California Wage & Hour Class Action Litigation:

Key Recent Developments & Trends

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Seyfarth Shaw LLP

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Agenda

1. Introduction: *Litigating California Wage & Hour Class and PAGA Actions* (22nd Edition)
2. Recent Trends Affecting PAGA Representative Actions
3. *Naranjo v. Spectrum Security Services* – The California Supreme Court Creates Additional Wage & Hour Headaches for Employers
4. Regular Rate Pitfalls for Employers to Avoid
5. Other Key Wage & Hour Legal Developments
6. Key Wage & Hour Issues Being Considered by the California Supreme Court

Introduction:

Litigating California Wage & Hour Class and PAGA Actions

(22nd Edition)

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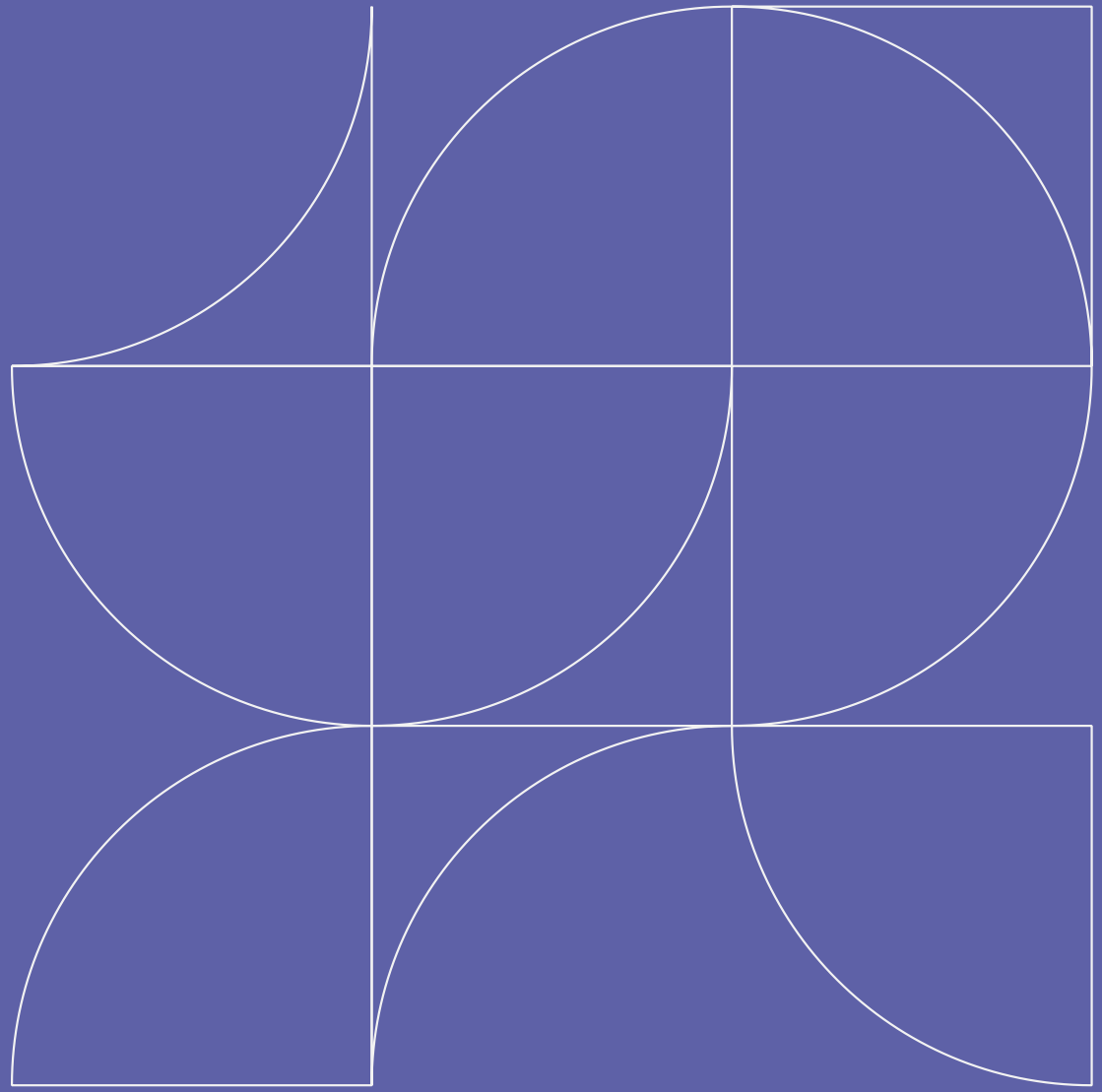

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Litigating California Wage & Hour Class and PAGA Actions

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Table of Contents

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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.

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Table of Cases

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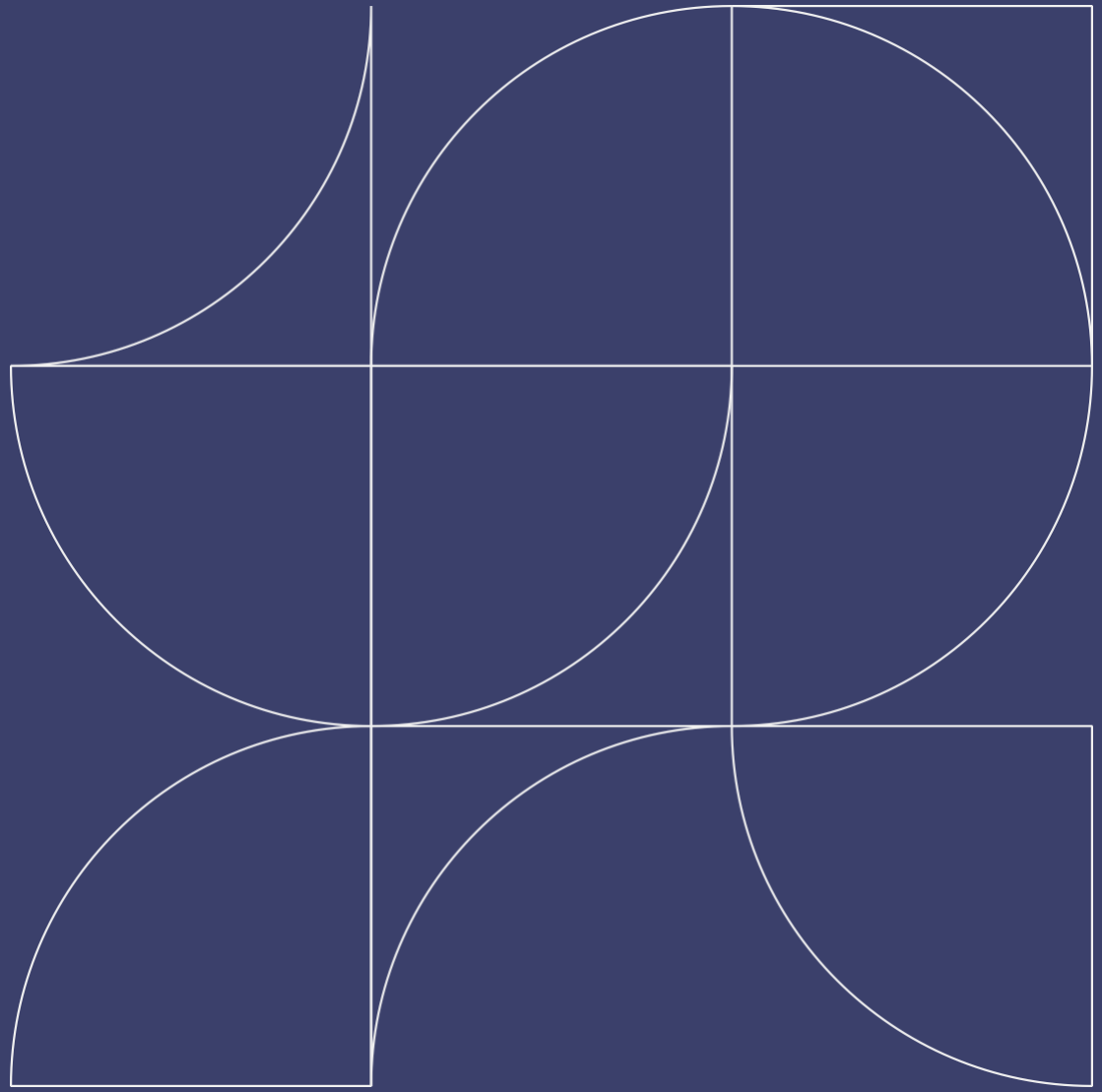
Index of Terms

Recent Trends and Developments

Affecting Representative Actions Under the Private Attorneys General Act (PAGA)



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Recent PAGA Developments

***Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022)**

PAGA claims of employees may be compelled to individual arbitration.

Partially overruled *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014), which held that categorical waivers of PAGA standing are contrary to state policy and that PAGA claims cannot be split into arbitrable individual claims and non-arbitrable “representative” claims.

Recent PAGA Developments

***Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022)**

- The Federal Arbitration Act ("FAA") preempts *Iskanian's* rule that PAGA claims cannot be divided into individual and non-individual actions through an arbitration agreement.
- Plaintiffs can maintain representative PAGA claims "only by virtue of also maintaining an individual claim in that action."
- Once a plaintiff's individual PAGA claim is compelled to arbitration, the employee lacks standing to maintain a PAGA representative claim.

Recent PAGA Developments

Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022)

- The Supreme Court did not entirely overrule *Iskanian*.
- Waivers of "representative" PAGA claims are still invalid under *Iskanian* if they amount to a "wholesale waiver."
- This rule is *not* preempted by the FAA.

Recent PAGA Developments

Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022)

- Severability clause in the arbitration agreement was key to the Court's decision.
  - Viking River's arbitration agreement *did* contain a wholesale waiver of representative PAGA claims, which was invalid.
  - The agreement's severability clause allowed enforcement of any portion of the waiver that remained valid. Therefore, the employees *individual* PAGA claim was compelled to arbitration.

Recent PAGA Developments

Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022)

- Justice Sotomayor's concurring opinion:
  - Concerning PAGA standing, the U.S. Supreme Court's understanding of California law may be incorrect.
  - "California courts, in an appropriate case, will have the last word."
  - Further, the California Legislature "is free to modify the scope of statutory standing under PAGA."

Recent PAGA Developments

Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022)

- Takeaways for Employers:
  - Arbitration agreements may properly compel an individual employee's PAGA claims to arbitration.
  - Arbitration agreements **may not** properly include blanket waivers of PAGA claims.
  - It is **critical** to review and update arbitration agreements so that they conform to *Viking River.*

Recent PAGA Developments

Hamilton v. Wal-Mart, 39 F.4th 575 (9th Cir. 2022)

- Trial courts do not have inherent authority to dismiss PAGA claims as unmanageable.
  - "In light of the structure and purpose of PAGA, we conclude that imposing a manageability requirement in PAGA cases akin to that imposed under Rule 23(b)(3) would not constitute a reasonable response to a specific problem and would contradict California law by running afoul of the key features of PAGA actions."

Recent PAGA Developments

Hamilton v. Wal-Mart, 39 F.4th 575 (9th Cir. 2022)

- "[A]pplication of the Rule 23(b)(3) manageability requirement in PAGA cases would be "inconsistent with PAGA's purpose and statutory scheme," [ ] and would not represent a reasonable solution to a specific problem. The requirement cannot be imposed in PAGA actions under the guise of a court's inherent powers."

Recent PAGA Developments

Estrada v. Royalty Carpet Mills, 76 Cal. App. 5th 685 (2022)

- "Imposing a manageability requirement would create an extra hurdle in PAGA cases that does not apply to LWDA enforcement actions. This would undermine PAGA's purpose as an administrative enforcement action conducted in court on behalf of the state by an aggrieved employee."
- California Courts of Appeal are split on the Issue of Whether PAGA Claims can be Dismissed as Unmanageable.
  - Wesson v. Staples, 68 Cal. App. 5th 746 (2021) (trial court can dismiss unmanageable PAGA claims).

Recent PAGA Developments

Gavriiloglou v. Prime Healthcare, 83 Cal. App. 5th 595 (2022)

- A Plaintiff who loses arbitration on Labor Code claims still has standing to pursue a PAGA representative action in court based on the same alleged underlying Labor Code violations.
  - Plaintiff filed Labor Code and PAGA claims.
  - Labor Code claims compelled to arbitration.
  - Arbitrator found no violations occurred.
  - Trial court dismissed PAGA claims.
- Court of Appeal held that issue preclusion did not apply because Plaintiff was acting in different capacities in the arbitration and in the litigation of the PAGA claim.

Recent PAGA Developments

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

- Plaintiff brought class and individual Labor Code claims against employer, and then settled the action.
- Plaintiff filed a second action alleging PAGA claims based on the same alleged Labor Code violations.
- Trial court found that the second action was barred by claim preclusion.

Recent PAGA Developments

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

- Court of Appeal reversed, holding that claim preclusion did not apply to bar the PAGA suit.
  - "claim preclusion does not apply because the parties in the two lawsuits are not the same. In the First Lawsuit, the plaintiff was the real party in interest, as she as an individual and class representative sought damages against the employer for purported Labor Code violations to employees. However, in the Second Lawsuit, the state is the real party in interest. Although the Legislature gave Plaintiff, as an 'aggrieved employee,' standing to act as a representative in the Second Lawsuit, she was not the real party in interest in that suit."

Recent PAGA Developments

Gunther v. Alaska Airlines, 72 Cal. App. 5th 334 (2022)

- Heightened wage statement penalties under Labor Code § 226.3 apply only where the employer fails to provide wage statements or keep required records.
  - "Any employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars ($250) per employee per violation in an initial citation and one thousand dollars ($1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the records required in subdivision (a) of Section 226. The civil penalties provided for in this section are in addition to any other penalty provided by law." (Italics added.)

Recent PAGA Developments

Gunther v. Alaska Airlines,
72 Cal. App. 5th 334 (2022)

- Heightened wage statement penalties under Labor Code § 226.3 apply only where the employer fails to provide wage statements or keep required records.
- Proper PAGA penalty for wage statement violations is $100 for an “initial violation” and $200 for each “subsequent violation.”
- Split between panels of Court of Appeal: Raines v. Coastal Pacific Food Distributors, 23 Cal. App. 5th 667 (2018), held that “section 226.3 sets out a civil penalty for all violations of section 226.”

Recent PAGA Developments

Hutcheson v. Sup. Ct., 74 Cal. App. 5th 932 (2022)

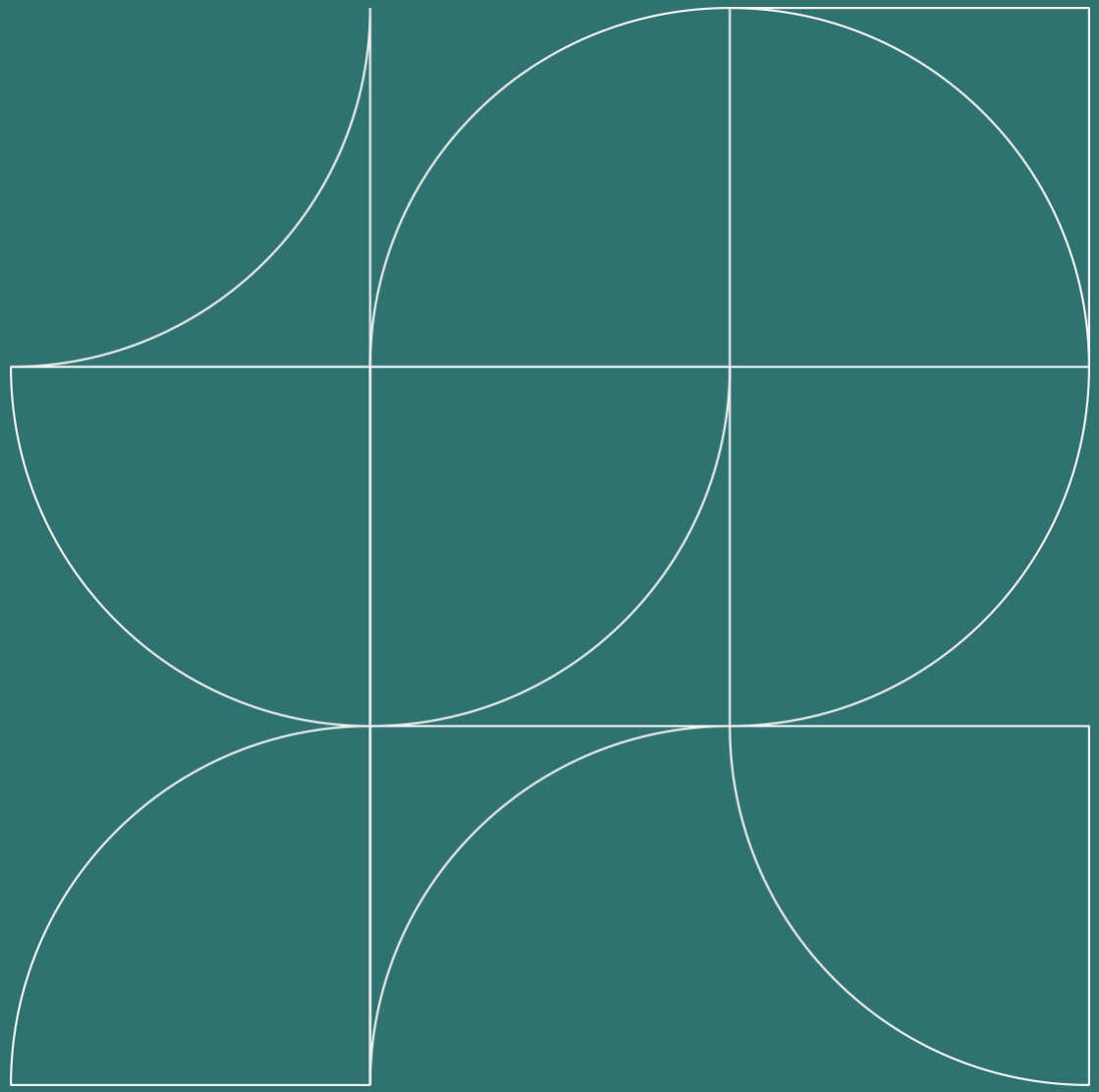
- PAGA claims of second plaintiff related back to filing of earlier lawsuit by the first plaintiff.
- Both plaintiffs were “aggrieved employees” working for the same employer; both had filed PAGA notices with the LWDA, and both had filed separate lawsuits.
- The LWDA is the real party in interest. “We see no bar to [second plaintiff], who acts as the proxy of the LWDA, substituting a qualified plaintiff to take his place as the LWDA’s proxy.”

Recent PAGA Developments

LaFace v. Ralphs,
75 Cal. App. 5th 388 (2022)

- No right to trial by jury in PAGA action.
  - PAGA representative plaintiff is a proxy for the LWDA. In an administrative enforcement action, LWDA would have no right to jury trial.
  - PAGA penalties are subject to equitable factors and may be reduced. This is the type of evaluation typically performed by judges.
  - PAGA seeks to enforce rights that were not known at common law; right to jury trial traditionally reserved for common law claims.

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



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Naranjo v. Spectrum Security Services

Case Background

- Naranjo filed a putative class action on behalf of Spectrum Security Services, Inc.’s California-based non-exempt employees, alleging that Spectrum failed to pay him meal and rest premium pay pursuant to Labor Code section 226.7, and that Spectrum’s failure to do so resulted in violations of Labor Code section 203 for failing to pay all wages owed upon separation of employment, as well as Labor Code section 226 for failing to furnish accurate wage statements.
- A jury found Spectrum liable for failure to pay meal period premiums.
- The trial court then concluded that section 226.7’s requirement to provide meal period premiums triggered the final pay and wage statement requirements of sections 203 and 226(e), respectively.

Naranjo v. Spectrum Security Services

Court of Appeal Says No Derivative Penalties

- The Court of Appeal reversed the trial court's order that a failure to pay meal period premiums could support derivative claims under the wage statement and timely payment statutes.
  - The Court of Appeal concluded that section 226.7 premium pay was a statutory remedy and not a "wage." As such, section 203, which penalizes an employer that willfully fails "to pay … any wages" owed to a separating employee was not triggered by a violation of section 226.7.
  - Likewise, the Court of Appeal held that section 226(e), which entitles an employee to a penalty when the employee's wage statement omits gross or net "wages earned," was not triggered when the employer failed to include section 226.7 premium payments in an employee's wage statement.

Naranjo v. Spectrum Security Services

California Supreme Court Inflicts Pain

- In what seems to be par for the course now in California, the Supreme Court reversed the appellate court, holding that violations of section 226.7 do give rise to derivative penalties under sections 203 and 226.
  - The Court held that, while section 226.7 premium payments are statutory remedies designed to deter employers from requiring employees from working through breaks, premium payments also are “wages” that the employee earns by virtue of work performed during the break period.
  - The Court compared meal period and rest break premium payments to overtime wages, finding that both are designed to compensate an employee for hardship (i.e., working more than eight hours in a day or working through a required break), as well as to shape employer conduct

Naranjo v. Spectrum Security Services

What Does This Mean For Employers?

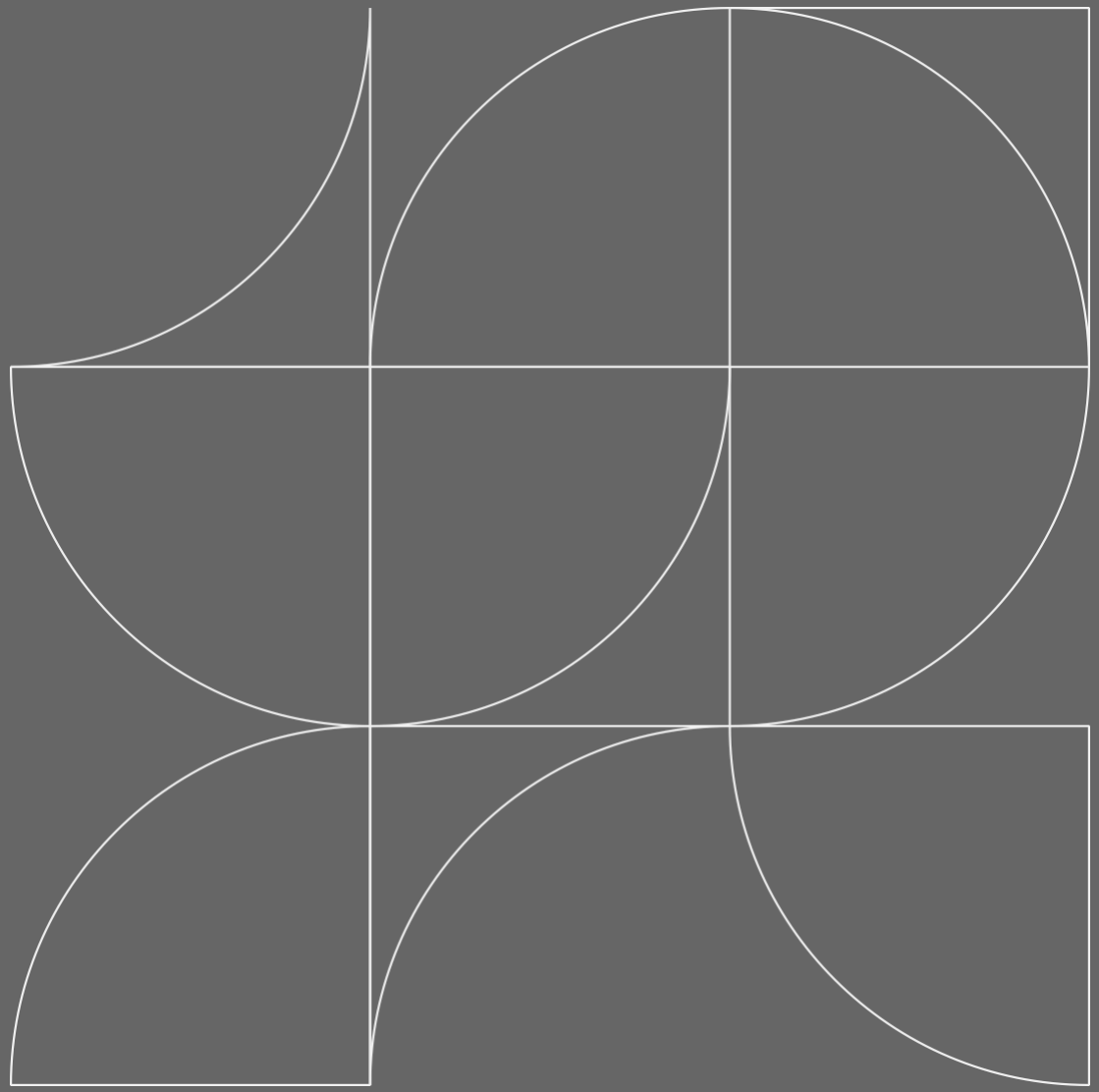
- It is now clear that employers must include, and separately list, meal and rest break premium payments on their wage statements and ensure that such premiums are paid on termination or separation of employment.
- Open question as to whether employers can still assert affirmative defenses to derivative claims by showing that a section 226 wage statement violation was not “knowing and intentional,” or that a section 203 final pay violation was not “willful.”
- Is this retroactive? Not explicitly stated in the decision, so it remains to be seen.
- Why is this such a big deal? Huge amounts of penalties now at stake.

Betancourt v. OS
Restaurant Services, LLC

What About Attorneys' Fees?

- Labor Code section 218.5 mandates an award of reasonable attorney fees to the prevailing party in any action brought for the "nonpayment of wages."
- *Naranjo* changed the law on whether claims for meal and rest period violations are actions brought for the nonpayment of wages but did not specifically address the issue of attorneys' fees.
- Historically, meal and rest period claims were not fee-bearing causes of action.
- But … as expected, that is no longer the case. In *Betancourt v. OS Rest. Servs., LLC*, 83 Cal. App. 5th 132, 134 (2022), the Court of Appeal held that, based on direction from *Naranjo*, meal and rest period claims now support attorneys' fees.

Regular Rate Pitfalls for Employers to Avoid



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Regular Rate Basics

- Regular rate is a **rate per hour.**
  - While non-exempt employees may be paid an hourly rate, salary, commission, etc., the regular rate is an hourly rate that must be determined to calculate overtime pay.
  - Determined by dividing total remuneration for employment (with some exceptions!) by the total hours worked for which the compensation was paid.
- It’s a fraction:
  - The numerator is the compensation required to be included.
  - The denominator is the hours covered by the compensation.

What's In? What's Out?

Premium Pay for Certain Hours, Days, or Types of Work

- In:
  - Premium pay for undesirable working conditions
  - Hazard pay
  - Shift differentials
  - Standby pay
  - Commissions
- Out:
  - Premium pay for hours worked in excess of a daily or weekly standard (i.e., overtime).
    - Only the premium portion is excluded.
  - Premium pay for work on weekends, holidays, or other special days.
    - So long as the premium is at least 1.5x the employee's base rate.

What's In? What's Out?

Bonuses, Gifts, Benefit Plans

- In:
  - Non-discretionary bonuses
  - Seniority or longevity pay
  - Attendance bonuses
  - Bonuses designed to incent workers to work harder or more efficiently.
- Out:
  - Discretionary bonuses
  - Gifts
    - Not based on hours, production, or efficiency
    - Not too large
    - Not pursuant to any agreement
  - % of earnings bonuses
  - Payment to profit-sharing plan or trust.
  - Contribution to employee benefit plans.

Regular Rate in the Golden State

- California does not separately define the regular rate of pay.
  - It adopts (for once!) the FLSA definition and generally tracks the federal regulations.
  - Inclusions and exclusions are generally consistent.
  - But there are different calculations and additional applications.
- Calculations
  - Flat-sum bonuses
  - Piece-rate / other production-based nuances
- Applications
  - Sick pay, reporting time pay
  - Missed meal or rest break pay
  - Wage statements

Regular Rate in the Golden State

(Relatively) Recent Subject of Caselaw in California

- *Alvarado v. Dart Container Corp. of Calif.*, 4 Cal.5th 542 (2018)
  - Flat sum bonuses: Those that do not increase or have the potential to increase in proportion to hours worked.
  - Divide by the total straight-time hours worked as opposed to *all* hours worked.
- *Ferra v. Loews Hollywood Hotel LLC*, 11 Cal.5th 858 (2021)
  - Regular rate must be used to pay meal and rest period premium pay.
  - Applies **retroactively**

Examples

Shift Differential

- Bailey works 30 hours @ $15/hour, and 12 hours at $16/hour because of a $1/hour overnight shift differential.
- Step One: Calculate total earnings
  - (30 x $15) + (12 x $16) = $642
- Step Two: Divide total earnings by total hours
  - $642 / 42 hours = $15.29
- Step Three: Calculate the additional overtime premium due
  - $15.29 x 0.5 half-time premium = $7.65
- Step Four: Calculate additional overtime pay
  - $7.65 x 2 overtime hours = $15.30

Examples

Flat-Sum Bonus

- Michael works 42 hours in a week (40 regular; 2 overtime hours) at a straight-time rate of $15/hour and receives a flat-sum bonus of $60 for the work done in that workweek (for a total of $690).
- Here, Michael's employer would have to separately calculate his overtime premiums for his hourly pay and the flat-sum bonus.
- Step One: Calculate the hourly pay overtime premium
  - $15 x 0.5 = $7.50 x 2 hours of overtime = $15
- Step Two: Calculate the flat-sum bonus overtime premium
  - $60 / 40 = $1.50 x 1.5 x 2 overtime hours = $3.00
- Under California law, the total OT pay is $18. Under the FLSA, the total OT pay would be $15.72.
  - $660 / 42 = $15.71 x 0.5 = $7.86 x 2 = $15.72

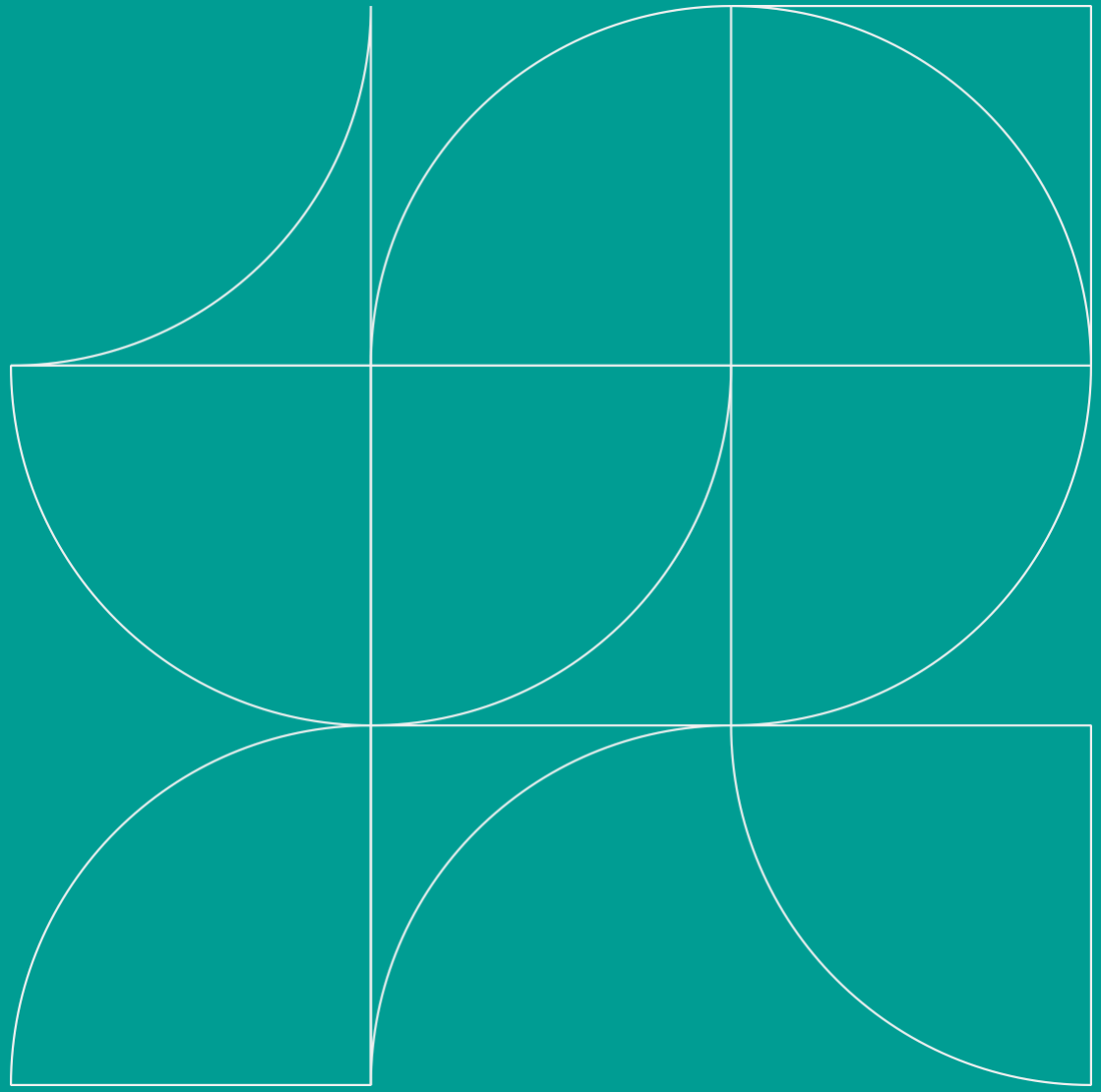
Why it Matters

- Growing source of litigation in California.
- Tough to get right! Easy to tell if it’s being done wrong.
- Policy likely applied in a uniform manner (certification).
- Can be pennies in damages, but huge exposure in derivative claims.
  - 203 penalties
  - 226 penalties
  - PAGA

Advice

- Be Proactive
  - Don’t assume that your payroll provider is getting it right.
  - Do an audit of your payroll codes to make sure that everything that should be included in the regular rate is being included.

Other Key Recent Wage & Hour Legal Developments



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Camp v. Home Depot
84 Cal. App. 5th 638
(2022)

Is Rounding Finally Dead?

- Neutral rounding policies have long been approved by the California courts. *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 (2012). And the California Supreme Court has never explicitly denounced rounding.
- However, the California Court of Appeal recently held that employers who "can capture and [have] captured the exact amount of time an employee has worked during a shift" must fully compensate employees for all the time worked, rather than rounded time, even if the rounding practice is neutral on its face and as applied.
- Is this the death-knell of rounding?
- Troubling concurrence…

Magadia v. Wal-Mart Assocs., Inc.
999 F.3d 668
(9th Cir. 2021)

No Article III Standing Where No Injury

- Ninth Circuit considered whether Magadia has standing to bring a PAGA claim for meal break violations. Although the district court found that he did not suffer a meal-break injury himself, Magadia insisted he has standing to pursue this claim because PAGA is a *qui tam* statute.
- The Ninth Circuit analyzed the PAGA statute and determined it was not in line with traditional *qui tam* actions.
  - "As a result, we hold that Magadia lacks standing to bring a PAGA claim for Walmart's meal-break violations since he himself did not suffer injury."
- ALSO: (1) there is no wage statement violation for failure to list hourly rates corresponding to lump sum overtime adjustments; (2) no wage statement violation by failing to list pay-period start and end dates on statement of final pay

***Gen. Atomics v. Superior Ct.*, 64 Cal. App. 5th 987 (2021), review denied** (Sept. 15, 2021)

OT Premium Of 0.5 Is OK For Wage Statements

- Wage statements that listed overtime premiums separately to show 0.5 times the regular rate of pay, rather than a 1.5 times the regular rate of pay, do not violation Labor Code section 226
- Wage statements showed applicable hourly rates in effect and corresponding numbers worked at each rate, and to extent an employee wanted to know her compensation for a given hour, she could add her standard hourly rate to the "0.5x" overtime premium, both of which were listed on the wage statement.

Table 1A

Description	Hours	Rate	Gross Pay
Straight-time	45	$25.00	$1,125.00
Overtime	5	$12.50	$62.50
Total Hours Worked: 45		**Total Pay:**	$1,187.50

Table 1B

Description	Hours	Rate	Gross Pay
Straight-time	40	$25.00	$1,000.00
Overtime (1.5x)	5	$37.50	$187.50
Total Hours Worked: 45		**Total Pay:**	$1,187.50

Johnson v. WinCo Foods, LLC
37 F.4th 604
(9th Cir. 2022)

Pre-Employment Drug Testing Not Compensable

- Johnson brought putative class action in California state court against WinCo, seeking compensation for time spent and travel expenses incurred undergoing mandatory drug-testing that employer required of successful job applicants.
- Ninth Circuit affirmed summary judgment against certified class, concluding that employee and class members were not employees when they underwent drug testing.
  - Control over the mandatory drug tests that it required of successful job applicants as part of the application process, including by prescribing time and date of tests, facility where tests took place, and scope of tests, was not control over the performance of the job and so did not convert applicants into “employees” entitled to be compensated for time spent and travel expenses incurred undergoing the testing.
  - The subject drug testing, like an interview or preemployment physical examination, was an “activity to secure a position,” not a requirement for those already employed, and applicants were not doing work for employer when they took the drug tests.
- The tests did not constitute a “condition subsequent” to plaintiffs' hiring as employees but, instead, were a “condition precedent.”

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Key Wage & Hour Issues Being Considered by the California Supreme Court

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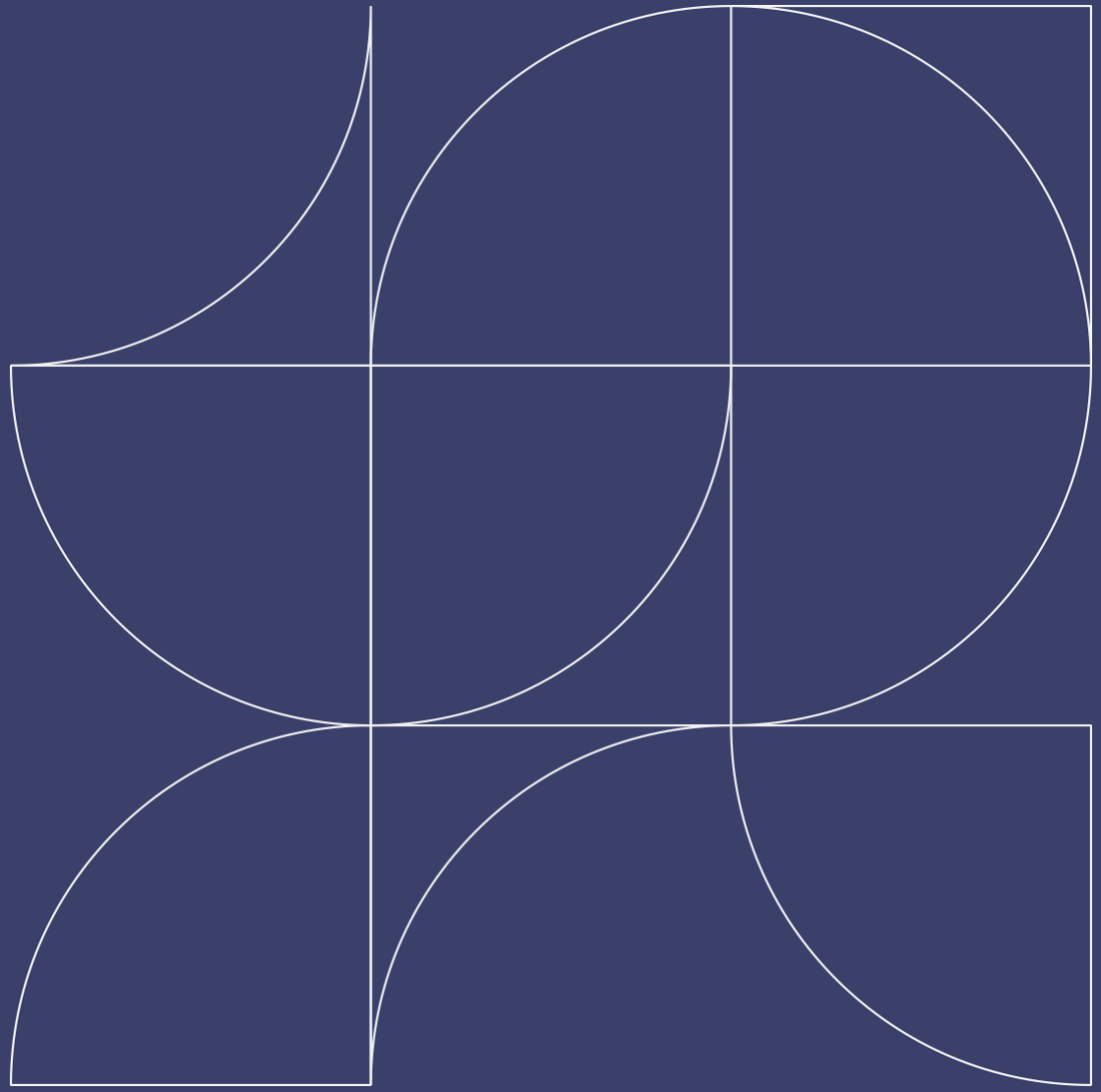


Adolph v. Uber

PAGA Arbitration

- Sotomayor Concurrence in *Viking River*:
  - "If this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word."
- Adolph seeking to make this the "appropriate case" contemplated.
- Asked the California Supreme Court to address whether California law allows an aggrieved party who is forced into arbitration to maintain standing to pursue the non-individual aspect of the employee's PAGA claim.
- If California says yes, employers could have to defend on two fronts – individual PAGA claim in arbitration, and non-individual action in court.

Huerta v. CSI Electrical Contractors

Compensable Time

- Ninth Circuit certified questions to the California Supreme Court regarding compensability of time.
  - Time spent on the employer's premises in a personal vehicle and waiting to scan an identification badge, have security guards peer into vehicle, and exit security gate.
  - Time spent in a personal vehicle driving between the security gate and parking lot while subject to certain employer rules.
  - Time spent on an unpaid meal period when employees were prohibited from leaving the employer's premises pursuant to a valid CBA.

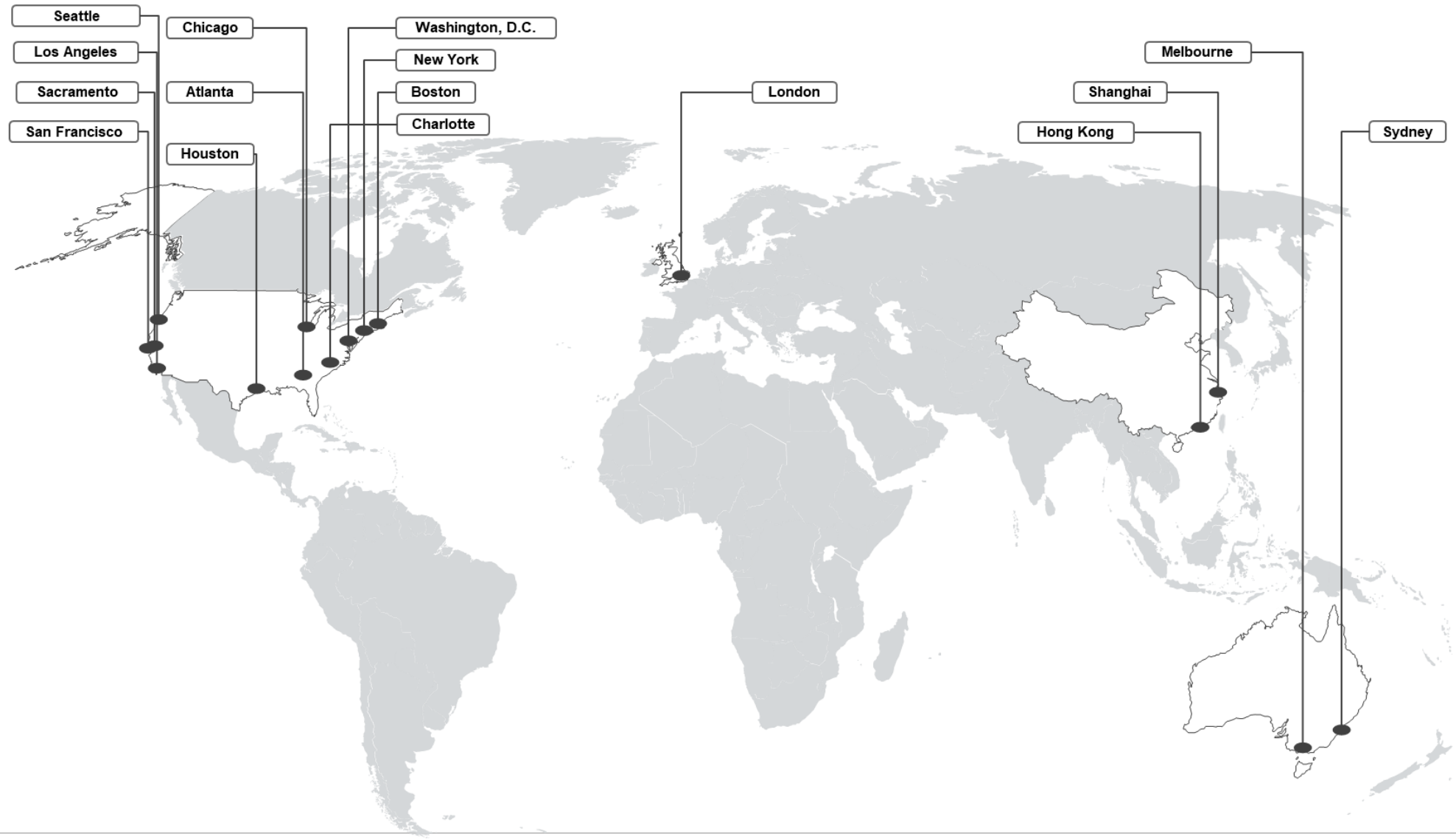
Estrada v. Royalty Carpet Mills

PAGA Manageability

- 2021: *Wesson* said that a trial court could dismiss unmanageable PAGA claims.
- 2022: *Estrada* said that imposing a manageability requirement would create an “extra hurdle” in PAGA cases that does not apply in LWDA enforcement actions.
- California Supreme Court set to resolve the issue.

Questions?

Global Reach



22nd Edition
Litigating California Wage & Hour Class and PAGA Actions

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