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COMBATTING THE RISE IN WAGE & HOUR AND PAGA LITIGATION IN THE HEALTH CARE INDUSTRY

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California courts have continued to issue groundbreaking wage and hour decisions that have dramatically changed the legal landscape for health care employers within the state. This article will address the most significant issues employers in the health care industry currently face and provide strategies to minimize legal exposure.

MEAL PERIOD AND REST BREAK PREMIUMS

In July, the California Supreme Court issued the much-anticipated decision in *Ferra v. Loews Hollywood Hotel, LLC,* where it concluded that employers that fail to provide an employee with a compliant meal break or rest period, must make a premium payment of one hour of pay at the employee's "regular rate of pay," as opposed to an hour of pay at the employee's base hourly or straight-time rate of pay. The c court sought to maximize protections for employees by requiring employers to factor non-discretionary compensation into the break premium rate of pay.

Under California law, the "regular rate of pay" has been given the same meaning as the federal "regular rate," which is always the same as or greater than the employee's base hourly rate of pay. That is because the "regular rate" factors in the base compensation and differential rates of pay (e.g., shift premiums), non-discretionary bonuses (including attendance bonuses), and several other forms of non-discretionary payments.

The Ferra decision is a recent example of the state high court construing California's labor laws in a manner that ensures higher pay to employees creating additional liability for employers, despite contrary guidance from the California Department of Labor Standards and Enforcement and the lower courts. Ferra confirms that health care employers seeking to avoid wage and hour liability must adopt payroll practices that err on the side of overpayment to the employees absent controlling legal precedent.

WORK FROM HOME ARRANGEMENTS

As health care employers continue to see more requests for work from home arrangements, they must keep in mind California's increasingly complex wage and hour laws. Work from home arrangements make if difficult, if not impossible, to police when employees are working, whether and when meal and rest breaks are taken and a host of other issues that expose health care employers to liability for unpaid wages, unpaid meal and rest period premiums and related penalties. To remain compliant, health care employers must be vigilant when ensuring that employees are recording all time spent working and providing the opportunity to take their uninterrupted meal and rest breaks. Health care employers should have written policies, clearly stating the expectations that all time spent working is recorded and meal and rest breaks are taken. Employers should check in regularly with remote workers to confirm they have the opportunity to take their legally compliant meal and rest breaks and address any potential barriers.

Reimbursement issues may also arise when engaging a remote workforce. Pursuant to Labor Code Section 2802, employers must reimburse employees for all "necessary" and "reasonable" expenses, which would include any additional costs associated with work-related cell phone usage, home internet/Wi-Fi and home office supplies (e.g., printers, paper, printer cartridges). To reduce liability, health care employers should provide employees with a clearly defined mechanism for seeking reimbursement or provide a monthly stipend in an amount mutuallyagreed upon to cover all such expenses. Employers should also have a written policy stating that the employee must seek approval before exceeding the agreed upon amount and setting forth the process for payment in the event the actual expense exceeds the stipend amount.

MANDATORY ARBITRATION AGREEMENTS

Mandatory arbitration agreements in employment have been one of the most effective tools against wage and hour class claims in the health care industry because of the enforceability of class action waivers. However, in October 2019, Gov. Gavin Newsom signed Assembly Bill 51 into law in an attempt to curtail employers' use of such agreements. AB 51 precludes an employer from requiring an applicant or employee as a "condition of employment, continued employment or receipt of any employment-related benefit … to waive any right, forum or procedure" for any claim arising under California's Labor Code and its Fair Employment and Housing Act and prohibited commonly used "opt-out" provisions. The law imposes both criminal and civil penalties for any such violation.

Just days before the law was set to take effect, the U.S. District Court for the Eastern District of California, enjoined enforcement on the grounds that it was preempted by the Federal Arbitration Act. Nevertheless, on Sept. 15, 2021, the 9th U.S. Circuit Court of Appeal set aside the injunction finding, for the most part, AB 51 to be valid and enforceable.

Good News: The 9th Circuit ruling has not yet taken effect and it appears that the opponents of AB 51 will petition for Supreme Court review.

For health care employers that have mandatory arbitration agreements with class action waivers, this issue is far from over. Going forward, any employer with mandatory arbitration agreements should take a "wait and see" approach as the case makes its way to the United States Supreme Court.

PRIVATE ATTORNEYS GENERAL ACT

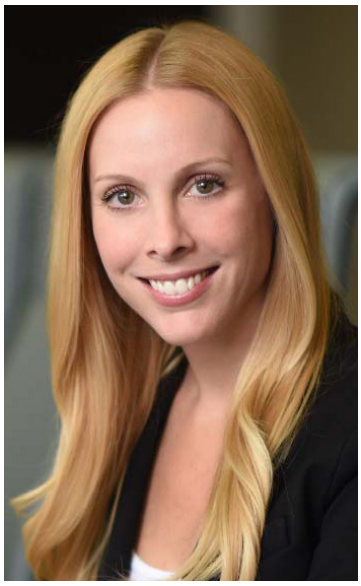
Employers in the health care industry are plagued with lawsuits brought by current or former employees pursuant California's PAGA. California courts have recently issued a few good, and a few not so good, decisions for employers facing PAGA litigation.

Johnson v. Maxim Healthcare Services, Inc. (July 21, 2021): The California Court of Appeal held that an employee whose individual claim is time-barred may still pursue a representative claim under PAGA. In reaching its conclusion, the Court of Appeal relied on *Kim v. Reins International California*, Inc. (2020), where the Supreme Court concluded an employee who settles and dismisses individual Labor Code claims does not lose standing to pursue a PAGA claim. The Supreme Court in Kim also observed PAGA standing is not "inextricably linked to the plaintiff's own injury and PAGA standing does not depend on maintaining an individual Labor Code claim." Therefore, according to Johnson, any aggrieved employee can bring a PAGA action at any time, regardless of when the employee was personally aggrieved. Maxim Health care has sought California Supreme Court review.

Amaro v. Anaheim Management, LLC (Sept. 28, 2021) and *Turrieta v. Lyft, Inc.* (Sept. 30, 2021): Two California Court of Appeal decisions provided a much-needed employer-friendly relief with regard to PAGA settlements. The vast majority of PAGA lawsuits are resolved by way of settlement and require a court to "review and approve" the PAGA settlement. Historically, there was little guidance as to the appropriate scope of a PAGA settlement, especially when other overlapping PAGA actions are pending against the same employer. These cases provide that guidance and collectively hold that:

- A PAGA plaintiff can release PAGA claims beyond the one-year limitations period of her/ his own PAGA claim, including the claims alleged in earlier and later filed PAGA actions against the same employer.
- There is nothing inherently wrong with "plaintiff shopping," which means settling out with one PAGA plaintiff as opposed to another PAGA plaintiff.
- A PAGA plaintiff does not have a "personal interest" in the settlement of another PAGA claim.
- A PAGA plaintiff in a parallel PAGA action does not have standing to seek to vacate the PAGA settlement or judgment.
- A PAGA plaintiff in a parallel PAGA action does not have a "direct and immediate interest in the settlement" which would establish an entitlement to mandatory or permissive intervention.

Wesson v. Staples (Sept. 9, 2021): The California Court of Appeal held that courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike claims that cannot be rendered manageable, and as a matter of due process, defendants are entitled to a fair opportunity to litigate available affirmative defenses, and a court's manageability assessment should account for them.



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