

in this issue:

AUGUST 2005

The potential personal liability of corporate agents in wage and hour class actions is a matter of great concern. In *Reynolds v. Bement*, the California Supreme Court concluded that there was no such personal liability under the state Labor Code at the time the case arose. There is, however, potential personal liability under provisions of the Labor Code not at issue in *Reynolds*, under changes made in the Code since *Reynolds* filed suit, under principles of corporate law and under long-established federal law. The risk of personal liability makes wage and hour compliance a priority of every manager.

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California Edition

A Littler Mendelson California-specific Newsletter

Then and Now: The California Supreme Court Rules Corporate Officers and Directors Were Not Personally Liable for Non-Payment of Wages, but Individual Defendants Are Now At Risk

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In the California Supreme Court's long awaited *Reynolds v. Bement* opinion, the court concluded that individuals who were either officers or directors of a company and who were shareholders of the company were not liable for the alleged failure to pay overtime to the company's employees. Though the court's decision will bring a sigh of relief to individual defendants in some pending matters, individual liability for the failure to pay wages is still a possibility under provisions of the Labor Code that were not at issue in *Reynolds*, under changes made to the Labor Code after the *Reynolds* case arose, under general corporate law principles, and under the federal Fair Labor Standards Act (FLSA).

The Claims Made in *Reynolds* & the Court's Analysis

Steven Reynolds worked as a "shop manager" and "assistant shop manager" at several locations of Earl Schieb, Inc.'s automobile painting business. Reynolds complained that he and other similar employees were misclassified as overtime-exempt employees and forced to "work long overtime hours without overtime compensation." Reynolds brought his claims under the applicable Wage Order and sections 510 and 1194 of the California Labor Code. In addition to the company, Reynolds named eight individuals as defendants. Each of the individual defendants was, in addition to being a director or officer of the company, also a shareholder of the company. Reynolds claimed that the individuals were liable because they "directly or indirectly, or through an agent or any other person, employed or exercised control over wages, hours, or working conditions..." The individual defendants argued that they could not be held liable since they were not Reynolds' "employer."

The Supreme Court agreed with the individual defendants and relieved them of liability for any failure to pay overtime. The court readily disposed of Reynolds' claim that he could recover overtime under the Labor Code. The court noted that section 510 of the Labor Code, which requires the payment of overtime, does not define its use of the term "employer." Similarly, the court found that section 1194 of the Labor Code, which authorizes lawsuits to recover overtime, "does not specify potential defendants."

The court rejected Reynolds' argument that the definition of an "employer" found in the Industrial Welfare Commission's (IWC's) Wage Orders should be used with respect to sections 510 and 1194 of the Labor Code. The Wage Orders' definition of an employer includes any "person" as defined in Section 18 of the Labor Code who "directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours or working conditions of any person." Section 18 of the Labor Code defines a "person" to include a person as an individual, and to include partnerships, corporations and many other forms of conducting a business. In its decision, the court determined that the Legislature did not expressly or impliedly intend to incorporate the IWC's definition of an "employer" into sections 510 and 1194 of the Labor Code. While the Legislature amended the Labor Code's provisions regarding wages, hours, and working conditions numerous times after the Wage Orders included the broad definition of an "employer," the Legislature never adopted or even referenced the IWC's broad definition of an "employer." As a result, the court concluded that the Legislature did not intend to define an "employer" to include individual defendants as provided in the IWC's Wage Orders.

The court stopped short of finding the IWC's definition of an "employer" to be invalid. The court strongly suggested that the IWC's definition of an "employer" could be used in wage claim hearings that are conducted by the Division of Labor Standards Enforcement.¹ Ironically, such claims can be appealed for a trial de novo in Superior Court, but the same wage claim could not be initiated against an individual defendant in Superior Court under the reasoning of the *Reynolds* decision.²

The court also rejected Reynolds' attempt to hold the individual defendants liable on the premise that the individual defendants had committed torts by failing to pay overtime. Reynolds did not allege that the individual defendants misappropriated to themselves for their individual advantage the unpaid wages Reynolds alleges were owed to him. The court found that a failure to pay overtime is fundamentally statutory in nature. Consequently, the court concluded that a failure to comply with statutory overtime requirements does not qualify as a tort.

Other Potential Labor Code Claims Against Individual Defendants

Though the court's decision will bring a sigh of relief to individual defendants in some pending matters, the court's decision only applies to private claims made directly under Labor Code sections 510 and 1194. Potential individual defendants should be aware that there are a number of Labor Code provisions under which individuals may be held liable for a failure to pay wages, and provisions added to the Labor Code after the *Reynolds* case arose are also a potential basis for personal liability.

Potential Individual Liability for Wages & Civil Penalties

Section 558 of the Labor Code, which took effect on January 1, 2000, provides that any employer or "other person acting on behalf of an employer" who "violates, or causes to be violated," section 510 of the Labor Code, the related wage payment statutes, or any provision of a Wage Order which regulates employees' hours or days of work, shall be subject to a civil penalty. The civil penalty is defined as a fixed sum per employee per pay period *and the unpaid wages*. The fixed sum is \$50 per employee per pay period and increases to \$100 per employee per pay period for any subsequent or willful violation. A violation of Section 558 can be pursued by

the Labor Commissioner or by a private plaintiff under the Labor Code Private Attorneys General Act of 2004.³

Individuals who violate provisions dealing with the timing of wage payments for various occupations, posting a notice as to when employees will be paid, and the place of payment, may be liable for civil penalties under Section 210 of the Labor Code, which applies to "every person."⁴ Individuals who attempt to pay by checks that cannot be cashed, refuse to pay employees, seek repayment of wages from employees, and engage in improper wage withholdings may also be subject to civil penalties under section 225.5 of the Labor Code, which also applies to "every person."⁵ And, individuals are subject to civil penalties if employees are paid less than minimum wages.⁶ These provisions can also be enforced by private plaintiffs through the Labor Code Private Attorneys General Act of 2004.

Individuals Can Also Be Found Guilty of Misdemeanors

A "person" may be found guilty of a misdemeanor for violating any of a large number of the provisions of the Labor Code.⁷ Section 553 of the Labor Code 553 provides that any person who violates Section 510, which was at issue in *Reynolds*, or the related provisions of the Code is guilty of a misdemeanor. Misdemeanor penalties are also provided for such diverse violations of the Labor Code as failing to timely pay all compensation on established paydays, paying employees in kind instead of by cash or check, and falsely denying the amount of wages due.⁸

Piercing the Corporate Veil as a Basis for Individual Liability

Generally, a corporation and its shareholders, directors and officers are distinct and separate entities and only the corporation is liable for the actions of its owners and representatives. However, courts have created an equitable power to hold individuals associated with a corporation liable where there is a unity of interest between the corporation and the individuals and recognition of the corporation as a barrier to personal liability would result in a fraud or grave injustice on others. Piercing the corporate veil may be based on a showing of variety of factors, including a showing of bad faith, a failure to maintain proper corporate form, the commingling of corporate

and individual assets, the misuse or diversion of corporate assets and the like. This doctrine is known as the "alter ego doctrine" or as "piercing the corporate veil." When this doctrine is applied, the corporate entity is disregarded, and the individuals controlling the corporation may be found liable for what would otherwise be the actions and liabilities of the corporation.

Federal Law

Individuals who act on behalf of employers have been subject to personal liability under the federal Fair Labor Standards Act (FLSA) since the Act was passed in 1938.⁹ The FLSA defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee."¹⁰ There is no need to "pierce the corporate veil" or find a corporation to be an "alter ego" in order for individual liability to be established under the FLSA. Individuals who control the compensation in dispute may be found liable if they are corporate officers and shareholders,¹¹ or if they are simply the supervisor whose actions form the basis of the dispute.¹² Individuals may be found jointly and severally liable with the corporate employer for unpaid wages, but there is no need to name the corporate employer in order to bring suit against an individual who is alleged to be the employer. When a judgment is satisfied under the FLSA, a corporate employer may not demand indemnity from an individual defendant, and an individual defendant cannot demand indemnity from the corporate defendant.¹³

Conclusion

Individual personal liability is a risk in the ever increasing wave of wage and hour litigation. The risk of liability makes wage and hour compliance not only the responsibility but the obligation of every manager with control over wage payment practices.

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¹ Cal. Lab. Code § 98.

² Cal. Lab. Code § 98.2.

³ Cal. Lab. Code §§ 2698 – 2699.5. Individuals who are engaged in the business of garment manufacturing can be held liable as the guarantors of the wages due from any subcontractor to its employees. Cal. Lab. Code § 2673.1.

⁴ E.g., Cal. Lab. Code §§ 204, 204b, 204.1, 204.2, 205, 205.5 and 1197.5.

⁵ E.g., Cal. Lab. Code §§ 212, 216, 221, 222, and 223.

⁶ Cal. Lab. Code § 1197.1.

⁷ E.g., Cal. Lab. Code §§ 204, 204b, 205, 207, 208, 209, 212, 215, 216, 221, 222, 222.5,

223, 225, 226, 226.2, 226.6, 270-272, 800-801, 853, 1174, 1175, 1199 and 1199.5.

⁸ Cal. Labor Code §§ 204, 212 and 226.

⁹ 29 U.S.C. § 201 *et seq.*

¹⁰ 29 U.S.C. § 203(d).

¹¹ *Donovan v. Agnew*, 712 F.2d 1509 (1st Cir. 1983).

¹² *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987) (arising under the equal pay provisions of the FLSA).

¹³ *Martin v. Gingerbread House*, 977 F.2d 1405 (10th Cir. 1992); *Herman v. RSR Security Servs., Ltd.*, 172 F.3d 132 (2