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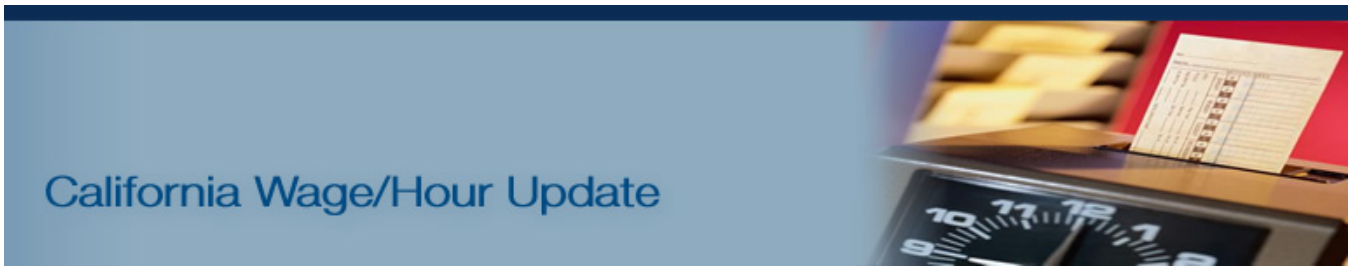

"Pay Stub" Rulings Continue

By Christina Kotowski and John Skousen

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Recent Decisions Carve Out The Distinctions Between Frivolous And Successful Claims

Earlier this year, a case reinforced yet again the need for employers to pay close attention to the specific requirements of the California Labor Code – this time, the itemized wage statement requirement in Labor Code section 226(a). *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement.*

Heritage Residential Care operated seven residential care facilities and had 24 employees. Of these, 16 lacked social security numbers. Heritage elected to treat those 16 workers as independent contractors, withheld no taxes, and reported their earnings on a 1099-MISC form at the end of the year. Those employees were not given itemized wage statements each pay period as required by Section 226(a), but the eight employees who had social security numbers were provided with itemized wage statements.

The Labor Code's Requirements – And Penalties

Labor Code section 226(a) requires employers to provide "an accurate itemized statement in writing" each pay period that includes nine categories of information specified by law. These categories include gross wages earned, total hours worked, deductions taken, net wages earned, all applicable hourly rates in effect and the hours worked at each rate, and the name and address of the legal entity that is the employer. Although it is recommended that these records be retained for four years, employers should retain these records for at least three years and must allow current and former employees to inspect them.

Under Section 226(e), employees can recover penalties if they suffer an "injury" as a result of an employer's "knowing and intentional" failure to comply with the statute. These are material elements of proof for recovering such damages. If this standard is satisfied, then an employee is

entitled to recover the greater of actual damages or $50 for the initial pay period when the violation occurs and $100 for each violation in a subsequent pay period, subject to a maximum aggregate penalty of $4,000 per employee, plus an award of attorneys' fees and costs. It is not sufficient to show merely that a pay statement was missing one of the nine categories of information required. Instead, the employee must suffer an "injury" from the missing information."

In addition to penalties under law, the Labor Commissioner can impose "civil penalties" of $250 per employee per violation (i.e., per pay period) for an initial citation and $1,000 per employee per violation for a subsequent citation. And an employee may also file an action to recover civil penalties under the Private Attorneys General Act. Under such an action penalties are divided between the Labor and Workforce Development Agency (75%), and the aggrieved employees (25%).

When assessing penalties, the Labor Commissioner must "take into consideration whether the violation was inadvertent" and has discretion to decide "not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake."

Employer's Arguments Rejected

In *Heritage Residential Care,* the Division of Labor Standards Enforcement (DLSE) imposed a civil penalty of $72,000 on the employer after finding 288 violations of Section 226(a) at $250 per violation in a workplace inspection.

Contesting this penalty at an administrative hearing, Heritage explained that it believed that it could not withhold federal taxes without a Social Security number, and so issued 1099s to those employees instead of W-2s and itemized wage statements. In fact, Section 226(a) requires itemized wage statements regardless of whether any taxes were withheld. Because no clerical error or inadvertent mistake was shown, the hearing officer declined to reduce or eliminate the $72,000 in penalties assessed against the employer.

This decision was upheld on appeal. The court determined that the employer's mistaken belief that it did not have to provide wage statements if it paid its workers pursuant to a form 1099 and did not deduct taxes was not an "inadvertent mistake" for purposes of assessing penalties under Section 226(e). Instead, the court held that the legal requirements of Section 226(a) were clear and settled, and the employer's mistake was no defense.

Frivolous Cases Will Be Dismissed

In a more recent case, the court rejected an employee's claim that he was "injured" for purposes of Section 226(e) because the regular and overtime hours were not totaled. The court reasoned that the plaintiff's "simple math is not based on any allegation that the information is inaccurate" and concluded that this is not the type of "mathematical injury that requires computations to analyze whether the wages paid in fact compensated him for all hours

worked." Id. at pg 7. The trial court dismissed, and the appeals court affirmed, the dismissal (or "demurrer") of the plaintiff's claim without a trial. *Price v. Starbucks Corp.*

Conclusion

The employer in *Heritage* learned an expensive lesson: California has specific requirements about the itemized wage statements that must be provided to employees each pay period. Section 226(a) is not only enforced by the DLSE, but has also been used as the basis for class-action claims by employees under the Labor Code Private Attorneys General Act.

How can you protect yourself? Make sure you know the legal requirements of Section 226(a) and be sure your payroll personnel are aware of them too. A sample itemized wage statement for an hourly-paid employee is available on the DLSE's website.

For more information contact the authors: ckotowski@laborlawyers.com, 415-490-9000 or jskousen@laborlawyers.com, 949-851-2424.