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## **14<sup>th</sup> Annual Advanced Wage and Hour Conference**

Wage and Hour Update

Thursday, July 18, 2024  
9:05 a.m. – 10:20 a.m.

Speakers:

Jahan Sagafi

Nina Huerta

### **Conference Reference Materials**

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# California Wage & Hour Law: The Year in Review

Nina Huerta (Locke Lord LLP) & Jahan C. Sagafi (Outten & Golden LLP)  
July 18, 2024

## Topics for Today

1. The Basics
2. Legislative Changes
3. Case Developments

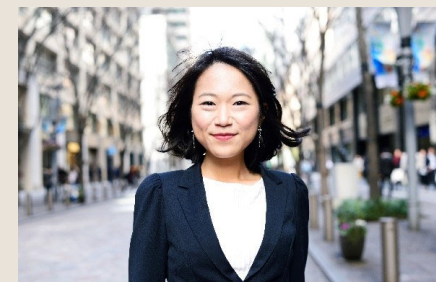
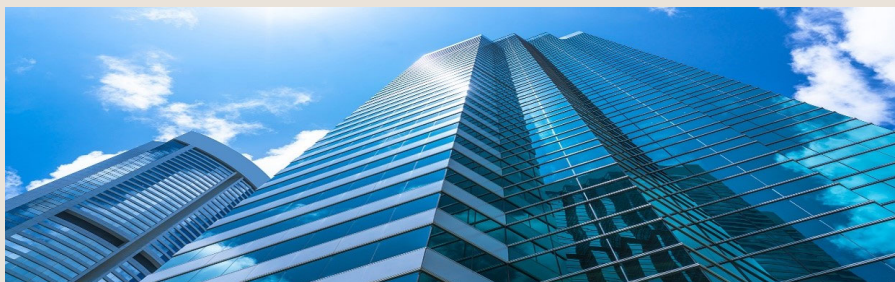


## Section 1: The Basics



## General Rules Regarding Minimum Pay

- Statewide minimum wage: \$15.50 → **\$16.00/hr** (effective Jan. 1, 2024)



- White-collar exemptions: \$1,240/wk or \$64,480/yr → **\$1,280/wk or \$66,560/yr**
  - Increases with inflation and Consumer Price Index

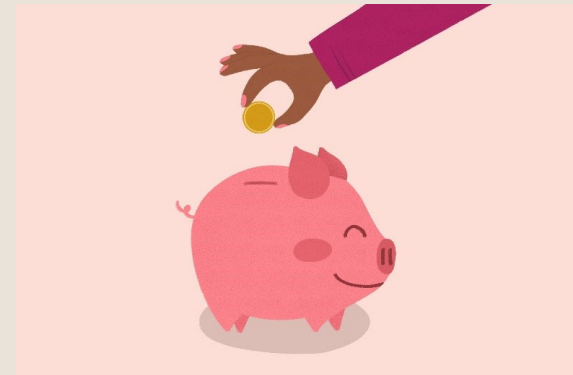
## Specific Types of Employees



- Hand tools workers: \$31 → **\$32/hour**
- Fast food workers (national chains): **\$20/hour** (AB 1228, as of 4/1/24)
- Inside sales exemption: \$48,360 → **\$49,920/year**
- Increasing premiums (split-shifts, missed meal periods/rest periods, paid sick leave, etc.)

## Minimum Wage – Local Ordinances

- ~40 cities/counties have local minimum wage ordinances higher than the state minimum
  - Examples:
    - San Diego → \$16.85/hr
    - Petaluma → \$17.45/hr
    - Santa Clara → \$17.75/hr
- Exempt employee salary threshold is tied to **statewide** minimum wage



## Section 2: Legislative Changes





## Healthcare workers (SB 525)

- Minimum wage gradually increasing to **\$25** per hour

- Rates and increases depend on:

- Employer's size
- Location
- Funding source



- Effective date: Oct. 15, 2024 or Jan. 1, 2025 (depending on state revenue)



## Healthcare workers (SB 525)

### Qualifying workers include:

- Nurses
- Physicians
- Caregivers
- Medical residents, interns, and fellows
- Patient care technicians
- Janitors
- Housekeeping staff
- Groundskeepers
- Guards
- Clerical workers
- Nonmanagerial administrative workers
- Food service workers
- Gift shop workers
- Technical/ancillary services
- Medical coding/billing personnel
- Call center workers
- Warehouse workers
- Laundry workers

SEIU supported this wage increase for 455,000 workers,  $\frac{3}{4}$  of whom are women and  $\frac{3}{4}$  of whom are people of color.



## Senate Bills that Became Law in 2023

### **SB 1044** (Durazo) State of Emergency

- If unsafe: Leave work or don't show up
- No retaliation



## Senate Bills that Became Law in 2023

### **SB 1162** (Limón) Publication of Pay Data

- Requires publication of compensation data collected by state
- Private right of action + PAGA penalties for failure to publish.



### **SB 1334** (Bradford) Meal & Rest Periods for Public Hospital Employees

- Meal and rest break requirements now apply to **public sector** hospital employees who:
  - Provide direct patient care or support direct patient care
  - In a general acute care hospital, clinic or public health setting



## Assembly Bills that Became Law in 2023

### **AB 2183** (Stone) Agricultural Labor Relations Voting Choice Act

- Expands voting options for farmworkers
  - Physical location, mail, ALRB office
  - Can get assistance
- Unionization occurs if majority votes yes



## Assembly Bills that Became Law in 2023

**AB 257** (Holden, Carrillo, Low and Rivas; Co-Authors Senators Stern and Wiener) Established Fast Food Sector Council / Joint and Several Liability

- Created fast food worker bill of rights
- Expanded liability to franchisors for various employment and public health and safety laws
- Created Fast Food Sector Council to set “sector-wide standards”
- Covers operations in CA that are part of a chain of 30+ similar restaurants anywhere in the US
  - Placed on hold pending veto referendum



## AB 2288 and SB 92 - PAGA Reform



- Narrowed scope of claims: Only those personally suffered by named P
- Allows injunctive relief
- Default \$100 penalty unless (a) subsequent violation or (b) “malicious, fraudulent, or oppressive”
- ER can cure by making Complainant whole: All unpaid wages (for 3 years) + 7% interest + liquidated damages +’ fees and costs
- Lower penalties if ER takes steps to comply
- Added manageability requirement
- Eff. July 1, 2024

## Ballot-Based Legislative Activity in 2024

- **AB 257 Veto Referendum**
  - The California Fast Food Restaurant Minimum Wage and Labor Regulations Referendum qualified for the ballot in California as a Veto Referendum
    - Note: AB 1228 impact

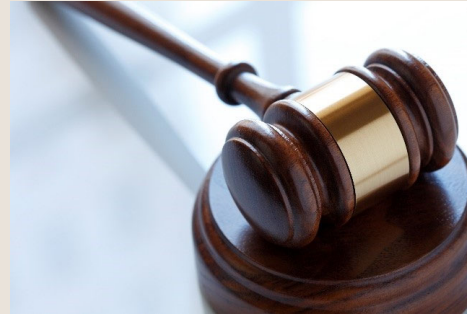




## Legislation from 2024

### **AB 338 (Aguiar-Curry) Fuel Reduction Work**

- Fuel reduction work will be required to meet several standards
  - Workers within an apprenticeable occupation in the building/construction trades must be paid at least the general prevailing rate of per diem wages
- Applies to contract work paid for with public funds (in whole or in part)
- The Labor Commissioner is authorized to enforce the wage requirement
  - Exempt → contracts for less than \$500,000
- July 1, 2026



## Legislation from 2024

### **AB 594** (Maienschein) Labor Code: alternative enforcement

- Public prosecutors can pursue Labor Code violations
  - Without input from others (DLSE, DWC, Cal-OSHA)
- Prevailing party attorneys' fees, costs, and injunctive relief to prevent continued Labor Code violations
- Arbitration agreements inapplicable

## Legislation in 2024

### **SB 616** (Gonzales) Sick days: paid sick days accrual and use.

- PSL: Increase to employee's entitlement to paid sick leave
  - Increase: 3 days → **5 days** or 24 hours → **40 hours**
  - **Effective January 1, 2024**
- Accrual: Employers may continue providing PSL at rate of 1hr/30hrs worked
  - If an employer uses an alternative accrual method: must ensure employees have accrued **40 hours** or **5 days** by the end of the **200th** calendar day of employment

## Legislation in 2024

### SB 616 (Continued)

- Frontload: Employers also may frontload the entire paid sick leave amount, just as they may do now.
- Annual usage cap: An employee's annual usage cap increasing 24 → **40 hours**



## U.S. Department of Labor Final Rule

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees (July 1, 2024)

- Salary Thresholds for Executive, Administrative, and Professional Employees
  - \$684/week (\$35,568/year) → **\$844/week (\$43,888/year)**
- Threshold for Highly Compensated Employees
  - \$107,432/year (including at least \$684/week on salary/fee basis) → **\$132,964/year** (including at least \$844/week on a salary/fee basis)

## Minimum Wage Increase, AB 1228

- April 1, 2024
- Raises the minimum wage for fast-food employees at national chains to **\$20/hour**
- Exemptions:
  - Bakeries and Restaurants located within grocery stores
  - Restaurants located within airports, hotels, large event centers, theme parks, museums, gambling establishments, corporate campuses, and certain public lands



## Section 3: Case Developments



## PAGA standing and arbitration – background

- ***Iskanian v. CLS*** (Cal. S.Ct. 2014): No waiver of representative PAGA claims
  - Unaffected by *Viking River*
- ***Adolph v. Uber*** (Cal. S.Ct. July 2023): Under *Viking River*,
  - Individual claims: forced arbitration OK
  - Non-individual / representative claims: can proceed in court



## PAGA standing and arbitration – new developments

*Johnson v. Lowe's Home Centers*, 93 F.4th 459 (9th Cir. 2024)

- *Adolph* is consistent with *Viking River*
- Forced arbitration of individual PAGA claim OK
- Arbitration of representative PAGA claims not: remand
- See also *Barrera v. Apple American Group*, 95 Cal. App. 5th 63 (2023) (same)

## PAGA standing and arbitration – new developments *(cont'd)*

*Balderas v. Fresh Start Harvesting*, 101 Cal. App. 5th 533 (2d DCA 2024)

- Representative PAGA claim without individual claim is OK
- Aggrieved employee definition is simple:
  - (1) P was employed by the violator
  - (2) Violations were committed against P
- Dismissing representative claim (instead of following *Adolph*) was error

## PAGA, arbitration, and the “poison pill” provision

*DeMarinis v. Heritage Bank of Commerce*, 98 Cal. App. 5th 776 (2023)

- Arbitration agreement included representative action waiver + “poison pill” provision
  - Poison pill: “[T]he conditions set forth in [the waiver] provision are material terms of this Agreement and may not be modified or severed, in whole or in part. If this specific provision is found to be unenforceable, then the entirety of this Agreement shall be null and void.”



## PAGA, arbitration, and the “poison pill” provision

*DeMarinis v. Heritage Bank of Commerce*, 98 Cal. App. 5th 776 (2023)

- The representative action waiver = unenforceable
- No severance, so whole arbitration agreement invalid
- *See also Westmoreland v. Kindercare Education LLC*, 90 Cal. App. 5th 967 (2023) (same)

## PAGA and arbitrability

*Mondragon v. Sunrun*, 101 Cal. App. 5th 592 (2d DCA 2024)

- Arbitration clause excluded all PAGA claims: That's both individual and non-individual
- Arbitrability: Statement that AAA rules applied generally was not enough to delegate arbitrability to the arbitrator in employment context
- Compare *Nickson v. Shemran, Inc.*, 90 Cal. App. 5th 121 (2023) (upholding delegation of arbitrability issues to the arbitrator in an employment context where the contract contained an explicit delegation clause)

## PAGA and waiver of right to compel arbitration

*Semprini v. Wedbush Sec.*, 101 Cal. App. 5th 518 (4<sup>th</sup> DCA 2024)

- ER waived right to compel arbitration . . .
  - of individual PAGA claims by waiting 9 months after *Viking River*
  - of class claims by waiting 5 months after class members signed arbitration agreements
- Waiver supported by ER's other conduct

## PAGA premiums and the statute of limitations

*Arce v. The Ensign Group*, 96 Cal. App. 5th 622 (2<sup>nd</sup> DCA 2023)

- PAGA claim timely because last wage statement was within the SOL, even though missed meal break itself was not.
- Each failure to pay the premium “constituted its own Labor Code violation.”



## PAGA and manageability

*Estrada v. Royalty Carpet Mills*, 15 Cal. 5th 582 (2024)

- Trial court cannot strike PAGA claims on manageability / judicial economy grounds
  - Trial courts have inherent authority to dismiss claims only in limited circumstances
- Class action manageability requirements do not apply to PAGA claims
- Trial courts have adequate tools to manage complex cases

But note legislative amendment to PAGA



## PAGA and intervention

*Accurso v. In-N-Out Burgers*, 94 Cal. App. 5th 1128 (1<sup>st</sup> DCA 2023)

- EE can intervene if claims overlap
  - Denial of mandatory intervention affirmed
  - Denial of permissive intervention reversed and remanded
- *But see* *Turrieta v. Lyft* (5<sup>th</sup> DCA 2021) (no intervention allowed), later appealed to S.Ct., opinion coming any day now. . .



## Wage and Hour Arbitration Fees

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*Suarez v. Superior Court of San Diego*, 99 Cal. App. 5th 32 (4<sup>th</sup> DCA 2024)

- CCP § 1281.97: arbitration fees must be paid within 30 days of due date
  - No FAA preemption

## Wage and Hour Arbitration Fees

- Suarez v. Superior Court of San Diego*, 99 Cal. App. 5th 32 (4<sup>th</sup> DCA 2024)
- CCP § 1281.97: arbitration fees must be paid within 30 days of due date
    - No FAA preemption
  - CCP § 1010.6 (2-court-day extension for e-service) does not apply.
    - § 1010.6 covers court litigation, not arbitration
    - Invoices are “provided,” not “served”
  - EE’s failure to pay fees was irrelevant

## Unconscionability

*Alberto v. Cambrian Homecare*, 91 Cal. App. 5th 482 (2<sup>nd</sup> DCA 2023)

- Arbitration agreement + confidentiality agreement read together “as one transaction”
- Arbitration agreement was unconscionable
  - Lacked mutuality
  - Prohibition on discussion of wages
  - Representative PAGA claim waiver
- No severance: not abuse of discretion



# Unconscionability



*Cook v. Univ. of S. Cal.*, 102 Cal. App. 5th 312 (2024)

- Employee sued USC for employment-related causes of action.
- Employee arbitration agreement was unconscionable
  - Too broad in scope
  - Infinite in duration
  - Lacked mutuality
- Unconscionable terms could not be severed.



## § 2802 reimbursements at universities

*Krug v. Board of Trustees of Cal. State Univ.*, 94 Cal. App. 5th 1158 (2<sup>nd</sup> DCA 2023)

- CSU = exempt from § 2802 (reimbursement) under the Sovereign Powers canon
- CSU need not reimburse professor for computer and other equipment to teach remotely during COVID
- Note: California Supreme Court granted review (Dec. 2023)

## Expense Reimbursement

*Parker v. Battle Creek Pizza, Inc.*, (6th Cir. 2024) 95 F.4th 1009

- Delivery drivers supplied their own vehicles, reimbursed \$0.28/mi and \$1.00-\$1.50/delivery
  - Alleged subminimum wage pay considering expenses
- Defendants argued a “reasonable approximation” was sufficient
- Plaintiff argued IRS standard-mileage rate was owed
- Court rejected both arguments and suggested a burden-shifting framework akin to a *McDonnell-Douglas* test might work



## Compensable Time

*Huerta v. CSI Electric Contractors*, 15 Cal. 5th 908 (2024)

- Mandated exit procedure is compensable as “hours worked”
- Drive time to parking lot from gate would be compensable as travel time if the security gate was the first location where the employee’s presence was required
- Meal period when required to stay on premises is compensable time

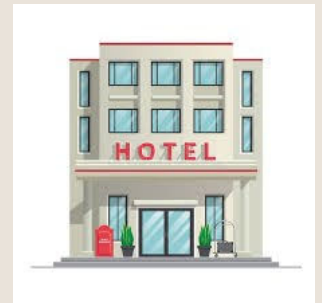




## Payment of Accrued Vacation Upon Separation

*Hartstein v. Hyatt Corporation*, 82 F.4th 825 (9th Cir. 2023)

- Hotel workers were furloughed indefinitely in March 2020 and terminated in June 2020, at which time they were paid their accrued vacation.
- Vacation was due in March 2020. DLSE Opinion Letter:
  - A furlough with no specified return date is a termination under the California Labor Code.
- Value of free hotel rooms workers received annually was properly excluded from regular rate of pay.



## Salary Basis Test

*Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. 39 (2023)

- Hewitt worked on an offshore oil rig for 84 hours a week for 28 stints
  - Paid a day-rate
  - Earned over \$200,000 annually but did not receive overtime pay
  - Employer argued Hewitt is exempt from OT as a Highly Compensated Employee
- The salary basis test requires employer to pay a predetermined and fixed salary that does not fluctuate based on the number of days or hours worked
- Hewitt's day-rate compensation did not constitute a salary as defined by FLSA regulations

## Regular Rate of Pay

*Sanders v. County of Ventura*, 87 F.4th 434 (9th Cir. 2023)

- Plaintiff employees who opted out of the County’s Flexible Benefits Program received a monthly monetary credit less a pre-tax “opt-out fee” that was substantially comprised of a “risk sharing fee” offsetting increased insurance premiums for participating employees.
  - Plaintiffs argued opt-out fee should be included in their regular rate of pay.

## Regular Rate of Pay

*Sanders v. County of Ventura*, 87 F.4th 434 (9th Cir. 2023)

- Opt-Out fees were paid to third parties to fund benefits for County employees.
  - 29 U.S.C. § 207(e)(4) states that “regular rate” of pay does not include “contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees.”
- Not required to be included in the regular rate of pay.

## Stock Options

*Shah v. Skillz Inc.*, 101 Cal.App.5th 285 (2024)

- Employee was granted stock options but was then terminated for cause before employee was able to exercise them and two years before the company's IPO.
- Employee sued for wrongful termination but conceded that his claims would fail if stock options were not considered wages.
- Stock options are not wages within the meaning of the Labor Code section 200:
  - Not fixed or ascertainable.

## Stock Options

*Shah v. Skillz Inc.*, 101 Cal.App.5th 285 (2024)

- Stock options are merely contractual rights to buy shares of stock.
- Labor Code prohibition on employers receiving wages from employees under section 221 does not apply to stock options.



## Arbitration Agreements

*Vazquez v. SaniSure, Inc.*, 101 Cal.App.5th 139 (2024)

- Vazquez worked as an at-will employee for SaniSure for two stints.
  - Signed an arbitration agreement for first stint but not for the second
- Arbitration agreement signed during her first period of employment *did not* apply to her second period
  - Deemed “revoked” upon resignation from her first period of employment
  - SaniSure failed to demonstrate implied agreement to arbitrate during the second stint of employment

## Minimum Wage Protections

*Ruelas v. County of Alameda*, 15 Cal.5th 968 (2024)

- Non-convicted detainees who performed unpaid work preparing meals at a county jail sued for unpaid minimum wages and overtime
- Penal Code § 4019.3, which addresses inmate labor within county jails and allows for wage credits up to two dollars per eight-hour shift, does not mandate minimum wage
- No claim for minimum wages or overtime under Cal. Lab. Code § 1194



## Premium Pay and Wage Statements

*Naranjo v. Spectrum Security Services, Inc.*, 15 Cal.5th 1056 (2024)

- Reversed trial court's Labor Code § 226 penalties to employer for failing to include premium pay for missed meal periods on wage statements
- An employer's "objectively reasonable, good faith belief that it has provided employees with adequate wage statements precludes an award of penalties under section 226, subdivision (e)(1)."
  - No evidence of bad faith or unreasonable beliefs.
  - Prior success defending practices.
  - Uncertainty, given Spectrum's role as a federal security contractor, whether California wage laws and wage orders applied.

Thank you!

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**JAHAN C. SAGAFI** is the partner-in-charge of the firm's San Francisco office, where he represents workers in [employment class actions](#) challenging discrimination, wage and hour abuses, Fair Credit Reporting Act violations, and other types of exploitation of workers. He has won a jury trial for a nationwide class of technical support workers, an [en banc appeal in the Ninth Circuit](#), settlements [protecting software engineers from gender and race discrimination](#) and [older applicants to accounting jobs](#), and many other settlements to recover backpay for overtime compensation, meal and rest breaks, vacation benefits, discriminatory pay and promotion gaps, and more.

Mr. Sagafi has represented a wide array of workers throughout the country, including HVAC service technicians, corporate instructors, financial advisers and trainees, security officers temp staffing workers, cashiers, call center customer service representatives, counselors, drivers, and many others.

During his career, he has recovered well over \$100 million for workers, asserting claims against transportation companies (e.g., Uber, Lyft, Hertz, GlobalTranz), tech companies (e.g., AT&T, IBM, [Computer Sciences Corp.](#)), banks (e.g., Wells Fargo, JPMorgan Chase, Goldman Sachs, Morgan Stanley Smith Barney), retailers (e.g., Walmart, Target, [Abercrombie & Fitch](#), [Guess?](#), Raley's) healthcare companies (e.g., Permanente, Premera Blue Cross), an accounting firm ([PwC](#)), insurance companies (e.g., Travelers, Farmers), restaurants, and more.

In addition to his trial court work, Mr. Sagafi represents plaintiffs in appeals in the U.S. Supreme Court, Ninth Circuit, and other courts, addressing issues such as workers' rights, arbitration agreements, class certification, standing, unfair and deceptive practices under California's Unfair Competition Law, and FDA preemption. He has also volunteered to write amicus briefs in the Ninth Circuit and U.S. Supreme Court.

Mr. Sagafi is also active in the community, serving on several boards, including national nonprofit Alliance for Justice's (AFJ) board and the San Francisco American Constitution Society(ACS) Bay Area chapter's [Board of Advisors](#). In the past, he has served as a Governor of the board of the nonprofit Public Advocates, a member of the Bar Association of San Francisco (BASF) Judicial Evaluations Committee, a BASF attorney fee disputes arbitrator, Vice Chair of the board of the ACLU of Northern California (and Chair of Legal Committee), chair of the Board of the San Francisco ACS chapter, and as an Executive Committee member of the California Bar Litigation Section. Additionally, Mr. Sagafi has served as an organizer of ABA Labor & Employment Law Section conferences.

Mr. Sagafi has been recognized by numerous legal and non-profit organizations. He has received the Community Justice Award from Centro Legal De La Raza, and has been repeatedly recognized as a [California Super Lawyer](#), one of the Top 100 lawyers in all fields in Northern California (2015-21), one of the Daily Journal's "Top 75 Labor and Employment Lawyers" in California (2015-20), and one of Lawdragon's 500 Leading Plaintiff Employment Lawyers in the United States (2018-20).

Prior to joining Outten & Golden, he was a partner at Lieff, Cabraser, Heimann & Bernstein, and clerked for the Honorable William W Schwarzer of the Northern District of California. Mr. Sagafi graduated from Harvard College, *magna cum laude*, and received his J.D. Harvard Law School, where he was a Senior Editor of the Civil Rights-Civil Liberties Law Review and president of the Board of Student Advisers.

*(\*Prior results do not guarantee a similar outcome.)*



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## EDUCATION

J.D., University of Southern California Gould School of Law, 2003

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## BAR ADMISSIONS

California, 2003

## INDUSTRIES

Financial Services Litigation | Consumer Products, Retail & Franchise

## PRACTICES

Litigation | Employment Law Compliance & Litigation | Labor & Employment | ADA Accessibility | Wage & Hour Matters | Independent Contractor Compliance

Nina Huerta serves on the Firm's Executive Committee and is Managing Partner of the Firm's Los Angeles office where she focuses on defending companies in complex and class action litigation, typically involving labor and employment claims. She has defended employers in litigation, employment due diligence and proactive risk management in relation to mergers and acquisitions.

- Latina Lawyers Bar Association, Member
- National Employment Law Council, Speaker and Member
- Just the Beginning, Los Angeles SLI Steering Committee

## COURT ADMISSIONS

- U.S. District Court for the Northern, Southern, Central and Eastern Districts of California
- U.S. Court of Appeals for the Ninth Circuit, 2003

## AWARDS AND RECOGNITIONS

- Recognized, Top Verdicts, Daily Journal (2023)
- Named, Top 100 Lawyers, Los Angeles Business Journal (2023)
- Recipient, Top 100 Lawyers Specialty Award in Champion of Diversity, Los Angeles Business Journal (2023)
- Named, The Best Lawyers in America®, Litigation - Labor and Employment (2023-2024)

## PROFESSIONAL AFFILIATIONS

- President and Trustee, Mexican American Bar Foundation (MABF)
- Women Lawyers Association of Los Angeles, Racial Justice and Equality Advisory Council
- Los Angeles County Bar Association, Labor and Employment Section

## PUBLICATIONS AND PRESENTATIONS

- Locke Lord QuickStudy: UPDATE On The Families First Coronavirus Response Act (FFCRA) Leave Protections Following Enactment of Consolidated Appropriations Act, 2021, December 28, 2020
- Wage and Hour Hot Topics in the COVID-19 Environment, September 9, 2020
- Update on COVID-19 Employment Issues, July 30, 2020
- Locke Lord QuickStudy: Key Questions for Employers Facing COVID-19 (FAQ), July 20, 2020

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