

A New Battlefield

OVER THE PAST DECADE, CALIFORNIA EMPLOYERS HAVE battled wage and hour class actions on multiple fronts. Most disputes come under the California Labor Code, which covers claims for unpaid wages and overtime, meal-and-rest-period violations, inaccurate pay stubs, and

a host of related issues. The ground seems to be shifting, though. Private plaintiffs are now seeking classwide penalties against their employer by looking beyond the Labor Code and instead tethering their claims to California's Industrial Wage Orders. In two cases in 2010, the court of appeal allowed plaintiffs to bring claims rooted

in Wage Order 7-2001 (8 Cal. Code Admin. Regs. § 11070), which requires certain employers to provide "suitable seats" to employees "when the nature of the work reasonably permits the use of seats." (*Bright v. 99¢ Only Stores*, 189 Cal. App. 4th 1472 (2010); *Home Depot U.S.A. Inc. v. Superior Court*, 191 Cal. App. 4th 210 (2010).) Since then, simi-

lar cases have starting working their way up to the appellate courts.

WAGE ORDERS AS WEAPONS

"Suitable seating" requirements are just the beginning. California's wage orders are loaded with a number of other provisions that employers can now expect to be cited in private wage and hour actions. For example, Wage Order 7-2001 (cited above) speaks to the availability of hot food and beverages on late-night shifts; "reasonable privacy and comfort" for employees who must change clothing; suitable workplace temperatures; and resting facilities.

In the wake of *Bright* and *Home Depot*, a misstep under any one of these requirements could give rise to classwide penalties, attorneys fees, and

costs. And the potential exposure is huge—up to \$200 for each aggrieved employee *in each pay period*. (Cal. Lab. Code § 2699(f)(2).)

KNOW THE REGULATIONS

So what should employers do?

First, it's more important than ever for businesses to know which wage order governs their operations. This is not always as straightforward as it may seem. In fact, courts have provided little guidance on this issue, primarily because past wage claims have most often been rooted in the Labor Code itself. But because plaintiffs can invoke a number of unique wage order provisions, the differences between one wage order and the next will take on added significance. Consequently, employers can expect to see more litigation over the next few years on the question of which wage order applies to their operations.

For example, note that Wage Order 1-2001 (8 Cal. Code Admin. Regs.

§ 11010) applies to the manufacturing industry, while Wage Order No. 5-2001 (8 Cal. Code Admin. Regs. § 11050) pertains to restaurants and bars. (All of California's wage orders are available online at www.dir.ca.gov/iwc/wageorderindustries.htm.)

Second, employers should carefully review the intricacies of the applicable wage order to identify any provisions unique to California that may pertain to their in-state workforce. Again, because many wage order provisions have yet to be litigated by private parties and analyzed definitively in appellate opinions, there is scant judicial guidance to lead the way. Going forward, however, defense lawyers can expect plaintiffs attorneys to seize on any ambiguities within these wage orders, and to litigate some of the lesser-known provisions within the wage orders.

APPROPRIATE DEFENSES

Finally, employers who find themselves defending against a lawsuit like *Bright* or

Home Depot will need to ensure that they are asserting the appropriate defenses. Among the possible considerations: Is the case suitable for class action treatment? Are the plaintiffs actually "aggrieved" by the alleged violation? Do the penalties sought constitute excessive fines or otherwise violate due process? Should the court exercise discretion to reduce the amount of penalties sought to bring them in proportion to the alleged harm? And ultimately, does the Labor Code's Private Attorney General statute (Cal. Lab. Code §§ 2698–2699.5) constitute an unlawful delegation of executive and/or legislative power?

In short, to prepare for the wage order court battles ahead, employers should take stock, anticipate, and adapt accordingly. As George Washington noted long ago: "To be prepared for war is one of the most effectual means of preserving peace." 🗣️

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