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Getting to Know Your Wage Order

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In the Golden State, most private employers must grapple with no fewer than six major sources of wage and hour laws when one considers statutory, regulatory, and case law in both the state and federal systems. The state Industrial Welfare Commission Wage Orders are part of this web of wage and hour laws and rules.

When managers are asked “what is your wage order,” blank stares and silence are potentially deadly for the bottom line. The wage orders contain both well known and obscure provisions that employers in California must heed to avoid significant liability. As retailers 99 Cent Only Stores and Home Depot recently learned the hard way, the wage orders provide potential plaintiffs with significant bases to assert class action claims for penalties.

California Wage Orders 101

The California Constitution, Article 14, Section 1, gives our state legislature the power to “provide for minimum wages and for the general welfare of employees.” The constitution also authorizes a commission to provide for both minimum wages and “general welfare” of employees. The legislature created the Industrial Welfare Commission (IWC) to carry out that mission.

The IWC, which the legislature defunded several years ago, issued 17 separate “wage orders” for a variety of industries and occupations. The courts have said the wage orders are due the same deference as statutes, unless there are statutes that override or conflict with them.

With few exceptions, every employer in the state must comply with one or more of the wage orders. Industry orders typically cover all employees within the business operating in a covered industry. Occupation orders apply to employees based on job type. Businesses not covered by an industry order may have to comply with multiple occupation orders. The wage orders contain a number of common provisions, but also differ in several respects. Therefore it is important to know what wage order applies to a given business or occupation.

Each covered employer must post the applicable wage order(s) in an area that is easily accessible to employees during their workday. Fortunately, service providers have developed those collages of workplace notices and posters.

Posting the wage order is important, but reading it is critical. The wage orders contain mandatory provisions governing overtime, the exemptions from minimum wage and overtime law, and a variety of provisions regarding other wage-related conditions, including reporting time pay, meal and rest periods, alternative workweek election procedures, and more.

The wage orders also cover issues beyond wages themselves. For example, wage orders address employee responsibility for employee-caused “cash shortages” and equipment breakage, as well as employer-provided meals and lodging.

Wage orders also mandate non-wage-related “working conditions.” These include matters such as the

temperature in the workplace, adequate changing facilities, break areas, elevator or escalator access, and even a requirement of “suitable seating” when the nature of the work permits it. Depending on whether the workplace is an office or another setting, compliance with the wage orders’ working conditions standards can be challenging. Additionally, multi-state employers may find they have to design or operate facilities in California different from other states.

There is nothing new about the wage orders or their working conditions mandates. However, the Court of Appeal’s decisions in Bright v. 99 Cent Only Stores and Home Depot U.S.A., Inc. v. Superior Court may focus employers’ attention on these provisions.

Bright, Home Depot and the Growing Significance of Wage Orders

The responsibility for enforcing the minimum wage standards in the Labor Code and the wage orders traditionally befell upon the state Labor Commissioner, head of the Division of Labor Standards Enforcement (DLSE). That is because only the DLSE could issue citations for the penalties contained in the Labor Code and wage orders.

Private enforcement of the Labor Code and wage orders became more common once the legislature passed the Private Attorneys General Act of 2004 (PAGA). This statute created private rights of action to collect penalties under the Labor Code, and imposed a new “catch all” penalty for violation of statutes that did not already provide for penalties. PAGA

provides for penalties of at least \$100 to \$200 for each employee and for each pay period that a violation continues. PAGA provides for the recovery of attorney's fees for prevailing plaintiffs, but does not award attorney's fees to prevailing employers. Recovered penalties must be split between the successful plaintiff and the state.

The Court of Appeal's recent decision in Bright v. 99 Cent Only Stores is significant for two reasons. First, it concerns "suitable seating," which is a requirement imposed only in the wage orders. Second, the opinion recognized that PAGA actions are available to enforce violation of wage order provisions.

Eugenia Bright worked for 99 Cents Only Stores as a cashier. 99 Cents Only Stores did not provide her with a seat at her register. She brought a class action on behalf of herself and her co-worker. She alleged section 14 of Wage Order 7-2001 required the company to provide her and other cashiers with a seat given the nature of their work.

Bright filed her claim for violation of the wage order under PAGA. The express provisions of PAGA apply to alleged violations of the Labor Code, not the wage orders. But the court reasoned that Labor Code section 1198 prohibits violations of the wage orders. That provision states: "The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the

order or under conditions of labor prohibited by the order is unlawful."

The employer argued that the seating requirement was not a "condition of labor prohibited by the order" and, therefore, was not covered by Section 1198. But the court of appeal rejected this argument, reasoning that Section 1198's language included affirmative requirements as well as outright prohibitions in the wage orders. Therefore, the court held, a PAGA claim alleging violation of a wage order could be predicated on Section 1198.

A different court of appeal reached a similar conclusion in Home Depot USA, Inc. v. Superior Court (Harris), a decision issued soon after Bright. Home Depot also involved claims by retail workers that the employer failed to provide adequate seating. Following its sister court's decision in Bright, the court decided that the claims could proceed under PAGA.

The courts' decisions in Bright and Home Depot will make it easier for plaintiffs to assert violation of wage order provisions that are not contained in the Labor Code itself. It is not hard to predict that the opinion will generate more interest in litigating claims based on the "working conditions" requirements in the wage orders.

How to Win the New Wage Order War

Employers should take steps now to minimize the risk of litigation over alleged wage order violations. The first priority is to learn what wage order(s) apply.

Determining which order covers a given business or occupation can be tricky. Employers should consult with skilled wage hour lawyers to ensure compliance.

There are, however, several free resources available on-line. The wage orders themselves are available at <http://www.dir.ca.gov/iwc/wageorderindustries.htm>. Each wage order contains a section entitled "Applicability of Order," and other definitions. There is also a government publication, entitled "Which IWC Order? Classifications," available at <http://www.dir.ca.gov/dlse/WhichIWCOrderClassifications.pdf>. This pamphlet contains a list of job titles along with the wage order that likely applies.

The next step is to train managers that the wage orders govern certain working conditions. As discussed above, employers will find guidance regarding matters such as daily overtime, reporting time pay, and meal and rest period requirements, in addition to the minimum working conditions standards. Third, employers should take the time to ensure that policies and procedures are consistent with wage order mandates.

Employers that take the time to gain a better understanding of the wage orders and their requirements will help prevent costly lawsuits. As always, it also pays to consult experienced employment law counsel to address the gray areas and make appropriate recommendations.

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