SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

Nisei Farmers League, Plaintiff, v. California Labor and Workforce Development Agency, et al., Defendants.	No. 16CECG02107 ORDER AFTER HEARING Hearing Date: July 18, 2016 Dept. 402 Judge: Honorable Jeff Hamilton

The following matter came on calendar before this court on June 18, 2016 on an Order to Show Cause why a Preliminary Injunction should not issue. Having reviewed the papers and documents on file with the original Temporary Restraining Order and the supplemental briefing requested by the Court, and having considered the arguments of counsel, the Court rules as follows:

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff is an organization representing the interests of many farmers throughout the State of California. Many of its members pay their employees through "piece-work," which is to say, an employee works for a fixed rate per item of work. For example, a farmworker

could be paid per barrel, basket or bushel of fruit or nuts picked.

Recently, in response to cases interpreting the interplay of piece work and California minimum wage requirements, the Legislature enacted Labor Code section 226.2. This sets forward a scheme for ensuring that employees compensated on a piece work basis are also compensated for "other nonproductive time" which is defined in the first paragraph of the statute as "time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis." (Labor Code §226.2.) The statute mandates that such work, in addition to "rest and recovery periods" is intended to be compensated. (Labor Code §226.2, subd.(a)(1).) The statute sets forth guidelines for how the compensation is to be determined. (Labor Code §226.2, subd. (a)(3).)

At issue here in this Motion is a subsequent provision that creates an affirmative defense for employers "to any claim or cause of action for recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties . . .based solely on the employer's failure to timely pay the employee the compensation due for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015." (Labor Code §226.2, subd.(b).)

In order to qualify for the affirmative defense, an employer must make payments to each of its employees for "previously uncompensated or undercompensated rest and recovery periods and other non-productive time from July 1, 2012 to December 31, 2015." (Labor Code §226.2, subd.(b)(1).) The payments must be either the "actual sums due" to each employee or a sum based on the "amount

equal to 4 percent of that employee's gross earnings in pay periods in which any work was performed on a piece-rate basis" with adjustments not relevant here. (Labor Code §226.2, subd.(b)(1)(A)&(B).) Such payments must be made on or before December 15, 2016. (Labor Code §226.2, subd.(b).)

Moreover, as especially pertinent here, in order to qualify for the affirmative defense, the statute requires, by no later than July 1, 2016, the employer to provide "written notice to the department of the employer's election to make payments to its current and former employees in accordance with the requirements of this subdivision." (Labor Code §226.2, subd. (b)(3).) The statute requires that the Department of Industrial Relations post on its website "either a list of the employers who have provided the required notice or copies of the actual notices. The list or notices shall remain posted until March 31, 2017." (Labor Code §226.2, subd. (b)(3)(B).)

Plaintiff filed a complaint on June 26, 2016. The Complaint seeks Preliminary and Permanent Injunctive and Declaratory Relief on a number of grounds: (1) Due Process-Vagueness; (2) Due Process-Arbitrary Deprivation of Property; (3) Due Process-Lack of Fair Notice; (4) Due Process-Retroactive Punishment; (5) Takings Clause; (6) Contract Clause; (7) Declaratory Relief; and (8) Injunctive Relief.

Two days after filing the complaint, Plaintiff filed a request for a Temporary Restraining Order and for the Court to set an Order to Show Cause why a Preliminary Injunction should not be issued. Defendants filed an opposition. On June 30, 2016, the Court heard arguments from counsel. At oral argument, counsel for Plaintiff

argued that the requirement the publication requirement of Section 226.2, subd.(b)(3)(B) represented an irreparable injury for the farmers represented by Plaintiff because it would potentially expose them to investigation by the state and lawsuits by potential plaintiffs. Relying in part on this argument and on the serious questions on the merits raised by Plaintiff, the Court granted the Temporary Restraining Order.

Because of scheduling issues, the parties stipulated to hold the hearing on July 18, 2016. After the hearing, the Court asked the parties to specifically brief the factual and legal support for or against the granting of the preliminary injunction as well as the evidentiary support for each position.

Plaintiff and Defendants each filed supplemental briefs and, despite no permission or request from the Court to do so, Plaintiff filed a reply brief.

Plaintiff's motion was based, in large part, on several declarations filed as "Doe Declarations." Defendants moved to strike those declarations on the grounds of non-compliance with Code of Civil Procedure section 2105.5, which requires proper "subscription" of declarations.

II. LEGAL DISCUSSION

A trial court must evaluate two interrelated factors when deciding whether to issue a preliminary injunction: (1) the likelihood of success on the merits, and (2) the balance of harm presented. (*Common Cause v. Bd. of Supervisors of Los Angeles County* (1989) 49 Cal.3d 432, 441-42.) A motion for preliminary injunction *must be denied* if the plaintiff has failed to satisfy either of

these two factors. (*Carsten v. City of Del Mar* (1992) 8 Cal.App.4th 1642, 1649.) A preliminary injunction may only issue upon an adequate evidentiary showing. (*Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, 247.)

A. Likelihood of Success

The challenge for Plaintiff is that it must show a likelihood of success on one of its causes of action in order to support its claim to a preliminary injunction. The arguments presented in its motion focused largely on its assertion that Section 226.2 was void for vagueness, but also that it unconstitutionally applied the law retroactively, and that, in addition to the void for vagueness argument, that the Court could issue a declaration clarifying the law in advance of its enforcement.

Even so, Plaintiff's briefing largely centered on its assertion that Section 226.2 is unconstitutionally void for vagueness. One of the difficulties the parties had was in settling on a standard for "void for vagueness." Recently, the United States Supreme Court, in *Johsnon v. United States* (2015) 135 S.Ct. 2551, 2557, held that the standard found in some cases- that so long as *any* reasonable construction could be given to a statute it was immune from a vagueness challenge- was too high a bar. (*Id.*) However, the Supreme Court did not announce a new standard.

Until such time as the California Supreme Court can provide definitive guidance, the Court must rely on the state court cases that have provided standards.

Plaintiffs argue that the standard is simply whether "a lay person of common intelligence can understand the law, not a lawyer

or judge." (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 498-99.) This is an oversimplification. As Defendants point out, the standard, as applied, is much higher.

A statute will be upheld unless its unconstitutionality "clearly, positively and unmistakably appears." (*Patel v. City of Gilroy* (2002) 97 Cal.App.2d 354, 489 (citing cases).)

Moreover, a party "cannot prevail by simply suggesting hypothetical situations in which constitutional problems *may* arise. [S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.' " (*Hill v. Colorado, supra,* 530 U.S. at p. 733, 120 S.Ct. 2480; see also *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1109, 40 Cal.Rptr.2d 402, 892 P.2d 1145 [unless law sweeps in substantial amount of constitutionally protected conduct, facially vague law must be invalid in all respects and applications]; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1201, 246 Cal.Rptr. 629, 753 P.2d 585 [in facial vagueness challenge party must demonstrate vagueness in "all of its applications," not just some instances of uncertainty or ambiguity]; cf. *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 347-348, 66 Cal.Rptr.2d 210, 940 P.2d 797.)" (*Id.* at 487-88 (internal quotations and citations omitted).)

Finally, as Defendants point out, two underling principles (endorsed by the US Supreme Court in *Communications Ass'n v. Douds* (1950) 339 U.S. 382, 412) also inform the analysis: first, "the concrete necessity that abstract legal commands must be applied in a specific *context*," and, second "the notion of '*reasonable*

specificity' or '*[r]easonable* certainty.'" (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117 (emphases in original).)

Plaintiff's argument is that its members do not know whether to take advantage of the affirmative defense provided by the statute because its members do not understand the phrases "other nonproductive time," "directly related," and/or "actual sums due."

The parties' disputes center on the proper interpretation to give *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36 (*Gonzalez*) and *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864 (*Bluford*). The cases, in turn, involved interpretations of *Amenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314 (*Amenta*). These cases stand for the proposition that, at least in certain circumstances, when an employee is performing rest or recovery periods or "performing non-piece-rate tasks directed by their employer" (*Gonzalez, supra,* 215 Cal.App.4th at 54), the employee must be compensated at least at minimum wage by the hour, and not on an average on a weekly basis, as under the federal minimum wage system. (*E.g., Armenta, supra,* 135 Cal.App.4th at 45.)

Defendants argue that, in the context of these cases, which the legislative history suggests Section 226.2 was meant to codify, the challenged language is understandable, even to a person of "common intelligence." Plaintiff contends that the cases do not offer sufficient guidance and that the cases are incorrectly decided.[1]

Whatever standard is to be adopted, the Court does not believe

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[1] The Court will note that it is without power to decide whether those cases were rightly or wrongly decided; the duty of the trial court is simply to follow their rulings until or unless they are overturned.

that Plaintiff has borne its burden of showing a likelihood of success on the merits that the statute is unconstitutionally vague. A fair reading of the statute is that, insofar as activities prior to its enactment are concerned, no new obligations were created; either employers had fully compensated their employees for their work or they had not been fully compensated. If an employer wishes to take advantage of the offered affirmative defense it must either make a good faith attempt to pay the amounts due or pay 4% of the gross earnings of the employee between July 1, 2012 and December 31, 2015. (Labor Code §226.2, subd.(b)(1) &(b)(1)(A)-(B).)

If the employer does not take advantage of the safe harbor provisions, then it may still argue that it does not owe any back pay to its employees.

In oral argument, Plaintiff stressed that its members found that "other non-productive time" and "directly related" were void as applied to the farming industry. While the Court is sympathetic to these issues, the Court is also mindful that the statue is intended to apply to all industries utilizing piece-rate compensation, and so all that is required is that there must be "reasonable certainty" and "reasonable specification." ((*People ex rel. Gallo, supra,* 14 Cal.4th at 1117.)

Here, Plaintiff has not shown that the definitions in dispute are "clearly" and "unreasonably" indefinite.

Further, there is nothing in the statute that suggests that it makes any substantive changes to the law. To the extent that *Gonzalez, Bluford,* and/or *Armenta* did or did not apply beyond their facts prior to the enactment of this law, it does not appear that this code section changes that calculation.

Finally, to the extent that Plaintiff has alleged that the Court could issue a declaration "clarifying" the law for its members, the Court is inclined to agree with Defendants that such a ruling would be advisory.

The Court has therefore concluded that Plaintiff has not shown a likelihood of success on the merits in the papers presented as part of this motion.

B. Balance of Harms

Where a Court has ruled that there is no likelihood of success on the merits, the preliminary injunction will be denied. (*Law School Admission Council, Inc. v. State of Calif.* (2014) 222 Cal.App.4th 1265, 128 ("trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim").) Nevertheless, the Court will observe that Plaintiff has not shown that the balance of harms will tilt in its direction. (*Id.* (balance of harm demonstrated by the comparative consequences of the issuance and non-issuance of the injunction).)

As stated above, Plaintiff has shown no harm to Plaintiff's membership from any requirement to pay back wages: the statute appears to make no difference in the obligations of employers to pay for rest and recovery periods and other non-productive time for any period before its enactment. Simply put, Plaintiff's members' obligations with respect to moneys owed do not appear to be changed by this statute.

The only applicable harm, as identified by the Plaintiff, appears to be the publication requirement of Labor Code section

226.2, subdivision (b)(3)(B). In support of the alleged harm caused by this requirement, Plaintiff has provided declarations of several farms who have remained anonymous (they have filed "Doe Declarations").[2] Collectively, they state that they are fearful that, by declaring their intentions to rely on the affirmative defense and make payments to their employees, they are likely to suffer investigation from the state and law suits from the plaintiff's bar.

While the Court is mindful that state investigations and private lawsuits are not trivial, there is nothing in the declarations that explains the costs of such lawsuits or why such lawsuits would be more likely if their names are posted. In fact, there is an argument that by broadcasting to potential plaintiffs that they are relying on an affirmative defense, it makes private lawsuits less likely.

Furthermore, the Defendants have presented declarations and information that delaying implementation of the affirmative action scheme would be a hardship for the employers who had already indicated to the State their intention to pay employees under the auspices of Section 226.2. As Defendants noted in oral argument, such non-parties will also be subject to uncertainty as to whether they can have the advantage of an affirmative defense if the injunction were to be granted.

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[2] At oral argument, the Court denied the motion to strike and allowed admission into evidence of the "Doe Declarations." The Court noted that much of the evidence provided by Defendant was hearsay (to which Plaintiff did not object), but admitted the evidence from both parties. The Court has treated the evidentiary deficiencies as going to the weight, not the admissibility, of the evidence.

To be fair, neither party has provided definitive evidence as to the scope of the problem for purposes of balancing these hardships. In such a case, the burden remains on the party seeking the injunction to demonstrate that the balance of harms tilts in its favor. (*Id.*) For this reason, too, the motion will be denied.

The Court notes that the Court is not making any observations or rulings on the other causes of action contained in Plaintiff's complaint, merely those for which Plaintiff provided briefing.

III. CONCLUSION

For the reasons stated above, the Court denies Plaintiff's motion for preliminary injunction. The Temporary Restraining Order, expired as of the hearing on July 18, 2016. Per the terms of the Court's order to show cause, the deadline for electing whether to comply with Labor Code §226.2, subd.(b)(3) is July 28, 2016.

DATED this 25th day of July, 2016

Honorable Jeffrey Y. Hamilton, Jr.
Judge of the Superior Court