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Law Alert

To: Firm Clients and Contacts

From: Niesar & Vestal LLP

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Re: ***Nishiki v. Danko Meredith, APC,*** **Court of Appeal, 1st District, August 1, 2018.**

A new opinion from the California Court of Appeal sends a stark warning to employers regarding employee rights to prompt payment upon termination of employment. *Nishiki v. Danko Meredith, APC,* Court of Appeal, 1st District, August 1, 2018.

California Labor Code Section 202 requires that the employer pay all wages (including accrued PTO, earned commissions, etc.) within 72 hours of termination of employment if the employee voluntarily quits; or, if the employee has given at least 72 hours' notice of her quit date, the wages must be paid at the time of quitting. If payment is not made as required, the employee, in effect, stays on the payroll until the full wages are paid, but not to exceed 30 days (Labor Code Section 200(a)--"waiting time penalties").

In *Nishiki*, the employee gave her notice at 6:38 on a Friday night. The following Tuesday, November 18, her law firm employer sent her a check for what all involved agreed was the amount owing to her. But while the handwritten check had, in numerals, the correct amount ($2,880.31), the written amount was $2,800.31. The employee tried to cash the check, but it was not honored by the bank due to the error. She sent an email on Wednesday, November 26 at 9:46 a.m. (the day before the Thanksgiving holiday) saying she had been unable to cash the check because of the error, and claimed that she was entitled to waiting time penalties. There followed some emails back and forth and, on Monday, December 1, the employer sent the employee an email saying the check was negotiable and she could either keep it and the employer would send her the extra $80, or she could return the check and get a replacement for

the full $2,880.31. Finally, after more exchanges, on December 5 the employer mailed the employee a new check in the amount of $2,880.31.

The employee then filed a complaint with the Labor Commissioner seeking a total of $31,585.63 for break-time she alleged she had been denied, unpaid vacation time, and waiting time penalties. The hearing officer rejected all but the waiting time claim for which he awarded her $4,250 (17 days times the agreed-upon daily rate of $250).

Here is where the real damage to the employer started to accrue. Instead of swallowing hard and paying the $4,250 award, the employer exercised its right to appeal for a trial de novo in the superior court (a retrial of the issues as if there had been no prior trial). Unfortunately for the employer, the superior court, after a trial, awarded the same $4,250 waiting time penalties. Then, the employee moved for statutory attorney's fees, as provided in Labor Code Section 98.2. The Superior Court awarded her $86,160 in attorney's fees.

The employer appealed that award to the court of appeal which, after all briefs, oral arguments, etc., awarded the employer a pyrrhic victory. It held that the superior court had awarded too many days waiting time; waiting time only started on November 26, the day the employer received notice of the problem with the original check, and extended to December 5 when it sent the replacement check—so only nine days times $250, or $2,250.

But, the court of appeal then went on to consider the attorney's fee award. Important to its decision was its interpretation of the purpose of the attorney's fee award provision in the statute, i.e., "to penalize an unsuccessful party who appeals the Commissioner's decision". And, the law is very specific on what constitutes "success" if the party against whom the appeal is lodged is an employee: "An employee is successful if the court awards an amount greater than zero". In this case, the employee had claimed in her original filing in the superior court proceedings that she was denied wages and waiting time penalties in the amount of $31,585.63, but she was found entitled to only $2,250 by the court of appeal. Nevertheless, because she was awarded a sum greater than zero, she was entitled to recover all of her attorney's fees to the tune of $86,160.

But that is not all. The court of appeal said that Section 98.2 of the Labor Code provides for recovery by the employee of her attorney's fees in successfully contesting the appeal of the Labor Commissioner's award, and that includes the costs of the further appeal of the superior court's decision. Thus, the court of appeal sent the matter back to the superior court for a determination of how much the employee should be paid for her attorney's fees in the appellate court proceeding.

The bottom line is that the employer is liable for all of the former employee's attorney's fees in the trial de novo in the Superior Court, her attorney's fees incurred in the appeal to the court of appeal, its own attorney's fees in both venues, and the $2,250 waiting time penalty ultimately determined correct by the court of appeal. Cumulatively, the employer owes and has paid close to 59 times what it would have incurred if it had just off the Labor Commissioner's initial award.

It should be obvious now, but is still worth saying, an employer should never appeal an award granted by the Labor Commissioner unless it is absolutely certain that it will prevail and the employee will not receive even a nominal award.

If you have questions concerning the *Nishiki* case, or the respective rights and obligations of employees and employers, please feel free to contact Gerald Niesar (gniesar@nvlawllp.com), Oscar Escobar (oescobar@nvlawllp.com), or Peter Vestal (pvestal@nvlawllp.com).