Case No. _____

IN THE SUPREME COURT OF CALIFORNIA

CHRISTIAN MORALES,

Petitioner,

v.

BRIDGESTONE RETAIL OPERATIONS, LLC,

Respondent.

After a Decision of the Court of Appeal,
Fourth Appellate District, Division Three, Case No. G057043

Appeal from the Orange County Superior Court,
Case No. 30-2017-00900244 (The Honorable William Claster)

PETITION FOR REVIEW

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STATEMENT OF THE ISSUE

The California Labor Code requires employers to give workers an "accurate itemized" paystub each pay period that discloses "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate." (Lab. Code, § 226(a)(9).) The issue presented by this case is:

Is an hourly rate "in effect during" a pay period under section 226(a)(9), and thus required to be disclosed on a paystub for that period, when the hourly rate is (1) calculated before the end of the pay period (as the Fourth District Court of Appeal held below), (2) earned during the pay period (as the Second District Court of Appeal has held), or (3) paid during the pay period (as the majority of federal courts have held)?

INTRODUCTION

This case presents an important issue for workers that has led to an acknowledged split among state and federal courts in California—as well as significant confusion among employers—over the scope of an employer's obligation to disclose wage information on employee paystubs under the California Labor Code.

Section 226(a)(9) of the Labor Code requires employers to include in paystubs "*all* applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate" (emphasis added)—a provision designed to ensure that employees are "fully informed regarding the calculation of [their] wages" and are "not shortchanged." (*Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385,392.) The Fourth District Court of Appeal held below, however, that the hourly rate of overtime pay is not "in effect during" a pay period, and thus need not be disclosed by an employer, if the rate "cannot be calculated until the pay period closes"—if, for example, the rate is based on a bonus earned during the period for

which the total amount is not known in advance. (Opn. at p. 11.)[1] Even if the employer *actually paid* overtime at that rate for the pay period, and the overtime pay appears on an employee's paystub for that period, the court held that an employer need not disclose the basis for calculating that pay. Indeed, under the Court of Appeal's reasoning, such an hourly rate is *never* "in effect"—despite having been paid—and need not be disclosed on a paystub for *any* pay period.

The decision below widens a growing split between state and federal courts on the scope of an employer's reporting obligations. That split is especially problematic because the Class Action Fairness Act funnels many class actions brought under section 226(a)(9) into federal court, where federal judges are required to make predictions, based on conflicting decisions, about how this Court would interpret the statute. Only this Court can provide much-needed authoritative guidance on this important question.

The decision below also creates a new intra-state split with the only other Court of Appeal decision to have directly addressed the question, *Canales v. Wells Fargo Bank, N.A.* (May 30, 2018, B276127 [par. pub. opn.]) 23 Cal.App.5th 1262. Although the decision below and *Canales* both held that an employer need not disclose the rates and hours of overtime pay, they did so based on incompatible interpretations of section 226(a)(9)'s language that would impose inconsistent obligations on employers and in many cases, including this one, lead to opposite results.

The upshot is a three-way split among state and federal courts. In the majority of federal courts, an hourly rate is "in effect" during a pay period if the rate is paid during that period. Under the decision of the Second District Court of Appeal in Canales, the rate is instead "in effect" if the rate is earned based on hours worked during the period. And now, under the

[1] The Court of Appeal's opinion is attached as Exhibit A and cited as "Opn."

Fourth District Court of Appeal's decision below, the rate is "in effect" only if it can be calculated before the period ends.

The resulting confusion is intolerable. The Legislature intended section 226(a)(9) to create "transparency as to the calculation of wages" by providing "the information necessary for an employee to verify if he or she is being properly paid in accordance with the law." (*Morgan v. United Retail Inc.* (2010) 186 Cal.App.4th 1136, 1149.) The absence of a clear rule leaves workers at the mercy of employers by denying them the tools they need to determine whether they have been paid correctly and, even when pay information is provided, a basis for confidence that information is accurate. Employees are thus vulnerable to abuse—including theft of their wages.

At the same time, the current confusion also harms employers by leaving them to guess about the scope of a basic obligation under the Labor Code—an obligation common to all employers in the state. And this is no small-stakes issue for employers. Violations of section 226(a)(9) can lead to multimillion-dollar damages and penalties, with one recent judgment against a single employer exceeding $100 million. Without a definitive statement from this Court, employers will continue to face uncertain standards that vary by the forum in which a case is heard.

This case presents an ideal vehicle for resolving that uncertainty. The decision below is based on a single issue of statutory interpretation about the meaning of the phrase "in effect during the pay period" under section 226(a)(9). The case thus gives this Court a tailor-made opportunity to cleanly and definitively settle an issue that has increasingly perplexed workers, employers, and courts. The Court should take that opportunity to hold that section 226(a)(9), by its plain language, structure, and purpose, requires employers to disclose the rates and corresponding hours of all hourly wages paid during a pay period. Otherwise, workers will continue to be left vulnerable in precisely the way that the Legislature sought to avoid.

BACKGROUND

I. Statutory background

For more than a century, California has strictly regulated "wages, hours and working conditions for the protection and benefit of employees." (*Indus. Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702.) This Court construes the state's worker-protection laws liberally, "with an eye to promoting such protection." (*Ibid.*)

The Division of Labor Standards Enforcement (DLSE) "is the state agency charged with enforcing California's labor laws." (*Alvarado v. Dart Container Corp.* (2018) 4 Cal.5th 542, 554.) With "the benefit of many years' experience, the DLSE has developed numerous interpretations" of the labor laws, "which it has compiled in a series of policy manuals." (*Id.* at pp. 554–555.) Although the DLSE's manuals are not authoritative, this Court "may take into consideration the DLSE's expertise and special competence, as well as the fact that the DLSE Manual is a formal compilation that evidences considerable deliberation at the highest policymaking level of the agency." (*Id.* at p. 561.)

A. Overtime and "regular rate of pay"

Central to California's worker protections is the requirement that employers pay an "overtime premium" to any employee who works more than eight hours a day or forty hours a week—a requirement that the Legislature has described as a "fundamental protection for working people." (*Alvarado*, *supra*, 4 Cal.5th at p. 561, fn. 7.) The overtime premium is typically half the employee's "regular rate of pay," meaning that employees working overtime will typically earn one-and-a-half times that regular rate (Lab. Code, § 510(a).)

"Significantly, an employee's 'regular rate of pay' … is not the same as the employee's straight time rate (i.e., his or her normal hourly wage rate)." (*Alvarado*, *supra*, 4 Cal.5th at p. 554.) Under the Labor Code and the

federal Fair Labor Standards Act, the regular rate "includes adjustments to the straight time rate" during a pay period such as "shift differentials"—increased hourly rates for working unpopular shifts. (*Ibid.*; see 29 U.S.C. § 207(e).) It also includes the "per-hour value of any nonhourly compensation the employee has earned." (*Alvarado*, at p. 554; see DLSE Enforcement and Interpretations Manual, § 49.1.1 (2019) <https://perma.cc/9P4R-9ZHC> (DLSE Manual).) Such compensation "includes many different kinds of remuneration," including commissions, piece-work pay, and "the value of meals and lodgings." (DLSE Manual, § 49.1.)

Non-discretionary bonuses are one common form of non-hourly compensation that employers must include in an employee's regular rate of pay when calculating overtime. (See, *Alvarado*, *supra*, 4 Cal.5th at p. 549; DLSE Manual, §§ 35.7, 49.1.2.1.) Such bonuses include "production bonus[es]" like those at issue here, where the amount awarded is based on the work an employee completes rather than the time the employee takes to complete it. (See Opn. at p. 3.) When an employee receives a production bonus, or any bonus not based on hours worked, the employee's regular rate of pay is increased by the "per-hour value" of that bonus. (*Alvarado*, at p. 554.) A bonus's per-hour value—or "regular bonus rate"—is calculated "by dividing the bonus by the total hours worked throughout the period in which the bonus was earned." (DLSE Manual, § 49.2.4.1.) In other words, "a flat sum bonus must be *treated as if* it were earned on a per-hour basis throughout the relevant pay period, augmenting the employee's other hourly wages." (*Alvarado*, at p. 562.) The employer then owes additional overtime on that bonus equal to the overtime premium on the regular bonus rate—that is, "half of the regular bonus rate for each [overtime] hour worked" during the bonus period. (DLSE Manual, § 49.2.4.1.)

Because an employee's compensation may vary over time, the employee's regular rate of pay may "change[] from pay period to pay period

depending on whether the employee has earned shift differential premiums or nonhourly compensation" for that period. (*Alvarado*, *supra*, 4 Cal.5th at p. 562.) Thus, "the word 'regular' in this context does not mean 'constant'"—rather, "regular" pay is just non-overtime pay. (*Ibid.*) An employee who receives a shift differential for working an extra Saturday during a particular pay period, for example, would have a correspondingly increased regular rate for that period. And the same is true for an employee who receives a production bonus or commission for a pay period. As a consequence, the employee's overtime rate—which is tied to regular rate of pay—would also increase during that period. (*Id.* at p. 554.)

B. Paystub requirements

The effectiveness of California's wage and overtime laws requires that workers and the DLSE are able to determine exactly how much an employer has paid for each hour worked. (See *Soto*, *supra*, 4 Cal.App.5th at pp. 390, 392.) For that reason, section 226 of the Labor Code requires an employer, "at the time of each payment of wages," to provide employees with a paystub containing an "accurate itemized statement" of the wages paid. (Lab. Code, § 226(a).) The Legislature "enacted section 226 to ensure an employer documents the basis of … employee compensation payments" so that the employee "is fully informed regarding the calculation of those wages" and is "not shortchanged." (*Soto*, at p. 392.) In that way, the paystub requirement "plays an important role in vindicating the fundamental public policy favoring full and prompt payment of an employee's earned wages." (*Id.* at p. 390.)

The paystub that section 226(a) requires is "highly detailed, containing nine separate categories that must be included." (*Soto*, *supra*, 4 Cal.App.5th at p. 391.) The required information includes, among other things, gross and net wages earned, and total hours worked. (Lab. Code, § 226(a)(1), (2), (5).) In addition, section 226(a)(9) requires employers to include

"all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate." (*Id.*, § 226(a)(9).) If an employer pays overtime during a pay period, it must thus disclose the "hourly rate[]" for that overtime and the "corresponding number" of overtime hours worked. (*Morgan*, *supra*, 186 Cal.App.4th at p. 1148.) The Legislature intended that information to create "transparency as to the calculation of wages" by providing "the information necessary for an employee to verify if he or she is being properly paid in accordance with the law." (*Id.* at p. 1149.)

II. Factual background

Christian Morales works as an automotive technician for Bridgestone Retail Operations, LLC. (Opn. at p. 3.) Bridgestone pays Morales, and other technicians like him, under a hybrid pay system with two components. (*Ibid.*) First, it pays an hourly rate based on the number of hours worked, which it lists on its paystubs as "Regular hours." (*Id.* at pp. 2–3.) Second, it pays a non-hourly production bonus, the amount of which is based on services, such as changing a customer's oil, that the employee performs during the pay period. (*Id.* at p. 3.) Bridgestone assigns each service a number of "flag units" and calculates an employee's production bonus based on the number of units earned in the pay period, listing the bonus on paystubs as "Flag Units." (*Id.* at pp. 2–3.)

Bridgestone does not dispute that the production bonus is part of its employees' "regular rate of pay" for purposes of computing overtime. When a technician receives a bonus for a pay period in which the technician has worked overtime hours, Bridgestone therefore adjusts that employee's overtime rate for the period to account for the increased regular rate attributable to the bonus. (Opn. at p. 4.) Suppose, for example, that a Bridgestone technician earns a $500 production bonus at the end of a pay period. That $500, when divided by the 50 hours the technician worked

during the period, amounts to a rate of $10 per hour (the "regular bonus rate"). (DLSE Manual, § 49.2.4.1.) Bridgestone in that case would pay the employee an additional overtime premium of $5, representing "half of the regular bonus rate," for each hour of overtime that the employee worked during the period. (Opn. at p. 8.) If 10 of the employee's hours during the period were overtime hours, the overtime pay attributable to the production bonus for the period would thus be $50.

What Bridgestone does not do, however, is disclose those calculations to employees. Bridgestone's paystubs list overtime separately for each component of pay: Overtime attributable to an employee's ordinary hourly rate is labeled "Hourly OT," while overtime attributable to a production bonus is labeled "OT Premium." (Opn. at pp. 3–4.) For "Hourly OT," Bridgestone provides the employee's hourly overtime "rate" and the corresponding number of "hours" as required by section 226(a)(9). But "OT Premium" is just a lump sum, with "no information about how Bridgestone arrived at [the] amount." (*Id.* at p. 10.)

The paystub for the employee in the example above would look like this:[2]

Earnings	**Rate**	**Hours**	**Total**
Regular hours	$20	40	$800
Hourly OT	$30	10	$300
Flag units	$1	500	$500
OT Premium			$50

[2] This paystub is based on the representative sample submitted by the parties below (Opn. at pp. 3–4), but is simplified and modified to fit the example. As the Court of Appeal noted below, the "hours" listed for flag units "actually has nothing to do with hours." (*Id.* at p. 4, fn. 3.)

From the face of this paystub, it is impossible to determine the basis for calculating the $50 "OT Premium." And the actual overtime rate earned by the employee is not listed at all: The overtime rate provided, $30.00, represents just the overtime rate on the hourly component of the employee's pay, not the employee's full overtime rate.

III. Procedural background

Morales sued Bridgestone under the Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.) (PAGA), alleging a single cause of action for Bridgestone's failure to include on its paystubs "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked," as required by section 226(a)(9). (Opn. at p. 2.) Because there were no disputed issues of fact, the parties filed cross-motions for summary judgment. (*Id.* at p. 4.) Bridgestone argued that it was not required to include the overtime rate attributable to production bonuses on its paystubs because that rate is not an "hourly rate in effect during the pay period" under section 226(a)(9). (Dec. on Penalty Phase (Aug. 2, 2018) at p. 3.) The trial court disagreed. The purpose of the section, the court held, "is to enable employees to understand how their wages are calculated." (*Ibid.*) And "without a stated rate for the [production] bonuses, that calculation was difficult." (*Ibid.*)

After a trial on PAGA penalties, conducted through briefing and declarations, the court imposed $425,000 in penalties (Dec. on Penalty Phase, *supra*, at p. 6.) Of that, 75% is for the state, leaving 25% ($106,250) for the approximately 1,700 aggrieved employees. (*Id.* at pp. 4, 6.)

Bridgestone appealed, and the Court of Appeal reversed, holding that an employer need not disclose on its paystubs the hourly overtime rate attributable to a production bonus. (Opn. at p. 1.) The court explained that such an overtime rate "changes from pay period to pay period" based on the amount of the bonus and the number of overtime hours worked. (*Id.* at

p. 10.) The rate of an employee's overtime premium thus "cannot be calculated until the pay period closes," and, for that reason, "cannot be an 'applicable hourly rate *in effect during the pay period*.'" (*Id.* at p. 11.) Rather, the rate "is a fictional hourly rate calculated after the pay period closes in order to comply with the Labor Code section on overtime," which "appears as part of the calculation for an overtime bonus and then disappears, perhaps never to be seen again." (*Id.* at p. 2.) "Because there is no 'applicable hourly rate in effect during the pay period' for the overtime premium," the court concluded, "Bridgestone did not violate" section 226(a)(9). (*Ibid.*)

Morales did not seek rehearing.[3]

REASONS FOR GRANTING REVIEW

I. The state and federal courts are divided on an issue of California law.

The Labor Code requires employers to include on employee paystubs "all applicable hourly rates *in effect during the pay period* and the corresponding number of hours worked at each hourly rate." (Lab. Code, § 226(a)(9) (emphasis added).) Before the Court of Appeal issued the decision below, state and federal courts had already adopted two incompatible interpretations of what it means for an hourly rate to be "in effect during" a pay period. The decision below further widens that acknowledged split by adopting yet a third interpretation, compatible with neither of the other

[3] The Court of Appeal filed its opinion on March 11, 2020. Ordinarily, the decision would have become final after 30 days, on April 10, 2020. (Cal. Rules of Court, rule 8.264(b)(1).) On April 9, 2020, however, the court extended "[a]ll time periods specified by the California Rules of Court," including "time periods pertaining to finality of a decision," "that occur during the time period between March 19, 2020, through and including April 18, 2020." (Implementation Order for Order Authorizing Retroactive Application of Amended R. 8.66 of the Cal. Rules of Ct. (Apr. 9, 2020).) Accordingly, the court's decision became final on May 10, 2020. This petition is timely filed within 10 days of that date. (Cal. Rules of Court, rule 8.500(e)(1).)

two. This Court's intervention is "necessary to secure uniformity of decision" among these divergent views. (Cal. Rules of Court, rule 8.500(b)(1).)

A. In the decision below, the Fourth District Court of Appeal held that the hourly overtime rate attributable to Bridgestone's production bonus is not, under the plain meaning of section 226(a)(9), "in effect during the pay period" in which that rate is actually paid. (Opn. at pp. 6, 11.) That overtime rate, the court wrote, "cannot be calculated until the pay period to which it applies ends, and, unlike the hourly 'straight time' wage rate, … changes from pay period to pay period, dependent as it is on the number of overtime hours worked, if any, and the number of flag unit credits obtained during that period." (*Id.* at p. 10.) Thus, the court reasoned, the rate "cannot be an 'applicable hourly rate *in effect during the pay period*,'" but is rather "a *fictional* hourly rate calculated after the pay period closes in order to comply with the Labor Code section on overtime." (*Id.* at pp. 2, 11 (emphasis added).) The rate "comes into being after the period closes 'for the limited purpose of calculating overtime pay' and then vanishes." (*Id.* at p. 10, quoting *Alvarado, supra*, 4 Cal.5th at p. 554.) "Its omission," the court concluded, "therefore does not violate" section 226(a)(9). (*Ibid.*)

Under the Fourth District's rationale, the key question is therefore whether a particular hourly rate can be *calculated* during the pay period. An overtime rate based on a fixed hourly wage that is known in advance must be disclosed, but an overtime rate based on a bonus that varies by pay period need not be.

B. The Fourth District's decision below conflicts with the Second District's decision in *Canales v. Wells Fargo Bank, N.A.* (May 30, 2018, B276127 [par. pub. opn.]).[4] Like the decision below, the unpublished portion of *Canales* purported to rely on the plain language of section 226(a)(9) to con-

[4] *Canales* is partially published at (2018) 23 Cal.App.5th 1262. The unpublished portions of the opinion are attached as Exhibit B.

clude that overtime pay attributable to a bonus was not "in effect during the pay period" in which it was actually paid. (*Id.* at pp. 12–13.) But it did so based on a very different reading of that language. Rather than relying on whether the overtime rate could be *calculated* during the pay period, *Canales* held that the critical question was whether the rate was *earned* based on work done during that period (*ibid.*)—a reading that in many cases, including this one, would lead to the opposite result.

Canales was about Wells Fargo's payment to employees of non-discretionary incentive bonuses earned over monthly, quarterly, or annual periods. (*Canales*, *supra*, at p. 3.) Like Bridgestone here, Wells Fargo paid overtime based on those bonuses, but failed to identify the rates or hours of that overtime on its paystubs. (*Id.* at pp. 3–4.) The court reasoned that the "pay period" in section 226(a)(9) refers to the *current* pay period—that is, "the two-week period covered by the wage statement." (*Id.* at p. 12.) But Wells Fargo's bonuses—and the overtime based on those bonuses—were earned over multiple pay periods. (*Id.* at pp. 12–13.) Because "the overtime hours were worked in *previous* pay periods," the court held, the rates for those hours were not "in effect" during the period covered by the paystub. (*Id.* at p. 13.) "Accordingly," it concluded, "there were no applicable hourly rates in effect during the pay period" that were "required to [be] include[d] in the wage statement." (*Ibid.*)

One federal district court has also followed this approach. (*Ritenour v. Carrington Mortgage Servs., LLC* (C.D. Cal. 2018) 2018 WL 5858658, at p. *10.) In *Ritenour*, the employer paid overtime attributable to commissions, but listed that overtime on paystubs as a flat amount for "'0.0000' hours" of work "at a pay rate of '$0.0000.'" (*Id.* at p. *9.) Nevertheless, the court held that the employer did not violate section 226(a)(9) because the payment was "an adjustment to wages for work done in a *prior* pay period." (*Id.* at p. *10.) Like *Canales*, the court concluded that, where a "wage statement documents an

adjustment to the overtime payment that is based on work from a prior period, there is no hourly rate in effect during the pay period that is covered in the wage statement." (*Ibid.*)

The Court of Appeal's decision here cannot be reconciled with *Canales* or *Ritenour*. Unlike the employers in those cases, Bridgestone pays its production bonuses—and associated overtime—in the same pay period that the overtime hours are worked and the overtime pay is earned. (Opn. at pp. 3–4, 10.) The overtime rate is therefore, under the rationale of *Canales* and *Ritenour*, not based on work in a *prior* pay period, but in the *current* one, and Bridgestone—by failing to disclose that rate—has violated section 226(a)(9).

Indeed, *Canales* approved of another federal decision, *Ontiveros v. Safelite Fulfillment, Inc.*, for precisely that reason. ((C.D. Cal. 2017) 231 F.Supp.3d 531, 540–41.) *Ontiveros* held that an employer's paystub violated section 226(a)(9) because it failed to report the rates and hours of overtime based on a bonus that was paid—as here—in the same pay period that it was earned. (*Ibid.*) *Canales* agreed with that result, holding that *Ontiveros* was "distinguishable" because the installation bonuses there were "paid weekly" and "based on work performed during the pay period reflected in the wage statement." (*Canales*, *supra*, at pp. 14–15.) Under the logic of *Canales*, those weekly bonuses—like the bonuses here—were earned in the *current* pay period rather than a past one. (*Id.* at p. 12.) *Canales* thus confirmed that, under the facts here, it would have reached the opposite result as the decision below.

C. In a line of decisions issued in the wake of *Ontiveros*, federal district courts have adopted yet another reading of section 226(a)(9)'s plain language—a reading in direct conflict with both the decision below and with *Canales*. Under that reading, whether section 226(a)(9) requires an employer to disclose the hourly rate of overtime pay turns not on whether the rate is *calculated* before the end of a pay period or whether it is *earned* in that period,

but whether the rate is *paid* in the pay period. Section 226(a)(9), with that understanding, simply requires an employer to list the rates and hours of all hourly wages at the time it pays those wages—if a paystub includes overtime earned at an hourly rate, the employer must include that rate and the corresponding hours.

In the leading case, the court in *Magadia v. Wal-Mart Associates., Inc.* held that Wal-Mart violated section 226(a)(9) by reporting overtime on bonuses "as a lump sum," without specifying "how many hours the employee worked or the employee's hourly rate." ((N.D. Cal. 2019) 384 F.Supp.3d 1058, 1070.) Wal-Mart paid performance bonuses and associated overtime on a quarterly basis and so, as here and in *Canales*, did not compute the overtime until after the end of the pay period in which it was earned. (*Ibid.*) The company argued that the court should follow *Canales* to hold that "employers need not comply with § 226(a)" for overtime payments "when the overtime at issue was earned in a previous pay period." (*Magadia v. Wal-Mart Assocs., Inc.* (N.D. Cal. 2018) 2018 WL 10638221, at p. *5.)

In a series of rulings, the district court disagreed, holding in the process that *Canales* was wrongly decided as a matter of California law. "*Canales*," the court wrote, "exempts an entire class of overtime payments—those which derive from nondiscretionary bonuses—from any duty to comply with § 226(a)(9)." (*Magadia*, *supra*, 2018 WL 10638221, at p. *6.) As the court explained, Wal-Mart's position—"in line with *Canales*"—would mean that employers *never* have to disclose the hours and rates of such payments. (*Ibid.*) That result, it concluded, "is difficult to reconcile with a California labor statute whose avowed goal is to 'insure that employees are adequately informed of compensation received and are not shortchanged.'" (*Magadia*, *supra*, 384 F.Supp.3d at p. 1092, quoting *Soto*, *supra*, 4 Cal.App.5th at p. 392.)

Three other decisions by federal district courts have, for the same reason, also rejected the reasoning in *Canales*. (See *Mitchell v. Corelogic, Inc.*

(C.D. Cal. 2019) 2019 WL 7172978, at p. *5 [declining to follow *Canales* based on the plain language of section 226]; see also *Krauss v. Wal-Mart, Inc.* (E.D. Cal. 2020) 2020 WL 1874072, at p. *5; *Hamilton v. Wal-Mart Stores, Inc.* (C.D. Cal. 2019) 2019 WL 1949456, at p. *7.) Like *Magadia*, these courts have "decline[d]" to follow *Canales* because section 226(a)(9) "is clear: an employer must identify all applicable hourly rates *in effect during the pay period*, not when wages are alleged 'earned.'" (*Hamilton*, at p. *7; see also *Mitchell*, at p. *5 ["disagree[ing]" with *Canales* and holding that a rate is "*in effect* during the pay period even if it was *earned* in a different pay period"].) Thus, the Labor Code requires employers to identify rates and hours of overtime payments "even though the work was done before the pay period." (*Krauss*, at p. *5.)

The existence of a deep and open split between state and federal courts is especially problematic on a wage issue like this one. Because wage violations can involve hundreds or thousands of employees, such cases can often only effectively be resolved in class actions. The "state's public policy" thus "supports the use of class actions to enforce [the wage] laws for the benefit of workers." (*Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 987.) But the federal Class Action Fairness Act creates federal jurisdiction in class actions exceeding $5 million in value, thus funneling many, and the most significant, of these cases into federal district courts. (28 U.S.C. § 1332(d)(2).) Those courts are then forced to resolve an issue of state law by predicting how this Court would likely resolve the issue, with only inconsistent Court of Appeal decisions for guidance and without the benefit of this Court's review. (See *In re K F Dairies, Inc. & Affiliates* (9th Cir. 2000) 224 F.3d 922, 924.) Thus, although the Ninth Circuit has been asked to weigh in on the meaning of section 226(a)(9) in *Magadia*, it cannot definitively decide the issue. Only this Court is capable of resolving the split by saying what section 226(a)(9) actually means. The Court should take this opportunity to do so.

II. The issue is exceptionally important both to workers and employers.

A. This Court's intervention is also needed to ensure that section 226(a)(9) can continue to serve its purpose of protecting employees. The Fourth District's decision below, and the Second District's decision in *Canales*, leave employers free to withhold the rates and hours on which they base many forms of overtime pay, thus depriving employees of the tools they need to determine whether they have been paid correctly and leaving them vulnerable to abuse—including wage theft by unscrupulous employers. A decision by this Court is needed to settle this "important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

Wage theft is the practice of paying workers less than they have earned, by, for example, paying them less than the minimum or agreed wage, forcing them to work off the clock, or failing to pay overtime. (Cho et al., National Employment Law Project, *Hollow Victories: The Crisis in Collecting Unpaid Wages for California's Workers* (2013) p. 4 <https://bit.ly/3bvSHce> (*Hollow Victories*).) "Numerous studies put the incidence of wage theft at staggering levels." (Lab. Comm'n's Office, 2017-2018 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement (2018) p. 2 <https://bit.ly/2TogZVc> (Fiscal Year Report).) The minimum-wage law alone is violated in the state nearly 400,000 times per week. (*Ibid.*) And overtime theft is a particular problem, with nearly 80% of those working more than 40 hours in a workweek being paid less than the legally required overtime rate. (Milkman et al., *Wage Theft and Workplace Violations in Los Angeles* (2010) p. 2 <https://bit.ly/2WNgM92>; *Hollow Victories,* at p. 1.) Overall, one study found that more than two-thirds of low-wage workers had experienced at least one pay-related violation in the previous work week, costing the average worker about $2,600 annually. (*Hollow Victories*, at p. 1.)

Although the state's "labor law enforcement agencies … are authorized to assess and collect civil penalties for specified violations of the Labor Code," those agencies often lack the resources to pursue enforcement. (*Raines v. Coastal Pac. Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 673.) Section 226(a)'s paystub requirements are thus designed to allow workers to help themselves by creating "transparency as to the calculation of wages" with "essential information for verifying that they [are] being properly paid for all hours worked." (*Morgan*, *supra*, 186 Cal.App.4th at p. 1149.) By requiring employers to "document[] the basis of … employee compensation payments," the section helps ensure that employees are "fully informed regarding the calculation of those wages" and are "not shortchanged." (*Soto*, *supra*, 4 Cal.App.5th at p. 392.)

Until 2000, section 226(a) required employers to disclose *total* "wages earned" and "hours worked." Even with those requirements, however, the Legislature faced concerns that workers were "often provided little information about their wages." (Sen. Com. on Judiciary, Analysis of Assem. Bill 2509 (1999–2000 Reg. Sess.) as amended Aug. 7, 2000.) As a result, employers were able to "cheat workers out of billions of dollars in wages owed to them." (Assem. Com. on Labor & Employment, Analysis of Assem. Bill 2509 (1999–2000 Reg. Sess.) as introduced Feb. 24, 2000.) The Legislature addressed those problems with section 226(a)(9) by "expand[ing] the scope of information" in paystubs to include the specific hourly rates and corresponding hours underlying the wages reported. (*Morgan*, *supra*, 186 Cal.App.4th at p. 1148.) The section required employers for the first time to disclose the rates and hours of overtime pay separately from regular hourly wages. (*Ibid.*) With that "more specific requirement," the Legislature sought to make it "easier for employees to determine whether they were being paid for all hours worked at the appropriate rates of pay." (*Ibid.*)

By restricting an employer's disclosure obligation under section 226(a)(9) to fixed wages that can be "calculated" before the end of the pay period, the decision below largely limits the section's disclosures to overtime based on an employee's "straight time rate"—that is, the employee's "normal hourly wage." (Opn. at pp. 9–10, quoting *Alvarado*, *supra*, 4 Cal.5th at p. 554.) Overtime, however, is based not just on an employee's straight-time rate, but on the employee's "regular rate of pay"—a rate that includes "any nonhourly compensation the employee has earned." (*Alvarado*, at p. 554.) Many employees depend on compensation like commissions, bonuses, and other non-fixed wages that may be earned "on a monthly, quarterly, or less frequent basis." (*Peabody v. Time Warner Cable, Inc.* (2014) 59 Cal.4th 662, 668.) Not only are these employees just as entitled to overtime on their wages as those who earn only a straight-time rate, but they have just as strong an interest in being "fully informed regarding the calculation of those wages." (*Soto*, *supra*, 4 Cal.App.5th at p. 392.) Indeed, the fact that overtime for some workers is not always "a simple matter of multiplying an hourly wage by the number of hours worked" just "underscores the importance" of the disclosure that section 226(a)(9) requires. (*Magadia*, *supra*, 384 F.Supp.3d at p. 1102.)

The alternative rule adopted by the court in *Canales* would have even more far-reaching effects. *Canales* limits an employer's disclosure obligation under section 226(a)(9) to wages earned based on hours worked in the *current* pay period. But the Labor Code does not require employers to include overtime on paystubs until "the paystub for the *next* regular pay period." (Lab. Code, § 204(b)(2) (emphasis added).) By that time, the overtime payment would reflect wages earned in a *previous* period, and thus, under *Canales*, would no longer be subject to section 226(a)(9)'s disclosures. *Canales* thus reads the section's plain language in a way that would allow employers to evade its central purpose: requiring disclosure of the rates and hours of overtime pay. (See *Morgan*, *supra*, 186 Cal.App.4th at p. 1148.)

Even worse, both the decision below and *Canales* do not just hold that overtime rates and hours should be reported in a different pay period than the period in which they are paid. Rather, under the rules adopted in those cases, an employer "*never* has to tell its employees on what hours and rates the [overtime] on their wage statement is based." (*Magadia*, *supra*, 2018 WL 10638221, at p. *6 (emphasis added).) Both decisions would thus destroy employees' ability to ensure they are "being paid for *all hours worked* at the appropriate rates of pay." (*Morgan*, *supra*, 186 Cal.App.4th at p. 1148 (emphasis added).) Without this Court's intervention, employees will, as a result, be left vulnerable to abuse.

B. The current three-way split on the plain meaning of section 226(a)(9) also seriously harms the interests of employers by leaving them without guidance on the scope of their paystub obligations. Employers have long complained about the "serious challenges" involved in "attempting to comply with California's … detailed and complex labor laws," calling for "clear notice of wage-statement requirements" so they can avoid "potentially massive penalties." (Br. of Chamber of Commerce in *Magadia v. Wal-Mart* (9th Cir. Oct. 28, 2019, No. 19-16184), at pp. 2, 5; see also Br. of Employers Group and Cal. Employment Law Council in *Magadia v. Wal-Mart* (9th Cir. Oct. 24, 2019, No. 19-16184), at p. 14 [arguing for "fair notice of [employers'] obligations" to "avoid massive financial penalties"].) Now, they are facing conflicting standards that vary with the forum.

The requirements of section 226(a) are technical and apply broadly to all of the state's 1.5 million employers. (See Fiscal Year Report, *supra*, at p. 2.) An employer must comply with the section's requirements every time it issues a paystub, at least twice monthly, for each of its employees, so any misreading of the section's requirements can quickly lead to hundreds or thousands of violations. (See Lab. Code § 226(a), (e).) Penalties for those violations can be substantial, especially for larger employers: The Labor Code

provides statutory damages of $50 per employee for the first pay period and $100 per employee for each subsequent pay period in which a violation occurs. (*Id.*, § 226(e)(1).) On top of that, the Labor Code provides a civil penalty of $250 for each paystub violation. (*Id.*, § 226.3.) Ignorance of the law's requirements is no excuse. (*Ontiveros*, *supra*, 231 F.Supp.3d at p. 541 [finding an employer liable under section 226(a)(9) even though "it thought the information was not required"].) The result is often multimillion-dollar liability. In *Magadia*, for example, the court rejected Wal-Mart's reliance on *Canales* and imposed more than $100 million in damages and penalties for Wal-Mart's violation of section 226(a)'s paystub requirements. (*Magadia*, *supra*, 384 F.Supp.3d at p. 111.)

In struggling to read section 226(a)(9)'s language to avoid such penalties, the decision below and in *Canales* made things worse. Although the decisions may have allowed the defendants to escape liability in those cases, they did so at the cost of adopting convoluted (and inconsistent) readings of the section's language that will only add to employers' confusion and risk lulling them into a false sense of security. An employer following the reasoning of the decision below to exclude the rates and hours of overtime from its paystubs could nevertheless find itself subject to substantial liability in a Court of Appeal that follows the reasoning of *Canales*, or in a federal court rejecting the reading of both.

The best way to achieve the clarity that employers seek would be for this Court to hold, like *Magadia* and other federal courts, that an hourly rate is "in effect" during the pay period in which an employee is actually paid at that rate. The resulting rule is simple: The statute requires employers to list the rates and hours of wages for any hourly wage appearing on a paystub for that pay period. As long as the paystub includes wages paid at an hourly rate, the employer must disclose that rate and corresponding hours. But no matter how section 226(a)(9)'s requirements are interpreted, they should be

interpreted consistently. Nobody's interests are served by a regime under which an employer's paystub obligations—and potentially significant liability—turns merely on the forum in which the case happens to land.

III. This case is an ideal vehicle to resolve the current confusion.

As explained above, the Class Action Fairness Act channels the most significant state-law wage cases into federal court, limiting this Court's opportunity to weigh in on an important issue of state law. But the Court has that opportunity here, and this case presents an ideal vehicle for doing so. The Court of Appeal below decided a single issue: the meaning of the phrase "in effect during the pay period" in section 226(a)(9). (Opn. at p. 2.) That issue is one of "pure statutory interpretation" that is well suited for resolution by this Court. (*Ibid.*) There are no ancillary legal questions that might impede resolution of the issue. Nor are there any "disputed issues of fact." (*Id.* at p. 4.) It was "undisputed that Morales' wage statement does not include an hourly rate for the overtime on his production bonus"—a fact that was the entire "basis for the judgment" below. (*Id.* at p. 2.) This case thus presents the perfect opportunity for this Court to resolve an issue that has led to significant confusion among workers, employers, and the courts.

IV. The decision below is contrary to the law's plain language, its structure, and its purpose of providing employees with critical information about their pay.

A. Finally, this Court should grant review because the decision below is manifestly wrong. Start with the text. Under section 226(a)(9)'s plain language, Bridgestone's disclosure obligation is straightforward: It must include on employee paystubs "*all* applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate." (Lab. Code, § 226(a)(9) (emphasis added).)

Words in a statute "should be given the meaning they bear in ordinary use." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) Under the ordi-

nary meaning of "in effect," an hourly rate is always in effect during a pay period in which it is paid. "In effect" means "operative" or having the "power to bring about a result." ("Effect," Merriam-Webster.com <http://bit.ly/ 31vwg3t>.) An hourly rate at which an employer *actually pays* wages during a pay period is necessarily "operative" during that period because, along with corresponding hours, the rate *determines* the wages paid. The rate, in other words, "bring[s] about [the] result" of an employee's wages in the period. (*Ibid.*)

In the case of overtime based on Bridgestone's production bonuses, the period in which the rate is paid is the *only* time the rate could be "in effect." That bonus, and associated overtime, is paid at the end of the same period in which the employee works the overtime hours and earns the overtime wages. The only alternative is the one embraced by the Court of Appeal below—that the rate on which Bridgestone pays overtime is *never* in effect. The rate, the court held, is "a *fictional* hourly rate calculated after the pay period closes in order to comply with the Labor Code section on overtime." (Opn. at p. 2 (emphasis added).) But that makes no sense: An hourly rate cannot be "fictional" if an employee is actually paid at that rate. And the fact that the rate is calculated to "comply with the Labor Code" does not make it any less real.

Nor was the decision below correct that the overtime rates at issue do not "appear[]" until after the end of the pay period. (Opn. at p. 2.) That might be an accurate description of a bonus that Bridgestone awarded purely in its discretion, like a holiday bonus that functions more as a gift than a wage. In that case, the bonus really would be unpredictable and, for that reason, would not be included in employees' "regular rate of pay" for purposes of computing overtime. (DLSE Manual, § 49.1.2.4.) But Bridgestone's bonuses are not discretionary—they are, along with hourly wages, a key component of its hybrid pay system. (Opn. at p. 3.) The bonuses may

not be as simple as a flat amount or a specified hourly rate, but they are nevertheless determined by objective criteria over which Bridgestone has no discretion. Employees who earn "flag units" by performing services are entitled to expect, by performing the services, that they will receive the resulting production bonus and accompanying increase in overtime rate. (See DLSE Manual, § 35.)

It is true that Bridgestone may not know *exactly* what an employer's production bonus and associated overtime will be until the end of the pay period. But that is not unique to Bridgestone's bonuses—it is the "very nature" of the regular rate, which "reflect[s] all payments which the parties have agreed shall be received regularly during the workweek." (DLSE Manual, § 49.1.2.2, quoting *Walling v. Alaska Pacific Consolidated Mining Co.* (9th Cir. 1945) 152 F.2d 812, 815.) An employee, for example, may earn a higher hourly wage in a particular pay period through shift differentials, which increase that employee's regular rate of pay and, as a consequence, the employee's overtime rate. (*Alvarado*, *supra*, 4 Cal.5th at p. 554.) The possibility of such adjustments to an employee's hourly rate means that an employer may not know until the end of the pay period what an employee's regular rate, and thus overtime pay, will be for that period. But "[o]nce the parties have decided upon the amount of wages … the determination of the regular rate becomes a matter of mathematical computation." (DLSE Manual, § 49.1.2.2, quoting *Walling*, *supra*, 152 F.2d at p. 815.) That rate is not, in any sense, "fictional"—"it is an actual fact." (*Ibid.*)

B. The context of section 226(a)(9) and the structure of the section as a whole further demonstrate the section's purpose of requiring disclosure when wages are paid—regardless of when an hourly rate is calculated. (*Soto*, *supra*, 4 Cal.App.5th at p. 392 [courts should not "focus solely on a single word or sentence; the words must be construed in context, and provisions

relating to the same subject matter must be harmonized to the extent possible"].)

Section 226(a)'s entire focus is on disclosures related to the "specific wages being paid at the time of the payment." (*Soto*, *supra*, 4 Cal.App.5th at p. 393.) Thus, an employer's duty to provide a paystub is triggered at "the time of each *payment of wages*" and is tied to the check or other method by which those "wages are *paid*." (Lab. Code, § 226(a) (emphasis added).) And the information that the employer must itemize in the paystub—gross and net wages earned, total hours worked, and deductions—are all the underlying values on which the payment is based. (*Id.*, § 226(a)(1), (2), (4), (5); see *Soto*, at p. 392 [section 226(a) "requires the employer to 'itemize[]' the constituent parts of the total amount to be *paid to the employee*" (emphasis added)].) Considered in that context, the "applicable hourly rates" and "corresponding number of hours" for which section 226(a)(9) requires disclosure can only mean the rates and hours that form the basis of the gross wages and total hours reported on the paystub—that is, the rates and hours "applicable" to the wages being paid. (Lab. Code, § 226(a)(9).) That is the only "reasonable construction which conforms to the apparent purpose and intention of the lawmakers." (*Webster v. Superior Court* (1988) 46 Cal.3d 338, 344.)

Under the rule adopted by the decision below, in contrast, disclosure of the rates and hours of hourly wages under section 226(a)(9) turns not on whether the wages are *paid* during the pay period, but on whether the rate on which the wages are based can be "calculated" before "the pay period closes." (Opn. at p. 11.) That reading creates a disconnect in the statute, under which payment of wages triggers all of section 226(a)'s disclosures for those wages *except* for section 226(a)(9)'s required disclosure of underlying rates and hours. For section 226(a)(9) alone, disclosure would be required only for wages based on hourly rates determined in advance, thus excluding overtime based on bonuses, commissions, and other wages that are not

fixed before the pay period ends. As a result, employers would have to disclose the rates and hours of some wages included on a paystub but not others, depending on the point in the pay period at which the rate can be calculated. There is no conceivable reason why the Legislature would have intended that result.

C. Finally, the fact that section 226(a)(9) requires disclosure for all payments reflected on a paystub is confirmed by the section's purpose. "The purpose of requiring greater wage stub information" under section 226(a) is to ensure that employees are adequately informed of "*paid wages* to ensure the employee is fully informed regarding the calculation of *those wages*." (*Soto*, *supra*, 4 Cal.App.5th at p. 392.) And the purpose of section 226(a)(9)'s "more specific requirement" is similarly to make it "easier for employees to determine whether they [are] *being paid* for *all hours worked* at the appropriate rates of pay." (*Morgan*, *supra*, 186 Cal.App.4th at p. 1148 (emphasis added).) Whether an overtime rate happens to have been calculated before, during, or at the end of a pay period is irrelevant to that purpose. When an employer pays wages and includes the payment on a paystub, the employee has an interest in knowing the basis for that payment.

This Court's "overarching interpretive principle[]" in construing the wage laws is that the laws must be "liberally construed in favor of worker protection." (*Alvarado*, *supra*, 4 Cal.5th at p. 561–62.) Courts are therefore "obligated to prefer an interpretation that … favors the protection of the employee's interests." (*Id.* at p. 562.) Here, "the more protective construction of § 226(a)(9) is the one that does not exempt a category of overtime from its coverage." (*Magadia*, *supra*, 2018 WL 10638221, at p. *6.) The decision below erred by failing to recognize and apply that overarching principle.

Only this Court can correct that error, resolve the otherwise intractable split among state and federal courts on the scope of an employer's ob-

ligation to disclose wage information, and thereby provide much-needed certainty for employees and employers alike.

CONCLUSION

This Court should grant the petition for review.

Respectfully submitted,

May 20, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 8.204(c), 8.360(b)(1), and 8.504(d) of the California Rules of Court, the enclosed brief contains 8,276 words including footnotes, and was prepared in 1.5 spaced typeface and 13-point Baskerville type. I have relied on the word count of the computer program used to prepare this brief.

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EXHIBIT A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHRISTIAN MORALES, Plaintiff and Respondent, v. BRIDGESTONE RETAIL OPERATIONS, LLC, Defendant and Appellant.	G057043 (Consol. with G057380) (Super. Ct. No. 30-2017-00900244) O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County, William D. Claster, Judge. Reversed with directions.

Klatte, Budensiek & Young-Agriesti, Ernest W. Klatte, Summer Young-Agriesti and Selwyn Chu for Defendant and Appellant.

Fernandez & Lauby, Brian J. Mankin and Peter J. Carlson for Plaintiff and Respondent.

INTRODUCTION

Bridgestone Retail Operations, LLC, appeals from a judgment after an order granting a motion for summary judgment and a subsequent Private Attorney General Act (PAGA) award in favor of respondent Christian Morales in this employment action. This case is anomalous – perhaps even unique – in that there is not and never was a claim that Morales had been underpaid. Instead, the dispute is over the information provided on the wage statement accompanying his paycheck.[1]

The issue before us is one of pure statutory interpretation. Morales asserted that Bridgestone violated Labor Code section 266, subdivision (a)(9), by failing to include the hourly rate for the overtime he earned on his production bonus.[2] Section 266, subdivision (a)(9), requires an employer to include "all applicable hourly rates in effect during the pay period" on the wage statement required to accompany each paycheck. It is undisputed that Morales' wage statement does not include an hourly rate for the overtime on his production bonus, and that was the basis for the judgment.

We reverse. The statute requires the wage statement to reflect the hourly rates *in effect during the pay period*. The "hourly rate" for an overtime production bonus, however, is not and cannot be in effect during the pay period. It is a fictional hourly rate calculated after the pay period closes in order to comply with the Labor Code section on overtime. It appears as part of the calculation for an overtime bonus and then disappears, perhaps never to be seen again. It is not an "hourly rate in effect during the pay period." Its omission therefore does not violate section 226, subdivision (a)(9).

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[1] Bridgestone has already reconfigured its wage statements to reflect the trial court's decision in this case. Thus the real drivers of this appeal, for Bridgestone's purposes, are the PAGA award and the subsequent attorney fee award.

[2] All further statutory references are to the Labor Code.

FACTS

Bridgestone employs Morales as a maintenance technician, responsible for servicing customers' automobiles. He is paid according to a hybrid system. Part of his compensation is an hourly wage for a 40-hour week, with time-and-a-half or double time, as appropriate, for any additional hours during the week. The other part is based on "flag units."

A flag unit is a credit that a maintenance technician receives for performing a service such as changing a car's oil. Each service is assigned a number of flag units, and the employee is awarded that number of units for performing that service, regardless of how long it takes to perform it. An employee who takes one hour to perform the service gets the same number of flag units as an employee who takes four hours. Obviously, it is in the employee's interest to perform the service as quickly as possible, so that other flag-unit services can be assigned. But the number of flag units earned depends on the service performed, and not the time involved. Payment for flag units is in addition to the hourly wage. The parties agree that the flag-unit system of payment is a production bonus.

In addition to the statutorily required information regarding employer and employee names, pay period, etc., Morales' wage statement provided the following information about his compensation: regular hours (rate, number, and amount); 1.5 overtime hours (rate, number, and amount); 2.0 overtime hours (rate, number, and amount); total work hours; flag units (rate, number, and amount); and overtime premium (amount).

The parties submitted a representative Morales wage statement for his compensation during a pay period, which looked like this:

EARNINGS	RATE	HOURS	CURRENT AMOUNT[3]
Regular hours	12.50	24.00	300.00
Hourly OT 1.5	18.75	3.78	70.88
Hourly OT 2.0			
Memo Total Work Hours		27.78	
Flag Units	1.00	31.10[4]	31.10
OT Premium			2.12

The dispute concerns the last line of the wage statement, "OT Premium." This category is the amount to which Morales was entitled as overtime on his flag units for that pay period. Morales claimed Bridgestone violated section 226, subdivision (a)(9), because the wage statement did not include an hourly *rate* for OT Premium. Bridgestone asserted that the subdivision did not require an hourly rate for OT Premium.

There were no disputed issues of fact, such as whether Morales had been underpaid for his overtime premium, so the parties made cross-motions for summary judgment, each side advancing its interpretation of section 226, subdivision (a)(9).

Morales proposed two ways in which Bridgestone could have complied with section 226. The first was to list an actual overtime rate of $19.31 in the "hourly OT 1.5" column, instead of $18.75. Second, it could have entered $.56 in the "rate" column and 3.78 in the "hours" column for OT Premium.

The trial court granted Morales' motion and denied Bridgestone's motion. After a trial on PAGA penalties (§ 2699), conducted through briefing and declarations, the court awarded $425,000 in penalties, and judgment was entered accordingly. The court noted that Bridgestone had by the time of trial reconfigured its wage statements, a process the court described as "time-consuming and expensive, lasting nearly 12 months and costing about $30,000." Bridgestone appealed from the judgment. The court

[3] The wage statement also contains columns for "adjustment period" and "year to date," which have been omitted as not pertinent to the appeal.

[4] Although this number is entered in the "hours" column, when it actually has nothing to do with hours, there does not appear to be any confusion about what the number referred to.

subsequently awarded plaintiff's counsel $203,733 in attorney fees, an order which Bridgestone has also appealed.[5] The two appeals have been consolidated.

DISCUSSION

We review a judgment entered after the grant or denial of a summary judgment motion de novo. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 705.) We also review issues of law such as the interpretation of a statute de novo. (*Morgan v. United Retail Inc.* (2010) 186 Cal.App.4th 1136, 1142 (*Morgan*).)

This appeal hinges on the proper interpretation of the portion of section 266, subdivision (a), that provides: "An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing [¶] . . . [¶] (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee . . . ."[6]

---

[5] Bridgestone's sole contention with respect to the attorney fee award is that if the judgment is reversed, the fee award must also be reversed.

[6] The complete text of section 226, subdivision (a), reads, "An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except as provided in subdivision (j), (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee and, beginning July 1, 2013, if the employer is a temporary services employer as defined in Section 201.3, the rate of pay and the total hours worked for each temporary services assignment. The deductions made from payment of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. For purposes of this subdivision, 'copy' includes a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information required by this subdivision."

The bone of contention here is the phrase "all applicable hourly rates in effect during the pay period." Morales claimed that his wage statement violated section 226, subdivision (a)(9), because it failed to state the correct overtime hourly rate for the flag units.

"When interpreting statutes, 'we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law . . . .'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 737, quoting *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632-633.) We give words their ordinary and usual meaning, and we avoid an interpretation that would render any part of the statute meaningless or mere surplusage. (*Aleman v. Airtouch Cellular* (2012) 209 Cal.App.4th 556, 568.)

Although the parties may be correct in labeling this a case of first impression on this precise issue, we do have some guidance from prior cases. The California Supreme Court addressed the computation of overtime on a flat rate bonus in *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542 (*Alvarado*). The Court in *Alvarado* was careful to explain that the details of the opinion dealt with overtime pay on a flat rate bonus and that "[o]ther types of nonhourly compensation, such as a production or piecework bonus or a commission, may increase in size in rough proportion to the number of hours worked, including overtime hours, and therefore a different analysis may be warranted . . . ." (*Id.* at p. 561, fn. 6.) Nevertheless, we believe some of the basic observations in *Alvarado* apply to the case before us now.

The court found that section 510 and Wage Order No. 1 provided the state law for courts to construe and enforce; both the statute and the wage order required payment of an overtime premium based on an employee's "'regular rate of pay.'" (*Alvarado, supra,* 4 Cal.5th at p. 560.)[7] The court stated, "Significantly, an employee's

[7] It was therefore unnecessary to resort to federal law to determine overtime pay on bonuses. (*Alvarado, supra,* 4 Cal.5th at p. 560.)

'regular rate of pay' for purposes of . . . section 510 and the [Industrial Welfare Commission] wage orders is not the same as the employee's straight time rate (i.e., his or her normal hourly wage rate).[8] Regular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation the employee has earned." (*Id.* at p. 554.) As to how the "regular rate of pay" is to be determined for overtime purposes, the court stated, "[The bonus] is part of an employee's overall compensation package, and therefore both parties agree that its per-hour value must be determined so that the employee's regular rate of pay – and, derivatively, the employee's overtime pay rate – reflects all the various forms of regular compensation that the employee earned in the relevant pay period. In other words, for the limited purpose of calculating overtime pay, the attendance bonus (which is earned all at once by completing a weekend work shift) is *treated as if* it were earned on a per-hour basis throughout the pay period." (*Ibid.*)

The Policies and Interpretations Manual of the Division of Labor Standards and Enforcement (DSLE) includes a formula for computing overtime on a production bonus such as the one Morales receives on his flag units:

"49.2.4 Computing Regular Rate and Overtime on a Bonus. When a bonus is based on a percentage of production or some formula other than a flat amount and can be computed and paid with the wages for the pay period to which the bonus is applicable, overtime on the bonus must be paid at the same time as the other earnings for the week,

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[8] Section 510 provides in pertinent part, "(a) Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the *regular rate of pay* for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the *regular rate of pay* for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the *regular rate of pay* of an employee. Nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work." (Italics added.)

or no later than the payday for the next regular payroll period. (See Labor Code § 204) Since the bonus was earned during straight time as well as overtime hours, the overtime 'premium' on the bonus is half-time or full-time (for double time hours) on the regular bonus rate. The regular bonus rate is found by dividing the bonus by the total hours worked during the period to which the bonus applies. The total hours worked for this purpose will be all hours, including overtime hours. (See previous section)

"49.2.4.1 Example Involving Overtime and Bonus: First, find the overtime due on the regular hourly rate, computing for salaried worker and piece workers as described in the sections above. Then, separately, compute overtime due on the bonus: find the regular bonus rate by dividing the bonus by the total hours worked throughout the period in which the bonus was earned. The employee will be entitled to an additional half of the regular bonus rate for each time and one-half hour worked and to an additional full amount of the bonus rate for each double time hour, if any.

"Regular hourly rate of pay . . . . . $ 20.00

"Total hours worked in workweek = 52

"Total overtime hours at time and one-half = 12

"Overtime due on regular hourly rate = 12 x $30.00 . . . . . $360.00

"Bonus attributable to the workweek $138.00

"*Regular bonus rate = $138.00÷52 = $2.6538÷2 = $1.33 x 12 Overtime Hours $ 15.92*

"Total earnings due for the workweek:

"Straight time: 40 hours @ $20.00 . . . . . $800.00

"Overtime: 12 hours @ $30.00 . . . . . $360.00

"Bonus $138.00

"Overtime on bonus . . . . . $ 15.92

"Total . . . . . $1,313.92"

(Italics added)

(See *Marin v. Costco Wholesale Corp.* (2008) 169 Cal.App.4th 804, 813-816 [approving Manual's provisions for computing overtime on production bonus].)

Taking the corresponding numbers from Morales' representative wage statement, the calculation looks like this:

Regular hourly rate of pay $12.50

Total hours worked in the workweek = 27.78

Total overtime hours at time and one-half = 3.78

Overtime due on regular hourly rate = 3.78 hours x $18.75 $70.88

Bonus attributable to the workweek [flag units x flag rate]. $31.10

Regular bonus rate = $31.10 ÷ 27.78 = 1.12 ÷ 2 = .56 x 3.78 overtime hours . . . $2.12

Total earnings due for the workweek: Straight time: 24 hours @ $12.50 . . . . $300.00

Overtime: 3.78 hours at $18.75 . . . $70.88

Bonus [flag units x flag rate] $31.10

Overtime on bonus [overtime premium] $2.12

Total $404.10

The present dispute centers on the phrase "all applicable hourly rates in effect during the pay period" in section 226, subdivision (a)(9). Does the "hourly rate in effect during the pay period" mean the per-hour wage, in this case, $12.50 per hour, and the multiples for time-and-a-half and double time? Or does it *also* include the hourly rate arrived at after computing the overtime premium, that is, after dividing the production bonus by the total hours worked and dividing that number by two (or multiplying by .5)?

As this calculation shows, Morales' "straight time rate (i.e., his . . . normal hourly wage rate)" (*Alvarado, supra,* 4 Cal.5th at p. 554) – $12.50 for regular hourly time and $18.75 for first-tier overtime – plays no part in calculating the overtime "as if" hourly rate (to use *Alvarado*'s expression) on his bonus. This number is a function of the amount of the bonus and the total number of hours worked.

Morales' interpretation renders the qualifying phrase "in effect during the pay period" in section 226, subdivision (a)(9), surplusage. The hourly rate for the overtime premium is not in effect during the pay period. It comes into being after the period closes "for the limited purpose of calculating overtime pay" (*Alvarado, supra,* 4 Cal.5th at p. 554) and then vanishes. It cannot be calculated until the pay period to which it applies ends, and, unlike the hourly "straight time" wage rate, it changes from pay period to pay period, dependent as it is on the number of overtime hours worked, if any, and the number of flag unit credits obtained during that period.

We recognize that one important purpose of section 226 was to show employees how their pay was calculated in such a way that they can check for themselves to see whether they are being paid as they should be. (See § 226, subd. (e)(2)(B),(C) [employee should be able to determine wages from wage statement "promptly and easily," meaning that a reasonable person could readily ascertain information without reference to other documents or information]; see also *Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 390 (*Soto*) [§ 226 enacted "to assist employee in determining whether he or she has been compensated properly"].) The Legislature, however, listed the categories of information needed to fulfill this purpose, such as "the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis" (§ 226, subd. (a)(3)) and "applicable hourly rates in effect during the pay period." (§ 226, subd. (a)(9).) The courts are not free to specify additional categories. (See *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist., supra,* 14 Cal.4th at p. 633, quoting *Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365 ["'This court has no power to rewrite the statute to make it conform to a presumed intention which is not expressed.'"].)

The lump sum for "overtime premium" on the representative wage statement, which corresponds to the "overtime on bonus" category in the above examples, gave no information about how Bridgestone arrived at this amount. But the

two fixes Morales proposed did not mend matters. The first fix – an overtime hourly rate of $19.31 – simply pushed the uncertainty back one level. How would the employee know whether that rate is correct? It is not a simple multiple of the hourly rate, such as time-and-a-half. (Cf. *Morgan, supra,* 186 Cal.App.4th at p. 1147 [employer complied with section 226 by listing regular hours and overtime hours separately; simple addition revealed total hours worked].) And why does it change from pay period to pay period? The other fix proposed multiplying the overtime hours by $.56, the number arrived at after dividing the production bonus by the total number of hours and dividing that number by two. Again, how is the employee to know whether this number is correct?

More importantly for statutory interpretation, the overtime premium "as-if" hourly rate varies from pay period to pay period and cannot be calculated until the pay period closes. It therefore cannot be an "applicable hourly rate *in effect during the pay period*."[9] (See *Soto, supra,* 4 Cal.App.5th at p. 392 [unused vacation pay not "earned" until termination of employment; section 226 does not require wage statement to include vacation pay as "gross wages *earned*" and "net wages *earned*" (italics added.)].)

We offer no opinion regarding how the complicated calculation for an overtime production bonus could or should be expressed on a wage statement in a way employees can understand and verify. That is a legislative task. Our job here is to ascertain whether the trial court correctly interpreted the Labor Code when it decided that Bridgestone violated section 226, subdivision (a)(9), by not including an "applicable hourly rate in effect during the pay period" for the overtime premium on Morales' wage statement. Because there is no "applicable hourly rate in effect during the pay period" for the overtime premium, we conclude that Bridgestone did not violate the subdivision.

[9] "[A]n employee's regular rate of pay changes from pay period to pay period depending on whether the employee has earned shift differential premiums or nonhourly compensation. Therefore, the word 'regular' in this context does not mean 'constant.'" (*Alvarado, supra,* 4 Cal.5th at p. 562.)

DISPOSITION

The judgment and the order awarding attorney fees are reversed. The trial court is instructed to enter judgment for appellant. Appellant is to recover its costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.

EXHIBIT B

Filed 5/30/18

CERTIFIED FOR PARTIAL PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

FABIO CANALES et al., Plaintiffs and Appellants, v. WELLS FARGO BANK, N.A., Defendant and Respondent.	B276127 (Los Angeles County Super. Ct. No. BC502826)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Shepard Wiley, Jr., Judge. Affirmed.

Law Offices of Sherry Jung and Larry W. Lee; Hyun Legal, Dennis S. Hyun for Plaintiffs and Appellants.

Kading Briggs, Glenn L. Briggs, Theresa A. Kading and Nisha Verma, for Defendant and Respondent.

** Pursuant to California rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts III(B) and III(C).

I. INTRODUCTION

Plaintiffs Fabio Canales and Andy Cortes, on behalf of themselves and class members, appeal from a summary judgment. Plaintiffs were former or current non-exempt employees of defendant Wells Fargo Bank, N.A. Plaintiffs alleged that their wage statements failed to include information required under Labor Code[1] section 226, subdivision (a)(9). Specifically, plaintiffs argued that a line on the wage statement, "OverTimePay-Override," should, but did not, include hourly rates and hours worked. Plaintiffs also alleged defendant violated section 226 by failing to provide a wage statement concurrently with the terminated employees' final wages paid in-store. Plaintiffs moved for summary adjudication on the section 226 cause of action.

Defendant in its summary judgment motion argued that OverTimePay-Override reflected additional overtime pay that was owed for work performed on a previous pay period, but could not be calculated because it was based on a nondiscretionary bonus not yet earned. Under subdivision (a)(9), defendant contended OverTimePay-Override did not have corresponding hourly rates or hours worked for the current pay period. As to plaintiffs' second theory, defendant asserted it complied with the statute by furnishing the wage statement by mail. The trial court found in favor of defendant and against plaintiffs.

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[1] Further statutory references are to the Labor Code unless otherwise indicated.

Plaintiffs contend the trial court erred by denying their summary adjudication motion and by granting defendant's motion. We affirm.

II. BACKGROUND

A. *Factual Background*[2]

Plaintiffs are current or former non-exempt California employees of defendant. Defendant would in some instances issue a paycheck and wage statement that contained nondiscretionary incentive compensation[3] (the bonus) to employees who worked during the period covered by the incentive compensation. These bonus periods would be monthly, quarterly, or annually. For employees who worked overtime during those bonus periods, the wage statements contained a line item called "OverTimePay-Override," formerly called "OT-Flat." OverTimePay-Override listed incremental additional overtime paid to the employee for overtime hours worked during the bonus

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[2] All facts are considered undisputed for purposes of summary judgment.

[3] Teresa Swanson, defendant's person most knowledgeable, stated that a nondiscretionary bonus was "given to a team member, based on some sort of preset work definition, goal, something that they have to meet. And then they earn that bonus." It appears this bonus was a production or piecework bonus.

Cal.App.4th 1136, 1142 (*Morgan*).) "'As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose.' [Citation.] The well-established rules for performing this task require us to begin by examining the statutory language, giving it a plain and commonsense meaning. [Citation.] We do not, however, consider the statutory language in isolation; rather, we look to the statute's entire substance in order to determine its scope and purposes. [Citation.] That is, we construe the words in question in context, keeping in mind the statute's nature and obvious purposes. [Citation.] We must harmonize the statute's various parts by considering it in the context of the statutory framework as a whole. [Citation.] If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history." (*Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1106-1107; *Morgan, supra*, 186 Cal.App.4th at pp. 1142-1143.)

B. *Nondiscretionary Bonuses and Overtime Pay*

We first discuss the nature of nondiscretionary bonuses and how they relate to overtime pay under the Labor Code. Pursuant to section 510, subdivision (a), an employer must pay one and a half times an employee's "regular rate of pay" if he or she works more than 40 hours per week or more than 8 hours per day. Nondiscretionary bonuses are considered part of the "regular rate

of pay." (*Marin v. Costco Wholesale Corp.* (2008) 169 Cal.App.4th 804, 807 (*Marin*); see 29 C.F.R. § 778.209 (2012) [federal method of explaining regular rate of pay calculation for bonuses].)

In order to calculate overtime pay for an employee paid at an hourly rate, an employer must allocate the bonus over the period in which it was earned. (*Marin, supra*, 169 Cal.App.4th at p. 807; Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2017) ¶ 11:906 ["A bonus or prize paid in cash is allocated *over the period during which it was earned* to determine the increase in the average hourly rate for each week of the period"].) To explain this using an example, take a hypothetical employee wage statement for the period of January 7 to January 20, 2018.[9] This hypothetical wage statement would include an hourly regular rate, the number of regular hours worked during the pay period of January 7 to January 20, the hourly overtime rate, and the number of overtime hours worked during the pay period of January 7 to January 20. The hypothetical employee earned a $360 monthly bonus for work performed during the previous month of December, from December 1 to December 31, 2017. This bonus would be reflected on the January 7 to January 20, 2018 wage statement.[10] To calculate the OverTimePay-Override line, the

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9 We have provided these dates, but defendant used the hours and bonus figures in their respondent's brief as an illustration to calculate OverTimePay-Override. Plaintiffs have not disputed the accuracy of defendant's method.

10 Section 204, subdivision (b)(1) provides, "all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period."

hours worked in December 2017 would be used because that is the time period in which the bonus was earned. In this hypothetical, the employee had worked 160 regular hours and 20 overtime hours in December 2017, for a total of 180 hours. First, divide $360 by 180, which results in $2. This number represents the increase to the regular hourly rate. Multiply $2 by 0.5 and the result, $1, represents the increase to the overtime hourly rate. Then, take $1 and multiply it by 20, the overtime hours worked during December 2017, and the result, $20, is the overtime pay adjustment, which would be identified as the OverTimePay-Override line on the wage statement. This allocation, at least for production or piecework bonuses, is calculated by using the method described above in footnote 4.

C. *Section 226, Subdivision (a)(9) Does Not Require Hourly Rate and Hours Worked to be Identified For OverTimePay-Override*

The Court of Appeal in *Morgan* discussed the purpose of section 226, subdivision (a)(9): "The 2000 amendment [which added subdivision (a)(9)] . . . expanded the scope of information to be included by employers in the itemized wage statements furnished to employees. Following the amendment, an employer

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Plaintiffs contend that pursuant to *Peabody v. Time Warner Cable, Inc.* (2014) 59 Cal.4th 662, 669, defendant was prevented from paying OverTimePay-Override for wages earned in prior pay periods. *Peabody v. Time Warner Cable, Inc.*, is inapposite. In that case, our Supreme Court held an employer could not attribute wages paid in one period to a prior pay period in order to meet an exemption for minimum wages. (*Ibid.*) It has no application to the OverTimePay-Override line at issue here.

that previously listed the total hours worked by an employee in a single category [as required under subdivision (a)(2)] was now required to list both the total regular hours worked and the total overtime hours worked, along with the corresponding hourly rates. It appears that by adding this more specific requirement, the statute made it easier for employees to determine whether they were being paid for all hours worked at the appropriate rates of pay." (*Morgan, supra*, 186 Cal.App.4th at p. 1148.)

Subdivision (a)(6) requires that the wage statement show "the inclusive dates of the period for which the employee is paid." Applying the standards of statutory construction, in the context of section 226 as a whole, the "pay period" discussed in subdivision (a)(9), which requires that the wage statement include "all applicable hourly rates in effect during the pay period," refers to the period described in subdivision (a)(6). In our hypothetical wage statement above, we interpret the pay period to refer to the two-week period covered by the wage statement, January 7 to January 20, 2018.

Defendant argues it was not required to provide on the wage statement hourly rates or hours worked related to OverTimePay-Override. Defendant has met its initial burden of production. (Code Civ. Proc., § 437c, subd. (p)(2).) Based on the above statutory construction and the method by which OverTimePay-Override was calculated, there were no "applicable ***hourly rates*** in effect ***during the pay period***" that corresponded to OverTimePay-Override. Accordingly, there was also no "corresponding number of hours worked at each hourly rate by the employee" for the pay period that applied to OverTimePay-Override. As discussed above, OverTimePay-Override represented additional wages that were earned as

overtime pay based on nondiscretionary bonuses being spread over the hours worked during the bonus period. Moreover, based on how OverTimePay-Override was calculated, the overtime hours were worked in *previous* pay periods for which employees had already received their standard overtime pay. The itemized wage statement issued by an employer need only provide the applicable hourly rates and the corresponding number of hours worked "in effect during the pay period." In other words, the employer need only identify on the wage statement the hourly rate in effect during the pay period for which the employee was *currently* being paid, and the corresponding hours worked.

Plaintiffs argue to the contrary, but have failed to meet their burden. (Code Civ. Proc., § 437c, subd. (p)(2).) "[S]ection 226, subdivision (a) is highly detailed, containing nine separate categories that must be included on wage statements . . . . When a statute omits a particular category from a more generalized list, a court can reasonably infer a legislative intent not to include that category within the statute's mandate." (*Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 391.) The purpose of spreading the bonus over the hours worked during the bonus period is to calculate the "regular rate of pay" for overtime under section 510. Defendant's wage statements included the regular rate of pay, the overtime rate of pay, and the hours worked at each rate. Each of these was "in effect during the pay period," January 7 to January 20 in our example. The OverTimePay-Override was an adjustment to the overtime payment due to an employee, based on bonuses earned by the employee for work performed during prior pay periods. Accordingly, there were no applicable hourly rates in effect during the pay period which defendant was required to include in the wage statement.

Plaintiffs contend a federal district court case, *Ontiveros v. Safelite Fulfillment, Inc.* (C.D.Cal. 2017) 231 F.Supp.3d 531 (*Ontiveros*) is directly on-point and supports their position. In *Ontiveros*, the district court found that the employer's wage statements were deficient for failing to report overtime wages associated with an installation bonus. (*Id.* at pp. 540-541.) The district court reasoned: "It is undisputed that Plaintiff earned additional overtime wages if he worked overtime during the same period that an installation bonus was earned, as this bonus would lead to an increase in his regular rate under 29 C.F.R. § 778.109. . . . It is also undisputed that when Plaintiff earned installation bonuses, his wage statements reflected both the underlying bonus earned and the additional overtime wages owed as a single line item. . . . Finally, it is undisputed that the wage statement does not have information from which Plaintiff could calculate the additional overtime owed as a result of participation in the installation bonus program. . . . The Court concludes that the 'regular rate' is an 'applicable hourly rate.' As such, the law requires that the regular rate appear on the face of the wage statement or else be ascertainable from the information included therein. Because it was not possible to promptly and easily determine the regular rate from the wage statements when an employee was enrolled in the installation bonus program, the statements were deficient. [Fn. omitted.]" (*Ibid.*)

Ontiveros is distinguishable. *Ontiveros* involved a piece-rate compensation, paid weekly. (231 F.Supp.3d at p. 535.) Additionally, the bonus earned and additional overtime wages were reflected on the wage statement on one line, rather than being separated. (*Id.* at p. 540.) Finally, the bonus was based on

work performed during the pay period reflected in the wage statement. (See *id.* at p. 534.)

Plaintiffs also cite a May 17, 2002 opinion letter from the Division of Labor Standards Enforcement (DLSE). That letter concerned a unique situation in which an employer continually listed 86.67 hours as the hours worked by its employees during each pay period, regardless of whether it was true. The DLSE was concerned with an employer's failure to list all hours worked during the pay period, including overtime. To the extent the DLSE determined an employer must comply with section 226 when making additional overtime payments for work performed in prior pay periods, we conclude the DLSE opinion letter is not applicable. Accordingly, we find defendant should prevail as a matter of law on this theory.

D. *No Violation for not Providing an Itemized Statement at Time of Termination*

Defendant argues it is in compliance with section 226, subdivision (a) because it "furnished" the wage statement to the discharged employee by United States mail. As noted, section 226, subdivision (a) provided, "[e]very employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing . . . ." It is undisputed defendant provided some discharged employees with their last wages in-store by cashier's check, in compliance with the Labor Code. (See §§ 201, subd. (a) ["[i]f an employer discharges an

PROOF OF SERVICE

I, Jennifer D. Bennett, hereby certify that at the time of service, I was at least 18 years of age and not a party to this action. My business address is Gupta Wessler PLLC, 100 Pine Street, Suite 1250, San Francisco, CA 94111, and my email address used to e-serve is *jennifer@guptawessler.com*. I certify that on May 20, 2020 I served this brief on the lower courts and below interested parties via the California Supreme Court's TrueFiling 3.0 system:

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Fourth Appellate District, Division Three
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Jennifer D. Bennett
Jennifer D. Bennett