BUSINESS BRIEF:
CALIFORNIA QUARTERLY EMPLOYMENT LAW UPDATE

APRIL 15, 2021

RAINESFELDMAN

THIS EDITION

I. UPDATE ON PAGA

II. RETURN TO WORK RECOMMENDATIONS

III. REMINDER TO KEEP POLICIES AND ANTI-HARASSMENT TRAINING CURRENT

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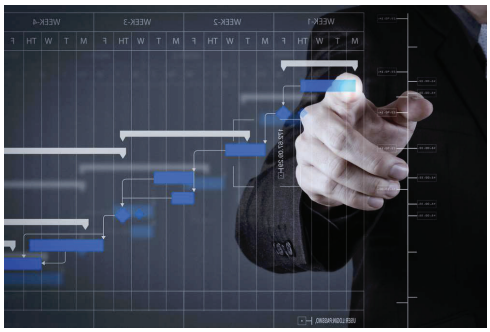
Trial Courts, Not Arbitrators, Determine When an Independent Contractor Is an Employee Under PAGA: *Contreras, et al. v. Superior Court (Zum)* (Ct. of Appeal, March 1, 2021)

Plaintiffs worked for Zum, a service that schedules transportation for school children. The Plaintiffs claimed they were employees whom Zum misclassified as independent contractors. They sued for penalties under California's Private Attorneys General Act ("PAGA"), which requires that the Plaintiff be an employee to claim a violation, and multiple provisions of the Labor Code. Zum moved to compel arbitration based on agreements the Plaintiffs signed when they began working as independent contractors. Zum argued that an arbitrator should decide whether the workers were employees based on the arbitration agreements and based on the arbitrator's rules which required the arbitrator to determine who had jurisdiction over the claim. In contrast, the Plaintiffs argued that a court must decide whether it, or the arbitrator, had jurisdiction. The trial court rejected the Plaintiffs' argument, agreed with Zum, and ordered the matter to arbitration. The Court of Appeal disagreed and reversed.

Courts, not arbitrators, have jurisdiction over PAGA. Every PAGA claim is a dispute between an employer and the State of California (the "State"), regardless of whether a worker or the Labor Commissioner initiates the legal action. An employee suing under PAGA stands in the State's shoes, meaning the employee acts as the State's agent. According to the Court of Appeal, the State owns the claim as the real party in interest. In a PAGA claim, the State must consent to arbitration before a business can move to compel it. Here, the State was not a party to the arbitration agreement, only the worker and employer were, so a court could not require arbitration. This decision does not discuss whether an arbitrator may determine jurisdiction over an employee allegedly misclassified as an independent contractor when the action involves only individual claims under the Labor Code subject to an arbitration agreement.



This case underscores that employers cannot rely on arbitration in claims brought under PAGA.

PAGA Cases Require Nuanced Understanding of Evidence and Caution over Attorneys' Fees: *Sargent v. Bd. of Trustees of the Cal. State Univ.* (Ct. of Appeal, March 5, 2021)

Plaintiff was a technician at California State University, Sonoma (the "University"). He claimed his supervisor retaliated against him after he raised concerns about asbestos dust at the University. He sued alleging multiple theories of liability including violations of a whistleblower statute and California's Private Attorneys General Act ("PAGA"). Before trial, the University's attorneys neglected to designate the school's Vice President of Human Resources, Tammy Kenber, as an expert witness. At trial, the judge prohibited Ms. Kenber from explaining why the University suspended the Plaintiff and implemented a performance improvement plan. The judge also prohibited Ms. Kenber from testifying about whether Plaintiff should have been on a performance improvement plan, the relationship between an improvement plan and Plaintiff's salary, and whether placing Plaintiff on the plan was an act of retaliation.

The court ruled these were subjects for an expert witness. A jury found for the Plaintiff, awarding him $271,895 in lost wages and $116,000 for emotional distress. The jury also awarded $2,900,000 in PAGA penalties, and $7,800,000 in attorneys' fees.

On appeal, the University argued that PAGA does not apply to government entities. The Court of Appeal agreed in part. It determined that PAGA permits claims against public entities when the statutes upon which the employee bases the PAGA action contain civil penalties. (Some statutes in the Labor Code contain civil penalties; some do not. In claims against private employers, PAGA permits actions based on violations of all statutes in the Labor Code, regardless of whether the statute provides for civil penalties. In claims against public entities, PAGA permits claims based only on violations of statutes with civil penalties.) The jury found that the University had violated three statutes that do not include civil penalties, and four that do; but the jury also found that the Plaintiff was not subjected to the violations that include civil penalties. The Court of Appeal reversed the award of PAGA penalties. The Plaintiff elected job reinstatement and waived his award of lost wages. He received a total of $116,000 for emotional distress and $7,793,030 in attorneys' fees.

The case underscores two points. First, trial counsel missed an opportunity to rebut the Plaintiff's allegations by neglecting to designate the University's human resources professional as an expert witness. Early in a case, trial counsel should begin to anticipate evidence needed and determine how to admit it at trial. Second, in most employment-related lawsuits, the prevailing employee will receive attorneys' fees as a damage, but the prevailing employer will not. In exploring defensive tactics, lawyers and their clients should consider how attorneys' fees may grow, sometimes exponentially, and comprise a disproportionate amount of the damages a plaintiff could receive at trial.

Employers Cannot Round Meal Breaks: *Donohue v. AMN Services, LLC* (Supreme Ct., February 25, 2021)

Plaintiff worked as a recruiter for AMN, a healthcare services and staffing company. AMN had a policy emphasizing that meal breaks comprise a 30-minute period, uninterrupted, during which the business would relieve the employee of all job duties and relinquish all control of the employee. The policy underscored that supervisors may not impede or discourage employees from taking the break. The employer used an electronic timekeeping system called "Team Time," which employees used to record the time they punched in and out for lunch.

Team Time rounded the time punches to the nearest 10-minute increment. For example, if an employee received a 24-minute lunch break, from 11:02 a.m. to 11:26 a.m., Team Time would record a 30-minute break from 11:00 a.m. to 11:30 a.m. (AMN separately preserved the original timesheet showing the 24-minute meal break.) When the system noted that an employee recorded a missed, short, or delayed meal period, a dropdown menu would appear on the screen that would prompt the employee to state (i) whether they had received a 30-minute break before the end of the 5th hour of work, (ii) whether the employee had voluntarily taken a noncompliant break, or (iii) that they had not received the meal break but wanted it, in which case the person would receive an extra one hour's pay at the regular rate as a penalty for the violation. AMN went further to try to confirm it was complying with the law. At the end of each pay period, AMN required employees to certify that all entries on their time sheets were accurate. The Plaintiff filed a class action lawsuit alleging various wage and hour violations, including for noncompliant meal breaks. The trial court dismissed the case on summary judgment, a decision with which the Court of Appeal agreed.

The Supreme Court reversed. It concluded that California law (Labor Code section 512 and, as applicable here, Wage Order No. 4) requires a meal break of not "less than 30 minutes." The practice of rounding time for meal periods can lead to shorter breaks than the law requires. Time records showed 40,110 short meal periods and 6,651 delayed meal periods. However, Team Time rounded them into compliance. This led the Supreme Court to rule that time records showing noncompliant meal periods raise a rebuttable presumption that the employer failed to provide a meal break of at least 30 minutes. An employer may raise as an affirmative defense that it gave the employee a 30-minute duty-free break, but the employee waived it. However, the employer has the burden to prove this.

This case raises three important points. First, protecting against claims that a business violated California's meal and rest break laws requires planning and on-going monitoring, not just good policies. Businesses that establish clear, legally compliant meal and rest break policies can still be the target of lawsuits, even businesses requiring employees to confirm in writing that they received their breaks on time. (Employers can violate their policies, and sometimes neither they nor their employees realize it.) Second, employers must disprove employees' claims that they did not receive breaks if time records reveal non-compliant meal periods. That means employers should maintain records that confirm they provided timely and complete meal and rest breaks. Finally, employers may not round the times employees clock in and out for meal breaks.

The Supreme Court did not rule on whether employers may use rounding at the beginning and end of shifts. Please contact legal counsel for the most current information about this complicated area.

Preparing for Workplace Reintegration: Arguments over Politics, Protecting Against Harassment, Reminding Employees about Personal Care

Employment reintegration is growing as COVID-19 infection rates drop. The reintegration may lead employees to struggle with certain behaviors that developed at home over the past year. We explore three areas in which we expect to see litigation grow: political arguments, personal care issues, and sexual harassment. As every situation is different, please consult legal counsel when considering ways to respond to these issues.

The Employee Who Provokes Political Debates

Businesses may prohibit employees from arguing about politics while on the clock, just as businesses may curb other activities that disrupt the workplace. However, employers cannot prohibit political activity based on content. Employers must be careful not to discriminate against employees based upon their political views. Often, employers implement policies that prohibit on-duty political conduct, while explicitly stating the employer does not restrict off duty conduct. The policy should also restate the company's commitment to diversity and inclusion, and emphasize its policy against discrimination, harassment, and bullying. Through the policy, a business should remind its employees to respect different political views.

Remember, Section 7 of the National Labor Relations Act protects employees who try to establish collective bargaining or collective forms of protection. Protected discussions can include some conversations about politics, wages, leaves of absence, and criticisms of the employer.

The Employee Who Neglects Personal Care

For some people, the stress of working alone over the past year or returning to a common

workplace may create changes in behavior, including in hygiene and grooming. An uncomplicated strategy for dealing with unkempt employees is to address their grooming and hygiene in private. Some people may be unaware of the issue and appreciate the confidential exchange. Others may react defensively. A clear policy describing the business's expectations regarding appearance and cleanliness is helpful for responding to defiant employees who return to work with inadequate hygiene. Businesses should enforce their appearance and hygiene policies consistently. Selective enforcement may invite claims of disparate treatment discrimination. Business leaders should also recognize that some things appearing to be the result of inattentiveness may arise from medical or psychological conditions protected under the ADA. When an employee's issues derive from a disability (or from a condition the ADA protects), a business leader must engage in the interactive process to explore reasonable accommodation. Employers should recognize cultural differences in appearance such as natural hairstyles like locs or dreads that employers must exclude from their policies. California made natural hairstyles a protected category in recent years, and employers are prohibited from discriminating against or harassing employees on that basis. Consult legal counsel for assistance.

The Employee Who Wants to Hug

Some people may have changed their perspective on personal boundaries during their time at home. Employees may also experience an over-exuberance upon returning to the workplace and may wish to express that emotion with personal interactions such as hugs. Businesses should prepare for this by having a well-crafted anti-harassment policy stating that an employee may not hug workers (including an independent contractor) who has made clear they do not wish to embrace. Discussing whether to hug, shake hands, or neither should be part of the business's anti-harassment training. Now is a good time to revisit your policies and to deliver the required training. (California requires that all staff and managers receive training every two years, one hour for staff, two for managers.) Moreover, an embrace may violate COVID-19 protocols. Contact legal counsel for additional information.

Conclusion

Personnel policies may not be enough to meet this moment. During this unique time, businesses may wish to consider return-to-work reorientation meetings that survey the problems workplace reintegration prompts. Individual reorientation, department meetings, or business-wide state of the business updates may include reminders to observe personal boundaries and to report problems immediately. Employers may also need to take a personal approach to certain employees through one-on-one meetings to address individual reintegration struggles confidentially and compassionately. Please contact legal counsel for advice specific to your business.

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Please note: The changes to California employment laws in 2021 are numerous and significant. Please contact us with any questions or concerns.

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