlier and clocked out later than the times for which they were paid (due to time-clock rounding), he offset the “unpaid” minutes due to time-clock rounding against the “paid” minutes for meal breaks, and concluded that meal breaks were not, on the whole, compensated. But time-clock rounding itself may be permissible or impermissible; there is authority governing when a employer may use time-clock rounding. (See Silva v. See’s Candy Shops, Inc. (2016) 7 Cal.App.5th 235, 239, 249, 212 Cal.Rptr.3d 514.) In this case, even if plaintiffs’ complaint could be broadly interpreted to encompass a claim for improper time-clock rounding, plaintiffs did not seek class certification on it, and, most importantly, never tried the issue of whether Epsilon was liable for it. Kahrs’s overtime calculations simply assumed that plaintiffs were entitled to be paid for every minute they were on the clock—effectively imposing liability on Epsilon for time-clock rounding in the course of a damages analysis for an improperly adopted AWS. This was improper.

Second, Kahrs’s attempt to establish any conclusion at all with respect to the class, based on a random sample of 51 pieces of data, over half of which did not even pertain **477 to class members, is the sort of “profoundly flawed” mock statistical analysis by a non-statistician rejected by the California Supreme Court in Duran. (Duran, supra, 59 Cal.4th 1 at p. 13, 172 Cal.Rptr.3d 371, 325 P.3d 916.) As the Supreme Court explained: “Sampling is a methodology based on inferential statistics and probability theory. The essence of the science of inferential statistics is that one may confidently draw inferences about the whole from a representative sample of the whole.” [Citation.] Whether such inferences are supportable, however, depends on how representative the sample is. “[I]nferences from the part to the whole are...
justified only when the sample is representative.’ [Citation.] Several considerations determine whether a sample is sufficiently representative to fairly support inferences about the underlying population.” *(Id. at p. 38, 172 Cal.Rptr.3d 371, 325 P.3d 916.)* It is enough to say Kahrs made no determination of variability, and simply stated that his random sample of less than 1 in 1000 was sufficient because it was random. This is inadequate as a matter of law.

Third, we reject Kahrs’s attempt to cloak his testimony in the statistical respectability of a 95 percent “confidence interval” as not only unsupported, but missing key data. The 95 percent “confidence interval,” as used by statisticians, is the “interval of values above and below the estimate within which one can be 95 percent certain of capturing the ‘true’ result.” *(Durán, supra, 59 Cal.4th at p. 46, 172 Cal.Rptr.3d 371, 325 P.3d 916.)* The interval is expressed in terms of the margin of error; and if the margin of error is too large, the result can be rejected as a matter of law. *(Ibid.)* Here, Kahrs testified to a 95 percent “confidence interval” in the conclusion that the employees were not, on the whole, paid *1331* for meal breaks. This is not an interval at all, and not a statement in which, statistically speaking, one can have a 95 percent “confidence interval.” No testimony was elicited on the margin of error.

Having rejected Kahrs’s inferences, we are left with the question of whether plaintiffs established entitlement to any overtime, over and above the 1.5 hours per shift conceded by Epsilon. Kahrs’s conclusions may be lacking, but his data demonstrates that some employees did not, in fact, get paid for every meal break. This anecdotal evidence, even if truly random, is not sufficient to justify an award of overtime for any particular amount of minutes. This is especially true given that Epsilon presented competing anecdotal evidence that some employees were paid for some meal breaks.

However, on appeal, Epsilon argues not for a reversal of the additional half hour of overtime, but for the court to split the difference and award the midpoint between 1.5 hours per shift and 2 hours per shift. As Epsilon concedes that this is an appropriate amount of damages, we will direct the judgment be reduced to that amount. On remand, the trial court shall make the calculation. Because the amount of overtime damages will change following recalculation, the court will also be required to recalculate the waiting time penalties and prejudgment interest.

2. **Challenges to the Award of Waiting Time Penalties**

Epsilon has two challenges to the award of waiting time penalties. First, it argues that it has established its good faith defense as a matter of law with respect to the first two periods in which it used the 10/2 AWS. Second, it argues that those waiting time penalties imposed for the period after March 31, 2013, were not supported by the evidence.

**A. The Evidence Supports the Finding of Lack of Good Faith**

“If an employer willfully fails to pay, without abatement or reduction, ... any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.” *(§ 203, subd. (a).)*

“A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203. *(¶)(a)* Good Faith Dispute. A ‘good faith dispute’ that any wages are due occurs when an employer presents a defense, based in law or fact which, if *1332* successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a ‘good faith dispute.’ ” *(Cal. Code Regs., tit. 8, § 13520.)*

This regulation “imposes an objective standard.” *(FEI Enterprises, Inc. v. Yoon (2011) 194 Cal.App.4th 790, 802, 124 Cal.Rptr.3d 64.)* “The appearance of the language ‘or presented in bad faith’ in the list of circumstances precluding a finding of a good faith dispute does not render the test a subjective one, but indicates that subjective bad faith may be of evidentiary value in the objective bad faith analysis.” *(Id. at p. 802, fn. 9, 124 Cal.Rptr.3d 64.)*

Although the trial in this case proceeded as though Epsilon had the burden to prove a good faith dispute, the law on this point is not entirely clear. Certainly, an argument could be made that since section 203 provides that waiting time penalties are awarded only for a
“willful” failure to pay wages, lack of good faith is an element of willfulness on which plaintiffs had the burden of proof. (See, e.g., Armenta v. Osmose, Inc. (2005) 135 Cal.App.4th 314, 325-326, 37 Cal.Rptr.3d 460.) We need not resolve the burden of proof issue, however, as Epsilon’s only argument on appeal is that it had established good faith as a matter of law, a point that we reject. The issue of good faith is, in actuality, an issue of fact reviewed for substantial evidence. (Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc. (2002) 102 Cal.App.4th 765, 781, 125 Cal.Rptr.2d 804.)

Courts have found good faith disputes in a failure to pay wages when the legal duty to pay the wages was unclear at the time of the failure to pay. (E.g. Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1201-1202, 78 Cal.Rptr.3d 572.) However, the existence of a bona fide legal dispute will not necessarily result in a finding of good faith when other evidence indicates the defendant knew it was not paying all wages due. (Armenta v. Osmose, Inc., supra, 135 Cal.App.4th at pp. 325-326, 37 Cal.Rptr.3d 460.)

Epsilon challenges the trial court’s findings that its failure to pay full overtime during the first two periods it used the 10/2 AWS was not the result of a good faith dispute. Epsilon argues that the issue may be resolved in its favor as a matter of law. But, there is legally sufficient evidence supporting the trial court’s conclusion in favor of plaintiffs.

1. Sufficient Evidence of Lack of Good Faith in the First Period

Epsilon’s argument that it had a good faith dispute that overtime was due **479** under the first 10/2 AWS is based on Epsilon’s evidence that it had a *1333* subjective good faith belief that it had inherited a properly-adopted AWS from Apple. But, a mere subjective good faith belief that wages were not due is insufficient; the test is whether there was an objectively reasonable, even if unsuccessful, defense to the payment of wages. Here, there was no objectively reasonable factual basis for Epsilon’s defense—it offered, for example, no evidence that Apple represented to it that the 10/2 AWS was properly adopted, and that it relied on that representation. Instead, the evidence showed that Epsilon made no inquiry whatsoever when it took over the plant, and simply assumed the 10/2 AWS had been properly adopted. This is sufficient to defeat Epsilon’s claim of good faith.

2. Sufficient Evidence of Lack of Good Faith in the Second Period

Epsilon’s argument that it had a good faith dispute that overtime was due under the second 10/2 AWS is based on its evidence that Mendoza attempted, in subjective good faith, to comply with the legal requirements for the adoption of an AWS, and that, although there were some errors in the process, Epsilon substantially complied. In short, Epsilon argues that “substantial compliance” was its defense with respect to the second period, and that although the defense did not win the day, it was sufficient to establish a good faith dispute as a matter of law.

There was a flaw in the adoption of the 10/2 AWS in the second period which could, conceivably, fall under the framework of “substantial compliance,” were it the only error: the AWS was implemented 6 days after the vote, rather than 30. Harder to fit under that rubric is the fact that the employees voted on the AWS on the same day as written notice of the AWS and the meetings discussing it, rather than 14 days after. Even if this, too, were the sort of deficiency that could objectively constitute substantial compliance, there were other circumstances surrounding the adoption of the 10/2 AWS which defeat Epsilon’s claim. Specifically, there was evidence that the employees were not given an opportunity to freely exercise their vote. Mendoza had been told that the plant “had no choice; it had to move to the 12-hour shift.” The document she drafted proposing the 10/2 AWS said that the “plant will be moving from an (8) eight hour shift to a (12) 12-hour shift.” The document asked the employees for their “input” on whether they agreed or disagreed with the schedule, but it did not indicate that an employee vote would actually govern whether the 10/2 AWS would be adopted. The employees were never told what the alternative would be if the plant needed to run 24/7 but the 10/2 AWS was not adopted. Several employees testified that they were told to vote yes, “because it was going to happen anyway.” The trial court believed this evidence. Irrespective of which party had the burden of proof, this evidence defeats *1334* Epsilon’s claim that it proved good faith as a matter of law, and it constituted substantial evidence that plaintiffs had proved a lack of good faith under the statute.
B. Substantial Evidence Supports the Challenged
Waiting Time Damages After March 31, 2013

As mentioned, plaintiffs initially hired Skorheim as their expert. They subsequently fired him and hired Kahrs. At trial, Kahrs testified to a small amount of waiting time penalties, incurred after March 31, 2013, based solely on Skorheim’s calculations; Kahrs had not independently verified Skorheim’s math. Epsilon’s expert, Plante, also did not review any of Skorheim’s calculations on this particular line item.

The trial court awarded the damages. On appeal, Epsilon argues this aspect of the award is unsupported by the evidence, because Skorheim did not testify to the calculation himself, and his credibility came into question when plaintiffs sued and replaced him.

The award is supported by Kahrs’s testimony. While it is clear that plaintiffs disagreed with Skorheim in several respects (largely related to billing), neither party questioned his ability to calculate waiting time penalties from established data. Moreover, Plante, who had been retained by Epsilon to review Skorheim’s calculations and point out disagreements with them, did not challenge Skorheim on this point. The evidence was admitted with no objections, and, although sparse, was legally sufficient

3. The Award of Wage Statement Penalties is Unsupported

Plaintiffs were awarded penalties for inaccurate wage statements. Specifically, they established that the wage statements were inaccurate because, whenever the plant was on the 10/2 AWS, the wage statements did not properly indicate the ninth and tenth hours were overtime. Plaintiffs did not plead, or argue, that the wage statements were inaccurate in any other particular.

But inaccurate wage statements alone do not justify penalties; the plaintiffs must establish injury flowing from the inaccuracy. Here, the trial court concluded the plaintiffs had suffered injury because they were not paid all of the overtime they were due.

On appeal, Epsilon argues that this is not sufficient to support the award, in that the failure to pay overtime flowed from the improperly adopted AWS, for which we affirm compensation, not from the inaccurate wage statements. Therefore, according to Epsilon, there is no injury as a matter of law. In response, plaintiffs pursue a new theory, not raised before the trial court: that injury is presumed under the statute. Because the issue presents primarily an issue of law, we exercise our discretion to consider it. (In re J.C. (2017) 13 Cal.App.5th 1201, 1206, 221 Cal.Rptr.3d 579.)

Section 226, subdivision (a) itemizes nine categories of information which must be included in a wage statement. As relevant to this case, it provides: “(a) An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee’s wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee ..., (5) net wages earned, ... and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee ....”

Wage statement penalties are awarded only to employees who suffer injury “as a result of a knowing and intentional failure by an employer to comply with subdivision (a).” (§ 226, subd. (e)(1).) The statute provides, however, that an employee is deemed to suffer injury if the employer “fails to provide accurate and complete information as required by any one or more of items (1) to (9) inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following: (i) The amount of gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4) inclusive, (6) and (9) of subdivision (a).” (§ 226, subd. (e)(2)(B) & (e)(2)(B)(i).) It further explains that “[f]or purposes of this paragraph, ‘promptly and easily determine’ means a reasonable person would be able to readily ascertain the information without reference to other documents or information.” (§ 226, subd. (e)(2)(C).) In short, while the statute requires nine categories of information to be included in a wage statement, injury is only presumed if one of five specific categories is omitted, and, even then, only if a reasonable person would be unable to readily ascertain the missing information without reference to other documents or information.

Here, plaintiffs argue the missing information from which injury can be presumed is that of category (a)(9)—“all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.” The applicable hourly rates were included on the pay stub. Plaintiffs argue that
the corresponding number of hours worked at each hourly rate was not because, in hindsight, the employees legally worked 8 hours at the regular time rate and 4 hours at the overtime rate (for each 12-hour shift), but the paystub indicated they worked 10 hours at the regular rate and 2 hours at the overtime rate.

Epsilon takes the commonsense position that the pay stubs were accurate in that they correctly reflected the hours worked and the pay received. Epsilon argues that if plaintiffs’ argument were followed to its logical conclusion, the only way it could have avoided wage statement penalties while operating under the 10/2 AWS it believed was legitimate would have been to issue a wage statement which bore no similarity to the pay the employees were actually receiving. As it is illogical to think this is what the Legislature intended, plaintiffs’ counter argument boils down to the proposition that any failure to pay overtime at the appropriate rate also generates a wage statement injury justifying the imposition of wage statement penalties—an apparent unintentional double recovery.13

We believe Epsilon has the better argument. We look at the statutory language. Subdivision (a) uses both the term “earned” and the term “worked.” That is, categories (a)(1) and (a)(5) require the employer to provide information regarding the “gross wages earned” and “net wages earned” respectively; but these two categories are excluded from subdivision (e)(2)(B)(i)’s list of those categories whose omission gives rise to a presumption of injury. In contrast, categories (a)(2) and (a)(9) refer to the “total hours worked.” **482 and “number of hours worked at each hourly rate.” These categories are included in subdivision (e)(2)(B)(i)—if they are excluded from the wage statement, injury may be presumed. There is a clearly a significance to the Legislature’s decision that injury is not presumed when a wage statement fails to include wages “earned” but is presumed when the wage statement fails to include hours “worked at” a particular rate. The difference, we believe, is to account for precisely this situation—where at the time the work was performed, the work was done and paid for at a particular rate, but it was subsequently determined that the employee had actually earned the right to additional compensation. Wage statements should include the hours worked at each rate and the wages earned. In a perfect world, the first numbers will calculate out to the second. But when there is a *1337 wage and hour violation, the hours worked will differ from what was truly earned. But only the absence of the hours worked will give rise to an inference of injury; the absence of accurate wages earned will be remedied by the violated wage and hour law itself, as is the case here.

[13]This interpretation is supported by legislative intent. The purpose of section 226 is to “document the paid wages to ensure the employee is fully informed regarding the calculation of those wages.” (Soto v. Motel 6 Operating, L.P. (2016) 4 Cal.App.5th 385, 392, 208 Cal.Rptr.3d 618.) “‘The purpose of requiring greater wage stub information is to insure that employees are adequately informed of compensation received and are not shortchanged by their employers’” (quoting Assem. Com. on Labor and Employment, Analysis of Sen. Bill No. 1255 (2011–2012 Reg. Sess., italics added).)” (Ibid.)

Here, Epsilon’s plant was operating under the 10/2 AWS; Epsilon paid its employees pursuant to the 10/2 AWS; and its wage statements accurately reflected the pay under the 10/2 AWS. That the 10/2 AWS ultimately turned out to be invalid mandates that the employees receive unpaid overtime, interest, and attorney’s fees. (§ 1194, subd. (a).) It does not mandate that they also receive penalties for the wage statements which accurately reflected their compensation under the rates at which they had worked at the time.

4. Arguments Related to Attorney’s Fee Award

[14]Plaintiffs were awarded nearly $900,000 in attorney’s fees. On appeal, Epsilon contends the attorney’s fee award must be reversed because it was untimely sought. In the alternative, Epsilon argues that the court abused its discretion in using a multiplier of 1.5 in calculating the award. We do not reach the latter argument. As we conclude the plaintiffs’ recovery must be reduced in two respects (part of the overtime award, which impacts the waiting time penalties; and the wage statement penalties), we remand to enable the court to exercise its discretion to reconsider the amount of the fee award, should it so choose. However, we briefly address Epsilon’s argument that no fees could properly be awarded because the motion seeking them was untimely filed.

A notice of motion for attorney’s fees “must be served and filed within the time for filing a notice of appeal under rules 8.104 and 8.108.” (Cal. Rules of Court, rule 3.1702(b)(1.).)

California Rules of Court, rule 8.104(a)(1) provides that, unless otherwise extended, the time for filing a notice of appeal is the earliest of: “(A) 60 days after the superior court clerk serves on the party filing the notice of appeal a *1338 document entitled ‘Notice of Entry’ of judgment or a filed-endorsed copy of the judgment, showing **483 the
date either was served; (B) 60 days after the party filing
the notice of appeal serves or is served by a party with a
document entitled ‘Notice of Entry’ of judgment or a
filed-endorsed copy of the judgment, accompanied by
proof of service; or (C) 180 days after entry of judgment.”

In this case, the signed file-stamped judgment is dated
July 26, 2016. On August 10, 2016, plaintiffs served
“Notice of Judgment” on Epsilon, attaching a
file-stamped copy of the judgment. Sixty days from
August 10, 2016 is October 9, 2016. That day is a
Sunday. October 10, 2016 was Columbus Day, a state
holiday. (Gov. Code, § 6700, subd. (a)(12).) When “the
last day for the performance of any act that is required by
these rules to be performed within a specific period of
time falls on a Saturday, Sunday, or other legal holiday,
the period is extended to and includes the next day that is
not a holiday.” (Cal. Rules of Court, rule 1.10(b).) The
next court day was October 11, 2016. Plaintiffs’ motion
for attorney’s fees was filed on that day. As long as the
60-day period is measured from August 10, 2016,
plaintiffs’ motion was timely.

Epsilon argues, however, that the motion was untimely
because it should be measured from the date of the clerk’s
certificate of mailing. According to a declaration of
counsel, on July 26, 2016, the court sent a single mailing
consisting of: (1) the court’s one-page order indicating it
signed the judgment; (2) the judgment itself; and (3) the
clerk’s certificate of mailing. This only starts the clock
running if the clerk serves “a document entitled ‘Notice of
Entry’ of judgment or a filed-endorsed copy of the
judgment, showing the date either was served.” (Cal.
Rules of Court, rule 8.104(a)(1)(A).) The clerk did not
serve a document entitled “Notice of Entry”; the clerk’s
document was, at most, a certificate of mailing. Moreover, the document did not indicate the date it was
served. Nor did the clerk serve a file-endorsed copy of the
judgment showing the date it was served. The
file-endorsed copy of the judgment which Epsilon’s
counsel represented he received in the mailing contains no
proof of service beyond the original proof of service from
when plaintiffs served it as a proposed judgment. We also
observe that the trial court, in its attorney’s fee order,
found that the judgment was not a part of the mailing,
stating that the exhibit attached to counsel’s declaration,
“does not comport with the document on file, which
consists of only two pages and does not include a copy of
the judgment.” In sum, the July 26, 2016 mailing did not
meet the requirements of the court rule sufficient to start
the 60-day clock running. The attorney’s fees motion was
therefore timely.

*1339 DISPOSITION

The case is remanded to the trial court with directions to:
(1) reduce the award of overtime damages to provide the
overtime premium of 1 hour 45 minutes per shift, rather
than 2 hours per shift; (2) recalculate the waiting time
penalties and interest accordingly; and (3) eliminate the
award for wage statement penalties. The trial court’s
order awarding attorney’s fees is vacated to permit the
trial court to reconsider attorney’s fees following remand.
In all other respects the judgment is affirmed. The parties
are to bear their own costs on appeal.

WE CONCUR:

BIGELOW, P.J.

GRIMES, J.

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Footnotes

1 All undesignated statutory references are to the Labor Code.

2 Mathematically, this is true. If the plant runs 24 hours a day for 7 days, that is 168 hours of work. Four shifts of
employees working 40 hours per week is 160 hours of work, leaving 8 hours of overtime per week.

3 There were four shifts of employees—two on night shift and two on day shift for each two-week period.

4 The parties and the trial court all operated under the assumption that if Apple had, in fact, properly adopted the 10/2
AWS, Epsilon would be permitted to continue operating the plant under it without a new secret ballot process. We therefore assume that this is true, although there appears to be no authority on the subject.

We note that to the extent this memorandum is a ballot, it is not a secret one. The ballot has a line for the “Employee name” and directs that the employee return the form to “your supervisor.”

The “12-hour shift” was another way of saying the 10/2 AWS.

Moreover, while her voting records indicate that shifts “B” and “C” voted on May 31, 2011, shifts “A” and “D” did not vote until June 2, 2011, after Mendoza wrote to the Division stating the employees had voted unanimously in favor of the 10/2 AWS.

Plaintiffs also named the plant manager as a defendant, but eventually voluntarily dismissed him.

Plaintiffs did not cross-appeal from the denial of class certification of the meal and rest break claims, but we discuss the facts underlying these claims as they relate to points Epsilon makes in its appeal.

The court also tried the named plaintiffs’ individual claims for missed meal and rest breaks. These are not at issue on appeal.

The parties, and the trial court, proceeded on the assumption that Epsilon had the burden of proof of its good faith, as a defense. Perhaps for this reason, plaintiffs did not specifically introduce additional evidence to refute good faith; they simply relied on the testimony regarding the adoption of the AWS from the first phase of the trial, and cross-examination of Epsilon’s witnesses.

Epsilon did not seek to offset against damages the additional half-hour of pay it gave its employees for the meal breaks. Epsilon would have had the burden of establishing such an affirmative defense. But Epsilon was simply taking the position that plaintiffs had not earned as much overtime as they claimed; this did not shift the burden.

At no point did Epsilon argue that it could not be liable for these waiting time penalties on the basis that waiting time penalties stop accruing when the action is commenced (§ 203, subd. (a)), and that these penalties accrued after the complaint was filed and the class certified.

Specifically, there was no suggestion that the wage statements were inaccurate due to time clock rounding or the fact that the meal period was simply included in 12 hours of paid work, rather than separately itemized.

The issue appears to be one of first impression. In Stewart v. San Luis Ambulance, Inc. (9th Cir. 2017) 878 F.3d 883, the Ninth Circuit certified to the California Supreme Court the related question of whether meal period violations may form the basis for improper wage statement claims under section 226. The case was initiated in the Supreme Court, but briefing has not yet begun. (Stewart v. San Luis Ambulance, S246255.)

Epsilon notes that, due to what was apparently an overloaded fax filing system, plaintiffs’ supporting documentation was not filed until the next morning, although it was timely served. The trial court was well within its discretion to consider this document.