

Class Action Lawsuits: A Perspective from the Trenches

Minimizing Your Exposure On Wage & Hour Class Claims

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Overview of Seminar - 1

- The Class Action Lawsuit
- Causes of Action
- The Putative Class

Overview of Seminar - 2

- Class Certification Issues
 - Attacking Commonality
("Nature of the Post")
 - Survey of the Post
 - HR Surveys
- Hours Worked Records

Overview of Seminar - 3

- Discovery
 - Purpose
 - Methods
 - Costs
- Privacy Issues

Overview of Seminar - 4

- Document Problems / Solutions
- Cost Reduction
 - Discovery vs. Discovery Light
 - TPAs
 - Consultants
- Goal of The Litigation

The Cost of Litigation

Quote from famous attorney, Lionel Hutz, Esq.:

***“If you don't win your case,
you only pay our fees!”***

Los Angeles Times

BUSINESS

TUESDAY, OCTOBER 21, 2008 :: LATIMES.COM/BUSINESS

SP 500 985.40 ▲ 44.85 | NASDAQ 1,770.03 ▲ 58.74 | GOLD \$787.60 ▲ 2.50 | OIL \$74.25 ▲ 2.40 | EURO \$1.332 ▼ 0.012 | U.S. T-BILL (6-mo.) 1.80% ▲ 0.58 | U.S. T-N

THE WORK OF PLAY

REAL ESTATE

LATIMES.COM/BUSINESS

BUSINESS BRIEFING

California Fedex drivers win **\$14.4** million in pay dispute

A court-appointed official has awarded drivers for FedEx Corp. in California about \$14.4 million in a dispute over whether the delivery company illegally classified them as independent contractors instead of employees.

The award for job-related expenses and interest is about \$9 million more than was awarded to the drivers by a trial court in 2005, lawyers for about 200 drivers said Monday.

FedEx said the company would review the recommendation and contest any disputed items.

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VICES, INC., a
gh 10, inclusive,

BC392527

Case No. _____

CLASS ACTION COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF FOR:

- (1) OVERTIME WAGES;
- (2) DENIAL OF MEAL PERIODS;
- (3) DENIAL OF REST PERIODS;
- (4) VIOLATION OF LABOR CODE § 226 RELATING TO RECORD KEEPING;
- (5) VIOLATION OF LABOR CODE § 203;
- (6); UNFAIR BUSINESS PRACTICES (Violation of California Business & Professions Code §17200 et seq.)

DATE PAID;
RECEIPT #;
CASH/DEBIT CARD;
PAYMENT;

ed } CASE NO. _____

CLASS ACTION

COMPLAINT FOR:

- (1) FAILURE TO PROVIDE MEAL PERIODS IN VIOLATION OF LABOR CODE §§ 226.7, 512, AND WAGE ORDER NO. 4;
- (2) FAILURE TO PROVIDE REST PERIODS IN VIOLATION OF LABOR CODE §§ 226.7, AND WAGE ORDER NO. 4;
- (3) FAILURE TO FURNISH TIMELY AND ACCURATE WAGE STATEMENTS IN VIOLATION OF LABOR CODE §§ 226, 226.3; and
- (4) VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION ACT ("UCL"), Bus. & Prof. Code § 17200 et seq.

DEMAND FOR JURY TRIAL

UNTY OF LOS ANGELES

elf and
half

Case No. BC 385910

CLASS ACTION

Assigned For All Purposes To:
Judge: Hon. Michael L. Stern
Dept.: 62

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FIRST AMENDED COMPLAINT

- 1. Failure To Pay Wages, Minimum Wages, and Overtime Wages
- 2. Failure To Provide Meal Periods
- 3. Failure To Provide Rest Periods
- 4. Failure To Refund Deposits For Work Uniforms
- 5. Waiting Time Penalties
- 6. Unfair Business Practice (Business & Professions Code § 17200, et seq.)
- 7. Failure To Provide Accurate Wage Statements

DEMAND FOR JURY TRIAL



10 25. Existence of Predominance of Common Questions of Fact and Law - Code of Civ.
11 Proc. § 382: Common questions of law and fact exist as to all members of the Class. These questions
12 predominate over any questions affecting only individual class members. These common legal and
13 factual questions include:
14 (a) Whether Defendant failed to provide their employees working as security guards thirty
15 (30) minute, uninterrupted meal breaks as contemplated by California law for work periods of over five
16 (5) hours;
17 (b) Whether Defendant violated Wage Order 4-2000, 4-2001 and Labor Code §§ 226.7 and
18 512 by failing to afford their employee security guards proper meal periods;
19 (c) Whether Defendant violated Wage Order 4-2000, 4-2001 and Labor Code §§ 226.7 by
20 failing to afford their employee gas station attendants proper rest periods;
21 (d) Whether Defendant committed an unlawful business act or practice within the meaning of
22 the Business and Professions Code §§ 17200 *et seq.*;
23 (e) Whether Defendant violated Business and Professions Code § 17200, *et seq.* by failing to
24 afford their employee security guards proper meal and rest periods;
25 (g) Whether, as a result of Defendant's unlawful conduct, Plaintiff and the Class members
26 are entitled to unpaid wages, waiting time penalties, restitution, equitable relief and other relief, and the
27 nature and amount of such relief;
28 ///

"Easy
Pickin's"

BRADLEY & GMELICH
Lawyers

EMPLOYMENT LAW

COMPENSATIONS, BENEFITS
Wage and Hour

SETTLEMENT: \$5,800,000.

CASE/NUMBER: Lisa L. Connell, an individual, on behalf of herself and all persons similarly situated v. Sun Microsystems Inc. / RG06252310.

COURT/DATE: Alameda Superior / July 24, 2008.

JUDGE: Hon. Bonnie L. Sabraw.

ATTORNEYS: Plaintiff - Norman B. Blumenthal, Michael Loughran (Blumenthal & Nordrehaug, La Jolla); Jonathan E. Gertler, Daniel Siegel (Chavez & Gertler, LLP, Mill Valley); R. Craig Clark, David R. Markham (Clark & Markham, LLP, San Diego); Walter L. Haines (United Employees Law Group, PC, Long Beach).

Defendant - Fred W. Alvarez, Ulrico S. Rosales, Troy A. Valdez (Wilson, Sonsini, Goodrich & Rosati, P.C., Palo Alto).

FACTS: Plaintiff Lisa L. Connell represented a class that included fellow technical support engineers who worked for defendant Sun

Microsystems Inc. between Jan. 25, 2002 and June 20, 2007 in California.

The plaintiffs sued for violation of the California Labor Code, unfair competition, unfair business practices, and conversion.

PLAINTIFFS' CONTENTIONS: Plaintiffs contended that Sun Microsystems Inc. did not pay overtime compensation in violation of the California Labor Code; failed to provide meal and rest breaks in violation of the California Labor Code; engaged in unfair competition and unfair business practices in violation of the California Unfair Competition Law; and failure to pay overtime was conversion.

DEFENDANT'S CONTENTIONS: Sun Microsystems Inc. countered that they were in full compliance with all laws at all times.

DAMAGES: Plaintiffs sought damages including unpaid overtime compensation, interest, penalties, attorney fees and costs, and injunctive relief.

RESULT: Plaintiffs accepted a settlement in the amount of \$5.8 million. Sun Microsystems Inc. will pay the employer's share of payroll taxes arising from the settlement. The settlement share for each class member will be determined through the total number of weeks employed. The settlement will be reduced by the following amounts: \$40,000 to the settlement administrator; \$1,740,000 to the attorneys; \$125,000 in costs; \$25,000 to the named plaintiff as a service award; and \$25,000 to the California Labor Workforce Development Agency.

\$40k to Settlement Administrator
\$1.74MM to the Attorneys (Plaintiff)
\$125k costs
\$25k to State of CA
AND
Employer had huge payroll tax liability!



Typical Causes of Action

- 1. Failure To Provide Meal Periods In Violation Of Labor Code §§ 226.7, 512, And IWC Wage Order No. 4;
- 2. Failure To Provide Rest Periods In Violation Of Labor Code §§ 226.7, And IWC Wage Order No. 4;
- 3. Failure To Pay Wages For All Hours Worked And Failure To Pay Overtime In Violation Of Labor Code §§ 1194 And 510 (Misclassification Cases Included);

Typical Causes of Action

4. Failure To Furnish Timely And Accurate Wage Statements In Violation Of Labor Code §§ 226, 226.3;
- 5. Failure To Furnish All Wages Due Upon Termination In Violation Of California Labor Code § 203 - 30 Day Time Waiting Penalties;
- 6. Failure To Refund Deposits For Work Uniforms In Violation Of Labor Code § 2802 (*and interest –LC § 400*) ; and
- 7. Violation Of California’s Unfair Competition Act (“UCL”), Bus. & Prof. § 17200.

Statutory Grounds

- Code of Civil Procedure § 382
- Private Attorneys General Act (“PAGA”)
- Federal: Class Action Fairness Act (“CAFA”)
 - (1) there are at least 100 class members in all proposed plaintiff classes;
 - (2) the combined claims of all class members exceed \$5 million; and,
 - (3) there is minimal diversity of citizenship (i.e., any class member is a citizen of a different state than any defendant, or any class member is a foreign citizen of a foreign state and any defendant is a foreign citizen).

Private Attorneys General Act ("PAGA")

- Actual damages
- Where Not Specified: \$100 penalty for each violation per employee per pay period for first violation; \$200 for second violation
- Attorneys Fees for Plaintiffs' Counsel

Class Action Issues: The Putative Class

- Class Description:
“All current and former security guards employed by Defendants in California, at any time beginning four (4) years prior to the filing of the complaint through the date notice is mailed to the Class.”

Class Action Issues: The Putative Class

- A sub-Class also exists and is defined as follows:
 “All formerly employed security guards employed by Defendants in California, at any time beginning four (4) years prior to the filing of the complaint through the date notice is mailed to the Class.” (No 17200 claim)

Class Action Issues: The Putative Class

- Numerosity of the Class
- **Commonality** of Questions of Fact and Law
- Typicality of Claims
- Adequacy of Class representatives
- Superiority and Substantial Benefit to the Class

Numerosity of the Class

- Members of the Class are so numerous that their individual joinder is impracticable.
- Plaintiffs estimate that there are no less than [200?] current and former aggrieved employees of Defendants employed in security guard positions in California during the Class period.
- Class members may be notified of the pendency of this action by electronic mail, the Internet, other mail, or published notice.

Commonality of Questions of Fact and Law

- Common questions of law and fact exist as to all members of the Class.
- These questions predominate over any questions affecting only individual class members.

Commonality of Questions of Fact and Law

These common legal and factual questions include:

- (a) Whether Defendant failed to provide their employees working as security guards thirty (30) minute, uninterrupted meal breaks as contemplated by California law for work periods of over five (5) hours (IWC Wage Order 4-2000, 4-2001 and Labor Code §§ 226.7 and 512 by failing to afford their employee security guards proper meal periods);

Commonality of Questions of Fact and Law

These common legal and factual questions include:

- (b) Whether Defendant violated Wage Order 4-2000, 4-2001 and Labor Code §§ 226.7 by failing to afford their employee security guards attendants proper rest periods;
- (c) Whether Defendant failed to pay Plaintiffs and the Class members upon termination all wages earned before termination in violation of Labor Code Section 201 or 202;

Commonality of Questions of Fact and Law

These common legal and factual questions include:

- (d) Whether Defendant is liable to Plaintiffs and the Class members for continuation wages under Labor Code Section 203;
- (e) Whether Defendant is liable to Plaintiffs and the Class members for Failure To Refund Deposits For Work Uniforms In Violation Of Labor Code § 2802;

Commonality of Questions of Fact and Law

These common legal and factual questions include:

- (f) Whether Defendant committed an unlawful business act or practice within the meaning of the Business and Professions Code §§ 17200 *et. seq.*;
- (g) Whether Defendant violated Business and Professions Code § 17200, *et seq.* by failing to afford their employee security guards proper meal and rest periods;

Commonality of Questions of Fact and Law

These common legal and factual questions include:

- (h) Whether, as a result of Defendant's unlawful conduct, Plaintiffs and the Class members are entitled to unpaid wages, waiting time penalties, restitution, equitable relief and other relief, and the nature and amount of such relief; and (FINALLY)
- (i) Whether Defendant's affirmative defenses, if any, raise common issues of fact or law as to Plaintiffs and the Class Members as a whole.

Typicality -- Claims Are Typical Of Class Because:

As employee security guards of Defendant were exposed and subjugated to the same unlawful business practices of:

- (i) failing to provide meal breaks to their employees for all shifts over five (5) hours in duration, and
- (ii) failing to provide proper rest periods for all shifts over four (4) hours in duration.

Adequacy of Representatives

- Plaintiffs are adequate representatives of the Class because their interests do not conflict with the interests of the members of the Class Plaintiffs seek to represent.
- **[Psst! They all want the same thing: \$\$\$]**

Superiority of Class Action

- **Superiority and Substantial Benefit:**
The class action is superior to other available means for the fair and efficient adjudication of Plaintiffs' and the Class members' claims.
- When it comes to settlement, class treatment may also **favor** the employer.

Class Certification Issues

- Attacking Commonality
("Nature of the Post")
 - Survey of the Post

Class Certification Issues

- Attacking Commonality
("Nature of the Post")
 - Survey of the Employees

Discovery

- Purpose
 - Certify Class
 - Favorable Settlement
 - Win at Trial

Discovery

- Methods:
 - Depositions
 - Interrogatories
 - Requests for Production of Documents
 - Requests for Admissions of Fact

Discovery – Typical Areas:

- **Personnel file**
- **Time records**
 - Beginning/ending of each work week
 - Start/stop each meal period
 - Any rest periods
- **Payroll records**
 - (earnings register, copies of paycheck stubs or wage statements, W-2's, documents evidencing rates of pay, amount of wages paid and how wages were calculated)

Discovery -- Typical Areas:

- **Identification of putative class**
- **Number of putative class members (“PCM”) whose employment ended any time after 11/5/04**
- **Post Information** (location, number of guards per shift at each post, rovers, duties)

Discovery -- Typical Areas: Time Records

- Beginning/ending of work week
- Start / stop of all work shifts (electronic or paper?)
- Start / stop of all meal periods
- Any rest periods

Discovery -- Typical Areas: Time Records

- Number of shifts worked by PCM
- Number of shifts of 5 hours or more
- Number of shifts of 6 hours or more
- Any PCMs ever work more than 12 hour shift or 7th consecutive day

Discovery – Typical Areas: Payroll Records

- Average rate of hourly pay
- Average daily pay
- Number of wage statements given to PCMs over the past four years

Discovery – Typical Areas: Policy/Procedure (Handbooks)

- For recording hours worked
- For recording meal periods
- For recording rest periods
- Payroll policies/procedures manual

Discovery – Typical Areas: Meal Periods (“Provide”)

- On Duty Meal Agreements
- Revocations of off-duty meal periods
- Posts where off-duty meal periods provided
- Evidence that “nature of post” prevented off-duty meal periods
- Number of PCMs from whom On Duty Meal Agreement was requested

Discovery – Typical Areas Rest Periods (“Authorize and Permit”)

- **How Communicated**
- **How Enforced**
- **Handbook**

Discovery – Typical Areas: Uniform Deductions and Maintenance

- Written authorizations for payroll deductions
- Evidence of deductions from paychecks / payment of deposit
- Cost of uniforms
- Maintenance – Check your tags!

Privacy Notice

- California is an Opt-Out State
- Privacy Notice Warns PCMs of Counsel Wanting to Get:
 - Name
 - Address
 - Phone
- \$\$\$\$\$\$\$\$

Privacy Notice 3 Choices (all bad)

- Can Send Information to Plaintiffs
- Can Refuse To Give Information
- Can Use a Third Party Administrator (TPA) to Conduct Mailing (not so bad)

Document Problems & Solutions

- Finding Them!
 - Exist?
 - Reproducible?
- 100's of Hours
- Cost of Your Attorneys
- Cost of Reproduction
- Not Billable!

Cost Reduction

- Discovery vs. Discovery Light
- TPAs
- HR Consultants

Your Goal In Class Action Litigation:

- Keep Your Business in Business!
- Attempt To Settle
- Avoid Scorched Earth Litigation Tactics
- Principles vs. Business Judgment?

Employee Classifications

- Employee vs. Independent Contractor?
 - Amount of Control is Governing Factor.
 - All IC's must have their own PPO (even off duty peace officers)
- Exempt (from overtime) vs. Non-Exempt?

Employee Classifications *“This Stuff Don’t Fly”*

- “We have always done it this way” is no excuse.
- “This is the industry standard” is no excuse.
- “I have a special deal with a long time employee/friend” is no excuse.
- The penalties will kill you...

Lessons Learned – 1

- Budget for the expense
- Keep accurate records – don't get lazy
- Check your paystubs
- Check your tags
- Know the nature of the duties at each post
- Know what your guards are doing

Lessons Learned – 2

- Not every post can have on duty meal agreements – desires of the employer and employee are irrelevant
- If you get sued, don't panic
- What does your documentation say about breaks (manual, post orders, etc.)
- Pray for legislative sanity

Class Action Lawsuits: A Perspective from the Trenches

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