RECENT DEVELOPMENTS IN CALIFORNIA WAGE AND HOUR LAW

BY DAVID BORGEN AND KEIA COLE[1]

[1] Mr. Borgen is a partner at Goldstein, Demchak, Baller, Borgen & Dardarian, in Oakland, California. Ms. Cole is a law student at Stanford Law School.

DAVID BORGEN
GOLDSTEIN, DEMCHAK, BALLER, BORGEN & DARDARIAN
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800
(510) 835-1417
borgen@gdblegal.com
www.gdblegal.com

David Borgen is a partner with Goldstein, Demchak, Baller, Borgen & Dardarian, an eleven attorney law firm located in Oakland, California, which represents plaintiffs and employees in complex and class action litigation, including employment discrimination, wage and hour, environmental, and other public interest class actions and attorneys' fees litigation. The law firm, formerly Saperstein, Goldstein, Demchak & Baller, was founded in 1972 and has a national practice. Goldstein, Demchak has litigated class action lawsuits in Texas, New York, Florida, Georgia, Missouri, Illinois, Washington, Michigan, Maryland, and Minnesota, as well as California, including the class action on behalf of women who were denied or deterred from positions as State Farm insurance sales agents, Kraszewski v. State Farm General Ins. Co., 30 FEP 197 (N.D.Cal. 1985), and the retail store gender discrimination class action, Butler, et al. v. Home Depot, Inc., 70 FEP 51 (N.D.Cal. 1996) (class action on behalf of women employees in and applicants to Home Depot Stores in its Western Division). He was lead counsel in Harrison v. Enterprise Rent-A-Car, 1998 WL 422169 (M.D. Fla. 1998) (certified as a nationwide FLSA collective action) and numerous state wage and hour class actions brought under California law. He is the Associate Editor of the cumulative supplement to the BNA Fair Labor Standards Act treatise, co-chair of the ABA Labor and Employment Section's Federal Labor Standards Legislation committee, and a member of the College of Labor and

Employment Lawyers, a national honorary society. He is a Senior Editor of the BNA treatise, Wage and Hour Laws: A State-by-State Survey (2004). He is also co-chair of the National Employment Lawyers Association's (NELA) Wage and Hour Committee. He is an active member of NELA's amicus advisory committee and has spearheaded amicus briefing in IBP v. Alvarez and Sav-On Drugs, among others. He is a graduate of University of California – Hastings College of the Law (Order of the Coif – 1981). Prior to joining the Goldstein firm, he was counsel for the Communications Workers of America, AFL-CIO.

I. INTRODUCTION

This paper focuses on recent developments in California wage and hour law including the following topics: (1) meal and rest period payments, (2) exemptions, (3) calculation of hours worked, (4) expense reimbursement, (5) enforcement and remedies, and (6) other litigation issues.

II. MEAL & REST PERIOD PAYMENTS

The state's appellate courts are split on whether a one-year or three-year statute of limitations applies to violations of meal and rest period requirements. The California Supreme Court will review the issue of whether the one hour payments for missed meal and rest periods required by Labor Code §226.7 should be treated as a penalty, subject to a one-year statute of limitations, or a wage, subject to a three or four year statute of limitations.

1. Murphy v. Kenneth Cole Productions, Inc., 134 Cal. App. 4th 728 (1 DCA, Dec. 2, 2005), petition for review granted, Feb. 22, 2006.

Plaintiff, a store manager in a Kenneth Cole retail store, filed a wage claim with the Labor Commissioner and was awarded overtime pay as a nonexempt employee. The employer appealed the Labor Commissioner's decision. On appeal to the San Francisco County Superior Court, plaintiff's new counsel added claims for missed meal and rest periods, failure to provide itemized wage statements, interest, and attorney fees. Plaintiff prevailed, winning a judgment for overtime pay, payments for missed meal and rest periods, waiting time penalties, and attorney fees. The Court of Appeals agreed with the trial court that the plaintiff should be classified as a nonexempt employee, rejecting the executive exemption defense. But the Court of Appeals held that the trial court did not have jurisdiction to hear new claims not

presented to the Labor Commissioner and that payments for meal and rest periods are penalties, not wages. The appellate court held that while the appeal from the Labor Commissioner is considered a new trial allowing parties to present new evidence and witnesses, the appeal is limited to review of the decision or award granted by the Labor Commissioner. The trial court, however, may award interest. Alternatively, plaintiff could, if timely, have filed a civil action alleging new claims and consolidated those with his appeal or filed another complaint with the Labor Commissioner. Plaintiff here could not have filed a timely claim for meal and rest period payments in an alternative forum because the Court of Appeals concluded that such payments are a penalty subject to a one-year statute of limitations. The court held that meal and rest period payments impose a penalty since the payments are not determined based on the actual loss suffered by the employee. A final section in the appeal court opinion strongly affirmed the waiting time (§203) penalties and suggests that employer's "good faith" defense on this issue is limited (not available here where employer tried to assert federal standard as to state law executive exemption defense).

2. National Steel and Shipbuilding Co. v. Superior Court, 135 Cal. App. 4th 102 (4 DCA, Jan. 20, 2006), petition for review granted, April 12, 2006.

Plaintiffs sued in a class action to recover compensation for the employer's violation of meal and rest period laws. The trial court denied the employer's motion to strike any reference in the complaint to meal or rest period violations beyond a one-year statute of limitations. The Court of Appeals affirmed concluding that payments for missed meal or rest periods are a statutory obligation, other than a penalty, subject to a three-year statute of limitations. The self-executing nature of the statute indicates that the

payment is wage. In the same way that an employee is immediately entitled to overtime pay, an employer has an affirmative obligation to compensate an employee for a missed meal or rest period. Additionally, a penalty already exists for underpayment of wages, and the Legislature did not intend to assess two penalties against employers for meal or rest period violations. The Legislature could have used the word penalty to limit the statute of limitations, but it chose not to do so.

3. Mills v. Superior Court (Bed, Bath & Beyond), 135 Cal. App. 4th 1547 (2 DCA, Jan. 27, 2006), petition for review granted April 12, 2006.

Plaintiff filed a class action on behalf of Bed, Bath & Beyond employees to recover compensation for missed rest periods. Plaintiff alleged that Bed, Bath & Beyond was liable for penalties under the Labor Code since payments for missed meal or rest periods are the equivalent of wages not promptly paid or properly accounted for in wage statements. The trial court sustained the employer's demurrer, which argued that rest period payments are a penalty and not subject to timing and reporting requirements governing wages. The Court of Appeals affirmed the trial court's order and concluded that the payment of one hour's wage for each missed meal or rest period is a penalty against the employer, not a wage to the employee. Despite the ambiguity of the statute, the legislative history indicated, to this panel, that the Legislature intended to impose meal and rest period payments as a penalty. Additionally, the panel opined that the payment for a missed rest period cannot be considered a wage because an employer pays an employee a fixed sum instead of compensating the employee for her additional labor. For example, an employee is entitled to a full hour of pay even if a ten minute rest period is missed. Thus, the panel concluded that the Legislature adopted a fixed sum to punish employers for failure to provide meal or rest periods.

4. Banda v. Richard Bagdasarian, Inc., 2006 WL 1554441 (4 DCA, June 8, 2006).

Plaintiffs, who were employed as farm workers to harvest grapes on a seasonal basis, filed suit against their employer to recover compensation for missed meal and rest periods. Plaintiffs alleged that the employer's failure to permit meal and rest periods violated California Business & Professions Code Section 17200, the Unfair Competition Law (UCL), and as a result, plaintiffs were entitled to restitution. The trial court concluded that the employer was not obligated to provide meal or rest periods and that compensation for such breaks is a penalty, so plaintiffs lacked the property interest in the payment to support a restitution action. The Court of Appeals, however, held that the employer was required to provide both meal and rest periods. But the appeal court agreed with the trial court that the payment for a meal or rest period is a penalty and is not covered by a UCL action, concluding that payment for a missed meal or rest period is a penalty because it compensates the employee for the employer's statutory violation, not the extra time worked. Plaintiffs thus did not have a property interest in the penalty and were not entitled to recover under the UCL. Additionally, since meal and rest period payments were determined to be a penalty, plaintiffs cannot recover waiting time penalties for failure to pay wages.

5. Cicairos v. Summit Logistics, Inc., 133 Cal. App. 4th 949 (3 DCA, Oct. 27, 2005), review denied. Jan. 18, 2006.

Plaintiffs, a group of truck drivers, sued their former employer for failure to provide adequate meal and rest periods and itemized wage statements. The trial court granted summary judgment for the former employer because the court found that the employees' claims were covered by the motor carrier exemption. The Court of Appeals,

reversed, holding that the employer's evidence that it left the decision to take meal or rest breaks to employees was insufficient to support summary judgment. Employers have an affirmative obligation to ensure that employees are relieved of all duties during their meal periods. The appeal court also concluded that the motor carrier exemption applies only to overtime compensation requirements and not to failure to provide meal and rest periods and itemized wage statements.

6. Bearden v. U.S. Borax, Inc., 138 Cal. App. 4th 429 (2 DCA, April 7, 2006).

Plaintiffs, employees in an open-pit mine, brought a lawsuit against their employer alleging failure to provide meal and rest periods, including a second meal-break to miners working a 12-hour shift. The trial court dismissed the plaintiffs' complaint holding that an exception under an IWC order, which governs certain occupations in the construction, drilling, logging and mining industries, relieves employers of the requirement to provide a second meal break to workers covered by a collective bargaining agreement. The Court of Appeals, however, reversed and found that the IWC order was invalid. The IWC exceeded its authority by creating an additional exception not found in the statute without clear guidance from the legislature to do so.

III. EXEMPTIONS

7. Conley v. Pacific Gas & Electric Co., 131 Cal. App. 4th 260, 31 (1 DCA, 2005).

Plaintiffs sued to recover unpaid overtime on behalf of several classes of employees. Plaintiffs alleged that each class of employees had been misclassified as exempt from overtime pay and moved to certify a salary basis class, including all employees classified as exempt, and various job duties classes. The trial court denied the motion for class

certification for all of the classes. The salary basis class did not have a common viable cause of action because the employer could lawfully deduct partial-day absences from the vacation bank balance for exempt employees (following federal law). In the published section of the opinion, the Court of Appeals affirmed the order denying class certification to the salaried class. While class certification does not generally depend on the merits of a class's claims, the Court of Appeals addressed the issue at the parties' request. As for the job duties classes, the trial court did not find common issues since the actual tasks performed by class members differed and concluded that administrative proceedings would provide a superior method of adjudicating the claims of each class member. In the unpublished portion of the opinion, the Court of Appeals remanded the issue of certification of the various job duties classes in light of SavOn Drugs.

IV. CALCULATION OF HOURS WORKED

8. Armenta v. Osmose, Inc., 135 Cal. App. 4th 314 (2 DCA, Dec. 29, 2005), review denied, March 15, 2006.

Plaintiffs, foremen and crew members of utility pole maintenance teams, sued the defendant to recover wages for "nonproductive time" including travel time to remote jobsites, time spent loading equipment and supplies, time spent doing paperwork, and time spent maintaining the defendant's vehicles. Instead of pursuing recovery under the hourly wage of their collective bargaining agreement, the employees alleged that the employer failed to pay the minimum wage. The trial court held that that the employer violated California's minimum wage law by not compensating the employees for travel time and time spent on paperwork. The Court of Appeals affirmed and rejected the employer's argument that the averaging formula used by federal courts should apply when an employee receive an

hourly rate higher than the minimum wage. California minimum wage law offers protection beyond the federal statute and intends that employees receive the minimum wage for each hour worked.

9. Overton v. Walt Disney Co., 136 Cal. App. 4th 263 (2 DCA, Jan. 4, 2006), review denied, April 19, 2006.

Plaintiff, a Disneyland security guard, filed a class action seeking compensation for travel time while riding on an employer-sponsored shuttle from an assigned parking lot. The trial court granted the employer's motion for summary judgment and held that employees were not entitled to compensation for travel time on the company-provided shuttle. The Court of Appeals affirmed and found that employers are not obligated to pay for travel time merely by providing optional transportation. Although the plaintiff was assigned to a parking lot accessible by the shuttle, the plaintiff was not required to drive to work and had the option to walk or bike from the parking lot instead of taking the shuttle. If an employer requires employees to take the employer-provided transportation, however, an employer must compensate employees for their time since the employees are subject to the control of the employer while using the transportation as in Morillion v. Royal Packing Co., 22 Cal. 4th 575 (2000).

10. Singh v. Superior Court, 140 Cal. App. 4th 387 (2 DCA, June 12, 2006).

Plaintiff, a nurse working an alternative workweek schedule with three twelve-hour days, sued the hospital for overtime compensation for hours worked on days outside of the three scheduled days. The trial court held that plaintiff could only receive overtime for working more than 40 hours per week or 12 hours per day. The Court of Appeals held that health care employees working on an alternative

schedule are entitled to overtime after working 40 hours per week.

V. EXPENSE REIMBURSEMENT

11. Gattuso v. Harte-Hanks Shoppers, Inc., 133 Cal. App. 4th 985 (2 DCA, Oct. 27, 2005), review granted, Feb. 22, 2006.

Plaintiffs, Outside Sales Representatives (OSRs) required to use their personal automobiles to sell the company's products, brought a class action seeking indemnification under Labor Code section 2802 for automobile expenses. According to the employer, OSRs were paid a higher base salary and commission rate than Inside Sales Representatives (ISRs) to compensate OSRs for additional expenses. The Court of Appeals affirmed the trial court's holding that section 2802 allows an employer to pay a higher salary or commission rate instead of reimbursing employees for actual expenses incurred. The court reasoned that because the statute does not specify a particular method by which an employer must indemnify employees for expenses, an employer can only violate the statute if the increased salary or commission does not adequately compensate employees for the expenses incurred. It is anticipated that the state Supreme Court will reverse.

VI. ENFORCEMENT AND REMEDIES

12. Caliber Bodyworks, Inc. v. Superior Court, 134 Cal. App. 4th 365 (2 DCA, Nov. 23, 2005).

Plaintiffs filed a class action on behalf of current and former technicians, painters, and mechanics against their employer alleging several wage-and-hour violations. The employer demurred to the complaint arguing that the trial court lacked subject matter jurisdiction since plaintiffs did

not plead compliance with the administrative exhaustion requirements of the Private Attorney General Act of 2004 (PAGA). The trial court overruled the demurrer holding that employees can sue separately or concurrently under state and federal law and the PAGA and that administrative exhaustion is not required for claims which had a private cause of action prior to the enactment of the PAGA. The Court of Appeals affirmed the trial court's order based on different reasoning. According to the Court of Appeals, the PAGA mandates pre-filing notice and exhaustion requirements for employees seeking to recover civil penalties identified in the Act. Employees, however, are not obligated to satisfy the same requirements when seeking compensation for unpaid wages and interest or statutory penalties not included in the PAGA. Additionally, the court held that the employer should have used a motion to strike, instead of a demurrer, to challenge a complaint seeking an improper remedy.

13. Bell v. Farmers Insurance Exchange, ("Bell V"), 137 Cal. App. 4th 835 (1 DCA, Mar. 15, 2006).

Plaintiffs, insurance claims representatives, brought a class action against their employer for unpaid overtime compensation. The trial court granted summary judgment to the employees, and the decision was upheld on successive appeals and ultimately remanded. Following remand, the employer paid a partial amount of the judgment amount into a trust account in the name of class counsel and a court-appointed claims administrator. The trial court denied the employees' motion for additional prejudgment interest for the period between the partial and full payments of the judgment. The Court of Appeals affirmed holding that interest stopped accruing once the employer deposited the partial judgment in the trust account. See also, Bell v. Farmers Ins. Exchange, 135 Cal. App. 4th 1138 (2006) ("Bell IV")(prejudgment interest payable at 10%).

14. Smith v. Superior Court (L'Oreal USA, Inc.), No. S129476, 2006 WL 1881245 (Cal. Supreme Court, July 10, 2006).

Plaintiff, a hair model who appeared in the employer's one-day show, brought a class action alleging several causes of action, including failure to pay earned and unpaid wages immediately upon discharge from unemployment. The trial court concluded that the plaintiff could not recover penalties for failure to promptly pay wages because completing a day's work does not qualify as a discharge or layoff which requires immediate payment of unpaid wages. The Court of Appeals affirmed holding that discharge requires an affirmative dismissal from ongoing employment, such as a firing or lay off. The Supreme Court of California, however, reversed and concluded that completion of a specific job assignment for which an employee is hired qualifies as a discharge from employment. If employees who are terminated for good cause or quit without completing their employment obligations are covered by the statute, the court reasoned that employees who complete a specific job assignment, like the plaintiff, should also be entitled to prompt compensation.

VII. OTHER LITIGATION ISSUES

15. Reynolds v. Bement, 36 Cal. 4th 1075 (2005).

Plaintiff sued his employer and the company's officers, directors, and shareholders to recover for misclassification and unpaid overtime. The trial court sustained the demurrer of the individual defendants. Both the Court of Appeals and California Supreme Court affirmed holding that the individual defendants were not liable for the company's misclassification or failure to pay overtime wages. The IWC did not adopt its current definition of employer to impose liability on individual corporate agents. Under the common law, individual corporate representatives

cannot be sued for the company's failure to pay wages. If the Legislature intended to create personal liability for corporate agents for wage and hour violations, it would have expressly identified those causes of action.

16. Jones v. Gregory, 137 Cal. App. 4th 798 (4 DCA, Mar. 14, 2006).

The Labor Commissioner sued the owner of a corporation on behalf of its unpaid California employees. The trial court found the defendant liable for the corporation's failure to pay outstanding wages, expenses, interest, and penalties because he was an officer with control over corporate operations. The Court of Appeals reversed and remanded based on the California Supreme Court's decision in Reynolds v. Bement. Following Reynolds, the Labor Code definition of employer precludes liability of individual defendants in court even in situations in which the individual actively participated in the day-to-day operation of the corporation by setting salaries and wage rates, authorizing pay changes, and personally firing and promoting employees.

17. Harris v. Investors Business Daily. Inc., 138 Cal. App. 4th 28 (2 DCA, Mar. 29, 2006).

Plaintiffs, who sold newspaper subscriptions over the telephone, filed a class action alleging violations of both federal and state law. The trial court sustained the defendant's demurrer to the claim under California Business & Professions Code Section 17200 alleging violations of the federal Fair Labor Standards Act (FLSA). The Court of Appeals held that a FLSA claim does not preempt a cause of action under state section 17200. Potential plaintiffs can comply with both the collective action opt-in requirement of FLSA (29 U.S.C. §216(b)) and the class action opt-out requirement of an UCL action brought under section 17200. The legislative history indicates that the FLSA opt-in

provision is intended to protect employers from excessive damages and prevent employees from receiving windfall payments. Such concerns are not relevant under a section 17200 claim since the law limits the remedy to restitution. The appeals court also reversed summary judgment granted to the employer on the commission sales exemption, holding that the points-based compensation system did not qualify, as a matter of law, as commissions (percentage of the price of a product). In addition, the court reversed summary judgment for the employer on the chargeback claims, distinguishing the chargebacks from those in Steinhebel v. L. A. Times Comms., 126 Cal. App. 4th 696 (2005), where the chargeback was not clearly identified as an advance and where there was no express agreement in writing.

VIII. CONCULSION

This paper is not intended to be an exhaustive survey of new developments in California wage and hour law. As demonstrated above, however, there is extensive litigation and emerging law, especially with respect to laws governing payments for missed meal and rest periods, in the field of wage and hour law.