

Case No. S238941

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

SHARMALEE GOONEWARDENE, AN INDIVIDUAL,

Plaintiff and Appellant,

v.

ADP, LLC; ADP PAYROLL SERVICES, INC.; AD
PROCESSING, LLC,

Defendants and Respondents.

ON REVIEW OF A DECISION OF THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION FOUR, No. B267010

ON APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
THE HON. WILLIAM BARRY, JUDGE
CIVIL CASE No. TC026406

**APPLICATION OF PAYCHEX, INC. FOR PERMISSION TO
FILE *AMICUS CURIAE* BRIEF AND PROPOSED BRIEF IN
SUPPORT OF DEFENDANTS, RESPONDENTS AND
PETITIONERS**

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**APPLICATION FOR PERMISSION TO FILE AMICUS
CURIAE BRIEF IN SUPPORT OF DEFENDANTS
RESPONDENTS AND PETITIONERS**

Pursuant to Rule 8.520(f) of the California Rules of Court, Paychex, Inc. (“Amicus” and/or “Paychex”) respectfully requests leave to appear as *amicus curiae* and file this proposed brief in support of Defendants, Respondents, and Petitioners, ADP LLC *et al.*

Pursuant to Rule 8.520(f)(4), no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund the preparation or submission of this brief; and no other person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

STATEMENT OF INTEREST

Paychex, Inc., founded in 1979, is a provider of payroll processing and employee benefit services. (Paychex, Inc. Form 10-K (May 31, 2016) at 2.)¹ Paychex provides a variety of services and products that allow its clients to meet their diverse payroll processing needs. *Id.* Paychex serves a diverse base of small-to-medium-sized

¹ United States Securities and Exchange Commission, Form 10-K, Paychex, Inc. (May 31, 2016), <https://www.sec.gov/Archives/edgar/data/723531/000072353116000046/payx-20160531x10k.htm>

clients operating in a broad range of industries throughout the United States, including California. *Id.* Paychex uses service agreements and arrangements with clients that are generally terminable by the client at any time or upon a relatively short notice. (*Id.* at 6.) Paychex currently serves approximately 605,000 payroll processing clients throughout the United States. (*Id.* at 2.) The average client size within its existing client base is approximately 17 employees. (*Id.* at 6.)

The market for payroll processing services is highly competitive and fragmented. Paychex competes directly with national, regional, local and online payroll service providers. (*Id.* at 6.) Competition in the payroll service provider industry is primarily based on service responsiveness, product quality and reputation, ease of use, accessibility of technology, breadth of service products, and price. *Id.* The highly competitive nature of the industry, and the typical ease with which clients are able to terminate service agreements, results in increased competition among providers to be innovative and flexible in tailoring products and services to meet the clients' diverse needs. If the client is unhappy with the payroll service provider, it can easily contract with a different provider. Furthermore, if the client incurs liability to its employees resulting from a payroll

service provider's error, the service contract determines the employer's recourse against the payroll service provider.

Paychex has an interest in this proceeding because the decision in *Sharmalee Goonewardene v. ADP LLC et. al.*, (“*Goonewardene*”) will have direct ramifications as binding legal precedent on the entire payroll service provider industry. *Goonewardene* will not only change the legal landscape for wage and hour litigation in California, it also alters the well understood boundaries between employers and payroll service providers and creates unnecessary confusion regarding the obligations and responsibilities between those parties.

A material aspect of Paychex's business model, and of the payroll service provider industry as a whole, is that payroll service providers *assist* clients in meeting their *non-delegable* obligations to properly pay their employees. The decision in *Goonewardene* substantially impacts the payroll service provider industry because it short-circuits the liability protections the service providers negotiate with their clients and subjects payroll service providers to unforeseen liability to their clients' employees with whom the payroll service provider has no relationship.

This shift in liability will significantly increase the cost of doing business in the industry given that payroll service providers will now face added litigation risks associated with wage and hour claims that are traditionally asserted against employers.

Goonewardene will, therefore, expose payroll service providers to staggering defense costs and to damages claims for wage and hour lawsuits. Increases in costs for payroll provider services will in turn directly impact employers' access to these services, potentially making such services cost prohibitive, resulting in less compliance and weakened protections for California workers. Moreover, the incorrect rulings in *Goonewardene* essentially eviscerate the concept of *non-delegable* employer responsibilities by placing upon a third party (*i.e.*, the payroll provider) employer responsibilities regarding individuals with whom they have no direct relationship.

Consequently, *Goonewardene* will have devastating consequences for the payroll provider industry and will negatively impact the countless California employers and employees that rely on these services.

To inform the Court about these matters, Paychex respectfully requests leave to file the accompanying *amicus curiae* brief.

PROPOSED BRIEF

INTRODUCTION

The decision in *Sharmalee Goonewardene v. ADP LLC et. al.*, (hereinafter “*Goonewardene*”) exposes payroll service providers to massive and unforeseen liability for their clients’ non-delegable obligations to properly pay their employees. In doing so, *Goonewardene* changes the legal landscape for wage and hour litigation in California, to the detriment of the entire payroll service provider industry and the countless California employers who depend on these services.

Specifically, *Goonewardene* significantly increases payroll service providers’ litigation risks, exposing payroll service providers to staggering defense costs and to damages claims for wage and hour lawsuits that are traditionally asserted against employers. The added litigation risks imposed by *Goonewardene* will have a devastating impact on the industry and will lead to significant increases in the prices for payroll provider services, potentially making such services cost-prohibitive to many California employers. California employers’ loss of access to payroll provider services will in turn result in less compliance and weakened protections for California workers. In

addition, the lower court's holding creates unnecessary confusion regarding the rights and obligations between an employer, its employees and the third party payroll service. Finally, federal and state wage and hour laws already provide ample avenues for employees to seek full remedy from their employers for unpaid wages and other Labor Code violations. Reversing, *Goonewardene* will, therefore, not leave employees without recourse, but rather, will restore the well-established and effective process pursuant to which California employees have long sought redress for wage payment violations.

Based on the foregoing, *amicus curiae* Paychex respectfully requests this Court to reverse the court of appeal's decision in *Goonewardene*.

STATEMENT OF FACTS

Paychex specifically adopts the Statement of the Case set forth in Petitioners' Opening Brief On The Merits, to the extent the facts are relevant and applicable for the purposes of this *amicus curiae* brief.

ARGUMENT

I. THE PAYROLL SERVICE PROVIDER INDUSTRY IS HIGHLY CONCENTRATED IN POPULOUS STATES LIKE CALIFORNIA, IS HIGHLY COMPETITIVE, AND SERVES A VAST NUMBER OF CALIFORNIA EMPLOYERS.

For over 60 years, payroll service providers have assisted countless employers in fulfilling their payroll obligations. Specifically, payroll service providers provide tools that assist clients in meeting their *non-delegable* obligations to properly pay their employees. In order to perform their work, payroll service providers depend on the data provided by their clients, including employees' hours and rates and other information about the client's work force. Payroll service providers range in size and sophistication and provide a variety of products and services including, generating paychecks, payroll reports, and tax filings for clients, that allow clients to meet their diverse payroll processing obligations and needs. (*See Barnes Report, 2017 U.S. Industry & Market Outlook*, (Oct. 2016) at 6; Hoover's Inc., *Payroll Services First Research Custom Report*, (2017) at 3.)²

² Retrieved July 7, 2017 from Hoover's database.

The United States is the “world’s primary market for payroll services.” (See Hoover’s Inc., *Payroll Services First Research Custom Report*, (2017) at 3.) The payroll service provider industry in the United States includes approximately 5,900 establishments that generate an annual revenue of approximately thirty-three billion dollars. *Id.* In the United States, the industry is “most highly concentrated in populous states with large numbers of businesses.” (*Id.* at 5.) Consequently, California, Florida, New York, Texas, and Illinois have the most payroll service providers. *Id.* As of 2017, California had an estimated 1,162 payroll provider service establishments. (Barnes Report, *2017 U.S. Industry & Market Outlook*, (Oct. 2016) at 10.) That number is expected to increase to approximately 1,251 in 2018. (*Id.* at 16.)

Payroll service providers typically serve a diverse base of small-to-medium-sized clients operating in a broad range of industries throughout the United States, including California. (Paychex, Inc. Form 10-K (May 31, 2016)³ at 6; Hoover’s Inc., *Payroll Services*

³ United States Securities and Exchange Commission, Form 10-K, Paychex, Inc. (May 31, 2016), <https://www.sec.gov/Archives/edgar/data/723531/000072353116000046/payx-20160531x10k.htm>

First Research Custom Report, (2017) at 4.) Many of these clients typically employ fewer than 20 people. (Hoover’s Inc., *Payroll Services First Research Custom Report*, (2017) at 4; see Paychex, Inc. Form 10-K (May 31, 2016) at 6.) According to the National Payroll Reporting Consortium, its member payroll service providers serve more than 1.4 million employers, with a combined total of more than 35 million employees – more than one third of the private sector work force in the United States.⁴

The market for payroll processing services is highly competitive and fragmented. Competition in the payroll services industry is primarily based on service responsiveness, product quality and reputation, ease of use, accessibility of technology, breadth of service products, and price. (Paychex, Inc. Form 10-K (May 31, 2016) at 6.) Furthermore, Payroll service providers typically enter into service agreements with clients that are generally terminable by the client at any time or upon a relatively short notice. (Paychex, Inc. Form 10-K (May 31, 2016) at 6; Hoover’s Inc., *Payroll Services First Research Custom Report*, (2017) at 4.) Service contracts are typically not long-term and payroll service providers “depend on excellent

⁴ Available at: <http://www.nprc-inc.org/about.html>

service to ensure high contract renewal rates.” (Hoover’s Inc., *Payroll Services First Research Custom Report*, (2017) at 4.) The highly competitive nature of the industry, and the typical ease with which clients are able to terminate service agreements, results in increased competition among national, regional, local and online providers to be innovative and flexible in tailoring products and services to meet the clients’ diverse needs.

Given the high concentration of payroll service providers in California and the widespread use of payroll provider services among California employers, the *Goonewardene* decision will have a devastating impact on the industry as a whole and will adversely affect the countless California employers who rely on payroll provider services.

II. GOONEWARDENE WILL EXPOSE PAYROLL SERVICE PROVIDERS TO CRUSHING FINANCIAL BURDENS ASSOCIATED WITH DEFENDING WAGE AND HOUR LAWSUITS.

“Litigation is expensive, for the innocent as well as the wrongdoer.” *Reno v. Baird* (1998) 18 Cal. 4th 640, 663. Nowhere is this maxim more clear than in California wage and hour litigation because employers must navigate a minefield of regulatory requirements under both federal and state law. Most significantly, the

California Labor Code regulates nearly all facets of employee compensation: the hours an employee works (*see, e.g.*, Cal. Lab. Code § 510), the hourly compensation an employee receives (*see, e.g., id.* § 1182.12), the frequency and length of required breaks throughout the workday (*id.* § 512), compensation for overtime (*id.* § 510), when employees must be paid (*see, e.g., id.* § 204), and even the information that must be provided to employees when they are paid (*id.* § 226). In addition, the Federal Labor Standards Act imposes similar regulations under federal law. (*See* 29 U.S.C. §§ 201 *et seq.*) As a result, employers routinely face costly and time-consuming litigation for alleged violations of one or more of these state or federal regulations. (Norton Rose Fullbright, *2016 Litigation Trends Annual Survey* (Sept. 2016) at 10 (noting that 46% of respondents in the United States indicated they had a labor and employment lawsuit pending in the prior twelve months).) The decision in *Goonewardene*, however, extends to payroll service providers the litigation risks associated with wage disputes and claims traditionally asserted against employers for violations of state and federal wage and hour laws.

A. *Goonewardene* Exposes Payroll Service Providers To Staggering Defense Costs For Wage And Hour Violations Without Providing Any Added Benefit To Employees.

Labor and employment class action litigation “has increased [] over the past decade,” and wage and hour class actions in particular are “the leading type of ‘high stakes’ lawsuits being pursued by the plaintiffs’ bar.” (Seyfarth Shaw LLP, *13th Annual Workplace Class Action Litigation Report*, 2017 Edition, at 1-2.) California leads the way in this regard, and “[t]he most dominant trend has been a steep rise in the number of class action lawsuits filed in state courts alleging violations of California’s overtime laws or the California Labor Code and wage & hour regulations.” (*Id.* at 445.) Worse still, the costs of wage and hour lawsuits have been increasing dramatically year over year. (Seyfarth Shaw LLP, *13th Annual Workplace Class Action Litigation Report*, 2017 Edition, at 34 (top ten private plaintiff settlements for wage and hour lawsuits rose from \$215 million in 2014 to \$463.6 million in 2015 to \$695.5 million in 2016).)

As with all litigation, defending wage and hour claims can be extremely expensive. The cost of defending and prosecuting large wage and hour class actions oftentimes can be in the millions of dollars. *See Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal. 5th 480,

487 (plaintiffs’ attorneys collectively billed more than 4,000 hours resulting in approximately \$3 million in fees). Unlike most claims, however, Labor Code violations typically permit an employee to recover their attorneys’ fees. *See, e.g.*, Cal. Lab. Code §§ 218.5, 226(e), 226(h), 233(e), 1194, 2699(g). Many of these are one-way fees shifting provisions, which further increases an employer’s costs of wage and hour litigation. *See, e.g., id.* § 2699(g) (“Any *employee* who prevails in any action shall be entitled to an award of reasonable attorney’s fees and costs.”).

Goonewardene exacerbates this problem by extending these potentially crippling defense costs to payroll service providers while confusing the fact that the employer obligations in question are *non-delegable* and thus should not be visited upon a third party (such as the payroll service provider) which has no direct relationship with the employees. Under *Goonewardene*, employees will continue to sue their employers in addition to suing payroll service providers, because the employees cannot obtain complete relief from payroll service providers since such providers are not their employers. Such a result not only confuses the employment obligations among the parties, it

places a huge financial burden on a third party who has no control over the circumstances and environment of employment.

The myriad provisions of the California Labor Code do not apply to payroll service providers because payroll service providers are not “employers” under the Code. *Futrell v. Payday California, Inc.* (2010) 190 Cal. App. 4th 1419, 1428. Thus the only damages theoretically available to employees under *Goonewardene* are unpaid wages that the payroll service provider allegedly was contractually obligated to make. Employees therefore have a strong incentive under *Goonewardene* to sue payroll service providers as well as their employer because unlike a payroll service provider, “an employer is potentially liable for unpaid wages and interest, statutory penalties and civil penalties for many violations of Labor Code wage-and-hour provisions.” *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal. App. 4th 365, 378.

Allowing employees to seek relief directly from payroll service providers merely makes wage and hour litigation extremely inefficient and misdirects attention to the payroll provider rather than the employer itself. Employees cannot obtain any relief from payroll service providers that they could not obtain directly from their

employers through the traditional wage and hour enforcement mechanisms established by the Legislature. *Goonewardene* significantly increases the costs of litigating wage and hour claims without providing any added benefit to employees. To the contrary, extending potential liability to payroll service providers will likely result in more protracted and complex litigation which would only increase defense costs for all parties and delay any recovery by employees.

B. *Goonewardene* Exposes Payroll Service Providers To Staggering Damages Claims For Wage And Hour Violations Without Providing Any Added Benefit To Employees.

Incurring unnecessary defense costs is merely the tip of the iceberg – the potential damages payroll service providers could face under *Goonewardene* is disastrous. The size and scope of wage and hour lawsuits have been increasing dramatically year over year: the top ten private plaintiff settlements for wage and hour lawsuits rose from \$215 million in 2014 to \$463.6 million in 2015 to \$695.5 million in 2016. (Seyfarth Shaw LLP, *13th Annual Workplace Class Action Litigation Report*, 2017 Edition, at 34.)

Even when limited to wages due, the damages in a wage and hour lawsuit can be massive. For example, in *Alexander v. FedEx*

Ground Packaging System, Inc., more than \$21 million of the settlement amount was for unpaid wages. (Settlement Agreement, *Alexander v. FedEx Ground Packaging System, Inc.* (N.D. Cal. Sept. 11, 2015) Case No. 3:05-CV-38-EMC at 13.)⁵ Under the California Labor Code, only an employer is responsible for paying employee wages, and thus a payroll service provider should have no obligation to pay any damages for unpaid wages to the employee. *Futrell, supra* 190 Cal. App. 4th at 1428. Nonetheless, under *Goonewardene*, payroll service providers could be liable to employees for their unpaid wages. Payroll service providers forced to pay damages for unpaid wages may be able to recover their damages payments from the responsible employer, but only after incurring additional litigation expenses for bringing indemnification claims. Thus, under *Goonewardene*, payroll service providers' clients each bring an unforeseen and inescapable risk that the payroll service provider may incur millions of dollars defending a wage and hour lawsuit brought by the client's employees, may face multi-million dollar judgments to

⁵ The Settlement Agreement is available on PACER and at [https://alexander-v-fedexground-settlement.com/Portals/0/Documents/2015%200915%20EXH%201%20\(Settlement%20Agreement%20with%20signatures\).pdf](https://alexander-v-fedexground-settlement.com/Portals/0/Documents/2015%200915%20EXH%201%20(Settlement%20Agreement%20with%20signatures).pdf)

the client's employees for unpaid wages, and additional litigation expenses to obtain indemnification from the client – none of which benefits the employees who already can seek their unpaid wages from their employer. Indeed, such a result only confuses the true *non-delegable* duties an employer has to its employees.

III. GOONEWARDENE WILL DISTORT THE ECONOMICS OF PAYROLL SERVICES AND WILL ADVERSELY IMPACT THE PAYROLL SERVICE PROVIDER INDUSTRY AND COUNTLESS CALIFORNIA EMPLOYERS WHO RELY ON THESE SERVICES.

The decision in *Goonewardene* will significantly alter the legal landscape for wage and hour litigation in California and will have a devastating impact on the payroll provider industry to the detriment of countless California employers and workers. More specifically, *Goonewardene*: (1) will increase prices for payroll provider services to reflect the added litigation risks and costs of defending wage and hour lawsuits, potentially making such services cost-prohibitive to many California employers; (2) will lead to employers' loss of access to payroll provider services, resulting in less compliance and weakened protections for workers; and (3) will produce unnecessary confusion as to the obligations between employers, employees and third party payroll service providers.

A. The Pricing of Payroll Provider Services Will Increase To Reflect The Added Litigation Risks Potentially Making Such Services Cost-Prohibitive To California Employers.

As more fully set forth above, the ruling in *Goonewardene* will significantly increase a payroll service provider's risk of incurring massive litigation costs. This change in the legal landscape will necessarily increase the costs of payroll provider services, potentially making such services cost-prohibitive for many California employers. In addition, the increased litigation risk and massive defense costs may prove insurmountable to many payroll service providers who may choose, or may be forced, to leave the California market altogether.

Payroll service providers currently offer employers cost-effective tools and services that facilitate an employer's compliance with federal and state labor laws. (*See* Paychex, Inc. Form 10-K (May 31, 2016) at 3 (“Our . . . tools, can assist companies with the scheduling, tracking and reporting of time which can be beneficial to clients in complying with [labor laws]”).) The price of these tools and services is a key factor in determining whether an employer will engage a payroll service provider in the first place and, once engaged, whether they will opt for a competing payroll service provider who

offers a more cost-effective option. (*Id.* at 6.) Although the cost of payroll services varies, the pricing structure typically involves a flat base fee that is charged per month or per pay period and added costs for more advanced services. (Paychex, Inc. Form 10-K (May 31, 2016) at 2; *see* Hoover's Inc., *Payroll Services First Research Custom Report*, (2017) at 4.) For example, Paychex charges recurring fees for services performed that are driven by various factors, including the number of transactions per client per pay period and whether the client uses any ancillary products. (Paychex, Inc. Form 10-K (May 31, 2016) at 2.) The competitive nature of the industry provides employers with a variety of options to choose from. In fact, payroll service providers have an incentive to offer increasingly flexible products and systems that allow different employers to use different aspects of those systems to varying degrees, depending on the employer's diverse needs and budget. The pricing of payroll provider services, however, also reflects the risks inherent in the industry. (*See* Paychex, Inc. Form 10-K (May 31, 2016) at 7.) Changes in laws and regulations that result in increased risks will necessarily increase the cost of these services.

The ruling in *Goonewardene* will significantly increase the litigation risk and defense costs for payroll service providers which will, in turn, significantly increase the cost of these services. For example, consider a company in Los Angeles with ten employees that uses a payroll service provider that charges a flat fee of \$100 per month and an additional \$5 per employee per pay period to process the company's bi-weekly payroll. (See The Payroll Blog, ("While base account fees vary widely from one provider to the next, you can expect to pay anywhere from \$20 to \$100 per month, plus an additional \$1.50-\$5.00 per payroll run for each employee."))⁶ On average, the company pays \$20 for each employee to process their payroll [\$5 each for the two pay periods plus the pro-rata share of the \$100 monthly flat fee]. Assume one of the company's employees sues the payroll service provider alleging that the employee was misclassified as falling within the "Executive Exemption" and therefore was entitled to be paid overtime and entitled to rest and meal breaks none of which she received. (See e.g. Wage Order 4 § 1(A)(1); Cal. Lab. Code §§ 510, 512, 515.) The \$435 filing fee the payroll

⁶ Available at: <https://www.surepayroll.com/resources/blog/small-business-payroll-cost>

service provider must incur to merely file an answer in that lawsuit is nearly double the yearly revenue the payroll service provider earned for that employee's payroll. (See Superior Court of California, County of Los Angeles Civil Fee Schedule, Effective July 1, 2016.)⁷ In addition, the legal fees the payroll service provider would have to expend to draft the answer, the cost of further litigation, the damages the payroll service provider could have to pay for the employee's unpaid overtime wages and missed meal and rest breaks, or the legal fees the payroll service provider would have to expend seeking indemnification for these expenses from the employer, would dwarf the profit the payroll service provider earned from processing that company's payroll. Consequently, payroll service providers faced with the added litigation risks imposed by *Goonewardene* will be forced to increase the cost of their services to reflect the added litigation risks.

Given that payroll service providers range from individuals to large enterprises, the added litigation risk may prove insuperable to many smaller payroll service providers. (Barnes Report, 2017 U.S.

⁷ Available at: http://www.lacourt.org/forms/pdf/fees/fee-schedule-2016_rev.pdf.

Industry & Market Outlook, (Oct. 2016) at 10.)⁸ Additionally, risk averse payroll service providers may choose to leave the market altogether, decreasing competition and further increasing prices for these services. Significant price increases coupled with the potential for a mass exodus of California payroll service providers, will have an adverse and widespread impact on California employers who rely on these services.

1. Price Increases For Payroll Provider Services Will Adversely Impact Small California Employers.

Small businesses in California will be particularly impacted by increased prices for payroll services and a constricted payroll service provider market. Paychex alone services 605,000 small to medium-sized businesses across a variety of industries, with an average client size of approximately 17 employees. (*See* Paychex, Inc. Form 10-K (May 31, 2016) at 6; Paychex Press Release (June 28, 2017) at 2, 5.)⁹

⁸ According to the 2017 Barnes Report, there are approximately 1,162 payroll service provider establishments in California, 512 of which employ fewer than 20 employees.

⁹ Paychex, Inc. Reports Fourth Quarter And Fiscal 2017 Results, Paychex Press Release (June 28, 2017), <https://www.paychex.com/a/d/investor/releases/2017-4Q.pdf>; https://www.sec.gov/Archives/edgar/data/723531/000072353117000014/payx-20170628xex99_1.htm

Because these companies have few employees, hiring another employee to process their payroll is potentially cost-prohibitive. (See Hoover's Inc., *Payroll Services First Research Custom Report*, (2017) at 4.) Similarly, paying significantly increased costs for the payroll services they currently use could also be cost-prohibitive to many small businesses. California businesses will therefore either have to bear the increased costs for their payroll service provider or perform these services in-house. Providing payroll services in-house, however, will be difficult for businesses that lack the size and scope to efficiently and cost-effectively perform these services on their own.

Id.

Consequently, *Goonewardene* will decrease countless California employers' access to cost-effective payroll provider services resulting in less compliance and weakened protections for thousands of California workers.

B. Employers' Loss Of Access To Payroll Provider Services Will Result In Less Compliance And Weakened Protections For Workers.

An increase in the cost of payroll provider services, and the resulting decrease of cost-effective options for employers, will directly impact countless California employers and will result in less

compliance with wage and hour laws and weakened protections for California workers.

The adverse impact of *Goonewardene* will be widespread because thousands of California employers, across various industries, utilize payroll provider services. For example, Paychex provides payroll processing services to over ten million client employees throughout the United States, including California. (Paychex, Inc. Shareholder/Analyst Call Oct. 12, 2016 at 5; *see* Anne Saunders, *Paychex Expecting More Strong Growth*, Rochester Business Journal, October 14, 2016.)¹⁰ This translates to approximately one out of every twelve employees in the private sector. *Id.* Furthermore, the National Payroll Reporting Consortium (“NPRC”), a nonprofit trade association of organizations that provide payroll processing services, reports that its members serve a combined total of more than 35 million employees, or over one third of the private sector.¹¹ The decision in *Goonewardene*, therefore, has the potential to negatively impact a vast portion of the California work force.

¹⁰ Available at: <http://rbj.net/2016/10/14/paychex-expecting-more-strong-growth/>

¹¹ Available at: <http://nprc-inc.org/about.html>

Payroll service providers have created proven systems that facilitate accurate, legally compliant, consistent, and timely payroll processing. These systems are widely used by employers to assist them in discharging their wage obligations because they have determined that outsourcing payroll is more cost-effective and efficient than handling it in-house. (*See Hoover's Inc., Payroll Services First Research Custom Report*, (2017) at 4.) Employers who choose to or are forced to take payroll services in-house will not have access to payroll service providers' trusted systems and are therefore more likely to generate inaccurate and non-compliant paychecks and paystubs for their employees.

Consequently, *Goonewardene* will expose California employees to less protections, expose employers to more litigation, and devastate an industry that thousands of California employers currently rely on to assist them in complying with their wage obligations. Moreover, the lower court's decision in *Goonewardene* confuses the obligations between employer, employee and third party payroll service provider. If there is any error in the services provided by a payroll service provider, the *employer* has sufficient contractual grounds to bring a claim. However, the payroll service provider has

no direct relationship with its clients' employees and does not have an effect on the terms of employment for those employees. To foist such wage and hour responsibilities on payroll service providers not only places an unfair burden on a third party, it ignores the fact that such wage and hour obligations are *non-delegable* duties of an employer which cannot and should not be placed on the shoulders of an independent third party with no power to affect the employer/employee relationship.

IV. PAYROLL SERVICE PROVIDERS SHOULD NOT BE FORCED TO INCUR THE MASSIVE LITIGATION RISKS AND COSTS IMPOSED BY *GOONEWARDENE*.

Payroll service providers should not be forced to incur the massive litigation risks and massive defense costs imposed by *Goonewardene*. As an initial matter, payroll service providers assist employers with their wage payment obligations but do not employ their clients' workers and are not in a position to enforce the employer's non-delegable wage obligations. *Goonewardene*, therefore, improperly extends liability to payroll service providers for their clients' non-delegable duties to pay their employees. In addition, federal and state laws regulating the payment of wages, and the existing enforcement mechanism for wage and hour laws, provide

ample avenues for employees to seek relief for wage disputes. (*See e.g. Cal. Lab. Code §§ 201 et. seq.; 29 U.S.C. §§ 201 et. seq.*)

A. *Goonewardene* Improperly Extends Liability To Payroll Service Providers For Employers’ Non-Delegable Wage Obligations.

In holding that employees are third-party beneficiaries of the contracts between payroll service providers and employers, *Goonewardene* improperly extends liability to payroll service providers for employer wage obligations. In doing so, *Goonewardene* disregards the fact that employers’ duties to pay their employees are non-delegable and that payroll service providers are dependent on data generated by employers, to perform their work.

Pursuant to California law, an employer’s duties to adequately pay its employees are non-delegable. *Martinez v. Combs* (2010) 49 Cal.4th 35, 49x. Both the federal government and the state of California have enacted comprehensive wage and hour laws establishing minimum wages, overtime compensation requirements, and record keeping requirements, among others, for the primary purpose of protecting employees from oppressive working conditions. (*See* 29 U.S.C. § 202(a) (b) (federal policy); Cal. Lab. Code § 90.5(a) (purpose of enforcement of minimum labor standards is to “ensure

that employees are not required or permitted to work under substandard or unlawful conditions”).) Employers covered by both federal and California wage and hour laws must comply with both. Employers are legally obligated, and best suited, to ensure compliance with state and federal wage and hour laws because they directly benefit from the employee’s work. Furthermore, employers can readily obtain and verify the information needed to determine whether their employees are subject to the myriad of wage and hour laws or whether exemptions apply.

In contrast, a payroll service provider does not have direct access to the requisite day-to-day information to independently ensure compliance with wage and hour laws. Instead, payroll service providers rely on the employer’s ability to provide such information. (See Paychex, Inc. Form 10-K (May 31, 2016) at 3 (“clients benefit from . . . products, which allow them to accurately and efficiently manage the gathering and recording of employee hours worked. Our . . . tools, can assist companies with the scheduling, tracking and reporting of time which can be beneficial to clients in complying with [wage laws].”).) *Goonewardene*, however, makes payroll service providers legally responsible for discharging the employer’s non-

delegable duties to pay wages, despite not having any direct knowledge of, or control over the terms and conditions of employment between their clients and their client's employees.

Payroll service providers do not control any aspect of the employment relationship between their clients and their clients' employees. Instead, payroll service providers provide tools that *facilitate* an employer's compliance with federal and state wage and hour laws. (See Paychex, Inc. Form 10-K (May 31, 2016) at 3.)

Payroll service providers, however, do not directly administer compliance with the law and do not have access to the necessary information to do so. Payroll service providers are heavily dependent on the quality and accuracy of data supplied to them by their clients in order to perform their work. For example, payroll service providers rely on the employer to determine whether specific employees are exempt from the overtime provisions of the California Wage Orders and/or the Fair Labor Standards Act. Specifically, in order to determine whether an employee is exempt from the state overtime requirements, an employer must first determine whether to classify the employee as an executive, administrative, or professional employee, among others. (Cal. Lab. Code § 515(a).) Payroll service providers do

not make these determinations and instead rely on the employer's classification of their employees. Indeed, the employer claiming an exemption bears the burden of proving that the exemption exists. *See Baldwin v. Trailer Inns, Inc.* (9th Cir. 2001) 266 F.3d 1104, 1112. If an employee is not exempt under the state and federal overtime laws, an employer must also determine an employee's regular rate of pay, the applicable overtime premium rate and whether non-productive time, including call-back time, donning and doffing time, and travel time, is compensable. Payroll service providers rely on the employer to make these determinations as well. These determinations are made by the employer because the employer typically has direct contact with the employee, knows and understands the employee's work and directly benefits from it, and has knowledge about its employees unavailable to the payroll service provider.

Similarly, employers are exclusively responsible for distinguishing employees from independent contractors and a payroll service provider relies on the employer to make that determination. Employers must distinguish employees from independent contractors pursuant to a complicated set of factors, all of which must be considered, and none of which is, alone, controlling. *See S.G. Borello*

& Sons, Inc. v. Dep't of Indus. Relations (1980) 48 Cal.3d 341 350-351. The legal test to distinguish employees from independent contractors involves specific facts and circumstances which the payroll service provider is not privy to, including, terms of the contract agreement, the extent of control the employer exerts over the day-to-day aspects of the independent contractor's work, whether the independent contractor supplies the instrumentalities and tools required for doing the work, and details pertinent to the employer's business and the independent contractor's business. *Id.*; *Estrada v. FedEx Ground Package System Inc.* (2007) 154 Cal. App. 4th 1, 10. The analysis is complicated and requires a thorough understanding of facts that payroll service providers cannot themselves obtain, or readily verify. Litigation regarding misclassification of employees as independent contractors is common for employers. The practical effect of the ruling in *Goonewardene* will be to extend liability for misclassification claims to payroll service providers despite having no involvement or control of the relationship between the employer client and its employees.

In sum, in extending liability to payroll service providers for employers' non-delegable wage obligations, *Goonewardene*

disregards the fact that payroll service providers do not employ their clients' workers, that employers' duties to pay their employees are non-delegable, and that payroll service providers are dependent on data generated by employers, to perform their work.

B. Federal And State Laws Regulating The Payment Of Wages Provide Ample Avenues For Employees To Seek Relief For Wage Disputes.

Federal and state wage and hour laws provide ample avenues for employees to seek relief for wage disputes. For decades prior to *Goonewardene*, employees have been able to seek redress for wage disputes via the comprehensive enforcement scheme, established by the Legislature, to enforce Labor Code and Wage Order obligations. (See Cal. Lab. Code §§ 201 *et. seq.*; 29 U.S.C. §§ 201 *et. seq.*) If this Court reverses the court of appeal's decision in *Goonewardene*, said system will continue to function as it has for decades and employees will continue to have remedies against their employers for wage disputes.

For example, the typical wage and hour violation alleged by employees seeking redress pursuant to the wage and hour laws are based on a statutory or Wage Order requirement applicable to "employers." (See *e.g.* Cal. Lab. Code §§ 226, 510, 512.) Those

types of claims can be brought by employees, the state, or on the state's behalf via private-party PAGA actions. An employee seeking to enforce federal and state wage payment obligations is not required to, and prior to *Goonewardene*, was not permitted to, allege said claims against a payroll service provider. Although *Goonewardene* creates new causes of action that allow employees to name payroll service providers as defendants in wage and hour disputes, said claims are redundant to the wage and hour claims typically alleged against employers. Consequently, reversing *Goonewardene* would not leave employees without recourse for alleged wage payment violations, but would restore the well-established and effective process pursuant to which employees have long sought redress for wage disputes.

V. CONCLUSION

Based on the foregoing, *amicus curiae* Paychex respectfully requests this Court reject Plaintiff's position and reverse the judgement of the court of appeal.

Dated: July 19, 2017

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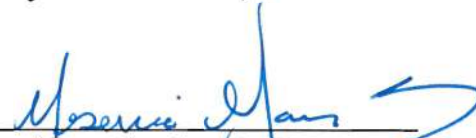
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**CERTIFICATE OF COMPLIANCE WITH CRC 8.520(C)
TYPE-VOLUME LIMITATION**

1. This brief complies with the type-volume limitation of Rule 8.520(c) of the California Rules of Court because it contains 5,302 words, not including the Application For Leave to File *Amicus Curiae* Brief. In certifying the foregoing I have relied upon the word count of the word processing system used to prepare the brief as authorized by CRC 8.520(c).

Dated: July 19, 2017



Eileen R. Ridley

Dated: July 19, 2017



Yesenia Garcia Perez

Dated: July 19, 2017



Anthony James Dutra

CERTIFICATE OF SERVICE

I hereby certify that one (1) copy of the foregoing
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