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EMPLOYMENT LAW UPDATE

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California

The Property Service Workers Protection Act

California-based janitorial workers are entitled to certain rights under California law. The Property Service Workers Protection Act ("PSWPA") has its first compliance date on July 1, 2018. The PSWPA can be found at California Labor Code sections 1420 et seq. and has its next compliance date of July 1, 2018. By way of background, commencing January 1, 2017, janitorial employers were required to keep accurate records for three years consisting of: (A) names and addresses of all employees engaged in rendering actual services for any business of the employer, (B) daily hours worked, including the times the employee begins and ends each work day, (C) wages paid each payroll period, (D) ages of any minor employees, and (E) any other conditions of employment (job descriptions, workplace injuries, and similar type of records). In the case of subcontractors, under probable application of Labor Code section 2810.3, if the employer is considered a "client employer" under California's joint employer statute, a copy of the same records should be maintained by the client employer for the subcontractor employees, together with proof of workers' compensation insurance, for every subcontractor performing work for the client employer from and after January 1, 2017.

Covered janitorial employers must register with the California Labor Commissioner. The registration fee is $500. Registration must occur no later than July 1, 2018. Moreover, starting July 1, 2018, and until the Division of Labor Standard Enforcement ("DLSE") establishes further training requirements, employers must provide employees with the Department of Fair Employment & Housing ("DFEH") Sexual-Harassment Prevention Pamphlet. The current version of this pamphlet can be obtained at the following address: https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH_SexualHarassmentPamphlet.pdf. By January 1, 2019, the DLSE must develop a biannual, in-person sexual violence and harassment prevention training for employees and employers.

Pending Legislation

June 1, 2018 was the deadline for the state Senate and Assembly to pass bills introduced in their respective houses to the other house. A number of employment-related bills failed to pass the house of origin. However, many others

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may potentially become law in California. The deadline for the bills to pass both houses and to move to Governor Brown for consideration is August 31, 2018.

The following bills are still being considered this legislative session:

AB 1761 (Muratsuchi, Quirk, and Carrillo): AB 1761 would require hotel employers to: (1) provide employees with a free "panic button" to call for help when working alone in a guest room that the employee may use, and allow the employee to cease work, if the employee reasonably believes there is an ongoing crime, harassment, or other emergency happening in the employee's presence; (2) post a notice on the back of each guestroom door informing guests of the panic buttons entitled, "The Law Protects Hotel Housekeepers and Other Employees from Sexual Assault and Harassment"; and (3) provide an employee subjected to an act of violence, sexual harassment or assault, upon request, with time off to seek assistance from law enforcement, legal or medical assistance, and/or reasonable accommodation. The bill would prohibit employers from taking action against any employee who exercises the protections afforded by this bill, and impose a $100 per day penalty, up to $1,000, for a violation of these proposed provisions.

AB 1867 (Reyes): AB 1867 would require employers with 50 or more employees to retain records of all internal employee sexual harassment complaints for ten years, and would allow the Department of Fair Employment and Housing to seek an order compelling non-compliant employers to do so. The bill, which would add Section 12950.5 to the Government Code, is currently before the Senate Labor and Industrial Relations Committee.

AB 1870 (Irwin): AB 1870 would extend the time an employee has to file an administrative charge with the DFEH alleging an unlawful practice under the FEHA, including, but not limited to, allegations of a sexual harassment, from one year to three years from the alleged incident.

AB 1976 (Limón): This bill would ensure employers' already-required reasonable efforts to provide a room or location for lactation consists of providing something other than a toilet stall or bathroom. This bill is before the Senate Committee on Labor and Industrial Relations.

AB 2079 (Gonzalez Fletcher): AB 2079 is also referred to as the "Janitor Survivor Empowerment Act." This bill would: (1) prohibit the Division of Industrial Relations ("DIR") from approving a janitorial service employer's registration or a renewal that has not fully satisfied a final judgment for certain unlawful employment practices; (2) require the DIR to convene an advisory committee to develop requirements for qualified organizations and peer trainers that janitorial employers must use to provide sexual harassment prevention training; (3) require the DIR to maintain a list of qualified organizations and qualified peer trainers and employers to use a qualified organization from the list; and (4) require employers, upon request, to provide an employee a copy of all training materials. AB 2079 builds upon AB 1978 (2016) – the Property Services Workers Protection Act, effective July 1, 2018 – which established requirements to combat wage theft and sexual harassment for the janitorial industry.

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AB 2282 (Eggman): AB 2282 is this year's Fair Pay Act bill, and it attempts to clarify some ambiguities in Labor Code sections 432.3 and 1197.5 created by prior pay equity legislation, AB 1676 (2016) and AB 168 (2017). AB 2282 would clarify that "pay scale" means a "salary or hourly wage range," that "reasonable request" by an employee for a position's pay scale means "a request made after an applicant has completed an initial interview with the employer," and that "applicant" or "applicant for employment" means an individual who is seeking employment with the employer and is currently not employed with that employer in any capacity or position. The bill provides that nothing in section 432.3 prohibits an employer from asking an applicant about his/her salary expectation, and that nothing in section 1197.5 should be interpreted to prohibit an employer from making a compensation decision based on a current employee's existing salary as long as any wage differential resulting from that compensation decision is justified by one or more of the factors specified in the statute. AB 2282 is currently before the Senate Committee on Labor and Industrial Relations.

AB 2587 (Levine): Legislation effective January 1, 2018, removed the seven-day waiting period before an eligible employee may receive family temporary disability benefits (under the paid family leave program, which provides wage replacement benefits to workers who take time off work to care for a seriously ill family member or to bond with a minor child within one year of birth or placement). AB 2587 would remove the requirement that up to one week of vacation leave be applied to the waiting period, consistent with the removal of the seven-day waiting period for these benefits. This bill is scheduled for hearing in the Senate Committee on Labor and Industrial Relations.

AB 2732 (Gonzalez Fletcher): This bill would make it illegal and subject to a $10,000 penalty for an employer to knowingly destroy or withhold any real or purported passport, other immigration document, or government identification, of another person, in the course of committing trafficking, peonage, slavery, involuntary servitude, a coercive labor practice, or to avoid any obligation imposed on the employer by the Labor Code. This bill would require an employer to post a workplace notice stating the rights of an employee to maintain custody of the employee's own immigration documents, that the withholding of immigration documents by an employer is a crime, and "If your employer or anyone is controlling your movement, documents, or wages, or using direct or implied threats against you or your family, or both, you have the right to call local or federal authorities, or the National Human Trafficking Hotline at 888-373-7888." Further, the bill would require an employer to provide employees with the "Worker's Bill of Rights," to be developed by the DIR by July 1, 2019, which would inform employees of the same rights. Employers would be required to have employees sign the "Worker's Bill of Rights" and maintain the records for at least three years.

AB 2770 (Irwin): AB 2770 would include as privileged communications: (1) complaints of sexual harassment made without malice by an employee to an employer based upon credible evidence; (2) communications between the employer and "interested persons" made without malice regarding the complaint; and (3) non-malicious statements made to prospective employers as to whether a decision to not rehire would be based on a determination that the former employee had engaged in sexual harassment. The bill is currently before the Senate Judiciary Committee.

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AB 3080 (Gonzalez Fletcher): This bill would prohibit: (1) a person from, as a condition of employment or as a condition of entering into a contractual agreement, prohibiting a job applicant, an employee, or independent contractor from disclosing to any person instances of sexual harassment suffered, witnessed, or discovered in the work place; (2) mandatory arbitration of sexual harassment claims; and (3) retaliation against an applicant or an employee who refuses to sign an arbitration agreement.

AB 3081 (Gonzalez Fletcher and Bonta): This bill would: (1) extend Labor Code prohibitions on discrimination against employees who are victims of domestic violence, sexual assault, or stalking to include employees who are victims of sexual harassment, as well as employees who take time off to assist a family member who is a victim of domestic violence, sexual assault, sexual harassment or stalking; (2) create a rebuttable presumption of unlawful retaliation against an employee if any adverse job action occurs within 90 days of reporting sexual harassment, participating in an investigation, or similar acts; (3) increase the time an employee has to file a complaint with the DLSE for violation of Labor Code section 230 (provides protected time off for jury duty and victims) from one year to three years; (4) require an employer, at the time of hiring and regularly on an annual basis thereafter, to provide to each employee a written notice that includes prescribed information about sexual harassment; and (5) require an employer with 25 or more employees to provide sexual harassment prevention training to all nonsupervisory employees at the time of hire and once every two years thereafter. The bill would also require the Labor Commissioner to create a means for employees to report sexual harassment or assault that occurs in the workplace.

AB 3082 (Gonzalez Fletcher): AB 3082 would require the state Department of Social Services ("DSS") to develop a policy addressing sexual harassment of in-home supportive services providers and to provide the Legislature with a summary by September 30, 2019. AB 2872 would require the DSS to adopt a peer-to-peer training course for IHSS providers and to ensure that every authorized provider has received at least two hours of peer-to-peer training by December 31, 2019. Beginning January 1, 2020, the bill would require all new or returning IHSS providers to receive at least two hours of peer-to-peer training within their first year of employment.

AB 3109 (Stone): This bill would make void and unenforceable a provision in a contract or settlement agreement, entered into on or after January 1, 2019 that: either (1) waives a party's right to testify regarding an alleged criminal conduct or sexual harassment by the other party to the contract or agreement in an administrative, legislative, or judicial proceeding; or (2) substantially restrains a party's right to seek employment or reemployment in any lawful occupation or industry, unless the other party to the contract or agreement is the current or prior employer (except for public employers and a private employer that "so dominates the labor market" so as to effectively restrict the employee from being able to secure employment). The bill is currently before the Senate Judiciary Committee.

SB 820 (Leyva): SB 820 is known as the Stand Together Against Non-Disclosure Act and would make void as a matter of law and public policy provisions in settlement agreements, entered into on or after January 1, 2019, that

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prevent the disclosure of factual information related to cases involving sexual assault, sexual harassment, sex discrimination, and failure to prevent sex-based harassment and discrimination. The bill would, however, allow such a confidentiality provision to be included upon the request of the claimant unless the opposing party is a government agency or public official; and would allow a provision requiring the monetary settlement payment be kept confidential. SB 820 would build on AB 1682, signed into law in 2016, which prohibits confidentiality provisions in settlement agreements in cases involving child sexual abuse or sexual assault against an elderly or dependent adult.

SB 937 (Wiener and Leyva): SB 937 would substantively change existing lactation accommodation requirements, by requiring a lactation room to be safe, clean, and free of toxic or hazardous materials, contain a surface to place a breast pump and personal items, contain a place to sit, and have access to electricity. The bill would exempt employers with fewer than 50 employees that can show that the requirement would impose an undue hardship by causing significant expense or operational difficulty when considered in relation to the employer's size, financial resources, or structure. SB 937 would allow employers to designate a temporary lactation location, instead of providing a dedicated room, due to operational, financial, or space limitations. In addition, SB 937 would require employers to develop and implement a new lactation accommodation policy describing an employee's right to a lactation accommodation, how to request an accommodation, the employer's obligation to respond to the request, and the employee's right to file a complaint with the Labor Commissioner. The bill would also require employers to maintain accommodation request records for three years and to allow the Labor Commissioner access to the records. The bill would require the DLSE to create and make available a model lactation policy and model lactation accommodation request form on the DLSE website, as well as lactation accommodation best practices. The bill would deem a denial of reasonable break time or adequate lactation space a failure to provide a rest period in accordance with Labor Code section 226.7.

SB 1038 (Leyva): This bill would make an employee who intentionally retaliates against a person who has filed a complaint, testified, assisted in any proceeding, or opposed any prohibited practice, under FEHA, jointly and severally liable, regardless of whether the employer knew or should have known of that employee's retaliatory conduct.

SB 1252 (Pan): SB 1252 would amend Labor Code section 226 to grant employees the right "to receive" a copy of (not just inspect) their pay statements. This bill is currently being considered by the Assembly Committee on Labor and Employment.

SB 1284 (Jackson): This bill would require, on or before September 30, 2019, and each year thereafter, that private employers with 100 or more employees submit a pay data report to the DIR. If enacted, the law would require employers to include in the report the following for each establishment, and a consolidated report for all establishments: (1) the number of employees by race, ethnicity, and sex in the following categories: all levels of officials and managers, professionals, technicians, sales workers, administrative support workers, craft workers, operatives, laborers and helpers, and service workers; and (2) the number of

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employees by race, ethnicity and sex whose earnings fall within each of the pay bands used by the US Bureau of Labor Statistics Occupation Employment Statistics Survey, determined by each employee's total earnings for a 12-month look-back period, including total hours worked by each employee for part-time/partial-year employment. Employers that are required to submit the EEO-1 Report could instead submit that report to the DIR. The DIR would maintain the reports for 10 years and make the report available to the DFEH upon request. Non-compliant employers would be subject to a $500 civil penalty for the initial violation and $5,000 for each subsequent violation as well as citation by the Labor Commissioner. The bill would prohibit the DIR and DFEH from publicizing any individually identifiable information obtained through this process but authorize the DIR or the DFEH to develop and publicize aggregate reports based on the information received that are reasonably calculated to prevent association of any data with any business or person.

SB 1300 (Jackson): This bill would amend the Fair Employment and Housing Act to require a plaintiff who alleges the employer failed to take all reasonable steps necessary to prevent discrimination and harassment to show: (1) the employer knew the conduct was unwelcome, (2) the conduct would meet the legal standard for harassment or discrimination if it increased in severity or became pervasive, and (3) the employer failed to take all reasonable steps to prevent the same or similar conduct from recurring. This bill would also (a) prohibit an employer from requiring a release of claims or rights under FEHA, or a nondisclosure agreement or other agreement not to disclose unlawful acts in the workplace, in exchange for a raise or a bonus or as a condition of employment or continued employment, (b) require employers, with five or more employees, to provide two hours of sexual harassment prevention training, including bystander intervention training, within six months of hire and every two years thereafter to all California employees – not just supervisors, and (c) prohibit a prevailing defendant from being awarded fees and costs unless the court finds the action was frivolous, unreasonable, or totally without foundation when brought or that the plaintiff continued to litigate after it clearly became so.

SB 1343 (Mitchell): SB 1343, which closely resembles SB 1300, would require employers with five or more employees – including temporary or seasonal employees – to provide at least two hours of sexual harassment training to all employees by 2020 and then once every two years thereafter. SB 1343 would also require the DFEH to develop (or obtain) and publish on its website a two-hour interactive online training course on prevention of sexual harassment in the workplace. The bill would also require the DFEH to make the training course, as well as posters and fact sheets, available in multiple languages (i.e., English, Spanish, Simplified Chinese, Tagalog, Vietnamese, Korean and any other language spoken by "a substantial number of non-English speaking people").

SB 1412 (Bradford): SB 1412 would allow an employer to inquire into a job applicant's particular conviction, regardless of whether that conviction has been judicially dismissed or sealed, under these specified conditions: (1) the employer is required by federal law, federal regulation, or state law to obtain information about the particular conviction, (2) the job applicant would carry or use a firearm as part of the employment, (3) the job applicant with that particular conviction would be

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ineligible to hold the position sought, or (4) the employer is prohibited from hiring an applicant who has that particular conviction.

SB 954 (Wieckowski): SB 954 would require that, except in the case of a class action, before engaging in a mediation or mediation consultation, an attorney representing a client participating in a mediation or a mediation consultation must provide the client with a written disclosure containing the mediation confidentiality restrictions provided in the Evidence Code. The bill would require the attorney to obtain a written acknowledgment signed by the client stating that the client has read and understands the confidentiality restrictions. However, an agreement prepared during a mediation would remain valid even if an attorney fails to comply with the disclosure requirement. The bill would also add to the mediation privilege of Evidence Code section 1122 any communication, document, or writing that is to be used in an attorney disciplinary proceeding to determine whether an attorney has complied with the above requirements, and does not disclose anything said or done or any admission made in the course of the mediation.

JUDICIAL

California

Court of Appeal Affirms Grant of Summary Judgment in Dispute Over Alleged Joint Employer Arrangement

A California Court of Appeal issued a modified ruling in *Curry v. Equilon Enterprises, LLC*, rejecting the joint employer relationship claimed by an alleged employee. The modified ruling amended the court's original order with regard to the analysis of whether the plaintiff, Sadie Curry ("Curry"), was an employee of Equilon (dba Shell Oil Products USA, (hereinafter, "Shell")), but the conclusion remained unchanged. In sum, Curry could not establish that she was an employee of the entity that owned the facility where she worked, leaving her solely the employee of the entity that operated the facility.

Curry worked as a manager for A.R.S., an entity that managed Shell fueling stations and convenience stores. Under the arrangement between Shell and A.R.S., Shell owned the filling stations and equipment, but leased the facilities to outside entities to operate the on-site convenience stores and car washes. The operating agreements were known as "Multi-Site Contractor Operated Retail Outlet Agreements" (MSO Contract). Shell owned the gasoline being sold, and controlled all revenues and pricing. MSO operators were required to document fuel sales and provide related information to Shell; Shell reimbursed Operators for the labor expenses related to the fuel operations.

Curry's lawsuit alleged that she had been misclassified as an exempt employee and had been denied overtime and breaks to which she had been entitled. She sued A.R.S. and Shell on the theory that both entities employed her. Shell brought a motion for summary judgment on the grounds that it had never employed Curry, and only A.R.S. could potentially be held liable for her employment-related claims. The trial court granted the motion. Curry thereafter appealed on the theory that Shell was also her employer based on its ownership of the facility and the work that she performed in furtherance of Shell's fuel sales, which Shell controlled.

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The Court of Appeal evaluated Curry's lawsuit with the recognition that the applicable wage order contained three different potential definitions for "employ." These were (a) to exercise control over the wages, hours, or working conditions (taken from the IWC definition of "employer"); (b) to suffer or permit to work (taken from the IWC definition of "employ"); or (c) to engage, (taken from the IWC definition of "employ"). In its circumspect decision, the court examined each.

First evaluating the test for control over wages, hours, and working conditions, the court concluded that A.R.S., not Shell, was the employer. It was undisputed that A.R.S. set Curry's schedule and pay rate, and Shell had no control as to what duties Curry performed or how she did them. The court rejected the theory that Shell controlled Curry's working conditions by setting requirements for facility operation, as A.R.S. was authorized to perform the necessary activities in the manner it saw fit. This included staffing and management of personnel.

The court similarly ruled that Shell was not Curry's employer under the "suffer or permit" test. Under that analysis, an employment relationship may arise where the employer permits the employee to work on its behalf, even if a traditional employment arrangement was not in place or originally intended. Here, A.R.S. alone controlled Curry's employment. Shell could neither hire nor discharge her, and the fact that Shell did not prevent A.R.S. (an independent third party) from employing her did not make her Shell's employee.

Finally, the court concluded that Shell did not "engage" Curry as understood under the common law employment relationship test, which is normally used to differentiate between employees and independent contractors. In weighing eight distinct factors, the court ruled that even though Shell owned the facility and set some general requirements for A.R.S. in its operation, the fact that A.R.S. controlled virtually all elements of Curry's employment precluded the finding of an employment relationship with Shell. Because this and the first two tests did not indicate an employment relationship, the court affirmed the grant of summary judgment.

The Court of Appeal's ruling identifies a serious concern for any entity that could potentially be considered a joint employer, including franchisers and owners of properties operated by outside management companies. If aggrieved employees can establish they were the employees of both the entity that managed them directly and one linked via contract – even if that entity did not have any contact with the employee or contemplate an employment relationship – both could be held responsible for noncompliant employment practices. As such, any arrangement wherein a third party oversees personnel management issues must be closely evaluated to determine whether a joint employment relationship could exist, and if so, whether all applicable employment regulations are being observed.

Court of Appeal Holds Deterring a Candidate from Applying for a Job by Lying About Open Positions Can Constitute a Discriminatory Failure to Hire

A potential employer can be held liable under the Fair Employment & Housing Act ("FEHA") by deterring a pregnant candidate from applying for a job by lying about open positions. In *Abed v. Western Dental Services, Inc.*, a

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California Court of Appeal reversed an award of summary judgment in favor of defendant Western Dental, concluding that plaintiff Ada Abed ("Abed") had raised triable issues as to whether Western Dental intentionally discriminated against her by falsely stating that no jobs were available.

In March 2015, Western Dental published a job posting for a dental assistant in its Napa office. In May 2015, Abed was selected for an externship as a dental assistant at the Napa office. Typically, Western Dental hires externs upon the completion of their externships. Abed was pregnant when she began her externship, but did not disclose this fact to Western Dental.

During her externship, Abed was supervised by Sabrina Strickling ("Strickling"). Although Strickling lacked authority to hire, fire, or discipline employees, she was responsible for evaluating Abed's performance. During the second week of Abed's externship, Strickling spotted prenatal vitamins in Abed's half-open purse. Strickling commented that "if [Abed] were pregnant, it would not be convenient for the office." On either that or a different occasion, Abed overheard Strickling say, "[W]ell, if she's pregnant, I don't want to hire her."

Approximately two weeks later, Abed asked Strickling whether there were any openings for dental assistants in the Napa office. Strickling said no. On account of Strickling's representation, Abed did not apply for a position in the Napa office.

The month after Abed's externship ended, another candidate commenced an externship in the Napa office. That candidate was ultimately hired for the position posted the previous March.

In employment discrimination cases, the plaintiff bears the initial burden of proving the elements of a prima facie case of discrimination. Generally, in a failure-to-hire case, those elements are: (1) the plaintiff applied for a job; (2) the plaintiff was not hired; and (3) the plaintiff's membership in a protected class substantially motivated the decision not to hire her. Here, Western Dental argued that, because Plaintiff never applied for any positions with the company, she could not establish a prima facie case of discrimination and therefore her claim necessarily failed.

The Court of Appeal disagreed, stating that this was not a typical failure-to-hire case. According to the Court of Appeal, a plaintiff asserting a failure-to-hire claim may satisfy her burden by showing that the employer's discriminatory conduct deterred her from applying for the position: "Employers who lie about the existence of open positions are not immune from liability under the FEHA simply because they are effective in keeping protected persons from applying." Here, Abed presented evidence that Strickling made multiple derogatory comments about Abed's pregnancy. Even though Strickling did not have hiring authority, she played a key role in the events that led Abed to forego applying for a job – she told Abed that there were no open positions in the Napa office, and that statement caused Abed not to submit an application. Based on the foregoing evidence, Abed had raised triable issues as to whether Western Dental intentionally refused to hire her because she was pregnant.

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Although the *Abed* opinion appears to extend the class of persons who may obtain relief for discrimination beyond employees and individuals who actually submit job applications, it does not represent a drastic or unforeseeable change in the law. Both the FEHA and Title VII of the Civil Rights Act of 1964 have long prohibited employers from lying to employees about the availability of promotions and other benefits of employment where such lies aim to prevent protected individuals from advancing their careers. The *Abed* opinion merely confirms that employers should avoid taking actions that are intended to disadvantage persons on account of their protected status.

Court of Appeal Holds Plaintiff Need Not Show Injury or a "Knowing and Intentional" Violation in Order to Prevail on Representative PAGA Claim For Failure to Provide Accurate Wage Statements

In *Raines v. Coastal Pacific Food Distributors, Inc.,* a California Court of Appeal reversed summary judgment granted in the employer's favor in connection with a Private Attorneys General Act of 2004 ("PAGA") claim for civil penalties for a violation of Labor Code section 226(a) ("section 226(a)").

After her discharge, Plaintiff Teri Raines ("Raines") sued her employer, Coastal Pacific Food Distributors, Inc. ("Coastal Pacific") for age and disability discrimination and other related claims. In addition, she sought recovery, both individually and in a representative capacity, under PAGA, for Coastal Pacific's alleged failure to provide and maintain accurate wage statements as required by section 226(a) and its provisions.

After settling and/or disposing of many claims, the parties focused their attention on Raines' individual claim under section 226(a) as well as the PAGA claim, stipulating that the wage statements issued by Coastal Pacific included the number of overtime hours worked and the total overtime pay, but did not include the overtime-hourly rate of pay.[1]

The trial court concluded that Raines had not suffered an "injury," as required for her individual claim under section 226(e), because the hourly overtime rate could be determined from the wage statement by using simple math. As such, Raines' individual section 226(e) claim failed. The trial court also held that Raines had to demonstrate injury in order to maintain her PAGA claim. Raines appealed.

The appellate court analyzed whether a representative PAGA claim for violation of section 226(a) requires the same showing as an individual claim for statutory penalties under section 226(e), ultimately concluding that the requirements for a section 226(e) individual claim do not apply to a PAGA claim for violation of the same code section. When a plaintiff brings a PAGA claim for a violation of section 226(a), he or she seeks to recover civil penalties under Labor Code section 226.3. The court differentiated these civil penalties from an individual suit for damages under section 226(a). It noted that section 226.3 permits the Labor Commissioner to take into consideration whether the section 226(a) violation was inadvertent. Thus, the civil penalty has no "knowing and intentional" requirement because inadvertence is only a factor the court may

[1] One item that must be included in the wage statement is "all applicable hourly rates in effect during the pay period."

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consider, not a disqualifying condition. Because section 226.3 does not include a "knowing and intentional" requirement, the court concluded that a representative PAGA claim for civil penalties for a violation of section 226(a) does not require proof of injury or a "knowing and intentional" violation.[2]

The different evidentiary standards for individual and PAGA claims highlight the importance of maintaining accurate itemized wage statements, as a plaintiff can pursue (and win) a representative PAGA claim without demonstrating that he or she has suffered any "injury" due to receiving inaccurate wage statements, or that the employer's violation was "knowing and intentional." To that end, employers are encouraged to audit their wage statements to ensure they are compliant with California law.

Court of Appeal Rules Employee Can Bring PAGA Action to Recover Penalties for *All* Alleged Labor Code Violations

California's Private Attorneys General Act ("PAGA") allows an employee who has allegedly suffered a Labor Code violation to sue his or her employer on behalf of all other aggrieved employees and the State of California. Among other damages and penalties, such an aggrieved employee can seek to recover penalties of $100 to $200 per pay period per employee per violation, along with attorneys' fees. PAGA has become a favorite of plaintiffs' lawyers because it allows them to use many small violations of the Labor Code (and the threat of an attorneys' fees award) to extract large settlements from unwitting employers who have run afoul of California's complex wage and hour laws.

PAGA actions are like a class action lawsuit but without the procedural formalities of a class action. Previously, it had been assumed that the individual representative PAGA plaintiff could only recover penalties if he or she actually suffered that particular violation of the Labor Code. In other words, if a Plaintiff missed a rest break, the plaintiff could recover penalties for that violation, but not for an alleged unrelated Labor Code violation that never affected the representative plaintiff.

A California Court of Appeal turned this assumption on its head in *Huff v. Securitas Security Services USA, Inc.*, holding that a PAGA plaintiff who allegedly suffers a single Labor Code violation can sue the employer on a representative basis and seek to recover penalties not only for that violation, but for all other Labor Code violations allegedly suffered by other employees (even though not suffered by the plaintiff). Stated differently, as long as the representative plaintiff in a PAGA lawsuit experienced at least one violation of the Labor Code of any kind, the plaintiff can collect penalties for any and all Labor Code violations committed by that employer.

The *Huff* court reasoned that PAGA requires this interpretation because it defines an "aggrieved employee" as an employee against whom "one or more" of the alleged violations was committed. Dismissing the argument that such an application of PAGA would violate standing requirements, the court held that

[2] The court, however, did indicate that a trial court may reduce the award for civil penalties for technical violations that cause no injury. It also directed trial court to consider whether the violation was inadvertent in assessing penalties.

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"traditional standing requirements do not necessarily apply to qui tam actions (like PAGA) since the plaintiff is acting on behalf of the government." The court even went so far as to state that "it would be arbitrary to limit the plaintiff's pursuit of penalties to only those Labor Code violations that affected him or her personally" because the government is the real party in interest in a PAGA action.

Considering the relative ease with which an individual can file a PAGA action, *Huff* is concerning for employers. This case will likely result in the filing of even broader PAGA lawsuits alleging any and all suspected Labor Code violations, regardless of whether the individual plaintiff experienced such violations. Employers should take this opportunity to work with experienced employment counsel to audit their wage and hour practices and minimize exposure to a PAGA action.

Court of Appeal Frowns Upon Employer's Ignorance of Applicable Minimum Wage Ordinance

Members of the legal profession are fond of the cliché that "ignorance of the law is not a defense." That concept proved axiomatic in the California Court of Appeal's ruling in *Diaz v. Grill Concepts Services*, in which the court held that an employer's failure to investigate or otherwise become aware of changes to applicable law cannot preclude it from liability for willful conduct.

Plaintiff Sandra Diaz ("Diaz") was employed by Grill Concepts Services at a Los Angeles restaurant called the Daily Grill. While the Daily Grill has a number of locations across the region, the location at which Diaz was employed was located within Los Angeles International Airport's ("LAX") "Airport Hospitality Zone." By virtue of that designation, beginning in 2010, employers within the zone became required to compensate their employees at a rate of pay higher than the normal minimum wage.

The Daily Grill participated in a conference call during which the changes were discussed, and was otherwise put on notice of, at the very least, the *likelihood* that wages for its employees at the LAX location would need to rise. Despite this, the restaurant's leadership neglected to perform any follow up, and failed to raise applicable wages until approximately eight weeks after the required rate change. Diaz and two other employees filed a lawsuit on behalf of themselves and other non-exempt employees at the LAX location, seeking unpaid wages and waiting time penalties pursuant to California Labor Code section 203.

Under California law, employers are required to pay employees all wages owed within 24 hours of involuntary termination or within 72 hours of voluntary resignation. The *willful* failure to do so results in the imposition of waiting time penalties against an offending employer. At issue in the Court of Appeal's decision was whether the Daily Grill's failure could be deemed willful, as it did not timely become aware, with certainty, of the relevant increased wage standards.

Ultimately, the appellate court looked with disdain upon on the Daily Grill's actions. It held that, despite the fact that the Daily Grill's leadership may not have become acutely aware of the nature or extent of the applicable wage changes, ignorance was not a defense. As the formula used by the city to indicate

applicable wages was not uncertain, and there was no good faith mistaken belief by the Daily Grill as to its obligations under the law, the imposition of waiting time penalties for willful failure to abide by applicable requirements was permissible.

The ruling in *Diaz* serves as a reminder that, despite the staggering number of laws, rules, and regulations impacting California employers, those employers are obligated to maintain awareness of (and compliance with) all legal requirements at all times. Consequences for failure to do so, as all too many have become aware, can be steep.

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