

March 21, 2017

VIA MESSENGER

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CLERK SUPREME COURT

Chief Justice Tani G. Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: Amici Curiae Letter in Support of Petition for Review in
Macy's West Stores, Inc., dba Macy's, and Macy's, Inc. v. Superior Court of
California for the County of San Bernardino
California Supreme Court Case No. S240613

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to California Rules of Court, Rule 8.500(g), amici curiae the Chamber of Commerce of the United States of America (U.S. Chamber) and the California Chamber of Commerce (CalChamber) respectfully submit this letter in support of the Petition for Review filed by Macy's in *Macy's West Stores v. Superior Court*, Case No. S240613.

Interest of Amici

The U.S. Chamber is the world's largest business federation, representing 300,000 members directly and, indirectly, the interests of more than 3,000,000 businesses and professional organizations of every size, from every sector, and in every geographic region of the country. Because thousands of the U.S. Chamber's members are either California businesses or conduct substantial business in the State, the U.S. Chamber has a significant interest in the development of California employment law.

CalChamber is a non-profit business association that has represented virtually every economic interest in the State of California for over 100 years. CalChamber has over 13,000 members, both individual and corporate, and while it represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. CalChamber represents the business community on a broad range of legislative, regulatory, and legal issues, and gives voice to the interests of large and small employers in the development of California employment law.

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As they seek to do today, the Chambers often advocate before the state and federal courts by filing amicus curiae briefs and letters in cases, such as this one, which involve issues of utmost concern to the business community.

Why Review Should Be Granted

Many employers in California utilize a commission advance and chargeback program like the one at issue in this case. As the record reflects and as described in Macy's petition for review, Macy's advances commission payments to its employees, subject to chargeback if the item on which the commission is paid is returned within a certain period. And like many employers in California, Macy's agrees to charge back such advances only in the form of an offset against future advanced commission payments. (3/14/17 Pet. for Review at 11, 28–29.) On January 3, 2017, the superior court held that Macy's violated Section 226 of the California Labor Code by issuing wage statements that reported these advanced commission payments at the time they were paid, without making further note of them on subsequent wage statements after the relevant chargeback period expired (meaning after they were earned). On March 2, 2017, the Court of Appeal summarily denied Macy's request for writ relief.

The Chambers respectfully urge this Court to grant the petition for review and either itself clarify, or transfer the matter back to the Court of Appeal for a determination on the merits of, two questions that will have significant impact on businesses throughout California: (1) when an employer agrees to charge back advanced commission payments only through an offset against *future* advanced commission payments, does the employer properly issue a wage statement reporting the commissions at the time of payment, without notation on future wage statements when the commissions are earned; and (2) does PAGA still afford a private right of action for alleged violations of California Labor Code Section 226(a)(6)—which requires itemized wage statements to show “the inclusive dates of the period for which the employee is paid”—in light of legislative amendments in 2015 that effectively removed this statutory provision from PAGA's scope?

With respect to the laws governing paying employees advanced commissions, California courts have long recognized the permissibility of programs such as the one at issue here. (See, e.g., *DeLeon v. Verizon Wireless, LLC* (2012) 207 Cal.App.4th 800; *Koehl v. Verio, Inc.* (2006) 142 Cal.App.4th 1313; *Steinhebel v. L.A. Times Communications* (2005) 126 Cal.App.4th 696.) Indeed, employers' use of such payment plans benefits employees, as it pays them sums above their hourly wages. (See, e.g., *Steinhebel, supra*, 126 Cal.App.4th at 709 [“Such advances work to the benefit of employees and are to be encouraged, since they provide present income even though subject to adjustment once initial sales have been reconciled with commissionable sales.”].)

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Many of the Chambers' members, as well as the businesses whose interests the Chambers represent, use the reporting practice at issue here: They report the payment of advanced commissions at the time the dollars are paid out to employees, without additional notation at the time those dollars are considered earned. The superior court's ruling raises concerns about the legality of this widespread practice and creates significant uncertainty for California employers. The consequences of potential liability for violating Section 226 and the possibility of penalties under PAGA are severe, and businesses in California therefore take their compliance with reporting requirements seriously. Absent this Court's review, employers throughout California will need to take action to review their commission reporting practices, and (given the superior court's one-paragraph order and the Court of Appeal's summary denial of writ relief therefrom) will do so without any real guidance.

The uncertainty created by the superior court's order will impose significant costs on California employers and will be of no benefit to California employees. The purpose of Labor Code Section 226 is "to assist the employee in determining whether he or she has been compensated properly." (See *Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 390.) Macy's current reporting method achieves precisely this purpose: Macy's wage statements inform employees of their commission payments as they are actually received. Under the superior court's order, however, employers would have to report commission payments long after employees' receipt of those payments, which would serve only to confuse the very individuals wage statements are meant to benefit.

Conclusion

The issues presented by Macy's are ones of first impression, are extremely important to California employers, and will ultimately need to be decided on the merits by higher courts. The uncertainty created by the superior court's ruling and the costs to employers and employees in California warrant this Court's immediate review. The Chambers respectfully urge this Court to grant Macy's Petition for Review and either transfer the case back to the Court of Appeal or itself resolve these issues now, and provide California employers certainty regarding these important wage statement questions.

Sincerely,

Blaine H. Evanson/asb

Blaine H. Evanson

BHE/nl

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PROOF OF SERVICE

I, Ariella Boeck, declare as follows:

I am employed in the County of San Francisco, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, CA 94105-0921, in said County and State. On March 21, 2017, I served the following document(s):

**AMICI CURIAE LETTER IN SUPPORT OF PETITION FOR
REVIEW IN *MACY'S WEST STORES, INC., DBA MACY'S, AND
MACY'S, INC. V. SUPERIOR COURT OF CALIFORNIA FOR THE
COUNTY OF SAN BERNARDINO*, CALIFORNIA SUPREME
COURT CASE NO. S240613**

on the parties stated below, by the following means of service:

- ☒ **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated below, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I am a resident of or employed in the county where the mailing occurred. The envelope or package was placed in the mail at San Francisco, California.

Clerk of the Superior Court
Superior Court of California
County of San Bernardino
San Bernardino District – Civil Division
247 West Third Street
San Bernardino, CA 92415-0210

Case No.
CIVDS1516007

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Clerk of California Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501

Case No. E067711

Clerk of the Supreme Court
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- ☒ I am employed in the office of Blaine H. Evanson, a member of the bar of this court, and that the foregoing document(s) was(were) printed on recycled paper.
- ☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 21, 2017.



Ariella Boeck