

REDUCING THE RISK OF COSTLY WAGE AND HOUR LITIGATION - KEY CONSIDERATIONS



2017 Floyd, Skeren & Kelly LLP Employment Law Conference

PRESENTED BY

- Bernadette M. O'Brien, Esq., SPHR, FS&K Partner, Managing Attorney Employment Law Department
- Eric E. Ostling, Esq., FS&K Partner, Managing Attorney, Sacramento Office
- Michael B. Adreani, Esq., Partner at Roxborough, Pomerance, Nye & Adreani

2

DISCLAIMER

NOTHING IN THIS PRESENTATION SHOULD BE INTERPRETED OR RELIED UPON AS LEGAL ADVICE. THE PRESENTATION IS **FOR EDUCATIONAL PURPOSES ONLY**. FOR LEGAL ADVISE YOU SHOULD CONSULT A QUALIFIED ATTORNEY OR OTHER EXPERT. THIS PRESENTATION MAY NOT BE RECORDED, COPIED, OR DISTRIBUTED WITHOUT THE EXPRESS PERMISSION OF FLOYD, SKEREN & KELLY LLP.

3

INTRODUCTION

Welcome!

We will be looking at some of the significant areas in wage and hour that pose challenges for employers on a daily basis.

4

AGENDA



MINIMUM WAGE
ITEMIZED WAGE
STATEMENTS
("PAY STUBS")
FAIR PAY ACT



OVERTIME
EXEMPTIONS



MEAL AND REST
PERIODS
PAGA CLAIMS



KEY CASES

MINIMUM WAGE

NEW- CALIFORNIA MINIMUM WAGE AS OF JANUARY 1, 2017

- Employers with 26 or more employees, the state minimum wage increased on January 1, 2017, to \$10.50 per hour.
- For employers with 25 or fewer employees, the state minimum wage remains at \$10 per hour in 2017.
- Minimum wage will gradually increase to \$15 by 2022.

7

NEW- LOCAL MINIMUM WAGE RATES

- **Berkeley**=\$12.53/hour (\$13.75/hour effective October 1, 2017);
- **Cupertino**=\$12/hour (\$13.50/hour effective January 1, 2018);
- **El Cerrito**= \$12.25/hour (\$13.60/hour effective January 1, 2018);
- **Emeryville**=For employers with 55 or fewer employees: \$13/hour (\$14/hour effective July 1, 2017); For employers with more than 55 employees: \$14.82/hour; Next increase: July 1, 2017 (estimated to be \$15.20).

8

NEW- LOCAL MINIMUM WAGE RATES

- **Los Altos**=\$12/hour (\$13.50/hour effective January 1, 2018);
- **Los Angeles City**=For employers with 26 or more employees: \$10.50/hour (\$12/hour effective July 1, 2017); For employers with 25 or fewer employees: \$10/hour (\$10.50/hour effective July 1, 2017).

9

NEW-LOCAL MINIMUM WAGE RATES

- **Los Angeles County (Unincorporated Areas)** For employers with 26 or more employees: \$10.50/hour(\$12/hour effective July 1, 2017); For employers with 25 or fewer employees: \$10/hour (\$10.50/hour effective July 1, 2017)

10

NEW- LOCAL MINIMUM WAGE RATES

- **Malibu**=For employers with 26 or more employees: \$10.50/hour (\$12/hour effective July 1, 2017); For employers with 25 or fewer employees: \$10/hour (\$10.50/hour effective July 1, 2017)
- **Mountain View**=\$13/hour (\$15/hour effective January 1, 2018);
- **Oakland**=\$12.86/hour (Next increase: January 1, 2018)
- **Palo Alto**=\$12/hour; \$13.50/hour effective January 1, 2018)

11

NEW- LOCAL MINIMUM WAGE RATES

- **Pasadena**= For employers with 26 or more employees: \$10.50/hour (\$12/hour effective July 1, 2017) For employers with 25 or fewer employees: \$10/hour (\$10.50/hour effective July 1, 2017);
- **Richmond**=\$12.30/hour (\$13/hour effective January 1, 2018);
- **San Diego**=\$11.50/hour (Next increase: January 1, 2019);
- **San Francisco**=\$13/hour (\$14/hour effective July 1, 2017);

12

NEW- LOCAL MINIMUM WAGE RATES

- **San Jose**=\$10.50/hour (\$12/hour effective July 1, 2017);
- **San Leandro**=\$12/hour (effective July 1, 2017);
- **San Mateo**=\$12/hour (\$13.50/hour effective January 1, 2018);
- **Santa Clara**=\$11.10/hour (Next increase: January 1, 2019);
- **Santa Monica**=For employers with 26 or more employees: \$10.50/hour (\$12/hour effective July 1, 2017); For employers with 25 or fewer employees: \$10/hour (\$10.50/hour effective July 1, 2017) (Next increase: July 1, 2017);
- **Sunnyvale**= \$13/hour (\$15/hour effective January 1, 2018).

13

NEW- AB 2899 (MINIMUM WAGE VIOLATION APPEALS)

- Effective January 1, 2017. (Amends Labor Code Section 1197.1.)
- Requires that any employer, before appealing a decision by the Labor Commissioner (LC) relating to a violation of wage and hour laws, must file a bond—in favor of the unpaid employee—with the LC covering the total amount of any minimum wages, liquidated damages, and overtime compensation owed. The bill also provides that the total amount of the bond is forfeited to the employee if the employer fails to pay the amounts owed within 10 days from the conclusion of the proceedings.

14

CALIFORNIA FAIR PAY ACT (CFPA)

- CFPA went into effect on January 1, 2016. CFPA prohibits California employers from paying workers of one sex more than the workers of the opposite sex for “substantially similar” work unless the employer can show that any pay gap is justified by a factor other than sex.
- For example, pay based on quantity or quality of production or that resulted from differences in education, training or experience.
- CFPA applies to **all** employers.

15

NEW- WAGE EQUALITY ACT (SB 1063)

- SB 1063 extends the protections of the CPFA to compensation disparity based on race or ethnicity. If there is a wage differential the employer must demonstrate that specific, reasonably applied factors account for the entire wage differential, including:
 - 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, such as education, training or experience.

16

NEW- WAGE EQUALITY ACT (SB 1063) CONTINUED...

- An employer relying on a “bona fide factor” must ensure that such factor(s):
 - Is not based on or derived from a difference in compensation that is based sex, race or ethnicity,
 - Is job related, and
 - Is consistent with a “business necessity”
- The bona fide factor(s) that the employer relies on must also account for the entire wage differential.

17

NEW- ANOTHER AMENDMENT TO CFPA-AB 1676

- In effect as of January 1, 2017;
- AB 1676 further amends the Fair Pay Act to state that “prior salary cannot, by itself, justify any disparity in compensation.” More specifically, it clarifies that prior salary does not fall under the “bona fide factor” exception for a wage differential under Labor Code Section 1197.5.
- Importantly, the amendment does not prohibit employers from asking applicants for their salary history.

18

NEW-EEO-1 REPORTING ON PAY

- The EEO-1 is an annual report filed that must be filed annually (by September 30th) by most federal contractors and other private employers (with at least 100 employees). Employers must tally and report their employee numbers by job category and then by sex, race, and ethnicity (Hispanic or Latino).
- On September 29, 2016, the EEOC announced approval of a revised EEO-1, starting with the 2017 report, **to collect summary pay data from employers**, including federal contractors and subcontractors, with 100 or more employees. Summary pay data for private employers subject to Title VII jurisdiction will go to the EEOC.

19

NEW- WHAT ARE THE EEO-1 “PAY BANDS”?

The EEO-1 pay bands track the 12 pay bands used by the Bureau of Labor Statistics for the Occupation Employment Statistics survey as follows:

- (1) \$19,239 and under;
- (2) \$19,240 - \$24,439;
- (3) \$24,440 - \$30,679;
- (4) \$30,680 - \$38,999;
- (5) \$39,000 - \$49,919;
- (6) \$49,920 - \$62,919;
- (7) \$62,920 - \$80,079;
- (8) \$80,080 - \$101,919;
- (9) \$101,920 - \$128,959;
- (10) \$128,960 - \$163,799;
- (11) \$163,800 - \$207,999; and
- (12) \$208,000 and over.

Employers will count the number of employees they have in each pay band for each job category. If no employees are in a job category or pay band, employers will leave the cell blank. The employer will then enter this data in the appropriate columns of the EEO-1 report based on the sex and ethnicity or race of the employees. For more information go to www.eeoc.gov

20

ITEMIZED WAGE STATEMENTS “pay stubs”

LABOR CODE SECTION 226(A)-REQUIREMENTS

Labor Code section 226 (a) lists **nine** specific categories of information that must be on each itemized wage statement:

- (1) gross wages earned;
- (2) total hours worked by the employee (with exceptions for certain exempt employees);
- (3) the number of piece-rate units earned and any applicable rates if the employee is paid on a piece-rate basis;
- (4) all deductions, provided that deductions made on written orders of the employee may be aggregated and shown as one item;
- (5) net wages earned;

22

LABOR CODE SECTION 226(A)-REQUIREMENTS CONTINUED...

- (6) the inclusive dates of the period for which the employee is paid;
- (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number;
- (8) the name and address of the legal entity that is the employer; and,
- (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked by the employee at each hourly rate.

Plus the amount of accrued paid sick leave/PTO.

23

NEW- AB 2535 (ITEMIZED WAGE STATEMENTS)

- Effective January 1, 2017. Provides that employers need not list the number of hours worked on wage statements for any employee who is exempt from minimum wage and overtime requirements under the applicable IWC Wage Order or under statutes specified in Labor Code Section 226(j).

24

NEW-SOTO V. MOTEL 6 OPERATING, L.P., 2016 WL 6123927 (2016)

- **Held:** Labor Code Section 226(a) does not require employers to include the monetary value of accrued paid vacation time in employee wage statements unless and until a payment is due at the termination of the employment relationship.
- The employee filed a PAGA claim against Motel 6, arguing that pay stubs should include vacation/PTO because it is considered a “wage” under the California Labor Code, and employers must itemize “wages earned” on the pay stub. The court disagreed, holding that accrued paid vacation is not identified anywhere in Section 226(a)’s detailed list, and thus is not required to be on the pay stub.
- **Note:** If PTO is being provided to employees to satisfy the employer’s obligation to provide paid sick leave, accrued PTO must be on the pay stub.

25

HR COMPLIANCE TIP

- **EVEN IF YOU USE AN OUTSIDE PAYROLL SERVICE, PERIODICALLY CHECK YOUR EMPLOYEE PAY STUBS TO ENSURE COMPLIANCE**
- **MAKE SURE ACCURED PAID SICK LEAVE/PTO IS ON THE PAY STUB**

26

POST-BRINKER

OVERVIEW OF AN EMPLOYER'S MEAL AND REST PERIOD OBLIGATIONS

BRINKER'S ARGUMENT

- An employer is only obliged to make meal breaks **available** and need not **ensure** that employees take such breaks;
- Brinker complied with its legal obligation to make meal breaks available, many employees took those breaks, and inquiry into why particular employees did not take meal breaks raised individual questions precluding class treatment.

BOTTOM LINE: WHAT DID THE **BRINKER** COURT SAY?

- The California Supreme Court held that “an employer must relieve the employee of all duty for the designated period, but need not ensure that the employee does no work”;
- On meal period timing, the Court held that “an employer’s obligation is to provide a meal period after no more than 5 hours of work and a second meal period after no more than 10 hours of work.”

29

WHAT DID THE **BRINKER** COURT SAY ABOUT REST PERIODS?

- The Court held that employers are “subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period...one rest break should fall on either side of the meal break...”
- “[E]mployees are entitled to 10 minutes rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours and so on.”

30

MEAL PERIODS

MEAL PERIOD OBLIGATIONS-in general

Employers must **relieve the employee of all duty and relinquish all control** over the employee's activities;

▪ Permit a reasonable opportunity to take:

- An uninterrupted 30 minute break (may leave the premises);
- **FIRST MEAL PERIOD**--After no more than 5 hours (5.0) of work (8 hour shift), unless a valid meal period waiver is in place;
- **SECOND MEAL PERIOD**—Required after no more than 10 (10.0) hours of work, unless a valid meal period waiver is in place.

32

| MEAL PERIOD WAIVER- FIRST MEAL PERIOD

- **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.**
- **The waiver should be in writing and can be revoked by the employee.**

33

| MEAL PERIOD WAIVER-SECOND MEAL PERIOD

- **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 employee only if the first meal period was not waived.**

34

PREMIUM PAY

What happens if an employee is **required** to work through a meal/rest period or somehow impeded from taking a meal/rest period by the employer ? **The employer owes “premium pay”;**

- Missed meal period: One hour of premium pay, at the employee’s regular rate of pay (straight-time), **in addition to pay for the time worked;**
- Missed rest period/s: One hour of premium pay, at the employee’s regular rate of pay; **a total of one hour** of premium pay, even if both rest periods are missed.

35

BRINKER ON PREMIUM PAY

When someone is suffered or permitted to work – i.e., employed – for 5 hours, an employer is put to a choice: It must:

- (1) Provide an off duty meal period or,
- (2) Consent to a mutually agreed-upon waiver, if one hour or less will end the shift or,
- (3) Obtain written agreement to an on-duty meal period, if circumstances permit.

Failure to do one of these will render the employer **liable for premium pay.**

36

PREMIUM PAY - WHEN IS THERE NO OBLIGATION TO PAY?

What happens if the employee **voluntarily** works through all or part of his or her meal/rest period/s or takes a delayed meal/rest period?

▪ **Brinker:** “If work does continue, the employer will not be liable for premium pay. At most, it will be liable for straight pay, and then only when it “knew or reasonably should have known that the worker was working through the authorized meal period.”

▪ The key question will be whether the meal or rest period/s was missed due to the employee’s voluntary action or due to the employer’s requirement (or impeding action) that caused the employee to miss the meal/rest period/s.

37

PREMIUM PAY - BURDEN OF PROOF

EMPLOYERS MUST CONSIDER:

▪ How will you show that employees have taken their meal and rest period/s, as required?

▪ How will you show that the employee voluntarily chose to work (as opposed to “was required” to) through all or part of a meal/rest period/s?

▪ What documentation/evidence do you have, especially if a class/representative action is filed?

38

ON-DUTY MEAL PERIOD

- 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 employer and employee an on-the-job paid meal period is agreed to. The written agreement must state that the employee may, in writing, revoke the agreement at any time.
- The test of whether the nature of the work prevents an employee from being relieved of all duty is an objective one. An employer and employee may not agree to an on-duty meal period unless, based on objective criteria, any employee would be prevented from being relieved of all duty based on the necessary job duties.
- Some examples of jobs that fit this category are a sole worker in a coffee kiosk, a sole worker in an all-night convenience store, and a security guard stationed alone at a remote

39

REST PERIODS

IS ANYTHING WRONG WITH THIS POLICY?

- Every employee is permitted to take rest periods, which insofar as practicable shall be in the middle of each work period.
- The authorized rest period time shall be based on the total hours worked daily at the rate of ten minutes of rest time for every four hours worked.
- However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half hours.

41

REST PERIOD OBLIGATIONS-IN GENERAL

Employers must authorize and permit:

- An uninterrupted 10 minute rest period;
- For every 4 hours worked **or major fraction thereof, which is defined as two hours;**
- Rest breaks are not required if the workday is 3 and ½ hours or less.

42

| **RODRIQUEZ V. E.M.E., INC. (APRIL 2016)**

- Rest breaks **may not be** combined into one 20 minute break, even if the employee consents, absent “unusual or exceptional circumstances.”
- For an eight-hour shift, rest breaks should fall on either side of the meal break, absent factors rendering such scheduling “impracticable.”
- “A departure from the preferred schedule is permissible only when the departure (1) will not unduly affect employee welfare and (2) is tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule.”

43

| **NEW- THE *AUGUSTUS* CASE**

- California Supreme Court held:
“During required rest periods, employers **must relieve their employees of all duties and relinquish any control over how employees spend their break time.**”
- \$90 million dollar judgment against the employer upheld.

44

BEST PRACTICES FOR MEETING MEAL AND REST PERIOD OBLIGATIONS

- IMPLEMENT COMPLIANT, WRITTEN WAGE AND HOUR POLICIES;
- HAVE **EMPLOYEES SIGN** A SEPARATE MEAL AND REST PERIOD POLICY;
- **TRAIN** MANAGEMENT AND ALL EMPLOYEES ON THESE POLICIES; DOCUMENT YOUR TRAINING EFFORTS.
- IMPLEMENT APPROPRIATE TIME-KEEPING SYSTEMS

45

**OVERTIME CLAIMS
ARE A CONTINUING PROBLEM
FOR EMPLOYERS**

OVERTIME – IT IS A CONTINUING PROBLEM FOR EMPLOYERS

- Employers continue to **misclassify** employees as exempt from overtime, either because an employee does not meet exemption criteria or the employer mistakenly believes if employee is “salaried” no overtime is owed;
- It is the number one wage and hour violation claim on a federal level. Overtime class actions are filed every day. These are incredibly expensive for employers to defend and resolve.

47

EXEMPTION LAWS

- **Federal:**
 - Fair Labor Standards Act (FLSA)
 - 29 C.F.R. Part 541 - Overtime Exemption Regulations for Executive, Administrative, Professional, Computer and Sales Professionals
- **California:**
 - Labor Code §515 and,
 - California Code of Regulations; Chapter 5. Article 4§110401(A).

48

CALIFORNIA EXEMPTION TEST

Overtime is owed for more than 8 hours in a day, 40 in a week, unless the employee is exempt; To meet exemption status the employer must meet both the duties and salary requirements. Each exempt category has specific duty requirements:

▪ **Duties Test:** > 50% (Amount of time on exempt duties);

▪ **Salary Test:**

- **Employers with 26 or more employees:** 2xs the 2017 state minimum wage = \$3,640 per month (\$43,680 per year).
- **Employers with 25 or fewer employees:** For 2017, the state minimum wage remains at \$10 per hour. Accordingly, the minimum monthly salary test remains at \$3,466.67 per month (\$41,600 per year) .
- **Computer Professionals:**
 - January 1, 2017 = \$42.35 per hour, effective January 1, 2017. The minimum monthly salary exemption is \$7,352.62, and the minimum annual salary exemption is \$88,231.36.

49

FEDERAL EXEMPTION TEST

- Employer must meet both the duties (requiring exercise of discretion and independent judgment) and salary test (\$455 per week);
- Overtime pay is owed for hours worked over 40 in a workweek at a rate not less than time and one-half their regular rates of pay;
- There is no limit in the FLSA on the number of hours employees aged 16 and older may work in any workweek;
- The FLSA does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest, unless overtime is worked on such days.

50

“SALARY” AND OVERTIME

- **REMEMBER:** Just because an employee receives a “salary” **does not mean** the employee is exempt from overtime;
- The employee’s position **must meet the duties and salary tests**;
- Consequences for misclassification include:
 - Damages for missed meal and rest periods
 - Back pay
 - Penalties
 - Other damages

51

NEW- AB 1066 (AGRICULTURAL WORKERS)

- “Phase-In Overtime for Agricultural Workers Act of 2016,” which requires employers to pay agricultural workers overtime over a four-year phase-in process.
- Effective January 1, 2019, employers must pay overtime for any hours worked over 9.5 hours per day or 55 hours per workweek. Each year the hours worked triggering overtime pay will reduce, until reaching 8 hours per day, 40 hours per week, beginning January 1, 2022. Effective January 1, 2022, any employee who works over 12 hours per day must be paid at a rate no less than double the regular rate of pay.

52

| KEY EXEMPTIONS

- Executive Exemption
- Administrative Exemption
- Professional Exemption (Licensed Professionals)
- Computer Professional
- Outside/Inside Salesperson
- Learned Professional

53

| Question?

- If an employee is a “professional” (e.g. store manager, loan officer, account manager) and is paid a salary that meets California’s minimum threshold for exempt status, are they properly classified as exempt?

54

JOB DUTIES AND TITLE ARE NOT DETERMINATIVE OF EXEMPT STATUS

- Job titles are not determinative of an employee's exempt or nonexempt status;
- The employee must meet the duties requirement **and** salary basis;
- Most exemptions require, at a minimum, that the employee **“customarily and regularly exercise discretion and independent judgment”** in their jobs - this does not mean mere supervisory duties.

55

PROPOSED CHANGES TO SALARY BASIS FOR EXEMPT STATUS

DOL'S PROPOSED MINIMUM SALARY INCREASE

- DOL proposed a minimum exempt salary increase from \$455 to \$913 per week, which annualizes to \$47,476 (up from \$23,660 per year). This amount would be “updated” every three years with the first update scheduled for January 1, 2020.
- This is more than California’s current requirement that an exempt employee must earn a salary equivalent to \$43,680 annually. (For employers with 25 employees or less, the current minimum wage is \$10.00 per hour – so the exempt salary threshold is \$41,600 annually).;
- This would be a significant development for many employers around the country due to the amount of the increase (from \$23,660 to \$47,476).

57

CURRENT STATUS OF PROPOSED INCREASE TO FEDERAL MINIMUM SALARY THRESHOLD

- March 17, 2016 - House and Senate Republicans introduced legislation calling for the rule to be stopped or at least delayed;
- On November 22, 2016, a federal judge in Texas blocked the DOL’s overtime rule from taking effect on December 1, 2017, by issuing a preliminary injunction preventing the rules from being implemented on a nationwide basis. The DOL has appealed.

58

NEW- AB 1565**(PROPOSED CA LEGISLATION TO RAISE MINIMUM EXEMPT SALARY THRESHOLD)**

- **AB 1565 requires that an executive, administrative, or professional employee is exempt from overtime only if they perform exempt duties and earn a monthly salary of \$3,956 (or \$47,472 annually) or twice the state minimum wage, whichever is higher.**

59

**THE ADMINISTRATIVE EXEMPTION
WHAT ARE THE PITFALLS?**

ADMINISTRATIVE EXEMPTION DUTIES TEST

- Office or non-manual employee;
- Management of policies or operations using:
 - **Discretion and independent judgment**
 - **Executive/administrator**
 - **Only general supervision**
- 50% of time performing exempt duties;
- Meets required salary.

61

MISCLASSIFICATION

- **Administrative exemption** - most overused and incorrectly applied - Why?
 - Wording - “Legalese”
 - Close calls
 - Historical mindset
 - Job title connotations
 - Salary connotations

62

BEST PRACTICES

Be proactive:

- Conduct regular internal HR audits
- Create accurate job descriptions
- Ensure compliant job duties
- Update employee handbooks
- Conduct annual performance reviews
- Follow changes in the law

63

COMMONLY MISCLASSIFIED EMPLOYEES

- IT employees
- Loan officers
- Store managers
- “Administrative” assistants
- Supervisors

64

INDEPENDENT CONTRACTOR versus EMPLOYEE STATUS

MISCLASSIFYING EMPLOYEES AS INDEPENDENT CONTRACTORS

- **DEPARTMENT OF LABOR (DOL) CALIFORNIA DEPARTMENT OF LABOR STANDARDS ENFORCEMENT (DLSE)**
 - Increased scrutiny:
 - Misclassification cases often resolve in employee's favor.
- **Multiple tests for determining independent contractor status including from the DOL and DLSE;**
- In California, "willful" misclassification penalties \$5,000 to \$25,000 per violation.

66

FEDERAL DOL TEST

- Pursuant to the DOL, factors include:
 - Degree of control
 - Managerial skill
 - Employee's v. employer investment
 - Job requires special skill and initiative

- Administrator's Interpretation No. 2015-1;
 - FLSA expansive definition of "employ" - most workers are employees.

67

CALIFORNIA DLSE TEST

The most significant factor to be considered is whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker both as to the work done and the manner and means in which it is performed. Additional factors that may be considered depending on the issue involved are:

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal;
2. Whether or not the work is a part of the regular business of the principal or alleged employer;
3. Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work;
4. The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers;
5. Whether the service rendered requires a special skill;

68

CALIFORNIA DLSE TEST CONTINUED...

6. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;

7. The alleged employee's opportunity for profit or loss depending on his or her managerial skill;

8. The length of time for which the services are to be performed;

9. The degree of permanence of the working relationship;

10. The method of payment, whether by time or by the job; and

11. Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests.

69

DAY OF REST AND EXEMPT EMPLOYEES

The California Labor Code “day of rest” provisions are as follows:

▪Section 551 provides that “every person employed in any occupation of labor is entitled to one day’s rest therefrom in seven.”

▪Section 556 exempts employers from the duty to provide a day of rest “when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof.”

▪Section 552 prohibits employers from “causing their employees to work more than six days in seven.”

Question: How do the required “day of rest” provisions impact exempt employees?

70

PAGA CLAIMS

WHAT ARE “PAGA” CLAIMS?

California’s “Private Attorney General Action of 2004” (PAGA)

- Enacted in 2004 – Labor Code Sections 2698-2699.5;
- Deputizes employees to act as private attorney generals;
- Employees may seek civil penalties that previously were only available to the State;
- Employees may seek civil penalties on behalf of themselves **and all other current and former similarly “aggrieved employees”**;

- PAGA award:
 - 75 percent of any penalties go to LWDA
 - 25 percent distributed among aggrieved employees
 - Attorney’s fees and costs

- A one-year statute of limitations.

72

| PAGA VS. CLASS ACTION

- Do not have to meet criteria required to obtain class certification;
- Cases where class certification is denied may still proceed under PAGA;
- Theory is PAGA is designed to **protect the public** as opposed to a means to recover damages on behalf of a class (75/25 split);
- Statute of limitations
 - PAGA – one year
 - Class and individual claims – up to 4 years.

73

| WHAT CLAIMS DOES PAGA COVER?

Numerous (100+) wage and hour violations including:

- Pay stub violations
- Meal and rest periods violations
- Failure to timely pay wages on termination
- Denial of time off for jury duty, school activities, crime victims leave, etc.
- Retaliation for lawful conduct while off duty
- Failure to reimburse employee for expenses
- Failure to pay overtime
- Violating right to day of rest

74

| MOST COMMON PAGA CLAIMS

- Meal break violations
- Rest break violations
- Overtime violations
- Pay stub violations

75

| WHAT IS A “PAGA LETTER”?

- Notice sent by plaintiff’s counsel to the employer and Labor and Workforce Development Agency (LWDA);
- Provides notice of intent to file a “Private Attorney General Action” (PAGA claim);
- Another avenue an employee could elect for wage and hour violations is to file his or her claim with the Labor Commissioner. This would **not** be a PAGA claim.

76

PAGA NOTICE REQUIREMENTS

- Written notice from the employee, by certified mail, to LWDA and the employer;
- The notice, which is in letter format, details all labor code provisions allegedly violated;
- All PAGA claim notices must be filed online, with a copy sent by certified mail to the employer;
- All employer cure notices or other responses to a PAGA claim must be filed online, with a copy sent by certified mail to the aggrieved employee or aggrieved employee's representative;
- **PAGA civil suit proceeds if LWDA:**
 - Specifically declines to pursue the matter- LWDA has 60 days to consider.

77

SAFE HARBOR PROVISION

In limited situations, employers may avoid a PAGA claim for certain violations if the employer cures the violation within 33 days;

- **Process:**
 - Employer sends notice of actions taken to cure the violation to the LWDA and the employee;
 - Employee may respond alleging the violation was not cured;
- **Appeal** to LWDA goes to the California Superior Court.

78

EMPLOYER RESPONSE TO “PAGA Letter”

- Consult with legal counsel. Counsel will then determine if notice was:
 - Served properly and contained sufficiently specific facts about the alleged violations;
- If not:
 - Claim can be dismissed outright.

79

WHAT IF NOTICE IS SUFFICIENT?

- Employer must raise same defenses as other civil actions under the labor code and wage orders;
- **Best defense is a good offense:**
 - Internal HR audits
 - Job descriptions
 - Performing specified job duties
 - Employee handbooks/wage and hour policies
 - Enforce wage and hour policies
 - Train management on wage and hour policies
 - Annual performance reviews

80

| PAGA SETTLEMENTS

- The court must review and approve;
- If settlement also covers other labor code violations:
 - A portion is allocated to PAGA claims
 - It must be reasonable

81

| QUESTION?

- **WHY DO PAGA CLAIMS CONTINUE TO BE SUCH A PROBLEM FOR EMPLOYERS?**

82

ANSWER

PAGA BROADENED WAYS OF SUING EMPLOYERS

- **PAGA broadened the ways that employers can be sued, because it enabled employees to sue employers for violation of statutes that previously provided no private right of action.**

83

ANSWER

PAGA INCREASED POTENTIAL LIABILITY FOR EMPLOYERS

- **PAGA increased potential liability for employers, because employees can sue on behalf of themselves and other aggrieved employees.**
- **A class action plaintiff has to satisfy specific requirements to represent a class; however, it is not clear what, if anything, a PAGA plaintiff must prove to bring a representative action.**
- **A PAGA representative action cannot be subject to mandatory arbitration.**

84

ANSWER

LACK OF employer compliance

- **Many employers do not understand their obligations under the Labor Code, particularly in regards to meal and rest periods, overtime and pay stubs.**

85

QUESTION?

- **WHY ARE PAGA CLAIMS OFTEN SO EXPENSIVE TO DEFEND AND RESOLVE?**

86

ANSWER-ATTORNEY FEES/PAGA PENALTIES

For all provisions of the Labor Code, except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of PAGA, as follows: \$100 for each employee per pay period for the initial violation and \$200 for each employee per pay period for each subsequent violation. **PAGA does not limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently.** (Lab. Code section 2699(f)(2))

- The employee who brought the action collects 25% of the total penalties and the remaining 75% are distributed to the LWDA.
- In addition, employees can recover attorneys' fees, costs, and interest as well as unpaid wages.
- The employee may collect on behalf of other aggrieved employees (current and former).

87

EXAMPLE-OVERTIME CLAIM

A supervisor claims he was denied overtime. He brings a PAGA action on behalf of 50 current supervisors and an additional 5 former supervisors who worked for the employer in the past year (the statute of limitations is 1 year), alleging they were all denied overtime. The overtime statute provides a penalty for unpaid overtime for the first violation at \$50 per employee per pay period (26 in a year), and \$100 for subsequent violations.

PAGA Penalties Calculation

- \$50/penalty for first violation x 55/aggrieved former and current employees x 1/first pay period = \$2,750.
- \$100/ penalty for subsequent violations x 55/aggrieved former and current employees x 25/subsequent pay periods = \$137,500.
- \$2,750 + \$137,500 = \$140,250 in total PAGA penalties (PLUS ATTORNEY'S FEES/COSTS)

88

NEW-AB 1506

PAGA related legislation (2016) that amends PAGA to provide an employer with the opportunity to cure a violation of requirement that:

- Employer provide employees with dates of pay period on paystub;
- Employer provide name and address of employer on paystub;

Paystub violations often form the basis of PAGA claims. This section can be used once in a 12 month period of time.

EMPLOYERS MUST PERIODICALLY CHECK THEIR PAYSTUBS TO ENSURE COMPLIANCE.

89

ARBITRATION AGREEMENTS

SHOULD AN EMPLOYER HAVE AN ARBITRATION AGREEMENT?

Should discuss with legal counsel what is appropriate for your workplace; however,

- **Arbitration agreements can include a class waiver - this is important (representative PAGA claims cannot be included);**
- **Arbitration tends to be a speedier, more cost effective method of resolving disputes;**
- **Should be a separate stand alone policy.**

91

STATUTE OF LIMITATIONS IN WAGE AND HOUR CASES

WHAT IS THE STATUTE OF LIMITATIONS FOR A WAGE AND HOUR CLAIM?

▪ In general:

- Claims for “penalties” have a **one-year** statute of limitations;
- Claims for unpaid wages have a **three-year** statute of limitations;
- Most attorneys filing wage claims also include a claim for violation of California’s Unfair Competition Law (UCL), which has a **four-year** statute of limitations.
- PAGA claims- **one-year** statute of limitations.

93

KEY CASES

| SAFEWAY INC. V. SUPERIOR COURT

- **Class action against Safeway in which plaintiffs alleged Safeway failed to provide itemized pay statements, and never “under any circumstances” paid premium pay for missed meal and rest periods, even though Safeway had correct policies in place and employees signed declarations stating they were provided meal and rest periods as required;**
- **Court of Appeal upheld class certification because the employer’s challenged practice and the fact of damage were capable of common proof.**

95

| PENDING-MENDOZA V. NORDSTROM

- **At issue is whether under California law an employee can waive her right to a day off, or opt to shift her rest day from week to week. For example, a worker who takes a day off on Monday of one week, then on a Friday the following week would work for 10 days straight, but still have a day off in each workweek.**

96

PENDING- DYNAMEX OPERATIONS WEST, INC., V. SUPERIOR COURT

- At issue is which test determines whether an independent contractor was misclassified? The IWC definition of “employee” (as set forth in *Martinez v. Combs*, 49 Cal. 4th 35 (2020), or the common law test set forth in *S.G. Borello & Sons, Inc.*, 48 Cal. 3d 341 (1989)

97

PENDING-TROESTER V. STARBUCKS CORP.

- At issue is whether the federal *de minimis* doctrine applies to claims for unpaid wages under California Labor Code Sections 510, 1194 and 1997 (minimum wage and overtime).

98

PENDING-ALVARADO V. DART CONTAINER CORP OF CALIFORNIA

- At issue is the correct way to calculate the rate of overtime pay when a non-exempt employee receives a flat sum bonus.

99

CONCLUSION

SPEAKER BIOS

BERNADETTE M. O'BRIEN, ESQ., SPHR

- PARTNER, FLOYD, SKEREN & KELLY, LLP
- JOINED FS&K IN 2009
- MANAGING ATTORNEY OF FS&K'S EMPLOYMENT LAW DEPARTMENT
- HUMAN RESOURCES SPECIALIST REPRESENTING EMPLOYERS IN HR COMPLIANCE
- AUTHOR OF "LABOR AND EMPLOYMENT IN CALIFORNIA" AND "CALIFORNIA LEAVES OF ABSENCE"

102

ERIC E. OSTLING, ESQ.

- PARTNER, FLOYD, SKEREN & KELLY, LLP
- JOINED FS&K IN 2007
- MANAGING ATTORNEY OF FS&K'S SACRAMENTO OFFICE
- SPECIALIZES IN EMPLOYMENT LAW LITIGATION DEFENSE INCLUDING WAGE AND HOUR/DISCRIMINATION AND HARASSMENT CLAIMS, ADMINISTRATIVE CLAIMS, CERTIFIED SPECIALIST-WORKERS' COMPENSATION LAW, THE STATE BAR OF CALIFORNIA BOARD OF LEGAL SPECIALIZATION

103

MICHAEL B. ADREANI, ESQ.

- MICHAEL B. ADREANI, PARTNER AT ROXBOROUGH, POMERANCE, NYE & ADREANI
- MR. ADREANI SPECIALIZES IN THE AREAS OF BAD FAITH LITIGATION, CLASS ACTIONS, WAGE AND HOUR LAWS, CIVIL APPEALS, INSURANCE REGULATION, ADMINISTRATIVE ACTIONS AND APPEALS, EMPLOYER LIABILITY AND LEGISLATIVE ACTION.
- PRIOR TO JOINING RPNA IN 1997, MR. ADREANI GAINED VALUABLE EXPERIENCE IN INSURANCE RELATED ISSUES WHILE WORKING AT THE CALIFORNIA DEPARTMENT OF INSURANCE, LEGAL DIVISION, IN SAN FRANCISCO, AND WITH THE IN-HOUSE LEGAL TEAM AT HANNOVER RE, ONE OF THE WORLD'S LARGEST REINSURERS LOCATED IN HANNOVER, GERMANY.

104

DISCLAIMER AND COPYRIGHT INFORMATION

This publication/presentation is only intended to provide [educational information](#) about the subject matter covered. It is not intended to, nor does it constitute legal advice.

[More specifically, it is provided with the understanding that the authors/presenters do not render legal or other professional advice/services.](#)

If legal advice or other expert assistance is required, seek the services of a competent professional. Persons using this publication/attending the presentation, who are dealing with specific legal matters, should exercise their own independent judgment and research original sources of authority and local court rules. The authors/presenters make no representations concerning the contents of this publication/presentation and disclaim any warranties of merchantability or fitness for a particular purpose.

THIS PRESENTATION MAY NOT BE RECORDED, COPIED, OR DISTRIBUTED WITHOUT THE EXPRESS PERMISSION OF FLOYD, SKEREN & KELLY, LLP.

© 2017 FS&K Publishing, Inc. ALL RIGHTS RESERVED