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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *September 2018*

JUDICIAL

Federal

Ninth Circuit Clarifies Standard for Moving Class Actions Into Federal Court

In *Fritsch v. Swift Transp. Co. of Ariz., LLC*, Plaintiff Grant Fritsch ("Fritsch") filed a wage-and-hour class action in state court. Fritsch worked as a driver for Swift Transportation Company of Arizona, LLC ("Swift"), a trucking and transportation company. Fritsch alleged that Swift denied him and other employees proper overtime pay, meal periods, and appropriate wage statements. Fritsch sought wages and premiums owed, prejudgment interest, statutory penalties, attorneys' fees, costs of suit, and statutory damages under the Private Attorneys General Act ("PAGA").

Swift sought to remove the action from state court to federal district court. Generally, a defendant may remove certain actions filed in state court to a district court if the federal court has jurisdiction over the action and procedural requirements are met. The defendant starts the process by filing a notice of removal in the appropriate district court and giving notice to the plaintiff and state court. Filing the notice in state court effects removal, and the state court can do nothing else with the case unless the district court remands the case to the state court.

Here, Swift alleged that the district court had subject matter jurisdiction under the Class Action Fairness Act ("CAFA"). CAFA gives federal district courts jurisdiction over civil class actions in which "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs," the proposed class consists of more than 100 members, and any member of the class of plaintiffs is a citizen of a state different from any defendant. It is Swift's burden to prove the amount in controversy by a preponderance of the evidence (more likely true than not).

To do so, Swift relied on Plaintiff's mediation brief that asserted the case had a value of $5,924,104 (excluding PAGA penalties, which are not included in the amount in controversy). Swift added $150,000 of accrued attorneys' fees and costs, and estimated that future attorneys' fees would bring the amount in controversy to $6,553,375. However, the court decided that Fritsch's complaint included no claim for failure to provide rest periods – which was included in the mediation value – so $948,192 for unpaid rest period premiums needed to be deducted from the $5.9 million value. The court also removed claimed interest of

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$500,000. Regarding the attorneys' fees, the court explained "that when calculating attorneys' fees to establish jurisdiction, the only fees that can be considered are those incurred as of the date of removal." The court therefore included only the $150,000 of attorneys' fees, and determined that Swift had only established an amount in controversy of $4.7 million.

The district court remanded the action to state court on the ground that Swift failed to prove that the matter in controversy exceeded the sum or value of $5 million, as required for jurisdiction under CAFA. Swift appealed.

The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") concluded that if a plaintiff would be entitled under a contract or statute to future attorneys' fees, such fees are at stake and should be included in the amount in controversy. Referring to a case recently decided by the same court, *Chavez v. JPMorgan Chase & Co.*, the Ninth Circuit explained that "'the amount in controversy is not limited to damages incurred prior to removal – for example, it is not limited to wages a plaintiff-employee would have earned before removal (as opposed to after removal),' but rather 'is determined by the complaint operative at the time of removal and encompasses all relief a court may grant on that complaint if the plaintiff is victorious.'" Therefore, a court must include future attorneys' fees recoverable by statute when assessing whether the amount-in-controversy requirement is met.

This case clarifies what amounts may be included when attempting to demonstrate that the "amount in controversy" in a class action is over $5,000,000. For employers facing high-value class actions, it is now arguably easier to move a class action into federal court, which tends to be more "employer friendly."

California

Court of Appeal Imposes Waiting Time Penalties and Attorneys' Fees on California Employer In Connection with Clerical Error

In *Nishiki v. Danko Meredith*, a Court of Appeal required an employer to pay waiting time penalties plus significant attorneys' fees in connection with a clerical error on an employee's final paycheck.

Taryn Nishiki ("Nishiki") was employed as a non-exempt office manager at the law firm of Danko Meredith P.C. ("Defendant"). At 6:38 pm on a Friday, November 14, 2014, Nishiki sent an email to Defendant's managing partners and bookkeeper resigning her employment. In the email, Nishiki particularly noted that her unused vacation time "needs to be paid within 72 hours of my notice of resignation."

The parties agree that the email was not read by any representative of Defendant until the following morning. Defendant thereafter mailed a check to Nishiki on Tuesday, November 18, 2014 – more than 72 hours after Nishiki had sent her resignation email but fewer than 72 hours after Defendant had actually read the email.

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The hand-written check was for $2,880.31, the amount of unused vacation pay owed to Nishiki. Unbeknownst to Defendant, however, the check included a typographical error, as the numerical value on the check was accurate, but the spelled value omitted the word "eighty." Nishiki brought the error to Defendant's attention on November 26, 2014, indicating that her bank was unable to cash the check as erroneously drafted. While a series of emails ensued between Defendant and Nishiki, the error was not definitively addressed until December 5, 2014, when Defendant mailed Nishiki a new check for the full amount owed.

Nishiki filed a complaint with the California Labor Commissioner, seeking, in pertinent part, waiting time penalties for Defendant's delay in issuing Nishiki's final paycheck. The Labor Commissioner ultimately issued an award of $4,250, reflecting 17 days of waiting time penalties (beginning from the date Nishiki emailed her notice of resignation). Defendant appealed.

Under the California Labor Code, employers are required to pay employees all wages owed within 24 hours of involuntary discharge or within 72 hours of resignation. Failure to do so results in the award of waiting time at an employee's regular rate of pay for up to 30 days, plus the recovery of penalties and attorneys' fees associated with pursuing a successful claim.

The appellate court determined that the Labor Commissioner had erred in its calculation. As Nishiki received her initial check within 72 hours of Defendant reading her resignation email, payment was timely. However, it also held that, upon learning of the error on the initial check, Defendant should have acted immediately to rectify the situation. By failing to do so between November 26 and December 5, 2014, Defendant's inaction entitled Nishiki to recovery of $2,250, reflecting nine days' worth of waiting time penalties.

Unfortunately for Defendant (and other similarly situated California employers), however, even despite the reduction in Nishiki's recovery on appeal, the appellate court held that, because her recovery was not reduced to zero, Nishiki was still entitled to recover her reasonable attorneys' fees, totaling $86,150 (plus later accrued fees associated with her appeal).

Nishiki is another example of California courts' willingness not only to issue rulings protective of employees' rights, but also to enforce attorneys' fees provisions that allow for recovery of fees that dwarf the actual claim's economic value. Employers should therefore routinely audit their wage and hour practices to ensure that relatively minor, inadvertent errors do not give rise to significant claims for relief.

Court of Appeal Affirms That Safe Harbor Provision Covers All Violations Prior to January 1, 2016

In the recent decision *Jackpot Harvesting Co. v. Superior Ct.* ("*Jackpot*"), a California Court of Appeal ruled that under the plain and ambiguous language of section 226.2(b), an employer complying with Labor Code Section 226.2(b) has an affirmative defense against any employee claims based on the employer's failure to timely pay an employee for rest and recovery periods and other nonproductive time on the job ("rest/NP time") accruing prior to and including December 31, 2015.

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Labor Code section 226.2 became effective on January 1, 2016, addressing the manner in which piece-rate employees are to be compensated for rest/NP time. Piece-rate compensation is based on paying a specified sum for completing a particular task or making a particular item. § 226.2(a) mandates that piece-rate employees receive compensation for all rest/NP time that is "separate from piece-rate compensation." Such employees are assured under an alternative formula in subdivision (a) that both rest and recovery time and nonproductive time are compensated at no less than the applicable minimum wage. § 226.2(b) provides a safe harbor for an employer that failed to properly compensate piece-rate workers for unpaid rest and nonproductive time accrued. Additionally, section 226.2(b) recites the five subparts for the specific tasks the employer had to accomplish by December 15, 2016 to avail itself of the safe harbor. The steps include completing payment to employees for all unpaid rest/NP time "from July 1, 2012, to December 21, 2015, inclusive." The employer is to choose one of two specified formulas in calculating the rate of compensation for such unpaid rest/NP time.

Plaintiff Jose Lainez ("Lainez") filed a class action on May 14, 2015 against his former employer Jackpot Harvesting Company, Inc., a company that performs harvesting and farming activities in Monterey and Ventura Counties. Lainez alleged that Jackpot compensated him on a piece-rate basis and he sought unpaid minimum wages for rest/NP time, interest, liquidated damages, and statutory penalties. Lainez claimed that his job required him to (1) perform a minimum of 10 minutes of mandatory exercise in the morning, (2) attend meetings of approximately 15 minutes in duration, (3) make trips between fields two to three times per month with an average duration of 30 minutes, and (4) take 15-minute rest breaks. Lainez alleged that Jackpot's workers were compensated only on a piece-rate basis, and they were not separately paid for this nonproductive time and rest time at a rate equal to or greater than minimum wage as required by law.

Jackpot complied with section 226.2(b) and made back payments to Lainez and 1,138 other current and former employees. Since Jackpot complied with the specified conditions of 226.2(b), it filed a motion for summary judgment claiming that under section 226.2(b), it had established a complete defense to the first cause of action. However, Lainez had begun working for Jackpot prior to May 14, 2011 and was seeking compensation for unpaid minimum wages prior to July 1, 2012. Lainez argued that the statute did not immunize the company against unpaid minimum wage claims accruing prior to July 1, 2012. The superior court denied Jackpot's motion for summary judgment, ruling that the statutory language was unclear, and that it did not appear to provide a defense for claims accruing before July 2012.

The Court of Appeal reversed the trial court's decision, concluding that the language of subdivision (b) makes clear that the employer safe harbor applies to *all* pre-2016 claims, as confirmed elsewhere in the statute, noting the safe harbor to be inapplicable to claims accruing after January 1, 2016. Further, it found that the specification in subdivision (g) of six exceptions to the safe harbor, without inclusion of an exception for pre-July 1, 2012 claims, further evidenced the Legislature's intent.

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Jackpot has far-reaching consequences for the 2,300 California employers that elected under the safe harbor provision to make back payments to their piece-rate employees. For other California employers, it serves as a reminder to constantly remain aware of wage and hour laws in effect and to consider taking remedial action when problems are identified.

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