S248702

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CHARLES E. WARD, ET AL.,
Plaintiffs and Appellants,

v.

UNITED AIRLINES, INC.,
Defendant and Respondent.

AFTER A DECISION BY THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT, CASE NO. 16-16415
MAGISTRATE JUDGE WILLIAM ALSUP, CASE NO. 3:15-CV-02309-WHA

OPENING BRIEF ON THE MERITS

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1. Does California Labor Code section 226 apply to wage statements provided by an out-of-state employer to an employee who resides in California, receives pay in California, and pays California income tax on her wages, but who does not work principally in California or any other state?

2. The Industrial Welfare Commission Wage Order 9 exempts from its wage statement requirements an employee who has entered into a collective bargaining agreement (CBA) in accordance with the Railway Labor Act (RLA). (See Cal. Code Regs., tit. 8, § 11090(1)(E).) Does the RLA exemption in Wage Order 9 bar a wage statement claim brought under California Labor Code section 226 by an employee who is covered by a CBA?

INTRODUCTION

The Ninth Circuit Court of Appeals certified the above two questions to this Court for resolution based upon its conclusion that there is no controlling California precedent and that their resolution would determine the outcome of the summary judgment orders which are the subject of this appeal as well as the fact that their resolution "matter greatly to many California residents who work only episodically in California and to the many employers who regularly send California residents to work outside of the state." (*Ward v. United Airlines, Inc.* (9th Cir. 2018) 889 F.3d 1068, 1072.)

In these two class actions, Plaintiffs are airline pilots and flight attendants who work for Defendant United Airlines. Plaintiffs are all based in California, receive their paychecks and wage statements in California, and pay California income taxes on those wages. Plaintiffs allege that United violated California Labor Code section 226 which governs the information that employers such as United must include on employee pay documents and which provides a penalty for its violation. The parties filed cross-motions for summary judgment. The district courts granted United's motions and dismissed this action on two grounds, neither of which justifies its ruling.

First, the district courts concluded that the application of section 226 to Plaintiffs' claims would be extraterritorial in nature (i.e. it would apply to claims arising from conduct occurring outside of California). In so ruling, the courts erred.

The application of section 226, which governs the composition of pay documents in California to claims arising from paychecks issued in

California to employees headquartered there, is not extraterritorial. In ruling to the contrary, the courts below concluded that the application of that section to Plaintiffs' claims would be extraterritorial based on the "job situs" test that focuses on the percentage of where the plaintiff performed his or her work.

Even in the context of wage claims, a purely percentage based test is improper. As explained by the Court *Bernstein v. Virgin America, Inc.* (N.D. Cal., Jan. 5, 2017, No. 15-CV-02277-JST) 2017 WL 57307, even in wage and hour cases the application of state statutes to employees who work in a variety of states, such as airline employees, may not be extraterritorial under the appropriate multifaceted test.

It is decidedly not the case that a claim purely under section 226 which is brought based on pay documents issued in California to California plaintiffs has any extraterritorial effect regardless of what percentage of the plaintiff's work is performed outside of California. The first basis for the district courts' summary judgment rulings therefore fail.

The courts below also ruled that the application of section 226 to Plaintiffs' claims would violate the dormant Commerce Clause because these Plaintiffs performed work both in California and elsewhere. This aspect of the courts' rulings was also wrong and it is not entirely clear whether this question is embraced in the first issue certified for review by this Court. In the event it is, plaintiffs will explain that once again, the district courts failed to appreciate that all of the conduct being regulated by the application of section 226 to these actions would be California conduct. In order to succeed on its dormant Commerce Clause argument, it was necessary for United to establish that the application of section 226 would be a "clearly excessive burden." Here, the application of section 226

imposes no additional burden on United than it does on any other California employers who happen to do business in multiple states. It simply has to comply with the very clear terms of that section with respect to paychecks it issues in this state. The second ground for the district courts' summary judgment rulings therefore also fail.

Finally, as further explained, the wage statement exemptions found in Wage Order 9 (8 C.C.R. § 11090) for employers who employ persons under a collective bargaining agreement ("CBA") do not apply here because Wage Order 9 contains wage statement requirements that are not at issue in these cases, and thus, any exemptions from these requirements for CBA employers do not affect Plaintiffs' claims under Section 226 and because Labor Code § 226 contains no applicable deference to the Industrial Welfare Commission ("IWC"), as other sections of the Labor Code do. Accordingly, Wage Order 9 simply does not preclude Plaintiffs' claims.

COMBINED STATEMENT OF THE CASE AS TO *WARD* AND *VIDRIO*

A. Plaintiff Charles Ward Brings This Claim Against United Airlines For Its Failure To Provide Information On Its Wage Statements Required By California Law.

United Airlines, Inc. ("United") pays its pilots various hourly rates. Ward-3 ER 339. A pilot's hourly rate varies by the pilot's different pay activities. Ward-3 ER 339. For example, a pilot receives a regular hourly rate, 200% of the regular rate of pay for Senior Manning pay, 150% of the regular rate of pay for Volunteer Day Off pay, and 150% of the regular rate of pay for "deadhead middle seat" pay.[1] Ward-3 ER 339. There is also vacation pay, training pay, and reassignment pay. Ward-3 ER 339. Pilots receive two or more wage statements per month. Ward-3 ER 338.

Plaintiff Charles Ward is a United pilot. Ward-3 ER 336. In 2014, Ward received a paycheck that he believed underpaid him several thousand dollars. Ward-3 ER 336. Ward could not determine the exact amount missing from his paycheck, however, because the pay statement did not provide the hours Ward worked at each different hourly rate nor did it list the different hourly rates. Ward-3 ER 337.

Ward brought this claim in the Superior Court of the City and County of San Francisco on behalf of himself and the other United pilots

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[1] "Senior Manning" pay is when a pilot with a set monthly schedule agrees to work on his or her day off and "deadhead middle seat" pay is when a pilot travels in a middle seat as a passenger to a location to work. Ward-3 ER 339-40.

living in California. Ward-4 ER 633. The Complaint alleged United violated California Labor Code § 226. Ward-4 ER 633-40. Section 226 requires each statement of wages to include the name and address of the legal entity that is the employer and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. Ward alleged United failed to comply with these requirements. Ward-4 ER 634. Ward alleged the section 226 claim as two causes of action, one as a Private Attorney General Act cause of action and another as a class action. Ward-4 ER 633. United removed the action to the United States District Court for the Northern District of California. Ward-4 ER 611-16.

B. The District Court Grants United's Motion For Summary Judgment In *Ward*, Concluding California Law Does Not Apply Because The *Ward* Class Members Performed Work Primarily Outside California.

Both parties moved for summary judgment. Plaintiffs moved for summary judgment on the ground that California Labor Code § 226 mandates wage statements issued to California employees list the address of the legal entity that is the employer and list all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate. Ward-4 ER 541. As it was undisputed United failed to list its physical address or the applicable hourly rates and number of hours worked at each rate on the wage statements, Plaintiffs reasoned they were entitled to summary judgment. Ward-4 ER 541. United opposed the

motion and Plaintiffs replied to the opposition. Ward-3 ER 232; Ward-2 ER 213.

United moved for summary judgment, first arguing that California law does not apply because the class members spent the majority of their time working outside California; therefore, applying the California law would violate the presumption against the extraterritorial application of California law. Ward-2 ER 130-37. United also argued that applying California law would violate the dormant Commerce Clause, contending that requiring United comply with California law "would impose a burden on interstate commerce that is incommensurate with California's interest in ensuring that its own citizens are adequately informed of their compensation received." Ward-2 ER 138. As additional grounds for its motion, United argued it is entitled to summary judgment because the claims are preempted by the Airline Deregulation Act and by the Railway Labor Act. Ward-2 ER 142-47. As a final ground for its motion, United contended it complied with California Labor Code § 226 because United's wage statements include a Post Office Box and because United provided its pilots access to pay registers which contain the required information. Ward-2 ER 148.

Plaintiffs opposed the motion. Plaintiffs explained that California law does apply because they are not alleging a wage claim so the locations of where Plaintiffs earned their wages is irrelevant; instead, Plaintiffs' claim involves the physical wage statements United provides to its pilots in California. Ward-2 ER 106. As the pilots reside in California, are paid their wages in California, receive their wage statements in California, and suffered their injuries in California, the principle of extraterritoriality does not apply and California law governs. Ward-2 ER 106. Plaintiffs then

noted the district court reached this very same conclusion in granting the motion for class certification: "Ward's claims do not arise from the work he or members of the putative class performed outside California. Rather, they arise from the wage statements that United furnished to its pilots who resided in California." Ward-2 ER 108; Ward-4 ER 588.

Plaintiffs then explained the dormant Commerce Clause does not bar Plaintiffs' claim because United cannot meet its burden of showing that compliance with section 226 will cause a clearly excessive burden on interstate commerce in relation to the local benefits to employees, as is required for the clause to apply. Ward-2 ER 109.

Next, Plaintiffs responded to United's preemption claims, citing case law holding that the Airline Deregulation Act does not preempt section 226 claims, and explaining that Plaintiffs' claims are not preempted by the Railway Labor Act because consultation with the Collective Bargaining Agreement is unnecessary. Ward-2 ER 113-15.

Last, in response to United's argument that it complied with section 226, Plaintiffs incorporated their argument from their motion for summary judgment as to why United violated section 226 as a matter of law. Ward-2 ER 115-16; Ward-4 ER 541.

United replied to Plaintiffs' opposition. Ward-2 ER 79. The district court heard the cross-motions for summary judgment and took the matters under submission. Ward-2 ER 78. The court denied Plaintiffs' motion and granted United's motion. Ward-1 ER 1. The court concluded that the proper analysis for determining whether California law applies looks to where the class members earned their wages, rather than where the class members received their wage statements. Ward-1 ER 7. The court reached this conclusion by reasoning that section 226 was enacted to enable

employees to verify that they have received the protections of California's wage-and-hour laws. Ward-1 ER 7. Accordingly, the court ruled, section 226 "must be subject to the same jurisdictional limits as the wage-and-hour statutes and regulations to which it relates." Ward-1 ER 7. Therefore, the court concluded, section 226 does not apply to pilots who worked primarily outside of California. Ward-1 ER 8.

The district court additionally held that United is entitled to summary judgment due to the dormant Commerce Clause. Ward-1 ER 8-11. The district court concluded that the benefit section 226 provides to the United pilots is outweighed by the "administrative burden of complying with the patchwork of state wage-statement statutes and regulations" that would result. Ward-1 ER 9. The district court did not rule on United's additional arguments. The district court entered judgment in favor of United. Ward-2 ER 53.

Plaintiffs timely appealed. Ward-2 ER 12. The Ninth Circuit then certified two controlling issues of California law that have not yet been resolved by this Court of the California Courts of Appeal.

C. Plaintiff Felicia Vidrio Brings This Claim Against United Airlines For Its Failure To Provide Information On Its Wage Statements Required By California Law.

Plaintiff Felicia Vidrio is a flight attendant employed by United Airlines, Inc. ("United"). Vidrio-3 ER 431. Vidrio resides in Oceanside, California and is based out of Los Angeles International Airport. Vidrio-3 ER 431-32.

United's flight attendants are paid different hourly rates for different activities, such as "Regular Pay" for flying time; "Galley Pay" for cooking or warming food; "Lead Pay" or "Purser Pay" when the flight attendant is in charge of a particular flight; "Starlite Pay" or "Night Pay" for flying time between 10:00 p.m. and 6:00 a.m.; "Holding Pay" when the flight is delayed; "Per Diem" pay for expense reimbursement; Understaffing Rate; International Pay; and Deadhead Pay (when flight attendant is a passenger on a flight traveling to an airport to work on a flight departing from that airport). Vidrio-3 ER 432-33.

United's flight attendants receive two wage statements per month. Vidrio-3 ER 432. These wage statements do not reflect the hours each flight attendant works at each rate, however. Vidrio-3 ER 433, 436-40.

As a result of her wage statement not including the different hourly rates of pay and United's address, Vidrio filed this action against United for violation of California Labor Code § 226 in the Los Angeles County Superior Court. Vidrio-3 ER 452. California Labor Code § 226 requires employers to provide its employees with an accurate written statement that lists, among other things, total hours worked by the employee, the address of the legal entity that is the employer, and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. United removed the case to the United States District Court for the Central District of California. Vidrio-3 ER 443.

Upon removal, Plaintiff moved for class certification. Vidrio-3 ER 481. The district court granted Plaintiff's motion, certifying the class as "[a]ll persons who were or are employed by United Airlines Inc. as flight attendants for whom United applied California income tax laws pursuant

to 49 U.S.C. 40116(f)(2) at any time from July 6, 2015 up to the present." Vidrio-3 ER 433.

D. The District Court Grants United's Motion For Summary Judgment As To *Vidrio*, Concluding California Law Does Not Apply Because The *Vidrio* Class Members Performed Work Primarily Outside California.

In *Vidrio*, both parties moved for summary judgment. United argued it was entitled to summary judgment because the presumption against extraterritoriality bars Plaintiffs claims, application of Section 226 would violate the dormant Commerce Clause, Section 226 is preempted by the Railway Labor Act and the Airline Deregulation Act, and it complied with Section 226's requirements. Vidrio-3 ER 390-92.

In regard to its extraterritoriality argument, United argued the governing law is determined by the location of the work performed, and not the employee's state of residence. Vidrio-3 ER 399-403. As such, according to United, because the class members do not work primarily in California, application of Section 226 would have an extraterritorial effect. Vidrio-3 ER 403-04.

Plaintiffs opposed the motion, explaining the presumption against extraterritoriality is not triggered because application of Section 226 here would not operate outside California. Vidrio-3 ER 286-92. Plaintiffs noted that compliance with Section 226 has no relation to where the class member performed his or her work, but rather is only determined by where the class member receives his or her wage statement (California) and what type of work the class member performs, which is location-neutral. Vidrio-3 ER

286-92. Accordingly, rather than applying a job situs test to determine whether application of the law would be extraterritorial, Plaintiffs explained the district court should instead apply a multi-factor approach recently taken in another case involving an airline. Vidrio-3 ER 289-92.

Plaintiffs supplied evidence as to the deep ties United has with California, employing over 17,000 employees at Los Angeles International Airport (LAX) and San Francisco International Airport (SFO) alone, servicing 17 airports in California (more than in any other state), operating 400 flights daily in California, serving an average of 5.6 million passengers annually at LAX and 10.6 million passengers annually at SFO, and investing $573,000,000 in upgrades to its facilities at LAX. Vidrio-2 ER 243-46.

Plaintiffs also explained that application of Section 226 would not violate the dormant Commerce Clause because it would not create an undue burden on interstate commerce (Vidrio-3 ER 296-301); that Section 226 is not preempted by the Railway Labor Act because resolution of Plaintiffs' claims does not require interpretation of the collective bargaining agreement (Vidrio-3 ER 297-300); that Section 226 is not preempted by the Airline Deregulation Act because compliance with the statute will have no effect on prices, routes, and/or services (Vidrio-3 ER 300-01); and finally, mirroring their own motion for summary judgment, that United violated Section 226 because United did not comply with the statute's "address" requirement because including a P.O. Box is insufficient and because Plaintiffs' specific rates of pay and the number of hours worked at each specific rate clearly are not included on their wage statements (Vidrio-3 ER 301-06; *see also* Vidrio-2 ER 181 [Plaintiffs' motion for summary judgment]).

After full briefing on both motions, the district court granted United's motion and denied Plaintiffs' motion. Vidrio-1 ER 1. The district court concluded that applying Section 226 to Plaintiffs' claims would violate the presumption against extraterritorial application of California law. Vidrio-1 ER 4-9. Relying on the recent decision in *Ward v. United Airlines, Inc.*, 2016 WL 3906077 (N.D. Cal. 2016), the district court applied the job situs test, which considers where the employee principally worked, and concluded that since Plaintiffs worked primarily outside of California, application of Section 226 to Plaintiffs' claims would violate the presumption against exterritoriality. Vidrio-1 ER 6.

The district court then concluded that the same result would be reached under the multi-factor approach because United is not based in California and only 18.34% of United's domestic flights operate out of California. Vidrio-1 ER 7. The court did not address United's other contentions. Vidrio-1 ER 7.

E. The Ninth Circuit Certifies Two Questions To This Court For Resolution.

Following oral argument in the Ninth Circuit, the Court requested the parties to file supplemental briefing whether Wage Order 9's RLA exemption applies to employees who, like Ward and Vidrio, bring claims exclusively under § 226. The parties filed those supplemental briefs.

The Ninth Circuit then certified two questions for this Court's resolution. As to the issue concerning whether plaintiffs' claims under Labor Code section 226 were foreclosed under Wage Order 9, the Ninth Circuit explained:

> California law requires us to "harmonize" § 226 and Wage Order 9. See *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004, 139 Cal.Rptr.3d 315, 273 P.3d 513, 528 (2012). But it is not clear how to harmonize § 226 and Wage Order 9's RLA exemption.
>
> On the one hand, Wage Order 9's RLA exemption is arguably irrelevant to § 226 because § 226 does not refer to Wage Order 9's wage statement requirements or include an RLA exemption in its section on exemptions. See Cal. Labor Code § 226(j). Nor does § 226 leave undefined the precise requirements for a wage statement, which could suggest that the California Legislature intended § 226's requirements to be "read as shorthand for the requirement[s] contemplated in ... [the] wage order[ ]." *Brinker*, 139 Cal.Rptr.3d 315, 273 P.3d at 534. Instead, the wage statement requirements in § 226 are far more comprehensive than those in Wage Order 9. Compare Cal. Labor Code § 226(a) with 8 C.C.R. § 11090(7)(B). The lack of an RLA exemption in the detailed text of § 226 may mean that § 226 properly applies to a claim brought by a unionized worker. See, e.g., *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 35 Cal.Rptr.3d 243, 247, 251 (2005).
>
> On the other hand, that reading of § 226 arguably nullifies Wage Order 9's RLA exemption with regard to wage statements. It requires an employer of a unionized employee to comply with the more specific requirements of § 226, which is at odds with Wage Order 9's identification of wage statement regulations as properly overridden by a CBA. It may be that to best effectuate the purpose of both provisions, Wage Order 9's RLA exemption must be deemed to cover § 226 claims as well. See *Collins v. Overnite Transp. Co.*, 105 Cal.App.4th 171, 129 Cal.Rptr.2d 254, 260 (2003) (on Wage Order 9's motor carrier exemption).

(*Ward v. United Airlines, Inc.* (9th Cir. 2018) 889 F.3d 1068, 1072–1073.)

As to whether application of Labor Code section 226 would constitute an unlawful extraterritorial application of California law, the Ninth Circuit explained asked: "Does § 226's focus on an employee's receipt of information about her pay make the relevant location for a § 226 claim the place where the employee receives her pay? See Cal. Labor Code

§ 226(e)(2); see also *Lopez v. Friant & Assocs., LLC,* 15 Cal.App.5th 773, 224 Cal.Rptr.3d 1, 6 (2017); *Morgan v. United Retail, Inc.*, 186 Cal.App.4th 1136, 113 Cal.Rptr.3d 10, 19 (2010). If so, does an employee's California residence and receipt of pay in California strengthen California's interest in the content of an out-of-state employer's wage statement? Cf. *Sullivan*, 127 Cal.Rptr.3d 185, 254 P.3d at 243. On that score, neither *Tidewater* nor *Sullivan* discussed how to balance California's interest in applying its law to its residents with California's interest in avoiding interstate conflict by not applying its law to an out-of-state employer, such as United." (*Ward v. United Airlines, Inc., supra*, 889 F.3d at p. 1074.)

Finally, in its Certification Order, the Ninth Circuit indicates that although the pilots' and flight attendants' wage statements fail to list the hours worked and applicable hourly rates, *Ward* and *Vidrio* admit that this information is available in electronic records on United's internal website. *Ward v. United Airlines, Inc.* (9th Cir. 2018) 889 F.3d 1068, 1071. However, the Ninth Circuit is incorrect on these important facts as Plaintiffs have made no such admission, and the factual record directly contradicts this assumption.

It is definitely true that the wage statements omit the various hourly rates and the number of hours worked at each specific rate. Ward-3 ER 345-356; 369-384; Vidrio-3 ER 436-440. But, the electronic time records available to the pilots and flight attendants *do not* show the different hourly rates or the number of hours worked at each specific rate. These electronic records for the pilots are named the "PILOT PAY REGISTER," which is a confusing computer coded display of time records that do not show the applicable hourly rates or the number of hours worked at each rate. Ward-3

ER 358-367; 386-392. Likewise, these electronic records for the flight attendants are named the "FLIGHT ATTENDANT PAY REGISTER," which is also a confusing computer coded display of time records that do not show the applicable hourly rates or the number of hours worked at each rate. Vidrio-3 ER 355. Accordingly, contrary to the Ninth Circuit's factual assumption, the electronic records available to the pilots and flight attendants do not supply the information that is missing from the wage statements, and Plaintiffs have never made an admission that these electronic records contain this information.

In any event, even if these electronic records did supply the missing information (which they do not), Labor Code § 226 requires that the wage statement itself contain all the required information within the four corners of the wage statement alone. *See* Lab. C. § 226, subds. (e)(2)(B) and (e)(2)(C). In other words, Labor Code § 226 is violated if the employee must look to other documents or information beyond the wage statement itself in order to determine the applicable hourly rates and number of hours worked at each rate. *Id.* Thus, § 226 would still be violated here if the pilots and flight attendants had to look to the electronic pay registers to find the applicable hourly rates and number of hours worked at each rate.

ARGUMENT

I. LABOR CODE SECTION 226 APPLIES TO WAGE STATEMENTS PROVIDED BY AN OUT-OF-STATE EMPLOYER TO AN EMPLOYEE WHO RESIDES IN CALIFORNIA, RECEIVES PAY IN CALIFORNIA, AND PAYS CALIFORNIA INCOME TAX ON HER WAGES, BUT WHO DOES NOT WORK PRINCIPALLY IN CALIFORNIA OR ANY OTHER STATE. THE APPLICATION OF SECTION 226 TO PLAINTIFFS' CLAIMS WOULD NOT BE EXTRATERRITORIAL.

California Labor Code Section 226 ("Section 226") requires "employers [to] provide accurate itemized statements of wages to their employees." *Morgan v. United Retail Inc.* (Cal. Ct. App. 2010) 186 Cal.App.4th 1136, 1143 ("*Morgan*"). The employer must provide the wage statement to the employee "semimonthly or at the time of each payment of wages" and furnish the statement "either as a detachable part of the check . . . paying the employee's wages, or separately when wages are paid by personal check or cash." (§ 226(a).) The wage statement must contain the information specified in the statute. *Soto v. Motel 6 Operating, L.P.* (Cal. Ct. App. 2016) 4 Cal.App.5th 385, 390.[2]

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[2]Section 226 requires that pay statements include "(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

The first question certified by this Court for resolution concerns whether the application of section 226 to the Plaintiffs' claims in this action would be extraterritorial (i.e. to conduct outside California) when the subject wage statements are issued to employees (here airline pilots and flight attendants) who reside in California, are paid their wages in California, receive their wage statements in California, and suffered their injuries in California, to wit, they cannot determine by looking at their wage statements the hourly rates they were paid during the pay period or the number of hours they worked at each hourly rate during the pay period.

As now explained, when the proper standard is employed, it is evident that section 226 was intended to apply to the claims here and that application of section 226 would not be extraterritorial in nature.

A. The "Focus" Test For Determining Whether A Statute Has Extraterritorial Application.

In its opinion requesting certification of issues for review by this Court, the Ninth Circuit explained that there "are three principles that generally guide our evaluation of the propriety of a potentially extraterritorial application of California law, and the California Supreme Court's application of those principles, do not provide sufficient guidance here." (*Ward v. United Airlines, Inc.*, *supra*, 889 F.3d at p. 1073.) The Court continued:

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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 . . . ."

> The first principle is that "[o]rdinarily the statutes of a state have no force beyond its boundaries." *N. Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, 162 P. 93, 94 (1916). To evaluate whether a claim seeks to apply the force of a state statute beyond the state's boundaries, courts consider where the conduct that "creates liability" under the statute occurs. *Sullivan*, 127 Cal.Rptr.3d 185, 254 P.3d at 248; see also *RJR Nabisco, Inc. v. European Cmty.*, —— U.S. ——, 136 S.Ct. 2090, 2101, 195 L.Ed.2d 476 (2016) (where the "conduct relevant to the statute's focus occur[s]"). If the conduct that "creates liability" occurs in California, California law properly governs that conduct. *Sullivan*, 127 Cal.Rptr.3d 185, 254 P.3d at 248; see also *Diamond Multimedia Sys., Inc. v. Superior Court*, 19 Cal.4th 1036, 80 Cal.Rptr.2d 828, 968 P.2d 539, 554 (1999). By contrast, if the liability-creating conduct occurs outside of California, California law generally should not govern that conduct (unless the Legislature explicitly indicates otherwise, which it did not in the Labor Code). See *Sullivan*, 127 Cal.Rptr.3d 185, 254 P.3d at 248.
>
> The second principle is that the proper reach of Labor Code provisions can differ because the provisions regulate different conduct and implicate different state interests. See id., 127 Cal.Rptr.3d 185, 254 P.3d at 243–44. For example, because "California's interest in the content of an out-of-state business's pay stubs" may be weaker than its interest in the payment of overtime wages, wage statement provisions may apply more narrowly than overtime provisions do. See id., 127 Cal.Rptr.3d 185, 254 P.3d at 243.
>
> The third principle is that courts must balance California's interest in applying its law with considerations of "interstate comity," in order to avoid unnecessary conflicts of state law. See id., 127 Cal.Rptr.3d 185, 254 P.3d at 242–43. For example, courts should consider whether the proposed use of California law would displace another state's law or protect an employee who is otherwise not protected by any state law. See id., 127 Cal.Rptr.3d 185, 254 P.3d at 243 (citing *Bostain v. Food Express, Inc.*, 159 Wash.2d 700, 153 P.3d 846 (2007)).

(*Ibid.*)

As the Ninth Circuit recognized (and plaintiffs agree) the California Legislature did not intend section 226 to have extraterritorial application. Therefore, the first issue that must be evaluated is whether the liability-creating conduct occurs outside of California. Contrary to United's arguments and the district court's analysis, just because the pilots and flight attendants work in other states[3], that does not mean application of section 226 to claims concerning wage statements issued in California to employees who both live in and are headquartered in California is extraterritorial. As the Ninth Circuit explained in an analogous context:

> Simply because a case's factual background involves some conduct occurring abroad does not mean that every statute governing the matter is subject to the presumption against extraterritoriality; a court must first inquire into whether applying a statute implicates any issue of extraterritoriality. *Massey*, 986 F.2d at 531–32. This requires considering the conduct the statute seeks to regulate. See id.; see also *Pakootas*, 452 F.3d at 1077 ("The difference between a domestic application of United States law and a presumptively impermissible extraterritorial application of United States law becomes apparent when we consider the conduct that the law prohibits.").

Blazevska v. Raytheon Aircraft Co. (9th Cir. 2008) 522 F.3d 948, 952.

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[3] Ironically, when applying the job situs test here, the district court ignored the fact that the location of where the pilots perform their work (e.g. in California, outside California, or both) is totally irrelevant with respect to pilot compensation because the pilots are not paid hourly rates according to the state they are flying over, but are paid according to the rates set forth in their collective bargaining agreement. 2-ER 129. Thus, only two factors determine the pay reflected on the pilot's wage statements: (1) clock-in and clock-out times; and (2) the hourly rates applicable to the tasks performed, as set forth in the collective bargaining agreement. Therefore, the location of the work or "job situs" is irrelevant. The same is true as to the flight attendants in *Vidrio*.

The *Blazevska* Court then described how to decide what conduct the statute sought to regulate as follows:

> [W]hen deciding whether a statute implicates the presumption against extraterritoriality, courts must determine whether application of that statute would govern conduct occurring abroad. *Id.* at 533." Id. at pp. 953–54. Thus, "[u]niformly, the cases invoke the presumption when applying a statute would have the effect of regulating specific conduct occurring abroad. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173–74, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (deportation of aliens from international waters); *Smith*, 507 U.S. at 203–04, 113 S.Ct. 1178(federal tort claims arising in Antarctica); *Aramco*, 499 U.S. at 248–51, 111 S.Ct. 1227 (employment discrimination in Saudi Arabia); *Foley Bros. v. Filardo*, 336 U.S. 281, 285–86, 69 S.Ct. 575, 93 L.Ed. 680 (1949) (minimum overtime pay provisions for employees working in Iraq and Iran); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 4 L.Ed. 471 (1818) (anti-piracy laws in international waters); *ARC Ecology*, 411 F.3d at 1097 (environmental assessment in Philippines); *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1542–43 (9th Cir.1994) (banking regulation in Marshall Islands); *Subafilms, Ltd. v. MGM–Pathe Commc'ns Co.*, 24 F.3d 1088, 1095–97 (9th Cir.1994) (en banc) (copyright infringement in foreign distribution of films).
>
> On the other hand, when a statute regulates conduct that occurs within the [forum], the presumption does not apply. See *Pakootas*, 452 F.3d at 1077–78 (holding that, since the Comprehensive Environmental Response, Compensation, and Liability Act regulates the actual release of hazardous materials, no issue of extraterritoriality arises when a company arranged for disposal in Canada of hazardous substances, but the release itself occurred within the United States). Here, Congress passed a statute regulating the ability of a party to bring a suit against a general aviation aircraft manufacturer in American courts. Following these cases, GARA itself does not regulate any conduct that occurred abroad, so the presumption does not apply.

Id. at pp. 954–55.

California applies a similar test to determine whether its statutes have extraterritorial effect. "Under California law, the relevant inquiry for whether a state law is being applied extraterritorially is not the location of employment or where the contract was formed, but rather whether '*the conduct which gives rise to liability ... occurs in California.*" *Diamond Multimedia Sys., Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1059 (emphasis added).

Since here, all of the conduct that gives rise to Plaintiffs' claims – the issuance of wage statements without the information required under section 226 – occurred in California, the application of the correct standard focusing on the location of the wrongful conduct establishes that plaintiffs' claims are not extraterritorial in nature.

The second consideration identified by the Ninth Circuit (the purpose served by the law in question) adds further support to why section 226 applies here. At the outset, the district court in *Ward* (adopted by the court in *Vidrio*) was mistaken in its evaluation of the purpose of section 226. The *Ward* court reasoned that "the fact that our case concerned wage statements [rather than . . .] the actual performance of work (and compensation therefor) is a distinction without a difference. Indeed, the principal purpose of Section 226 is to enable employees to vet the accuracy of their compensation. *See Morgan v. United Retail, Inc.* (2010)186 Cal.App.4th 1136, 1149 (citations omitted). That is, Section 226 is in place to enable employees to verify that they have received the protections of California's wage-and-hour laws that all agree are subject to the job situs test, so it serves as an extended form of protection. Thus, this order holds Section 226 must be subject to the same jurisdictional limits as the wage-and-hour statutes and regulations to which it relates." Ward-1 ER 7.

The district court continued: "Ward's interpretation would yield absurd results. An employer in Nevada would need to apply Nevada wage-and-hour law to all paychecks, but it would need to comply with the wage-statement laws of each state of residence of its employees. Similarly, a California wage earner who resides elsewhere would not be entitled to the added protections guaranteed by California's wage-statement statute. The California Legislature could not have intended for its wage-statement laws to cause such confusion for out-of-state workers while the substantive protections for workers remained confined to the work within state borders. Nor could it have intended to deprive California wage earners of the protection offered by the wage-statement law simply based on their place of residence." Ward-1 ER 7-8.

Finally, in reaching this conclusion, the district court narrowly construed that "Section 226 is in place to enable employees to verify that they have received the protections of California's wage-and-hour laws that all agree are subject to the job situs test, so it serves as an extended form of protection. Thus, this order holds Section 226 must be subject to the same jurisdictional limits as the wage-and-hour statutes and regulations to which it relates." Ward-1 ER 7.

Respectfully, the district court's reasoning in *Ward* does not withstand analysis. First, the district court's conclusion that the purpose of section 226 is to enable employees to verify that they have received the protections of California's wage-and-hour laws is not correct. "The Legislature enacted section 226 to ensure an employer document[s] the basis of the employee compensation payments to assist the employee in determining whether he or she has been compensated properly. (*Gattuso*, supra, 42 Cal.4th at p. 574, 67 Cal.Rptr.3d 468, 169 P.3d 889; see *Morgan*,

supra, 186 Cal.App.4th at p. 1145, 113 Cal.Rptr.3d 10.) Section 226 play[s] an important role in vindicating [the] fundamental public policy favoring full and prompt payment of an employee's earned wages." *Soto v. Motel 6 Operating, L.P.* (Cal. Ct. App. 2016) 4 Cal.App.5th 385, 390 (internal quotation marks omitted).

Thus, section 226 has a much broader purpose than to simply allow employees to ensure that they are being paid only those wages to which they are entitled under California law. That section's purpose is to allow employees to determine whether they have been paid what they are owed, whether required under California law or not. Stated differently, this purpose is not dependent on peculiar aspects of California wage and hour law. It is to allow the employee to see whether he or she is being fully paid no matter what law applies. In other words, the direct linkage between section 226 and California wage and hour law on which the district court relied simply does not exist.

Second, the supposed "absurd results" the district court feared would arise are illusory. The information required under section 226 is readily ascertainable. If an employer employs a California resident who is based in California, who is paid in California, who has California taxes deducted and who unquestionably performs at least some work in California, it is a small price to pay to have the wage statement issued to that employee comply with California law. United, which conducts business in all 50 states and throughout the world, could not seriously claim that it would be overly burdensome for it to determine the information that must be placed on wage statements to its employees in the states where those employees reside and where they are based any more than the host of other state laws

with which it must comply. The onus claimed to exist is simply nonexistent.

Moreover, the district court's "absurd results" conclusion was specifically debunked in *Bernstein v. Virgin America, Inc.* (N.D. Cal. Jan. 5, 2017) 2017 WL 57307, wherein the court noted this determination by the *Ward* court and rejected it:

> The *Ward* court also failed to analyze whether state laws regarding wage statements actually conflicted such that the airline would need to provide different wage statements for different states. In doing so, the court neglected to hold the airline to its burden of showing that compliance would impose a substantial burden. See *Int'l Franchise Ass'n, Inc.*, 803 F.3d 389. Plaintiffs here have presented a thorough analysis of state-by-state wage statement requirements which suggests that a wage statement that complies with California law would comply with almost all state laws, thus mitigating any burden.

Id. at * 10, fn. 6. Indeed, as the chart appearing at page 52 (following the conclusion of this brief) demonstrates, there is no conflict between California's wage statement laws and the wage statement laws of the other states that have such laws. Accordingly, there is no absurd result or burden imposed upon United by requiring it to comply with the requirements of Labor Code § 226 when issuing wage statements to its pilots and flight attendants who reside in California, are employed in California, are paid their wages in California, and who pay California income taxes on those wages.

Nor is it the case that the application of section 226 under the circumstances here would be absurd because, according to the district court, "[n]or could [the Legislature] have intended to deprive California wage earners of the protection offered by the wage-statement law simply based on their place of residence." Ward-1 ER 8. If an employee resides in

California, receives his or her paycheck here, has California taxes deducted, then the physical composition of the wage statement issued must comply with California law. This is clearly consistent with what the Legislature intended, not at odds with it.

Simply put, all of the conduct that gives rise to this action occurred in California. The physical location of the work that generated the employees' salary, if relevant at all, provides only the "factual background" for Plaintiffs' pay document claims, which is not sufficient to implicate extraterritoriality. *Blazevska v. Raytheon Aircraft Co., supra,* 522 F3d. at p. 952.

The application of section 226 to the issuance of a wage statement in California is no different than other cases where courts have concluded that extraterritoriality was not an issue. For instance, in *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1061, the Court rejected the defendant's argument that a state statute making it unlawful to utter false or fraudulent transactions affecting the market for a security did not apply to the out-of-state plaintiffs who purchased stock outside of California because it would be extraterritorial in effect. *Id.* at pp. 1040-1041.

In concluding that the application of that statute to the plaintiffs' claims would not be extraterritorial, the Court reasoned, "unlike the injury in *North Alaska Salmon Co. v. Pillsbury, supra*, 174 Cal. 1 [(where the issue was whether California worker's compensation laws applied to an employee injured in another state)], the conduct which gives rise to liability under section 25400 occurs in California." *Id.* at p. 1059. The same is true here. All of the conduct that Plaintiffs allege gives rise to liability occurred in California.

In contrast, the cases on which United relied below to attempt to blur the difference between wage and hour statutes and section 226's wage statement requirements only serve to highlight why United is mistaken, because in each of those cases the wrongful conduct was premised upon out-of-forum activity. See *O'Neill v. Mermaid Touring Inc.* (S.D.N.Y. 2013) 968 F.Supp.2d 572, 575, 579 (Court concludes that the plaintiff's claim under New York law for nonpayment for work performed outside of New York was improper because, under New York law: "Plaintiff's reliance on residence or domicile is misplaced. The crucial issue is where the employee is 'laboring,' not where he or she is domiciled."); *Peikin v. Kimmel & Silverman, P.C.* (D.N.J. 2008) 576 F.Supp.2d 654, 658 (employment discrimination and harassment claim not governed by New Jersey law because the plaintiff principally worked at the defendant's office in Pennsylvania); *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 564 (California wage laws applies to work performed in Santa Barbara Channel because it is within the state).

The nature of the claims in these cases all focused on the particular activity the plaintiffs were performing *outside* of the forum state. Not one of these cases conclude that when the activity in question is performed entirely in the forum (such as here), extraterritoriality is nevertheless implicated.

B. *Bernstein v. Virgin America, Inc.* (N.D. Cal., Jan. 5, 2017, No. 15-CV-02277-JST) 2017 WL 57307 Contains The Fullest And The Most Accurate Analysis And It Confirms Why Plaintiffs' Claims Here Are Not Extraterritorial.

In addition to the district court opinions in the cases giving rise to the issues being reviewed by this Court, there are several other recent district court opinions arising from actions brought by airline employees analyzing whether California Labor Code provisions apply to the plaintiffs' claims even though much if not most of the plaintiffs' work took place outside of California.

Of these cases, *Bernstein v. Virgin America, Inc.,* (N.D. Cal., Jan. 5, 2017, No. 15-CV-02277-JST) 2017 WL 57307 contains the fullest and the most accurate analysis. There, the district court disagreed with the "job situs" analysis employed by the court in this case and concluded that the plaintiffs' claims were not extraterritorial even though they were much broader than Plaintiffs' claims are here. There, the plaintiffs were flight attendants who claimed that the defendant airline did not pay them for certain time worked (i.e. hours worked before and after flights, time spent training, time taking mandatory drug tests and meal and rest breaks). The plaintiffs also claimed that the airline failed to provide accurate wage statements. In the context of that action involving mixed claims, the court nevertheless rejected the defendant's argument that California's labor laws do not apply because the plaintiffs "do not work 'exclusively or principally' in California but rather across 'multiple jurisdictions' . . . ." *Id.* at *4.

The *Bernstein* court explained that, "[i]nstead of considering principal 'job situs' in a vacuum, the California Supreme Court has

endorsed a multi-faceted approach in determining [whether the particular Labor Code provisions were intended to apply to the plaintiffs' claims]." 2017 WL 57307, at *5.

Bernstein continued: "The California Supreme Court's later decision in *Sullivan* confirms that the three factors listed in *Tidewater*—i.e. California residency, receipt of pay in California, and exclusive or principal 'job situs' in California—are sufficient, but not necessary, conditions for an individual to benefit from the protections of California law. . . . The court also suggested that other factors were relevant to this inquiry, such as the employer's residency and whether the employee's absence from the state was temporary in nature. See id. at 1199–1200 . . . ." 2017 WL 57307, at * 5.

The *Bernstein* court concluded that, under this analysis, the Labor Code sections at issue there were intended to apply to the plaintiffs' claims. In reaching this conclusion, the court referenced its earlier class certification ruling in which it expressly disagreed with the district court's ruling in this case, explaining that "the court in *Ward* did not provide any relevant support for its conclusion that California wage and hour laws only apply to work performed in California." *Id.* at *9. The *Bernstein* court then analyzed each case relied on by the *Ward* court and explained why none of those cases support the conclusion in *Ward* that § 226 can only apply if the employees perform the majority of their work in California. *Bernstein* at *8-9.

The *Bernstein* court's analysis applies with even greater force here since Plaintiffs all reside in California, are headquartered in California, receive their paychecks and wage statements in California, pay California income on their wages, and perform significant work in California.

Accordingly, the application of section 226 would have absolutely no extraterritorial effect. The first reason why the district court granted summary judgment for United and denied Plaintiffs' summary judgment motion therefore fails.

II. PLAINTIFFS' CLAIMS ARE NOT PREEMPTED UNDER THE DORMANT COMMERCE CLAUSE

In addition to granting summary judgment based on its conclusion that the application of section 226 here would be extraterritorial in nature, the district court also ruled that its application would be preempted under the dormant Commerce Clause. In its opinion requesting certification by this Court, the Ninth Circuit identified as a third consideration the principle "that courts must balance California's interest in applying its law with considerations of "interstate comity," in order to avoid unnecessary conflicts of state law." (*Ward v. United Airlines, Inc.*, supra, 889 F.3d at p. 1073.) The Court cited to an aspect of this Court's opinion in *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1200, concerning whether the application of California law in that case would constitute "an undue burden on interstate commerce and, thus, violate the commerce clause." To the extent this raises the issue of whether application of section 226 would be preempted under the dormant Commerce Clause, Plaintiffs will explain why no such preemption exists.

The Commerce Clause empowers Congress "[t]o regulate Commerce ... among the several States." U.S. Const., Art. I, § 8, cl. 3. Although the Commerce Clause does not expressly restrain "the several States," the Supreme Court has "sensed a negative implication in the

provision since the early days." *Dep't of Revenue of Ky. v. Davis* (2008) 553 U.S. 328, 338. This negative implication known as the dormant Commerce Clause "prevents a State from jeopardizing the welfare of the Nation as a whole by placing burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *American Trucking Ass'ns, Inc. v. Michigan Public Serv. Comm'n et al.* (2005) 545 U.S. 429, 433 (citations omitted). In analyzing whether a state's regulatory measures violate the dormant Commerce Clause, the first inquiry is whether a challenged law facially discriminates against interstate commerce. *See Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.* (1994) 511 U.S. 93, 99.

Under the dormant Commerce Clause, a discriminatory law is "virtually per se invalid," and will survive only if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 101. Absent discrimination, however, the inquiry turns to whether the challenged law "regulates evenhandedly to effectuate a legitimate local public interest and [whether] its effects on interstate commerce are only incidental." *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142. If so, the law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.*

Here, in the district court, United agreed that section 226 is not discriminatory. Ward-2 ER 139. Therefore, the only argument is that the law imposes an impermissible burden on interstate commerce. State laws frequently survive the *Pike* "clearly excessive burden" test. *See, e.g., United Haulers Assn., Inc. v. Oneida–Herkimer Solid Waste Management Authority* (2007) 550 U.S. 330, 346–47 (finding it unnecessary to decide

whether ordinances related to waste management "impose any incidental burden on interstate commerce because any arguable burden does not exceed the public benefits of the ordinances"); *Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kan.* (1989) 489 U.S. 493, 525–26 (finding a Kansas state regulation regarding production of gas "is an exercise of Kansas' traditional and congressionally recognized power," which, even if it reduced takes from other states, "is not 'clearly excessive' in relation to Kansas' substantial interest in controlling production to prevent waste and protect correlative rights; and the possibility that the regulation may result in the diversion of gas to intrastate purchasers is too impalpable to override the state's weighty interest"); *Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 472–474 (finding Minnesota's statute mandating dairies package milk in a particular kind of container satisfied legitimate state purposes of resource conservation, easing solid waste disposal problems, and conserving energy, and that any burden on interstate commerce was not "clearly excessive in relation to the putative local benefits"). However, they sometimes fail, as in *Pike* itself. 397 U.S. at 146.

To repeat, Plaintiffs here are not seeking to enforce California's wage and hour laws for work Plaintiffs performed outside of California. Rather, Plaintiffs are only seeking redress for alleged violations of California's wage statement law as to statements that are issued in California to employees who reside in California and who are paid their wages in California. "California has a legitimate public interest in regulating employment practices within its state. See *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir.2014) (recognizing "the public interest in enforcement of California's labor law"), the extent or

strength of that interest must be balanced with the burden, if any, that exists on interstate commerce. See *Pike*, 397 U.S. at 142, 90 S.Ct. 844 ("[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities"). To be held unconstitutional, such a burden must be "clearly excessive in relation to" the benefits afforded California citizens through the enforcement of California's labor laws. Id." *Yoder v. Western Express, Inc.* (C.D. Cal. 2015) 181 F.Supp.3d 704, 717–19.

As applied here, any burden on United in applying California's wage statement laws to the wage statements it issues in California to pilots and flight attendants who reside in California and receive their wage statements and pay in California is certainly not clearly excessive in relation to the benefits afforded by section 226.

In *Bernstein, supra*, 2017 WL 57307, the Court recently observed in rejecting a similar dormant commerce clause argument:

> Perhaps most importantly, the Ninth Circuit has already rejected a similar Dormant Commerce Clause to California's Labor Code. See *Sullivan v. Oracle Corp.*, 662 F.3d 1265, 1271 (9th Cir. 2011). Oracle, the California employer in *Sullivan*, argued that "[i]f California decides to impose its Labor Code on business travelers, other states may follow suit" and "[t]he resulting patchwork of conflicting state laws would have severe adverse impact on interstate commerce, resulting in an administrative burden as employers attempted to comply with varying state laws." Brief for Appellee Oracle Corporation, *Sullivan v. Oracle Corp.*, 2007 WL 2317029 (9th Cir. 2007). The Ninth Circuit squarely rejected this argument, explaining that "California applies its Labor Code equally to work performed in California, whether that work is performed by California residents or by out-of-state residents." *Sullivan*, 662 F.3d at 1271. As result, the Court explained, "[t]here is no plausible Dormant Commerce Clause argument when

> California has chosen to treat out-of-state residents equally with its own." *Id. Sullivan* therefore confirms that California's Labor Code "regulates even-handedly to effectuate a legitimate local public interest" such that it will be upheld unless Virgin shows that the burden it imposes on interstate commerce "is clearly excessive in relation to the putative local benefits."

Id. p. * 10.

The *Bernstein* court continued: "The only potential difference between this case and *Sullivan* is that this case involves the airline industry. It is true that a state regulation 'that imposes significant burdens on interstate transportation' represents the kind of 'inconsistent regulation of activities that are inherently national or require a uniform system of regulation.' *Harris*, 682 F.3d at 1148. The question then becomes what uniform system of regulation Virgin is currently subject to and whether the application of the California Labor Code is inconsistent with that system." *Id.* at *11.

As in this case, in *Bernstein* the defendant airline relied on *United Air Lines, Inc. v. Indus. Welfare Com.*, a 1963 California Court of Appeal decision that was later overruled on other grounds, *United Air Lines, Inc. v. Indus. Welfare Comm'n* (1963) 211 Cal.App.2d 729, 747 disapproved of by *Indus. Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 728, n.15, to argue that the dormant commerce clause was implicated.

As *Bernstein* explains, in *United Air Lines*, "the court held that a California wage regulation that required the defendant airline to pay for their flight attendant's uniforms would pose an undue burden on interstate commerce. *See id.* at 747–49, 28 Cal. Rptr. 238. The only burden that the court could identify was the 'personnel troubles' that would result if some flight attendants had to pay for their uniforms and others did not. *Id.* Tellingly, the court admitted that 'that burden may not be very great.' *Id.*

Nonetheless, the court held that the regulation violated the Dormant Commerce Clause because 'the subject is one which necessarily requires uniformity of treatment.' *Id.* The Court does not find this case persuasive because (1) controlling United States Supreme Court and Ninth Circuit precedent require a 'substantial burden,' and (2) the application of the California Labor Code would not disrupt national uniformity in this case because Congress intended for state law to supplement the FLSA. See *Harris*, 682 F.3d at 1148 (citing *S.–Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984))." *Bernstein*, 2017 WL 57307 at *12.

Here, the premise of the district court's conclusion that the application of section 226 would be burdensome was again based on its use of the "work situs" test. But as already explained, that test has no application here. The Court reasoned:

> Ward does not cite a single decision addressing the problem herein — the application of California labor law to individual employees each of whom performed work in a patchwork of states, with rare instances of pay periods in which the employees worked in California for a majority of their time. Nor can he. Ward's arguments might have legs if we were dealing with a regional airline that flew exclusively or primarily in California, or a class of pilots within United who exclusively took limited assignments primarily in California, but that is not our case. To the extent any pilot worked principally in California for any bid period, the application of Section 226(a) and equivalent state laws in these circumstances would impose too great an administrative burden on United's interstate and international airline business.

Ward-1 ER 10-11. This concern about patchwork and potentially overlapping regulations is inapposite as Plaintiffs are not claiming that the application is dependent upon the amount of work they performed in

California versus other states. Rather, they are claiming that section 226 applies here because Plaintiffs all reside in California, receive their paychecks and wage statements in California, and perform some work in California. In fact, the location of where the pilots and flight attendants perform their work (e.g. in California, outside of California, or both) is irrelevant to the wages they are paid as reflected on their wage statements. This is because the pilots and flight attendants are not paid different hourly rates depending on what territory, state, or country they happen to be flying over, but instead are paid the hourly rates established in their collective bargaining agreement for time spent performing different tasks, as recorded by the computer timekeeping system. Thus, the location of where work is performed is completely irrelevant to both the wages earned and the wage statements United issues to these California employees.

If United is concerned with ease of application, then as demonstrated in the attached chart at page 52– compliance with California's wage statement law will ensure that United is in compliance with the laws of the 37 other states that have laws regulating the content of wage statements. Indeed, the district court in *Bernstein* points out the error in the *Ward* court's unsupported conclusion that the wage statement laws of other states are in conflict with California. *Bernstein, supra,* 2017 WL 57307, at * 10, fn. 6. There is no conflict, and thus, no burden on United.

Simply put, under the district court's analysis the "clearly excessive burden" test that United was required to meet would be turned on its head. Under United's view and the district court's ruling, a state statute would be unconstitutional so long as a defendant could assert any inconvenience caused by its application – even if that burden is dwarfed by the host of other regulations a multi-state business such as United must comply with.

Fortunately, as this Court's prior case law establishes this is not the test. Since United utterly failed to establish that the application of Section 226 to its employees who receive their pay checks and wage statements in California and who live and are headquartered here would constitute any burden, let alone a "clearly excessive burden," its dormant Commerce Clause challenge should have failed.

As now explained, the remaining arguments United raised in its summary judgment motion, and which were not relied upon by the district court, also fail.

III. THE PAY STUB REQUIREMENTS OF WAGE ORDER 9 ARE NOT THE REQUIREMENTS THAT PLAINTIFFS ALLEGE UNITED VIOLATED UNDER LABOR CODE § 226, AND THUS, WAGE ORDER 9 HAS NO APPLICATION TO THESE CASES

The second issue certified for review by this Court is based on the Industrial Welfare Commission Wage Order 9 which exempts from its wage statement requirements an employee who has entered into a collective bargaining agreement (CBA) in accordance with the Railway Labor Act (RLA). (See Cal. Code Regs., tit. 8, § 11090(1)(E).) The Court has asked does the RLA exemption in Wage Order 9 bar a wage statement claim brought under California Labor Code section 226 by an employee who is covered by a CBA?

Wage Order 9, Sections 1 and 7, state in relevant part:

> Except as provided in Sections 4, 10, 11, 12, and 20 through 22, this order shall not be deemed to cover those employees who have entered into a collective bargaining agreement under and in accordance with the

> provisions of the Railway Labor Act, 45 U.S.C. Sections 151 et seq.
>
> . . .
>
> Every employer shall...furnish each employee...an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee... and (4) the name of the employer...

As shown directly above, Section 7 of Wage Order 9 addressing wage statement requirements does not cover the wage statement requirements that Plaintiffs allege United violated under Labor Code § 226(a). For example, Wage Order 9 mandates that wage statements show (1) all deductions, (2) the pay period, (3) the employee's name, and (4) the employer's name. Then, a different section of Wage Order 9 says that an employer need not comply with these four requirements of Wage Order 9 if the employer and employees have entered into a CBA. See § 1, subd. (E), and § 7, subd. (B) of Wage Order 9. However, Subdivision (E) of § 1 of Wage Order 9 only exempts a qualifying employer from the requirements listed in Subdivision (B) of § 7 of Wage Order 9, and nothing else. Plaintiffs here are not alleging that United's wage statements fail to show all deductions, the inclusive dates of the pay period, the name of the employee, or the name of the employer. That is not our case and no such violations are alleged. See Ward-4 ER 633-40 (*Ward*); SER 2-10 (*Vidrio*). To the contrary, Plaintiffs allege that United's wage statements fail to list total hours worked, the applicable hourly rates, the number of hours worked at each rate, and the employer's address, as required by Labor Code § 226(a)(2), (a)(8) and (a)(9) respectively. None of these requirements are covered by Wage Order 9.

Thus, the CBA exemption for the wage statement requirements of Wage Order 9 simply do not apply to the claims alleged in these cases. Therefore, applying the narrow wage statement exemptions of Wage Order 9 to the Section 226 claims at issue in these cases would be fundamental legal error.

IV. WAGE ORDER 9 AND LABOR CODE § 226 OPERATE HARMONIOUSLY IN THESE CASES, AND THUS, THERE IS NO REPEAL OF SECTION 226'S MANDATES BY IMPLICATION OR OTHERWISE

In its opinion requesting certification, the Ninth Circuit observed that "California law requires us to "harmonize" § 226 and Wage Order 9. See *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004, 139 Cal.Rptr.3d 315, 273 P.3d 513, 528 (2012). But it is not clear how to harmonize § 226 and Wage Order 9's RLA exemption." (*Ward v. United Airlines, Inc.*, *supra*, 889 F.3d at p. 107.) As now explained, Wage Order 9 and Section 226 operate harmoniously together in these cases.

The interplay here between Section 226 and Wage Order 9 is governed by the following rules: "[W]age and hour claims are today governed by two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18 wage orders, adopted by the IWC." *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1026. "To the extent a wage order and a statute overlap, we will seek to harmonize them, as we would with any two statutes." *Id.* at 1027.

Here, as applied to these cases, Section 226 and Wage Order 9 operate in full harmony together, are not inconsistent, and certainly do not repeal each other in any way by implication or otherwise. Indeed, Wage Order 9 only addresses the paystub requirements of (1) listing all deductions, (2) listing the pay period, (3) listing the employee's name, and (4) listing the employer's name, and then makes these specific requirements inapplicable to employers who employ persons pursuant to a CBA.

As noted above, Plaintiffs are not suing United for the failure to list deductions, the pay period, the employee's name, or the employer's name on the paystub. Instead, Plaintiffs are suing United for its failure to list all hours worked, all applicable hourly rates, the number of hours worked at each rate, and United's address on the paystub. Therefore, the paystub exemptions found in Wage Order 9 do not come into play in these cases, and Section 226 and Wage Order 9 do not conflict in these cases in any way, nor does their application create any specter of repeal by implication. The statutes have concurrent operation, and Wage Order 9 does not bar Plaintiffs' Section 226(a) claims in any way.

IV. THE REASONING FROM *ANGELES V. US AIRWAYS* DOES NOT APPLY HERE

At oral argument in the Ninth Circuit, the Court asked whether the reasoning of the district court in *Angeles v. US Airways, Inc.* (N.D. Cal. Feb. 13, 2017) No. C 12-05860 CRB, 2017 WL 565006 would preclude United's liability here. That is not the case, as *Angeles* involved a section of California's Labor Code which expressly deferred to California Wage

Order 9, while California Labor Code section 226, at issue in this case, does not have such language.

In *Angeles*, the plaintiff class members alleged in part that US Airways did not properly pay them under California Labor Code § 510 for overtime hours worked. 2017 WL 565006, at *1. Section 510 defines what constitutes "overtime," and provides how overtime work must be paid. The plaintiffs' employment was governed by two collective bargaining agreements in accordance with provisions of the Railway Labor Act ("RLA"). *Id.* at *2.

US Airways moved for summary judgment of the Section 510 claim, arguing that, among other reasons, California's Wage Order 9's RLA Exemption not only exempted US Airways from compliance with Wage Order 9's requirements (as the district court had already concluded), but also exempted US Airways from compliance with Section 510. *Angeles*, 2017 WL 565006, at * 3. The district court agreed, relying on the California Court of Appeal's opinion in *Collins v. Overnite Transp. Co.* (Cal. Ct. App. 2003) 105 Cal.App.4th 171.

In *Collins*, the plaintiff truck drivers brought a class action seeking compensation for unpaid overtime pay under California Labor Code § 510. *Collins*, 105 Cal.App.4th at 173, 176. The plaintiffs' employer demurred, contending they were exempt from Section 510's requirement pursuant to the motor carrier exemption contained in Wage Order No. 9 of the IWC. *Id.* at 173. The court agreed. The court first noted that Labor Code § 515, which governed Section 510, contained a provision stating that, "[e]xcept as otherwise provided in this division, the commission may review, retain, or eliminate any exemption from provisions regulating hours of work that

was contained in any valid wage order in effect in 1997."[4] The court then reasoned that, because Wage Order 9 contained the motor carrier exemption in 1997, the Legislature gave the IWC discretion to retain the exemption, which it did, and the exemption applied to the plaintiffs. Accordingly, the employer need not comply with Section 510.

The *Angeles* court applied this same reasoning, noting Wage Order 9's RLA exemption. *Angeles*, 2017 WL 565006, at * 3.

That reasoning does not apply here, however, because Plaintiffs are not alleging a violation of Section 510. Therefore, Section 515 and its Wage Order 9 deference do not apply. Simply put, the Legislature did not give the IWC the power to exempt from Section 226 as it did for Section 510.

The inapplicability of the *Collins* and *Angeles* reasoning to this case was recognized by the California Court of Appeal in *Cicairos v. Summit Logistics, Inc.* (Cal. Ct. App. 2005) 133 Cal.App.4th 949. In that case, the five union-member plaintiffs sued their employer for violations of the Labor Code and IWC wage order provisions related to meal periods, rest breaks, and itemized wage statements. *Id.* at 952. Relying on *Collins*, the trial court granted the employer's motion for summary judgment, applying the same exemption the *Collins* court applied to the plaintiffs' meal period, rest break, and wage statement claims. *Id.* at 956. The court of appeal reversed, explaining that "[t]he trial court erred by extending the holding of *Collins* to the claims raised in this appeal." *Id.*

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[4] The *Angeles* and *Collins* courts referenced subdivision (b)(2) of Labor Code § 515. The California Legislature amended Section 515 in 2012, eliminating the subdivisions of subparagraph (b). The Legislature maintained the language the courts relied on, however.

The *Cicairos* court explained that the *Collins* decision was limited to overtime claims, and "not to meal periods, rest breaks, and itemized wage statements." *Cicairos*, 133 Cal.App.4th at 957. The court elaborated on why *Collins* was limited to claims for unpaid overtime:

> At the beginning of the opinion, the court stated that the appellants were "seeking compensation for unpaid overtime pay...." (*Collins, supra,* 105 Cal.App.4th at p. 173, 129 Cal.Rptr.2d 254.) In its discussion of wage order No. 9, the court never mentioned meal periods, rest breaks or itemized wage statements. (*Id.* at pp. 174–175.) The only published case to cite *Collins* involved an overtime wage claim. (*Watkins v. Ameripride Services* (9th Cir.2004) 375 F.3d 821, 825.) The court in *Watkins* discussed what "IWC Wage Order No. 9 ... excludes from its *overtime pay* requirements...." (*Watkins v. Ameripride Services, supra,* at p. 825, italics added.)

Id. The *Cicairos* court summed up: "Having properly restricted our analysis of *Collins* as precedent, we conclude *Collins* is not authority for holding that the plaintiffs' meal period, rest break, and itemized wage statement contentions are without merit." *Id.* Accordingly, California Court of Appeal authority holds that the *Collins/Angeles* approach cannot be applied to claims for Section 226 violations.

United may argue that, even though the *Cicairos* court did not apply the *Collins/Angeles* approach, the *Cicairos* court concluded the plaintiffs' Section 226 claim was not precluded by Wage Order 9 based on a de novo analysis of Wage Order 9's motor carrier exemption—an exemption with narrower applicability than Wage Order 9's Railway Labor Act exemption. Such an argument would fail, however, because if this Court were to conduct such a de novo analysis of the issue as United may suggest, the

only reasonable conclusion is that there is no basis for interpreting Wage Order 9 as superseding Labor Code 226.

The first reason why Wage Order 9 does not supersede Section 226 is the reason mentioned above: unlike with the overtime sections of the Labor Code, for example, there is no express deference from the Labor Code to Section 226 applicable here. Further, the Legislature listed several exemptions in Section 226, but it did not include any expressly applying here. Even more persuasive is that the Legislature created an exemption in Section 226 for providing total hours worked, and in that exemption referenced Section 515 and the IWC, but limited that exemption to salaried employees and it does not apply here. Cal. Labor Code § 226(j). As another example, in Labor Code § 226.7, subdivision (e), the Legislature created an express deference to Wage Orders: "This section shall not apply to an employee who is exempt from meal or rest or recovery period requirements pursuant to other state laws, including, but not limited to, a statute or regulation, standard, or order of the Industrial Welfare Commission." But no such language appears in Section 226, so the Legislature was clearly aware of the possibility of extending the same deference to the IWC included in Sections 515 and 226.7, but it did not.

Further still, Section 226 was most recently modified in 2016—15 years after Wage Order 9 was most recently updated, and includes nine requirements for wage statements, whereas Wage Order 9 only includes four requirements. If the Legislature intended to simply defer to Wage Order 9, it would maintain consistent requirements with it, not include five additional requirements, or the Legislature would have expressly deferred to the Wage Order 9—but it did not. *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1043 (IWC may augment the

statutory framework with additional protections on matters not covered by Labor Code § 512 but it cannot amend its wage orders to conflict with Section 512); *see also Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1102, n. 4 ("The Legislature defunded the IWC in 2004, however its wage orders remain in effect.").

Accordingly, while subsection (1)(E) of Wage Order 9 would exempt United from compliance with Wage Order 9's wage statement requirements (none of which United is alleged to have violated here), that exemption has no effect on the wage statement requirements of Section 226 because, unlike with Sections 510, 515, or 226.7, there is no express deference by the Legislature to the IWC that would allow the IWC to supersede the requirements of Section 226.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court conclude:

(1) California Labor Code section 226 applies to wage statements provided by an out-of-state employer to an employee who resides in California, receives pay in California, and pays California income tax on her wages, but who does not work principally in California or any other state; and

(2) The RLA exemption in Wage Order 9 does not bar a wage statement claim brought under California Labor Code section 226 by an employee who is covered by a CBA.

Dated: September 10, 2018

JACKSON HANSON, LLP

ESNER, CHANG & BOYER

By _____
Stuart B. Esner
Attorneys for Plaintiffs and Appellants

CHART OF STATE LAW WAGE STATEMENT LAWS

This chart summarizes the wage statement requirements of the 37 states that have such requirements.

State	Code Section	Wage Statement Requirements
Alaska	Alaska Admin. Code § 15.160(h)	• rate of pay • gross and net wages earned • pay period • total hours worked • all deductions • board and lodging costs
Arizona	Ariz. Rev. Stat. § 23-351 (E) - (F)	• earnings • withholdings
California	**Labor Code § 226(a)**	• ***gross and net wages earned*** • ***total hours worked*** • ***piece-rate units if applicable*** • ***all deductions*** • ***pay period*** • ***employee name and last four numbers SSN*** • ***name and address of the employer*** • ***all applicable hourly rates and the number of hours worked at each rate***
Colorado	Colo. Rev. Stat. § 8-4-103(4)	• gross and net wages earned • all deductions • pay period • employee name and last four numbers SSN • name and address of employer

State	Code Section	Wage Statement Requirements
Delaware	Del. Code Ann. Tit. 19, chp. 11, § 1108(4)	• wages due • pay period • all deductions • total hours worked
District of Columbia	D. C. Mun. Regs., tit. 7, § 911.2	• date of wage payment • gross and net wages paid • total hours worked • allowances and deductions
Hawaii	Haw. Rev. Stat. § 387-6(c)	• total hours worked • overtime hours • regular wages earned • overtime wage earned • gross and net wages earned • all deductions • date of payment • pay period
Idaho	Idaho Code § 45-609(2)	• all deductions
Illinois	820 ILCS 115/10	• all deductions
Indiana	Ind. Code, tit. 22 § 22-2-2-8	• hours worked • wages earned • all deductions
Iowa	Iowa Code § 91A.6(4)	• hours worked • wages earned • deductions
Kansas	Kan. Stat. Ann. § 44-320	• (only if requested by employee) • hourly rate • pay date and location • all deductions

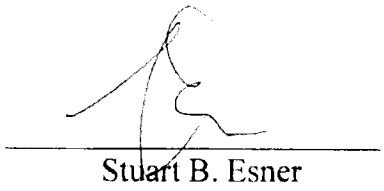
State	Code Section	Wage Statement Requirements
Kentucky	Ky. Rev. Stat. Ann. § 337.070	• all deductions
Maryland	Md. Code Ann. Labor & Empl. § 3-504(a)(2)	• gross wages earned • all deductions
Massachusetts	Mass. Gen. Laws chp. 149, § 150A	• all deductions
Michigan	Mich. Comp. Laws § 408.479(2)	• hours worked • gross wages • pay period • all deductions
Minnesota	Minn. Stat. § 181.032(b)	• employee name • employer name • hourly rate • total hours worked • gross and net pay earned • all deductions • pay period end date
Missouri	Mo. Rev. Stat. § 290.080	• all deductions
Montana	Mont. Code § 39-3-101	• all deductions
Nevada	Nev. Rev. Stat. § 608.110(2)	• all deductions
New Hampshire	N. H. Rev. Stat. § 275:48 I.(d)	• all deductions
New Mexico	N. M. Stat. § 50-4-2(B)	• employer name • gross pay • total hours worked • total wages and benefits earned • all deductions

State	Code Section	Wage Statement Requirements
New York	N. Y. Lab. Law § 195(3)	• pay period • employee name • employer name, address and phone number • all rates of pay • number of regular and overtime hours worked • gross and net wages • deductions
North Carolina	N. C. Gen. Stat. § 95-25.13(4)	• all deductions
North Dakota	N. D. Admin Code Rule 46-02-07-02(10)	• hours worked • the rate of pay • all deductions
Oklahoma	Okla. Stat., tit. 40 § 165.2	• all deductions
Oregon	Or. Rev. Stat. § 652.610(1)	• all deductions
Pennsylvania	Pa. Code § 231.36	• hours worked • rates paid • gross and net wages • minimum wage allowances (if any) • all deductions
Rhode Island	R. I. Gen. L. § 28-14-2.1	• hours worked • all deductions • regular hourly rate (only if employed in commercial construction industry)
South Carolina	S. C. Code § 41-10-30(C)	• gross pay • all deductions

State	Code Section	Wage Statement Requirements
Texas	Tex. Lab. Code § 62.003	• name of employee • rate of pay • gross and net pay earned • all deductions • total hours worked • signed by employer or employer's agent
Utah	Utah Code § 34-28-3(4), (5)	• all deductions • (additional requirements apply to employers in the construction industry)
Virginia	Va. Code § 40.1 – 29(C)	(only if requested by the employee) • gross wages earned • all deductions
Washington	Wash. Admin. Code § 296-126-040	• hours or days worked • rate(s) of pay • gross wages • all deductions • pay period
West Virginia	W. Va. Code § 21-5-9(4)	• all deductions
Wisconsin	Wis. Stat. § 103.475 WI Admin Code DWD § 272.10	• all deductions • number of hours worked • rate of pay
Wyoming	WY Stat. § 27-4-101(b)	• all deductions

CERTIFICATE OF WORD COUNT

This Petition contains 13.124 words per a computer generated word count.



Stuart B. Esner

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 234 East Colorado Boulevard, Suite 975, Pasadena, CA 91101.

On the date set forth below, I served the foregoing document(s) described as follows: **OPENING BRIEF ON THE MERITS.** on the interested parties in this action by placing ___ the original/ X a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

☒ BY ELECTRONIC SERVICE VIA FILE & SERVEXPRESS
Based on a court order, I caused the above-entitled document(s) to be served through File & ServeXpress at https://www.truefiling.com addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the File & ServeXpress Filing Receipt Page/Confirmation will be filed, deposited, or maintained with the original document(s) in this office.

☒ STATE I declare under penalty of perjury that the foregoing is true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 10, 2018, at Pasadena, California.

Marina Maynez

SERVICE LIST
Ward v. United Airlines
(S248702 | 16-16415 | 3:15-CV-02309-WHA)

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Molly Dwyer, Clerk of the Court UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT The James R. Browning Courthouse 95 7th Street San Francisco, CA 94103	***Appellate Court (Via Mail)***
Magistrate Judge William Alsup UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA San Francisco Courthouse Courtroom 12 – 19th Floor 450 Golden Gate Avenue San Francisco, CA 94102	***Trial Court (Via Mail)***