

No. E067711

**IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA**  
FOURTH APPELLATE DISTRICT, DIVISION TWO

---

---

**MACY'S WEST STORES, INC., DBA MACY'S, AND MACY'S, INC.,**  
*Petitioners,*

v.

**SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF  
SAN BERNARDINO,**  
*Respondent,*

**AMBER GARCIA,**  
*Real Party in Interest.*

---

---

Petition for Writ of Mandate from the Superior Court of the State of  
California for the County of San Bernardino  
The Honorable Donna Gunnell Garza, Judge Presiding  
Superior Court Case No. CIVDS1516007

---

---

***AMICI CURIAE* BRIEF OF U.S. CHAMBER OF COMMERCE AND  
CALIFORNIA CHAMBER OF COMMERCE  
IN SUPPORT OF PETITIONERS**

---

**GIBSON, DUNN & CRUTCHER LLP**

\*BLAINE H. EVANSON, SBN 254338

BEVANSON@GIBSONDUNN.COM

NETA LEVANON, SBN 280875

NLEVANON@GIBSONDUNN.COM

333 SOUTH GRAND AVENUE

LOS ANGELES, CALIFORNIA 90071

TELEPHONE: 949.451.3805

ATTORNEYS FOR *AMICI CURIAE*  
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND  
CALIFORNIA CHAMBER OF COMMERCE

Received by Fourth District Court of Appeal, Division Two

**TABLE OF CONTENTS**

	<u>Page</u>
INTRODUCTION.....	4
ARGUMENT .....	4
CONCLUSION .....	6

## TABLE OF AUTHORITIES

	<u>Page(s)</u>
<b>Cases</b>	
<i>DeLeon v. Verizon Wireless, LLC</i> (2012) 207 Cal.App.4th 800 .....	5
<i>Koehl v. Verio, Inc.</i> (2006) 142 Cal.App.4th 1313 .....	5
<i>Soto v. Motel 6 Operating, L.P.</i> (2016) 4 Cal.App.5th 385 .....	6
<i>Steinhebel v. L.A. Times Communications</i> (2005) 126 Cal.App.4th 696 .....	5
<b>Statutes</b>	
Lab. Code, § 226(a)(6) .....	4

## INTRODUCTION

The Chamber of Commerce of the United States of America (U.S. Chamber) and the California Chamber of Commerce (CalChamber) (collectively, the Chambers) respectfully submit this *amici curiae* brief in support of the Petition for Writ of Mandate filed by Macy’s. The Chambers respectfully urge this Court to grant the petition and clarify two questions that will have significant impact on businesses throughout California: (1) when an employer agrees to charge back advanced commissions 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? These issues are exceptionally important to businesses in California and warrant this Court’s immediate interlocutory review.

## ARGUMENT

Many employers in California utilize a commission advance and chargeback program like the one at issue in this case. As described in Macy’s summary adjudication opposition papers filed with the superior court, 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. (Defendants’ Memorandum of Points and Authorities in Opposition to Plaintiff’s Motion for Summary Adjudication

at 1–2 & n.2.) 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).

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.”].)

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 writ review, employers throughout California will need to take action to review their commission reporting practices, and (given the superior court’s one-paragraph order) 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 and are extremely important to California employers. They will ultimately need to be decided by the appellate courts, and the uncertainty created by the superior court's ruling and the costs to employers and employees in California warrant this Court's immediate writ review. The Chambers respectfully urge this Court to grant Macy's Petition for Writ of Mandate to resolve these issues now and provide California employers certainty regarding these important wage statement questions.

February 15, 2017

Respectfully Submitted,

GIBSON, DUNN & CRUTCHER LLP

By:   
\_\_\_\_\_

Blaine H. Evanson

Attorneys for *Amici Curiae*  
Chamber of Commerce of the  
United States of America and  
California Chamber of Commerce

**CERTIFICATION OF WORD COUNT**

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that this *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONERS contains 777 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

Dated: February 15, 2017

GIBSON, DUNN & CRUTCHER LLP

By:  \_\_\_\_\_

Blaine H. Evanson

Attorneys for *Amici Curiae*  
Chamber of Commerce of the  
United States of America and  
California Chamber of Commerce

**PROOF OF SERVICE**

I, Arlene R. Thompson, declare as follows:

I am employed in the County of Orange, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 3161 Michelson Drive, Irvine, CA 92612-4412, in said County and State. On February 15, 2017, I served the following document(s):

***AMICI CURIAE BRIEF OF U.S. CHAMBER OF COMMERCE AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS***

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

- BY ELECTRONIC SERVICE:** On the above-mentioned date, I caused the documents to be sent to TrueFiling, the Court’s Electronic Filing Services Provider, for electronic service and filing. Electronic service will be accomplished by TrueFiling’s case-filing system at the electronic notification addresses as shown below.

Robert H. Wright  
Horvitz & Levy LLP  
3601 West Olive Avenue, 8th Floor  
Burbank, CA 91505-4681

rwright@horvitzlevy.com  
fshafir@horvitzlevy.com  
cchristopher@horvitzlevy.com

Attorney for Petitioner

John S. Curtis  
Law Offices of Julia Azrael  
5200 Lankershim Boulevard, Suite 850  
North Hollywood, CA 91601

jcurtis@azraelaw.net  
Attorney for Petitioner

Brian Jay Mankin  
Fernandez Lauby LLP  
4590 Allstate Drive  
Riverside, CA 92501

bjm@fernandezlauby.com  
Attorney for Real Party in  
Interest Amber Garcia

James Brown  
Sedgwick LLP  
333 Bush Street, 30th Floor  
San Francisco, CA 94104-2834

james.brown@sedgwicklaw.com

Matthew W. Callahan  
Schiff Hardin LLP  
One Market Street  
Spear Street Tower, Suite 3100  
San Francisco, CA 94105

mcallahan@schiffhardin.com

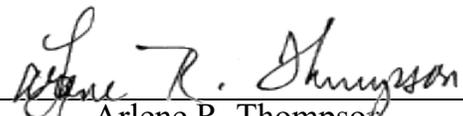
- BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated below, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. 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 Irvine, California.

Honorable Donna Gunnell Garza  
Superior Court of California  
County of San Bernardino  
San Bernardino District – Civil Division  
247 West Third Street  
San Bernardino, CA 92415-0210

- 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 February 15, 2017.

  
Arlene R. Thompson