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"Pay Stub" Rulings Continue

Recent Decisions Carve Out The Distinctions Between Frivolous And Successful Claims

By Christina Kotowski (San Francisco) and John Skousen (Irvine)

Earlier this year, a case reinforced yet again the need for employers to pay close attention to the specific requirements of the California Labor Code – this time, the itemized wage statement requirement in Labor Code section 226(a). *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement.*

Heritage Residential Care operated seven residential care facilities and had 24 employees. Of these, 16 lacked social security numbers. Heritage elected to treat those 16 workers as independent contractors, withheld no taxes, and reported their earnings on a 1099-MISC form at the end of the year. Those employees were not given itemized wage statements each pay period as required by Section 226(a), but the eight employees who had social security numbers were provided with itemized wage statements.

The Labor Code's Requirements – And Penalties

Labor Code section 226(a) requires employers to provide "an accurate itemized statement in writing" each pay period that includes nine categories of information specified by law. These categories include gross wages earned, total hours worked, deductions taken, net wages earned, all applicable hourly rates in effect and the hours worked at each rate, and the name and address of the legal entity that is the employer. Although it is recommended that these records be retained for four years, employers should retain these records for at least three years and must allow current and former employees to inspect them.

Under Section 226(e), employees can recover penalties if they suffer an "injury" as a result of an employer's "knowing and intentional" failure to comply with the statute. These are material elements of proof for recovering such damages. If this standard is satisfied, then an employee is entitled to recover the greater of actual damages or $50 for the initial pay period when the violation occurs and $100 for each violation in a subsequent pay period, subject to a maximum aggregate penalty of $4,000 per employee, plus an award of attorneys' fees and costs. It is not

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Labor Commissioner Hearings Cannot Be Waived By Arbitration Agreements

By Bruce Larson (Irvine)

The Labor Code gives aggrieved employees the right to file a claim for unpaid wages and other similar violations with the Division of Labor Standards Enforcement. These claims are decided by a deputy labor commissioner in an administrative hearing, sometimes called a "Berman" hearing. The process is more streamlined than a proceeding in court, and is "designed to provide a speedy, informal, and affordable method of resolving wage claims." If either party does not agree with the deputy labor commissioner's decision, they can appeal to the superior court in a process called a "trial de novo."

The California Supreme Court recently ruled on whether a binding arbitration agreement can require employees to waive their rights to this administrative hearing. The Supreme Court answered this question in the negative, holding that an "Employee's statutory right to seek a Berman hearing, with all the possible protections that follow from it, is itself an unwaivable right that an employee cannot be compelled to relinquish as a condition of employment." *Sonic-Calabasas v. Moreno.*

But the Court did not find that having a Berman hearing was incompatible with a binding arbitration agreement which covers "all disputes that may arise out of the employment context," nor that the agreement was unenforceable. Instead, the decision held that, while the administrative hearings should still proceed before the deputy labor commissioner, the trial de novo could take place before an arbitrator rather than in superior court.

Thus, as the court stated, "the Berman hearing was merely preliminary to, rather than preemptive of, binding arbitration." After the Berman hearing is complete, the parties can proceed in arbitration, assuming a valid arbitration agreement is in place.

As a result of this ruling, employers who have employees sign pre-dispute arbitration agreements should review their agreements to ensure that they do not ask employees to waive their right to a Berman hearing. Similarly, the arbitration agreement should state that reviews of Berman hearings are covered by the agreement.

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Non-Exempt Employees Can Agree To A Salary That Includes Overtime

By Neal Fisher (Irvine)

A California appellate court ruled that Labor Code section 515 does not outlaw clear wage agreements that provide for salaries that include fixed amounts of overtime. *Arechiga v. Dolores Press, Inc.*

This case involved a janitor who sued his former employer, Dolores Press, for additional overtime wages. Arechiga had orally agreed to work eleven hours a day and six days a week for a total of sixty-six hours per week. In addition, the parties had executed a written agreement which provided that "Employee shall be paid a salary/wage of $880.00" weekly. The word "salary" had been circled.

When Dolores Press subsequently terminated Arechiga's employment, he sued, claiming that it owed him unpaid overtime because his weekly salary of $880.00 only compensated him for a regular workweek of forty hours at a base rate of $22.00 per hour. Arechiga therefore argued that he was entitled to unpaid overtime of 26 hours at the overtime premium rate for each workweek during the statutory period.

In support of his argument, Arechiga relied upon Labor Code section 515(c). That provision states that "for the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be 1/40th of the employee's weekly salary."

Dolores Press responded by arguing that under California's "explicit mutual wage agreement" doctrine, parties may agree to a guaranteed fixed salary so long as the employer pays the employee for all overtime at a rate of at least one and one half times the employee's base rate of pay. The trial court entered judgment for Dolores Press, which has now been upheld on appeal.

In upholding the trial court's decision, the court of appeals rejected Arechiga's argument that Labor Code section 515 prohibits explicit mutual wage agreements. Although judicial opinions concerning these agreements predated the passage of Labor Code section 515, the court reasoned that it could find no case law supporting Arechiga's position. Furthermore, the appellate court expressly rejected a provision from the Labor Commissioner's Enforcement Policies and Interpretations Manual which purported to interpret Labor Code section 515 as rejecting explicit mutual wage agreements.

Although this case is good news for employers, you should still require non-exempt employees to document all hours worked, including meal periods, and seek legal assistance before attempting to draft any compensation agreement building overtime into a salary.

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sufficient to show merely that a pay statement was missing one of the nine categories of information required. Instead, the employee must suffer an "injury" from the missing information."

In addition to penalties under law, the Labor Commissioner can impose "civil penalties" of $250 per employee per violation (i.e., per pay period) for an initial citation and $1,000 per employee per violation for a subsequent citation. And an employee may also file an action to recover civil penalties under the Private Attorney Generals Act. Under such an action penalties are divided between the Labor and Workforce Development Agency (75%), and the aggrieved employees (25%).

When assessing penalties, the Labor Commissioner must "take into consideration whether the violation was inadvertent" and has discretion to decide "not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake."

Employer's Arguments Rejected

In *Heritage Residential Care,* the Division of Labor Standards Enforcement (DLSE) imposed a civil penalty of $72,000 on the employer after finding 288 violations of Section 226(a) at $250 per violation in a workplace inspection.

Contesting this penalty at an administrative hearing, Heritage explained that it believed that it could not withhold federal taxes without a Social Security number, and so issued 1099s to those employees instead of W-2s and itemized wage statements. In fact, Section 226(a) requires itemized wage statements regardless of whether any taxes were withheld. Because no clerical error or inadvertent mistake was shown, the hearing officer declined to reduce or eliminate the $72,000 in penalties assessed against the employer.

This decision was upheld on appeal. The court determined that the employer's mistaken belief that it did not have to provide wage statements if it paid its workers pursuant to a form 1099 and did not deduct taxes was not an "inadvertent mistake" for purposes of assessing penalties under Section 226(e). Instead, the court held that the legal requirements of Section 226(a) were clear and settled, and the employer's mistake was no defense.

Frivolous Cases Will Be Dismissed

In a more recent case, the court rejected an employee's claim that he was "injured" for purposes of Section 226(e) because the regular and overtime hours were not totaled. The court reasoned that the plaintiff's "simple math is not based on any allegation that the information is inaccurate" and concluded that this is not the type of "mathematical injury that requires computations to analyze whether the wages paid in fact compensated him for all hours worked." Id. at pg 7. The trial court dismissed, and the appeals court affirmed, the dismissal (or "demurrer") of the plaintiff's claim without a trial. *Price v. Starbucks Corp.*

Conclusion

The employer in *Heritage* learned an expensive lesson: California has specific requirements about the itemized wage statements that must be provided to employees each pay period. Section 226(a) is not only enforced by the DLSE, but has also been used as the basis for class-action claims by employees under the Labor Code Private Attorneys General Act.

How can you protect yourself? Make sure you know the legal requirements of Section 226(a) and be sure your payroll personnel are aware of them too. A sample itemized wage statement for an hourly-paid employee is available on the DLSE's website at http://www.dir.ca.gov/dlse/PayStub.pdf.

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