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Recent Developments in Wage and Hour Class Action and FLSA Collective Litigation

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The Hospitality Law Conference
February 12, 2014

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Arthur Chinski is a Shareholder of Buchalter Nemer, A Professional Law Corporation. He has been active in the Firm's administration and at differing times has been Chair of Buchalter Nemer's Labor and Employment Practice Group, a Member of the Firm's Board of Directors and the Firm's Co-General Counsel for Labor and Employment legal issues. He represents private and public companies and management in all areas of employment relations and labor law in a broad spectrum of industries. He has appeared in federal and state courts and before governmental agencies throughout the United States.

He is currently Chair of the Firm's Restaurant, Food and Beverage, and Hospitality Practice and represents a number of national private and public restaurant chains and food and beverage related manufacturing and retail companies. His practice includes Wage and Hour Class Action defense litigation and litigating and giving advice in the prevention and/or the defense of discrimination, wrongful termination, wage and hour, OSHA, and harassment and retaliation claims, claims arising under the National Labor Relations Act, and other employment related claims and issues. He also represents businesses in collective bargaining and response to Union organizing drives.

Additionally, Mr. Chinski is an adjunct Professor of Law at Southwestern University School of Law, where he has taught Entertainment Industry Labor and Employment Law in the Law School's National Institute of Entertainment and Media Law. He represents a number of Entertainment Industry Taft-Hartley trust funds, and is a member of Los Angeles' Music Center Leadership Council.

Prior to joining the Firm, Mr. Chinski was an attorney with Region 21 of the National Labor Relations Board in Los Angeles.

Mr. Chinski has chaired or appeared at numerous labor and employment law programs designed for attorneys and management. These include programs for the California Continuing Education of the Bar, Beverly Hills Bar Association, Los Angeles County Bar Association, the University of California, the Human Resources Institute presented by the Institute of Business Law.

Representative Publications and Journals

- Co-Author, "Companies Beware When Using Models and Spokespeople in Advertisement Campaigns," Buchalter Nemer *Points & Authorities*, Summer 2013
- Contributing Author, "The Impact of Social Media & Employment Law for New Companies," Exec Sense E-Book, 2012-2013
- Author, "The Best Ways That CEO's can Minimize Risks When Terminating Employment," Exec Sense E-Book, July 2012
- "How the Affordable Care Act Impacts Employers," Buchalter Nemer *Client Alert*, July 6, 2012
- Co-author, "The Disabled Persons Act: The Rules Have Changed, But the Game Remains the Same," *Points & Authorities*, Spring 2011
- Co-author, "How 2010 Healthcare Legislation Impacts Employers," Buchalter Nemer *Client Alert*, April 2010

- Author, "Independent Contractors, Leased Workers, and Outsourcing," *Advising California Employers and Employees* (former title Advising California Employers), California Continuing Education Of the Bar, 1997-2013
- Contributing editor, "Developing Labor Law," *BNA*, (1st, 2nd and 3rd Ed)
- Contributing editor and author, "Discrimination in Employment-Discharges for Union Activity," *BNA*, (1st, 2nd and 3rd Ed)
- Co-editor, "Employment Regulations in California, A Survival Kit for California Employers," *Institute of Business Law*, Management Education Corporation
- Co-editor, "Employee Termination Issues Notebook," (preface), *Institute of Business Law*, Management Education Corporation
- Co-editor, "Drug and Alcohol Issues in the Workplace Notebook," (preface), *Institute of Business Law*, Management Education Corporation
- Co-editor, "Discrimination: Age, Race, Disability, Religion Notebook," (preface), *Institute of Business Law*, Management Education Corporation
- Co-editor, "Sexual Harassment and Other Sex Discrimination Notebook," (preface), *Institute of Business Law*, Management Education Corporation
- Author, "Tinseltown Follies," (Dual Roles-Identifying the "Employer" and "Employee" In the Entertainment Industry) *California Law Business*, July 9, 2001
- Author, "Medical Surveillance in the Workplace-Legal Issues," *Occupational Medicine*, 1990
- Co-author, "Guidelines for Healthcare Workers: AIDS-Legal Implications," *Administrative Radiology*, 1988
- Co-author, "AIDS in the Health Care Workplace: Legal Considerations and Current Development," *American Radiology*, 1987

Mr. Chinski is a member of Hospitality Lawyer, where he was featured as "Attorney of the Week, " and recognized as a 2013 Top Rated Lawyer in Labor & Employment by *American Lawyer Media* in conjunction with Martindale Hubble, and he appeared in *Fortune Magazine*. He is also a member of the Labor Relations and Employment Law Sections of the State Bar of California and the Los Angeles County Bar Association. Mr. Chinski is AV Preeminent-rated by Martindale Hubbell and was selected as a Southern California Super Lawyer in 2004 and 2006.

Mr. Chinski earned his J.D. from the University of California, Davis, where he was an Associate Editor of *The Law Review*. He earned his B.A. from the University of California, Los Angeles.

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I. SCOPE OF ARTICLE: RECENT DEVELOPMENTS IN WAGE AND HOUR CLASS ACTION AND FLSA COLLECTIVE LITIGATION

The threat of wage and hour litigation is real and on the rise. According to an October 13, 2013 report published by the U.S. Chamber Institute for Legal Reform, wage and hour claims currently outpace all other types of workplace litigation. In fact, between 2007 and 2012, employers paid approximately $2.7 billion to settle wage and hour class actions, $467 million of which was paid in 2012 alone. As reflected below, a majority of this litigation takes place in California and New York (of all money paid for wage and hour settlements, 40% is in New York and 38% is in California). However, wage and hour litigation is constantly evolving and several recent decisions signal a perceptible shift away from resolving wage and hour litigation through the class action device. In light of the changing legal landscape, summarized below, employers should review their employment policies and practices to ensure compliance with applicable law and consult with counsel to develop effective strategies to avoid wage and hour class and FLSA collective actions.

II. PROCEDURAL ISSUES

A. What Claims Are Susceptible To Class Action Treatment?

1. Arbitration Class Action Waivers

In 2010 and 2011, the United States Supreme Court issued two landmark decisions upholding the enforceability of class action waivers. First, in *Stolt-Nielsen, S.A. v. Animalfeed International Corp.*, 130 S.Ct. 1758 (2010), the Supreme Court held that "a party may not be compelled under the Federal Arbitration Act ("FAA") to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Noting that class action arbitration fundamentally changes the nature of the proceeding by adjudicating the rights of absent parties in high stakes disputes with limited judicial review, the Court found the differences between bilateral and class action arbitration too great for arbitrators to presume that the parties' mere silence of the issue of class-action arbitration constitutes consent to resolve their disputes in class action proceedings.

In *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746, 1753 (2011) the Supreme Court found that the FAA preempted a California rule that classified most collective action waivers in consumer contracts as unenforceable. In so holding, the Court noted that Section 2 of the FAA allows for invalidation of arbitration agreements by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or derive their meaning from the fact that an [arbitration] agreement is at issue. Based thereon, the Court determined that the California rule requiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

In *American Express Company v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013) the Court expanded on these rulings, holding that the FAA does not permit courts to

invalidate class action waivers, even when the individual incentive is too small to arbitrate a statutory claim. In so holding, the Court noted that a party is not entitled to class proceedings for the vindication of statutory rights. It further noted that the appropriate inquiry is not whether the costs of pursuing an individual action is prohibitively expensive, but rather the costs of arbitration are prohibitively expensive as compared to the costs of pursuing claim in court. *See also Sutherland v. Ernst & Young LLP*, 768 F.Supp.2d 547 (S.D.N.Y. 2013) (rejecting the argument that an employee should be allowed to invalidate a class action waiver because proceeding individually in arbitration would be prohibitively expensive and remove the financial incentive to pursue a claim).

Please note, however, that the Supreme Court precedent has not always been followed. For example, in *In re D.R. Horton, Inc*., 357 NLRB No. 184 (N.L.R.B. Jan. 3, 2012), the National Labor Relations Board ("NLRB") ruled that arbitration agreements barring employees from pursuing class or collective claims violates employee rights to act collectively under Section 7 of the National Labor Relations Act ("NLRA"). Nonethless, the Fifth Circuit recently rejected this rationale on appeal.

California courts have also split on whether to apply *Stolt-Nielsen* and *Concepcion* to state law claims arising under the Private Attorney General Act ("PAGA"), which authorizes an aggrieved employee to bring a representative action on behalf of himself or herself and other current or former employees to recover civil penalties. In *Brown v. Ralphs Grocery Co*., 197 Cal.App.4th 489 (2011), a California Court of Appeal found that *Concepcion* does not apply to PAGA actions based on the theory that a PAGA claim is necessarily a representative action intended to advance a predominately public purpose. According to the Court in *Brown*, "a private agreement purporting to waive the right to take representative action is unenforceable because it wholly precludes the exercise of an unwaivable statutory right." By contrast, the Court in *Iskanian v. CLS Transportation Los Angeles, LLC*, 206 Cal.App.4th 949 (2012) expressly disagreed with Brown and held that the FAA preempts any attempt by a court or state legislature to insulate a particular type of claim from arbitration. The *Brown* and *Iskanian* cases are currently pending review before the California Supreme Court.

Notwithstanding *Stolt-Nielsen*, employers should also beware of arbitration agreements that are silent as to class arbitration. In *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013), the United States Supreme Court upheld an arbitrator's decision to allow class-wide arbitration where the parties had delegated the interpretation of their arbitration agreement to the arbitrator and the agreement did not expressly preclude arbitration. But, the Court indicated that the outcome might have been different had the employer not conceded that the arbitrator had the authority to decide whether the contract authorized class arbitration.

2. Individualized Damages May Defeat Class Certification

Recent United States Supreme Court decisions have also raised questions about whether wage and hour claims are appropriate for class treatment. In 2011, the Supreme Court overturned class certification of a gender discrimination class action on the grounds that: (1)

there was no discriminatory company-wide policy; and (2) the necessity of individualized monetary damages made class certification inappropriate. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011). Likewise, in *Comcast v. Behrend*, 133 S.Ct. 24 (2012), the Supreme Court reversed certification in a consumer anti-trust case where "[q]uestions of individual damage calculations [would] inevitably overwhelm questions common to the class." In so holding, the Court noted that damages must be "capable of measurement on a classwide basis" for class issues to predominate in order to make class treatment appropriate under Federal Rule of Civil Procedure 23(b)(3).

Employers have attempted to apply the holdings of these cases to wage and hour matters with varying degrees of success. Some courts take the position that *Dukes* and *Comcast* preclude class certification where damages must be individually calculated. For example, in *Wang v. The Hearst Corp*. (S.D.N.Y. 2013), a Second Circuit District Court denied certification of a putative class of unpaid interns alleging that they should have been classified as employees. While the Court agreed that Hearst had a centralized policy of classifying all interns as unpaid, non-employees, the Court held that certification was inappropriate because the liability question turned on what the interns did and what benefits they received during their internship. Applying *Dukes*, the Court distinguished this case from other Second Circuit misclassification cases noting that in certified misclassification cases the plaintiffs were able to show a company-wide policy regarding employee duties in addition to a company-wide classification policy, whereas here there was no uniform policy with respect to the contents of the internship. As such, the Court would have to perform an individualized analysis of the factors regarding the proper classification of an intern. *See also RBS Citizens N.A. v. Ross* (7th Cir. 2013) (Seventh Circuit vacated and remanded a Court of Appeals decision that had previously certified an overtime class in light of the Comcast decision); *Cowden v. Parker & Assocs*. (E.D. Ky 2013) (only way to resolve plaintiffs' allegations that their employer withheld certain commissions and charged excessive fees is to analyze each employee's account, and such individualized analyses would overwhelm any common issues).

By contrast, in *Leyva v. Medline Industries* (9th Cir. 2013), the Ninth Circuit rejected the argument that *Dukes* and *Comcast* generally precludes class certification where damages must be individually calculated. In an action where the plaintiffs alleged rounding violations, failure to calculate overtime rates properly, failure to pay all earned wages on separation, and failure to provide timely and accurate wage statements, the Court reasoned that if the plaintiffs can show that the employer damaged the proposed class in the same way, class certification is appropriate. The Court further reasoned that damages for these violations would flow directly from liability and may be ascertained through the company's computerized payroll and time-keeping database, thereby enabling the court to accurately calculate damages. Employing a similar analysis, an Arizona District Court certified a class complaining of overtime violations where the damages determination was a purely mechanical process relying upon objective factors such as employee payroll information and the wage scale. *Parra v. Bashas', Inc*. (D. Ariz. 2013). The Ninth Circuit, therefore, takes the position that even if specific damage amounts vary among class members, certification is appropriate where the plaintiffs can show that the employer damages the putative class in the same manner.

3. Mooting

In *Genesis Healthcare v. Symczyk* 133 S.Ct. 1523 (2013), the United States Supreme Court considered whether a collective action under the Fair Labor Standards Act ("FLSA") may proceed when the lone plaintiff's individual claim becomes moot. While the Court noted that the Courts of Appeal disagreed as to whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot, it declined to reach this question because the plaintiff conceded that her individual claim was moot. Based thereon, the Court determined that "in the absence of any other claimant's opting in, the plaintiff's suit became moot when her individual claim became moot because she lacked any personal interest in representing others in this action."

III. RECURRING WAGE & HOUR CLASS AND/OR COLLECTIVE ACTION LITIGATION ISSUES

The following issues seem to continue to be the subject of class action and/or FLSA Collective Actions.

A. Tips and Tip Pooling Arrangements.

Many states allow employers to require tip pooling (where employees contribute a portion of their tips to a pool, which is then divided among a designated group of employees). Tip pooling arrangements will generally be upheld so long as tip pool participants are limited to the employee(s) to whom the tip is paid, given, or left for, but the laws of each state vary as to which employees satisfy this standard.

California Labor Code § 351 - No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer.

FLSA 29 C.F.R. § 531.54 - Where employees practice tip splitting, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those given the busboys are considered tips of the individuals who retain them, in applying the provisions of section 3(m) and 3(t). Similarly, where an accounting is made to an employer for his information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his own are counted as his tips for purposes of the Act. Section 3(m) does not impose a maximum contribution percentage on valid mandatory tip pools, which can only include those employees who customarily and regularly receive tips. However, an employer must notify employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

B. Uniforms and Maintenance.

The FLSA standard on this issue differs from many state laws.

California Wage Order 5-2001, Section 9 - When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color.

FLSA - Employees may not be required to pay for any of the costs of uniforms if, by so doing, their wages would be reduced below the required minimum wage or overtime compensation. U.S. Dept. of Labor Wage and Hour Division, Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA).

C. Non-Work Minimum Pay Issues.

1. Reporting Time Pay

California Wage Order 5-2001, Section 5

a. Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than minimum wage.

b. If an employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

c. The foregoing reporting time pay provisions are not applicable when:

(i) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or

(ii) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or

(iii) The interruption of work is caused by an Act of God or other cause not within the employer's control.

d. This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

2. Split Shift

California Wage Order 5-2001, Sections 2(R) and 4(C) - When an employee works a split shift (defined as a work schedule which is interrupted by non-paid working periods established by the employer, other than bona fide rest or meal periods), one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

3. Shift Differentials

Shift differentials are not required by state or federal law, but if an employer provides premiums (such as nightshift differentials) and premiums paid for hazardous, arduous or dirty work, these premiums must be included in the regular rate of pay. FLSA 29 C.F.R. § 778.207(b).

4. Reimbursement

California Labor Code § 2802 - An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be true.

FLSA - Employers at times require employees to pay or reimburse the employer for other items. The cost of any items which are considered primarily for the benefit or convenience of the employer may not be deducted from employee wages if, by so doing, their wages would be reduced below the required minimum wage or overtime compensation. U.S. Dept. of Labor Wage and Hour Division, Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA).

D. <u>Employee Misclassification.</u>

1. California Wage Order 5-2001, Section 1(B)(1) - **Executive Exemption**. A person employed in an executive capacity means any employee:

a. Whose duties and responsibilities involve the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof; and

b. Who customarily and regularly directs the work of two or more other employees therein; and

c. Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion of any other change of status of other employees will be given particular weight; and

d. Who customarily and regularly exercises discretion and independent judgment; and

e. Who is primarily engaged in duties which meet the test of the exemption…

f. Such an employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment.

2. California Wage Order 5-2001, Section 1(B)(2) - **Administrative Exemption**. A person employed in an administrative capacity means any employee:

a. Whose duties and responsibilities involve either:

(i) The performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers; or

(ii) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department of subdivisions thereof, in work directly related to the academic instruction or training carried on therein; and

b. Who customarily and regularly exercises discretion and independent judgment; and

c. Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section); or

d. Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or

e. Who executes under only general supervision special assignments and tasks; and

f. Who is primarily engaged in duties which meet the test of the exemption…

g. Such an employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment.

3. FLSA Test: An employee who is paid at least $455 a week on a salary basis, exclusive of board, lodging, or other facilities, will qualify for the **Executive Exemption** if he satisfies the following three-part standard:

a. He must have a "primary duty" of management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof;

b. He must customarily and regularly direct the work of *two or more other employees*; and

c. He must have the authority to hire or fire other employees or have "*particular weight*" given to suggestions and recommendations as to the hiring, firing, advancement, promotion or any other *change of status* of other employees.

4. FLSA Test: An employee who is paid at least $455 a week on a salary or fee basis, exclusive of board, lodging, or other facilities, will qualify for the **Administrative Exemption** if he satisfies both of the following requirements.

a. His "*primary duty*" is the performance of office or non-manual work *directly* related to the management or general business operations of the employer or the employer's customers; and

b. His "*primary duty*" includes the exercise discretion and independent judgment with respect to matters of significance.

E. Meal and Rest Periods.

1. Meal Periods

California Labor Code § 512 - An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

FLSA 29 C.F.R. § 785.19 - Bona fide meal periods are not worktime … The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal periods. A shorter period

may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.

2. Rest Periods

California Wage Order 5-2001, Section 12(A) - Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours. Authorized rest period time shall be counted, as hours worked, for which there shall be no deduction from wages.

FLSA 29 C.F.R. § 785.18 - Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time.

IV. ON THE HORIZON - EMERGING TRENDS IN WAGE AND HOUR LITIGATION

A. Paycards.

Many employers are introducing paycard programs to their workforce, whereby employees are paid through prepaid debit cards that are loaded up by the employer every pay period. Like a traditional debit card, paycard programs generally allow employees to withdraw funds at participating banks or ATMs and/or use the cards to make purchases and obtain cash at points of sale. Use of paycards may have distinct advantages for employers and employees. For employers, paycards offer employers a way to minimize fraud and the costs associated with printing paper checks. Paycards also present a way for employees without bank accounts to conveniently access their wages without resort to expensive check cashing services and are more secure than carrying around a large amount of cash. However, paycards also come with certain disadvantages. Most paycard programs charge fees if the cards are used more than a certain number of times in a designated period. Some employees have also found that they are unable to withdraw their full wages at local banks or participating service providers without incurring transaction fees (*i.e.*, the service providers limit the amount of funds that may be withdrawn at any given time). Because most states have enacted regulations regarding the manner in which employees must be paid wages (including payment of wages without discount), these issues have led to a wave of new litigation.

California Labor Code § 212 - No person, or agent or officer thereof, shall issue in payment of wages due, or to become due, or as an advance on wages to be earned: any order, check, draft, note, memorandum, or other acknowledgement of indebtedness, unless it is negotiable and payable in cash, on demand, without discount, at some established place of

business in the state, the name and address of which must appear on the instrument, and at the time of its issuance and for a reasonable time thereafter, which must be at least 30 days, the maker or drawer has sufficient funds in, or credit, arrangement, or understanding with the drawee for its payment…

California Labor Code § 221 - It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.

Because this is a hot button issue, employers should expect to see both judicial activity and regulatory efforts in the near future. For example, in November 2011, the California Legislature unsuccessfully attempted to pass a bill which would have severely restricted the use of paycards. Michigan also weighed in on the subject – requiring that employees be given the option of being paid through paycard or direct deposit and mandating that employees be able to make at least one free withdrawal or transfer from the paycard per pay period.

B. Standby/On-Call.

In recent years, employees have increasingly initiated lawsuits alleging that time spent on standby or "on-call" is compensable time. In determining whether or not an employee should be paid for standby or on-call time, the courts look to: (1) whether the restrictions on off-duty time are primarily directed toward the fulfillment of the employer's requirements and policies; and (2) whether the employees' off-duty time is so substantially restricted that the employee is unable to engage in private pursuits. In making this analysis, factors that courts generally consider include: (a) whether there are excessive geographic restrictions; (b) whether the frequency of calls is unduly restrictive; (c) whether a fixed time for response is unduly restrictive; (d) whether the on-call employee can trade on-call responsibilities; (e) whether an employee engaged in personal activities during the on-call time period. *See e.g.*, *Berry v. County of Sonoma*, 30 F.3d 1174 (9th Cir. 1994). As such, employers who have standby or "on-call" policies should review these policies to ensure that employees are not unduly restricted during such time.

C. Reimbursement of Costs/Expenses Associated With BYOD Programs.

Bring Your Own Device ("BYOD") policies are rapidly proliferating in workplaces throughout the nation. A recent report by Gartner, Inc. predicted that by 2017, half of employers will require employees to supply their own devices for work purposes. Over the past few years, many employers have joined the BYOD movement and authorized their employees to remotely access company data and information from their own personal mobile devices. The benefits are apparent. As technology advances, there are fewer and fewer differences between the operational capabilities of mobile devices and traditional desktop computers. As a result, employees can perform many business functions from their personal mobile devices in lieu of their company-issued desktop or laptop computers. Using their mobile devices, employees have the flexibility to perform work outside of the office and/or business hours when and where most convenient, which translates into increased employee productivity and morale. While many employers may view the BYOD movement as a logical and more cost-effective outgrowth of employer-issued mobile device programs, allowing employees to use personal devices to

perform work may pose increased risks in the wage and hour context, including whether and under what circumstances an employer may need to reimburse an employee for expenses associated with a BYOD program.

D. Recovery Periods.

Under existing California law, employees who work outside in temperatures exceeding 85 degrees must be provided with five minute cool-down periods (or recovery periods) in a shaded area to protect themselves from overheating. Effective January 1, 2014, California Labor Code § 226.7 will prohibit employers from requiring an employee to work during such a recovery period. As with meal and rest periods, the law will further require an employer to pay an employee one additional hour of pay at the employee's regular rate of compensation for each workday that a recovery period is not provided.

California Title 8 CCR § 3395(d) - When the outdoor temperature in the work area exceeds 85 degrees Fahrenheit, the employer shall have and maintain one or more areas with shade at all times while employees are present that are either open to the air or provided with ventilation or cooling …Employees shall be allowed and encouraged to take a cool-down rest in the shade for a period of no less than five minutes at a time when they feel the need to do so to protect themselves from overheating. Such access to shade shall be permitted at all times.

California Labor Code § 226.7

1. As used in this section, "recovery period" means a cooldown period afforded an employee to prevent heat illness.

2. An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to applicable statute, or applicable regulation, standard, or der of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

3. If an employer fails to provide an employee a meal or rest or recovery period in accordance with state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

4. This section shall not apply to an employee who is exempt from meal or rest or recovery period requirements pursuant to other state laws, including, but not limited to, a statute or regulation, standard, or order of the Industrial Welfare Commission.

E. Suitable Seating.

Retail and hospitality businesses or others with workers who stand for prolonged periods should beware of California's seating requirements. California law requires employers to provide employees with suitable seats when the nature of the work reasonably permits the use of seats. It further provides that when employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties. While this law has been on the books for many years, seating claims have been on an uptick with varying degrees of success.

California Wage Order 5-2001, Section 14

1. All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

2. When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.