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Employment Law Commentary

Employees Can Now Sue for Suitable Seating (Among Other Things): *Bright v. 99 Cents Only Stores* and *Home Depot U.S.A. v. Superior Court (Harris)*

By Timothy F. Ryan and Erika Drous

California employers should be aware of two recent decisions issued by the Second District Court of Appeal that allow employees a private right of action to pursue monetary remedies under the Private Attorneys General Act of 2004 ("PAGA") for violations of the Industrial Wage Commission ("IWC") Orders: *Bright v. 99 Cents Only Stores* and *Home Depot U.S.A. v. Superior Court*. The IWC Wage Orders are generally known for establishing minimum wage and overtime requirements. However, they also establish standard labor conditions for employees. For example, IWC Wage Order 7-2001 requires that all retail employers in California provide: facilities for securing hot food and drink for meal periods between 10 p.m. and 6 a.m., lockers or closets for safekeeping of employees' outerwear, resting facilities for employees in an area separate from the bathroom, "suitable seating" for employees, and a temperature of not less than 68º in the toilet, changing, and resting rooms. The wage order itself does not provide damages for violations of these standards and only provides penalties if an employee is underpaid. The *Bright* and *Home Depot* decisions will now allow employees to pursue civil penalties under PAGA when employers do not meet these obscure standards.

Bright v. 99 Cents Only Stores

Eugina Bright worked as a cashier for 99 Cents Only Stores. She brought a class action seeking penalties under PAGA alleging that the stores failed to provide its cashiers with suitable seating in violation of Labor Code sections 1198 and 2699(f),

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and IWC Wage Order 7-2001. The question in the case was whether an employee may state a cause of action for civil penalties under PAGA for violation of the "suitable seating" provision of the IWC orders.

Labor Code section 1198 provides that the labor conditions set by the IWC shall be the standard labor conditions for employees. IWC Wage Order 7-2001 states that all working employees "shall be provided with suitable seats when the nature of the work reasonably permits the use of seats. When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties." The Labor Code also establishes the Labor Code Private Attorneys General Act of 2004, § 2698 et seq. ("PAGA"), which allows an employee to bring a private action for civil penalties. PAGA penalties consist of $100 for each aggrieved employee per pay period for the first violation and $200 for each aggrieved employee for each subsequent violation.

The trial court sustained the employer's demurrer on the basis that (1) the failure to provide suitable seating is not a violation of Labor Code section 1198 because such failure is not a condition "prohibited" by IWC Wage Order 7-2001, and (2) even if a failure to provide suitable seating is a prohibited condition of labor, civil penalties are not recoverable under PAGA because the wage order contains its own civil penalty provision.

On November 12, 2010, the Second District reversed and reinstated the claim. The court found that the Wage Order's directive that all employees be provided with "suitable seating" created a condition of labor that was incorporated by Labor Code section 1198 and held that an employee can state a cause of action against an employer for civil penalties under PAGA based on wage order violations, even if penalties provided in the wage order do not apply.

On December 23, 2010, the employer filed a petition for review asking that the California Supreme Court review this decision. The petition was denied on February 16, 2011.

Home Depot U.S.A. v. Superior Court (Harris)

On December 22, 2010, the Second District issued a similar decision. Employees of Home Depot filed a lawsuit alleging Home Depot failed to provide seats for employees as required by Labor Code section 1198 and Wage Order 7-2001. The employees filed their lawsuit as an action for penalties under PAGA. The trial court overruled Home Depot's demurrer, which was based on the argument that PAGA provides no remedies for the alleged violation.

The Court of Appeal denied Home Depot's petition for writ relief from the trial court's order overruling the demurrer to plaintiff's PAGA claim. Relying on the decision in *Bright*, above, the Court held that PAGA specifically provides a "default" remedy that applies to claims by an aggrieved

Update: The NLRB and Facebook

Last month, we informed you about the complaint issued by the National Labor Relations Board ("NLRB") against an employer that allegedly terminated an employee for making derogatory remarks about her supervisor on the employee's Facebook page. The complaint alleged, inter alia, that this termination was in violation of federal labor law, that the company's social media policy was "overly broad" because it prohibited employees from posting disparaging remarks about the company, and that enforcement of this policy interfered with employees' rights to engage in concerted activity.

This case received significant media attention because it applied a well established legal theory to a new context. Although it is long settled that employees have the right to engage in discussions about their wages, hours, and working conditions, this case signals to both union and non-union employers that this right extends past the physical workplace and onto its employees' Facebook pages. Further, this case warns employers of the NLRB's intent to protect employees' use of the Internet as a forum to engage in concerted activity, even where the protected content is less than respectful.

On February 7, 2011, the NLRB announced that it entered into a settlement agreement with the employer. Although the agreement was not released, public reports indicate that, as part of the settlement, the employer agreed to change its "overly broad" social media policy to ensure that it does not interfere with employees' right to engage in concerted activity such as discussing wages, hours, and working conditions. The employer also agreed not to discipline employees for engaging in such activity and not to deny employees' requests for union representation or discipline them for making such requests. The employer also settled with the terminated employee, but the terms of that agreement remain private.

Employers should be aware of employees' right to communicate with one another regarding their wages, hours, and working conditions and their ability to do so over the Internet and still remain under the protection of federal labor laws. It is important for employers to keep this lesson in mind when drafting social media policies to ensure that they will not be construed as interfering with protected employee rights.

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employee whose employer violates the Labor Code and wage order requiring employers to supply adequate seating to workers.

On February 1, 2011, Home Depot filed a petition for review asking that the California Supreme Court review this decision. The petition is still pending but in light of what the court did in *Bright v. 99 Cents Only Stores* it is likely the petition will be denied.

What Should Employers Do Now?

The *Bright* and *Home Depot* cases serve as reminders to employers that they may be required to provide adequate seating for employees. Non-compliance can now trigger PAGA penalties, which can add up to a significant amount of money: $100 for the initial violation and $200 for each pay period where the violation continues for each and every employee who is not provided with suitable seating. A successful PAGA plaintiff can also recover attorney's fees. Now that these cases have established that inadequate seating claims are actionable under PAGA, employers can expect to see more of these claims asserted. At least three lawsuits have been filed against major retailers in the past month for failure to provide suitable seating and we expect more to come. It is a good time for employers to consider whether a policy providing "suitable seating" for employees should be adopted.

These cases open the door for costly lawsuits claiming PAGA penalties on the basis that an employer failed to comply with any of the obscure labor conditions set forth in the wage orders. What this means is that if an otherwise compliant employer lets the bathroom temperature drop to 67° or fails to provide a working microwave between the hours of 10 p.m. and 6 a.m., an employee may be able to bring a collective action for penalties under PAGA. Now is the time for employers to familiarize themselves with the standard labor conditions required under the wage orders.

There is hope, however small it may be. As noted above, the employers in both cases submitted petitions urging the California Supreme Court to review the appellate decisions that open the door to costly PAGA lawsuits based on an employer's failure to comply with the labor conditions set forth in the wage orders. While the Court denied review in one case, a petition is still pending in the other.

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