

FRIDAY, NOVEMBER 25, 2016

PERSPECTIVE

End wage violation penalty piggybacking

By Maria Stearns and Peter Hering

Picture this: Employee is underpaid \$15 due to minimum wage or overtime error. Employee is terminated. Several months later, Employee reappears, this time in the form of an attorney demand letter seeking recovery of \$15, plus wage-and-hour penalties 200 times the amount of the underpayment (and, of course, attorney fees).

This is an all-too-familiar scenario faced by California employers because of the cornucopia of penalties lurking in the Labor Code and misguided assumptions that they simply piggyback off the underlying wage violation. The most common piggyback penalties are (1) waiting time penalties (Labor Code Section 203); and (2) inaccurate wage statement penalties (Labor Code Section 226).

It is time to stop automatic penalty stacking and, instead, thoughtfully consider the Legislature's intent in enacting these statutes. When one examines the purpose behind these statutes, it becomes clear that the practice of penalty piggybacking cannot be supported and must stop.

Waiting Time Penalties: Purpose = Prompt Payment of Final Wages

Under Labor Code Section 203, an employer who *willfully* fails to timely pay unpaid wages to an employee who is discharged or quits, is liable to the employee for one day of wages for every day wages remain unpaid, up to 30 days (i.e., waiting time penalties).

From its earliest days, courts have recognized that the purpose of Section 203 is to ensure the *prompt* payment of wages at termination, not to punish wage payment errors during employment. *Oppenheimer v. Sunkist Growers, Inc.*, 153 Cal. App. 2d Supp. 897, 898-99 (1957) ("The purpose of [Sections 202 and 203] is to compel the *prompt* payment of wages."); *Division of Labor Law Enforcement v. El Camino Hospital District*, 8 Cal. App. 3d Supp. 30, 35 (1970) ("Obviously [Section 203] was designed to assure *prompt* payment of wages



to discharged employees.").

In 2010, the California Supreme Court reexamined the purpose behind waiting time penalties, which have existed since 1915, and reiterated that waiting time penalties are about "ensuring *prompt* wage payment." *Pineda v. Bank of America, N.A.*, 50 Cal. 4th 1389, 1399 (2010). The Supreme Court went on to say "the failure to *timely* pay wages injures not only the employee, but the public at large," and Section 203 penalties act "as a disincentive for employers to pay final wages late."

To ensure prompt payment of final wages, the Legislature chose to penalize an employer who "*intentionally* fails to pay wages to an employee when those wages are due." 8 CCR Section 13520. While Section 203 does not require "a deliberate evil purpose to defraud workmen of wages which the employer knows to be due," it does require that the employer "knows what [it] is doing [and] intends to do what [it] is doing." *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1, 7 (1981); *Davis v. Morris*, 37 Cal. App. 2d 269, 274 (1940).

Wage Statement Penalties: Purpose = Transparent Wage Calculation

Under Labor Code Section 226(a), employers are required to include nine items on employee pay stubs, including gross wages earned, total hours worked, and all applicable hourly rates. "An employee suffering injury as a result of an employer's *knowing* and *intentional* failure" to include one of the nine required items may seek up to \$4,000 in penalties. Labor Code Section 226(e).

Section 226 is intended to provide "transparency" — to "assist the employee in determining whether he or she has been compensated properly." *Soto v. Motel 6 Operating, L.P.*, 4 Cal. App. 5th 385, 390 (2016); DLSE Opinion Letter No. 2006.07.06 (July 6, 2006) ("The purpose of the wage statement requirement is to provide transparency as to the calculation of wages.") An employee is deemed to have suffered injury if: (1) the employer fails to provide accurate and complete information on the wage statement; *and* (2) the employee cannot promptly and easily determine from the wage statement the nine required items under Section 226(a). Labor Code Section 226(e) (2).

Section 226's penalty provision incentivizes employers to provide employees "with the essential information for verifying that they were being properly paid for all hours worked." *Morgan v. United Retail Inc.*, 186 Cal. App. 4th 1136, 1149 (2010). The purpose behind Section 226 is to penalize employers who *knowingly* and *intentionally* make it impossible or difficult for employees to determine whether they have been properly paid.

An Illustration: The Absurdities of Piggybacking

As we head into the new year, let's examine the fun that awaits California employers who are faced with the nightmarish task of staying on top of the myriad of minimum wages at the county and city level.

Employee earns minimum wage and works for Company, located in Los Angeles County. As of Jan. 1, 2017, California's minimum wage increases from \$10 to \$10.50; so does Employee's pay, as reflected on his paystub. Employee is terminated on July 5, 2017; he receives his final paycheck that day with all unpaid wages earned through July 5, 2017 (10 hours), at the California minimum wage (\$10.50).

Several months later, Company receives a demand letter seeking several thousand dollars and threatening a class action for failure to pay minimum wage, waiting time penalties and paystub violations. Company frantically checks its payroll system and confirms that Employee was paid the state minimum wage. Company is located in Los Angeles County, whose minimum wage increased to \$12 on July 1, 2017. Due to the off-cycle termination, the new local minimum wage had not gone into effect in Company's

payroll system. As a result, Employee was paid the state minimum wage of \$10.50 on his final paycheck when he should have been paid L.A. County's \$12 minimum wage.

Company timely paid all wages it believed were owed and accurately included all required items on Employee's final wage statement, which then allowed Employee to immediately determine that he had not been paid the correct minimum wage. Although Company indisputably failed to pay the proper minimum wage, it did not violate Labor Code Sections 203 or 226.

The gulf between Employee's recovery for unpaid minimum wages and the piggyback penalties is drastic. Employee had only worked 10 hours during his final week leading to a minimum wage underpayment of \$15. The wage statement penalty, if assessed, is \$50 — more than three times his underpayment, and the waiting time penalties are \$2,880, almost 200 times his underpayment.

As demonstrated by this example, treating waiting time penalty and wage statement violations claims as merely derivative of other violations leads to absurd results, ignores the statutory intent of Sections 203 and 226, creates a windfall for employees, and unfairly punishes employers. It must stop.

Maria Stearns is a partner and **Peter Hering** is an associate at *Rutan & Tucker, LLP* where they specialize in representing companies in all aspects of employment-related matters. You can contact them at (714) 641-5100 or mstearns@rutan.com or phering@rutan.com.



MARIA STEARNS



PETER HERING