7th Annual Wage & Hour Litigation Conference
Bridgeport

Recent Trends and Cases in Wage & Hour Litigation

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CASES

1. ARBITRATION

A. Unconscionability

1. Sonic-Calabasas A, Inc. v. Moreno, 51 Cal.4th 659 (2011)

As a condition of his employment, an employee signed an arbitration agreement. After leaving his position, he filed an administrative wage claim with the California Labor Commissioner for unpaid vacation pay. The employer petitioned to compel arbitration of the wage claim and dismiss the pending administrative action.

The California Supreme Court held that requiring the employee to waive the option of a Berman administrative hearing (Lab. Code §§ 98–98.8) was contrary to public policy and unconscionable. Because an appeal from such a hearing can be made to an arbitrator, the court found no conflict between the Berman hearing procedures and the California Arbitration Act (Code Civ. Proc. § 1280).

An employee's statutory right to invoke the Berman process is an unwaivable right that an employee cannot be compelled to relinquish (Civ. Code § 3513) as a condition of employment. Moreover, although the contract defenses of unconscionability and violation of public policy cannot be used to discriminate against arbitration agreements (see 9 U.S.C. § 2) invalidating Berman waivers does not trigger federal preemption because it does not disfavor arbitration.

2. Shappell v. Sun Life Assurance Company, WL 2070405 (E.D. Cal. 2011)

Plaintiff Teresa Shappell sought damages for denial of disability benefits issued by Defendant Sun Life Assurance Company, which plans were obtained by Plaintiff's former employer Employers Insurance Company of Nevada ("Employers"). Plaintiff also sued Employers for allegedly wrongfully interfering with her attempts to collect disability benefits. In dismissing Plaintiff's suit against employer, the district court pointed to both the prohibition against claim-splitting and the arbitration provision in Plaintiff's employment agreement, which dictated that any controversy arising therefrom would be subject to arbitration. Plaintiff claimed that because her disability plan benefits fell within the purview of ERISA, federal court, not arbitration, was the proper venue. The court rejected this claim, holding that "any doubts concerning the scope of arbitration issues should be resolved in favor of arbitration."

3. Wherry v. Award, Inc., 192 Cal.App.4th 1242 (2011)

The plaintiffs worked under independent contractor agreements that were on preprinted forms and contained arbitration provisions. Their declarations stated that they were required to sign the agreements as a condition of working for the companies, that they were given no time for discussion or review, and that they were not given copies. The arbitration provisions allowed the arbitrator to impose

costs on the losing party and provided that an arbitration had to be filed within 180 days of the event triggering the action.

The court of appeal held that the arbitration terms were both procedurally and substantively unconscionable. The salespeople established procedural unconscionability by showing oppression, which was present because they had no meaningful opportunity to negotiate the terms and the contract was presented to them on a take it or leave it basis. The agreement was substantively unconscionable because it purported to waive statutory rights provided by the California Fair Employment and Housing Act (FEHA), Gov. Code § 12900, including the one-year statute of limitations for FEHA claims in Gov. Code § 12960(d), and protections against paying costs and fees.

4. Zullo v. Superior Court, 197 Cal.App.4th 477 (2011)

A claim for wrongful termination (allegedly due to race and national origin discrimination) in violation of the California Fair Employment and Housing Act was not arbitable as the arbitration agreement was both procedurally and substantively unconscionable. It was procedurally unconscionable as the arbitration agreement was a contract of adhesion contained in the employee handbook and was non-negotiable. The arbitration agreement was substantively unconscionable for two reasons: (1) it lacked mutuality as it appeared to only require employees to arbitrate their disputes against the employer, but not claims the employer may have had against its employees; and (2) the agreement had a procedural requirement that applied to employees, but not the employer. Employees were required to respond to arbitration communications regarding the arbitration procedures within 10 days or forfeit their claims. For example, the employer could delay the selection of an arbitrator without risking a penalty. In contrast, employees were bound to respond to any communication within 10 days or lose their claims. As there were multiple substantive defects in the agreement, the agreement was "permeated" with unconscionability, and the agreement could not be rendered enforceable by severing one offensive provision.

B. AT&T Mobility v. Concepcion and Its Progeny

1. AT&T Mobility v. Concepcion, 131 S.Ct. 1740 (2011)

Respondent customers brought a putative class action suit against petitioner cellular telephone service provider in district court, alleging false advertising and fraud. The district court denied the provider's motion to compel arbitration, and the United States Court of Appeals for the Ninth Circuit affirmed.

The Supreme Court held that the Federal Arbitration Act (FAA) preempted the Discover Bank rule. The saving clause under 9 U.S.C. Section 2 did not permit application of the California rule; nothing in the saving clause suggested an intent to preserve state law rules that stood as an obstacle to the accomplishment of the FAA's objectives. The overarching purpose of the FAA was to ensure the

enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings; requiring the availability of class arbitration was inconsistent with the FAA.

2. Morse v. Servicemaster Global Holdings Inc., 2011 WL 3203919 (N.D. Cal. 2011)

Judge Susan Illston holds that defendants did not waive right to arbitrate where plaintiffs' arguments were based upon actions taken by defendants prior to issuance of Concepcion.

3. Plows v. Rockwell Collins, Inc., 2011 WL 3501872 (C.D. Cal. 2011)

Holdings on various issues in light of AT&T Mobility v. Concepcion:

1. Defendant waived right to demand arbitration with respect to plaintiff whose arbitration agreement did not ban class actions;
2. Defendant did not waive right to demand arbitration with respect to plaintiff whose arbitration agreement did ban class actions;
3. Gentry remains valid law;
4. Parties are given four months to conduct discovery to determine whether arbitration agreement is unenforceable under Gentry;
5. Motion to compel arbitration of PAGA claims is denied.

4. Teimouri v. Macy's, Inc., San Diego Superior Court No. 37-2010-00093566-CU-OE-CTL (August 19, 2011)

Defendants' failure to move to compel arbitration prior to Concepcion did not waive right to move for arbitration of plaintiff's claims. However, the waiver of Plaintiff's right to pursue representative action under PAGA is not enforceable. Furthermore, the rules enunciated in Concepcion do not apply to Gentry.

5. Valle v. Lowe's HIW, 2011 WL 3667441 (N.D. Cal. 2011)

Northern District of California holds that arbitration agreements do not violate the NLRA; PAGA claims are arbitrable; Concepcion overrules Gentry; and the agreements at issue are not substantively unconscionable.

6. Quevedo v. Macy's, Inc., 2011 WL 3135052 (C.D. Cal. 2011)

Although this putative wage and hour class action case alleging failure to pay wages owed upon termination (Labor Code Section 203) and for PAGA penalties had been litigated as a class action for two years, Judge Feess granted Macy's motion to compel arbitration of the named plaintiff's individual claims, including the claims for PAGA penalties. The Court rejected the plaintiff's claims that Macy's waived its right to compel arbitration by engaging in class action litigation for more than two years. This decision was reached after carefully examining six waiver factors. The most important aspect of the decision was the

holding that Macy's did not take action inconsistent with the right to arbitrate and did not unduly delay seeking arbitration because the case did not become arbitrable until Concepcion invalidated on FAA preemption grounds the holdings in Discovery Bank and Gentry. Quevedo also held that Macy's unilateral right to cancel the arbitration program did not render the arbitration agreement unenforceable as this provision could be severed. Finally, the Court held that under Concepcion, the PAGA claim was arbitable only on an individual basis and the class action waiver applied to a PAGA representative action.

2. ATTORNEYS FEES

A. Fox v. Vice, 131 S.Ct. 2205 (2011)

Where civil rights lawsuit involves both frivolous and non-frivolous claims, a court may only grant fees to the defendant for costs that the defendant would not have incurred but for the frivolous claims. But, a plaintiff in the same case may receive fees for all work relating to the claims, even if unsuccessful on every issue.

B. In re UPS Wage and Hour Cases, 192 Cal.App.4th 1425 (2011) (review granted)

The employee alleged that he had been misclassified as exempt. His overtime claim proceeded to a jury trial following pretrial rulings for the employer on his other claims. The jury found that he was an exempt employee under both state and federal law. The court held that although Lab. Code § 1194(a), authorized fee awards only to prevailing employees on overtime compensation claims, Lab. Code § 218.5, did not bar the employer from seeking to recover the fees it incurred in defending the other claims. The court concluded, however, that the employer was not entitled to attorney fees on any of the claims. Section 1194 precluded recovery as to both state and federal overtime claims.

As to a wage statement claim, Lab. Code § 226(e), allowed fee awards only to employees. The unfair competition law, Bus. § 17200Code & Prof. , did not authorize attorney fees. A claim for remedial compensation under Lab. Code § 226.7, did not trigger the reciprocal fee recovery provisions of § 218.5. The employer could recover its litigation costs pursuant to Code Civ. Proc. § 1032(b), because § 1 did not expressly disallow a cost award to a prevailing employer.

3. CLASS ACTIONS

A. Class Action Fairness Act

1. Coleman v. Estes Express Lines, 631 F.3d 1010 (9th Cir. 2011)

Under the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005), defendants may remove a diversity class action from state to federal court when, among other conditions, the parties are minimally diverse and the amount

in controversy exceeds $5,000,000. However, plaintiffs can obtain a remand to state court if the suit involved a local controversy. The appellate court found that a federal district court was limited to the complaint in deciding whether two of the criteria for the local controversy exception were satisfied.

According to the district court, the employee's complaint sought sufficient relief against the corporation to satisfy 28 U.S.C. § 1 where it sought damages equally from the corporation and its predecessor corporation, and there was nothing in the complaint to suggest that the corporation would be incapable of complying with an injunction. Moreover, the complaint sufficiently alleged conduct of the corporation that formed a significant basis for the claims asserted on behalf of the class under 8 U.S.C.S. § 1332(d)(4)(A)(i)(II)(bb).

2. Lewis v. Verizon, 627 F.3d 395 (9th Cir. 2010)

Plaintiff customer brought a putative class action against defendant telephone provider in California state court, alleging that the provider charged for services that were never ordered. The provider removed the case to federal court under the Class Action Fairness Act (CAFA), 28 § 13U.S.C.S.. The district court remanded to state court. The provider appealed.

The customer sought to represent a class of customers that had been billed for services that they never expressly agreed to or requested. The complaint did not state a fixed amount of damages sought. The provider submitted a declaration stating that the customers were billed more than $ 5 million, the jurisdictional amount under CAFA. The district court found that the complaint placed only unauthorized charges into controversy and that the declaration therefore did not satisfy the provider's burden to demonstrate the requisite amount in controversy.

The court of appeals held that the provider had sufficiently established CAFA jurisdiction. The district court had assumed that total billings included both authorized and unauthorized charges, but there was no evidence or allegation to support that assumption. The provider had offered evidence of the amount of total billings, and the customer had not argued that the claimed damages were less than the total billed. The entire amount of the billings was therefore "in controversy." “The law in our circuit is articulated a little differently from that of others, in that we expressly contemplate the district court's consideration of some evidentiary record.”

B. Class Actions-Procedure

1. Kullar v. Foot Locker, Inc., 191 Cal.App.4th 1201 (2011)

In consolidated class actions, the trial court entered an order denying defendant's motion to disqualify the attorneys for parties who had objected to a proposed settlement agreement in the first of the cases and were the plaintiffs in the second

action in which a class had not yet been certified. The Court of Appeal affirmed the order denying defendant's motions to disqualify counsel in both cases.

The court concluded that the filing of the second class action did not create a conflict of interest requiring counsel's disqualification. Although putative class members favoring the proposed settlement may have been adverse to objectors in the sense that they disagreed as to the fairness and adequacy of the settlement and in their desire to have it approved or rejected, their common interests in the outcome of the litigation were unaffected by that disagreement. Class counsel did not obtain any confidential information from the putative class members who favored the settlement, nor did they engage in any conduct displaying disloyalty to any of the putative class members. Under these circumstances, disqualification was not justified.

2. Pitts v. Terrible Hearst, 2011 DJDAR 11955 (D. Nev. 2011)

Unaccepted offer to satisfy individual's claim made before plaintiff filed for class certification does not moot case, if plaintiff may still file timely motion.

3. Safaie v. Jacuzzi Whirlpool Bath, Inc., 192 Cal.App.4th (2011)

Plaintiffs cannot file successive motions for class certification. Denial of certification triggers "death knell" doctrine and must be appealed.

4. Smith v. Bayer Corp., 131 S.Ct. 2368 (2011)

Petitioner consumers sued respondent pharmaceutical company in West Virginia state court regarding a drug. After denying Fed. R. Civ. P. 23 certification in a similar suit, a federal district court enjoined the West Virginia court from hearing a certification motion under the relitigation exception to the Anti-Injunction Act, 28 § 2283U.S.C.S.. The U.S. Court of Appeals for the Eighth Circuit affirmed. The U.S. Supreme Court reversed.

Although the Anti-Injunction Act generally prohibited federal courts from enjoining state court proceedings, the circuit court affirmed the injunction under the relitigation exception to this statute, finding that ordinary rules of issue preclusion barred the consumer from seeking certification of his proposed class, which was identical to the class that the federal district court had declined to certify. In reversing this decision, the Court noted that the relitigation exception to the Act should be narrowly construed, and an injunction should issue only if preclusion was clearly established.

Applying these principles, the Court found that the federal district court's rejection of Rule 23 certification in the related federal court suit did not preclude a later adjudication in state court of the consumer's class certification motion. Specifically, the issue decided by the federal court was not the same issue as the one presented in the state tribunal because federal and state certification rules

were not identical. In addition, the consumer was not a party to the federal suit, and he was not bound to the federal court ruling since the Rule 2 certification motion had been denied.

C. Class Certification

1. Marlo v. UPS, Inc., 639 F.3d 942 (9th Cir. 2011)

The United States District Court for the Central District of California certified a class in a wage claim case, comprised of full-time supervisors employed by defendant from 2000 to 2004, and appointed plaintiff class representative. The district court subsequently decertified the class on the ground that plaintiff had failed to establish that common issues of law or fact predominated over individual ones. Plaintiff appealed.

Because plaintiff had brought a class action challenging defendant's exemption of full-time supervisors as a policy of misclassification, plaintiff had to be able to demonstrate pursuant to either scenario that misclassification was the rule rather than the exception. Although, under California law an employer bore the burden of demonstrating that an employee was exempt from the Labor Code's overtime requirement, the district court properly placed the burden on plaintiff to demonstrate that Fed. R. Civ. P. 2's class-certification requirements had been met.

Also, the district court did not err in finding that plaintiff failed to establish the "predominance" element of Fed. R. Civ. P. 23(b)(3); a blanket policy classifying full-time supervisors as exempt from overtime-pay requirements did not necessarily establish that they were misclassified, because the policy may have accurately classified some employees and misclassified others.

2. Mora v. Big Lots, 194 Cal.App.4th 496 (2011)

Plaintiff employees appealed an order from the Superior Court of Los Angeles County, which, in a suit for failure to pay overtime compensation and other wage and hour claims, denied the employees' motion to certify a class of present and former retail store managers allegedly misclassified as exempt by defendant employer.

The employees asserted that their employer uniformly misclassified its store managers as exempt employees based on their job description alone rather than on consideration of actual work performed, which involved a significant amount of time on nonexempt tasks. The parties submitted conflicting declarations and deposition testimony addressing managers' duties. The trial court, in denying certification, found that the employer did not operate its stores in a standardized manner and had no systematic practice of misclassification of managers. The court held that the trial court properly exercised its discretion when it found that the putative class representatives had failed to establish a well-defined community of interest under Code Civ. Proc. § 382. The trial court employed the correct

analysis in concluding that the employees' theory of recovery was not susceptible to common proof. Substantial evidence, including an observational study, supported its findings. The expert who conducted the study had sufficient qualifications.

D. Wal-Mart Stores, Inc. v. Dukes and Its Progeny

1. Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011)

Class action certified by the district court involved 1.5 million female Walmart employees bringing Title VII claims. Supreme Court reverses Ninth Circuit. FRCP 23(a) (5-4): Insufficient commonality, insufficiently proved by statistics, anecdotal evidence and opinion of sociologist. FCRP 23(b)(2) (unanimous): Plaintiffs' backpay claims cannot be certified under this section, which primarily applies to claims for injunctive and declaratory relief.

2. Butcher v. United Airlines, Inc., No. 09-11681 (D. Mass. 2011)

District court denied a motion for reconsideration following Dukes:

> Dukes does not involve the FLSA, and its holding does not apply to conditional certification. It is well settled that Rule 23 is more stringent than § 216(b) generally, see Lewis v. Wells Fargo Co., 669 F. Supp. 2d, 1124, 1127 (N.D. Cal. 2009) (The requisite showing of similarity of claims under the FLSA is considerably less stringent than the requisite showing under Rule 23 of the Federal Rules of Civil Procedure, quoting Wertheim v. Arizona, 1993 WL 603552, at *1 (D. Ariz. 1993)), and especially so at the conditional certification stage.

3. Cruz v. Dollar Tree Stores, Inc., 270 F.R.D. 499 (N.D. Cal. 2010)

District court decertified a class of store managers because plaintiffs' plan to rely at trial on "representative testimony from a handful of class members" became untenable following Marlo v. United Parcel Service, Inc. ("Marlo II") --- F.3d --- (9th Cir. 4/28/11) and Dukes.

4. Jasper v. C.R. England, Inc., No. 08-05266 (C.D. Cal. 2011)

District court denied an application to vacate an order certifying a Rule 23 class action alleging violation of California wage law on behalf of a class of truck drivers deemed independent contractors.

5. Ramos v. SimplexGrinnell LP, No. 07-CV-981 (E.D. NY 2011)

District court granted a Rule 23(b)(3) motion for class certification in an action for unpaid prevailing wages under New York law:

> The Supreme Court's decision in Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011), issued earlier this week, does not command a different result. In Wal-Mart, the Court considered whether plaintiffs had bridged the "conceptual gap" between an individual's claim of injury and the existence of a class of persons who have suffered the same injury. 2011 WL 2437013, at *8. The Court held that the gap could be bridged with "significant proof that [defendant] operated under a general policy of discrimination." Id. (internal quotation marks omitted). The Court found that such proof was "entirely absent" and emphasized that plaintiffs did not allege "any express corporate policy" of discrimination, id. at *4, and that the challenged pay and promotion decisions were "generally committed to local managers' broad discretion, which [was] exercised in a largely subjective manner." Id. at *3. The relevant facts and circumstances in Wal-Mart have little bearing here. As indicated above, plaintiffs have come forward with significant proof that defendant routinely failed to account for labor performed on public works projects and pay prevailing wages for covered work. Moreover, there is little discretion or subjective judgment in determining an employee's right to be paid prevailing wages; the right arises automatically, by operation of law, provided the nature of the construction project and the type of labor performed fall within the scope of New York Labor Law § 220. In addition, whereas in Wal-Mart defendant had an "announced policy" prohibiting discrimination, id. at *8, defendant here has not come forward with evidence of an expressed uniform policy that ensured the payment of prevailing wages to its employees when due. Finally, although the efforts of the Wal-Mart plaintiffs to prove their case with statistical evidence failed, plaintiffs here have come forward with class-wide proof culled from defendant's electronic data that, as discussed in greater detail below, is sufficiently reliable to be presented at trial. Slip op. at 9-10.

6. Spellman v. American Eagle Express, No. 10-1764 (E.D. Pa. 2011)

District court declined to reconsider its order granting conditional certification in light of Dukes.

4. WAGE AND HOUR

A. FLSA

1. Kasten v. Saint-Gobain Performance Plastics Corp., 131 S.Ct. 1325 (2011)

Employee orally complained about the location of time clocks, which prevented workers from receiving pay for donning and doffing uniforms. United States Supreme Court held that FLSA's anti-retaliation provision was broad enough to encompass oral complaints.

2. Parth v. Pomona Valley Hospital, 630 F.3d 794 (9th Cir. 2010)

At the request of nurses, defendant hospital offered an optional 12-hour shift schedule under which the nurses received a lower base hourly salary and time-and-a-half pay for hours worked in excess of eight per day. Nurses who volunteered for the 12-hour schedule made approximately the same amount of money over a 14-day period as they made working an 8-hour shift schedule. The complaint alleged that the hospital's use of different base hourly rates violated the FLSA.

The court of appeals held that the hospital and its employees were free to establish any regular rate they wished as long as it met minimum wage standards. The 12-hour shift arrangement was not prohibited under the FLSA and did not contravene the FLSA's purpose. Nor was the 12-hour shift pay plan an artifice to avoid paying overtime. The reduced rate was agreed to through a collective bargaining agreement and was not artificially low. There was no requirement that an average blended rate calculation be used to determine a "regular rate," and the FLSA did not prohibit the hospital's use of a weighted average method of calculation. Also, workers who worked different shifts could be paid different rates.

B. Meal and Rest Period

1. UPS v. Superior Court, 196 Cal.App.4th 57 (2011)

Employees brought 32 coordinated actions against their employer, seeking compensation for, among other things, the employer's alleged failure to provide meal and rest periods pursuant to Lab. Code § . The trial court concluded § 226.7 allowed up to two premium payments per workday.

The Court of Appeal denied the employer's petition for writ of mandate challenging the trial court's ruling. The court held that Lab. Code § 226.7, permits up to two premium payments per workday—one for failure to provide one or more meal periods, and another for failure to provide one or more rest periods. Allowing an employee to recover one additional hour of pay for each type of

violation per work day is not contrary to the "one additional hour" and "per workday" wording in § 226.7(b). Accordingly, based upon the wording of § 226.7(b), the Industrial Welfare Commission's wage orders, the public policy behind the statute and wage orders, and also the principle that courts are to construe § 226.7 broadly in favor of protecting employees, the court concluded that the employees in the instant case could recover up to two additional hours of pay on a single workday for meal period and rest period violations.

C. Misclassification

1. Areso v. CarMax, Inc., 195 Cal.App.4th 996 (2011)

The trial court granted summary adjudication to employers in a class action lawsuit brought by a salesperson alleging wage and hour violations, including a failure to pay compensation for overtime. The salesperson received payments based on the products and services she sold, with a minimum guaranteed base pay. She was classified as a commissioned exempt salesperson and was not paid overtime. She received a payment in the same amount for each used vehicle she sold, regardless of the sale price of the vehicle.

The Court of Appeal affirmed the judgment. The court held that the employee was exempt under Cal. Code (3)(D)., tit. 8, § 11070Regs, from the overtime pay requirement of Lab. Code § 510(a), because more than half her compensation represented commission wages as defined in Lab. Code § 204.1. Although a line of cases has described commission wages as a percentage of the sale price, the plain language of § 204.1 also allows wages based on the number of items sold to be considered commission wages.

2. Arzate v. Bridge Terminal Transport, Inc., 192 Cal.App.4th 419 (2011)

The transport company did not own any trucks and contracted with owner-operators to transport cargo. A collective bargaining agreement stated that some owner-operators were employees working exclusively for the transport company, while describing others as independent contractors who hauled cargo for more than one company. The truckers who filed the suit were in the group described as employee owner-operators. They had signed agreements, which were terminable on one day's notice, leasing their trucks to the transport company. They maintained their own trucks, decided when and where to take meal and rest breaks, and received checks for wages and for the lease of their trucks. The transport company presented evidence that it had not required any trucker to work exclusively for it.

The court concluded that triable issues of material fact precluded summary judgment. Although the transport company's evidence suggested that it did not control the manner and means by which the truckers hauled loads, there were other factors that did not weigh in favor of independent contractor status, such as

the description of the truckers as employees and the right to discharge them at will.

3. Christopher v. SmithKline Beecham Corp., 635 F.3d 383 (9th Cir. 2011)

Employees worked as pharmaceutical sales representatives (PSRs). The Court of Appeals held that PSRs fit within the § 213(a)(1) exemption (outside salesperson). The court declined to give deference to an amicus brief filed by the Secretary of the Department of Labor in another FLSA case, finding that the Secretary's interpretation was inconsistent with the statutory language and regulations and merely incorporated the statutory language, which was not the type of agency expertise requiring deference. Although the PSRs did not transfer any product to doctors, they nonetheless were salesmen since they could not make sales directly to the patients, they promoted the products to doctors, as the industry purchaser, and they were paid commission.

4. Campbell v. PricewaterhouseCoopers, LLP, 642 F.3d 820 (9th Cir. 2011)

Unlicensed junior accountants filed a class suit against appellant accounting firm seeking unpaid mandatory overtime under state law. The accountants helped perform audits for the firm's clients. The parties sharply disagreed about the nature of this work. The accountants claimed that their work was predominately routinized and menial, and that compliance with strict instructions, comprehensive computer auditing software, and an extensive work-review system precluded them from exercising any significant degree of discretionary judgment or analytical thinking. The firm countered that the accountants performed analytical work integral to its client services.

The Court of Appeals held that the firm had viable defenses under both exemptions, neither of which was inapplicable to unlicensed accountants as a matter of law. The court further found that the firm established material fact questions as to whether the accountants fell under either exemption, which required resolution by a jury.

5. Soderstedt v. CBIZ, 197 Cal.App.4th 133 (2011)

The employer was an accounting and financial services firm with offices in multiple cities. The employees were entry-level accountants, not yet licensed, who worked as accounting associates under the supervision of certified public accountants. The court held that substantial evidence supported the trial court's finding that common questions did not predominate because individualized inquiries would be necessary to determine application of the administrative exemption authorized by Lab. Code § 515(a), and Cal. Code Regs., tit. 8, § 11040(1A))(. The employees had different job responsibilities and exercised varying levels of discretion and independent judgment. The control and supervision requirement in Bus. & Prof. Code § 5053, was not inconsistent with

the administrative exemption. Moreover, the employees failed to proffer evidence of numerosity and could not rely on the employer's pleadings to satisfy their evidentiary burden. The class representatives' declarations did not establish their willingness to act as fiduciaries. A class action was not superior in light of evidence demonstrating that no substantial benefit would be conferred.

6. Solis v. Washington, 2011 WL 3966117 (9th Cir. 2011)

The Secretary of Labor sued the State of Washington, Department of Social and Health Services (DSHS), alleging that DSHS had failed to pay overtime compensation to certain social workers in violation of the FLSA. The United States District Court for the Western District of Washington granted summary judgment in favor of DSHS, and the Secretary appealed. The Court of Appeals held that the social worker positions at issue did not qualify under the FLSA's "learned professional" exemption, as they required only a degree in one of several diverse academic disciplines or sufficient coursework in any of those disciplines; an educational requirement that could be satisfied by degrees in fields as diverse as anthropology, education, criminal justice, and gerontology did not call for the requisite course of "specialized" intellectual instruction, and moreover, the net was cast even wider by the acceptance of applicants with other degrees as long as they had sufficient coursework in any of those fields.

7. Zelasko-Barrett v. Brayton-Purcell, LLP, 198 Cal.App.4th 582 (2011)

Law school graduates who have not yet passed the bar exam fall within the professional exemption even though they are not yet "licensed or certified by the State of California." Wage order 4-2011 is written in the disjunctive (requiring licensure or being primarily engaged in an occupation commonly recognized as learned or artistic).

D. PAGA

1. Brown v. Ralph's, 197 Cal.App.4th 489 (2011)

An arbitration provision in the employment agreement contained a class action waiver and a PAGA representative action waiver. The trial court ruled that both waivers were unenforceable. The Court of Appeal held that the trial court erred in invalidating the class action waiver because the employee did not meet her evidentiary burden to show obstacles to the vindication of class members' rights to overtime pay through individual arbitration.

The court further concluded that United States Supreme Court authority regarding preemption by the Federal Arbitration Act (FAA), 9 § 1U.S.C., did not invalidate California case law finding PAGA representative action waivers unenforceable. Because a PAGA action brought under Lab. Code § 2699, to recover civil penalties was fundamentally a law enforcement action designed to protect the public and not to benefit private parties, it did not frustrate the purposes of the

FAA, which governed private arbitrations. Thus, the PAGA waiver was properly found unenforceable for public policy reasons in accordance with Civ. Code § 3513. Further proceedings were necessary as to whether the PAGA waiver might be severable under Civ. Code § 1670.5(a).

2. Home Depot v. Superior Court, 191 Cal.App.4th 210 (2011)

Real parties in interest, employees of a retail chain store, sought civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA), Lab. Code § 2698, based on petitioner employer's alleged failure to provide seating to its employees, as required by California law.

The court of appeal held that the default remedy stated in Lab. Code § 2699(f), encompassed violations of Lab. Code § 1198, based on the seating requirement in Wage Order 7-2001, Cal. Code 8, § 11070., tit. Regs. Therefore, the employees stated a claim under PAGA by alleging that the employer had not provided seating for its employees, even though there was ample space behind each counter/cashier to allow for a stool or seat. The seating requirement of Wage Order No. 7-2001, though framed as an affirmative standard of reasonable conduct, clearly prohibited employers from failing to provide suitable seating to employees under the conditions specified in the wage order.

The court also held that the default remedy penalties of § 2, viewed as supplements to the penalties under § 20(A) of Wage Order 7-2001 were not excessive or improper under due process principles, given that § 26, permitted the court to award a lesser amount to avoid an unjust, arbitrary and oppressive, or confiscatory result.

3. Sample v. Big Lots Stores, Inc., 2010 WL 4939992 (N.D. Cal. 2010)

The salient issue presented is whether a representative enforcement action under PAGA is a "class action" subject to removal under CAFA. The answer is no. This case involves the opposite situation where an individual litigant is stepping into the role of the state attorney general *on behalf of the State*, to recover civil penalties for the State. See Cal. Lab. Code § 2699()i. "[PAGA's] civil penalties are not meant to compensate unnamed employees because the action is fundamentally a law enforcement action."

4. Villacres v. ABM Industries, Inc., 189 Cal.App.4th 562 (2010)

A prior wage and hour action seeking statutory penalties resulted in a settlement. The terms of a general release in the settlement agreement provided that class members waived all claims for alleged violations that could have been raised. The employee, who was a member of the prior class, brought suit against the same employer seeking civil penalties under PAGA as provided in Lab. Code §§ , 2699.3(a), 2699.5.

The court stated that res judicata barred not only issues that were raised in the prior suit but related issues that could have been raised. The employee could have sought to expand the scope of the prior action to include his additional penalty claims or could have opted out of the class. His PAGA claims were within the scope of the prior litigation and were related to the subject matter and issues in that action, which consisted of the payment of wages and penalties by the same employer. Consequently, his PAGA claims could have been raised in the prior action for purposes of res judicata. The general release was broad and had to be given a comprehensive scope. Privity existed because the employee was a member of the prior class.

E. Miscellaneous Wage and Hour

1. Alcazar v. Catholic Archbishop, 627 F.3d 1288 (9th Cir. 2010)

Plaintiff entered the seminary to become a Catholic priest and, as part of his preparation for ordination into the priesthood, the church required him to engage in a ministerial placement outside their diocese. For his ministerial placement, the employee was placed in a parish, where he was hired to do maintenance of the church and also assisted with Mass. The employee challenged the sufficiency of his wages. The appellate court determined that the ministerial exception under the First Amendment applied to the employee's claims because he was a "minister" for purposes of the ministerial exception since he affirmatively alleged that he was a seminarian and sought to challenge the church's wage payments concerning his work as a seminarian. The ministerial exception applied notwithstanding the assignment of some secular responsibilities. The appellate court did not need to adopt a general test for determining whether a person is a "minister" because, on the facts as alleged, the employee was a minister under any reasonable interpretation of the exception.

2. Arechiga v. Dolores Press, Inc., 192 Cal.App.4th 567 (2011)

Under explicit mutual wage agreement doctrine, an employer and an employee may agree to a guaranteed fixed salary that includes overtime.

3. Capaz v. Toll Bros., Inc., 197 Cal.App.4th 1172 (2011)

The minimum wage, not the prevailing wage for a particular trade, was the basis for determining contract price sufficiency under Labor Code § 2810(a) . Payment of more than the minimum wage did not, however, conclusively establish lack of knowledge under § 2810()(1)i, (2) , that the contract was insufficient. Because there was evidence of other wage and hour violations that had the effect of reducing the effective wages of employees, the builder was not entitled to summary adjudication as to two contracts. Section 2810 did not require proof of a causal connection between the contract insufficiency and the wage and hour violations.

4. Futrell v. Payday, Inc., 190 Cal.App.4th 1419 (2011)

In employees' class action alleging federal and California labor law violations, the trial court granted summary adjudication, finding that a payroll company was not an employer, and thereafter entered judgment in favor of the payroll company. The employees provided traffic and crowd control services to a company that produced television commercials. The production company contracted with the payroll company to provide payroll services. The payroll company's form contracts described it as an employer

The Court of Appeal affirmed the judgment. The court held that various payroll documents and the word "employer" in a contract for payroll services could not, as a matter of law, establish that an employer-employee relationship existed between the payroll company and the employees either for purposes of Lab. Code §§ 203, 226, 510, 1194, or within the meaning of 29 §§ 206U.S.C., 207 of the Fair Labor Standards Act of 1938 (29 § 201 et seq.U.S.C.). The payroll company was not an employer as contemplated by Cal. Code ., tit. 8, § 11120Regs, because it did not exercise control over wages, hours, or working conditions, did not cause the employees to work, and did not enter into a common law employment relationship.

Under federal law, the payroll company was not an employer because it did not control hiring, firing, and day-to-day supervision. A commonsense understanding of who employed the worker—for purposes of compelling the payment of allegedly unpaid wages—had to prevail, and that employer was the production company.

5. Gordon v. City of Oakland, 677 F.3d 1092 (9th Cir. 2010)

Collective bargaining agreements and city policy provided that police officers who voluntarily separated from the city's employment prior to completing five years of service had to repay a pro rata share of their police academy training costs. The officer resigned before completing her second year of service. The officer received a final paycheck reflecting her regular hourly pay. The city notified the officer that the city was entitled to recover 80% of her training costs. The city withheld paychecks for accrued unused vacation and compensatory time off and made a reimbursement demand. The appellate court determined that the training reimbursement agreement did not cause the officer to receive less than the federal minimum wage during her final workweek and did not violate the FLSA because (1) the city issued her a paycheck exceeding the minimum wage amount, (2) she did not allege she was paid below the federal minimum wage for any given week, and (3) the $ 5,268.03 payment she made to the city was repayment of a voluntarily accepted loan, not a kick-back under 29 C.F.R § 531.35.

6. Heritage Residential Care, Inc. v. DLSE, 192 Cal.App.4th 75 (2011)

Employer that issued 1099s to employees who lacked social security numbers instead of itemized wage statements did not inadvertently fail to comply with Labor Code 226. Inadvertent means "unintentional, accidental or not deliberate."

7. Paton v. Advanced Micro Devices, Inc., 97 Cal.App. 4th 1505 (2011)

The court applied four factors in evaluating whether a sabbatical is really a vacation. The ultimate fact is whether the defendant's purpose in establishing its sabbatical policy, i.e. whether it was intended as additional vacation for longer term employees.

8. Pineda v. Bank of America, 50 Cal.4th 1389 (2010)

Labor Code section 203(b) contains a single, three-year limitations period governing all actions for § 2 penalties irrespective of whether an employee's claim for penalties was accompanied by a claim for unpaid final wages. Section 203 penalties are not recoverable as restitution under the UCL because employees had no ownership interest in the funds.

9. Plancich v. UPS, 129 Cal.Rptr.3d 484 (2011)

Labor Code section 1194 gives a prevailing employee the right to recover attorney's fees and costs. It does not provide an exception to the general rule permitting an employer, as a prevailing party, to recover costs under Code of Civil Procedure section 1032(b).

10. Seymore v. Metson Marine, Inc., 194 Cal.App.4th 361(2011)

When employed by the employer, plaintiff employees worked consecutive 14-day "hitches" on the employer's ships providing emergency cleanup of oil spills and other environmentally hazardous discharges off the California coast. The Court of Appeal held that it was not permissible for the employer to artificially designate the workweek in such a way as to circumvent the statutory requirement to pay overtime rates for the seventh consecutive day worked in a workweek. The court concluded that the restrictions placed on the employees during their on-call hours, including the requirement that they sleep aboard the ships and remain within no more than 45 minutes of the ship at all times, subjected the employees to the employer's control for the full 14-day hitch, so that the on-call hours constitute time worked. However, the court did not agree that the employees were entitled to compensation for 24 hours a day. California law authorizes employers to enter into an agreement with their 24-hour employees to exclude from compensation eight hours of sleep time in each 24-hour period, and the undisputed evidence established that the employees and the employer had such an

understanding. Accordingly, the employees were entitled to compensation for an additional four, but not 12, hours in each 24-hour period.

11. Securitas Security Services v. Superior Court, 197 Cal.App.4th 115 (2011)

Plaintiff employees, who worked as security guards or field supervisors, sometimes worked night shifts that began on one calendar day and ended on the next, and they sometimes had another overnight shift on the next night. The employer had established the workday as beginning at midnight and ending the following midnight. The court held that employees who worked uninterrupted overnight shifts on consecutive days did not work a split shift as defined in Cal. Code ., tit. 8, § 11040 2(Q)Regs, and thus were not entitled to split-shift pay under § 11040 4(C).

A split shift occurred only when an employee's designated working hours were interrupted by one or more unpaid, nonworking periods established by the employer that were not bona fide rest or meal periods. When a single continuous shift happened to begin during one workday and end in another, there was no split shift. The employees' claim was not limited to consecutive overnight shifts, however, but also encompassed other instances in which they allegedly had worked split shifts. Absent evidence that the employees had not worked split shifts in other circumstances, the employer was not entitled to summary adjudication.

12. Sheppard v. North Orange County Occupational Program, 191 Cal.App.4th 289 (2010)

A part-time instructor with a regional occupational program sought compensation for unpaid preparation time, alleging that he was required to spend 20 minutes of unpaid time preparing for every hour he spent teaching. He asserted claims for violation of the minimum wage law, pursuant to Industrial Welfare Commission's wage order No. 4-2001 (Cal. Code ., tit. 8, § 11040Regs) and Lab. Code § 218, for breach of contract, and for quantum meruit.

The court of appeal held that, by its terms, the minimum wage provision in wage order No. 4-2001 applies to employees directly employed by the state or any political subdivision of the state. The Legislature has plenary authority over public school districts and was constitutionally authorized to vest in the Industrial Welfare Commission, through Lab. Code § 1173, the power to impose that provision. Thus, wage order No. 4-2001 applied to the instructor's employment with the program, which, as the creation of public school districts, was a political subdivision of the state. Lab. Code § 1, provided authority for bringing a private cause of action.

The court also held that the instructor had a contractual right to earned but unpaid wages, which was protected by the contract clause of the California Constitution

(Cal. Const., art. I, § 9). Thus, the breach of contract claim was not defeated by the instructor's status as a public employee.

13. Starbucks v. Price, 192 Cal.App.4th 1136 (2011)

After an absence, the employee was told that he was not scheduled to work for the rest of the week. The manager told him to come in for a meeting later that week, at which time he was terminated. He received two hours of reporting time pay for that meeting and was paid for all work prior to that date. The court held that the wage statement claim was properly dismissed because the employee did not allege injury under Labor Code § 226(e).

Because the complaint alleged that the employee was terminated on the same day he received his last paycheck, the trial court did not err in accepting that date and rejecting the employee's contention that he should have been paid his final paycheck when he was taken off the schedule. The minimum two-hour reporting time pay amount under Cal. Code ., tit. 8, § 11050 5(A)Regs, was the proper amount for an employee who was not scheduled to work but reported to work for a meeting, without the expectation of working a scheduled shift. Because the claims for unfair competition and civil penalties were derivative, the failure of the underlying causes of action meant that they could not be maintained.

14. Sullivan v. Oracle, 51 Cal.4th 1191 (2011)

At the request of the Ninth Circuit, the California Supreme Court addressed questions about the applicability of California law to plaintiff nonresident employees who worked both in California and in other states for defendant, a California-based employer.

The California Supreme Court held that the California Labor Code's overtime provisions apply to work performed in California by nonresidents, such that overtime pay would be required for work in excess of eight hours per day or in excess of 40 hours per week. The Court further held that the same claims can serve as predicates for claims under the UCL. However, claims for overtime compensation under the FLSA for work performed in other states cannot serve as predicates for UCL claims.