2023

California

STATE HR ADVOCACY & LEGISLATIVE CONFERENCE

CALIFORNIA
STATE COUNCIL OF SHRM

2023 California Case Law Update

Christopher C. Hoffman
Fisher Phillips | Regional Managing Partner
choffman@fisherphillips.com | 858.597.9610

2023
California
STATE HR ADVOCACY &
LEGISLATIVE CONFERENCE

CALIFORNIA
STATE COUNCIL OF SHRM

AFFILIATE OF
SHRM
BETTER WORKPLACES
BETTER WORLD™

Camp v. Home Depot, U.S.A. Inc. 2022 WL 13874360(Oct 24, 2022)

Camp v. Home Depot, U.S.A., Inc. 2022 WL 13874360 (Oct 24, 2022)

- Home Depot used the "Kronos" electronic timekeeping system, which recorded, to the minute, the time that employees punched in and out for their shifts. At the end of each shift, Home Depot applied a quarter-hour rounding to each employee's total shift time.
- Home Depot moved for summary judgment on the grounds that the policy was neutral on its face and neutral as applied in conjunction with past California cases. The lower court granted the ruling.

Camp v. Home Depot, U.S.A., Inc. 2022 WL 13874360 (Oct 24, 2022)

- The California Court of Appeal, citing to more recent cases, reversed the lower court and found that there was a triable issue of fact as to whether Home Depot's time rounding was impermissible.
  - Focused on court cases indicating you have to pay to the minute.
  - Focused on access to better technology that eliminates the need for rounding.
  - Focused on how the employer was able to capture the exact amount of time worked.

Camp v. Home Depot, U.S.A., Inc. 2022 WL 13874360 (Oct 24, 2022)

- The Camp case reminds employers that rounding policies shall be scrutinized and that a review of such policies should be done immediately.
- Companies with electronic timekeeping should pay close attention to this ruling and consider eliminating rounding policies.

Hill v. Walmart, Inc.
32 F.4th 811 (9th Cir. 2022)

Hill v. Walmart, Inc.
32 F.4th 811 (9th Cir. 2022)

- Bijon Hill modeled in ten Walmart photo shoots for a total of 15 days and was represented by a modeling agency, Scout.
- Walmart had a contract with Scout where it agreed to pay Scout a daily flat rate for each day of modeling services. The flat fee was to be passed along to Hill. The contract further specified that Scout and its personnel were independent contractors.
- *Issue: Whether Hill was entitled to 30 days of waiting penalties under California Labor Code § 203 because Walmart "discharged" and failed to pay Hill at the end of each photoshoot.*

Hill v. Walmart, Inc.
32 F.4th 811 (9th Cir. 2022)

- **Holding: Walmart was not required to pay waiting penalties because there was a "good faith dispute" that any wages were due to Hill.**
- The Ninth Circuit held that "a good-faith mistake about a worker's employment status is a defense to the imposition of waiting-time penalties pursuant to § 203."
- Using the *Borello* test, the Ninth Circuit concluded that Walmart had reasonable grounds at the time to believe Hill was an independent contractor (Hill arranged and paid for her own travel, worked for other modeling companies, etc.).

Hill v. Walmart, Inc.
32 F.4th 811 (9th Cir. 2022)

- Takeaways:
  - A "good faith dispute" will preclude the imposition of waiting time penalties pursuant to § 203.
  - Employers are able to show a "good faith dispute" by presenting a defense that would prevent recovery by the employee.
  - The fact that a defense is ultimately unsuccessful will *not* preclude a finding that a good faith dispute existed.
  - However, defenses presented that are "unsupported by any evidence, are unreasonable, or are presented in bad faith" will preclude a finding of a good faith dispute.

Johnson v. Winco Foods, LLC
37 F.4th 604 (9th Cir. 2022)

Johnson v. Winco Foods, LLC 37 F.4th 604 (9th Cir. 2022)

- WinCo Foods required successful job applicants to take a mandatory drug test before they could begin their employment. WinCo paid the drug testing facility's fee, but applicants were required to pay for the travel expenses associated with said drug testing and were not reimbursed for their time.
- Johnson sued on behalf of himself and a class of WinCo employees, seeking reimbursement for the time and travel expenses required to take the test arguing that they were employees when they took the drug test.
- *Issue: Whether WinCo is required to reimburse job applicants for the time and travel expenses associated with completing a mandatory drug test as a condition of employment.*

Johnson v. Winco Foods, LLC 37 F.4th 604 (9th Cir. 2022)

- **Holding: Johnson and other WinCo applicants were not employees at the time they were required to undergo mandatory drug testing. As such, WinCo is not required to compensate for the time and travel expenses associated with mandatory drug testing.**
- Although WinCo exercised control over the mandatory drug testing, the Court found that control over a drug test as part of the job application process is not control over the performance of the job. Therefore, the applicants were not yet employees when they underwent drug testing.
- Applying principles of California contract law, the Court held that WinCo job applicants did not become employees until they satisfied the condition of passing the pre-employment drug test. Accordingly, the drug test was a condition precedent to employment, and applicants were not entitled to reimbursement.

Johnson v. Winco Foods, LLC 37 F.4th 604 (9th Cir. 2022)

- Takeaways:
  - Employers are not required to compensate job applicants for time and expenses spent taking drug tests as a condition precedent to employment.
  - The fact that employers control the manner in which certain activities take place, such as job interviews, background checks, and drug testing, *does not* convert applicants into employees for purposes of compensation.
  - To avoid being required to reimburse for expenses such as drug testing, employers must emphasize that these activities are conditions precedent to a *contingent* job offer, either orally or in writing. For example, in *Winco Foods* the Hiring Manager of WinCo was required to tell applicants that the pre-employment drug test was a condition of WinCo's contingent job offer.

Hebert v. Barnes & Noble, Inc.
78 Cal. App. 5th 791 (2022)

Hebert v. Barnes & Noble, Inc. 78 Cal. App. 5th 791 (2022)

- Vicki Hebert applied to work for Barnes & Noble in 2018. During the application process, Barnes & Noble's consumer reporting agency emailed Hebert a link to a website that displayed Barnes & Noble's consumer report disclosure.
- Hebert alleged that Barnes & Noble willfully violated the federal Fair Credit Reporting Act (FCRA) by providing job applicants with a disclosure that included extraneous business-to-business language that was unrelated to the topic of consumer reports.
- Barnes & Noble filed a motion for summary judgment asserting that the "extraneous information" was included in the disclosure due to an inadvertent drafting error that resulted from a "miscommunication" between its employees, its outside counsel, and its consumer reporting agency.
- *Issue: Whether a reasonable jury could find that Barnes & Noble's alleged FCRA violation was willful.*

Hebert v. Barnes & Noble, Inc. 78 Cal. App. 5th 791 (2022)

- **Holding: The Court of Appeal reversed a grant of summary judgment to Barnes & Noble, holding that a jury could conclude that the violation was willful.**
- The "extraneous information" constituted a willful violation because it violated an unambiguous provision of the FCRA; at least one of the company's human resources employees was aware of the extraneous information in the disclosure; the company may not have adequately trained its employees on FCRA compliance; and/or the company may not have had a monitoring system in place to ensure compliance with the FCRA.

Hebert v. Barnes & Noble, Inc. 78 Cal. App. 5th 791 (2022)

- Takeaways:
  - 15 U.S.C. § 1681(b)(2)(a) clearly and unambiguously prohibits a prospective employer from including terms on a disclosure form in addition to those mandated by the FCRA.
  - Generally, "willfulness" under the FCRA presents a question of fact properly reserved for the jury; as such, it is an inappropriate ground for a motion for summary judgment.
  - "Willfulness" under the FCRA includes *reckless* statutory violations, in addition to knowing statutory violations.
  - It is unclear whether a FCRA defendant may invoke the advice-of-counsel defense to try to rebut a showing of willfulness; however, even in contexts where an advice-of-counsel defense is recognized, a defendant's good faith reliance on the advice of counsel "is not a complete defense, but only one factor for consideration."

Meza v. Pacific Bell Telephone Co.
79 Cal. App. 5th 1118 (2022)

Meza v. Pacific Bell Telephone Co. 79 Cal. App. 5th 1118 (2022)

- Pacific Bell is a telecommunications corporation that had an incentive program for employees whereby each month, employees earned "points" that could be exchanged for merchandise based on the achievement of specified metrics. The points, which were a form of bonus, were earned over the course of an entire month, and the bonus amount was not known until the close of that month. Accordingly, Pacific Bell calculated the overtime true-up after the close of the month and reflected it in the next month's first wage statement.
- Meza sued Pacific Bell, alleging that certain entries in Pacific Bell's wage statements violated the statutory requirements of California Labor Code § 226(a)(9) by failing to include the "rate" and "hours" attributable to Pacific Bell's lump sum overtime true-up payments.
  - Overtime true-up: additional overtime wages owed based on performance bonuses earned in earlier periods.

Meza v. Pacific Bell Telephone Co. 79 Cal. App. 5th 1118 (2022)

- **Holding: The statutory requirements of California Labor Code § 226(a)(9) do not require that employers list the "rates" and "hours" from prior pay periods underlying an overtime true-up calculation on an employee's wage statement. Thus, Pacific Bell's wage statements complied with the requirements of § 226.**
  - This holding is consistent with the Ninth Circuit's interpretation of § 226(a)(9) in *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668 (9th Cir. 2021).
- The Court of Appeal found that none of the variables involved in the overtime true-up calculation, such as the hours worked or rates of pay, related to the pay period when payment was actually issued. As such, these variables did not need to be listed on wage statements.

Meza v. Pacific Bell Telephone Co. 79 Cal. App. 5th 1118 (2022)

- Takeaways:
  - California Labor Code § 226(a)(9) does not require an employer to list the hours and rates from *prior* pay periods next to its calculations of an overtime true-up payment on an employee's wage statement.
  - The California Supreme Court has repeatedly held that an employer's obligation to provide information in connection with § 226 is limited to the pay period in which a statement was issued.
  - The California Legislature did not include a requirement in § 226 that employers include the hours and rates from prior pay periods on wage statements. **Caution:** if the Legislature amends the language of § 226 to include such a requirement, employers must comply accordingly.

Viking River Cruises, Inc. v. Moriana
142 S. Ct. 1906 (2022)

Viking River Cruises, Inc. v. Moriana 142 S. Ct. 1906 (2022)

- Moriana filed a Private Attorneys General Act (PAGA) action despite having entered into an arbitration agreement with her former employer, Viking River Cruises. In this agreement, Moriana agreed to waive her right to bring a class, collective, or PAGA representative action.
- Viking River moved to compel arbitration of Moriana's individual PAGA claim and to dismiss her other representative PAGA claims. Applying the *Iskanian* rule, the California courts denied the motion, holding that PAGA waivers are not enforceable and PAGA claims cannot be split into arbitrable "individual" claims and non-arbitrable "representative" claims.
- *Issue: Whether the Federal Arbitration Act (FAA) preempts the rule invalidating contractual waivers of the right to bring a representative action under PAGA as set forth in* Iskanian*.*

Viking River Cruises, Inc. v. Moriana
142 S. Ct. 1906 (2022)

- **Holding: The FAA allows the division of PAGA actions into individual and non-individual claims through an agreement to arbitrate; accordingly, Viking River was entitled to compel arbitration on Moriana's individual PAGA claim.**
- The Supreme Court also concluded that a plaintiff's ability to bring non-individual PAGA claims is tethered to maintaining their own individual PAGA claim in the action. Therefore, if a plaintiff is ordered to arbitrate their individual PAGA claim, they would lack standing to continue pursuing the non-individual PAGA claims in court. As such, a court would be required to dismiss the representative PAGA claims.

Viking River Cruises, Inc. v. Moriana 142 S. Ct. 1906 (2022)

- Takeaways:
  - The FAA preempts <u>any</u> state law discriminating on its face against arbitration – for example, a law prohibiting the arbitration of a particular type of claim.
  - Nothing in the FAA establishes a categorical rule mandating enforcement of PAGA waivers.
  - Sotomayor Concurrence: Emphasized that California courts have the last word on defining and interpreting PAGA. Additionally, the California Legislature can modify the scope of statutory standing under PAGA at any time.

What is the Status of Mandatory Arbitration Agreements in CA?

- Status of AB 51?
- Lots of drama
- February 16, 2023 – 9th Circuit found that AB 51 was preempted by FAA
  - Hopefully the end to an up and down battle
  - Reverses 2021 decision pre Viking River

What to Do Now?

- It is important to act now – "Triple A" - assess, analyze, act.
- Review existing arbitration agreements.
- If you do not have arbitration, evaluate implementing.
- Evaluate what to do with pending PAGA matters.
  - CA Supreme Court decision coming soon
  - Adolph v. Uber = fully briefed

Hamilton v. Wal-Mart Stores, Inc.
39 F.4th 575 (9th Cir. 2022)

Hamilton v. Wal-Mart Stores, Inc. 39 F.4th 575 (9th Cir. 2022)

- Walmart opened an ecommerce center in Chino, CA.
- As an anti-theft measure, Walmart placed a security checkpoint where employees exited the facility. All employees were required to go through the checkpoint whenever they left the facility, including for lunch, which took "several minutes" to get through. Employees were also required to take their breaks in designated rest areas. The time employees spent walking to and from the designated rest areas were deducted from their 15-minute break periods.
- Alyssa Hernandez brought five PAGA claims against Walmart, all concerning alleged wage and hour violations.
- *Issues: 1) Whether a PAGA plaintiff must satisfy the class certification requirements under Fed. R. Civ. P. 23, including manageability; and 2) Whether a PAGA claim must sufficiently disclose damages under Fed. R. Civ. P 26(a).*

Hamilton v. Wal-Mart Stores, Inc. 39 F.4th 575 (9th Cir. 2022)

- **Holding: PAGA claims are not subject to the same requirements as the requirements to certify a class in a class action lawsuit, including the manageability requirement. Moreover, Fed. R. Civ. P. 26(a) does not apply to PAGA claims.**
- Referencing the U.S. Supreme Court's decision in *Viking River*, the Court emphasized three differences between class and PAGA actions, namely that a class action plaintiff brings multiple claims and represents multiple individuals, while a PAGA plaintiff only represents a California state agency (LWDA) which has multiple claims.
- Since PAGA actions do not involve individual claims for money damages, the Court found it improper to apply the Rule 23 manageability requirement and the Rule 26(a) damages requirement because doing so would undermine PAGA's goals of enhancing the LWDA's enforcement capabilities.

Hamilton v. Wal-Mart Stores, Inc. 39 F.4th 575 (9th Cir. 2022)

- Takeaways:
  - Fed. R. Civ. P. 23 and 26(a) do not govern PAGA claims. As such, it is much easier for plaintiffs to proceed with PAGA claims than with class actions.
  - Even if PAGA is later determined by courts to be a state procedural rule, under the *Erie* doctrine PAGA is not inconsistent and does not conflict with Fed. R. Civ. P. 23. This is because class actions and PAGA actions are "fundamentally different."
  - PAGA claims seek *civil penalties*, not damages.
  - The Court emphasized that considering the structure and purpose of PAGA, imposing a manageability requirement in PAGA cases would not constitute "a reasonable response to a specific problem" and would contradict California law by going against the key features of PAGA actions. This is especially true given that the State of California would not face a similar manageability requirement if it brought an enforcement action.

Naranjo v. Spectrum Security Services, Inc.
13 Cal. 5th 93 (2022)

Naranjo v. Spectrum Security Services, Inc. 13 Cal. 5th 93 (2022)

- Spectrum Security Services provides secure custodial services to federal agencies, such as transporting and guarding prisoners and detainees who require outside medical attention. Gustavo Naranjo worked as a guard for Spectrum.
- Naranjo was suspended and later fired after leaving his post to take a meal break, in violation of a Spectrum policy that required custodial employees to remain on duty during all breaks.
- Naranjo filed a class action on behalf of Spectrum employees, alleging that Spectrum had violated state meal break requirements under the Labor Code and other applicable wage orders. Naranjo sought "premium pay" for each day on which Spectrum failed to provide employees a legally compliant meal break.
- *Issue: Whether extra pay for missed meal and rest breaks constitutes "wages" that must be reported on statutorily required wage statements during employment and paid within statutory deadlines when an employee leaves the job.*
- *Secondary Issue: What rate of pre-judgment interest applies to amounts due for failure to provide meal and rest breaks.*

Naranjo v. Spectrum Security Services, Inc. 13 Cal. 5th 93 (2022)

- **Holding: Meal and rest break premium pay constitutes wages for purposes of waiting time penalties. Thus, any premium pay that is not timely paid is subject to statutory waiting time penalties.**
- An employer's obligation to provide an accurate and itemized wage statement includes an obligation to report premium pay for meal or rest break violations.
- The pre-judgment interest rate for claims alleging meal and rest break violations is the 7% default rate set by the California Constitution, not the 10% contractual rate set by statute.

Naranjo v. Spectrum Security Services, Inc. 13 Cal. 5th 93 (2022)

- Takeaways:
  - Meal and rest break premiums constitute wages. Therefore, premium pay must be paid within the statutory time limits when an employment relationship ends.
- California Labor Code § 226 requires employers to provide an accurate itemized wage statement reporting all amounts earned and owing, not just amounts actually paid to the employee. For purposes of § 226, an employee who remains on duty without a break has "earned" premium pay. Therefore, failure to report premium pay on wage statements supports monetary liability for employers under § 226.

Bentacourt v. OS Restaurant Services, LLC
No. B293625 (Cal. Ct. App. Aug. 25, 2022)

Bentacourt v. OS Restaurant Services, LLC No. B293625 (Cal. Ct. App. Aug. 25, 2022)

- Raquel Bentacourt worked as a server at a restaurant jointly owned by OS Restaurant Services, LLC and Bloomin' Brands, Inc. from 2008 through 2015.
- Bentacourt sued in August 2016 alleging, in part, that defendants failed to give her full uninterrupted rest periods.
- Bentacourt sought premium pay under California Labor Code § 226.7 for the rest break violations as well as penalties, costs and attorney's fees under §§ 218.5 and 226 for failing to include rest break premiums on her itemized wage statements.
- *Issue: Whether an employee plaintiff can recover attorney's fees and costs when they prevail on a claim for statutory penalties for meal or rest period violations.*

Bentacourt v. OS Restaurant Services, LLC No. B293625 (Cal. Ct. App. Aug. 25, 2022)

- **Holding: For purposes of California Labor Code § 218.5, claims for statutory penalties under § 226 for meal or rest period violations are claims for the nonpayment of wages. Thus, a plaintiff who prevails on such claims can be awarded attorney's fees and costs.**
- The court emphasized that under § 218.5, the court *must* award the prevailing party reasonable attorney's fees and costs in any action brought for the nonpayment of wages, if any party requested fees and costs at the beginning of the action.

Bentacourt v. OS Restaurant Services, LLC No. B293625 (Cal. Ct. App. Aug. 25, 2022)

- Takeaways:
  - Attorney's fees and costs are recoverable in wage and hour actions based solely on meal and rest period violations because such claims are considered claims for the nonpayment of wages.
  - The *Naranjo* decision establishes a clear legal basis for the award of attorney's fees in connection with a prevailing claim for premium pay for missed meal/break periods.
    - Remember, the *Naranjo* court held that premium pay for missed meals/breaks constitutes wages subject to the same timing and reporting rules as other forms of compensation.
  - In addition to being liable for statutory penalties for missed meal and rest periods, employers are now also potentially liable for sizable attorney's fees and costs stemming from such actions.

Meda v. AutoZone, Inc. (81 Cal.App.5th 366)

Meda v. AutoZone, Inc. (81 Cal.App.5th 366)

- Monica Meda worked as a sales associate at an AutoZone for approximately six months before quitting and suing for violation of the Private Attorneys General Act ("PAGA"), on the basis that AutoZone failed to provide suitable seating to employees at the cashier and parts counter workstations.
- AutoZone obtained summary judgment in the trial court on the ground that Meda had no standing to bring a PAGA action because it satisfied the seating requirement by making two chairs available to its associates.
- Meda appealed arguing that the two chairs were not placed at the cashier or parts counter workstations (they were outside the manager's office), and Meda argued that no one told her the chairs were available for use at the front counter workstations, and she never saw anyone else use a chair at those workstations.
- The Court of Appeal reversed the summary judgment and held that "where an employer has not expressly advised its employees that they may use a seat during their work and has not provided a seat at a workstation," the inquiry as to whether the employer has "provided" suitable seating may be "fact-intensive and may involve a multitude of job- and workplace-specific factors," making resolution at the summary judgment stage "inappropriate."

Cadena v. Customer Connexx LLC
(51 F.4th 831)

Cadena v. Customer Connexx LLC (51 F.4th 831)

- Call center operators alleged they were not paid for time spent booting up computers prior to logging in or closing down computers
  - FLSA: employers not required to compensate employees for preliminary / postliminary activities
- 9th Circuit concluded duties could not be performed without turning on and booting up computer, and having functioning computer was necessary to receive calls
  - When required activity bears such a close relationship to the employees' principal duties that eliminating it would prevent them from performing their principal duties the activity becomes "compensable"
- Consider application under CA law

Christopher C. Hoffman

Regional Managing Partner
Fisher Phillips LLP

Chris Hoffman is the founding and managing partner of the San Diego office. He has represented hundreds of employers in matters ranging from class action litigation, to traditional labor matters and general employment advice. He also co-chairs the Automobile Dealers Industry Group.

2023

California

STATE HR ADVOCACY &
LEGISLATIVE CONFERENCE

CALIFORNIA
STATE COUNCIL OF SHRM

Thank You