

Employee Wage Claims (Berman Hearings)

Monday, April 29, 2019

Sonoma County Bar Association

WHAT IS A BERMAN HEARING?

- History
 - Howard Berman: California Assemblyman, 1976
- Administrative Relief
- Labor Code §98 and §98.8
- Procedural Purpose

“The purpose of the Berman hearing procedure is to avoid recourse to costly and time-consuming judicial proceedings in all but the most complex of wage claims.” (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094

CONFERENCE V. HEARING

Conference

- Initial Meeting
- Informal
- Like Mediation
- Goal: Settlement
- No testimony
- No discovery
- Appearance Required
- Attorneys/Representatives May Attend

Hearing (Berman Hearing)

- Second Meeting
- Occurs If Not Settled At Conference
- More Formal
- Sworn Testimony
- Evidence
- Decision Made – Binding
- May Be Appealed

Cal. Labor Code §98(a) & §98.3(a)

- ❖ The Labor Commissioner can only hear disputes for “any action to recover wages, penalties, and other demands for compensation.”

Cal. Labor Code §98(a)

- ❖ The Labor Commissioner may prosecute all actions for the collection of wages, penalties and demands of persons who, in the judgment of the Labor Commissioner, are financially unable to employ counsel and the Labor Commissioner believes have claims which are valid and enforceable. Cal. Labor Code §98.3(a)

TYPES OF WAGE CLAIMS

- Unpaid Wages
 - Minimum Wage
 - Commissions
 - Piece Rate
 - Regular Wages
 - Bonuses
 - Sick Pay
 - Vacation Time
 - Tips
- Meal/Rest Break Claims
- Final Wages
- Waiting Time Penalties
- Failure to Provide Personnel File/Records
- Unreimbursed Business Expenses
- Reporting Time Pay
- Unauthorized Deductions
- Other

JURISDICTION ISSUES

EXEMPTIONS FROM JURISDICTION

- Independent Contractors
- Government Workers
- Union Workers

* Labor Commissioner has ultimate authority to determine jurisdiction.

FILING THE CLAIM: DLSE FORMS

DLSE Form 1 Initial Report or Claim

- One page
- Filed with DIR/Labor Commissioner's Office
- Supplemented With Supporting Documentation

DLSE Form 55 for claimants who worked irregular hours and are claiming unpaid wages (for non-overtime or overtime hours worked) or meal and rest period violations

DLSE Form 155 for claimants with commission claims

DLSE Vacation Pay Schedule for claimants seeking vacation wages

CONFERENCE: INITIAL CONSIDERATIONS

- Attendance
 - Appearance Required
- Response
 - Filing Response/Answer – not required
- Counter-claims
 - -Must be filed in court
- Attorney Representation - Optional
- Arbitration Agreement?

PREPARING FOR CONFERENCE

- Representatives/Attorneys
- Legal Exposure
- Strengths & Weaknesses of Claims and Defenses
- Witnesses Who Could Corroborate Position
- Risks of Not Settling
- Potential Settlement Offer/Window
- Draft Settlement Agreement

WHAT TO BRING TO CONFERENCE

Recommended: (for reference,
but use discretion)

Employee's File

- Payroll records
Paystubs, timecards, etc.
- Vacation Time
- Sick Time accruals
- Meal/Rest Break Policies,
Waivers
- Other (handbook, policies,
etc.)

Generally Required by Labor Commissioner:

- DLSE's Report of Workers' Compensation Insurance
- City business license
- Articles filed with Secretary of State
- Certificate of Fictitious Business Name
- Other relevant information

RESOLUTION AT CONFERENCE

No Agreement Reached:

- Complaint
- Notice of Hearing
- Settlement can still happen

Agreement Reached:

- Settlement Approved
- Settlement Agreement
- Tax Issues
 - W-2
 - 1099

THE CONFERENCE

- Like Mediation
 - Deputy Commissioner – Neutral Party
 - Goal is Settlement
 - Forum – together and/or separate
 - Non-binding
- Discussion of claims [Calculation of wages/penalties]
- No burden of proof; no evidence presented

NOTICE OF HEARING

- Complaint
 - Plaintiff/Defendant Named
 - Service
 - Instructions
 - Allegations
- Answer
- Hearing Procedure
- Calendaring Issues – Hearing date rarely changed

WHAT TO EXPECT AT HEARING

- Testimony
- Witnesses
- Hearing Officer Preferences
- Binding Decision
- Labor Commissioner May:
 - Issue Subpoenas
 - Order Compelling Evidence
 - Documents, witnesses

PREPARING FOR HEARING

- Review Complaint
- File Answer
- Evidence
 - Payroll Records (paystubs, hours worked)
 - Calendar/Records
 - Business Records
 - Supervisor Notes
 - Opening/Closing Statement
 - Direct and Cross Exam
 - Witness Statements/Testimony

SUBPOENAS FOR HEARING

- Subpoenas for documents, records or witnesses must be issued by the Labor Commissioner. Applications to the Labor Commissioner for issuance of subpoenas should be made at least fifteen (15) business days prior to the date of the hearing. Submit a written request, using Information for Subpoena ([DLSE 564](#)) stating the reasons you feel the documents, records or witnesses are relevant or necessary. Costs incurred in the service of a subpoena, witness fees and mileage will be borne by the party requesting the subpoena.

BERMAN HEARING - FORUM

- Local Labor Commissioner's Office
 - Sonoma County: 111 Santa Rosa Ave
- Representatives/Attorneys May Attend
- Similar To Small Claims
 - Hearing Officer Facing Parties
 - Parties At Separate Tables
 - Interpreters Provided if Necessary

HEARING PROCEDURES

- Trial/Hearing Brief (not required, but I recommend)
- Oath Taken (parties and witnesses)
- Testimony
 - Sworn
 - Recorded
 - Opening Statement – (very brief)
 - Questions/Cross Examination – (Use best witness - often hearing officer will shorten your witness list unilaterally)
 - Closing Statement – (often no time for this)
- Decision

HEARING ATTENDANCE & FORMALITIES

- If Plaintiff Fails To Attend:
Case Dismissed
- If Employer Fails To Attend:
Case Decided On Merits Of Evidence Presented By
Employee
- Hearing Officer – Wide Discretion
- **No Formal Rules Of Evidence**

NOTICE OF DECISION

- Written – Order, Decision or Award (“ODA”)
- Within Fifteen (15) Days After The Hearing (Never happens this quickly)
- Filed In The DLSE Office and Served On The Parties Shortly Thereafter.
- Includes Decision and Amount Awarded
- Served
- Binding
- May Be Appealed [In Civil Court]

APPEALING THE ODA

- Both Parties May Appeal
- Notice of Appeal (DLSE 537)
- De-Novo (anew - start over from scratch)
- Tight Time-Frame – 10 days after service of ODA
- Bond Requirement – Total amount awarded to employee in ODA
- Filed in Superior Court
- Service

APPEALING, CON'T.

- Employer Risks (May lose and Employee may add claims)
- DLSE May Represent Employee
 - Discretionary
 - Financial Criteria
- Damages
 - Reduced
 - Reversed
- Attorney's Fees/Costs

Burkes v. Robertson

Cal. Court of Appeals – August 20, 2018

- Indigent Employer Has The Right To Seek A Waiver Of Bond Requirement.
- Must File Timely Motion For Waiver
 - Certificate Of Estoppel –
 - Showing Appeal Has Merit
 - Declaration Of Applicant
- Discouraged
 - *HIGHTENED OVERALL RISKS TO EMPLOYER

Nishiki v. Danko Meredith

Court of Appeal - August 1, 2018

Labor Code 203 – Waiting time penalties

- Quits at 6:30 on Friday via e-mail
- Check issued Tuesday, with typo; not cashable
- Employer said try cash again – caused more delay
- Corrected check eventually mailed – 17 days later

Willful Act?

- Typo **not** willful
- Refusal to re-issue corrected check = willful**

Employer Appealed

- Slight reduction in penalties, but. . .
- \$250K in attorneys fees!!

Questions



DICKENSON PEATMAN FOGARTY

Jennifer is a partner in the firm's labor and employment department. She has been a lawyer for 25 years with extensive experience in all manner of employment issues including wage and hour, discrimination, reasonable accommodation, leaves of absence, and implementing state and federal regulations.

She often analyzes legal risks associated with hiring, disciplining and firing in order to counsel clients with these employment decisions. Although counseling is the key to DP&F's employment practice, Jennifer is a trained and experienced litigator who protects her clients' interests when litigation becomes necessary.

As an employment lawyer Jennifer recognizes the importance human resources plays in every business. Because of this she obtained her certification as a Senior Professional in Human Resources from the HR Certification Institute. This in depth understanding of human resources enhances her ability to counsel her clients in all areas of employment law.

Jennifer is a world traveler and native Californian. She enjoys all that Sonoma County has to offer and resides in Santa Rosa with her two children.



Jennifer E. Douglas
Partner

DP&F Attorneys at Law
dpf-law.com – jdouglas@dpf-law.com – 707-524-7000

