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New Law Allows Employees to Sue for Labor Code Violations

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Focus Column

Employment Law

By Michael D. Singer

Among the flurry of bills that Gov. Gray Davis signed into law on his way out of office is SB796, the Labor Code Private Attorneys General Act of 2004, which provides employees a private right of action to recover civil penalties from their employers for Labor Code violations.

State Sen. Joe Dunn, D-Garden Grove, sponsored the bill. The California Labor Federation, AFL-CIO and California Rural Legal Assistance Foundation co-sponsored SB796. The California Chamber of Commerce, the California Retailers Association and the California Restaurant Association opposed the bill.

Effective Jan. 1, SB796 adds two new sections to the Labor Code that give employees the right to sue their employers directly for penalties provided by the code. Sections 2698 and 2699 assign new civil penalties to the many substantive Labor Code provisions that currently do not carry penalties and authorize workers, acting as private attorneys general, to file civil actions to recover existing and new penalties.

Existing law provides that employers that fail to pay minimum wage are subject to penalties of $50 per pay period for each affected employee for the first violation and $250 for succeeding violations. Employers that do not properly pay overtime premium pay are subject to penalties of $50 for each employee per pay period for initial violations and $200 for subsequent violations.

Previously, the Labor and Workforce Development Agency was responsible for assessing and collecting these types of penalties for Labor Code violations, and the labor commissioner was the only person who could bring actions for civil penalties.

SB796 grew out of the inability of the agency's enforcement budget to keep pace with growth in the economy, the population and the job market. Staffing shortages have resulted in fewer inspections and penalty citations. The current budget deficit guarantees that the state will not hire any new enforcement staff.

Authorizing employees to maintain private and class actions for wage-and-hour penalties fills in the enforcement gap and gives the penalty provisions teeth. SB796 fosters enforcement of labor laws without reliance on state resources. It provides costly disincentives for employers that do not comply with the state's tough laws. SB796 also generates revenue, which is divided among the general fund, the Labor and Workforce Development Agency and the aggrieved employees.

The new law has four major provisions. First, for substantive Labor Code sections that currently carry no civil penalties, SB796 creates a formula (borrowed from existing Labor Code provisions) for assessing penalties: If a person or company does not employ any workers, then the civil penalty shall be $500 per violation. If the person or company employs one or more employees, then the civil penalty shall be $100 per employee per pay period for the initial violation and $200 per employee per pay period for the second or subsequent violations.

Second, an aggrieved employee may recover the civil penalty only through a civil action filed "on behalf of himself or herself, or other current or former employees." This language expressly recognizes the private right to bring a representative or class action for penalties.

Any employee who prevails, in whole or in part, in any such action is entitled to an award of reasonable attorney fees and costs. Like Labor Code Section 1194, which governs actions to recover overtime, this is a "one-way" attorney-fee provision, authorizing fees only for prevailing employees, not for employers.

Third, an aggrieved employee may not maintain an action to recover civil penalties if the Labor

Department, or any of its agencies or employees, relying on the same facts and theories, cites the employer for a Labor Code violation and initiates proceedings to collect the applicable penalties.
Finally, the court will distribute civil penalties recovered by aggrieved workers as follows: 50 percent to the state general fund, 25 percent to the Labor and Workforce Development Agency (for programs to educate employers and employees about their responsibilities and rights under the Labor Code) and 25 percent to the aggrieved workers.
SB796's penalties and private right of action are expressly in addition to any other rights that employees may have under existing law.
Courts have struggled with the issue of employee standing to recover civil penalties. Two recent rulings granting motions to strike allegations in wage-and-hour class actions seeking overtime penalties under Section 558 have come down against a private right of action. *Newell v. California Pizza Kitchen Inc.*, 03CC00051 (Orange Super. Ct., June 6, 2003); *Miller v. Men's Wearhouse Inc.,* 03CC00132 (Orange Super. Ct., July 31, 2003).
Another hotly contested issue has been whether compensation owed under Labor Code Section 226.7 for failure to provide rest or meal periods constitutes "premium pay" or "penalties."
Section 226.7 provides that employees working shifts of at least five hours are entitled to one hour's pay at their regular rate for each day that an employer fails to provide a minimum 30-minute meal period, during which they are relieved of all duties and free to leave the work premises, or a second such meal period for shifts of 10 hours or more. Employees are entitled to identical compensation for failure to provide paid 10-minute rest periods for every four hours worked.
Monetary exposure for these violations can be formidable. For example, a company with 500 employees earning $7 per hour that fails to provide proper meal periods (which employees cannot waive) or fails to communicate clearly to employees that they are permitted to take statutory rest periods would be liable for $35 per employee per week - double that amount for both violations.
If the violation had been ongoing since Oct. 1, 2000, the effective date of the Industrial Welfare Commission's wage orders establishing the compensation (codified at Section 226.7, effective Jan. 1, 2001), then the company's total liability would be upwards of $35,000 per week for three years - more than $5 million.
Employers defending class actions for such compensation have developed two lines of attack, both premised on characterizing Section 226.7 compensation as a "penalty": First, they argue that employees have no private right of action to recover Labor Code penalties, which only the labor commissioner can recover. Second, employers argue that, even if workers do have standing to sue for such penalties, they are limited by Code of Civil Procedure Section 340(a)'s one-year statute of limitations for statutory violations for penalties.
Section 226.7 describes the compensation as "pay," not as a penalty. Under the Labor Code, there is a difference between civil penalties incurred for Labor Code violations and premiums owed under statutory minimum-pay provisions, such as the overtime premium, minimum reporting pay and compensation in lieu of rest or meal periods. This confusion has arisen in part because the courts and the Division of Labor Standards Enforcement sometimes interchangeably refer to all of these provisions as "penalties."
One court granted summary adjudication dismissing a Section 226.7 cause of action on the grounds that the compensation was a "penalty," not "wages," and, consequently, that no private right of action existed. *Terry v. Cigarettes Cheaper!*, 835526 (Alameda Super. Ct., April 18, 2003). This ruling overlooked Labor Code Section 218, which states that "[n]othing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article [consisting of Sections 200-243]."
On June 11, the Division of Labor Standards Enforcement issued an advisory opinion letter confirming that Section 226.7 compensation constitutes "premium pay" wages within the meaning of Section 200, in the nature of the overtime premium, and not a penalty; thus, it is not subject to Section 340(a)'s one-year statute of limitations.
On Oct. 17, the Division of Labor Standards Enforcement issued a letter stating that "it is beyond question that under California law, there is a private right of action for unpaid compensation or other amounts owed by an employer to an employee under any provision of the Industrial Welfare Commission ("IWC") orders or under any section of the Labor Code, including Labor Code section 226.7."
Several Superior Courts have denied motions to strike or overruled demurrers to causes of action under Section 226.7 on the grounds that the compensation is "pay," not a "penalty," and is not subject to the one-year statute of limitations for statutory penalties. *Scheidt v. RGIS Inventory*, C03-00067 (Contra Costa

Super. Ct., April 29, 2003); *Cassaro v. Spaghetti Factory Inc.*, 01CC02500 (Orange Super. Ct., April 3, 2003); *Newell*.

In addition, Division Three of the 4th District Court of Appeal has refused to grant an employer's mandamus petition challenging a cause of action for rest and meal period compensation. *OSF Int'l Inc. v. Orange County Super. Ct.*, G032357 (Cal. App. 4th Dist. June 26, 2003).

The 9th U.S. Circuit Court of Appeals in *Bender v. Darden Restaurants Inc. Restaurants*, 26 Fed. Appx. 726 (9th Cir. 2002), also ruled in favor of an employee's right to back pay for meal-period violations, including punitive damages for actions ratified by the employer.

Along with these authorities, SB796's grant of a private right of action ends efforts by employers to limit their exposure for Labor Code violations based on lack of employee standing. Although questions remain about how courts will apply the new provisions to violations that occurred before Jan. 1, employees will be able to act as private attorneys general, with the right to enforce and participate in the recovery of civil penalties for all Labor Code violations.

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