



2022 VIRTUAL EMPLOYMENT & LABOR LAW SUMMIT

October 24, 2022

1

Diana Estrada
October 24, 2022

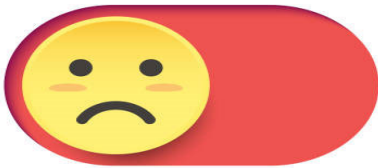
California Wage and Hour Update

2 © 2022 Wilson Elser. All rights reserved.



2

MIXED BAG



3

© 2022 Wilson Elser. All rights reserved.



3

New wage and hour laws for 2023

SB 1044

State of Emergency

Allows employees to leave work or refuse to show up to work in the event of “emergency conditions” defined as a “conditions of disaster or extreme peril to the safety of persons or property at the workplace or worksite caused by natural forces or a criminal act,” or (b) an “order to evacuate a workplace, a worksite, a worker’s home, or the school of a worker’s child due to natural disaster or a criminal act.” The bill specifically provides that an “emergency condition” does not include a health pandemic. This will be codified in Labor Code Section 1139 and result in PAGA penalties if violated.



4

© 2022 Wilson Elser. All rights reserved.



4

New wage and hour laws for 2023

AB 257

Establish Fast Food Sector Council / Joint and Several Liability

Creates fast food worker bill of rights, expands liability to franchisors for various employment and public health and safety laws. Creates 13 member Fast Food Sector Council consisting of state agencies, franchisor and franchisees and would have authority to set “shall promulgate minimum fast food restaurant employment standards, including... standards on wages, working conditions, and training, as are reasonably necessary and appropriate to protect and ensure

the welfare, including the physical well-being and security, of fast food restaurant workers.” Covers operations in California that are part of a chain of 30 or more similar restaurants anywhere in the U.S.



5

© 2022 Wilson Elser. All rights reserved.

2022 | VIRTUAL
EMPLOYMENT & LABOR LAW SUMMIT
WILSON ELSER

5

New wage and hour laws for 2023

SB 1334

Meal and Rest Periods for Public Hospital Employees

Private sector meal and rest period requirements (Section 512 of the California Labor Code) would be extended to cover public sector hospital employees that provide direct patient care or support direct patient care in a general acute care hospital, clinic or public health setting.



6

© 2022 Wilson Elser. All rights reserved.

2022 | VIRTUAL
EMPLOYMENT & LABOR LAW SUMMIT
WILSON ELSER

6

Paying Employees



COVID Supplemental Sick Leave (Labor Code § 218.7)

- 2022 SPSL law extended now set to expire December 31, 2022. Allows required second diagnostic test
- If employees are using SPSL at the time it expires they will remain eligible to use the full amount otherwise entitled to use

7

© 2022 Wilson Elser. All rights reserved.



7

Meal and Rest Break Issues

***Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93**

- Meal period and rest break violations can trigger derivative claims for waiting time penalties and wage statement penalties

***Espinoza v. Hepta Run, Inc.* (2022) 74 Cal.App.5th 44, review denied (Apr. 27, 2022)**

- The Federal Motor Carrier Safety Administration's 2018 regulation exempting commercial drivers from California's meal period and rest break requirements applies to short haul drivers.

8

© 2022 Wilson Elser. All rights reserved.



8

Meal and Rest Break Issues

***Bentancort v. OS Restaurant Services, LLC* (2022)**

83 Cal.App.5th 132 (Attorney Fees)

- The Labor Code mandates an award of reasonable attorney fees to the prevailing party in any action brought for the nonpayment of wages, if any party requests attorney fees at the initiation of the action. (Lab. Code, § 218.5, subd. (a).)
- The only wage and hour claims alleged and litigated by the parties were for rest break and meal period violations (§ 226.7), and claims for penalties (waiting time penalties under section 203 and wage statement violations under section 226) based on the rest break and meal period violations. In our original opinion, we held, following *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1255 (*Kirby*), that an action brought for failure to provide rest breaks or meal periods (§ 226.7) is not “an ‘action brought for the nonpayment of wages’ ” within the meaning of section 218.5. (*Kirby*, at p. 1255.)

9

© 2022 Wilson Elser. All rights reserved.



9

Meal and Rest Break Issues

- Prior to *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93 (*Naranjo*), a plaintiff could not recover penalties for waiting time and wage statement violations based on claims of rest break and meal break violations, and so could not recover attorney fees based on those penalties.
- In *Naranjo*, the Supreme Court held otherwise. The court concluded that “extra pay for missed breaks constitutes ‘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 (*id.*, § 203).” (*Naranjo*, at p. 102; *ibid.* [the extra pay is “designed to compensate for the unlawful deprivation of a guaranteed break,” but “also compensates for the work the employee performed during the break period”].) After issuance of its opinion, the Supreme Court transferred this case to Court of Appeal with directions to reconsider our opinion in light of *Naranjo*.

10

© 2022 Wilson Elser. All rights reserved.



10

Paying Employees



Estrada v. Royal Carpet Mills, (2022) 76 Cal.App.5th 685 (citing ton *Donohue v. AMN Services, LLC*, 11 Cal. 5th 58):

- Time records show missed, short, or delayed meal periods with no indication that premium pay was provided
- Rebuttable presumption arises that the employee was not provided a compliant meal period.”

11

© 2022 Wilson Elser. All rights reserved.

2022 | VIRTUAL
EMPLOYMENT & LABOR LAW SUMMIT
WILSON ELSER

11

Paying Employees – Executive Exemption

Rodriguez v. Parivar (2022) 83 Cal.App.5th 739

- Executive exemption case where the issues whether the employee spent most of her time engaged in duties that met the test of the executive exemption.
- Patricia Rodriguez was a salaried manager at Jack-N-the-Box. She sued to recover overtime wages for a 23 month period.

12

© 2022 Wilson Elser. All rights reserved.

2022 | VIRTUAL
EMPLOYMENT & LABOR LAW SUMMIT
WILSON ELSER

12

Paying Employees – Executive Exemption

Exemption is an affirmative defense and requires employers to prove six prongs:

- (a) whose duties and responsibilities involve the management of an enterprise or of a customarily recognized department or subdivision thereof; (b) who customarily and regularly directs the work of two or more other employees;
- (c) who has the authority to hire and fire, or whose recommendations and suggestions regarding a change in an employee's status receive particular weight;
- (d) who customarily and regularly exercises discretion and independent judgment;
- (e) who is primarily engaged in duties which meet the test of the exemption; and (f) who earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment, defined as 40 hours a week

13

© 2022
Wilson Elser. All rights reserved.

2022 | VIRTUAL
EMPLOYMENT & LABOR LAW SUMMIT
WILSON ELSER

13

Arbitration – Fate of Viking in CA

Adolph v. Uber Technologies (S274671/G059860/G060198), Petition for Review granted July 20, 2022

- The *Adolph* decision primarily concerns whether, in a PAGA action, the threshold issue of whether the plaintiff is an employee or an independent contractor is arbitrable. Uber argued that the threshold question of whether Adolph was an employee should be decided by an arbitrator, not a court. Citing *Iskanian*, the Court of Appeal ruled for the employee in an unpublished decision. *Adolph v. Uber Techs.*, 2022 WL 1073583 (Cal. Ct. App. Apr. 11, 2022).

14

© 2022 Wilson Elser. All rights reserved.

2022 | VIRTUAL
EMPLOYMENT & LABOR LAW SUMMIT
WILSON ELSER

14

Arbitration – Fate of Viking in CA

- The grant of review indicates that the Court may intend to address the questions of state law addressed by the U.S. Supreme Court in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022).
 - In *Viking River Cruises*, the Court held (among other things) that a plaintiff who has submitted the “individual” portion of a Private Attorneys General Act (PAGA) claim to arbitration lacks standing under state law to pursue a PAGA claim on behalf of others. The California Supreme Court appears poised to weigh in on this critical question.

15

© 2022 Wilson Elser. All rights reserved.



15

Arbitration – Use of Agreements

***Chamber of Commerce v. Bonta*, (9th Cir. Sep. 15, 2021) 13 F.4th 766, Rehearing Granted, Opinion Withdrawn August 22, 2022**

- 2021 holding: The FAA does not preempt Labor Code section 432.6’s prohibition of mandatory employment arbitration agreements, but does preempt the civil and criminal sanctions imposed for a violation of that provision.
- Since the *Viking River Cruises* case, which held that the California Supreme Court decision in *Iskanian* affected enforceability of arbitration agreements and, thus, violated the FAA the Ninth Circuit withdrew its holding to rehear arguments.

16

© 2022 Wilson Elser. All rights reserved.



16

Settlements – Scope of Release in Class Actions

***Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537, review denied (Dec. 29, 2021)**

- In a wage-and-hour class action, court may release not only those claims alleged in the complaint and before the court, but also claims which “could have been alleged by reason of or in connection with any matter or fact set forth or referred to in” the complaint.

- Also, when companion FLSA claims are being settled in the same agreement within the context of a state law wage and hour class action, the parties and absent class members need not comply with the FLSA’s “opt-in requirement.”

17

© 2022 Wilson Elser. All rights reserved.



17

Settlements – No Appeal Right

***Saucillo v. Peck* (9th Cir. 2022) 25 F.4th 1118**

- A non-party to PAGA action failed to show that he had any right to appeal
- PAGA claim was brought by two private plaintiffs, and Peck was not a party to the PAGA action. The panel held that Peck failed to show that he had any right to appeal the district court’s approval of the PAGA settlement. The panel rejected Peck’s arguments as to why he may appeal the PAGA settlement anyway. Although Peck is a class member of the class action, a PAGA action is distinct from a class action, and objectors to a PAGA settlement are not “parties” to a PAGA suit in the same sense that absent class members are “parties” to a class action.

18

© 2022 Wilson Elser. All rights reserved.



18

Settlements – Standing to Appeal

- ***Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56 & *Uribe v. Crown Building Maintenance Co.* (2021) 70 Cal.App.5th 986, as modified on denial of reh'g (Oct. 26, 2021)**
- Plaintiff in one PAGA action is sufficiently aggrieved by an unfair settlement of a different plaintiff's parallel PAGA suit to have standing to appeal from the judgment following approval of settlement in the other action—so long as the appellant became a party to that action by filing a motion to intervene or to vacate judgment.
- Standard of review for PAGA settlements is for a trial court “to determine whether it is fair, reasonable, and adequate in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws.”
- Created split of authority see *Turrieta v. Lyft, Inc.*, (2021) 69 Cal.App.5th 955, concluding intervenors lacked standing to challenge a PAGA settlement.

19

© 2022 Wilson Elser. All rights reserved.



19

Independent Contractor Issues

***Bowerman v. Field Asset Services, Inc.* (9th Cir. 2022) 39 F.4th 652**

- Confirmed that the *Dynamex* applies to claims rooted in California wage orders
- Borrello standard applies to claims that are not derived from the wage orders (e.g., in this case an expense reimbursement claim)
 - Noted: tools and equipment provision within the Wage Order is not equivalent to Labor Code § 2802

20

© 2022 Wilson Elser. All rights reserved.



20

Independent Contractor Issues - Volunteers

Woods v. American Film Institute (2021) 72 Cal.App.5th 1022

- A court of appeal held that persons volunteering for nonprofit entities may or may not be employees, in part depending on each person's expectation of payment.

- Citing DLSE Opinion Letter 1998.10.27, for purposes of the wage orders: "a person who works for a 'religious, charitable, or similar nonprofit corporation' is not an employee if he or she '**intends to volunteer his or her services for public service**, religious, or humanitarian objectives, not as an employee and without contemplation of pay.'"

21

© 2022 Wilson Elser. All rights reserved.



21

PAGA Issues – Pay Statements

Gunther v. Alaska (2021) 72 Cal.App.5th 334

Flight attendant was entitled to wage statements that complied with Labor Code section 226. Heightened damages should not have been awarded under Labor 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.

22

© 2022 Wilson Elser. All rights reserved.



22

PAGA Issues - Standing

***Garviiloglou v. Prime Healthcare Management* (2022) 83 Cal.App.5th 595**

Employee's loss of Labor Code violation claims in arbitration does not preclude her from bringing a PAGA claim that the trial court had stayed. The basis for this ruling is that the plaintiff was acting in different capacities, bringing Labor Code claims on her own behalf in arbitration, and acting in a different and representative capacity in the PAGA action. The PAGA action, which seeks civil penalties as a remedy, "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties."

23

© 2022 Wilson Elser. All rights reserved.



23

PAGA Issues – No Right to Trial & Seating

***LaFace v. Ralphs Grocery Co.* (2022) 75 Cal.App.5th 388, rev. denied (May 11, 2022)**

- In a matter of apparent first impression, no right to jury trial existed for PAGA action
- Grocery store employer was not required to provide its cashiers with seating under Industrial Welfare Commission Wage Order.

***Meda v. AutoZone Inc.* (2022) 81 Cal.App.5th 366**

- When an employer has not expressly advised employees that they may use a seat during their work and does not place seats at workstations, resolution of the issue of whether an employer has “provided” suitable seating may be inappropriate at the summary judgment stage.

24

© 2022 Wilson Elser. All rights reserved.



24

PAGA Issues – Concurrent Matters

Shaw v. Superior Court of Contra Costa County (2022) 78 Cal.App.5th 245

- Trial court has inherent authority to stay a second filed PAGA action under doctrine of concurrent exclusive jurisdiction.

Leenay v. Superior Court (2022) 81 Cal.App.5th 553

- Defendant employer was not entitled to stay of PAGA actions pending arbitration of similar third party claims. The PAGA plaintiffs were not plaintiffs in any of the pending arbitration matters.

25

© 2022 Wilson Elser. All rights reserved.



25

PAGA Issues - Exemptions

- PAGA contains two industry-specific provisions allowing labor organizations in the construction and janitorial industries to waive the right to bring PAGA claims in a collective bargaining agreement (CBA)
 - Exemptions for Janitorial Industry effective 1/1/22 (Labor Code § 2699.8)
 - Exemptions for Construction Industry (Labor Code § 2699.6)

26

© 2022 Wilson Elser. All rights reserved.



26

PAGA Issues - Exemptions

***Oswald v. Murray Plumbing & Heating Corp.*, 82 Cal. App. 5th 938**

Court of Appeal construed Labor Code section 2699.6 broadly, holding that a CBA can retroactively bar PAGA claims, even where the plaintiff was no longer employed at the time the CBA was adopted

27

© 2022 Wilson Elser. All rights reserved.



27

Contact Information



Diana M. Estrada
Partner – Los Angeles, CA
diana.estrada@wilsonelser.com

28

© 2022 Wilson Elser. All rights reserved.



28