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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *March 2021*

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JUDICIAL

Federal

Ninth Circuit Court of Appeals Limits PAGA Recovery in *Bernstein v. Virgin America, Inc.*

In a valuable decision for California employers, the United States Court of Appeals for the Ninth Circuit recently held in *Bernstein v. Virgin America, Inc.* that employers are not subject to heightened penalties for subsequent violations of the California Labor Code's Private Attorneys General Act of 2004 ("PAGA") until they have been notified of prior violations by either a court or the California Labor Commissioner.

PAGA allows individuals to "step into the shoes of the state" to seek recovery on behalf of themselves and similarly aggrieved employees. PAGA generally permits recovery of a $100 penalty for each initial violation of the Labor Code and a "heightened" $200 penalty for each subsequent violation. In *Amral v. Cintas Corp. No. 2*, however, the Court of Appeals held that a good faith dispute that an employer is required to comply with a particular law "will preclude imposition" of heightened PAGA penalties.

The *Bernstein* plaintiffs ("Plaintiffs") are California-based flight attendants employed by Virgin America, Inc. ("Virgin"). Plaintiffs sought to recover for a host of alleged violations arising under the California Labor Code, as well as for PAGA civil penalties, based on a theory that Virgin was required to abide by California law in providing meal and rest breaks to covered employees. The trial court not only held in favor of Plaintiffs, but also imposed heightened PAGA penalties against Virgin. Virgin appealed, based on a theory that it had not yet been notified of potential violations by either a court or the Labor Commissioner.

The Ninth Circuit reviewed the initial decision to impose heightened PAGA penalties against Virgin. Relying on *Amral v. Cintas Corp. No. 2*, the appellate court held that a good faith dispute existed as to whether Virgin's policies were subject to California law. As Virgin had not previously been notified by the Labor Commissioner or any court that it was subject to the California Labor Code until the trial court's decision in the instant action, the Ninth Circuit reversed the earlier decision, and held that heightened penalties were not appropriate.

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The *Bernstein* decision marks a notable victory for California employers. Employers can now take some small comfort in the reticence of the appellate court to assign heightened penalties in instances in which employers were not already on notice of violations.

California

California Appellate Court Holds Plaintiff's Alleged Electromagnetic Hypersensitivity Could be Deemed a Disability Under FEHA in *Brown v. L.A. Unified School District*

In 2012, Los Angeles Unified School District ("LAUSD") consulted with outside professionals regarding replacing LAUSD's existing Wi-Fi system at Millikan Middle School ("Millikan") with a system that would accommodate iPads, Chromebooks, and tablets. When LAUSD invited public opinion, an environmental scientist and expert on electromagnetic frequency stated she could not support any conclusions about the safety of the proposed new Wi-Fi system.

During a school board hearing on May 28, 2014, LAUSD's "medical personnel" expressed uncertainty regarding potential long-term effects of the Wi-Fi on students and staff. LAUSD assured that it would continue to monitor developments.

Plaintiff Laurie Brown ("Plaintiff") began teaching at Millikan in early 2015, and in April 2015, LAUSD installed and began operating the upgraded Wi-Fi system. Soon thereafter, Plaintiff reported chronic pain, which she claimed was caused by the new system.

After her employment ended, Plaintiff filed a complaint, alleging five causes of action pursuant to California's Fair Employment and Housing Act ("FEHA"): (1) discrimination based on physical disability; (2) failure to accommodate; (3) failure to engage in the interactive process; (4) retaliation; and (5) failure to prevent discrimination and retaliation.

Plaintiff claimed that the school's Wi-Fi system had caused a host of medical issues and, as a result, she requested and was granted leave from work due to her symptoms. Plaintiff alleged that, although LAUSD did engage in the interactive process and agreed to provide an accommodation, it refused to change or further investigate the safety of the Wi-Fi system. Plaintiff claimed she was therefore not properly accommodated because she was unable to return to work without her symptoms returning.

On July 31, 2018, LAUSD filed a demurrer on all causes of action, which the lower court sustained without leave to amend.

California's Second District Court of Appeal reversed in part and affirmed in part the trial court's decision. Most pertinent to this analysis, the appellate court held that Plaintiff adequately pled a physical disability when she alleged symptoms that limited her work and affected her body systems, even though the symptoms were not attributed to a federally recognized disability. In doing so, the appellate court was not persuaded by federal cases that decline to recognize Electromagnetic

Hypersensitivity as a disability. It further noted that Plaintiff's claims arose under FEHA, which defines a disability more broadly than the Americans with Disabilities Act ("ADA"). The appellate court reasoned that under FEHA, a physical disability includes a condition that "[a]ffects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine" and also "[l]imits a major life activity."

The ruling in *Brown* demonstrates a continued willingness of California courts to protect California employees under FEHA. Employers are therefore charged with ensuring, as carefully as ever, that appropriate protections are maintained and observed.

California Supreme Court Strikes Down Meal Period Rounding Policies in *Donohue v. AMN Services, LLC*

In its prior ruling in *Donohue v. AMN Servs.* (2018) 29 Cal. App. 5th 1068, the Court of Appeal held that a meal period rounding policy was legal under California law because it was fair and neutral on its face and used in such a manner that it did not result, over a period of time, in failure to compensate employees properly for all time actually worked.

In the rounding policy at issue, whenever an employee's rounded punch times resulted in a noncompliant meal period time, a drop-down menu appeared on the employee's computer screen beneath the punch times for the date in question. The drop-down menu required the employee to indicate whether the employee was: (1) provided a meal period but chose not to take it; (2) provided a meal period but took a shorter meal period; or (3) not provided an opportunity for a meal period. The reporting employee's pay was then adjusted accordingly and/or premium pay for missed meal period(s) was assigned, as appropriate.

On February 25, 2021, however, the Supreme Court of California reversed the Court of Appeal's judgment and remanded the matter to permit additional filings on the subject. In pertinent part, the Court held that employers cannot engage in the practice of rounding time punches – adjusting the hours that an employee has actually worked to the nearest present time increment – in the meal period context**.** In doing so, it held that the practice of rounding time punches for meal periods is inconsistent with the purpose of the applicable Labor Code provisions and the Industrial Welfare Commission wage order. The Court further held that the existence of time records showing noncompliant meal periods raises a rebuttable presumption of meal period violations, including at the summary judgment stage.

The Court reasoned that premium pay serves the dual purposes of compensating employees for their injuries and incentivizing employers to comply with labor standards. Whether an employer provides a shortened meal period or no meal period at all, the employee receives one additional hour of pay. The meal period provisions are designed to prevent even minor infringements on meal period requirements and, the Court reasoned, rounding is incompatible with that

objective. By requiring premium pay for any violation, no matter how minor, employers are forced to provide compliant meal periods.

Fortunately for employers, the Court reiterated the guidance set forth in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004: an employer is liable only if it does not provide an employee with the opportunity to take a compliant meal period. The employer is therefore not liable if an employee chooses to take a short or delayed meal period or no meal period at all. The employer is not required to police meal periods to make sure no work is performed. Instead, the employer's duty is to ensure that it provides the employee with bona fide relief from duty and that this is accurately reflected in the employer's time records. Otherwise, the employer must pay the employee premium wages for any noncompliant meal period.

In light of the *Donohue* ruling, California employers must ensure that meal period policies remain in compliance with applicable law, and that any meal period rounding policies are promptly discontinued.

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