



LITIGATION TRENDS

NAVIGATING WAGE & HOUR ISSUES IN 2021

Presented by

Ryan H. Nell, Esq. & Shannon R. Finley, Esq.

PETTIT KOHN INGRASSIA LUTZ & DOLIN

PETTIT KOHN
PETTIT KOHN INGRASSIA LUTZ & DOLIN



Ryan H. Nell, Esq.
Shareholder

(858) 509-5690
rnell@pettitkohn.com

J.D., University of Illinois College of Law
B.A., University of Southern California

PETTIT KOHN

PETTIT KOHN INGRASSIA LUTZ & DOLIN

Ryan H. Nell is an employment attorney responsible for representing California employers statewide in both counseling and comprehensive litigation support. With the ever-changing landscape of California and federal employment law, Ryan prides himself on assisting clients in staying ahead of the curve in an effort to avoid legal trouble before it arises. He has extensive experience representing clients in harassment, retaliation, and discrimination matters, as well as large-scale wage and hour lawsuits.

Ryan speaks regularly on a wide range of topics aimed at assisting California employers in the avoidance of legal trouble before it arises, and his work in the field has led to his recognition as a Rising Star by *San Diego Super Lawyers*®. Mr. Nell was also included in the inaugural edition of *Best Lawyers: Ones to Watch* for his work in Labor and Employment Law – Management.



Shannon R. Finley, Esq.
Shareholder

(858) 509-5676
sfinley@pettitkohn.com

J.D., University of San Diego
School of Law

B.A., University of California, Los Angeles

PETTIT KOHN

PETTIT KOHN INGRASSIA LUTZ & DOLIN

Shannon R. Finley is a shareholder in the firm's San Diego office and focuses her practice on employment law, representing California employers in disputes ranging from single plaintiff wrongful termination cases to complex class actions, and everything in between. In addition to defending employers in litigation, Ms. Finley provides guidance to employers, advising on best practices to avoid lawsuits before they arise.

Ms. Finley is a speaker and author on issues including best hiring practices, wage and hour law, discrimination, leaves of absence, and social media. She was recognized as a Rising Star by *San Diego Super Lawyers* and received the C. Hugh Friedman New Lawyer Award from Lawyers Club for her leadership and professionalism in the San Diego Legal Community. Ms. Finley was also included in the inaugural edition of *Best Lawyers: Ones to Watch* for her work in Litigation – Labor & Employment and was honored as one of the 2020 Leaders in Law and 2021 Women of Influence in Law by the *San Diego Business Journal*.

Class Action and PAGA

Class Action 101

Class Action Litigation: A representative action wherein one or more employees (“Class Representatives”) seek to represent the interests of similarly situated employees.

- Class action employment claims generally seek recovery of damages and statutory penalties
 - Requirements to certify a class in federal court are:
 - Numerosity
 - Commonality
 - Typicality
 - Adequacy of representation
- (FRCP 23(a))

Class Action 101

California law requires both an “ascertainable class and a well-defined community of interest among class members.” (*Gattuso v. Hart-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 575.)

“Community of interest” is defined as:

- Predominant common questions of law or fact;
- A class representative with claims or defenses typical of the class; and
- A class representative who can adequately represent the class.

Court approval of all proposed settlements is required.

PAGA 101

The California Private Attorneys General Act of 2004 (Labor Code section 2699.3, et seq.)

- Permits an aggrieved employee to pursue recovery of civil penalties on behalf of the State of California.
- 75% of recovered penalties are remitted to the State; the remaining 25% is to be distributed to the aggrieved employees.
- No class certification is required.
- Court approval of proposed settlements is required.

Class Action and PAGA Claims at a Glance

	FLSA Class	California Class Claims	California PAGA Claims
Typical Scope of Claims	<ul style="list-style-type: none"> ❖ Minimum and overtime wages 	<ul style="list-style-type: none"> ❖ Minimum and overtime wages ❖ Meal Breaks ❖ Rest Breaks ❖ Expense Reimbursement ❖ Final pay ❖ Paystub violations 	<ul style="list-style-type: none"> ❖ Minimum and overtime wages ❖ Meal Breaks ❖ Rest Breaks ❖ Expense Reimbursement ❖ Final pay ❖ Paystub violations
Statute of Limitations	2 or 3 years	4 years	1 year
Class/Participant Inclusion Process	Opt-in	Opt-out	None
Primary Potential Recovery Sought/Available	<ul style="list-style-type: none"> ❖ Actual Damages ❖ Liquidated Damages ❖ Attorneys' Fees 	<ul style="list-style-type: none"> ❖ Actual Damages ❖ Liquidated Damages ❖ Statutory Penalties ❖ Attorneys' Fees 	<ul style="list-style-type: none"> ❖ Civil Penalties ❖ Attorneys' Fees
Personal Liability?	<ul style="list-style-type: none"> ❖ If inadequate adherence to corporate formalities ❖ Potentially 	<ul style="list-style-type: none"> ❖ If inadequate adherence to corporate formalities ❖ Any person who "causes" the violation to occur 	<ul style="list-style-type: none"> ❖ If inadequate adherence to corporate formalities ❖ Any person who "causes" the violation to occur

Arbitration Agreements

Arbitration Agreements – State of the State



Gerald Lange v. Monster Energy Company

- California Appellate Court, Second Appellate District
- Plaintiff signed an employment agreement that contained an arbitration agreement that required Plaintiff to waive punitive damages as a remedy for all nonstatutory claims and reserved Monster's right to litigate its claims of trade secret misappropriation against Plaintiff.
- The trial court denied the employer's motion to compel the case to arbitration because the agreement was "permeated with unconscionability."
- Appellate court held that the trial court needed to analyze each term to see if severance was possible and/or appropriate in the context of the entire contract and circumstances of contract formation.

Garner v. Inter-State Oil Co

- California Court of Appeal, Third Appellate District
- The employee agreed that the arbitration agreement precluded him from filing a class action *in court* but argued that it contained an express agreement to pursue a class action in arbitration. Inter-State Oil Co. (“Inter-State”) argued that the arbitration agreement contained a waiver of class action claims in any forum.
- The Court of Appeal held against Inter-State by finding that the arbitration agreement contained an express agreement to arbitrate class action claims.
- Clause in Dispute: “To resolve employment disputes in an efficient and cost-effective manner, [the employee] and Inter-State Oil Co. agree that any and all claims arising out of or related to [the employee’s] employment that could be filed in a court of law, including but not limited to, claims of unlawful harassment or discrimination, wrongful demotion, defamation, wrongful discharge, breach of contract, invasion of privacy, or class action shall be submitted to final and binding arbitration, and not to any other forum. This Arbitration Agreement is a waiver of all rights to a civil jury trial or participation in a civil class action lawsuit for claims arising out of your employment.”

Collie v. The ICEE Company, et al.

- California Appellate Court, Fourth Appellate District
- Employee Taraun Collie was an employee of the Icee Company. Collie signed an arbitration agreement at the start of his employment with Icee in November 2014. Collie and Icee agreed that any claims brought by either party against the other would be subject to mandatory arbitration.
- In July 2016, Collie filed a PAGA lawsuit on behalf of himself and other aggrieved employees against the Icee Company.
- Icee Company filed a motion to compel the case to mandatory arbitration, which was denied.
- The appellate court held that PAGA claims cannot be compelled to arbitration. The state, which was the real party in interest, was not bound by Plaintiff's predispute agreement to arbitrate. Plaintiff signed the arbitration agreement when he began his employment and before his PAGA claim arose. He executed the agreement in his individual capacity.

Thomas Jarboe v. Hanlees Auto Group, et al.

- California Appellate Court, First Appellate District
- Plaintiff Thomas Jarboe was hired by one of twelve automobile dealerships that comprise Defendant Hanlees Auto Group in Northern California. During his onboarding process, he signed an employment application and an employment agreement which contained arbitration provisions.
- Following the termination of his employment, Plaintiff brought a wage and hour class action lawsuit (which included a PAGA claim) against Hanlees, its twelve dealerships, and three individual owners of Hanlees (collectively, “Defendants”).
- Defendants moved to stay the entire action and compel arbitration based on the arbitration clauses in Plaintiff’s initial employment application and agreement. But the trial court only granted the motion as to claims against the hiring dealership. The other Defendants appealed, arguing the arbitration agreement should extend to them because they were third party beneficiaries to Plaintiff’s employment agreement.
- The appellate court concurrently determined that a trial court has broad discretion to deny a request to stay a PAGA claim pending the arbitration of any individual claims. The court emphasized that a PAGA claim is brought on behalf of the state, which was not a signatory to the arbitration agreement.

Fleming Distribution Company v. Younan

- California Appellate Court, First Appellate District
- Employee Alfonus Younan filed a claim before the Labor Commissioner for unpaid commissions.
- Employer Fleming notified the Labor Commissioner that Younan had signed an arbitration agreement but proceeded through the entire administrative process without seeking to compel arbitration and appeared at the Labor Commissioner's hearing (the administrative "trial" of Younan's claim), examined witnesses, introduced evidence, and awaited a ruling. Only after the Labor Commissioner ruled against the company did Fleming file a motion to compel arbitration.
- The trial court denied Fleming's motion, reasoning that the company had waived its right to compel arbitration, and the appellate court agreed.

Types of Claims

Unpaid Wages/Overtime

- Employees must be compensated for all hours worked.
- Any work performed by an employee in excess of eight hours in one day, or in excess of 40 hours in any workweek, must be compensated at a rate of no less than one and one-half times the regular rate of pay for an employee. (Lab. Code, § 510(a); Wage Order No. 4-2001, § 3.)

Unpaid Meal and Rest Periods

- An employee who works more than five hours per day is entitled to receive a timely, uninterrupted meal period of at least 30 minutes. (Lab. Code, § 512(a); Wage Order No. 4-2001, § 11.)
- If an employer fails to provide an employee the opportunity to take a timely, uninterrupted meal period of at least 30 minutes, the employer must pay the employee one additional hour of pay at the employee's base hourly rate of compensation for each workday that a meal period is not provided. (Lab. Code, § 226.7(c).)
- Employers must authorize and permit all employees to take rest periods, during which the employer must not require the employee to work. (Lab. Code, § 226.7; Wage Order No. 4-2001, § 12.) The authorized rest period must be based on the total hours worked daily, at the rate of ten minutes net rest time for every four hours worked or major fraction thereof. (Wage Order No. 4-2001, § 12.)

Unpaid Meal and Rest Periods

- Similar to meal breaks, if an employer fails to provide an employee the opportunity for a rest period, the employer must pay the employee one hour of pay at the employee's base hourly rate of compensation for each workday that the rest period was not provided. (Id.) Unlike meal periods, employees are not required to record their rest periods. (Wage Order No. 4-2001, § 7.)
- Although employers must authorize meal breaks and rest breaks, employers are not required to police meal breaks. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1005.)
- If an employer's records do not show a meal period for a given shift over five hours, however, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided. (Id. at 1053.)

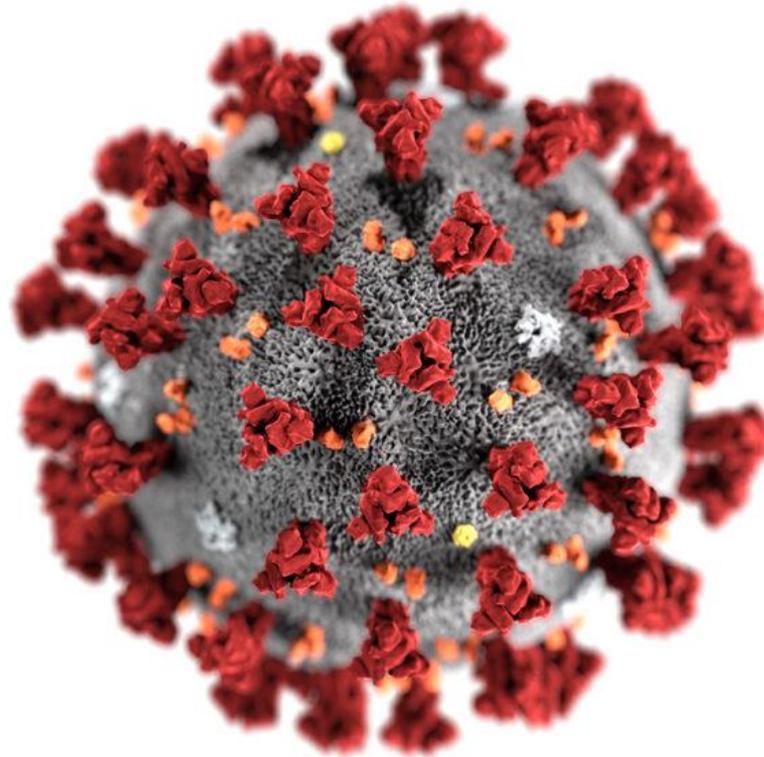
Improper Wage Statements

- Pursuant to Cal. Labor Code section 226(a), all paystubs must include the following:
 - (1) gross wages earned, (2) total hours worked, (3) the number of piece-rate units earned and any applicable piece rate, (4) all deductions, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.
- If an employer knowingly and intentionally fails to provide accurate wage statements, employees may recover a \$50 penalty for the initial violative pay period, and \$100 for each subsequent violative pay period, not to exceed \$4,000. (Lab. Code, § 226(e)(1).)

Waiting Time Penalties

- If an employee is involuntarily discharged, employers must pay all due and unpaid wages immediately. (Lab. Code, § 201.)
- If an employer willfully fails to pay wages due to an employee who quits or was discharged, the employee's wages continue as a penalty until paid, for up to 30 days. (Lab. Code, § 203.)

COVID-19 Related Claims



Wage and Hour Trends

If I had a crystal ball...



Challenges for Remote and/or Hybrid Workers

- Difficulty in tracking hours accurately
 - Off the clock work
- Employees failing to take timely breaks
 - Meal & rest breaks
- Employees purchasing work supplies
 - Internet use, phone use, printing, paper, ink, postage, pens, etc.



Solutions for Remote and/or Hybrid Workers

- Difficulty in tracking hours accurately
 - Remote Working Agreements
 - Time Keeping Training
 - Time Attestations
 - Regular Reminders
- Employees purchasing work supplies
 - Policies and procedures for reimbursements
 - Remote Work Reimbursement

Potential Wage Statement Issues

- Time Worked for Health Screenings
- Reporting Time Pay
- Travel Time
- Sick Pay
- Regular Rate of Pay
 - COVID-19 Hazard Pay
 - Recruitment Bonus
 - Vaccination Bonus



Misclassification: Independent Contractors

- Independent Contractors
 - Are your independent contractors properly classified?
 - Audit all independent contractor relationships to confirm that you are paying them properly



Misclassification: Exempt Employees



- Exempt employees who may no longer meet exemption requirements
 - Communicate about changes in job responsibilities and staffing
 - Trust but verify

PAGA Actions for Cal/OSHA Violations

- Employees are now pursuing PAGA claims on behalf of themselves and other allegedly “aggrieved employees” for alleged workplace safety violations.
- Potential civil PAGA penalties from violations of the California COVID-19 Emergency Temporary Standards can be significant.

Questions?



Ryan H. Nell, Esq.
Shareholder
(858) 509-5690
rnell@pettitkohn.com



Shannon R. Finley, Esq.
Shareholder
(858) 509-5676
sfinley@pettitkohn.com