PAUL HASTINGS

WAGE AND HOUR UPDATE

Ray Bertrand, Zach Hutton, and Anna Skaggs

January, 2023

AGENDA

- Federal Legal Developments
- California Supreme Court Update
- New California Legislation
- Regular Rate of Pay Issues
- Meal and Rest Periods
- Pay Stub Developments
- Telecommuting and Expense Reimbursements
- Definition of “Termination”
- Individual Liability for Wage-Hour Violations
- Rounding
- Suitable Seating
- Sales Incentive Plan Issues

FEDERAL LEGAL DEVELOPMENTS

PROPOSED FLSA INDEPENDENT CONTRACTOR RULE

- "The 2021 IC rule's elevation of certain factors and preclusion of consideration of relevant facts under several factors may result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it used to be to classify certain workers as independent contractors."
- "Codifying an ABC test could establish a simpler and clearer standard for determining whether workers are employees or independent contractors.… However, the Department believes it is legally constrained from adopting an ABC test because the Supreme Court has held that the economic reality test is the applicable standard for determining workers' classification under the FLSA as an employee or independent contractor."

PROPOSED FLSA INDEPENDENT CONTRACTOR RULE

- Totality of the circumstances test that focuses on six factors
  1. Opportunity for profit or loss depending on managerial skill
     - "The fact that workers may earn more or less at times (and their earnings may decline) depending on how much they work is not the equivalent of experiencing a financial loss."
  2. Investments by the worker and the employer
     - "[F]or a worker's investment to indicate independent contractor status, the investment must be capital or entrepreneurial in nature . . . such as increasing the workers' ability to do different types of or more work, reducing costs, or extending market reach . . . ."
     - "[C]osts borne by a worker to perform a particular job are not the type of capital/entrepreneurial investments that suggest independent contractor status."
     - "Comparing the workers' investment to the employer's investment can be a gauge of the workers' independence or dependence."
  3. Degree of permanence of working relationship
     - "[A]n indefinite or continuous relationship is consistent with an employment relationship, but . . . a worker's lack of a permanent or indefinite relationship with an employer is not necessarily indicative of independent contractor status if it does not result from the worker's own independent business initiative."

PROPOSED FLSA INDEPENDENT CONTRACTOR RULE

4. Nature and degree of control
   - "[C]ontrol should be analyzed in the same manner as every other factor, rather than take an outsized role when analyzing whether a worker is an employee or independent contractor."
   - "[I]ssues related to scheduling, supervision over the performance of the work . . . and the employer's ability to work for others are relevant considerations."
   - "While the case law is not uniform on this issues, the Department finds . . . that compliance with legal obligations [or safety standards] may be relevant evidence of control . . . ."
5. Extent to which work is an integral part of employer's business
   - Involves consideration of "whether the work is critical, necessary, or central to the employer's business . . . ."
6. Skill and initiative
   - "When evaluating the skill factor, the focus should be whether the worker uses an specialized skills to exercise business-like initiative."

SALARY BASIS TEST

- *Helix Energy Solutions Group, Inc. v. Hewitt*, No. 21-982 (U.S.)
  - Can an employee who receives a “day rate” that equals or exceeds the minimum weekly salary and who earns more than $200K/year qualify as exempt?
- Rulemaking: Will DOL propose increase to minimum salary for exempt status?

CALIFORNIA SUPREME COURT UPDATE

CALIFORNIA SUPREME COURT UPDATE

- Cases recently decided
  - *Grande v. Eisenhower Med. Ctr.*, 13 Cal. 5th 313 (2022).
    - An employee who brings an employment class action against a staffing agency and executes a settlement agreement releasing the agency and its agents may bring a second class action against the staffing agency's client based on the same violations.
  - *Naranjo v. Spectrum Security Serv., Inc.*, 13 Cal. 5th 93 (2022).
    - Missed-break premium payments are wages that must be reported on statutorily required wage statements during employment (Lab. Code, § 226) and paid within statutory deadlines when an employee leaves the job (Lab. Code, § 203)
    - Failure to do so can support § 203 waiting time penalties and § 226 wage statement penalties

CALIFORNIA SUPREME COURT UPDATE

- Cases recently depublished (i.e., good cases taken away)
  - *Cirrincione v. Am. Scissor Lift*, 2022 Cal. LEXIS 2040 (Apr. 13, 2022).
    - Affirming denial of class certification
    - Simply alleging the existence of a uniform policy or practice (or unlawful lack of a policy) is not enough to establish predominance of common questions required for class certification.
  - *Meza v. Pacific Bell Telephone Co.*, 2022 Cal. LEXIS 5807 (Sept. 28, 2022).
    - Trial court correctly granted summary adjudication of plaintiff's wage statement claim
    - Lab. Code, § 226(a)(9) did not require employer to list the rates and hours from prior pay periods underlying an overtime true-up calculation.

CALIFORNIA SUPREME COURT UPDATE

- Cases soon to be decided
  - *Estrada v. Royalty Carpet Mills, Inc.*, S274340.
    - Do trial courts have inherent authority to ensure that claims under the PAGA will be manageable at trial, and to strike or narrow such claims if they cannot be managed?
  - *Adolph v. Uber Technologies, Inc.*, S274671.
    - Whether an aggrieved employee who has been compelled to arbitrate claims under the PAGA that are "premised on Labor Code violations actually sustained by" the aggrieved employee maintains statutory standing to pursue "PAGA claims arising out of events involving other employees" in court or in any other forum the parties agree is suitable?

CALIFORNIA SUPREME COURT UPDATE

- Cases soon to be decided (continued)
  - *Huerta v. CSI Electrical Contractors, Inc*., S275431.
    - (1) Is time spent on an employer's premises in a personal vehicle and waiting to scan an identification badge, have security guards peer into the vehicle, and then exit a Security Gate compensable as 'hours worked' within the meaning of California Industrial Welfare Commission Wage Order No. 16?
    - (2) Is time spent on the employer's premises in a personal vehicle, driving between the Security Gate and the employee parking lots, while subject to certain rules from the employer, compensable as 'hours worked' or as 'employer-mandated travel' within the meaning of California Industrial Welfare Commission Wage Order No. 16?
    - (3) Is time spent on the employer's premises, when workers are prohibited from leaving but not required to engage in employer-mandated activities, compensable as 'hours worked' within the meaning of California Industrial Welfare Commission Wage Order No. 16, or under California Labor Code Section 1194, when that time was designated as an unpaid 'meal period' under a qualifying collective bargaining agreement?"

CALIFORNIA SUPREME COURT UPDATE

- Cases soon to be decided (continued)
  - *Seviour-Iloff v. LaPaille*, S275848
    - (1) Must an employer demonstrate that it affirmatively took steps to ascertain whether its pay practices comply with the Labor Code and Industrial Welfare Commission Wage Orders to establish a good faith defense to liquidated damages under Labor Code section 1194.2, subdivision (b)?
    - (2) May a wage claimant prosecute a paid sick leave claim under section 248.5, subdivision (b) of the Healthy Workplaces, Healthy Families Act of 2014 (Lab. Code, § 245 et seq.) in a de novo wage claim trial conducted pursuant to Labor Code section 98.2?

NEW CALIFORNIA LEGISLATION

NEW LEGISLATION

- California Minimum Wage Increase
  - SB3 (2016): Series of annual minimum wage increases: $15/hour by 1/1/22
  - But SB3 also required an additional increase if inflation greater than 7%
    - $15.50/hour for all employers beginning 1/1/23
    - Exempt employee threshold will be $64,480 per year
- Fast Food Sector Regulation
  - Covers any “fast food” chain with 100 or more establishments nationwide
  - Establishes a new bureaucratic organization to establish sector-wide standards on wages, working hours, and other working conditions
  - Could raise minimum wage to $22/hour in “fast food” sector

REGULAR RATE OF PAY ISSUES

EMPLOYEES PAID MULTIPLE HOURLY RATES

- "Where an employee in a single workweek works at two or more different types of work for which different non-overtime rates of pay (of not less than the applicable minimum wage) have been established, his regular rate for that week is the weighted average of such rates. That is, his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs." 29 CFR § 778.115; *see also id.*, § 778.419.

- "Where two rates of pay are paid during a workweek, the California method for determining the regular rate of pay for calculating overtime in that workweek mirrors the federal method, based upon the weighted average of all hourly rates paid." DLSE Manual §§ 49.2.5–6.

- *Levanoff v. Dragas*, 65 Cal. App. 5th 1079 (2021) – ***depublished***.

EQUITY AWARDS

Applicable FLSA Provision – No DOL Regulations

- "Any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable . . . if
  - (A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees . . . ;
  - (B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant . . ., and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;
  - (C) exercise of any grant or right is voluntary; and
  - (D) any determinations regarding . . . grants or rights that are based on performance are—
    - (i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) . . . or length of service or minimum schedule of hours or days of work; or
    - (ii) made based upon the past performance (which may include any criteria) . . . so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract." 29 USC § 207(e)(8).

MEAL AND REST PERIODS

MEAL AND REST PERIODS

- *Bernstein v. Virgin America, Inc.*, 3 F.4th 1127 (9th Cir. 2021).
  - Application of California meal and rest break laws not barred by dormant Commerce Clause and not preempted
  - "[A]irlines could comply with both the FAA safety rules and California's meal and break requirement by 'staff[ing] longer flights with additional flight attendants in order to allow for duty-free breaks.'"
  - *In Sullivan v. Oracle Corporation*, 51 Cal. 4th 1191 (2011), "the California Supreme Court emphasized the California Legislature's public policy goals in the context of California's overtime statute… We hold that policy similarly dictates application of California's meal and rest break requirements to both the Class and Subclass."

MEAL AND REST PERIOD PREMIUM CALCULATIONS

- *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858 (2021).
  - Meal/rest premiums must be paid at the “regular rate of pay”
  - True-ups required for payments spanning periods longer than a workweek
  - Separate formula for flat sums
  - Retroactive application

MEAL AND REST PERIOD PREMIUM CALCULATIONS

- Example: An employee works 2,000 hours (1,950 straight-time hours and 50 overtime hours) in a calendar year for which s/he receives a $4,000 bonus. The employee received 8 meal period premiums and 2 rest break premiums during the calendar year.
- How do you calculate the meal and rest period premium true-up?
  - The answer depends on whether the bonus is a variable payment or a "flat sum" subject to a different regular rate of pay calculation in California under *Alvarado v. Dart Container Corporation of California*, 4 Cal. 5th 542 (2018).

Normal Formula		Flat Sum Formula	
Step 1:	**Bonus / (Total Hours Worked) = RROP** **$4,000 / 2,000 hours = $2**	**Step 1:**	**Bonus / (Straight Time Hours Worked) = RROP** **$4,000 / 1,950 = $2.05**
Step 2:	**RROP x Meal/Rest Premiums** **$2 x 10 premiums = $20**	**Step 2:**	**RROP x Meal/Rest Premiums** **$2.05 x 10 premiums = $20.50**

PAY STUB DEVELOPMENTS

PIH

PAY STUB DEVELOPMENTS

- *Meza v. Pacific Bell Telephone Co.*, 79 Cal. App. 5th 1118 (2022) – ***depublished***.
  - Lab. Code, § 226(a)(9) did not require that defendant list the rates and hours from prior pay periods underlying an overtime true-up calculation.
  - *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668 (9th Cir. 2021) still citable for same proposition
- *Gunther v. Alaska Airlines*, 72 Cal. App. 5th 334 (2021).
  - Distinction in penalties awardable for violations of Labor Code § 226
    - Labor Code § 226(e): actual damages or $50/$100 per employee [$4000 cap]
    - Labor Code § 226.3: $250/$1,000 per employee
  - Heightened penalties should not have been awarded under Lab. Code, § 226.3, because the violations involved *failure to include certain information* in the provided wage statements, not *failure to provide* a wage statement *or to maintain records*
- *Ward v. United Airlines, Ward v. United Airlines, Inc.*, 9 Cal. 5th 732 (2020).
  - Noting “legislative desire for a single statement documenting employee pay.”
- *Vidrio v. United Airlines*, 2022 U.S. Dist. LEXIS 95891 (May 6, 2022).
  - Court concludes that Defendant's Pay Advice—a document issued to employees along with their paychecks—cannot be combined with the separate Pay Register available online to constitute one wage statement.
  - Such a combination of documents would not further the "legislative desire for a single statement documenting employee pay."

TELECOMMUTING AND EXPENSE REIMBURSEMENTS

TELECOMMUTING AND EXPENSE REIMBURSEMENTS

- *Williams v. Amazon*, 2022 U.S. Dist. LEXIS 97920, 2022 WL 1769124 (June 1, 2022).
  - Williams has plausibly stated a claim under California Labor Code section 2802 for reimbursement of expenses he incurred while working from home during the COVID-19 pandemic.
  - Even if the expenses Williams incurred were the result of government stay-at-home orders, not any action by Amazon, that does not absolve Amazon of liability.
  - What matters is whether Williams incurred those expenses "in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer.“
- *Gallano v. Burlington Coat Factory of California*, LLC, 67 Cal. App. 5th 953 (2021).
  - Plaintiff alleged she was directed to sign a promissory note establishing a personal debt of $880 for the losses her employer had allegedly sustained
  - Also alleged she was forced to resign and was threatened with criminal proceedings
  - Plaintiff did not make any expenditure or sustain any actual loss under the promissory note or the demand for payment
  - An indemnification claim may arise under section 2802 when the employee has made a monetary payment (i.e., an expenditure) for a business-related expense or incurred a loss in some other way—such as by becoming “liable or subject to” a charge or obligation on the employer's behalf.
  - When Gallano allegedly executed the promissory note at the direction and for the benefit of her employer, she incurred an economic loss.

DEFINITION OF "TERMINATION"

DEFINITION OF "TERMINATION"

- *Hartstein v. Hyatt Corp*., 2022 U.S. Dist. LEXIS 26453 (C.D. Cal. Feb. 14, 2022) (employees placed on indefinite furlough at the onset of the pandemic did not experience termination necessitating payout of accrued vacation because they did not experience "complete severance" of the employer-employee relationship); *c.f.* DLSE Opn. Ltr. 1996-05.30 (May 30, 1996) ("[T[he Division's position is that if an employee is laid off without a specific return date within the *normal pay period*, the wages earned to and including the layoff date are due and payable in accordance with Section 201.").
- *Sansone v. Charter Commc'n, Inc*., 831 F. App'x 801 (9th Cir. 2020) (corporate merger that changed identity of employer constituted termination necessitating the payment of accrued vacation).

INDIVIDUAL LIABILITY FOR WAGE-HOUR VIOLATIONS

PIH

INDIVIDUAL LIABILITY FOR WAGE-HOUR VIOLATIONS

- Labor Code Section 558.1:
  - "Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation."
  - For purposes of this section, the term 'other person acting on behalf of an employer' is limited to a natural person who is an owner, director, officer, or managing agent of the employer, and the term 'managing agent' has the same meaning as in subdivision (b) of Section 3294 of the Civil Code.
- *Espinoza v. Hepta Run, Inc*., 74 Cal. App. 5th (2022) (an "owner's or officer's approval of a corporate policy that violates the Labor Code is sufficient to find that individual caused the Labor Code violation within the meaning of section 558.1.").

ROUNDING

ROUNDING

- *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 (2012).
  - A rounding policy is lawful if it "is neutral on its face and is used in such a manner that it will not result, over a period of time, in failure to compensate employees properly for all the time they have actually worked
- *Troester v. Starbucks Corp*., 5 Cal. 5th 829 (2018).
  - "We liberally construe the Labor Code and wage orders to favor the protection of employees"
  - Federal "de minimis" rule had no counterpart in California's wage and hour laws and need not be followed
- *Donohue v. AMN Services*, LLC, 11 Cal. 5th 58 (2021).
  - Employers cannot engage in rounding time punches in the meal period context
  - Supreme Court "has never decided the validity of the rounding standard articulated in *See's Candy*"
  - Technological advances may help employers to track time more precisely, and employers are in a better position than employees to devise alternatives
- *Camp v. Home Depot U.S.A., Inc*., 84 Cal. App. 5th 638 (2022).
  - Home Depot captured the exact number of minutes that Camp worked for every shift but, due to its quarter-hour time rounding policy, he was not paid for all those minutes
  - Camp lost more than seven hours of worktime between March 2015, and October 2020, due to Home Depot's quarter-hour time rounding policy
  - Federal regulation allowing rounding as long as it averages out to "employees as a whole" (rather than to each individual employee) has no analog in state law
  - If an employer can capture and has captured the exact amount of time an employee has worked during a shift, the employer must pay the employee for "all the time" worked
  - "[W]e respectfully invite the court to 'decide[] the validity of the rounding standard articulated in *See's Candy*.'"

SUITABLE SEATING

SUITABLE SEATING

- *Meda v. AutoZone, Inc*., 81 Cal. App. 5th 366 (2022).
  - Denied employer summary judgment because:
    - Employer had not expressly advised employees that they could use a seat
    - Seats were not physically at employee workstations
- *LaFace v. Ralphs Grocery Co*., 75 Cal. App. 5th 388 (2022).
  - Wage order does not require seats to be provided if doing so would interfere with employees performance of their duties
  - A grocery company's failure to provide seating for cashiers did not violate workplace seating requirements, because the evidence showed that cashiers' duties included the reasonable expectation that they stay busy even while not checking out customers.
  - The evidence did not support the contention that there were lulls during which cashiers could sit in chairs while not engaged in the active duties of their employment.
  - Additional helpful ruling: no right to a jury trial in a PAGA case

SALES INCENTIVE PLAN ISSUES

SALES INCENTIVE PLAN ISSUES

- Caps and windfall provisions
- Chargebacks and deduction issues
- Requirement to remain employed.
- Use of unitary earnings code
- *Morales v. Factor Surfaces LLC* 70 Cal App 5th 367 (2021) (employer that did not maintain records of commission payments required to treat all payments as salary for RROP claim).
- Pay stub issues

Contact Information

Zach P. Hutton

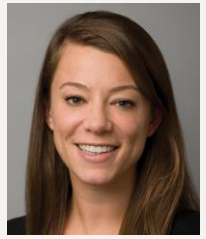
Partner, Employment Law Dept.
zachhutton@paulhastings.com

San Francisco
Phone: 1(415) 856-7036
Fax: 1(415) 856-7136

Raymond W. Bertrand

Partner, Employment Law Dept.
raymondbertrand@paulhastings.com

San Diego
Phone: 1(858) 458-3013
Fax: 1(858) 458-3113



Anna Skaggs

Associate, Employment Law Dept.
annaskaggs@paulhastings.com

San Francisco
Phone: 1(415) 856-7083
Fax: 1(415) 856-7183

Our Firm

In today's world of transformative change, our purpose is clear—to help our clients and people navigate new paths to growth.

Founded in 1951, Paul Hastings has grown strategically to anticipate and respond to our clients' needs in markets across the globe. Our innovative approach and unmatched client service has helped guide our journey to becoming one of the world's leading global law firms in such a short time.

We have a strong presence throughout Asia, Europe, Latin America, and the U.S. We offer a complete portfolio of services to support our clients' complex, often mission-critical needs—from structuring first-of-their-kind transactions to resolving complicated disputes to providing the savvy legal counsel that keeps business moving forward.

A Top-Ranked Firm
on *The American Lawyer's* A-List of the Most Successful Law Firms in the U.S. nine years in a row

A Top-Ranked Firm
in the *Financial Times* Innovative Lawyer's Report across Asia, Europe, and North America

Top 10 for "Best Place to Work" in Vault's annual survey eight years in a row

A Top-Ranked Firm
for Best Overall Diversity, according to Vault

50 Serving 50% of the Fortune 100

117 of our clients are on Fortune's Most Admired List

58 We advise clients based in 58 countries around the world

21 OFFICES across the Americas, Asia, and Europe.

Global Presence

The Americas

Atlanta
Century City
Chicago
Houston
Los Angeles
New York
Orange County
Palo Alto
San Diego
San Francisco
São Paulo
Washington, DC

Asia

Beijing
Hong Kong
Seoul
Shanghai
Tokyo

Europe

Brussels
Frankfurt
London
Paris

1 LEGAL TEAM to integrate with the strategic goals of your business.

PAUL HASTINGS