California Wage & Hour Class Action Litigation:

Key Recent Developments & Trends

Michael Afar
Bailey Bifoss
Christopher Crosman

March 19, 2024

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Speakers

Michael Afar

Partner
Los Angeles
(310) 201-9301
mafar@seyfarth.com

Christopher Crosman

Partner
Los Angeles
(310) 201-1528
ccrosman@seyfarth.com

Bailey Bifoss

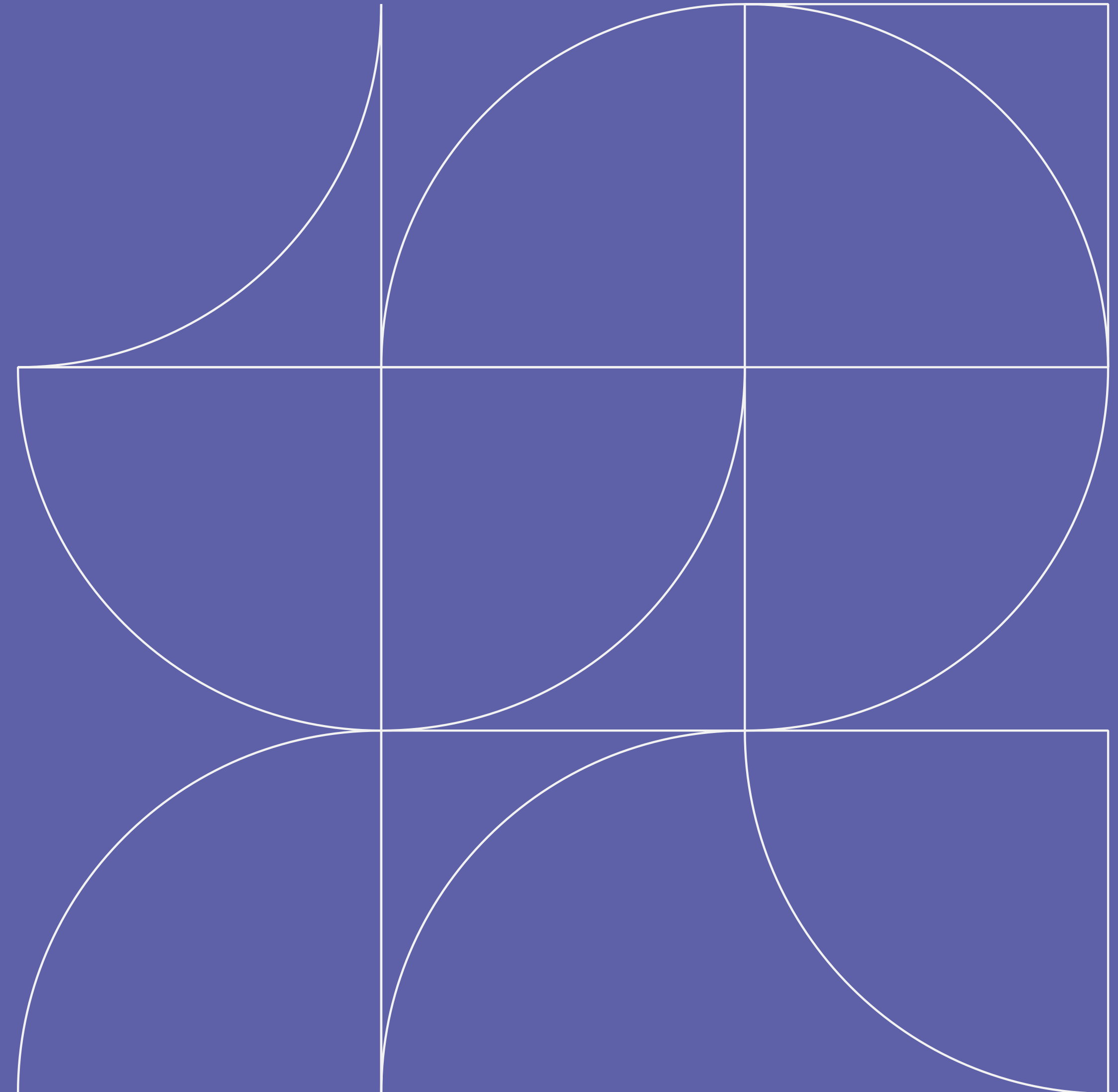
Partner
San Francisco
(415) 544-1050
bbifoss@seyfarth.com

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Agenda

1. Introduction: *Litigating California Wage & Hour Class and PAGA Actions* (23rd Edition)
2. Recent Developments Affecting PAGA Representative Actions
3. The Impact of Arbitration Agreements on Class and PAGA Actions
4. The Latest Decisions Involving Service Charges, Gratuities, and the Regular Rate of Pay
5. Cases to Watch from the California Supreme Court

23rd Edition of Litigating California Wage & Hour Class and PAGA Actions



©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Litigating California Wage & Hour Class and PAGA Actions

23rd EDITION

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Seyfarth

Table of Contents

I. Introduction and Overview **1**

II. Common Exempt Misclassification Claims **3**

A. Overview of State Overtime Law 3

B. The Executive (Managerial) Exemption 4

C. The Administrative Exemption 9

1. General Overview 9
2. California Develops a Unique Interpretation of the Administrative/Production Dichotomy 9
3. The Administrative/Production Dichotomy Test Survives—*Harris v. Superior Court* 12
4. The Ninth Circuit Makes a Mountain out of the Administrative/Production Dichotomy Molehill 13

D. The Outside Sales Exemption 14

E. The Commissioned Salesperson Exemption 16

III. Independent Contractor Classification **19**

A. *Dynamex* Decision 19

1. Freedom From Control and Direction of the Hiring Entity 20
2. Outside the Usual Course of the Hiring Entity's Business 20
3. Customarily Engaged in an Independent Business 21

B. Post-*Dynamex* Cases 21

1. *Curry v. Equilon Enterprises, LLC*: Application of *Dynamex* to Joint Employer Analysis 21
2. *Garcia v. Border Transportation Group, LLC* 22
3. Retroactivity of *Dynamex*: *Vazquez v. Jan-Pro Franchising International, Inc.* and *Gonzales v. San Gabriel Transit* 23

C. Addition of the ABC Test to the Labor Code 23

D. The Battle Over AB 5 24

1. *California Trucking Ass'n v. Bonta*: AB 5 Enforced as to Motor Carriers 24

E. California Voters Adopt Proposition 22 25

Seyfarth

IV. Unlawful Deductions from Wages **27**

A. Generally 27

B. Bonus Plan "Deductions" 28

C. Unlawful Commission Chargebacks 29

1. Nature of the Violation 29
2. *Steinhebel* Approves Certain Chargeback Plans 30
3. Further Development of the Law Since *Steinhebel* 31

V. Reimbursement of Employee Expenses **35**

A. The Duty to Reimburse Expenses Under Labor Code Section 2802 35

B. Reimbursement for Uniforms Under the Wage Orders 39

VI. Meal and Rest Period Claims **41**

A. Nature of Claims 41

1. Employers Must "Provide" Meal Periods 41
2. Employers Must "Authorize and Permit" Rest Periods 42
3. Meal and Rest Period Premium Pay 43

B. Debate Over Whether One-Hour Payment Is a "Penalty" 45

C. Meaning of "Provide" a Meal Period 46

D. Limits on IWC's Power to Alter Labor Code Meal Period Rules 49

VII. Tip-Pooling **53**

A. Actions Alleging Tips Were Diverted to Co-Workers Who Did Not Earn Them 53

B. Actions Alleging "Agents" of Management Wrongfully Took Tips 55

C. Timing of Payment Of Tips To Employees 56

D. The Future of Tip-Pooling Cases Under California Law 56

E. Service Charges 57

VIII. Vacation/Paid Time Off Forfeiture **61**

IX. Waiting Time Penalties **65**

A. Generally 65

B. Application to Fixed-Term and Temporary Employment 67

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

1. Assignments for a Fixed Term 67
2. Temporary Employment Agencies 68

X. Itemized Wage Statement Claims 71
A. Labor Code Section 226 71
B. Purpose Of The Wage Statement Statute 72
C. The Supreme Court Approves Of Derivative Wage Statement Claims Based On Unpaid Meal And Rest Premiums 73
D. Paid Sick Leave Must Be Recorded On Wage Statements 73
E. Accrued Vacation Time Need Not Be Recorded 74
F. Wage Statement Penalties 74
G. The "Injury" Requirement For Wage Statement Penalties Is Weakened 75
H. The Requirement That Violations Be "Knowing And Intentional" 76

XI. California Minimum Wage Claims 79
A. Wage Averaging Improper Under California Law 79
B. The Conflict Between Piece-Rate Formulas and the Requirement to Pay Minimum Wage 82
C. Neutral Time-Rounding Practices: Federal Law vs. California Law 84
D. Compensability of Time Spent in Security Checks 86
E. California's Application of the *De Minimis* Doctrine 87
F. Computer Bootup Time is Compensable Under FLSA 89
G. Compensability of Call-In Time for Standby Shifts 90

XII. Regular Rate of Pay 93
A. What is Included (and Excluded) 93
1. Discretionary Versus Non-Discretionary Bonuses 94
2. Percentage-of-Earnings Payments 94
B. Calculating the Regular Rate 94
1. Hourly Rates and Shift Differentials 95
2. Commissions and Production-Based Incentives 95
3. Salary 95
4. Flat-Sum Bonuses 96

XIII. California Labor Code Private Attorneys General Act 97

A. General Scope of the Law 97
B. Requirement to Exhaust Administrative Remedies 100
C. Scope of the "Civil Penalty" Provisions 103
D. Pursuing PAGA Claims Collectively Without Class Certification 105
E. Whether PAGA Claims Can Be Stricken As Unmanageable 106
F. Release of PAGA Claims Through Class Settlement 109
G. Wage Order Claims 111
H. Class-Like Discovery for PAGA Claims 113

XIV. Unfair Competition Claims, Business & Professions Code Section 17200 115
A. Former Law—Pre-Proposition 64 115
B. Reform of the Law—Passage of Proposition 64 116
C. Proposition 64's Restrictions on UCL Class Actions 117
D. Federal Courts Lack Jurisdiction Over UCL Claims For Restitution When There Is An Adequate Remedy At Law 118

XV. Class Action Fairness Act of 2005 121
A. The Purpose of the Act 121
B. General Requirements 121
C. Removal Under CAFA 122
1. The Timeliness Requirement For A CAFA Removal 122
2. Premature Removal and Sanctions 123
3. Establishing The "Amount In Controversy" In A CAFA Removal 123
4. The Amount In Controversy Does Not Include Non-Class Action Claims 126
D. Exceptions to CAFA Jurisdiction 126
1. Local Controversy Exception 126
2. Home State Exception 127
E. Waiver 127
F. After Removal and Effect of Denial of Class Certification 128
G. Settlement Process 129

XVI. Class Certification 133
A. General Requirements 133
B. Class Certification in Exempt Misclassification Cases 134

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

C. Subclasses ... 138

D. Opt-In Classes ... 139

E. *Wal-Mart Stores, Inc. v. Dukes*—The Supreme Court Shifts the Landscape of Class Certification ... 141

1. Class Members Must All Suffer A Common Injury Capable Of Class-Wide Resolution ... 141
2. The Similarly Situated And Commonality Standards Are Not So Different ... 142
3. *Dukes* Presents An Early Evidentiary Hurdle For Plaintiffs ... 143
4. Individualized Issues Preclude Certification ... 144

F. In *Comcast v. Behrend*, The Supreme Court Emphasizes That It Meant What It Said in *Dukes* ... 145

1. The Supreme Court Holding ... 145
2. The Antitrust Claim ... 145
3. The District Court Opinion ... 146
4. The Third Circuit Decision ... 146
5. The Supreme Court Applies its Holding to the Facts ... 146

G. The California Supreme Court Enforces Due Process in *Duran v. U.S. Bank* ... 147

1. Lower Court Proceedings ... 147
2. The Supreme Court Decision ... 148
3. What *Duran* Means For Employers ... 149

H. Easing of Class Certification Standards Post-*Brinker* ... 150

I. Relitigation of Class Certification Denials ... 154

J. Defense Motions to Deny Class Certification ("*Vinole* Motions") ... 157

XVII. Discovery Issues in Class Actions ... 159

A. Disclosure of Class Member Names and Addresses to Allow Access to Potential Witnesses ... 159

B. Discovery to Facilitate Location of Substitute Class Representatives ... 162

C. Discovery Issues Regarding Putative Class Member Declarations ... 166

1. Employers Must Approach Pre-Certification Communications With Their Employees With Caution ... 166

2. Protection Of Attorney Procured Witness Interviews From Discovery ... 169

XVIII. Class Action Settlement ... 173

A. Generally ... 173

B. Restrictions on Reversions of Settlement Funds ... 173

C. Court Scrutiny of the Adequacy of the Settlement Amount ... 176

D. Class Notice ... 179

E. Objection to Settlements ... 179

F. Individual Settlements with Putative Class Members ... 180

XIX. Class Action Waivers and Arbitration ... 185

A. Class Action Waivers and Arbitration Generally ... 185

B. The U.S. Supreme Court's *Epic Systems* Decision ... 186

C. The Supreme Court Holds That Class Arbitration Must Be Expressly Agreed Upon ... 187

D. The California Supreme Court's Arbitration Waiver Exception for PAGA Claims ... 188

E. California Judicial Reactions to *Iskanian* and PAGA ... 189

1. California Appellate Courts Continue to Keep PAGA Claims out of Arbitration ... 189
2. Federal District Courts in California Initially Declined to Follow *Iskanian's* PAGA Exception, but the Ninth Circuit Ended That Debate ... 190

F. The Return of the U.S. Supreme Court – The *Viking River* Decision ... 190

G. The California Supreme Court Counters *Viking River* – The *Adolph* Decision ... 191

H. Unconscionability Analysis Following *Iskanian* and *Concepcion* ... 193

I. The Ninth Circuit Invalidates California's Legislative Attacks on Employee Arbitration Agreements ... 195

J. Enforcement of Arbitration Agreements By Non-Signatory Third Parties ... 196

K. Trial Court Proceedings Are Automatically Stayed Pending An Interlocutory Appeal Of An Order Denying A Motion To Compel Arbitration ... 196

XX. Overview Of Joint Employer Liability ... 199

A. Joint Employer Liability Standards Under The FLSA ... 199

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

1. Assignments for a Fixed Term 67
2. Temporary Employment Agencies 68

X. Itemized Wage Statement Claims 71

A. Labor Code Section 226 71
B. Purpose Of The Wage Statement Statute 72
C. The Supreme Court Approves Of Derivative Wage Statement Claims Based On Unpaid Meal And Rest Premiums 73
D. Paid Sick Leave Must Be Recorded On Wage Statements 73
E. Accrued Vacation Time Need Not Be Recorded 74
F. Wage Statement Penalties 74
G. The "Injury" Requirement For Wage Statement Penalties Is Weakened 75
H. The Requirement That Violations Be "Knowing And Intentional" 76

XI. California Minimum Wage Claims 79

A. Wage Averaging Improper Under California Law 79
B. The Conflict Between Piece-Rate Formulas and the Requirement to Pay Minimum Wage 82
C. Neutral Time-Rounding Practices: Federal Law vs. California Law 84
D. Compensability of Time Spent in Security Checks 86
E. California's Application of the *De Minimis* Doctrine 87
F. Computer Bootup Time is Compensable Under FLSA 89
G. Compensability of Call-In Time for Standby Shifts 90

XII. Regular Rate of Pay 93

A. What is Included (and Excluded) 93
1. Discretionary Versus Non-Discretionary Bonuses 94
2. Percentage-of-Earnings Payments 94

B. Calculating the Regular Rate 94
1. Hourly Rates and Shift Differentials 95
2. Commissions and Production-Based Incentives 95
3. Salary 95
4. Flat-Sum Bonuses 96

XIII. California Labor Code Private Attorneys General Act 97

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Statutes of Limitations for Selected California Wage and Hour Claims

Statutory Section	Claim	Statute of Limitations
Labor Code § 203	Waiting Time Penalties	3 years
Labor Code § 226	Wage Statement Penalties	1 year
Labor Code § 226.7	Meal and Rest Premium Pay	3 years (unclear whether UCL extends SOL to 4 years)
Labor Code § 558	Penalties for Violation of Wage Order and Certain Labor Code sections	1 year
Labor Code § 1198.5	Penalty for Failure to Provide Timely Records and Inspection	1 year
Labor Code § 2699	PAGA Penalties	1 year
Labor Code § 2802	Reimbursement of Employee Business Expenses	3 years (Under UCL: 4 years)
Code Civ. Procedure § 338	Unpaid Wages	3 years (under UCL: 4 years)
Code Civ. Procedure § 338	Unpaid Overtime	3 years (under UCL: 4 years)
Bus. & Prof. Code § 17200, *et seq.*	Unfair Competition	4 years. A UCL claim effectively expands the statute of limitations on a Labor Code wage claim from 3 years to 4 years.

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Table of Cases

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Abdullah v. U.S. Sec. Associates, Inc.,
731 F.3d 952 (9th Cir. 2013) ... 151

Abrego Abrego v. Dow Chem. Co.,
443 F.3d 676 (9th Cir. 2006) ... 123

Aburto v. Verizon California, Inc.,
2012 WL 10381 (C.D. Cal. Jan. 3, 2012) ... 144

Adams v. United States,
36 Fed. Cl. 91 (1996) ... 7

Alba v. Papa John's USA,
2007 WL 953849 (C.D. Cal. Feb. 7, 2007) ... 137

Alcantar v. Hobart Service,
800 F.3d 1047 (9th Cir. 2015) ... 100, 101

Allen v. Pacific Bell,
348 F.3d 1113 (9th Cir. 2003) ... 133

Allen v. R&H Oil & Gas Co.,
63 F.3d 1326 (5th Cir. 1995) ... 122

Alonzo v. Maximus, Inc.,
832 F. Supp. 2d 1122 (C.D. Cal. 2011) ... 84

Alvarez v. Hyatt Regency Long Beach,
2009 WL 10673222 (C.D. Cal. Aug. 6, 2009) ... 66, 155, 156

American Pipe & Construction Co. v. Utah,
414 U.S. 538 (1974) ... 156, 157

Amey v. Cinemark USA Inc.,
2018 WL 3956326 (N.D. Cal. Aug. 17, 2018) ... 133

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) ... 150

Andrews v. Bechtel Power Corp.,
780 F.2d 124 (1st Cir. 1985) ... 139

Apodaca v. Costco Wholesale Corp.,
675 Fed. App'x 663 (9th Cir. Jan. 10, 2017) ... 74

Arabian v. Sony Elecs. Inc.,
2007 WL 2701340 (S.D. Cal. 2007) ... 129

Archila v. KFC U.S. Properties, Inc.,
420 Fed. App'x 667 (9th. Cir. 2011) ... 100

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

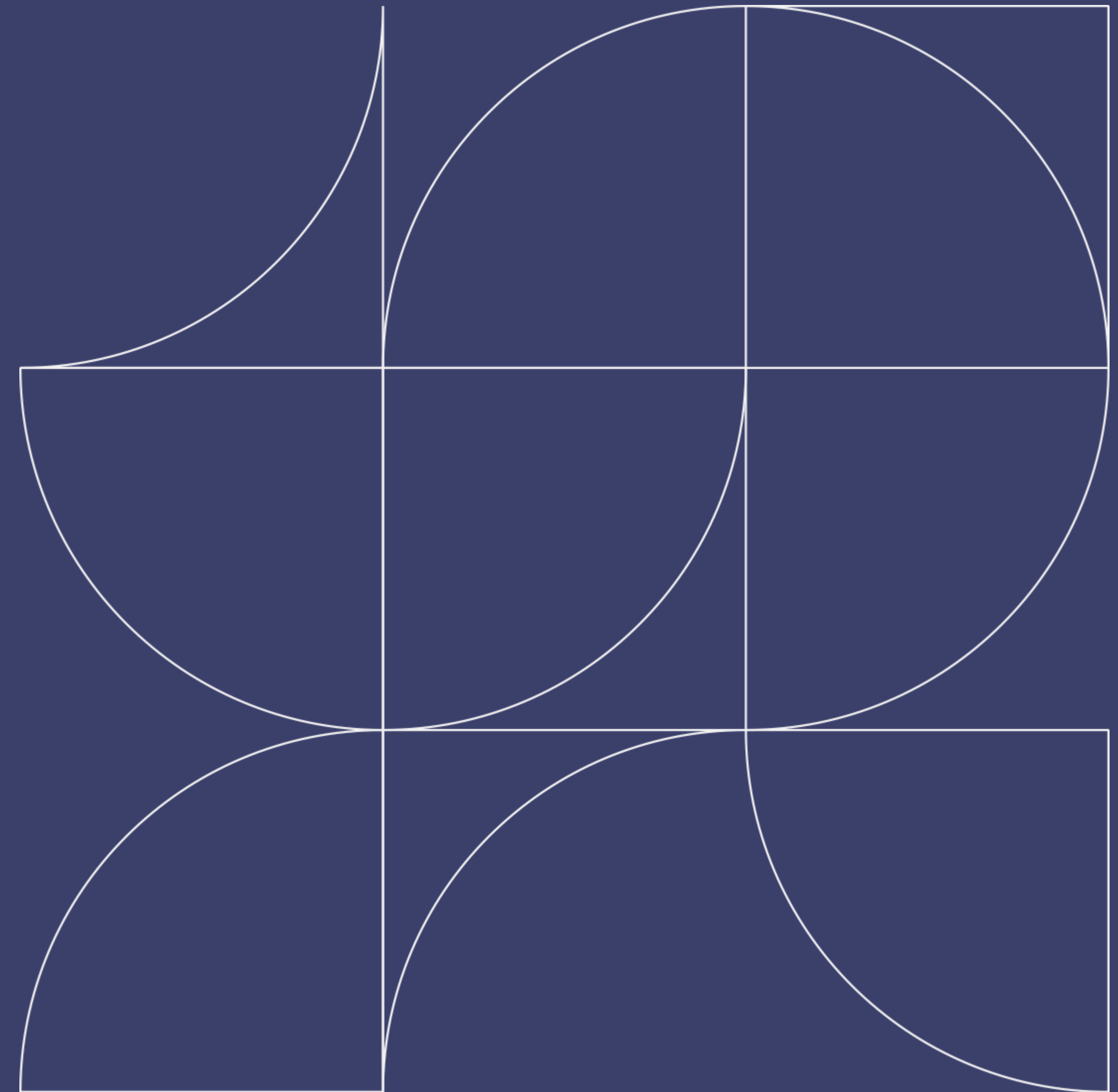
https://www.counties.org/sites/main/files/file-attachments/7.31.23_minimum_wage_increase_notification_-_governor_and_legislative_letter_-cc.pdf (last accessed October 23, 2023) ... 79
https://www.dir.ca.gov/dlse/faq_independentcontractor.htm (last visited Apr. 14, 2022) ... 20
https://www.dir.ca.gov/dlse/faq_minimumwage.htm ... 79
https://www.dir.ca.gov/dlse/FAQ_TipsAndGratuities.htm (visited 1/5/22) ... 57
Official Voter Information Guide, Arguments and Rebuttals, Proposition 64, http://vigarchive.sos.ca.gov/2004/general/propositions/prop64-arguments.htm (accessed Oct. 12, 2023) ... 116, 117
Ordono v. Marriott International Inc., Case No. CGC-16-550454 ... 59
Perez v. DNC Parks & Resorts at Sequoia, 2020 WL 4344911 ... 203
S. Rep. No. 109-14 ... 123, 127
Unemployment Insurance Code ... 23

Index of Terms

adequacy ... 133, 138, 145, 176
administrative exemption ... 9, 10, 11, 12, 13
administrative remedy ... 100, 103, 109, 110
administrative work ... 10, 13
administrative/production dichotomy ... 10, 11, 12, 13
advance ... 4, 27, 31, 176
advance commissions ... 27
advances on commissions ... 30
aggrieved employee 97, 99, 101, 102, 103, 105, 106, 110, 114, 189, 215
amount in controversy 121, 122, 123, 124, 125, 126, 128
anti-deduction rule ... 27
arbitration 1, 185, 186, 187, 188, 189, 190, 193, 194
ascertainability ... 133
attorney's fees 1, 4, 35, 67, 99, 115, 173, 174, 175, 179
base wage ... 32
bonus plans ... 28, 29
business expenses ... 35, 37, 213
CAFA 121, 122, 123, 124, 125, 126, 127, 128, 129, 130
California Industrial Welfare Commission ... 3
chargebacks ... 29, 30, 31, 32
civil penalty ... 45, 97, 99, 103, 104, 207, 215
class action 1, 4, 10, 12, 27, 28, 35, 37, 39, 44, 45, 46, 48, 53, 61, 62, 63, 65, 68, 71, 83, 106, 112, 114, 116, 117, 118, 121, 123, 125, 126, 127, 129, 131, 133, 134, 135, 137, 138, 139, 140, 141, 142, 145, 146, 147, 148, 150, 152, 153, 154, 156, 157, 158,

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Recent Developments Affecting PAGA Representative Actions



©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Explosion of PAGA Litigation

PAGA Action Filings Keep Increasing

- 2006: 11 pre-litigation PAGA letters sent to State of California (LWDA)
- 2009-2013: 1,500 to 2,000 PAGA letters sent per year
- 2014-2022: 4,500 to 6,500 PAGA letters sent per year
- 2023: Record 7,780 PAGA letters sent

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Explosion of PAGA Litigation

PAGA Action Filings Keep Increasing

- PAGA actions are very attractive to Plaintiff-side attorneys
  - No need to meet class certification requirements
  - Potential to recover penalties for almost any Labor Code violation
  - Possibility of “stacked” penalties for enormous potential exposure
  - PAGA provides for recovery of attorneys’ fees
  - Cannot be waived by arbitration agreements
  - Avoid removal to federal court

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Potential Repeal of PAGA

November 2024 Ballot Initiative to Repeal PAGA

- Would replace PAGA with the Fair Pay and Employer Accountability Act
  - Employees would receive 100% of any recovery (rather than 25% under PAGA)
  - Doubles statutory and civil penalties for *willful* violators
  - Allows employers to consult with Labor Commissioner regarding ambiguous regulations
  - Claims will be decided before Labor Commissioner (not in court)
  - **Eliminates recovery of attorneys' fees**

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Recent PAGA Developments

Estrada v. Royalty Carpet Mills, California Supreme Court (Jan. 18, 2024)

- Prior Court of Appeal decisions had found that PAGA claims could be dismissed as unmanageable.
- California Supreme Court disagreed, finding that trial courts do *not* have authority to completely dismiss PAGA claims if they believe them to be unmanageable.
- However, trial courts *can* limit the scope of PAGA claims, and can limit the type of evidence that can be presented, based on manageability.
- Trial courts can also issue rulings on demurrer or summary judgment to manage overbroad or unspecific claims where the plaintiff cannot prove liability as to all or most employees.
- Employers have due process right to present affirmative defenses.

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Recent PAGA Developments

Estrada v. Royalty Carpet Mills, California Supreme Court (Jan. 18, 2024)

- Employers still have tools to attack unmanageable PAGA claims:
  - Ask courts to order plaintiffs to submit trial plans
  - Attack plaintiffs' statistical sampling methodologies
  - Seek to limit scope of actions by demurrer or MSJ
    - Potentially reduce the scope of the "aggrieved employees"
    - Demonstrate that the Plaintiff is not an "aggrieved employee," and therefore lacks standing to represent other employees

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Recent PAGA Developments

Wood v. Kaiser Foundation Hospitals, 88 Cal. App. 5th 742 (2023)

- Sick leave violations can be the subject of a PAGA action
  - Labor Code § 248.5(e) provides that the labor commissioner or the attorney general “may bring a civil action” to enforce the sick leave law, but an individual raising a claim to enforce the act “on behalf of the public” is restricted to “only equitable, injunctive, or restitutionary relief, and reasonable attorney’s fees and costs.”

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Recent PAGA Developments

Wood v. Kaiser Foundation Hospitals, 88 Cal. App. 5th 742 (2023)

- Sick leave violations can be the subject of a PAGA action
  - The Court of Appeal noted “PAGA is not a private right of action, but rather a procedural device under which an agent or proxy of the state enforces the government’s ability to collect penalties.”

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Recent PAGA Developments

Howitson v. Evans Hotels, 81 Cal. App. 5th 475 (2022)

- Plaintiff who settled individual and class Labor Code claims still had standing to file follow-on PAGA action alleging same underlying Labor Code violations
  - Claim preclusion did not apply
    - The first action involved the plaintiff's individual claims, the second involved claims on behalf of the state and general public
    - In a PAGA action, the State of California is the real party in interest

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Recent PAGA Developments

Clark v. QG Printing II, LLC, 2023 WL 2843989 (ED Cal. April 7, 2023)

- Plaintiff cannot pursue representative PAGA claims when their own individual claims are time-barred
- Relying on *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668 (9th Cir. 2021), the court found that a plaintiff with time-barred claims lacks Article III standing
- Disagrees with *Johnson v. Maxim Healthcare Servs., Inc.*, 66 Cal. App. 5th 924 (2021) (holding an employee whose individual claim against employer is time-barred may still pursue representative PAGA claim)

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

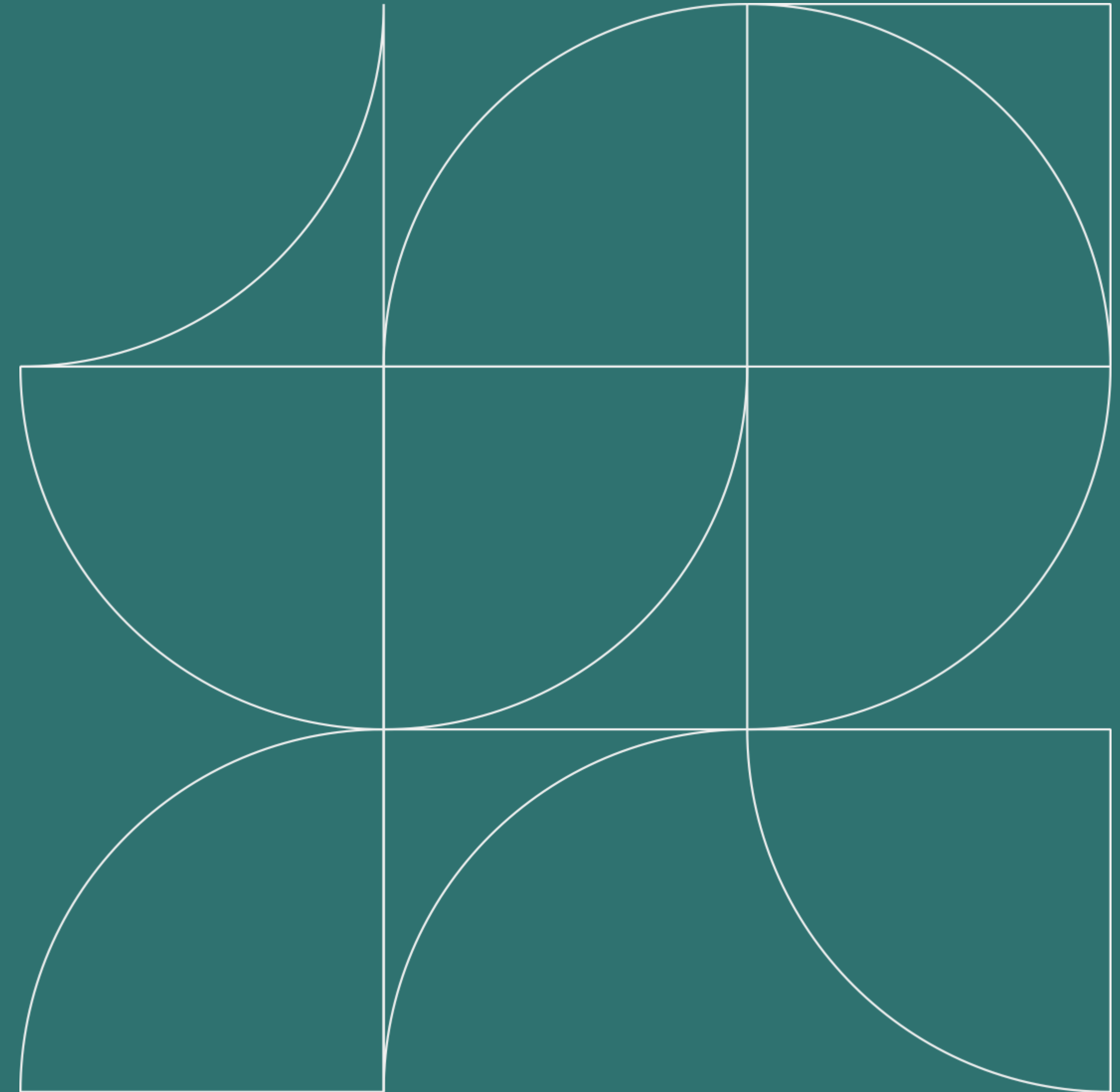
Recent PAGA Developments

Shaw v. Superior Court, 78 Cal. App. 5th 245 (2022)

- The exclusive concurrent jurisdiction rule may apply where two PAGA actions simultaneously seek similar relief
- The trial court did not abuse its discretion in staying the later-filed action because it "could reasonably conclude" that allowing both actions to proceed "would duplicate court efforts, waste resources, and potentially produce divergent results"

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

The Impact of Arbitration Agreements on Class and PAGA Actions



©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Individual PAGA Waivers

Adolph v. Uber Technologies, Inc. **14 Cal. 5th 1104 (2023)**

- California Supreme Court directly rejects SCOTUS on the issue of standing:
  - A plaintiff whose individual PAGA claims are compelled to arbitration retains standing to pursue representative PAGA claims in court.
  - As anticipated by appeals courts, the California Supreme Court held that, “where a plaintiff has filed a PAGA action [composed] of individual and non-individual claims, an order compelling arbitration of individual claims does not strip the plaintiff of standing to litigate non-individual claims in court.”
  - The Court made clear that the outcome of a PAGA plaintiff’s individual arbitration will be binding on issues of standing to the favor of the prevailing party.
  - The PAGA claim remains a single, unitary action that should be subject to the mandatory stay provisions of California Civil Procedure Code Section 1281.4.
  - Nevertheless, the *Adolph* decision affirms that employers are not defenseless in litigating PAGA actions.

©2022 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Individual PAGA Waivers

What is the Best Type of Language for an Individual PAGA Waiver?

- Arbitration agreements have long had class/collective/representative action waiver language, but often carved out PAGA claims because of the *Iskanian*
- Following *Viking River* and *Adolph*, it's important to ensure agreements have language stating that all individual claims will be arbitrated, including individual PAGA claims (but not non-individual representative PAGA claims)
- Example:
  - Claims asserted under the Private Attorneys General Act ("PAGA") in California involving any alleged violations suffered by you individually shall be arbitrated on an individual basis only, and any non-individual (i.e., representative) claim asserted under PAGA involving any violations suffered by other individuals will be stayed in court pending the outcome of the arbitration involving any violations suffered by you individually.

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Individual PAGA Waivers

What is the Best Type of Language for an Individual PAGA Waiver?

- **Why does this matter?**
- Courts can still be hostile to poorly crafted class/PAGA waiver language in arbitration agreements.
- *Hasty v. Am. Auto. Assn.*, 98 Cal. App. 5th 1041, 1063 (2023)
  - "The requirement that an employee's claims be brought solely in an individual capacity and not 'in a private attorney general capacity' precludes the employee from bringing a claim under the Act in arbitration or in court. But, as our Supreme Court explained, an employee's right to bring a claim under the Act is not waivable. … [B]y the clear language of the agreement, an employee may not bring a claim 'in a private attorney general capacity,' either as an individual or as a nonindividual."

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Stay Provisions and Impact on PAGA Claims

Stay Pending Appeal of Arbitration Decision

- **SB 365** -- Eliminates the current rule (from *Coinbase*) automatically staying all trial court proceedings pending appeal of a denial of a motion to compel arbitration
  - May mean employers have to be actively defending lawsuits in court while attempting to enforce arbitration agreements
- Decision whether to stay proceedings will be discretionary with the trial court
  - Likely to see forum shopping with plaintiffs
- **Reminder: Double check your arbitration agreements!**
  - Consider incorporating mandatory stay language into the agreement

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Stay Provisions and Impact on PAGA Claims

Stay of Representative Claims Pending Individual Arbitration

- CCP 1281.4 -- "[T]he court in which such action or proceeding is pending **shall**, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had…"
- The *Adolph* decision danced around this particular language:
  - "When a case includes arbitrable and nonarbitrable issues, the issues may be adjudicated in different forums while remaining part of the same action. Code of Civil Procedure section 1281.4 states that upon 'order[ing] arbitration of a controversy which is an issue involved in an action,' the court should 'stay the action.'" *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104, 1124 (2023).
- Another appellate court decision has upheld specific language in agreement mandating a stay
  - "[W]e agree with the parties that under the Arbitration Provision, they should be stayed pending completion of arbitration on his individual claim. On this point, the Arbitration Provision states: 'To the extent that there are any claims to be litigated in a civil court of competent jurisdiction because a civil court of competent jurisdiction determines that the PAGA Waiver is unenforceable with respect to those claims, the [p]arties agree that litigation of those claims shall be stayed pending the outcome of any individual claims in arbitration.'" *Gregg v. Uber Techs., Inc.*, 89 Cal. App. 5th 786, 806 (2023).

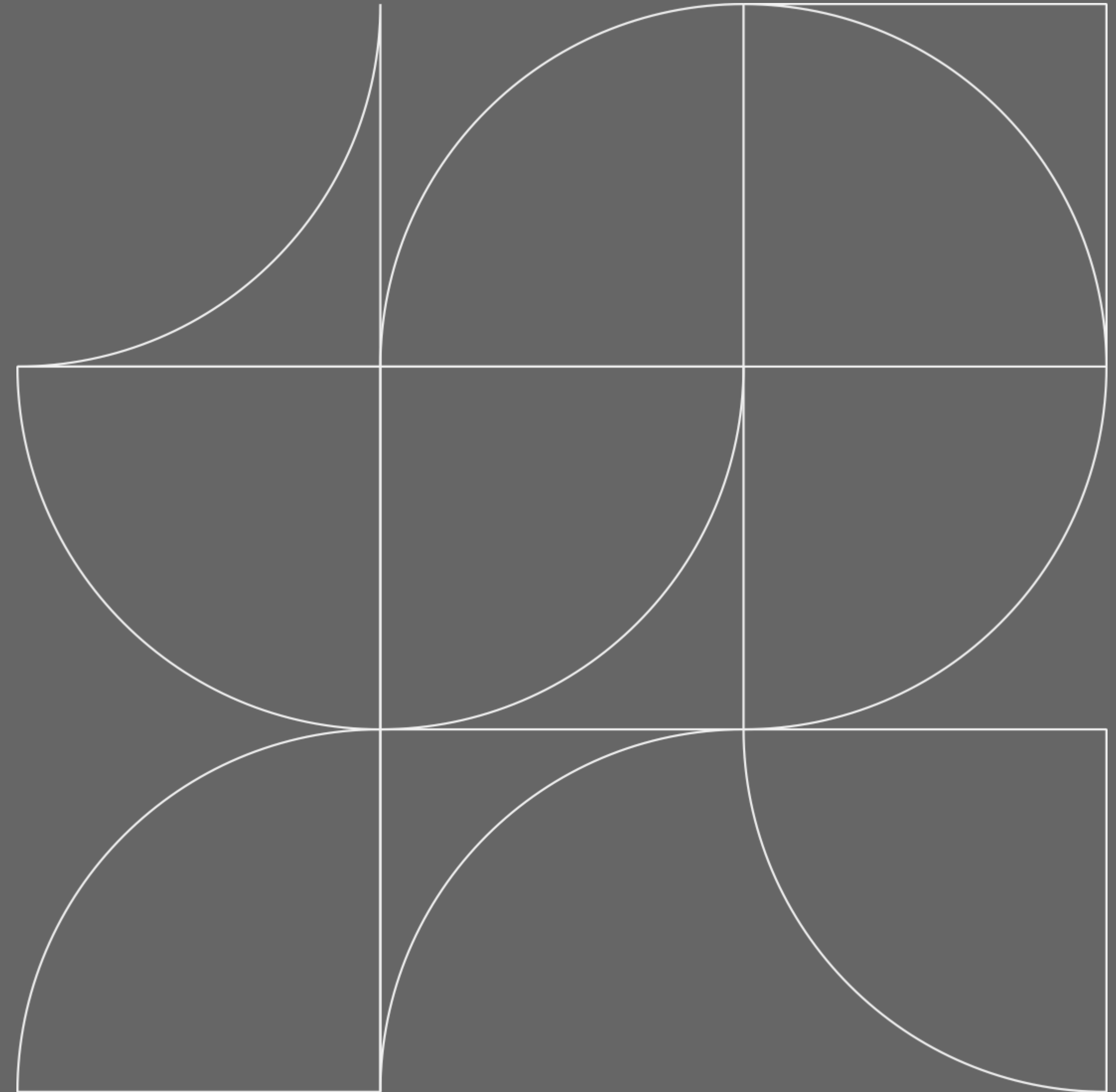
©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Workers Excluded from Mandatory Arbitration Provisions

- Workers engaged in foreign or interstate commerce
  - *Carmona Mendoza v. Domino's Pizza, LLC*, 73 F.4th 1135 (9th Cir. 2023)
    - Employees engaged in intrastate delivery of goods
  - *Ortiz v. Randstad Inhouse Servs., LLC*, No. 23-55147, 2024 WL 1061287 (9th Cir. Mar. 12, 2024)
    - Warehouse workers moving goods within facility

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

The Latest Decisions Involving Service Charges, Gratuities, and the Regular Rate of Pay



1 2 3 4 5

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Gratuities/Tips

Brief Summary of Tips in California

- You've probably seen this language all the time and never thought twice about: tip, gratuity, service charge – is it all the same?

- Why does it matter? What are some of the differences between how California treats a service charge vs. a tip?

- Of particular note: California Labor Code forbids any employer to take any "gratuity or a part thereof … left for an employee by a patron, or … require an employee to credit the amount … of a gratuity against … the wages due the employee." "Every gratuity" is the "sole property of the employee" for whom it was left." Lab. Code § 351

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

“Service Charges”

- ***O’Grady v. Merchant Exchange Prods., Inc.***, 41 Cal. App. 5th 771 (2019)

Key Holdings

- Food and beverage banquet service employees alleged that the banquet facility’s “mandatory service charge” of 21 percent should have gone exclusively to service staff but instead went to the employer and to managers and other non-service employees, even though the customers paying this charge reasonably thought the charge was a gratuity for service staff.

- The Court of Appeal, finding “service charge” a vague term, rejected the employer’s argument that a “service charge” can **never** be a gratuity.
  - The Court of Appeal concluded that the allegations supported a claim that customers intended the service charge to be a gratuity for the service staff, not management, and permitted the lawsuit to proceed.

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

"Service Charges"

- ***Ordono et al. v. Marriott International Inc.,*** No. CGC-16-550454 (Cal. Sup. Ct.)

Key Holdings/Takeaways

- On April 7, 2023, after a multi-day bench trial, a California Superior Court judge issued a tentative ruling awarding approximately $9 million in damages for unpaid service charges to class of banquet servers who worked at the Marriott Marquis hotel in San Francisco from 2012-2017, holding that Marriott had violated the California Labor Code's prohibition on employers keeping any portion of gratuities left for employees.
- A "service charge" is a gratuity that should be remitted to banquet service staff – unless it specifies how the charge is allocated between the employees and the employer.
- See also: *Gonzalez v. San Francisco Hilton, Inc.*, 2023 WL 5059536, at *6 (N.D. Cal. Aug. 8, 2023) (denying Defendant's motion for summary judgment; "the Court DENIES the motion for summary and finds that a jury will have to decide what an objectively reasonable customer would have understood the mandatory service charge to be after viewing all of the evidence.")
- Uptick in service charge cases in California…

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

“Service Charges”

- ***Ordono et al. v. Marriott International Inc.,***
  No. CGC-16-550454 (Cal. Sup. Ct.)

What is some good language that works?

- The *Ordono* Court granted summary adjudication to Marriott for part of the class period, based on a change in Marriott’s service charge language at a later point in the case. This language can serve as a good barometer for what may pass muster for future cases.

Marriott presents an exemplar banquet contract (Group Sales Agreement) reflecting this standard language for the post-April 2017 timeframe. (Jung Decl. ¶ 3 & Ex. B.) Under the heading “Special Plated Dinner Pricing,” it contains the statement, “All pricing is subject to a 25% Service Charge and 8.50% tax.” (*Id.*, Ex. B at 3.) The following text appears under a bold font, capitalized and underlined heading, “**F&B STAFF CHARGE AND F&B HOUSE CHARGE**”:

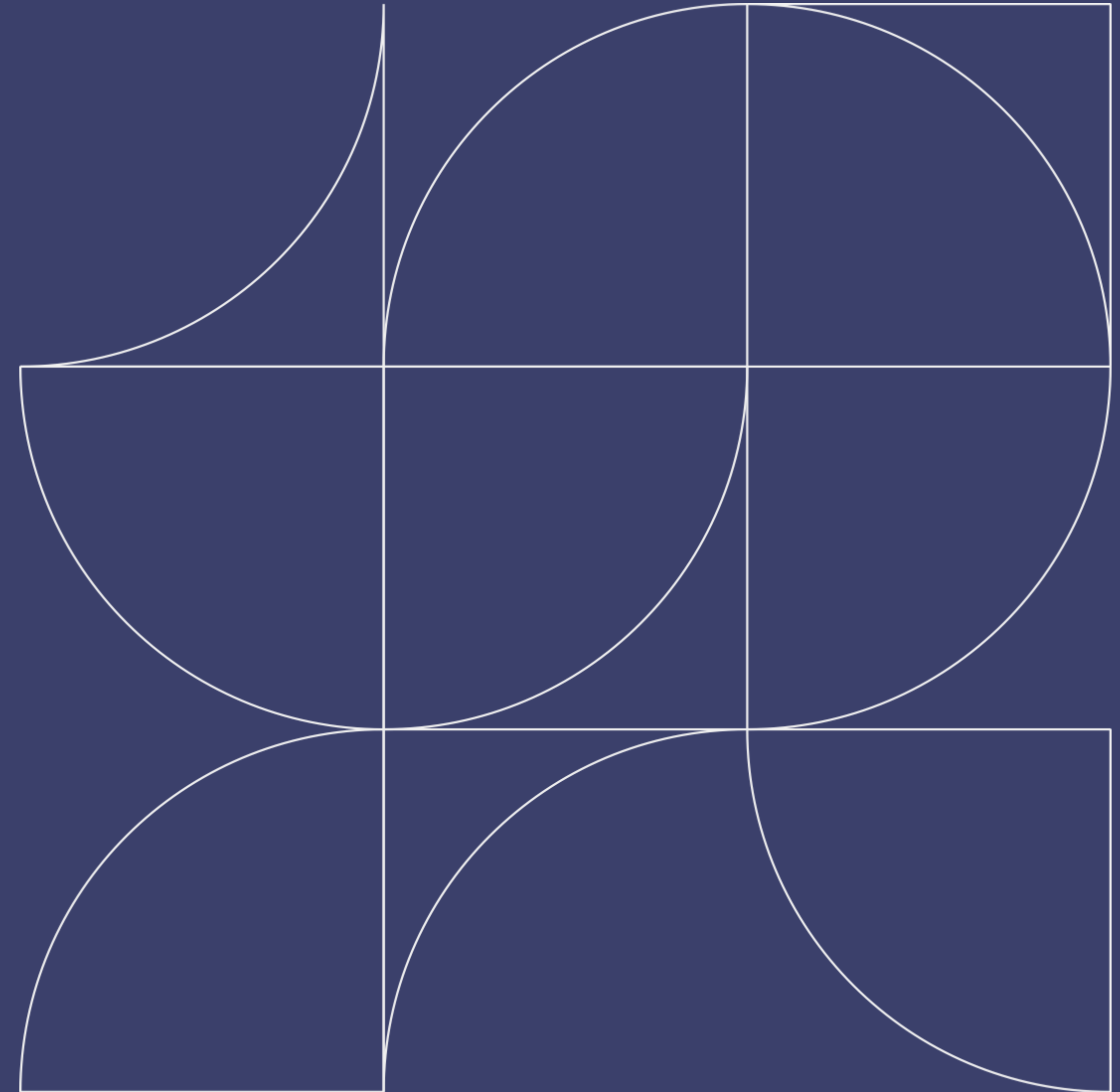
> A 14.625% F&B Staff Charge, a 10.375% F&B House Charge, plus applicable taxes (currently 8.5%) are applied to all plated services.

(*Id.*, Ex. B at 4.) Similar breakdowns of the applicable F&B Staff Charge and F&B House Charge are provided for buffet services, beverage and hosted bar services, reception service and coffee breaks, cash bar services, and meeting room rentals with food and beverage services in the room. (*Id.*) Those disclosures are followed by the following language, the first two sentences of which are in bold and italicized font:

> ***The F&B House Charge is used to offset the cost of utilities and equipment, and other non-labor expenses. This F&B House Charge is not a tip or gratuity for services provided by employees and is not distributed to employees.*** Banquet personnel are not customarily tipped, so tips are not expected.

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Cases to Watch from the California Supreme Court



1 2 3 4 5

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Quach v. California Commerce Club, 78 Cal. App. 5th 470 (2022), *review granted*

Waiving the Right to Arbitrate

- *St. Agnes Medical Center v. PacifiCare of California*, 31 Cal.4th 1187 (2003)
  - Set forth the 5-factor test traditionally used in California to evaluate whether a party has waived its right to compel arbitration
  - Includes whether the moving party's conduct "affected, misled, or prejudiced" the opposing party
- *Morgan v. Sundance*, 596 U.S. 411 (2022)
  - No prejudice required to show an opposing party's waiver of the right to compel arbitration
- *Quach* is expected to clarify whether prejudice remains a relevant factor in the waiver analysis following *Morgan*
- Status: Fully briefed; oral argument not yet set

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Huerta v. CSI Elec. Contractors, Inc., 39 F. 4th 1176 (9th Cir. 2022)

Hours Worked Under California Law

- Factual background
  - Entrance to worksite involved passing a guard shack with a security check plus a drive of 10-15 minutes to parking lots
  - Employees required to follow a low-speed limit during drive, and refrain from certain activities to minimize disturbances to endangered species' habitats
  - Same requirements on exit
  - On-premises meal period requirement
- Trial court granted summary judgment in favor of CSI, finding that time engaged in aforementioned activities was not sufficiently controlled for "hours worked" purposes

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

***Huerta v. CSI Elec. Contractors, Inc.*, 39 F. 4th 1176 (9th Cir. 2022*)**

Hours Worked Under California Law

- Ninth Circuit certified three questions to California Supreme Court:
  - 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” …?
  - 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” …?
  - 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” … when that time was designated as an unpaid “meal period” under a qualifying collective bargaining agreement?
- Status: Oral argument heard January 4, 2024; decision due April 3, 2024

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Naranjo v. Spectrum Sec. Servs., Inc., 88 Cal. App. 5th 937 (2023)

Good Faith Dispute Over Meal Period Premiums

- A Brief History of *Naranjo*
  - **2007**: Naranjo files a class action lawsuit re: Spectrum's meal period compliance
  - **2019**: Court of Appeal affirmed trial court's finding that Spectrum had violated meal break laws, but reversed its holding that a failure to pay meal break premiums could support claims under wage statement and waiting time statutes
  - **2022**: California Supreme Court disagreed, holding that wage statement violation and waiting-time penalties would result if break premiums (*i.e.*, wages) went unpaid

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Naranjo v. Spectrum Sec. Servs., Inc., 88 Cal. App. 5th 937 (2023)

Good Faith Dispute Over Meal Period Premiums

- The 2023 Court of Appeal Decision
  - Spectrum did not “willfully” withhold wages when it asserted a good faith dispute that meal period premiums were due
  - The “willful” standard under section 203 is functionally identical to the “knowing and intentional” standard under section 226, such that a “good faith dispute” would preclude recovery of penalties under both statutes
  - In addition to other good faith disputes raised by the employer, there was also a good faith dispute as to whether premium pay constituted “wages at all” before the Supreme Court resolved that issue in May 2022
- Status: Oral argument heard March 5, 2024; decision due August 1, 2024

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

***Camp v. Home Depot* and Rounding of Employee Work Time**

Is rounding on the verge of becoming illegal?

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Rounding of Employee Time

Overview of Time Rounding

- Refers to the practice of rounding an employee’s work time to a whole integer for purposes of paying wages
  - All timekeeping systems round to some degree
  - Litigation typically concerns rounding that is greater than to the nearest minute
- Historically, rounding practices were instituted due to technical and administrative difficulties in capturing exact start and stop times
- Less defensible today due to technological advances
  - *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018)

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Rounding of Employee Time

History of Rounding

- Historically, neutral rounding policies have been lawful in California and under federal law
  - 29 C.F.R. § 785.48(b)
  - *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 (2012)
- But … they attract litigation
- Additionally, the California Supreme Court recently declared that rounding meal periods is improper

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Camp v. Home Depot*, 84 Cal. App. 5th 638 (2022), *review granted

The Death of Legal Rounding?

- Background
  - Facially neutral quarter-hour rounding policy
  - Home Depot’s timekeeping system could and did track employee time to the minute
- Status: Fully briefed; oral argument not yet set
- *Woodworth v. Loma Linda Univ. Med. Ctr.*, 93 Cal. App. 5th 1038 (2023), *review granted*
  - When 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 time worked

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

CLE CODE

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Questions?

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

23rd Edition
Litigating California Wage & Hour Class and PAGA Actions

- **Request a Copy of the 23rd Edition Litigating California Wage & Hour Class and PAGA Actions eBook**
  - https://communication.seyfarth.com/v/bsfbw7ph
- **Sign Up For Seyfarth's California Labor & Employment Mailing List**
  - Global Forms | Subscription (seyfarth.com)
- **Subscribe to Seyfarth's Wage & Hour Litigation Blog**
  - Wage & Hour Litigation Blog | Seyfarth Shaw LLP (wagehourlitigation.com)

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Thank you!

Michael Afar

Partner
Los Angeles
(310) 201-9301
mafar@seyfarth.com

Christopher Crosman

Partner
Los Angeles
(310) 201-1528
ccrosman@seyfarth.com

Bailey Bifoss

Partner
San Francisco
(415) 544-1050
bbifoss@seyfarth.com

©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential