

# California Wage/Hour Update



FISHER & PHILLIPS LLP  
ATTORNEYS AT LAW  
Solutions at Work®  
www.laborlawyers.com

2009, No.3

## Defending Wage Claims Before the California Labor Commissioner

By John K. Skousen (Irvine)

Most employers doing business in California are familiar with wage claims brought by current or former employees before the Division of Labor Standards Enforcement (DLSE), which is the state agency charged with enforcing the California Labor Code and the state's wage-hour laws and regulations. This article highlights the rules and procedures in defending a wage claim in California.

### An Overview

The DLSE enforces the provisions of California law set forth in the Labor Code, as well as wage orders promulgated by the five member Industrial Welfare Commission (IWC), which was created in 1913. The wage orders regulate industries and occupations throughout California. Effective July 1, 2004, the California Legislature de-funded the IWC, but their wage orders generally still have the force of law. Applicable wage orders must be posted in the workplace.

The DLSE is staffed by deputy Labor Commissioners who conduct field audits and related investigations, settlement conferences, and evidentiary hearings. Although trained internally, these deputies generally are not attorneys, and thus, may rely upon DLSE staff attorneys (approximately 30) for support in deciding tough legal issues.

The DLSE's jurisdiction extends to employers and employees only and cannot be exercised by the DLSE over parties that have entered into a *bona fide* contractor-independent contractor relationship. And the DLSE's jurisdiction does not extend to certain governmental entities or employers with employees who reside outside of, and are not working in, California.

### DLSE Hearing and Dispute Resolution Procedures

The DLSE adjudicates wage claims in hearings conducted by hearing officers or deputy Labor Commissioners and may be called upon to decide the issue of jurisdiction itself. (The DLSE's exercise of jurisdiction, if disputed, may be challenged by a separate court action). The DLSE also investigates discrimination and public works complaints and enforces Labor Code statutes and IWC wage orders. The DLSE's power to investigate complaints includes the right to make inspections, subpoena witnesses and documents, and conduct examinations of witnesses.

Within 30 days of the filing of a complaint, the DLSE must notify parties as to whether the agency will take further action. The Labor Code gives the DLSE three alternatives: 1) accept the matter and conduct an administrative (or "Berman") hearing; 2) prosecute a civil action for the collection of wages and other money payable to employees arising out of an employment relationship; or, 3) take no action on the complaint.

Typically, the DLSE gives the employer written notice of a wage claim filed by an employee (claimant) with an opportunity to respond in writing. At that juncture, the employer generally can terminate the action by paying the amount set forth in the claim.



### Conciliation Conference.

If the employer disputes the claim or does not respond, the DLSE generally will hold a conciliation conference at one of the local DLSE offices. If the employer does not appear, generally the matter will be set for a formal hearing if the employee's claim has arguable merit.

By contrast, if the claimant does not appear at the conference, or if the claim appears to be frivolous, the claim will be dismissed without prejudice (meaning that the same claim may be brought in arbitration or in a civil court on the same issue). For example, notwithstanding Labor Code provisions guaranteeing a *Berman* hearing, a California appellate court recently held that an employee can waive his or her right to a *Berman* hearing by executing a valid arbitration agreement covered by the Federal Arbitration Act. *Sonic-Calabasas A, Inc. v. Frank Moreno* (Second Appellate District, May 29, 2009).

If the claimant appears and the DLSE claim has arguable merit (as determined by the Deputy Labor Commissioner conducting the conciliation conference), the Commissioner encourages settlement discussions. If a settlement is reached, the DLSE generally will provide a release document to be signed by the parties upon payment by the employer of the agreed consideration. If the dispute cannot be settled, disputed claims generally will be set for a formal hearing before another Deputy Labor Commissioner.

### Berman Hearing

If the DLSE decides to accept the matter and conduct an administrative hearing, commonly known as a "Berman hearing," the hearing generally is held within 90 days. The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving all but the most complex wage claims. Within 15 days after the *Berman* hearing is concluded, the DLSE hearing officer must file and serve a copy of the order, decision, or award, which must include a summary of

*Continued on next page*

## Defending Wage Claims Before the California Labor Commissioner

*Continued from previous page*

the hearing and the reasons for the decision, and must advise the parties of their right to appeal.

### *Right of Appeal*

Within 10 days after service of notice, the parties may seek review by filing an appeal to the municipal or superior court, where the appeal will be heard *de novo*, or the matter is heard “anew.” If no party takes an appeal, the DLSE’s decision will be considered a binding legal judgment, which can be enforced by a California superior court upon application by the DLSE for entry of judgment.

The decision of the trial court is subject to a conventional appeal to an appropriate appellate court. At this point appellate review is of the facts presented to the trial court, and not to the DLSE, which may include entirely new evidence.

### Stacking The Odds Against Employers

If found liable by the DLSE in a formal hearing, the procedural cards are stacked against employers since California public policy encourages swift payment of unpaid wages to employees. For example:

- although employers may appeal the DLSE’s decision and obtain a new hearing before the California Superior Court, they are required to file a bond or make a cash deposit with the court in the full amount awarded by the DLSE – employees are not;

- the Labor Commissioner may provide free legal representation to employees who wish to oppose an employer’s appeal – no such representation is available to employers;
- parties who are not successful on their appeal have to pay the non-appealing parties’ costs and reasonable attorneys’ fees; but
- the definition of a “successful” appeal is different depending on whether an employer appeals or an employee appeals. An employee is “successful” on appeal if he or she recovers an amount greater than \$0. Consequently, an employer is successful on appeal only if nothing is awarded at the *de novo* trial. Therefore, even if the employer who appeals succeeds in having an award reduced significantly, the employer still has to pay the employee’s reasonable attorneys’ fees and costs.

All the above factors persuade many employers to settle an unmeritorious claim, or pay the award amount, rather than appeal just to avoid the risk of being ordered to pay the non-appealing party’s costs and fees.

### The Labor Commissioner’s Opinions And Internal Guidelines

The Labor Commissioner and DLSE staff issue “opinion letters” that purport to create a cohesive policy to guide employers and hearing officers in the adjudication of wage claims. Over the years, the Labor Commissioner also has published written guidelines, often citing its own opinions for support, to assist its staff in enforcing California’s wage-hour laws. The most recent version is the DLSE’s Enforcement Policies and Interpretations Manual, which is updated periodically.

These opinions and internal guidelines do not have the force of law, but may provide valuable insight regarding how the DLSE will rule on issues of law. Although frequently rejected, these guidelines occasionally are adopted by courts or found to be persuasive on certain points of law. These non-binding opinions and guidelines, if not heeded, may subject businesses to citations by field officers, adverse administrative decisions at DLSE hearings, and court-enforced judgments. Although appeals or writs of mandate (for citations) are available to employers, they are costly.

Not all cards are stacked against the employer. Unlike remedies available in a court or arbitration proceeding, employees who succeed in obtaining an award of unpaid wages from the Labor Commissioner cannot recover their attorneys’ fees or costs incurred in pursuing the claims. Unlike an arbitrator, the Labor Commissioner proceeding is conducted by hearing officers at no charge to either party, although employers may sometimes question their neutrality or become frustrated because there are no equitable offsets or procedures for recovering on cross complaints.

In addition, the Labor Code purports to “protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by violating California’s wage laws. Of course, employers who comply with the law may well benefit when a competitor who has gained market share by unlawful compensation practices is effectively eliminated after getting caught by a DLSE field task force officer.

To sum it up, despite tough economic times in California which make budget constraints likely, employers should anticipate that the DLSE as an enforcement agency will continue to exist. This is not necessarily bad news for employers who make vigilant efforts to comply with the law or who are in a position to challenge the DLSE when it disagrees with decisions that are incorrect.

*For more information email the author at [jskousen@laborlawyers.com](mailto:jskousen@laborlawyers.com) or call 949.851.2424.*

*The California Wage/Hour Update* is a quarterly publication of Fisher & Phillips LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have. Fisher & Phillips LLP lawyers are available for presentations on a wide variety of labor and employment topics.

### Office Locations

<b>Atlanta</b> phone (404) 231-1400	<b>Houston</b> phone (713) 292-0150	<b>Orlando</b> phone (407) 541-0888
<b>Charlotte</b> phone (704) 334-4565	<b>Irvine</b> phone (949) 851-2424	<b>Philadelphia</b> phone (610) 230-2150
<b>Chicago</b> phone (312) 346-8061	<b>Kansas City</b> phone (816) 842-8770	<b>Portland ME</b> phone (207) 774-6001
<b>Columbia</b> phone (803) 255-0000	<b>Las Vegas</b> phone (702) 252-3131	<b>Portland OR</b> phone (503) 242-4262
<b>Dallas</b> phone (214) 220-9100	<b>Louisville</b> phone (502) 561-3990	<b>San Diego</b> phone (858) 597-9600
<b>Denver</b> phone (303) 218-3650	<b>New Jersey</b> phone (908) 516-1050	<b>San Francisco</b> phone (415) 490-9000
<b>Fort Lauderdale</b> phone (954) 525-4800	<b>New Orleans</b> phone (504) 522-3303	<b>Tampa</b> phone (813) 769-7500

*Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters*

We’re interested in your opinion. If you have any suggestions about how we can improve the *California Wage/Hour Update*, let us know by contacting your Fisher & Phillips attorney or email the editor at [mmitchell@laborlawyers.com](mailto:mmitchell@laborlawyers.com).

### How to ensure continued receipt of this newsletter

If you would like to continue to receive our newsletters and other important information such as Legal Alerts and seminar information via email, then please take a moment right now to make sure your spam filters are set to allow transmissions from the following addresses: [communications@laborlawyers.com](mailto:communications@laborlawyers.com) or [seminars@laborlawyers.com](mailto:seminars@laborlawyers.com). If you currently receive communications from us by regular mail, and would like to begin receiving them by email, please send a request to [communications@laborlawyers.com](mailto:communications@laborlawyers.com).