

FEB 28 2019

Jorge Navarrete Clerk

Case No. S248726

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

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Deputy

DEV ANAND OMAN; TODD EICHMANN; MICHAEL LEHR; ALBERT  
FLORES, individually, and on behalf of others similarly situated, and on  
behalf of the general public,  
*Plaintiffs/Petitioners,*

v.

DELTA AIR LINES, INC.  
*Defendant/Respondent.*

---

On Grant of Request to Decide Certified Questions from the United States  
Court of Appeals for the Ninth Circuit Pursuant to California Rules of Court,  
Rule 8.548,  
Ninth Circuit No. 17-15124

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**NOTICE OF ERRATA RE: APPLICATION TO FILE AMICUS  
BRIEF OF EMPLOYERS GROUP AND CALIFORNIA  
EMPLOYMENT LAW COUNCIL IN SUPPORT OF RESPONDENT  
DELTA AIR LINES, INC.; PROPOSED BRIEF OF *AMICI CURIAE***

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and California Employment Law Council

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**TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-  
SAKAUYE AND TO THE HONORABLE ASSOCIATE JUSTICES  
OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:**

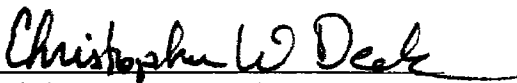
PLEASE TAKE NOTICE that the Application to File Amicus Brief of Employers Group and California Employment Law Council in support of Respondent Delta Air Lines, Inc., and Proposed Brief of *Amici Curiae*, submitted on February 19, 2019, contained certain typographical errors as follows:

<b>Page</b>	<b>Line</b>	<b>Error</b>	<b>Correction</b>
7	14	“sections 204 and 206”	“sections 204 and <u>226</u> ”
13	18	“accur”	“accrue”
15	1	“eriod”	“ <u>period</u> ”
22	2	“requires”	“require”
22	n.1	“Moreover”	“ <u>More</u> over”
30	18	“Employer”	“Employer <u>s</u> ”
34	2	“sections 204 and 206”	“sections 204 and <u>226</u> ”

Corrected pages of the Application and Proposed Brief are attached hereto as Exhibit A. *Amici Curiae* request that the Court replace the pages referenced above of the Application and Proposed Brief with the corrected pages attached hereto.

Dated: February 27, 2019

OGLETREE, DEAKINS, NASH,  
SMOAK & STEWART, P.C.

By:   
Christopher W. Decker  
Attorneys for *Amici Curiae*  
Employers Group and California  
Employment Law Council

# **EXHIBIT A**

**APPLICATION FOR PERMISSION TO FILE**

**AMICI CURIAE BRIEF**

**TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-  
SAKAUYE AND TO THE HONORABLE ASSOCIATE JUSTICES  
OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:**

Pursuant to rule 8.520(f) of the California Rules of Court, proposed *amici curiae* Employers Group and California Employment Law Council (“CELC”) respectfully request permission to file the enclosed *amici curiae* brief in support of Respondent Delta Air Lines, Inc. The proposed *amici curiae* brief offers a unique perspective on why the Court should conclude that incentive based compensation plans like Respondent’s comply fully with California’s minimum wage laws as interpreted under *Armenta v. Osmose, Inc.* (2005) 37 Cal. Rptr. 3d 460 and why the Court should conclude that Labor Code sections 204 and 226 do not apply to wage payment and wage statements provided by out-of-state employers to employees who work in California only episodically and for less than a day at a time.

*Amici* do not seek to merely repeat the arguments in Respondent’s Brief. Rather, *amici* present additional arguments and clarifications that will assist the Court in evaluating the important legal issues in this case.

determining whether the employer has paid at least minimum wage for all hours worked. This is all the more true where, as here, the parties have expressly agreed, and the compensation plan guarantees, that the employee will accrue at least the minimum wage for each hour worked, even if the precise amount of compensation will ultimately be fixed by a formula which counts less than all hours worked (or something other than simply total hours worked).

All of the precedential opinions following *Armenta* are consistent with this analysis, which provides a clear limit on *Armenta*'s application – the rule of *Armenta* is grounded in the agreement of the parties as to how work will be compensated, to which courts must defer when assessing whether the employer has paid at least minimum wage for all hours worked.

As will be demonstrated below, Delta's compensation scheme for flight attendants complies with the rule of *Armenta*. Nothing in Delta's Work Rules promises to pay flight attendants a specified rate for any particular activity and the rules expressly provide that the employee will accrue at least minimum wage for each and every hour worked. Therefore, deferring to the agreement of the parties, as the Court must, there are no activities for which compensation is not provided, or which are compensated at less than the minimum wage.

period, and other information. Meeting these wage payment and wage statement obligations for employees who may spend only a few hours in California during an entire month, or year, presents considerable, almost impossible challenges for out-of-state employers. Indeed, each of these statutory obligations contemplate inclusion of all hours worked in the pay period, which includes hours worked primarily outside of California and not just the small portion of work performed in California. Not unexpectedly, such misplaced obligations imposed on out-of-state employers have resulted in rampant class action litigation. As described more fully below, imposing such obligations on out-of-state employers under these circumstances is not supported by the controlling case law and furthers no compelling California interest. The Court should conclude that sections 204 and 226 do not apply to employees of out-of-state employers who work in California only sporadically and for periods of less than a day.

## **II. ARGUMENT**

### **A. The Rule of *Armenta* Rests On The Agreement Of The Parties That Certain Activities Will Be Compensated At Specified Rates.**

- 1. *Armenta's* holding is premised on a compensation contract which expressly provided that only certain activities would be compensated.**

In *Armenta*, the collective bargaining agreement classified employee hours as either “productive” or “nonproductive,” and provided a specified hourly rate for the “productive” hours. 135 Cal. App. 4th 314, 317. At

activities which the parties left uncompensated that underlies the prohibited averaging, as Labor Code sections 221, 222, and 223 require.<sup>1</sup>

In *Bluford*, the collective bargaining agreement governing the plaintiffs' employment as truck drivers provided for "activity based" compensation, with agreed-upon rates for miles driven, certain other tasks and delays. It was undisputed that none of these rates applied to rest periods. 216 Cal. App. 4th 864, 872. The court reasoned that the rest periods were therefore unpaid, in violation of state law, because including payment for expected rest periods in compensation assigned to other activities "is akin to averaging pay to comply with the minimum wage law instead of separately compensating employees for their rest periods at the minimum or contractual hourly rate." 216 Cal. App. 4th 864, 872. Once again, the "averaging" rejected by the court was the attempt to disregard the express agreement of the parties and re-allocate wages from the activities which the parties had agreed would generate them to other activities which the parties had left uncompensated.

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<sup>1</sup> The holding of *Gonzalez* has since been codified in Labor Code section 226.2. However, that codification has no impact on the analysis here, as Labor Code section 226.2 applies only to employees who are compensated on a piece-rate basis, and no party contends that Delta's compensation scheme constitutes a "piece-rate" within the meaning of the statute. Moreover, the issue before the court is: "Does the *Armenta/Gonzalez* bar on averaging wages apply to a pay formula that generally awards credit for all hours on duty, but which, in certain situations resulting in higher pay, does not award credit for all hours on duty?" As the court is not called upon to construe or apply Labor 226.2, it has no relevance to the question before the Court.



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Work Rules. It is also indisputably compliant with *Armenta* and its progeny as it expressly pays compensation at or above the minimum wage for each and every hour worked, with additional amounts as a bonus. If Delta's "greater of" approach is not compliant, then compliance will depend entirely on semantics, and the intricacies of drafting, a result which benefits no one. Developing a compensation system that incentivizes and rewards industrious employees should not be that hard.

In sum, Delta's formula-based compensation programs and other incentive based compensation systems, which are based upon an agreement by the employer and employee to compensate the employee for all hours worked and provide at least minimum wage for each hour worked without applying compensation which the parties have assigned to one activity to a different activity, comply with California's wage and hour laws under *Armenta* and its progeny.

**D. Applying the Reasoning Considered in *Sullivan V. Oracle Corporation*, This Court Should Hold That Labor Code Sections 204 and 226 Do Not Apply To Wage Payments And Wage Statement Issued By Out-Of-State Employers To Employees Who Work In California Only Episodically.**

Petitioners seek to apply the principles regarding overtime set forth in *Sullivan v. Oracle Corporation* (2011), 51 Cal. 4th 1191, to sections 204 and 226 of the Labor Code. Such efforts are unavailing and stretch *Sullivan* and other case authority beyond any extension they can bear. In *Sullivan*, this Court issued a narrow ruling holding that the state's overtime law

one activity to a different activity, do not violate *Armenta*. This Court should also hold that Labor Code sections 204 and 226 do not apply to wage payment and wage statements provided by out-of-state employers to employees who work in California only episodically and for less than a day at a time.

Respectfully submitted,

Dated: February 27, 2019

OGLETREE, DEAKINS, NASH,  
SMOAK & STEWART, P.C.

By: \_\_\_\_\_  
Robert R. Roginson

Attorneys for *Amici Curiae*  
Employers Group and California  
Employment Law Council

**CERTIFICATE OF SERVICE**

*Oman v. Delta Airlines, Inc.*

California Supreme Court Case No.: S248726

U.S. Court of Appeals for the 9<sup>th</sup> Circuit, No. 17-15124

I am employed in the County of Los Angeles, State of California; I am over the age of 18 years and not a party to this action. My business address is 400 S. Hope Street, Suite 1200, Los Angeles, California 90071.

On February 27, 2019, I served the following document(s) described as:

**NOTICE OF ERRATA RE APPLICATION TO FILE AMICUS BRIEF OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF RESPONDENT DELTA AIR LINES, INC.; PROPOSED BRIEF OF *AMICI CURIAE***

I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses as indicated in the attached service list:

**BY FIRST CLASS MAIL:** I placed the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for the collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in Los Angeles, California, for collection and mailing to the office of the addressee of the date shown herein.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 27, 2019, at Los Angeles, California.

Elizabeth Mendoza



Type or Print Name

Signature

**SERVICE LIST**

*Oman v. Delta Airlines, Inc.*  
California Supreme Court Case No.: S248726  
U.S. Court of Appeals for the 9<sup>th</sup> Circuit, No. 17-15124

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