

WAGE AND HOUR LAW**A win for employers on waiting time penalties**

by Robin E. Weideman

Most California employers are (or should be) familiar with the state's strict timing requirements on the payment of final wages to an employee who has resigned or been terminated and the consequences for failing to provide timely payment. California Labor Code Section 203 provides that an employee who isn't timely paid his final wages is entitled to seek "waiting time" penalties from the employer, equivalent to one day's regular wages for each day the payment is late, for up to 30 days. In many instances, the waiting time penalties end up being more than the underlying final wages.

Claims for waiting time penalties are increasingly pursued in connection with class-action wage and hour lawsuits. In these cases, the potential liability facing the employer is greatly affected by the statute of limitations (i.e., the time period covered by the claim and deadline for filing the claim) applicable to the claims. As a general rule, claims for "penalties" have a one-year statute of limitations and claims for unpaid wages have a three-year statute of limitations. However, most attorneys filing claims for unpaid wages also include a claim for violation of California's Unfair Competition Law (UCL), which has a four-year statute of limitations. Including that type of claim permits the employees to recover unpaid wages going back four years instead of three.

Which statute of limitations applies?

In a recent case, the California Court of Appeal was faced with deciding the statute of limitations for a waiting time penalties claim. The employee, Jorge Pineda, waited more than a year after his job separation and then filed a class action against Bank of America alleging that it didn't timely pay his and other employees' final pay. (His last day was May 11, and he was paid on May 15.)

Pineda didn't challenge the amount of his pay or claim that Bank of America owed him any wages. He claimed only that the pay was late. He sued for waiting time penalties under Labor Code Section 203 and included a

piggyback claim for violation of the UCL. The trial court threw his claims out, determining that they were barred by the statute of limitations and that the UCL didn't apply to a claim for waiting time penalties. Pineda appealed.

The California Court of Appeal agreed with the trial court. It held that a one-year statute of limitations applies to a claim for waiting time penalties when there is no underlying claim for unpaid wages. (The court suggested that if there is an underlying claim for unpaid wages, the statute of limitations for both claims is three years.) In this case, Pineda didn't allege that Bank of America failed to pay him wages; he simply alleged that his final wages were paid four days late. Because he didn't have an underlying claim for unpaid wages, a one-year statute of limitations applied. And because he filed his lawsuit more than one year after his resignation, his claim for waiting time penalties was time-barred.

Can claim for waiting time penalties be pursued under UCL?

The appellate court also agreed with the trial court that a claim for waiting time penalties couldn't be filed under the UCL. The court reasoned that penalties (unlike unpaid wages) generally can't be awarded under the UCL and that Pineda's claim was solely for penalties, not wages. *Pineda v. Bank of America* (California Court of Appeal, First Appellate District, 1/21/09).

Bottom line

Although this case was a victory for the employer, it's also a reminder of the litigation that can — and often does — follow when final wages aren't paid in accordance with California's strict statutory time requirements. As a reminder, if an employee is involuntarily terminated, final wages (including accrued, unused vacation) must be paid at the time of termination (on the employee's last day). If an employee resigns and gives at least 72 hours' notice, final wages must be paid on his last day. If an employee resigns with less than 72 hours' notice, final wages must be paid within 72 hours.

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