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WAGE AND HOUR CASE NOTES

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WHOLESALE PAGA WAIVER IN ARBITRATION AGREEMENT UNCONSCIONABLE

Navas v. Fresh Venture Foods, LLC, 85 Cal. App. 5th 626 (2022)

This case will be useful for any plaintiff-side employment attorneys looking to show that an arbitration agreement is unconscionable because it contains a wholesale PAGA waiver.

Navas and other Fresh Venture Foods (FVF) employees filed a class action lawsuit against FVF for minimum wage and overtime violations. The complaint also alleged a claim for penalties under the Private Attorneys General Act (PAGA). Navas signed an arbitration agreement requiring him to arbitrate all disputes against FVF on an individual basis, and waiving his right to bring any claims on a class or representative basis, including his right to bring a PAGA claim.

The arbitration agreement was substantively unconscionable because, among other things, it required Navas to waive his right to bring a PAGA claim, contrary to the rule enunciated under *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014). Although employers may require employees to bring the "individual" component of a PAGA claim in arbitration, they may not include a wholesale PAGA waiver in a mandatory arbitration agreement. *See Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022). Navas's arbitration agreement contained a wholesale PAGA waiver, and this illegal term contributed to the unconscionability of the entire agreement. When viewed in combination with a number of other unconscionable terms, the court held that the agreement as a whole was unenforceable. The trial court did not abuse its discretion in refusing to sever the offending terms because there were so many of them.

OUTSIDE SALESPERSON EXEMPTION DOES NOT APPLY TO EMPLOYEE WORKING AWAY FROM PROPERTY NOT CONTROLLED/OWNED BY EMPLOYER

Espinoza v. Warehouse Demo Services, Inc., 86 Cal. App. 5th 1184 (2022)

This case provides extensive discussion of the circumstances under which California's "outside salesperson" exemption applies to an employee who works on property that is not owned or controlled by the employer.

Warehouse Demo Services (WDS) is the exclusive in-house product demonstration company for Costco. WDS employs non-exempt "demonstrators" to perform demonstrations of products inside Costco warehouses. Demonstrators are assigned to a single Costco and do not travel. WDS does not rent space from Costco, but maintains an office inside each Costco where it has employees.

Espinoza worked as a WDS demonstrator for five years. She worked in a specific demonstration area inside a single Costco warehouse. She worked four days a week, six hours a day, a schedule set by WDS. She was not allowed to leave the demonstration area except when another demonstrator relieved her for breaks. Espinoza was supervised by an on-site event manager and two shift supervisors. She was required to clean up her demonstration area at the end of her shift.

Espinoza filed a wage-and-hour class action against WDS, alleging claims for minimum wage, overtime, and missed meal and rest breaks. WDS filed a summary judgment motion, arguing that Espinoza's claims failed because she fell within the "outside salesperson" exemption. Outside salespersons" are exempt from statutory overtime, minimum wage, reporting time, and meal-and-rest break requirements. *See* Cal. Lab. Code § 1171. To qualify as an "outside salesperson," the

employee must: 1) work more than half the time away from his or her employer's place of business; and 2) be engaged in sales.

The trial court granted WDS's motion, concluding that Espinoza worked more than half of her time away from WDS's place of business because WDS did not maintain, own, or control any space within Costco. The appellate court reversed. The main reason for the exemption is that outside salespersons generally control their own hours and it is difficult to control their working conditions. The facts of this case present the "perfect example" of when an employer controls its employees' hours and working conditions on property it does not own or lease.

Although WDS did not lease space from Costco, it functionally treated Costco warehouses as its satellite branches, maintaining office space in each of them. Unlike most traveling salespeople, Espinoza did not set her own schedule or decide where to work. Rather, WDS set her schedule, which was the same from week to week, and Espinoza worked in the same Costco warehouse from day to day. Espinoza was closely supervised by three different supervisors. She was required to clock in and out, and was not allowed to leave her demonstration area except when someone relieved her for meal and rest breaks. Accordingly, because WDS closely supervised Espinoza, required her to work in a specific location, and set her schedule, the traditional reasons for applying the outside salesperson exemption did not apply.

EMPLOYERS PAYING "PERCENTAGE BONUSES" THAT INCREASE GROSS WAGES NOT REQUIRED TO RECALCULATE OVERTIME

Lemm v. Ecolab Inc., 87 Cal. App. 5th 159 (2023)

There are many different ways for employers to calculate the "regular rate of pay" for purposes of overtime compensation. This case is a win for California employers because it articulates a simple rule for paying sales-based bonuses to non-exempt employees who work overtime hours.

Ecolab provides sanitation and pest control services. Lemm worked for Ecolab as a non-exempt salesperson. He installed and maintained Ecolab equipment, and sold Ecolab products. Lemm was paid hourly wages every two weeks. He was also given a monthly bonus that was calculated based on his sales. If he met or exceeded a specified sales goal, his gross wages for the month—which already included overtime wages—were increased by a certain percentage. The higher his sales, the higher was the percentage.

Under California law, employees are entitled to overtime compensation for working more than eight hours in a day or 40 in a week. Overtime compensation is one-and-a-half times the "regular rate of pay," which must incorporate any non-discretionary bonuses like the one Ecolab paid to Lemm. The parties in this case disagreed about how to incorporate the bonus into the regular rate.

Lemm argued that Ecolab was required to follow the bonus calculation set forth in the DLSE Enforcement Manual § 49.2.4, which was adopted in *Alvarado v. Dart Container Corp. of California*, 4 Cal. 5th 542 (2018). *Alvarado* involved a flat-sum bonus, under which employees were paid $15 (i.e., a flat sum that never changed) for working a shift on a Saturday or Sunday. Under this approach, employers must determine the bonus amount attributable to the workweek (or other period in which the bonus was earned), divide that amount by the number of hours worked in the workweek, and then increase the overtime rate accordingly.

Ecolab disagreed, arguing that its bonus was not a flat-sum bonus, but was instead a percentage bonus, under which Lemm's gross wages, which *already incorporated overtime pay*, were increased by a certain percentage depending on his sales. Ecolab argued that it was not required to go back and increase the overtime compensation rate based on the bonus amount because its bonus already incorporated Lemm's overtime compensation. It argued that its approach was consistent with a federal regulation, 29 C.F.R. § 778.210, which permits employers to simultaneously pay overtime compensation due on a monthly bonus by way of a percentage increase to straight time and overtime wages.

The appellate court held that Ecolab's compensation program complied with California law. Since Ecolab paid Lemm a bonus by increasing all of his wages—including overtime wages—by a certain percentage, it was not required to use the *Alvardo* formula and further increase his regular rate based on the bonus. This would have improperly required Ecolab to double-count the overtime compensation in its regular rate of pay calculation. Where a bonus already includes overtime pay, the employer is not required to pay "overtime on overtime."

FEDERAL AGENCY DECISION PREEMPTING CALIFORNIA'S MEAL AND REST BREAK LAWS FOR TRUCK DRIVERS IS RETROACTIVE

Valiente v. Swift Transp. Co. of Arizona, LLC, 54 F.4th 581 (9th Cir. 2022)

Congress passed the Motor Carrier Safety Act (MCSA) in 1984 to promote the safe operation of commercial motor vehicles, including trucks. The MCSA gives the Secretary

of Transportation the authority to decide that State laws regulating commercial motor vehicle safety are preempted. The Secretary has delegated this preemption authority to the Federal Motor Carrier Safety Administration (FMCSA).

In 2008, the FMCSA rejected a petition to rule that California's meal and rest break laws as applied to truck drivers were preempted by the MCSA, finding that the laws were not sufficiently related to commercial motor vehicle safety. In December 2018, the FMCSA reversed course, ruling that California's meal and rest break laws were preempted for any truck drivers subject to the MCSA.

In 2021, the Ninth Circuit ruled that the FMCSA's preemption decision was valid, but left open the question of whether the decision applied retroactively. *See Intl. Bhd. of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841 (9th Cir. 2021). In *Valiente*, the Ninth Circuit answered this question, ruling in a 2-1 decision that the FMCSA's preemption decision applied retroactively, wiping out two meal-and-rest break class actions filed on behalf of California truck drivers in October 2018, two months before the FMCSA decision.

Interestingly, the pro-employer majority opinion was written by Judge Holly A. Thomas, a recent Biden appointee who formerly served as Deputy Director of the California Civil Rights Department. Judge Thomas applied the two-part retroactivity test set forth in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). If Congress has clearly authorized retroactive agency action, and that agency has expressed an intent to act retroactively, the court's inquiry ends. If the intent of Congress or the agency is unclear, the court proceeds to the second step to determine whether retroactive application would impair vested rights or have some other impermissible effect.

The majority concluded that retroactive application of the FMCSA's preemption decision was proper under the first step. The MCSA is clear: a State "may not enforce" preempted motor vehicle safety laws. The FMCSA preemption decision is similarly clear: California may no longer enforce its meal and rest break laws with respect to truck drivers subject to the MCSA. Any court decision enforcing California's meal and rest break laws would thus contravene the statute and the clear direction of the FMCSA, regardless of when the lawsuit was filed.

The dissent disagreed, finding that the FMCSA had not clearly expressed any intent for its preemption decision to apply retroactively. Under the second *Landgraf* step, the dissent concluded, retroactive application of the preemption decision impermissibly impaired the settled expectations of truck drivers that California's meal and rest break laws would apply.

IN PAGA CASE, THE STATE-MUST-CONSENT-TO-ARBITRATION RULE IS PREEMPTED; ARBITRATOR, NOT COURT, MUST DECIDE WHETHER AGREEMENT COVERS ENTIRE PAGA CLAIM

Lewis v. Simplified Lab. Staffing Sols., Inc., 85 Cal. App. 5th 983 (Cal. App. 2d Dist. 2022)

This is the first published appellate court decision to discuss the impact of *Viking River* on a motion to compel arbitration in a PAGA case. Unfortunately, it does not provide guidance on the most significant question generated by the U.S. Supreme Court's decision: whether a PAGA plaintiff whose "individual" PAGA claim is sent to arbitration loses standing to pursue the PAGA claim on behalf of others in court.

Simplified is a staffing agency. When Sylvia Lewis started working there in 2019, she signed an arbitration agreement governed by the Federal Arbitration Act (FAA) in which she agreed to arbitrate all "claims that arise out of [her] relationship with [Simplified]." Lewis filed a PAGA-only action against Simplified in 2020. Simplified moved to compel arbitration. The trial court denied the motion on the grounds that pre-dispute agreements to arbitrate PAGA claims are not enforceable, citing *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014). Simplified appealed. While the appeal was pending, the U.S. Supreme Court decided *Viking River*. The appellate court asked the parties to brief the impact of *Viking River*. This decision followed that briefing.

The Court first held that California's "State-must-consent" rule—i.e., PAGA claims cannot be arbitrated because the State is the real party in interest and has not consented to arbitration—does not survive *Viking River*. *Viking River* rejected *Iskanian*'s characterization of PAGA actions as a dispute between the State and the employer. Instead, the dispute is one between the employee and the employer arising out of their contractual relationship. *Viking River* rejected the notion that PAGA actions are inconsistent with the objectives of arbitration, distinguishing PAGA actions from class actions, which have multiple complex requirements making them ill-suited for arbitration. Given *Viking River*'s conclusion that PAGA actions may be arbitrated without offending the FAA, and that PAGA actions are more properly characterized as between the employee and the employer, the "State-must-consent" rule—which disregards the employee's choice of the arbitral forum for all disputes—is preempted.

The parties agreed that Lewis's "individual" PAGA claim—that is, the PAGA claim based on Cal. Lab. Code violations she personally suffered—must be arbitrated. They disagreed, however, about the fate of the PAGA claim on behalf of others. Simplified urged the court to dismiss that claim for lack of standing, per Part IV of *Viking River*. Lewis argued she should be allowed to litigate the claim in court, urging the court to reject the U.S. Supreme Court's standing analysis.

The Court punted. Rather than decide the standing issue, the Court instead held that the arbitrator should decide in the first instance whether the arbitration agreement even covered the PAGA claim on behalf of others. If the arbitration agreement covers the entire PAGA claim—both its individual and non-individual components—the Court would not need to decide the standing issue, because the entire claim would proceed in arbitration. In sending this question to the arbitrator, the Court relied on a rule from the American Arbitration Association's employment rules, which says that the arbitrator "shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the agreement." Significantly, the Court did not rely on a delegation clause, or even discuss whether the parties had validly delegated questions about the scope of the agreement to the arbitrator.

WHERE EMPLOYER'S OBLIGATION TO PAY WAGES WITHIN SEVEN DAYS FALLS ON WEEKEND, TIME TO PAY EXTENDED TO NEXT DAY THAT IS NOT A HOLIDAY

Parsons v. Estenson Logistics, LLC, 86 Cal. App. 5th 1260 (2022)

Robert Parsons filed a PAGA-only lawsuit against Estenson alleging a claim for violation of Cal. Lab. Code § 204, one of California's timely payment provisions. Section 204 provides that wages for employees who are paid weekly are timely only if they are paid "not more than seven calendar days following the close of the payroll period." Parson's lawsuit involved a single question: what happens if the seventh calendar day falls on a Saturday?

Estenson took the position that wages may be paid the following Monday because Cal. Code Civ. Proc. § 12a provides that weekends are holidays, and further provides that "If the last day for the performance of any act provided or required by law to be performed within a specified period of time is a holiday, then that period is hereby extended to and including the next day that is not a holiday."

Parsons disagreed, arguing that Cal. Civ. Proc. § 12a did not apply to payment obligations arising under the Cal. Lab. Code, but only to civil procedure deadlines such as statutes of limitations.

The trial court sided with Estenson, and the appellate court affirmed.

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